ISSUES FOR THE DISABLED OR SPECIAL NEEDS CHILD

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CHAPTER 26

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I. Introduction

This article will discuss the unique approach that is necessary when handling a case involving a special needs child. The article will address how to approach the various parts of a Decree or SAPCR Order that may require non-standard provisions to address the uniqueness of the child's circumstances. Child support issues will only be briefly touched upon, but for a more comprehensive discussion of child support issues refer to the Author's article with Pi-Yi Mayo Child Support for Children with Disabilities presented at Advanced Family Law 2010. The article will also address the continuing need to parent an adult child and the legal options in those circumstances. Because the range of different special needs are so broad it is impossible to address all of the potential special needs that the child of a family law client might have.

At points in this paper, there are critical references to the Texas Family Law Practice Manual form language. These references should not be interpreted as a criticism of the hard work by the Practice Manual Committee over the years. The Practice Manual is an invaluable resource to family law practitioners, but some of the form language that will work in the vast majority of cases may be problematic for the parents of a special needs child and consideration of special drafting is needed in those instances.

II. Preliminary Investigation

Each child and each case involving a special needs child is unique. The first step the practitioner should take is to learn everything they can about the child. Obviously, the client will be an incredible source of information. The practitioner should also try to conduct independent research to obtain a better understanding of the child's condition and needs. Clients can only provide their perspective of a circumstance. We have all learned the hard way that the stories our clients tell us should be investigated. Often the two parents' perspective of their child will be very different. In those instances, it is crucial to develop corroborating evidence regarding the needs of the child.

It is often helpful to ask the client what the child's other parent would report and how they would describe the child and their needs. This line of questioning may expose potential conflicts between the parents' views, but may also provide information from another perspective of the circumstances, other than the client's. This technique often works well in a situation when your client might have a substance abuse problem. If the client does not recognize a problem, asking what their spouse might say will at least provide the client's perception of their spouse's viewpoint. Third parties and ultimately the judge might have a different outlook than either of the parents, but this technique can be fruitful during the initial interview.

Do not make assumptions. I am the parent of an autistic son but I know that all autistic children are different. They have different strengths and weaknesses and I cannot assume that someone else's child is like my son. I personally know very little about the needs of children with other disabilities.

It is often helpful to ask a client to describe daily routines. This will give some insight into the abilities that the child possesses. It also provides information about the level of care that the child requires, and who provides that care. Make sure to find out who is involved with each step of care giving. Find out if there are third party caregivers. Third party caregivers will be very beneficial in describing the child and the parents. They will also be a crucial witness in the case. Third party caregivers will offer a less subjective assessment of the child's ability and needs, as well as information regarding the involvement of both parents.

Ask about medical treatment that the child receives. Find out the involvement of both parents with the medical care. Ask about other interventions and therapies. Tutors and therapists will also be very helpful in educating the lawyer about the child and his or her needs. The medical treatment providers, tutors and therapists may also be crucial witnesses. Additionally, the schedule of doctors' appointments and therapy is crucial to the issues that will need to be addressed in the orders. Often, managing a child's treatment plan can be a full-time occupation.

It is very helpful to walk through the managing conservator's rights as well as the other rights and duties of parents early in the case. I try to do this in the initial consultation in all cases, but I believe that it is especially important in cases involving special needs children. It may be important to consider some other rights and duties about which the court should make orders. There may be concerns about the child's diet or various treatments that need to be addressed. For example, your client may want to request the court to create a duty that requires both parents to follow a particular diet or to perform a certain therapy treatment or tutoring during periods of possession. It is also important to inquire about the other children of the family. The needs of the special needs child's siblings may also require special consideration. When representing the parent of a special needs child, care should be taken to develop a plan that addresses the needs of the entire family.

III. Cautions About the Parties

Having a special needs child can affect parents significantly and in remarkably different ways. The circumstances surrounding the cause of the special needs can also have an impact on the parents. Birth defects may affect parents differently than an accident that resulted in profound injury to a child. A child is an extension of the child's parents. Some parents might perceive that a defect in their child is a defect in them. In some instances this might cause a parent to be in denial about the problem. They may blame themselves for the problem. They may blame the other parent for the defect. If the child's special needs were caused by an accident, then there will also likely be issues of blame or guilt surrounding the accident. Denial, guilt and blame may have a great deal of influence upon how the parents address their child's situation. These emotional reactions to the situation may have no rational basis, but they may have significant influence on the parents' behavior and attitudes.

Some parents hold out for a cure. Some parents are constantly on the lookout for anything that might help or cure their child. These parents are constantly on the internet and researching treatments and therapies. Other parents might be resigned that their child will never drastically improve regardless of what intervention might be tried. Neither viewpoint is right or wrong. When parents are on different ends of this spectrum there might be significant issues regarding decision making and whether or not to explore various interventions.

Some parents will respond to their child's special needs by attempting to shelter and protect the child, but other parents will push their child out into the world despite their challenges. When each parent has a different approach then the child may benefit from both. Unfortunately, the conflict between these two styles may create difficulties in co-parenting. Extreme differences in the parenting approach presents a potential for conflict in co-parenting. One parent may wish to home school a child, while the other parent will push to send the child to public schools. Such disputes arise in our cases with typical children, but may be intensified for the parent of a special needs child who believes their approach is the one that is necessary due to the child's needs.

Typical parents' relationships with their children are only controlled by court orders until the child turns 18 and graduates from high school.

Parenting of a special needs child may be subject to court involvement much longer. The practitioner should discuss with the client and bear in mind the longevity of the orders that will be put in place regarding the child. For some families this might mean that the litigation and conflict that would typically end at the time of the children turning 18 and graduating from high school could continue for many years longer. The fight might shift from the divorce/family court to the probate court when the child becomes an adult.

IV. Educating the Judge

Many lawyers will only infrequently handle cases involving children with profound special needs, and judges will generally hear such cases infrequently as well. Like most cases, cases involving special needs children will settle more often than not. Do not assume that the court will quickly understand the issues at hand. Unfortunately, the legislature has given very little guidance to judges or practitioners regarding what types of orders are in the best interest of special needs children. There are very few cases reported that guide judges either. Each case will potentially present the court with circumstances where their past experience will be much less useful than in typical cases. It will be up to the lawyer to work with their client and various other witnesses to paint the family's unique picture for the court and to guide the court to the types of orders that will suit the child's special needs and best interest.

Plaintiff's lawyers for years have prepared "day in the life" videos to show what an injured plaintiff has to endure in daily living. Such a video might in a few minutes explain to the court what the needs of a special needs child are and replace hours of testimony by the parties and other witnesses. Most family law judges understand that parents have to change diapers and potty train children. Most know from personal experience that this is often a challenging experience for parents and children. Most have no experience with a child that will always require diaper changes or one that may still be potty training as they approach adolescence. A video of the daily routines of the caretaking of a special needs child will be an effective way to help the court understand the circumstances of the child and the family. While a great deal can be spent to prepare such a video, having the client make the video, which could be done at virtually no cost, would serve as a very helpful tool to the court. This type of evidence could be very important in a case that involves a significant dispute regarding how much care that a special needs child does in fact need. Do not underestimate the emotional impact of a video of the daily life of a special needs child. It may be the only way to convey the needs of the child that the court could not otherwise understand.

V. Authority to Tailor Non-Standard Orders

The Family Code sets out certain Rights and Duties at all times, others that apply during periods of possession and those of a Managing Conservator. Sections 153.073, 153.074, 153.076 and 153.132. The Sole Managing conservator's rights set out in 153.132 are delegated in varying ways when parents are appointed joint managing conservators. The other rights and duties of a conservator are typically incorporated into the orders using the formbook language. When handling a case involving a special needs child there may be a need for more attention to detail in this area of the order.

The circumstances of a special needs child might require the Court to issue orders delineating rights and duties that cover issues not normally covered in typical orders. An order that sets out the rights and duties of the parents of a special needs child may need to address rights and duties that are not specifically set out in Chapter 153 of the Family Code. It may be necessary to explain to the Court that they have the ability, and in fact, the obligation, to expand upon the typical rights and duties set out in the formbook orders that are normally used. The Family Code provides for a more expansive and detailed order, but pointing out to the Court the authority for a more detailed order is something that the practitioner should be prepared to do. The explanation to the court will be slightly different depending upon whether the

court will appoint the parents as joint managing conservators or if the court will appoint one as sole managing conservator and the other as a possessory conservator.

The Family Code provides that "[a] parent of a child has... any... right or duty existing between a parent and child by virtue of law." Texas Family Code, Section 151.001(a)(11). The Code goes on to provide that when "rendering an order appointing **joint managing conservators,**

the court shall:

(2) specify the rights and duties of each parent regarding the child's physical care, support, and education;

(3) include provisions to minimize disruption of the child's education, daily routine, and association with friends;

(4) allocate between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent as provided by Chapter 151...."Section 153.134(b). These provisions give the court the authority to set out rights and duties that go beyond the rights and duties set out in sections 153.073, 153.074, 153.076 and 153.132, which must be addressed in every order.

If the court appoints one parent as a Sole Managing Conservator, then unless limited by the Court, that parent shall "have all of the rights provided by [Title 5] Subchapter B." Section 153.132. These rights would include all of the rights set out above and discussed in the context of a Joint Managing Conservatorship. Nevertheless, the court would need to order the possessory conservator parent to perform duties that the court determines must be set out in the order. The Code provides that in appointing a parent as a possessory conservator, the court may issue an order that sets out that the possessory conservator shall have "the rights and duties set out in Subchapter B and any other right or duty expressly granted to the possessory conservator in the order" Section 153.192. These provisions give the court the same broad discretion to fashion an order to meet the special needs of a child, when appointing the parents as sole managing conservators and possessory conservators, as the court may do when appointing parents as joint managing conservators.

VI. Adult Disabled Children

When a child reaches 18 years of age the authority of the family court changes. The authority of the family court to allow parents to make decisions regarding their child ends. The rights and duties set out in a Suit Affecting the Parent Child Relationship Order are no longer applicable. Parents are no longer entitled to private and confidential information regarding the healthcare and education of the child. In the typical scenario, this makes perfect sense because the child is now an adult and has the right to make his or her own decisions regarding the matters that were controlled by their parents while they were minors. However, a child with special needs may not be any better able to make decisions on their own by virtue of turning 18, than they were previously. If the adult disabled child still needs someone to make decisions on their behalf regarding their health, education and welfare, then the parents will need to turn to the probate court and seek a guardianship of the person and/or the estate of the child, as discussed later.

The family court will continue to have jurisdiction over the issue of the support of an adult disabled child beyond their 18th birthday and completion of high school, if the child qualifies for continuing support. This issue is discussed at length in The Advanced Family Law 2010 article, Child Support for Children with Disabilities.

The family court will also have the continuing jurisdiction to issue orders for possession of or access to the adult disabled child. Section 154.309. The provisions for possession and access to an adult disabled child are brief and contained in Child Support provisions of Chapter 154 of the Family Code. Unlike the lengthy provisions provided in the Family Code for access and possession of children, the only guidance that the court is given for possession and access of an

adult disabled child is that the "court may render and order... that is appropriate under the circumstances." *Id.* Possession and access orders for adult disabled children are discussed later.

A. Rights at all Times

Each conservator is entitled to receive information from the other conservator regarding "health, education, and welfare of the child." Section 153.073(a)(1). For typical children, this might involve a quick email about a well check doctor's appointment, a copy of a note sent home from school or a brief report about a playground injury. However, for children with fragile physical health, there may be a greater need to monitor and report detailed information regarding how a child is managing daily living. Doctor's visits may also require much more reporting. When everyone is living in the same home and the child is in the daily care of both parents, reporting is often taking place informally and in a fluid manner. Additionally, if the child has a primary care taker, then that person needs all the knowledge and the required knowledge of the other parent is potentially not as great. However, when the child is living in two different homes, the child is in the exclusive care of one parent at a time. This means that each is the primary care provider for the child during their period of possession. Depending on the needs of the child, both parents may need significant information at transitions to allow them to coordinate the care for the child's needs during their period of possession. Care should be taken to discuss with the client what information they need to share with and would need to receive from the other parent regarding issues of health, education and welfare. If the parents are unable to agree with one another about what information will need to be shared, then the attorney will need to prepare evidence to support a request to incorporate more detailed provisions on this subject than the formbook language that merely tracks the statute.

In addition to the right to information, a parent has a right to confer with the other parent about the child's health, education and welfare. Section 153.073(a)(2). There is also "a duty to inform the other conservator..., in a timely manner of significant information concerning the health, education, and welfare of the child." Section 153.075(a). It will be important to make sure that each of these provisions is reconciled, especially to insure that the right to information matches the duty to inform.

B. Rights During Periods of Possession

In some instances, it might be important to provide more details regarding the duty to support the child during periods of possession, particularly in the area of "food...and medical...care not involving invasive procedure." Section 153.074(2). Some children with special needs are on special diets or receiving various medical treatments. The parents may not agree with the diet or treatment plan. Unfortunately, parents of special needs children are not immune from the issues of divorcing and divorced parents of typical children. Parents may disagree regarding the importance of certain diets, medical treatments or and/or therapies. If these treatments are important to the client, then the practitioner should ask the court to require that both parties follow those treatments during their periods of possession. It is hoped that the parents will agree to both follow diets and treatments during their periods of possession, but if not the practitioner will need to marshal the evidence to convince the court to order the parents to follow such diets and treatments. If your client does not believe that certain diets, treatments, or therapies are necessary then evidence must be gathered to rebut the other parent's request that they are necessary.

Often diet issues involve restricting children from eating certain foods as opposed to requiring that the child eat certain foods. For example, many people believe that children on the autism spectrum benefit from a gluten free and casein free diet. Basically, this means no wheat and no dairy. It is challenging to restrict a child's diet to keep it gluten and casein free. While there is

research that indicates that such diets are beneficial, the issue is subject to much debate. Additionally, there are various occupational and physical therapy treatments that not only require parents to take children to see therapists regularly, but also requires parents and care givers to perform therapies themselves between therapy appointments. Again, the evidence is unclear regarding the medical benefit of such treatments and parents may disagree about the need. There are also private tutoring programs that require parents to do additional homework beyond what the schools require or what is done in the actual tutoring sessions. This tutoring can also require a great deal of time. There are many reasons why parents might disagree regarding the use of various diets, treatments and therapies, but if your client feels strongly and believes that the child's other parent might not agree, then the issue must be addressed in the orders.

C. Changing Needs

Care should be taken to address the changing needs of the child. Likely, the treatment plan that is in place at the time of the divorce will need to change over time. Some parents will not need specific orders to address the changing needs of their children, but many may. It is impossible to address all of the potential changes that will take place and address them specifically in the order, so the best method would likely be to implement a methodology for addressing potential changes and resolving disputes, if any, regarding changing the parenting plan. Often in agreed orders the parents will agree to a procedure for dispute resolution process that may ultimately utilize a third party to facilitate changes and sometimes will delegate to that person the right to render a binding decision if negotiation fails. The Court may also impose an order that provides for a plan "to minimize disruptions of the child's education… [and] daily routine", as well as an alternative dispute resolution method before requesting… modification… through litigation." Section 153.134(b)(3) and (4). Such plans, should be considered when addressing the rights of a managing conservator.

D. Managing Conservators Rights

The delegation of managing conservator rights set out in Section 153.132 is very important in a case involving typical children, but given that there can be significantly more managing conservator decisions during the life of a special needs child, the delegation of these rights in the case of a special needs child is even more important. Typical children may never face elective invasive procedures, psychological or psychiatric decisions, education decisions or require their parents to deal with the state or federal government on the child's behalf. The parents of special needs children will likely face these types of major decisions on a regular basis.

1. Geographical Restrictions

Geographical restriction is a hot button issue in cases with typical kids, but a move could have even more impact on the parenting relationship with a special needs child. Some children will never be able to fly unaccompanied by an adult. In such a situation, a move by the parent with the right to determine the child's legal residence may have a much greater impact on the other parent's ability to have meaningful contact with that child. It is the public policy of the State of Texas "to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child." Section 153.001(a)(1). If the parent with the right to determine legal residence of a child who cannot fly were allowed to determine that residence any significant distance from the other parent, then the state's public policy would not be served. Domicile restriction cases are some of the most

difficult cases that we have to litigate. There will be a great deal of sympathy for the circumstances of a parent who is going to be the primary caretaker of a severely disabled child. That parent's ability to pursue their own career may be impaired by the requirement of providing for the child's needs. Often there will be a plan to move to be near family so that they will be able to provide assistance at no cost. When attempting to restrict the other parent, there will need to be evidence that the parent opposing the move will be shouldering as much of the additional burden as possible. Counsel for both parents need to marshal evidence to prove that the alternative provides a comprehensive plan that balances the needs of the child and allow both parents to maintain a relationship with the child.

2. The right to consent to elective invasive procedures and psychological and psychiatric decisions.

The rights to consent to invasive elective procedures and psychological and psychiatric treatment are also significant issues when dealing with special needs children. The parents may not always agree about what treatments are in the best interest of the child. If an agreement is required, then each parent has the right to veto a treatment plan.

If one parent is a proponent of exploring many alternatives for treatment, then they may be at a disadvantage if consent requires agreement. Careful attention should be paid to gathering evidence to establish that the more proactive parent should make the ultimate decision. On the contrary, the more deliberate parent should present evidence that their cautious approach is in the child's best interest and that an agreement should be required to consent invasive medical and mental health treatment. Giving one parent the right to make invasive, medical and psychological decisions exclusively, will not necessarily guarantee that they will control the implementation of invasive elective procedures or psychological and psychiatric treatments. The Texas Family Law Practice Manual form for a Final Decree of Divorce provisions regarding medical support include a provision regarding "Compliance with Insurance Company Requirements." Texas Family Law Practice Manual, Volume 3, Form 23-1, Section 10.G.12.e. That provision of the form requires that

> Each party is ORDERED to conform to all requirements imposed by the terms and conditions of any policy of health insurance covering the child[ren] in order to assure maximum reimbursement or direct payment by any insurance company of the incurred health-care expense, including but not limited to requirements for advance notice to any carrier, second opinions, and the like. Each party is ORDERED to attempt to use "preferred providers," or services within the health maintenance organization, if applicable; however, this provision shall not apply if emergency care is required. Disallowance of the bill by a health insurer shall not excuse the obligation of either party to make payment; however, if a bill is disallowed or the benefit reduced because of the failure of a party to follow insurance procedures or requirements, IT IS ORDERED that the party failing to follow the insurance procedures or requirements shall be wholly responsible for the increased portion of that bill.
>
> IT IS FURTHER ORDERED that no surgical procedure, other than in an emergency or one covered by insurance, shall be performed on the child unless the parent consenting to surgery has first consulted with at least two medical doctors, both of whom state an opinion that the surgery is medically necessary. IT IS FURTHER ORDERED that a parent who fails to obtain the required medical opinions before consent to surgery on the child shall be wholly responsible for all medical and hospital expenses incurred in connection therewith and not covered by insurance.

Id. These provisions are often many pages removed from the section of the Decree that provides for the delegation of the Managing Conservators rights might restrict the rights of a parent who otherwise has an exclusive right to make the decisions regarding elective procedures or for psychological or psychiatric care. If the elective invasive procedure is experimental, then it may not be covered by the carrier. Additionally, many mental health providers do not take insurance, hence, a parent may be restricted to a limited list of mental health providers that they do not believe can address their child's needs. The parent with the exclusive right to make these decisions will be able to make such decisions, but only if they are willing to bear all of the cost. Otherwise, they will have to get the agreement of the other parent so that the cost will be shared. The cost is often part of the reason that one parent might be resistant to the treatment plan. If the formbook language is used for medical support provisions, then many elective invasive procedures and psychological and psychiatric treatment decisions may as a practical matter be subject to the agreement of both parents, unless the proponent is willing to bear all the cost.

In addition, it should be noted that the Texas Family Law Practice Manual also provides a definition of "reasonable and necessary health-care expenses not paid by insurance and incurred by or on behalf of a child". *Id.* at 10.G.12.a. The definition used in the Practice Manual is not a statutory definition. The Family Code merely provides that:

> [a]s additional child support, the court shall allocate between the parties, according to their circumstances: (1) the reasonable and necessary health care expenses, including vision and dental expenses, of the child that are not reimbursed by health insurance or are not otherwise covered by the amount of cash medical support [that may have been ordered]; and (2) amounts paid by either party as deductibles or copayments in obtaining health care services for the child covered under a health insurance policy.

Family Code Section 154.183(c). The language used in the Family Code is much broader than that used by the Formbook Committee. The broader language will give more latitude to a parent in seeking care for a special needs child. When negotiating and drafting this particular portion of the Decree, the practitioner should decide whether it is better to use the broad statutory language or to expand on the list used by the Practice Manual Committee. If a more extensive list will be used then consider adding: tutoring, physical therapy, occupational therapy, vision therapy, nutritionist, dieticians and the like to the list. Discussing the issue of current and potential future needs with the client, and with the treatment professionals already involved, will allow for a more comprehensive list being drafted. However, a general definition might be less restrictive and better for some clients. If possible, it is better to resolve these issues at the time of the drafting of the original Decree, than to leave something out that will have to be addressed later.

3. Legal Decisions

In some instances, the right to make legal decisions may be crucial to a special needs child. Often times the special needs of a child are the result of a catastrophic injury. More often than not, any potential tort claim will be resolved before the Decree is entered. If that is not the case, then controlling the resolution of the child's tort claims will be very important. If the case is pending, the child will likely have had an attorney ad litem appointed to represent the child's interest. To a certain degree the attorney ad litem and the court handling the tort claim will limit the control that either parent has over the outcome of the matter, but care will need to be taken in resolving this issue if the case is pending.

4. Educational Decisions

The right to make educational decisions will often be more significant when a special needs child is involved, than in a case involving typical children. For typical children there may be few educational decisions of significance that will need to be made. However, the parents of a

special needs child may be very involved with the school system in implementing an educational plan for their child. The practitioner must bear in mind that the school system would rather not spend money providing for the needs of special needs children. The school system receives funds to provide services for special needs children. If those funds are not used for that purpose, then they are available for other purposes. Hence, the system is set up to try to limit services provided. Federal law requires that the school provide the child what they need. This might include a one on one aide for the entire school day. This will cost the school district tens of thousands of dollars per school year. This is in addition to the cost of other special accommodations that the child might require. If it serves the school district's purposes, they will use a divide and conquer tactic with the parents. If the Decree is not very clear that both parent's consent is not required, then the school will require both parents consent. If the parents do not agree, then the service and benefit, will not be made available to the child and the school will save money.

The parents' request and consent is needed as several stages along the way. First, the parents must consent to seek services and accommodations from the school. Secondly, the parents must consent to have the child evaluated by the school. After the child has been evaluated, then there will need to be decisions made regarding the creation and implementation of a plan. This process is accomplished through a series of meetings with school officials. Often present will be the principal, the special education teacher, the mainstream teacher, the school psychologist, the occupational therapist, and the speech therapist. It is amazing to watch this teamwork together to convince you that the plan they have put together is a wonderful program to insure the academic success of your special needs child. Parents of special needs children should consider working either with an attorney specializing in education law or an education specialist when trying to maximize the services their child might be entitled to receive from the school.

5. Acting as the child's agent to deal with the government

The final right of a managing conservator that might be most important in the life of a special needs child is "the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state [or] the United States." Family Code, Section 153.132(9). In typical cases, this is a right that is routinely exercised jointly even when other decisions are not. Frankly, this decision is due to the very low probability that it will ever need to be utilized in the life of a typical child. If it is needed, however, it is important to give this right careful consideration. The parent with this right will have the right to seek benefits on behalf of the child from the State and the United States. While it will be challenging to deal with the school system as discussed above, that process pales in comparison to the task of seeking benefits from the State and the United States on behalf of a child. In this author's opinion, if this right is needed it should not be shared. The process is much too complicated and there should be one person that is clearly in charge. The services that are acquired will be available to the child and if both parents are actively involved, then both will benefit from many of these services. Many government benefits will be need based. As discussed in the 2010 Advanced Family Law paper on Child Support for Children with Disabilities, many benefits will be based on financial need and in Texas most of those will only be available, if the child is qualified for and receiving Supplemental Security Income (SSI). Some of the benefits that are available may also be available based a request for a waiver of financial need. Unfortunately, the waiting lists to qualify for the waiver program are very long. One client was on the list for the Community Living and Support Services (CLASS) for over 10 years before she began to receive services. It is a very complicated process to take all of the steps necessary to access these benefits. Having to do everything by agreement, will slow down the process at best and impede it in many cases. Care can be taken to

fashion a process where both parents are kept apprised of the process and even participate in the process, but placing one party in charge will limit to a certain degree the advantage that the government already has in the situation.

E. Parenting decisions for an adult disabled child

The authority of the Family Court to authorize parents to make decisions on behalf of a child ends when the child turns 18 years of age. A child, other than for the purposes of child support is "a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes." Family Code, Section 101.003(a). When 'both parents are appointed as conservators of the child, the court shall specify the rights and duties of a parent'...." Family Code, Section 153.071. The child will become an adult when they turn 18 or are otherwise emancipated. It is unlikely that a child with significant disabilities will be otherwise emancipated, but they will cease to be a child on their 18th birthday. At that time, they will be an adult and no longer subject to the jurisdiction of the family courts, except for child support and access possession issues (discussed later). Many special needs children will remain dependent upon their parents for the same decision-making that parents will need to make for minor children. Unfortunately, after a child turns 18 the court order that provided for how the parents would make decisions on behalf of the child no longer applies. The parents will need to take some steps to gain authority to act on behalf of their adult child and that authority will need to be sought in probate court.

The parents of an adult disabled child will need to seek a guardianship of the estate and/or the person of the adult disabled child. The Probate Code allows for the appointment of a guardian or in some instances the joint appointment of two persons as co-guardians. Texas Probate Code, Section 690. Section 690 specifically provides that only one person should be appointed as a guardian, but that different guardians can be appointed for the estate and the person of a ward. *Id.* Section 690 further states the following:

> [n]othing in this section prohibits the joint appointment, if the court finds it to be in the best interest of the ward, of:
>
> (1) a husband and wife;
>
> (2) joint managing conservators;...
>
> (4) both parents of an adult who is incapacitated if the incapacitated person:
>
> (A) has not been the subject of a suit affecting the parent-child relationship; or
>
> (B) has been the subject of a suit affecting the parent-child relationship and both of the incapacitated person's parents were named joint managing conservators in the suit but are no longer serving in that capacity.

Id. The appointment of parents as Joint Managing Conservators has been authorized by agreement since 1979 and has been presumed to be in the best interest of the child since 1995. Family Code, Section 153.131. The authority to appoint co-guardians is more recent in the Probate Code. There is no guidance in the Probate Code for what the terms of co-guardianship should be. A probate practitioner should be consulted to determine what the attitude of the local jurisdiction's probate judge(s) is regarding the appointment of co-guardians. The probate court may not wish to appoint co-guardians of the ward. The joint appointment is permitted, but is certainly not required. If the probate court were to appoint both parents co-guardians, they may not issue any order regarding how such a joint appointment is to be applied. It would seem very likely that if parents had shown they had experienced difficulty in making decisions prior to the guardianship proceeding, then that might hurt the chances of the court appointing co-guardians. If a joint appointment will be advocated for, then the argument should be made that the court could impose the same process for decision making that was imposed in the appointment of the parents as joint managing conservatorship. Of course, the same considerations set out above should be taken into consideration in the guardianship proceeding. The adult disabled child might need someone to work with the government, medical and mental health providers and educational facilities and having one person who has clear authority, might be a compelling argument to either not appoint co-guardians, or to limit one of the guardian's authority.

VII. Access and Possession

Often cases involving special needs children will require that the court vary from the Standard Possession Order. The Family Code and the courts of appeal have given wide latitude to the trial court, but this latitude is not without limitation. When fashioning possession orders the court must balance the best interest of the child and the parent's right to have an enforceable right to access.

A. Legal Standards for Possession Orders

The Family Code provides that "[i]t is the policy of this state to encourage frequent contact between a child and each parent for period of possession that optimize the development of a close and continuing relationship between each parent and child." Section 153.251(b). Additionally, "[i]t is preferable for all children in a family to be together during periods of possession." *Id.* at (c). "The standard possession order is designed to apply to a child three years of age or older." *Id.* at (d). It is also presumed that the standard possession order provides reasonable minimum possession of a child and is in the child's best interest. *Id.* at 153.252. If the court is going to vary from the standard possession schedule, then the court may consider: "(1) the age, developmental status, circumstances, needs, and best interest of the child; (2) the circumstances of the managing conservator and the parent named as a possessory conservator; and (3) any other relevant factor." *Id.* at 153.256. This provision obviously gives the practitioner much latitude to develop evidence to put on a case for something other than a standard possession schedule. While the client will be an excellent source of evidence to establish a case for a particular possession schedule, it is important to gather information from other sources regarding the child's ability to manage various schedules after the separation of the parents. While evidence prior to the separation may be useful, the best evidence will likely be how the child adapts to the shared parenting post separation but prior to the final Decree.

The appellate courts will usually defer to the trial court's decision regarding a possession schedule. The trial Court has broad discretion in determining the best interest of a child in family law matters such as custody, visitation, and possession. *In re Doe* 2, 19 S.W. 3d 278,281 (Tex. 2000). A trial court's judgment is reversed only when it appears from the record as a whole that the trial court abused its discretions. *Worford v. Stamper*, 801 S.W. 2d 108,109 (Tex. 1990); *Gillespie v. Gillespie*, 644 S.W. 2d 449, 451 (Tex. 1982). A trial court abuses its discretion as to legal matters when it fails to act without reference to any guiding principles. *In re M.W.T.* 12 S.W. 3d 598, 602 (Tex. App.—San Antonio 2000, pet. denied). A trial court's determination of the best interest of the child will only be reversed upon a determination of an abuse of discretion because a trial court is in the best situation to observe the demeanor and personalities of the witnesses and can feel the forces, powers, and influences that cannot be discerned by merely reading the record. *In re N.A.S.*, 100 S. W 3d 670, 673 (Tex. App.—Dallas 1999, no pet.). Under an abuse of discretion standard, legal and factual insufficiency are not independent grounds for asserting error, but are relevant factors in assessing whether a trial court abused its discretion. *In re Davis*, 30 S.W. 3d 609,614 (Tex. App.—Texarkana 2000, no pet.).

B. Using Factors for Underage Children for Special Needs Children

The Family Code has historically given very little guidance to the court's and the practitioner regarding possession of children less than three years of age. The current Family Code merely provides that: "The Court shall render an order appropriate under the circumstances for possession of a child less than three years of age." *Id.* at 153.254(a). Effective September 1, 2011, for cases pending at that time, Section 153.254 will be amended, and will now include a list of

factors for the Court to consider in rendering an order for a child under three. Tex. S.B. Section 820, 82nd Leg., R.S. (2011) signed by the Governor on May 19, 2011 and effective September 1, 2011, amends Section 153.254 of the Family Code. A copy of Senate Bill No. 820 is attached as Appendix A. The factors set out in the bill for the court to consider include:

(1) the care giving provided to the child before and during the current suit;

(2) the effect on the child that may result from separation from either party;

(3) the availability of the parties as caregivers and the willingness of the parties to personally care for the child;

(4) the physical, medical, behavioral, and developmental needs of the child;

(5) the physical, medical, emotional, economic, and social conditions of the parties;

(6) the impact and influence of individuals, other than the parties, who will be present during periods of possession;

(7) the presence of siblings during periods of possession;

(8) the child's need to develop healthy attachments to both parents;

(9) the child's need for continuity of routine;

(10) the location and proximity of the residences of the parties;

(11) the need for a temporary possession schedule that incrementally shifts to the schedule provided in the prospective order under Subsection (d) based on:

(A) the age of the child; or

(B) minimal or inconsistent contact with the child by a party;

(12) the ability of the parties to share in the responsibilities, rights, and duties of parenting; and

(13) any other evidence of the best interest of the child.

Id. The factors set out in the bill will be helpful to the practitioner in putting on a case for the Court to vary from the standard possession order when dealing with a case involving a special needs child. The factors set out in Senate Bill 280 are consistent with the current provisions of Section 153.256 for the court to consider when varying from the standard possession order. The developmental factors that justify varying from the standard possession order for very young children also justify varying from the standard for a child with developmental delays as a result of the child's special needs. The practitioner should use the factors set out for children under three in developing the case for the appropriate possession schedule for a special needs child.

C. Temporary Possession Orders

While the Family Code provides a standard possession order that is presumptively in the best interest of the child, there is no model for the best possession schedule for a child whose needs are atypical. Frankly, no one knows how the special needs child will respond to the separation and divorce of their parents, and the new living arrangements that the divorce will impose on the family. Each special needs child is unique and each will respond differently. Temporary Orders will be crucial in the situation of a special needs child. The practitioner must be prepared at the temporary orders hearing to put on the best case for the schedule that their client believes will work best. Nevertheless, everyone involved will have to be open minded about the fact that the temporary arrangement might not be ideal. Great care should be taken in gathering information

regarding the impact of the new living arrangements on the special needs child. Third party caregivers, if they are involved, will be crucial in developing evidence of how the child is handling the new living arrangements. These will include therapists, nannies, teachers, tutors, etc. If the client reports problems or if the other parent reports that the child is not managing the new arrangements, then the practitioner should contact the third parties to see if they can gather more objective reporting about how the child is fairing. The observations of these third parties will be very valuable evidence.

If the temporary orders schedule does not appear to be meeting the needs of the special needs child, then urge a change in schedule. Such a change might be accomplished by agreement, but if not seek relief from the Court. It is better to experiment with options at the temporary orders stage, so that there can be evidence of the pros and cons of different arrangements, than to have only one post separation living arrangement for the court to consider if the parents cannot agree about what the final schedule should be. In the situation where only one schedule was implemented on temporary orders, the Court might have information about what did or did not work about that schedule, but the Court will not have any information about what the pros and cons are of a schedule that has never been tried. This puts the parent proposing a different schedule in a very difficult position to advocate for a change at final orders. If your client wants a different schedule other than the one ordered at temporary orders, attempt to advocate for a change of the temporary schedule, so that on final orders the court can compare the two. Obviously, it may be difficult to convince the court to hold a temporary orders hearing regarding schedule more than once, but it may be the only chance for change. If you know at the outset that the court will never have more than one temporary orders hearing, perhaps you could advocate that the court enter an order, which provides for more than one schedule on temporary orders. Alternatively, provide a mechanism, such as a guardian ad litem, or a mental health professional that could recommend changes to the schedule to meet the needs of the child while the case is pending.

D. Evolving Schedule Post-Divorce

Courts have struggled with how to create flexible orders that balance the best interest of special needs children and the rights of a parent to have an enforceable access and possession schedule. A schedule that puts a parent's right to access and possession in the discretion of the other parent will not work. In *Niskar v. Niskar*, the child was severely handicapped and there was evidence that the father had limited experience providing care for her, so the trial court entered an order that allowed the mother to determine if a visit should happen, but required that father should be allowed to make up time as agreed with consideration of his work schedule. *Niskar v. Niskar*, 136 S.W. 3d 749, 755 (Tex. App.—Dallas 2004, no pet.). As pointed out by the Dallas Court of Appeals, "[t]he very serious consequences of contempt or the inability to enforce the judgment by contempt, require clear and unambiguous terms that order the performance of certain acts." *Id* at 754; citing *Ex Parte Brister*, 801 S.W. 2d 833, 834 (Tex. 1990). The judgment must clearly order the party to perform required acts. *Id* at 754. If the trial court gives one parent the unilateral right to deny the other's visitation and possession, then the court has abused its discretion by failing to order possession of and access to the child in clear and unambiguous terms. *Id.* at 755. Therefore, orders that allow one parent to determine whether a child should have a visit are not a way to address the needs of the child.

The Niskar case is also significant for a couple of other issues. The Dallas Court of Appeals approved the court's denial of overnight visits due to the special needs of the child. *Id.* at 756. The child in Niskar had to have saliva cleared from her mouth throughout the night and there was evidence that the father had limited experience in caring for her. *Id.* The trial court did not abuse its discretion in denying overnight visits under the circumstances. *Id.* The trial court did, however abuse its discretion by issuing an order that precluded the father's right to seek a modification of the denial over overnight visits for a period of two years. *Id.* The Court of Appeals held that "the trial court cannot possibly know what is in the child's best interest in the future" and cannot

prohibit a parent from exercising their right to modify an access and possession order. *Id.* Other courts have utilized neutral third parties to manage the difficulty of providing a flexible schedule of access and possession that addresses the disabilities of children. The ultimate goal of the trial court is to "minimize restrictions placed on a parent's right of possession of or access to their child." *In re J.S.P.* 278 S.W. 3d 414, 419 (Tex. App.—San Antonio 2008, no pet.). The "restrictions or limitations on a parent's right to possession of or access to a child may not exceed those that are required to protect the best interest of the child. *Id.* citing Family Code, Section 153.193. In *J.S.P.* the father of the child had cognitive disabilities due to a closed head injury and the child had special needs due to emotional problems. *Id.* at 417. At the time of the entry of the Order, the trial court found that it was not in the best interest of the child for the father to have unsupervised visitation. *Id.* The trial court appointed the child's therapist "an agent of the court". *Id.* at 419. The therapist was given the task of developing a program for the father to move from limited supervised access to a standard possession schedule. *Id.*

In discussing whether the trial court erred in delegating the power to change the schedule to a third party, the San Antonio court referenced two other Courts of Appeal decisions on the subject. The first case discussed was *In Re Webster*, 982 S.W. 2d 526, 528 (Tex. App.—Amarillo 1998, no pet.). In *Webster*, the trial court had terminated the parental rights of both parents and appointed the Department of Protective and Regulatory Services ("the "Department") as the managing conservator of the child. *Id.* The trial court allowed the paternal grandmother supervised access, but it was at the discretion of the Department. The Amarillo Court of Appeals held that this was an improper delegation of court authority. *Id.* The Amarillo Court held that once the jurisdiction of the court is invoked its power may not be assigned to another agency. *Id.* It should be noted that *Webster* involves the Court assigning authority to another branch of the government that had been appointed a conservator of the child and might be distinguishable on either of those grounds from the delegation of the authority to a non-governmental neutral third party. The second case discussed was *In re L.M.M.*, No. 03 04 00452 CV, 2005 WL 2094758, (Tex. App.—Austin Aug. 31, 2005, no pet.). *In L.M.M.*, as in *J.S.P.*, the trial court conditioned mother's right of possession on the approval of her therapist. *Id.* at *3. Mother was granted supervised access during specific periods. *Id.* at *2. The access could increase if the mother met certain criteria and if the mother's therapist and the children's therapist agreed in writing that it was not in the children's best interest for a particular visit to take place then it would not occur. *Id.* The Austin Court held that while delegation may not always be proper it was proper in this case because the decision-makers were neutral third parties as opposed to the parents or conservators appointed by the court. *Id.* at *12. The Austin Court found that the order did not deny the mom access and was enforceable by contempt. *Id.* "The therapists were permitted to deny her a specific period of possession only if they agreed that it was in the best interest of the children." *Id.* at *11.

After reviewing the sister court cases, the San Antonio Court "recognize[d] that there are limited circumstances, as in the instant case, where delegation of some authority to a third party may be necessary to both protect the interest of the child and comply with the Family Code's mandate to minimize, when possible, the restrictions placed on a parents right to possession of and access to his child." *J.S.P.* at 422. "[T]he trial court was faced with the difficult task of either exercising its authority and limiting possession, or exercising its authority and attempting to expand [the fathers] possession in the future. *Id.* The San Antonio Court held that when the trial court chooses to exercise its authority and attempt to expand possession in the future it may be appropriate to delegate such authority to a mental health professional while maintaining the power to review the decisions of the third parties if challenged by the parties. *Id.* According to the San Antonio Court this delegation would "be permissible so long as the parent maintains access to their child, and only faces the possibility of the denial of specific period of possession. The trial court's order must be sufficiently specific to be

enforceable by contempt". *Id.* 422-3. The order in *J.S.P.* was found to lack adequate specificity and was remanded back to the trial court to clarify *Id.* at 423. Specifically the order failed to "state:

(1) a date by which the transitory program leading to unsupervised visitation should be developed; (2) a date by which the standard possession order should begin; or (3) a deadline by which [the therapist] must provide the trial court with a written status report documenting the reasons why a transitory program leading to unsupervised visitation could not be developed, or a deadline for the commencement of a standard possession order could not be given.

Id. The Court of Appeals recognized that a trial court will be hesitant to issue specific deadlines, however, without them, the order would not be enforceable by contempt. *J.S.P.* and *L.M.M.* can both be used to support a request to involve a neutral third party to either limit specific periods of possession, or to provide a method to transition to expand a parent's right to possession in the future. Great care must be taken to insure that such orders are adequately specific to preserve the court's authority to enforce the order.

E. Different Schedules from Siblings

One factor to consider in fashioning a possession schedule for a family with a special needs child is the issue of whether all children should be together at all times. This is typically the preference in Family Code, Section 153.251(c). While this may make sense when none of the children is disabled, it may not be the best plan for a family with a special needs child. Investigate the care required for the special needs child. How does the care taking for the special needs child affect their siblings and the parents' relationship with those siblings? Perhaps having the children on somewhat different schedules would benefit the family. Staggering the schedule to some extent would allow both parents to give the special needs child one on one attention without detracting from the attention for the other children. Conversely, a staggered schedule will also allow the other children to receive attention from their parent without that parent having to devote their attention to the needs of the special needs child. The value of such a staggered schedule will depend on how much care giving the special needs child requires. If the needs of that child do not require too much of the care giving parent's attention, then the benefit of maintaining the same schedule for all of the children would likely not justify the effort that creating a staggered schedule will require, nor would it override the statutory preference to keep the children together during periods of possession. It should also be taken into consideration that while typical children's needs will predictably mature as they grow older, a special needs child may not emotionally and psychologically mature. That difference should also be taken into consideration and may justify the special needs child having a different schedule for parenting time than the other siblings.

F. Respite Care for Parents

Another consideration that should be involved in the process is the need for respite care for the care-giving parent(s). This need for respite care is addressed by some government benefits, which include respite care for the care provider of a disabled individual. Divorced parents can provide respite care for one another. The care provider of a special needs child will likely benefit from respite care whether they recognize it or not. It may be difficult for the care provider to acknowledge the need for respite care and to see their former spouse as the source of this respite care, but there is the potential for a win/win schedule that meets the needs of the post divorce family that should be explored.

G. Possession of Adult Disabled Children

Unlike the issue of conservatorship, the Code provides that the family court will have continuing jurisdiction to make orders for access and possession for an adult disabled child. Family Code, Section 154.309(c). It should be noted that the Probate Court also has jurisdiction in a guardianship of the person proceeding involving the adult disabled child. *Id.* The only guidance that is provided to the court by the Code for entering an order for access and possession of an

adult disabled child is that the schedule should be "appropriate under the circumstances." Family Code Section154.309(a). Once again the factors set out in Senate Bill 820, should be used to develop the case for what the circumstances of the adult disabled child are and what schedule would be appropriate under those circumstances.

One other important distinction regarding the adult disabled child's possession order is that the disabled child may have control over their schedule. If the adult disabled child is determined to have adequate capacity, then the court and the parents must honor the child's wishes regarding the possession schedule. Family Code, Section 154.309(b). Otherwise, the order for access and possession will be enforceable by contempt the same as an access and possession order for a minor child.

VIII. Conclusion

Representing the parents of children with special needs requires the practitioner to rethink the standard approaches to conservatorship and possession. Helping parents with these needs to obtain orders that fit the unique circumstances of their particular family is incredibly rewarding work. As divorce lawyers, we have too few opportunities to feel like we have had a positive influence on the lives of our clients. Helping the parents of special needs children work through the difficult process of a divorce presents a rewarding opportunity.