

Autism and Divorce Guidelines for Family Court Practice

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With both the rate of autism and the rate of divorce increasing each year, family courts now face an ever-growing frequency of divorce proceedings between parents of autistic children.

In some cases, a marriage is unhealthy and might be ending for reasons independent of a child's autism. In other cases, the inability of one or both parents to cope with the stress of raising an autistic child is a primary cause of the divorce. Research indicates that parents of children with autism may experience heightened degrees of stress. Pursuant to a study presented by the Autism Society of America, causes for such stress may include: 1) parents' inability to determine their child's needs; 2) reactions from society to the autistic child and feelings of isolation; 3) concerns of future caretaking for the autistic child; 4) finances and economic pressures from the cost of therapies for the child; 5) feelings of grief; 6) lack of personal time, and 7) stress from reactions by siblings and other family members.¹

When parents of an autistic child initiate divorce proceedings, there are a multitude of specialized issues that may need to be analyzed by the family court. Thus, if hypothetically there are two couples with identical lives getting divorced—with one couple having an autistic child and the other couple having a non-autistic child—the results of each divorce might radically differ on any of the following 15 matrimonial issues:

1. Physical custody of the child
2. Legal custody of the child
3. Parenting-time (visitation) schedule for the noncustodial parent
4. Requests to relocate from New Jersey to another state

5. Appointment of expert witnesses and child psychologists
6. Appointment of a *guardian ad litem* for the child
7. Child support
8. Private educational expenses for the child
9. Emancipation
10. Alimony
11. Equitable distribution (dividing assets and debts of parties)
12. Health insurance
13. Life insurance
14. Tax exemptions
15. Legal fees

This article addresses these 15 issues in the context of divorce between parents of an autistic child. Before beginning such an analysis, however, it is important to note that family courts presiding over such cases can benefit from increased autism awareness—including a general understanding of autism as well as a specific understanding of an autistic child's unique needs. Such an understanding is important because the court always has an obligation to protect the *best interests of the child*. This obligation—known as *parens patriae* jurisdiction—means that the family court has an affirmative duty to protect a child who cannot protect him or herself. This is especially true in the context of protecting a disabled child, such as one with autism.

Understanding Autism and the Importance of Intervention

In considering what is in an autistic child's best interests, it is helpful for a court to have a general working knowledge of autism, as well as a familiarity with the importance of early intervention and the need to prioritize a behavioral therapy program in the child's life.

Autism is a pervasive developmental disorder of the brain. The exact cause is unknown, and there is no known universal

cure. The reported incidence of autism has risen astronomically in the past decade in epidemic-like proportions. According to the Autism Society of America, recent studies reflect that autism affects approximately one out of every 100 children born in the United States. Infants and young children who are diagnosed with autism are said to suffer from infantile autism.

While no two autistic children are exactly alike, the academic and social deficits of such children can sometimes manifest themselves in predictable fashion. For example, autistic children often have little or no speech. Some children who do speak might only parrot what they hear others say (echolalia), and/or speak in monotone with a blunt affect. Autistic children often have great difficulty making eye contact, and frequently engage in obsessive-compulsive behaviors, such as persistently lining up objects in a row or spinning the wheels on toy cars for hours.

Autistic children often are unable to read and understand people's facial expressions, or respond to social cues and gestures. Many have no interest in people, and prefer isolation to social interaction with peers. Some autistic children engage in explosive temper tantrums and self-injurious behaviors, such as head-banging on walls and floors.

Many autistic children do not readily appreciate or understand the concept of danger. For example, a child might put his or her hand on a hot stove even if he or she was burned on the same exact stove the previous day. Other autistic children engage in repetitive self-stimulatory behaviors, such as spinning in circles, flapping their arms, and/or rocking their bodies back and forth for hours on end.

These are just some examples of the challenging behavioral aspects of autism. There can be many other manifestations of the disorder as well. There

are countless treatises, books, and professional articles on the subject of autism. Psychologists, behavioral therapists and other professionals focusing on the issue spend years studying autism—many devoting their entire professional lives to educating themselves on the topic. Thus, a family court judge cannot be reasonably expected to ever become a complete 'expert' on autism. Nonetheless, there are certain key points family court judges may wish to consider when adjudicating a divorce case involving autistic children. Nine of these key points are the following:

1. Autism is a serious disorder that can impair a child's ability to learn, communicate, and socially interact with other people.
2. While there is no cure for autism, children who have received an early diagnosis, with early and intense behavioral intervention, have often made significant and documented improvement to the point of being mainstreamed with non-autistic, 'typical' children.
3. In the autism community, the most recognized form of effective treatment is called Applied Behavioral Analysis (ABA). This intervention is based on a 1987 study at UCLA known as the Lovaas study, and requires intense behavioral interventions of 30-40 hours a week or more. This involves a serious commitment of time, money, energy and effort by the parents of the autistic child, often in conjunction with trained professionals such as behavioral therapists, speech therapists, and other professionals trained in educating with autistic children.
4. Generally, the earlier the diagnosis and intense intervention, the greater the chance for success of improving the autistic child's functional abilities. Some professionals

refer to the age bracket of two to six as the greatest window of opportunity to improve an autistic child's functionality. Accordingly, failure to provide a young autistic child with intense behavioral intervention could have drastic consequences on the child's future.

5. While professionals may develop, oversee, and administer the child's therapy, it is critical for parents and other family members of the autistic child to learn how to reinforce the therapy at home. This way, the autistic child is constantly learning to apply concepts in different environments and situations. Since autistic children often have difficulty generalizing what they learn, it is in the child's best interest for both parents to constantly reinforce the child's learning with coordinated intensity and consistency.
6. Autistic children often do poorly with down time and unstructured free time. Additionally, autistic children sometimes regress without constant reinforcement. Also, autistic children sometimes do not transition well into different environments and often resist changes to their routine and schedule. Accordingly, it is in the child's best interest for parents to coordinate their efforts and schedules so the child is constantly learning in a uniform and predictable manner. Constantly changing visitation schedules may be detrimental to the child's need for consistency.
7. Even in an intact family where the parents have a healthy marriage, a diagnosis of autism can place a heavy strain on the household. In addition to the emotional consequences, there can be serious economic stressors. For example, a parent might have to leave his or her career to care for the autistic child on a full-time basis, and/or to trans-

port the child to his or her therapy sessions. The other parent might have to work overtime or two jobs in order to help pay for the cost of private therapy. Both parents may need to forego leisure time to learn therapy reinforcement techniques and then apply them on a scheduled basis with the child.

8. Parents of autistic children are often faced with costs and expenses of therapy and special education services that are not fully covered by insurance and are not voluntarily provided by the child's school district. This results in the need for more income to either privately pay for therapy services, or alternatively to pay for legal fees in court actions against health insurance carriers or school districts to compel appropriate services for the child.
9. Some school districts offer better services for an autistic child than other school districts. This point must be considered in the context of where the autistic child is ultimately going to live. Additionally, since some autistic children do not transition well, a move from a home could be emotionally traumatic for a child unless done with appropriate care and professional guidance.

In divorces involving autistic children, judges may need to analyze any or all of the above-referenced 15 legal issues. Indeed, there is a "real responsibility in matrimonial actions to remain above the fray and try to preserve the best interests of the child."² Accordingly, the following are proposed guidelines on each of these 15 issues, for consideration by judges and attorneys in New Jersey Family Court.

Residential Custody

The first point to determine in a divorce is which parent will be the residential custodian of the child. The resi-

dential custodian is the parent with whom the autistic child primarily resides. Sometimes, the issue is self-evident when one parent has already left the other spouse and child by moving from the marital home. In such circumstances, the parent who has continued to reside with the child will probably be deemed the child's residential custodian. In other cases, however, divorcing parties may continue to reside together during the divorce litigation. In this circumstance, there may be a *bona fide* dispute over who will be the primary residential custodian of the autistic child following the divorce.

A judge presiding over a family court action has broad discretion in determining custody. In exercising this discretion, a controlling consideration must be the welfare of the child.³ The New Jersey Legislature has set forth many statutory factors for a judge to consider in resolving a *bona fide* custody dispute. These criteria are embodied in N.J.S. 9:2-4. In the context of a custody fight over an autistic child, some of the most relevant factors listed in N.J.S. 9:2-4 include:

- the fitness of the parents
- the needs of the child
- the safety of the child
- the quality and continuity of the child's education

The statutory factors are very general as written; however, a court has the discretion to consider supplemental factors it deems relevant and appropriate on a case-by-case basis. Thus, a judge who is presiding over a custody dispute involving an autistic child may wish to consider the following additional criteria.

Custody of an Autistic Child: Proposed Additional Criteria for the Court's Consideration

1. Each parent's role in obtaining the initial diagnosis of autism, and any

delay caused by a parent in obtaining the diagnosis.

2. Each parent's acknowledgement and acceptance of the child's autistic disorder, as opposed to a denial of the condition.
3. Each parent's role in obtaining early intervention and therapy for the child, and the reasons for any delay in attempting to obtain services for the child.
4. Each parent's ability to reinforce and follow through on daily recommended behavioral interventions for the autistic child, and the level of participation the parent has in working with the autistic child.
5. Each parent's history of increasing his or her education on the needs of an autistic child, by attending seminars, joining autism support groups, seeking private professional assistance and engaging in other reasonable self-education techniques.
6. Each parent's history of willingness to be a tireless and effective advocate for the autistic child, and ability to do so.
7. Each parent's ability to handle the emotional and psychological stress involved with raising an autistic child on a daily basis.
8. Each parent's understanding and appreciation of the window of opportunity concept and the importance of early intense intervention and potential consequences to the child and family if intervention does not take place.
9. The quality of the special education (either in public school or private school) the child will receive while in the parent's care.

The above factors are very important in considering which parent is best equipped to assist the autistic child on a daily basis and to oversee the child's development and progress with intensity and consistency.

In some cases, a parent may seek *joint residential custody* of the child—where each parent has the child approximately 50 percent of the time (either splitting the week at 3.5 days each or rotating weeks back and forth).

While flexible 50/50 timesharing may sound fair on paper, such an arrangement may not necessarily be in the best interest of a particular child, especially an autistic child. The back-and-forth nature of shared 50/50 residential custody may work against the need of an autistic child to have a predictable and consistent schedule. Autistic children often do not do well with inconsistencies in their schedules, and the need for a strict regimented schedule of behavioral therapy may be compromised if the child has to be passed back and forth between two households with two different methods of overseeing his or her development.

Even the most well-intentioned parents with the most synchronized of efforts may unknowingly be compromising an autistic child's need for consistency with a shared residential custody arrangement. Unless there is reason to believe the divorcing parents can work together to consistently coordinate their schedules and seamlessly reinforce the child's therapy and progress from one household to another, 50/50 shared physical custody might not be in the autistic child's best interest. The autistic child may have enough hurdles to overcome without further complicating matters with an overly repetitious, back-and-forth schedule.

Regardless of the specific parenting schedule, it is very important for both parents to be educated in autism and in the child's therapies, so their efforts at reinforcing the child's learning are consistent; in this fashion, the child can better generalize what he or she learns in different environments (*i.e.*, each party's home). Whatever parenting schedule is ultimately established, it

should require consistency and education on the part of both parents.

Legal Custody

In New Jersey, there are generally two kinds of custody: *physical* (residential) custody and *legal* custody.⁴ While the residential custodian is one with whom the child primarily resides, the legal custodian is one who makes the major decisions on the child's behalf. Generally, even if one parent has primary physical custody, both parents can still have joint legal custody. Under such an arrangement, the parties are to confer with each other and try to agree on significant issues affecting the child's health, education and welfare. If there is a disagreement, a court may have to resolve the issue in dispute.

N.J.S. 9:2-4a states that the court is to establish the residential arrangements (residential/physical custody) as well as arrangements for consultations between the parents in making major decisions regarding the child's health, education and welfare (legal custody). In any proceeding involving custody of a minor child, the case starts with the premise that the rights of both parents shall be equal.⁵ If the parties cannot agree on legal custody, a judge will decide the issue. Once a judge hears the evidence, he or she enters an order for legal custody, which the court determines to be in the best interest of the child.

Under N.J.S. 9:2-4, a court has the discretion to award joint legal custody to both parents or sole legal custody to one parent. If sole legal custody is granted, the sole legal custodian makes the decisions for the child. The noncustodial parent still has a right to parenting time (formerly known as visitation) with the child, but generally does not participate in making the major decisions in the child's life unless the custodial parent consents.

The concept of joint legal custody was advanced by the New Jersey

Supreme Court in the landmark case of *Beck v. Beck*.⁶ As a matter of public policy, New Jersey generally favors joint legal custody.⁷ Accordingly, courts often favor granting both parents joint legal custody of a child, rather than granting one parent sole legal custody.

Theoretically, joint legal custody enables both parents to share an equal role in the decision-making process regarding important events in a child's life. However, in many divorces a husband and wife have virtually no ability to communicate with each other rationally and reach agreements on *anything*, including issues concerning their autistic child. In fact, the inability to communicate may be a major reason why the parties' marriage failed in the first place.

In New Jersey's custody statute N.J.S. 9:2-4, the first listed element for the court to consider is the parents' ability to agree, communicate and cooperate in matters relating to the child.

In the case of an autistic child, it is imperative that there be an unobstructed decision-making process on critical issues such as therapies, interventions, comparative school programs, adaptations of programs, and modification of programs, as applicable. These issues may need to be considered and addressed by parents swiftly and with reasoned decisiveness. There is no room for fighting, posturing or promoting of hidden agendas by parents who still have unfinished business with each other after the divorce is over. The autistic child's best interests and development can be seriously compromised by parents who constantly argue and battle with each other to the point where the decision-making process is stalemated and crippled.

Some parents are able to put their differences aside and agree, communicate, and cooperate as joint legal custodians of the autistic child. However, other parents simply do not have this ability.

Accordingly, in cases where parents have a demonstrated and historical inability to deal with each other and reach agreements for the sake of the child, joint legal custody might *not* be in the child's best interests. Rather, in some cases it might be better if one parent—usually the residential custodian—has sole legal custody and authority to make decisions relative to the autistic child.

In *Nunfrio v Nunfrio*,⁸ the Appellate Division ruled that the prime criteria for establishing a joint legal custodial relationship between divorced or separated parents centers on the ability of the parents to agree, communicate and cooperate in matters relating to the health, safety and welfare of the child, notwithstanding any animosity or acrimony they may harbor toward each other. If parents are, in fact, unable to agree, communicate or cooperate in matters involving the child, then an award of sole custody may be in the child's best interest.

The facts in *Nunfrio* did not involve an autistic child. Nonetheless, the principles of *Nunfrio* can logically be applied by a family court judge presiding over a case involving custody of an autistic child.

In controversies between parents for the custody of children, there can be no restraint upon the mind of the court, and all legitimate force must be accorded to those considerations that touch the well-being of the child.⁹ Custody is not an absolute right of either parent, but rather is a trust reposed in a parent by the state for the welfare of the child. Thus, the state—through the court—must determine the custody arrangement that best furthers the child's best interest. Unfortunately, in some cases the most appropriate arrangement might be sole legal custody rather than joint legal custody.

Parenting Time (Visitation) by a Noncustodial Parent

Generally, the court will support the right of the noncustodial parent to have

parenting time with the parties' child.¹⁰ The right of a parent to companionship with his or her child is a fundamental right protected by the U.S. Constitution.¹¹ However, the welfare of the child is always the primary and controlling consideration for a court in deciding issues of parenting time.¹²

There are many different types of parenting schedules. One of the more common arrangements is when the noncustodial parent has time with the child every other weekend, a weeknight dinner visit, and alternating holidays with extended summer vacation time (perhaps two to four weeks each summer). Schedules can vary from case to case, depending on various factors, including employment obligations, proximity of the parents' homes, etc.

In the case of an autistic child, it is important that any proposed parenting schedule give due consideration to the child's therapy schedule and need for continued intervention. For example, a child might be in a year-round extended school year program for special education in order to prevent regressive behaviors during an extended summer vacation with no structured support. In such a case, removal of the child from the program for three or four weeks to accommodate summer vacation with the noncustodial parent might have a detrimental effect on the child's behavioral progress.

Similarly, if the child is involved in an intense behavioral intervention program, such a program may require daily behavioral reinforcements from the parent in the child's home to be truly effective. In such a case, it is critical that *both* divorced parents have appropriate education and training in behavioral intervention and reinforcement; other members of their respective households (second spouses, etc.) should have training as well. *Both* parties should follow the educational plans established by the child's professional therapists, and *both*

parents should be consistent with each other in reinforcing therapy goals and helping the child generalize learned skills in each home.

If the noncustodial parent and members in that parent's household (new spouse, etc.) refuses or fails to have an understanding of behavioral modification and reinforcement for an autistic child, then even weekend visits may cause setbacks to the child's progress. A parent's lack of understanding of autism could lead to serious problems if the child has a behavioral meltdown, temper tantrum, or engages in other challenging behaviors. Logically, a court exercising *parens patriae* jurisdiction can order that parenting time (or even custody) be conditioned upon the parent's ongoing compliance with the autistic child's therapeutic needs, including ongoing parental training and education.

A parent has a fundamental constitutional right to the companionship of his or her child, protected under the First, Ninth and 14th amendments to the U.S. Constitution.¹³ Parents also have fundamental constitutional rights to raise their children.¹⁴ Yet, in a court of equity, a child's best interests and general welfare must come first. When weighed, balanced and tested against competing constitutional principles, *parens patriae* jurisdiction must have paramount importance.¹⁵

Thus, parenting schedules need to be formulated in such a manner that they do not unduly interfere with the intensity and consistency of the autistic child's therapy and training.

Removal of an Autistic Child to Another State

Pursuant to N.J.S. 9:2-2, a custodial parent generally cannot permanently relocate a child who is a resident of New Jersey from the state unless either: 1) the noncustodial parent consents, or 2) a court grants permission for the relocation over the noncustodial parent's

objection. When a custodial parent seeks court approval to relocate a child out-of-state, the court conducts a proceeding known as a *Baures* hearing.¹⁶

At a *Baures* hearing, the court determines whether the custodial parent has a good faith reason for the proposed move, and whether the move would be inimical to the child's best interests.¹⁷ The term "*Baures* hearing" is based on the case of *Baures v. Lewis*, in which the Supreme Court set forth the criteria a court must consider when a parent wishes to permanently remove a child to another state. Interestingly, the *Baures* case involved a proposed relocation of an autistic child.

If a custodial parent applies to remove an autistic child to another state, it is extremely important for the court to consider evidence of the comparative services that might be available to the child in the new state as compared to New Jersey, including special services furthering the child's needs for specialized education and healthcare. There also needs to be consideration of the child's current program and relationships with his or her non-moving family members, teachers and therapists, and potential damage to the child by breaking those bonds.

A comparison of the benefits of the move to the autistic child and the benefits of staying in New Jersey must be carefully analyzed by the court. The child's ability or inability to transition from one location to another also must be explored. Expert testimony by professionals in the realm of autism may be very helpful to the court.

Appointment of Expert Witnesses and Child Psychologists

There might be significant disputes between divorcing parents over custody, visitation, and other issues relative to the child's autism. These issues may include conflicting parental views on what therapy program the child should

have, or the way in which parenting schedules should be best structured to accommodate the autistic child's needs. Since the family court judge may not be familiar with the intricacies of autism, input from an expert might be desirable, and sometimes even necessary.

Accordingly, either party or the court itself may seek to obtain expert testimony from someone with a significant amount of expertise in childhood autism, such as a child psychologist, an educational consultant who focuses on special education programs for autistic children, or a behavioral therapist trained and experienced in ABA therapy.

Whenever the court believes it can be assisted by expert opinion, it may order any person under its jurisdiction to be examined by a physician, psychiatrist, psychologist or other mental health professional appointed by the court.¹⁸ The court can also direct payment by either or both parents for the costs of the appointed professional.

The parties may each choose to obtain their own expert opinions as well.¹⁹ Each party has the right to retain his or her own expert, either before or after the appointment of one by the court.²⁰ Additionally, the court may at any time exercise its own discretion to appoint an expert to make recommendations regarding the nature and extent of parenting time to be granted to a party.²¹

Appointment of a Guardian Ad Litem for a Child

Further, the court, on its own initiative or upon request of a party, may appoint an individual to serve as a guardian *ad litem* for the autistic child during the course of the litigation.

Rule 5:8B states that in all cases in which custody or parenting time/visitation is an issue, a guardian *ad litem* may be appointed by court order to represent the best interests of the child if the circumstances warrant such an appoint-

ment. The services rendered by a guardian *ad litem* shall be to the court on behalf of the child. The guardian *ad litem's* duties may include:

1. interviewing the parties (and child when appropriate)
2. interviewing other persons possessing relevant information
3. obtaining relevant documentary evidence
4. conferring with counsel for the parties
5. conferring with the court, on notice to counsel
6. obtaining the assistance of a lawyer for the child with court permission

The guardian *ad litem* may obtain the assistance of independent experts, with court permission. Accordingly, if a guardian *ad litem* believes it will be helpful to retain the services of a psychologist, educational consultant or other professional who has an expertise in autism, the court may permit the guardian *ad litem* to obtain such expert(s) and may allocate the cost between the parents in an equitable fashion.

When the guardian *ad litem* completes his or her investigation, he or she files a written report of findings and recommendations to the court. If either party disagrees with the findings and recommendations, that party has a right to cross-examine the guardian *ad litem* before the court.

The court determines the manner of paying the guardian *ad litem*, setting the fee and equitably allocating responsibility for payment between the parties.²²

Child Support

Once custody and parenting time issues have been addressed, the court needs to determine financial issues between the parents of the autistic child. A custodial parent is entitled to receive child support from the noncustodial parent. The purpose of child sup-

port is to assure the appropriate care, education and maintenance of a child.²³

In cases involving children without special needs, the court generally calculates child support by considering the parties' respective incomes and reaching a support amount under New Jersey's Child Support Guidelines. The guidelines can be found in Appendix IX of the New Jersey Court Rules, and are referenced in Rule 5:6 as well. The guidelines are presumed correct unless a party provides proof that they are incorrect or inappropriate in a case.²⁴

The guidelines cover parents who together earn up to \$4,420 per week in combined net income. If the parties earn more than this amount, the court sets child support based upon other equitable criteria. A child has a right to be supported in accordance with his or her parents' respective financial circumstances.

It is important to note that the guidelines were developed in the context of analyzing the average costs of raising an average child in New Jersey. However, when one raises a special needs child—such as one with autism—there may well be additional significant financial costs and considerations that make rote application of the guidelines inappropriate and inequitable.

For example, if there are additional and significant out-of-pocket/un-reimbursed expenses for the autistic child, such as a specialized private school or supplemental therapy, then simple application of the guidelines would not account for these expenses since they are not anticipated expenses of a 'typical' child. If the expenses are not accounted for, then the amount of support received by the custodial parent may be too low. However, if these extra expenses are actually being covered by insurance or by the child's school district under an individualized educational plan (IEP), the expenses are not out-of-pocket costs to either parent, and should not impact the support amount.

An increase in a child's needs has been held to justify an increase in support by a financially able parent.²⁵ Accordingly, in setting an appropriate child support figure, it is important for a parent to bring to the court's attention: 1) the actual and reasonably anticipated out-of-pocket expenses for raising the autistic child, and 2) the ability of each parent to contribute to such expenses.

It is the parent's obligation to bring to the court information that might render the Child Support Guidelines inapplicable. Rule 5:6A states that the guidelines may be modified or disregarded by the court where "good cause" is shown. Good cause shall consist of certain considerations set forth in Appendix IX-A of the guidelines, or the presence of other relevant factors that may make the guidelines inapplicable or subject to modification. Good cause also exists when injustice would result from application of the guidelines. Determination of good cause is left to the sound discretion of the court on a case-by-case basis.

It is important to note that Appendix IX-A, Paragraph 9 expressly states that "special needs of disabled children" may be added as expenses to the basic child support obligation under the guidelines. These additional expenses may be divided on a comparative percentage basis between the parties when they occur. Alternatively, the expenses may be incorporated into the weekly child support amount if the expenses are recurring and predictable as part of the custodial parent's weekly budget.

When a guideline analysis takes place, a guideline worksheet is filled out by each parent with itemized columns of information. Line item 19 of the worksheet contains a space for a parent to include "extraordinary recurring expenses" of the child. If an autistic child has extraordinary and recurring expenses—such as the out-of-pocket weekly cost of a home behavioral therapist—this cost should be placed on line

item 19 of the worksheet. If there are issues between parents regarding the need for these expenses or the affordability of these services, then the court must resolve the issues.

It is also important to note that when a child support application is submitted to the court, the individual generally also must submit a case information statement, which provides the judge with data on that party's financial status. A case information statement is a multi-page form requiring detailed information on a party's income, assets, debts, budget, and overall financial status. In any divorce where contested financial issues exist, each parent must generally submit a case information statement.

Part F of the case information statement has a section for a parent to set forth any special circumstances the court should consider. If a parent has a child with autism with specialized needs and expenses, this information should be set forth in Part F of the statement.

If the government pays benefits to or for a child (disability, Social Security, etc.), these payments may in some cases reduce a parent's child support obligation, since the benefits reduce the parents' costs of raising the child.²⁶ Receipt of Social Security Disability benefits may reduce child support, while receipt of Supplemental Security Income (SSI) benefits may not reduce support, since SSI supplements parental income based on financial need.

Private School Tuition for an Autistic Child

The Child Support Guidelines generally do not include costs for private school tuition. However, the court has the discretion to adjust the child support figure under the guidelines to account for special needs of disabled children.²⁷

The matrimonial court has the discretion and authority to order a parent to contribute to the private schooling costs of a child. Whether the court will,

in fact, order such a payment in a given case depends on various factors—including the parties' financial income and resources and the benefits to the child of attending private school instead of public school.

In the case of an autistic child, it is often highly desirable and important for the child to attend a school that can deliver specialized educational services relating to autism. Tuition costs for these schools can be very high. A court may require a noncustodial parent to contribute to private school. The court may consider:

- whether the special educational or psychological needs of the child would be appropriately addressed in private school
- whether attendance is in the child's best interest

Sometimes, an issue may arise regarding the quality of the special education services offered by the child's public school district as compared to private school. Even in intact families where divorce is not an issue, parents of autistic children often have to battle their own school districts to obtain a "free and appropriate" education for their autistic child. Parents often have to battle their school district in a due process hearing under the Individuals with Disabilities Education Act,²⁸ often requiring an administrative law judge to determine whether a school district's proposed educational program for the autistic child is appropriate. In this circumstance, a court may determine that the public school's proposed IEP is appropriate or inappropriate. If inappropriate, the court may order the public school district to fund the cost of tuition for the parents to send the child to a private school that specializes in service for the autistic child.

When parents of an autistic child divorce, there may be a dispute regarding whether the child should attend

public or private school. Financially, the cost of a public school education may be free to the parents, while the cost of a private school education will involve out-of-pocket expenses unless the school district is ordered to pay the cost of the child's private school education.

It is thus predictable that in many cases a noncustodial parent might have a financial incentive to argue that an autistic child does *not* need to attend private school because the child can be adequately educated in public school. However, the issue of whether a *public school* should be compelled to pay for private school tuition of an autistic child is very different from the issue of whether a *parent* should be compelled to pay this tuition.

When an administrative law judge determines a public school's obligation to educate a child, the legal standard is *not* a best interest of the child analysis. Even if it is in a child's best interest to attend private school, a public school district is not obligated to provide the child with the best available education. Rather, the district is only required to provide the child with a "meaningful public education," even if that education is inferior to what might be available to the child in a private school.

In family court, however, the issue *is*, in fact, a best interest of the child analysis. A family court judge has the discretion to provide a child of divorced parents with an education greater than one available through state resources—even if the cost of a private school is significantly greater than an education in public school. This is why the guidelines and law specifically allow a family court to consider the cost of private school rather than simply requiring children to receive only a public school education.

Emancipation

Presumption of emancipation occurs at age of majority.²⁹ However, emancipation is a fact-sensitive issue, and dis-

putes regarding it are reserved to the judiciary for resolution.³⁰ Emancipation is when a child moves beyond the sphere of influence and responsibility exercised by a parent, and achieves an independent status on his or her own.³¹ No specific age equates to emancipation of a child. Attaining the age of 18 establishes only *prima facie* and not conclusive proof. The demonstrable needs of the child, not the child's age, are determinative of the duty of support.³²

Further, courts have held that where circumstances merit, disability may extend the time in which a child is deemed unemancipated, notwithstanding reaching the age of majority. Thus, a court may require a parent to support a child who, despite having reached the age of majority, is disabled and incapable of maintaining him or herself because of an illness or disorder that pre-existed attaining the age of majority.³³

As stated in *Kruvant v. Kruvant*:³⁴

...Children who are unable to care for themselves because of their minority are no less entitled to the court's solicitude when they continue to suffer, after they have achieved their minority, from a physical or mental disability which continues to render them incapable of self-support. Normal instincts of humanity and plain common sense would seem to dictate that in such cases the statutory obligation of the parent should not automatically terminate (at age eighteen), but should continue until the need no longer exists.

Accordingly, a child with autism may remain unemancipated well beyond the age of 18, and possibly for life. In such cases, a parent's child support obligation may continue as well. However, in a case where the autistic individual is living with neither parent but in another environment such as a group home for developmentally disabled adults, there may be little or no daily out-of-pocket

support expenses incurred by either parent, and thus little or no need at that specific time for child support.

Alimony

In addition to ordering child support, a family court can order payment of alimony in a divorce. Alimony is spousal support. The purpose of alimony is to provide the dependent spouse with a level of support and standard of living generally commensurate with the quality of economic life that existed during the marriage.³⁵

N.J.S. 2A: 34-23(b) requires the court to consider 10 factors on alimony, as well as any other factor the court deems equitable and just. Arguably, of heightened relevance in the context of an autism case are the following factors:

- actual need and ability of the parties to pay
- standard of living during the marriage
- earning capacity and employability of the parties
- length of absence from the job market and custodial responsibilities for children of the party seeking maintenance
- time and expense necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment, availability of training and employment and the opportunity for future acquisitions of capital assets and income
- history of financial or non-financial contributions to the marriage of each party, including contribution to the care and education of the children and interruption of careers and educational opportunities
- any other factors the court may deem relevant

The amount and duration of alimony may vary from case to case. A family court judge has vast discretion on whether or not to award alimony.

In the case of a divorce with an autistic child, often a parent has to leave his or her employment in order to care for the child. Such an absence from the job market, and the necessary interruption of a career or educational opportunity, may be an important factor for the court to consider on the issue of alimony.

Equitable Distribution

In 1971, the New Jersey Legislature passed the equitable distribution statute, which governs division of marital property at the time of divorce.³⁶

Courts do not automatically assume that all marital property is to be divided on a 50/50 basis. To the contrary, courts are specifically *not* supposed to automatically presume a 50/50 division on any asset. Rather, courts are to consider various equitable criteria in determining equitable allocation of assets and debts between divorcing parties.

Under the equitable distribution statute, courts are to consider various criteria, including: 1) the economic circumstances of each party at the time the division of property becomes effective; 2) income and earning capacity of the parties; 3) length of absence from the job market; 4) custodial responsibilities for children; 5) time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

In the context of parents of a child with autism, perhaps one of the most important factors is the extent to which a party has deferred accelerating his or her career goals to care for the autistic child.

One of the most frequently litigated equitable distribution issues in divorce litigation is what will happen to the parties' marital home. Generally, one of four events will occur:

1. The house is sold and neither party resides there.

2. The wife buys out the husband's interest in the home by refinancing the mortgage or trading off against other items of value.
3. The husband buys out the wife's interest in the home by refinancing the mortgage or trading off against other items of value.
4. The custodial parent remains in the house for a number of years, with the house to be sold at a later date and the net proceeds divided in an equitable fashion between the parties.

In the case of a child with autism, a custodial parent may want to stay in the marital home in order to maintain the child's stability and/or permit the child to remain in a school district that provides superior services for autistic children. On the other hand, if the custodial parent cannot afford to maintain the home, even after receiving alimony and child support, then a sale of the home may be unavoidable.

N.J.S. 2A:34-23(l) permits the court to consider the need of the parent who has physical custody of a child to own or occupy the marital residence, and to use or own the household effects.

N.J.S. 2A:34-23(n) further allows the court to create a trust fund from the party's assets to secure reasonably foreseeable medical or educational costs for a spouse or children.

N.J.S. 2A: 34-23(p) permits the court to consider any other factors it may deem relevant on the issue of equitable distribution.

Health Insurance

In divorce, it is important to address the issue of a child's health insurance, and each parent's responsibility to provide and/or pay for the insurance. Generally, each parent will have some obligation to contribute (directly or indirectly) based upon comparative incomes. Child support orders may provide for payment of medical and dental

expenses.³⁷

Under the Child Support Guidelines, the custodial parent generally pays the first \$250 in uncovered expenses per child, per year. The remaining balance is divided between the parents based upon comparative incomes.

A parent has a duty to pay for the cost of medical treatment rendered to his or her child.³⁸

In the case of an autistic child, health insurance can be particularly important. In New Jersey, health insurance may cover a portion of necessary expenses for an autistic child, such as speech therapy and physical/occupational therapy. The cost of uncovered expenses can be significant, especially if the child has an extensive therapy schedule with privately paid therapists. These expenses must be analyzed and allocated between the parties based upon ability to pay.

Life Insurance

Life insurance is a very important issue when there is an autistic child. If either parent dies, the financial result may be catastrophic for the family. The surviving parent may be left economically destitute and unable to raise the child if there is no life insurance to replace child support previously contributed by the deceased parent. Similarly, if the custodial parent dies, the non-custodial parent may well need life insurance funds to help cover the responsibility of raising the autistic child who may now be living under his or her roof for the first time.

In the context of a divorce, the court has the power to order either or both parents to carry life insurance for the benefit of the child or the other parent.³⁹ Life insurance is an important tool to ensure that a child has at least some source of ongoing support after a parent's death. Through the mechanism of compulsory life insurance, the court has the power to assure continued support for a dependent child after a parent's death.⁴⁰

In determining an appropriate amount of life insurance to continue the support of an autistic child, it is important to consider the age of the child, as well as his or her reasonably projected needs and expenses over a significant period of time. It is also advisable for parents of an autistic child to consider the benefits of creating a special needs trust to function as the named beneficiary of at least some portion of the life insurance. There can be significant estate planning advantages to such an approach.

Tax Exemptions

In divorce litigation, the court has the power to allocate the parties' right to claim the child as a tax deduction on the parties' annual tax returns.⁴¹ For example, a court can allow the husband to claim the child in even tax years and the wife to claim the child in odd tax years.

The issue of tax exemptions can be very important in a case involving an autistic child. The right to claim the child as an exemption may affect the right to deduct certain child-related expenses for that year. Depending on the child's program, these expenses may be significant.

Legal Fees

In divorce litigation, the court has the power and discretion to order one party to contribute to the legal fees of the other party.⁴² However, a court is never required to exercise that discretion, and a court often orders each party to be responsible for his or her own legal fees.

In a counsel fee application, the court can consider various factors, including the comparative financial circumstances of the parties and the reasonableness or unreasonableness of each party's position during the course of the litigation.

In the context of a divorce with an autistic child, it is critical for the court to consider the funds available to each

parent and the limitations placed on their financial circumstances as a result of the child's autism. For example, a custodial parent with daily responsibilities for the autistic child may not be able to work full time. Since the parent's opportunities to increase income may be less than that of the noncustodial parent, this factor may be given significant weight in a counsel fee application. However, if the noncustodial parent is already heavily contributing to the child's expenses and/or paying significant support to the custodial parent, then the parties' financial circumstances may be similar. In this case, a court may be less inclined to make the non-custodial parent contribute to the custodial parent's legal fees.

A court may also consider a party's assets as a source to help fund the other party's legal fees.

Divorce and Autism: The Need for Creative Problem Solving by Family Courts

It is firmly recognized that judicial decision-making is often creative.⁴³ While there is a need for stability and continuity in the law, there is also a need for *flexibility* to meet certain conditions. In acknowledging this need, the court has said:

...The judiciary is then on the one hand a guardian of the continuing stability, evenhandedness and predictability and on the other hand a participant in creative evolution that keeps law contemporary and viable.⁴⁴

With the increasing rates of both autism and divorce, judges are constantly facing new cases where families of autistic children are breaking apart. The challenge for family courts is to treat both parents fairly and equitably while safeguarding the needs and best interests of the autistic child. Through

increased autism awareness, courts can become greater *parens patriae* protectors of the needs of autistic children, and can render decisions consistent with those needs as part of the creative evolution of our law. ♪

Endnotes

1. See Horowitz, A., *Living with Autism, Stress on Families*, Autism Society of America (2002).
2. *Quinn v. Johnson*, 247 N.J. Super. 572, 580 (Ch., Div., 1991).
3. *Sobel v. Sobel*, 46 N.J. Super. 284, 286 (Ch. Div., 1957).
4. See N.J.S. 9:2-4.
5. N.J.S. 9:2-4.
6. *Beck v. Beck*, 86 N.J. 480 (1981).
7. *Grover v. Terlaje*, 379 N.J. Super. 400 (App. Div., 2005).
8. *Nunfrio v Nunfrio*, 341 N.J. Super. 548, 550 (App. Div., 2001).
9. *Quinn v. Johnson*, 247 N.J. Super. 572, 574 (Ch. Div., 1991).
10. *Wilke v. Culp*, 196 N.J. Super. 487 (App. Div., 1984).
11. *Id.* at 496; see *In re J.S. & C*, 129 N.J. Super. 486, 490 (Ch. Div., 1974).
12. *Fiore v. Fiore*, 49 N.J. Super. 219, 225 (App. Div., 1958).
13. *Wilke v. Culp*, 196 N.J. Super. 487, 496 (App. Div., 1984).
14. *DYFS v. J.Y and E.M.*, 352 N.J. Super. 245 (App. Div., 2002).
15. *Hoefers v. Jones*, 288 N.J. Super. 590, 608 (Ch. Div., 1994).
16. *Baures v. Lewis*, 167 N.J. 91 (2001).
17. *Id.*
18. Rule 5:3-3.
19. *Prol v. Prol*, 226 N.J. Super. 394 (Ch. Div., 1988).
20. Rule 5:3-3.
21. *Fusco v. Fusco*, 186 N.J. Super. 321, 323-24 (App. Div., 1982).
22. Rule 5:8B(d).
23. N.J.S. 2A:34-23.
24. See Appendix IX-A (2).
25. *Lepis v. Lepis*, 83 N.J. 139, 150 (1980).
26. Appendix IX-A 10(c).
27. Appendix IX-A, (21)(i).
28. 20 U.S.C. § 1400 *et seq.*
29. N.J.S. 9:17B-1.
30. *Bowens v. Bowens*, 286 N.J. 70, 73 (App. Div., 1995); see *Newburgh v. Arrigo*, 88 N.J. 529, 543 (1982).
31. *Bishop v. Bishop*, 287 N.J. Super. 593, 598 (Ch. Div., 1995).
32. *Patetta v. Patetta*, 358 N.J. Super. 90, 93-94 (App. Div., 2003).
33. 23 100 N.J. Super. 107, 119-120 (App. Div., 1968).
34. *Monmouth County Division of Social Services v. CR*, 316 N.J. Super. 600, 616-617 (Ch. Div., 1997).
35. *Koelbe v. Koelbe*, 261 N.J. Super. 190, 192-93 (App. Div., 1992).
36. N.J.S. 2A:34-23.
37. Appendix IX-A paragraphs 8, 24.
38. See *Greenspan v. Slate*, 12 N.J. 426 (1953).
39. *Zaragoza v. Capriola*, 201 N.J. Super. 55, 59-60 (Ch. Div., 1985); see *Kothari v. Kothari*, 255 N.J. Super. 500, 513-514.
40. *Grotzky v. Grotzky*, 58 N.J. Super. 354, 357, 361-62 (App. Div., 1971); see also *Schwartz v. Schwartz*, 328 N.J. Super. 275 (App. Div., 2000).
41. *Gwodz v. Gwodz*, 234 N.J. Super. 56 (App. Div., 1989).
42. Rule 5:3-5, Rule 4:42-9(a); *Chestone v. Chestone*, 322 N.J. S 250 (App. Div., 1999).
43. *State v. Johnson*, 43 N.J. 572,583 (1965); *State v. Carter*, 64 N.J. 382, 392 (1974), *overruled on other grounds*, *State v. Krol*, 68 N.J. 236,266 (1975).
44. *Ft. Lee Sav & Loan Assn. v. Libutti*, 106 N.J. Super. 211, 218-219 (App. Div., 1969) (Carton dissent), *aff'd*, 55 N.J. 32 (1970).

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