Special Needs Considerations in Divorce

This article is intended to provide practical assistance to divorce practitioners dealing with clients who have a child with special needs. Many of these cases are factually complex and involve considerations that are outside of the normal course of a divorce.

BY MICKI MORAN

The First Step is to Not Overlook Special Needs Considerations in Divorce or Post-Decree Issues. The number of children with disabilities is significant. The prevalence of autism in children is now 1 in 59.[1]

There is conflicting evidence that having a child with a disability increases the likelihood of divorce. What is known is that having a child with special needs complicates the divorce process and requires careful consideration of many factors in counseling and representing clients.

For many parents contemplating divorce, the first consideration when one or more of the children have a disability is how and whether they will manage the complications of parenting and supporting a special needs child. At the initial client interview, when there are children (including older children) one of the initial questions I ask is whether any of the children have special education issues or have been diagnosed with a disability. If the answer is yes, then I use a comprehensive checklist to assist me in getting a thorough understanding of the child's needs in the context of this family. It is important to ask detailed questions about the nature of the disability. It is also a good idea to request documents (e.g. evaluations, school records, Individual Education Plans (IEP)) that provide detailed information regarding the child's disability.

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As a starting point, ask whether a child receives special education services in school. Does the child have an Individualized Education Plan (IEP) or a 504 Plan? Ask the client to describe what services (e.g. speech, occupational therapy, counseling) the child receives and request a copy of the documents as a resource regarding the needs of the child. Typically, asking for the last two years of educational records will be sufficient. The IEP and the 504 Plan will often have useful information regarding the

1 Autism Speaks, *CDC increases estimate of autism's prevalence by 15 percent, to 1 in 59 children* (Apr. 26, 2018) ("Nationally, 1 in 59 children had a diagnosis of autism spectrum disorder (ASD) by age 8 in 2014, a 15 percent increase over 2012), https://www.autismspeaks.org/science-news/cdc-increases-estimate-autisms-prevalence-15-percent-1-59-children.

child's educational and related issues, including a description of how the disability impacts their functioning in school and in life. In the process of reviewing the IEP or 504 Plan you will learn about the school district and the parent's input into the discussion. This is relevant information when deciding who or whether a parent will be the designated parent for school district purposes, the allocation of parenting time and decision making. It also provides important data about the severity of the child's needs and may signal a discussion regarding a departure (upwards) from guideline support. In addition to the school documents, requesting a copy of any evaluations provides yet another source of relevant information. In addition to the IEP, I ask the client to provide me with a list of treatment providers and other resources.

It is not uncommon for parents to disagree about the nature and severity of the child's disability. Determining whether the parents are in agreement about the special needs of the child and the current interventions is an early essential step since it may shape the way you discuss and counsel your client regarding the Allocation of Parenting Time and Decision Making. If the parents are in substantial disagreement about the child's needs, this may make shared decision making inappropriate. Asking the client whether they are able to work together with the other parent and cooperate concerning their child is an essential early inquiry.

Reviewing the statutory language in 750 ILCS 5/602.5 is a starting point for the allocation of parental responsibilities and decision making. The statute states in subparagraph(a) that the court shall allocate decision-making responsibilities according to the child's best interests. Nothing in the Act requires that each parent be allocated decision-making responsibilities. The significant issues that the statute refers to when considering an allocation of parental responsibilities and decision making are as follows:

> Those significant issues shall include, without limitation, the following:
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> (b) Allocation of significant decision-making responsibilities. ...
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> (1) Education, including the choice of schools or tutors.
> (2) Health, including all decisions relating to the medical, dental, and psychological needs of the child and to the treatments arising or resulting from those needs.
> (3) Religion, ...
> (4) Extracurricular activities.
>
> (c) Determination of child's best interests. In determining the child's best interests for purposes of allocating significant decision making the court shall consider all relevant factors, including without limitation the following. (1) the wishes of the child ...; [not an absolute)]; (2) the child's adjustment to his or her home, school and community; (3) the mental and physical health of all individuals involved; (4) the ability of the parents to cooperate to make decisions, or the level of conflict between the parties that may affect their ability to share decision- making; (5) the level of each parent's participation in past significant decision-making with respect to the child; (6) any prior agreement or course of conduct between the parents relating to decision-making with respect to the child; (7) the wishes of the parents; (8) the child's needs; (9) the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement; (10) whether a restriction on decision-making is appropriate under Section 603.10; ... (15) any other factor that the court expressly finds to be relevant.

Therefore, the allocation of parenting time may require creativity, flexibility, and a lawyer who is familiar with the challenges of the individual child's disability.

The cases interpreting this statute and its predecessor are very fact specific and tend to give unequal weight to the factors depending on the circumstances of each case. No one factor controls in the appellate decisions. Clearly, it is in the child's interests for both parents (if appropriate) to share decision making and parental responsibilities in a way that works for the individual family and

keeps the child's best interests front and center.

It is presumptive under the Section 602.7(b) that both parents are fit to have unrestricted parenting time. However, determining early on whether the parents are in agreement regarding the needs of the child and the caregiving arrangements is critical. Reviewing with your client the factors set out in 750 ILCS 5/602.7(b)(1) and the issues presented by their special need's child provides a framework for decision making and drafting of the Parenting Agreement and Allocation Judgment. Parents may disagree on what is in the best interests of their child with a disability. For example, a consideration of whether one parent has and will continue to be the primary caregiver impacts all aspects of the case. In my practice it is common that one parent has taken on the role of case manager in medical and educational decision making. This parent has been on the ground every day managing the complex decisions for the child. Judges should be made aware of the roles historically played by each parent as a pivotal consideration in allocation of decision making.

In many cases the parents can no longer afford for one parent to be underemployed or unemployed following the divorce and the resulting separate households. Clients may agree about the needs of the child but may have more difficulty determining a schedule that works in the new family configuration. Standard parenting plans rarely fit children with disabilities. Therefore, the allocation of parenting time may require creativity, flexibility, and a lawyer who is familiar with the challenges of the individual child's disability. For example, some children (even non-disabled children) struggle with transitions and that needs to be accounted for in any allocation of parenting time. This makes a presumed equal parenting schedule inappropriate if this arrangement won't be in the child's best interest.

No child with a disability is the same. In counseling clients, it is important to avoid relying simply on a label as short hand for a description of the child. Details matter. Even if parents are fully cooperating and aligned with their child's needs, if there are other children, this may require parents to navigate different parenting schedules to accommodate the needs of the entire family. See *In re Marriage of Capelle*,[2] for an analysis of the application of the statutory factors in the allocation of parenting time.

SPECIAL EDUCATION ISSUES:

Residency: In cases of divorced or separated parents when only one parent has legal guardianship or custody, the district in which the parent having legal guardianship or custody resides is the resident district. When both parents retain legal guardianship or custody, the resident district is the district in which either parent provides the student's primary regular fixed night-time abode resides; provided that the election of resident district may be made only one time per school year. [3]

750 ILCS 5/606.10 Designation of custodian for purposes of other statutes.

Solely for the purposes of all state and federal statutes that require a designation or determination of custody or a custodian, a parenting plan shall designate the parent who has the majority of parenting time. This designation shall not affect the parent's rights and responsibilities under the parenting plan. For purposes of Section 10-20.12b of the School Code only, the parent with the majority of the parenting time is considered to have legal custody.

When both parents share educational decision-making and agree on the needs of the student it is easier to navigate the special education process. Urging parents who may be conflictual in other areas to attempt to cooperate in the educational realm makes it more likely that the educational needs of the child will be met.

Students are eligible for special education beginning at age 3 through the day before their 22nd birthday. For more severely disabled students remaining in school as long as possible makes sense. "Aging out" of the special education provides them the additional time to receive services and interventions.

CHILD SUPPORT:

The statutory amount of child support may be insufficient to meet the needs of the child with special needs. Frequently, both parents are already spending well above the costs associated with typical children. Many disabled children require specialized care that may not be covered by insurance and results in significant out of pocket expenditures for the family. For example, in cases where a child is on the autism spectrum, insurance may or may not cover the necessary interventions.

In this situation it may be appropriate to discuss with the parties and, if necessary, ask the court to make a finding for a deviation from statutory guidelines. Under 750 ILCS 5/505, Section 3.4, Deviation Factors reads as follows:

> In any action to establish or modify child support, whether pursuant to a temporary or final administrative or court order, the child support guidelines shall be used as a rebuttable presumption for establishment or modification of the amount of child support. The court may deviate from the child support guidelines if the application would be inequitable, unjust or inappropriate. Any deviation from the guidelines shall be accompanied by written findings by the court specifying the reasons for the deviation and the presumed amount under the child support guidelines without a deviation. These reasons may include:

2 2018 IL App (5th) 180011-U, 2018 WL 310 5765 (5th Dist. June 21, 2018) (not for a child with special needs).

3 105 ILCS 5/14-1.11.

(A) Extraordinary medical expenditures necessary to preserve the life or health of a party or a child of either or both of the parties;
(B) Additional expenses incurred for a child subject to the child support order who has special medical, physical, or developmental needs; and
(C) Any other factor the court determines should be applied upon a finding that the application of the child support guidelines would be inappropriate, after considering the best interests of the child.

In gathering information relevant to a request for a deviation from guidelines, you should ask your client to produce invoices for treatment providers, a schedule of the child's day, including travel to outside therapists, number of hours of care each day and the specifics of those interventions.

750 ILCS 505.2 provides for the provision of health insurance in addition to child support obligations.

Typically, child support terminates at age 18, to the earlier to occur of graduation from high school or age 19, if the child is still attending high school at age 18. However, children who would otherwise be emancipated may require ongoing life-long support.

NON-MINOR CHILDREN WITH A DISABILITY

750 ILCS 5/513.5 governs the issues related to support for a non-minor child with a disability. To be "disabled" for purposes of § 513.5, the child must have a "physical or mental impairment that substantially limits a major life activity" and is either generally regarded or has been recorded as having the impairment.4 § 513.5 (c). Disabled for purposes of the § 513.5 is not necessarily the same as "disabled" for the purposes of the Probate Act, and it is not a prerequisite that the child first be declared disabled in a probate court proceeding.

The factors that the court must consider in making an award under 750 ILCS § 513.5 include both parent's financial resources to meet their needs including retirement savings, the standard of living had the marriage not been dissolved, the child's financial resources, and any other resources, such as government benefits.5 In two unpublished orders under Rule 23, the Second District discussed the factors that should be considered in awarding post majority support.6 In one case, In re Hemphill, the court held that the trial court's finding that the parties 20 year- old daughter was disabled was not against the manifest weight of the evidence. The court did not abuse its discretion when it ordered the father to pay non-minor child support and all uncovered medical expenses.

There are many unique concerns that must be addressed in a divorce settlement regarding special needs children. As the child reaches majority it is essential that the divorce agreement be structured so that the child does not lose his or her eligibility for SSI and or Medicaid or other needs-based benefits. If one spouse receives support for the benefit of the special needs child this may impact the child's ability to receive benefits. At the time of the divorce, it is essential to anticipate, structure and carefully draft language to allow for continued support in a Marital Settlement Agreement. This can be done in a number of ways, specifically, the parties can arrange for a Special Needs Trust to be created for the benefit of the child. If the divorce pre-dates the recognition or identification of the child as one with a disability, the parties may need to amend their child support agreement to prevent an adverse impact on government benefits. For all clients, it is important to discuss potential and necessary modifications to their estate planning document.

I recommend the use of a checklist in counseling clients with children who have disabilities and in drafting Parenting Plans and Allocations of Decision Making as well as the Marital Settlement Agreement.

CONCLUSION

Given the high incidence of families with children with disabilities it is essential to be aware of the unique considerations faced by divorcing families to ensure that the rights of the parties, most importantly, the children are addressed in this context.

4 750 ILCS 5/513.5.

5 *Id.*

6 See *In Re Marriage of Wolf and Wolf*, 2017 IL App (2d) 161109-U.; *In Re Marriage of Hemphill v. Robert Hemphill*, 2017 IL App. (2d) 160833-U. I.