

## **BEST PRACTICES IN HANDLING FAMILY LAW CASES INVOLVING CHILDREN WITH SPECIAL NEEDS**

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This article explores the topic of special needs in family law cases. This is an emerging field of law, one in which judges and attorneys are trying to find their way. Since there is not a long line of case law or much clear statutory guidance in this field, some judges and attorneys would prefer to ignore special needs issues when handling family law cases. They are not comfortable with handling questions of law that do not have decades of concrete sources upon which to rely.

Legal professionals must address special needs issues in family law cases, and must do so in a unique manner. These cases cannot be approached with the same mindset routinely used in typical family law cases. As the revered President Abraham Lincoln said, “As our case is new, so we must think anew and act anew.”<sup>1</sup>

This article discusses the importance of handling special needs issues in family law cases, case management issues for the courts, and basic human dignity. It offers guidance on how attorneys can recognize when a case involves special needs, and provides practice tips for the initial interview as well as for drafting pleadings and discovery, and addressing the issues of child custody and visitation, parenting plans, spousal support and property distribution.

### **I. Why Attorneys Should Care About Special Needs in Family Law Cases?**

#### *A. The Statistics of the Problem*

Family courts are already overburdened by the sheer volume of routine divorce, paternity, custody, and modification cases.<sup>2</sup> Nearly half of all marriages end in divorce.<sup>3</sup> More than one

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<sup>1</sup> Abraham Lincoln, Annual Message to Congress -- Concluding Remarks, Dec. 1, 1862, available at <http://www.abrahamlincolnonline.org/lincoln/speeches/congress.htm>.

<sup>2</sup> Sanford N. Katz, *Historical Perspective and Current Trends in the Legal Process of Divorce*, 4 THE FUTURE OF CHILDREN – CHILDREN AND DIVORCE 44 (Spring 1994).

<sup>3</sup> BRADLEY A. COATES, *DIVORCE WITH DECENCY: THE COMPLETE HOW-TO GUIDE AND SURVIVOR’S GUIDE TO THE LEGAL, EMOTIONAL, ECONOMIC, AND SOCIAL ISSUES* (2004); GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* (1997).

million children are affected by divorce every year in America.<sup>4</sup> The number of children with special needs is soaring, not only in America but also throughout the world.<sup>5</sup> It logically follows that the number of family court cases involving special needs children is also rapidly increasing.<sup>6</sup> Indeed, raising a child with special needs causes great stress on marriage and other romantic relationships.<sup>7</sup> Some sources estimate divorce rates in families with special needs children at between 85 and 90 percent.<sup>8</sup> It is more important than ever that attorneys, judges, and other family court professionals become well-educated on the subject of special needs and become skilled at recognizing and handling special needs.<sup>9</sup>

### *B. Case Management by the Courts*

If family courts are already staggering under the weight of routine family law cases, where are they supposed to get the time to give cases involving children with special needs the increased attention they need and deserve? Some jurisdictions require that family law cases receive a disposition within one year of the filing date.<sup>10</sup> In many cases, this can be a challenge, even without dealing with special needs children.

If you are in the path of a tsunami tidal wave, it will do you precious little good to look away and say you will deal with it some other day when you have more time. Addressing special needs issues in family court cases is no longer an option – it is a necessity. The tidal wave is here. As Victor Hugo adroitly observed, “All the forces in the world are not so powerful as an idea whose time has come.”<sup>11</sup>

Once the issue of special needs has been raised in the family law case, the judge is on notice that the case might require a longer case management track or timeline than a standard family law case.<sup>12</sup> The judge might then remove the case from the standard case management track or timeline. The judge might also appoint a guardian ad litem to represent the unique needs

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<sup>4</sup> Sheela Kennedy & Steven Ruggles, *Breaking Up is Hard to Count: The Rise of Divorce in the United States, 1980-2010*, 51 DEMOGRAPHY 587, 595 (April 2014).

<sup>5</sup> Donald T. Saposnek et al., *Special Needs Children in Family Court Cases*, 43 FAM. CT. REV. 566 (2005).

<sup>6</sup> *Id.*

<sup>7</sup> Carole Brown et al., *The Unplanned Journey: When You Learn that Your Child Has a Disability*, CENTER FOR PARENT INFORMATION AND RESOURCES (Jan. 2014), available at <http://www.parentcenterhub.org/repository/journey/>.

<sup>8</sup> Marla B. Kraus, *Planning Is Important Even When Life Doesn't Go the Way We Plan*, 43 FAM. CT. REV. 607(2005).

<sup>9</sup> Donald T. Saposnek, *Editorial Preface to Special Issue of Family Court Review*, 43 FAM. CT. REV. 563 (2005).

<sup>10</sup> MO. SUP. CT. R. 17.

<sup>11</sup> Brainy Quote, [http://www.brainyquote.com/quotes/authors/v/victor\\_hugo.html](http://www.brainyquote.com/quotes/authors/v/victor_hugo.html).

<sup>12</sup> Brown, *supra* note 7.

of the child. Family law cases involving children with special needs are often high-conflict.<sup>13</sup> High-conflict divorces can result in harm to the child, through psychological maltreatment of the child by the parents.<sup>14</sup> Children are also put at risk for various types of developmental difficulties<sup>15</sup> and emotional and behavioral maladjustment<sup>16</sup> by being in a high-conflict divorcing family. A guardian ad litem can focus attention on obtaining the evidence to present to the court to help craft an appropriate custody and visitation schedule and to ensure that the court is aware of the child's financial needs.

Judges should be aware of the reality of special needs in family law cases, and should ensure that the appropriate measures are taken. The litigants cannot always be expected to properly present these issues to the courts. Nearly 75% of family court litigants do not have a lawyer.<sup>17</sup> Many people simply cannot afford to hire an attorney to represent them in court.<sup>18</sup> Special needs issues are complex, and can be a challenge for an experienced attorney. It can be too much to expect the *pro se* litigant to handle these issues.

Beginning these cases correctly can help to ensure that the needs and rights of the parties are being honored. Starting off on the right track can make properly handling the special needs issues a more manageable task.

### *C. The Human Dignity Aspect*

Americans hold certain rights to be non-negotiable. Being treated with dignity and respect, having the freedom of speech, and receiving basic fairness are inherent in our society. Although no society is perfect, Americans have much for which to be grateful. Yet somehow, attorneys and judges have been wearing blinders when it comes to some of the most vulnerable people in our society. The rights of people with disabilities are often, in reality, less than those of people without disabilities. In that regard, our society cannot call itself truly civilized. "We will never have true civilization until we have learned to recognize the rights of others."<sup>19</sup> To allow family law cases to go through the courts whilst ignoring the unique needs of disabled parties, is to be part of the problem and not part of the solution.

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<sup>13</sup> Sheila Jennings, *Autism in Children and Parents: Unique Considerations for Family Court Professionals*, 43 FAM. CT. REV. 582 (2005).

<sup>14</sup> Steven W. Kairys et al., *The Psychological Maltreatment of Children – Technical Report*, 109 PEDIATRICS 68 (Apr. 2002).

<sup>15</sup> Vivienne Roseby & Janet R. Johnston, *Children of Armageddon: Common Developmental Threats in High Conflict Divorcing Families*, 7 CHILD & ADOLESCENT PSYCHIATRIC CLIN. N. AM. 295 (1998).

<sup>16</sup> Janet R. Johnston, *High-Conflict Divorce*, 4 CHILDREN & DIVORCE 165, (Spring 1994).

<sup>17</sup> Brown, *supra* note 7.

<sup>18</sup> Katz, *supra* note 2, at 55.

<sup>19</sup> Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 1001 n.205 (2004) (quoting Will Rogers Memorial Archives, Will Rogers Says).

## **II. How Can Attorneys Know When They Are Handling a Special Needs Case?**

Special needs can encompass a wide range of conditions and diagnoses. Sometimes the label gets used where it might not be appropriate. Routine aspects of childhood are not special needs. The “terrible twos” and puberty are not special needs. Typical short-term childhood illnesses or injuries are not necessarily special needs. When a child has the flu or breaks an arm, this does not confer the status of “special needs” upon that child. Children with special health care needs are defined as those “children who have or are at increased risk for chronic physical, developmental, behavioral, or emotional condition and who also require health and related services of a type or amount beyond that required by children generally.”<sup>20</sup>

The next step for attorneys is to recognize when a particular case involves special needs. Although one might expect the parents of a child with special needs to disclose this to their attorneys, in practice, they often do not. Parents are used to discussing the special needs of their children with their healthcare providers and schools. Because special needs have not been routinely addressed by the family courts in the past, parents do not expect this issue to be raised in their legal cases. This is despite the fact that much of the family's routine and daily life may revolve around the child's unique needs.

The few family lawyers who do address special needs issues in their cases sometimes delay in bringing it to the attention of the court until it is time to calculate child support or determine a custody and visitation schedule. The best practice is to raise the special-needs issues beginning with the initial client interview. This will allow the maximum time for appropriate discovery, since obtaining medical and educational records can take a long time. This will also give the court the opportunity to remove the special needs case from the standard case management track or timeline and evaluate the need for appointment of a guardian ad litem for the child.

## **III. Practice Tips From Intake Interview to Post Trial**

### *A. The Initial Client Interview*

The superlative family law attorney will include general questions about special needs in the standard family law initial interview questionnaire or checklist for use in every family law case. This attorney will also have a specialized questionnaire or checklist to use when the general questions reveal the existence of a disability or special need.

#### **1. General Questions on Standard Intake Form**

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<sup>20</sup> Merle McPherson et al., *A New Definition of Children with Special Health Care Needs*, 102 PEDIATRICS 137(July 1998), cited in Paul W. Newacheck et al., *Children at Risk for Special Health Care Needs*, 118 PEDIATRICS 334 (July 2006).

The attorney should ask every family law client if any of the children have disabilities or special needs.<sup>21</sup> Even if the parent denies that any of the children have disabilities or special needs, the attorney should ask certain follow-up questions. It can be surprising how many parents misunderstand the question. Regardless of whether the parent says any of the children do or do not have disabilities or special needs, it is necessary to follow up to ensure that the issue has been thoroughly explored.

Explain to the parent what a disability or special need is: any physical, mental, or emotional disability; a behavior or mood disorder; a learning disability; or any other condition that might need to be evaluated during the divorce concerning medical treatment, therapy, medication, visitation, custody, or child support. Also ask if any of the children receive any special assistance at school. This can include an Individualized Education Plan (IEP)<sup>22</sup> or 504 Plan.<sup>23</sup> Ask if any of the children are taking any medication, or are receiving physical therapy, behavior therapy, or psychological or other counseling.

## 2. Questions on Special Needs Intake Form

Once a client has indicated that a child has a special need, the attorney should utilize a separate special needs intake form. Using this form, inquire whether any of the children have had an official diagnosis, either by a healthcare provider or through the schools. Explore the reasons the parents thought the child needed to be evaluated. Their responses can elicit valuable information as to how the child's condition impacts the family's daily routine. What is the child's current condition, and what is his prognosis (expected outcome)? Is his condition treatable, curable, or terminal? What is the child's life expectancy? Is she expected to ever obtain a high school diploma, get a college degree, live independently, be gainfully employed, marry, have and raise children? Thoroughly explore how the child's condition impacts her, her siblings and her parents now. Also discuss how the child's condition is expected to impact her life as well as the lives of her siblings and parents in the future.

Determine the primary caregiver for the child. Get clear facts as to how caring for the child has impacted the careers of both parents. How is the child's condition expected to impact the parents' career advancement and contributions to retirement plans?

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<sup>21</sup> The attorney should also ask the client whether any of the adults have a disability or special need. The topic of special needs of adults in family law cases is beyond the scope of this article, but it is an important issue that should be addressed.

<sup>22</sup> An IEP is a legal document, mandated by the IDEA, which controls the procedural requirements. It is more involved than a 504 Plan and required for students with disabilities who require specialized instruction. Some examples of IEP accommodations are allowing a student additional time for test-taking, receiving occupational or other therapy at school, or having instructions written or read aloud for the student. IEPs and 504 Plans are explained well in *A Parent's Guide to Special Education*, by Linda Wilmhurst and Allen W. Brue (2005).

<sup>23</sup> A 504 Plan is a written plan required for students with disabilities needing only reasonable accommodation. An example of a 504 Plan reasonable accommodation is a written plan allowing a student with diabetes to go to the school nurse's office at certain times of the day to test blood sugar and receive insulin injections.

It is imperative to begin collecting medical records, therapy records, and educational records as soon as possible. Obtaining these records can take longer than one might expect. To ensure complete records, have the parent list the names and contact information of all persons the child currently sees for the condition. List all medications the child currently takes, including frequency and dosage, the reason medication was prescribed, and the anticipated outcome from the medication. Obtain a list of all therapies the child currently receives, including therapies received at school, at home, and outside the home. As to each therapy, have the client identify where the therapy is received, the person or organization who provides the therapy, the type of therapy, the methodology used, the frequency and duration of the therapy sessions, how long the course of therapy is expected to continue, the cost of the therapy, how this cost is paid (insurance, funding program or out-of-pocket), the amount of uncovered costs, all incidental costs of the therapy (supplies, equipment, transportation, meals, caregiver), who takes the child to the therapy (parent, grandparent, sibling, public transportation, other caregiver), and who referred the child to that therapy or organization. Also cover the expectations regarding future therapies and medications, and note whether the child is on a waiting list for any school, special needs program, therapy, doctor or funding program.

Incorporate a checklist into the special needs intake form to ensure the collection of comprehensive data on all the direct and indirect costs of the child's disability or special need. Make sure the checklist includes all direct and indirect costs related to all doctors, healthcare providers, other professionals, therapy, equipment, supplies, medications, special nutritional requirements, supplements, home modifications, vehicle modifications, modifications at school, caregiver training, special clothing and personal care items, caregiver training, respite care, transportation, non-parental caregiver costs, and any other costs.

Gathering this information during the initial client interview will prepare the attorney to handle the special needs issues appropriately throughout the different stages of the case. The special needs issues should be addressed when drafting pleadings, engaging in discovery, calculating spousal support and child support, crafting a parenting plan, distributing assets, trying or settling the case, and drafting documents at the conclusion of the case.

### *B. Drafting Divorce Petitions and Answers*

Whether representing the petitioner or respondent, drafting the initial pleading, petition, or answer and counter-petition, the attorney should include an allegation that the child has special needs. A good way to present this to the court in the initial pleading is in a paragraph identifying to the court the names and dates of birth of all unemancipated children born of the marriage. Setting off in boldface type the special needs child's name and date of birth, followed by “**AND THAT SUCH CHILD HAS SPECIAL NEEDS, SPECIFICALLY \_\_\_\_\_**” can be useful to the court. Make it easy for the judge to be aware of the unique nature of this case.

In addition to this allegation of special needs, consider reciting the need to use a different amount of child support, a nonstandard parenting plan, maintenance, the type of appropriate physical and legal custody, and appropriate visitation. The appropriateness of any of these options will necessarily depend upon the facts of each individual case.

If any of these issues have not been alleged in the petition, or have been addressed inaccurately in the petition, they should be properly addressed in the answer and counter-petition. If the petitioner has not alleged the need for the appointment of a guardian ad litem for the child, and the court has not, on its own motion, appointed a guardian ad litem for the child, and the attorney or the client thinks such appointment would be appropriate, this should be alleged in the answer and counter-petition, and followed up with an appropriate motion.

### *C. Discovery*

#### 1. Interrogatories—Standard Questions for Form Interrogatories

A family law litigation arsenal should include standard special needs questions that can be incorporated into form interrogatories and requests for production of documents, or asked separately, depending upon the local court rules. These questions should address the issues discussed in the above section on the initial intake interview. Note that there are additional subjects that should be explored during discovery.

It can be useful to query about the percentage of each parent's involvement as the child's caregiver, the level of caregiver training of each parent, the impact of the special need on the daily life of the family, the impact of the special need on the current and future careers of each parent, the financial impact of the special need, and specific information about all modifications alleged to be necessary in each parent's home and vehicle during and following the case. Particular cases may require additional lines of inquiry during discovery.

#### 2. Discovery in General

It can be quite useful to obtain school records of the disabled or special needs child. These can include IEPs and 504 Plans. While parents often disagree about the severity of the child's disability and the life goal expectations for the child, judges tend to give great weight to school records on these issues. The school is an unbiased third party that has nothing to gain from exaggerating the child's condition or likely outcome. Indeed, the school has everything to gain from minimizing the child's condition or likely outcome, because schools are mandated to provide services necessary for the child to obtain an appropriate education. Being aware of this mandate, judges tend to consider the severity of the child's condition and the child's life goal expectations to be at least at the level contained in the school records. Another advantage of utilizing school records is that they are usually obtained free of charge or for a nominal copying fee. The school has already paid for testing and assessment of the child.

List all of the specific areas in which the parents disagree concerning the disability or special need of the child and its impact. An astute judge will see a pattern, of the parent obligated to pay spousal and/or child support minimizing the child's condition or of the parent receiving spousal and/or child support exaggerating the child's condition,<sup>24</sup> if, in fact, this is occurring. If a practitioner sees a client engaging in either type of behavior, the lawyer can

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<sup>24</sup> Jennings, *supra* note 13, at 589.

advise the client of the danger of this behavior backfiring. As a highly respected family court judge is fond of admonishing parties and attorneys, "Pigs get fed, hogs get slaughtered."

#### *D. Parenting Plan*

"Court professionals [are] largely ignorant of the unique and sensitive care required to competently address the special needs of these children when formulating parenting plans."<sup>25</sup>

When the parents can set aside their differences and collaborate, they can create a parenting plan that meets the unique needs of the disabled child. When the parents are in disagreement about issues involving the child,<sup>26</sup> the guardian ad litem can provide an essential voice for the child at this stage of the process. Standard parenting plans usually do a great disservice to these families. Living with special needs can greatly impact the daily routine of the family, even when everyone is living together and cooperating. When the family becomes located in two separate households, with strained emotions and finances, forcing the family to follow a standard parenting plan can have an abysmal outcome.

If the child has difficulty handling transitions, a standard visitation schedule can be highly inappropriate. When necessary equipment is located in only one of the households, overnight visitation can become an issue. When there are nondisabled children in the family, it may be beneficial to employ a creative visitation scheme in which each child gets one regular recurring visitation block one-on-one with each parent.

The schedules of both the custodial parent and the noncustodial parent should be taken into account when fashioning the visitation schedule. Children with special needs often require one or more types of therapy,<sup>27</sup> and the parenting schedule should ensure that the child is reliably taken to all treatment and therapy sessions. The visitation schedule will become the "new normal," a vehicle on which they will ride for a very long time. No visitation schedule is perfect, but when the family law attorneys are able to work collaboratively for the best interests of their clients and the children, the best possible result can be achieved. Some families report their lives are smoother and more pleasant after the divorce than before, when the interests of all the parties have been respected and honored during the process.

If the child's disability or special need requires modifications to the home, vehicles or environment, the specific details should be clearly stated in the parenting plan. The responsibilities of each party, including who bears the costs of each modification, should be itemized and tied to measurable goals. Sometimes it is necessary to require the noncustodial parent to complete certain home or vehicle modifications, or obtain specific equipment or

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<sup>25</sup> Saposnek, *supra* note 9, at 563.

<sup>26</sup> Martin T. Stein et al., *ADHD, Divorce, and Parental Disagreement about the Diagnosis and Treatment*, 107 J. DEVELOPMENTAL & BEHAVIORAL PEDIATRICS 867 (2001).

<sup>27</sup> L. ANNE BABB & RITA LAWS, *ADOPTING AND ADVOCATING FOR THE SPECIAL NEEDS CHILD: A GUIDE FOR PARENTS AND PROFESSIONALS* (1997).

training, before that parent will be allowed to exercise visitation in his or her home or transport the child in his or her vehicle.

The well-crafted special needs parenting plan candidly addresses the special need and its impact on the child and the rest of the family. This plan will be more detailed and lengthy than a standard parenting plan. Consider incorporating a means of alternative dispute resolution for both routine disagreements and crises. In some situations, it is necessary to designate one parent to be the decision-maker on medical and/or educational issues. Another option is to designate a parent coordinator to informally arbitrate these issues. It is unfortunate when parents cannot put the child's needs ahead of being contentious, but that is the reality in some cases. In other cases, the parents can astound their own lawyers with their level of cooperation in matters concerning the child with special needs.

### *E. Child Support*

Some child support charts include a brief nod to “extraordinary expenses.” Other child support charts apply a Procrustean formula regardless of the actual needs of the child. It is far more expensive to raise a child with special needs than a typical, healthy child.<sup>28</sup> “Families with disabled children experienced uncovered, out-of-pocket expenses substantially higher than those of families without disabled children.”<sup>29</sup> Families raising disabled children “face an avalanche of expenses that far outstrip cost projections for a normal healthy child.”<sup>30</sup>

If attorneys have raised the issue of the need for deviation from the standard child support chart in the initial pleading, and have collected the data and documentation concerning all of the direct and indirect special need costs during discovery, they are positioned to include these costs in the child support calculations. At this point, attorneys should refer back to the notes made in earlier stages of the case and create a checklist of all direct and indirect costs. These can include direct and indirect costs of preexisting expenses, therapy, equipment, medication, supplements, dietary costs, sensory items, special clothing and personal care items, respite care, doctors and other healthcare professionals, special needs advocates, educational advocates, modifications to the home environment, modifications to vehicles, and many other items, depending upon the circumstances of the individual case.<sup>31</sup>

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<sup>28</sup> Vicky Barham et al., *Are the New Child-support Guidelines “Adequate” or “Reasonable”?*, 26 CAN. PUB. POL’Y – ANALYSE DE POLITIQUES, 1 (Spring 2000).

<sup>29</sup> Marcia K. Meyers et al., *Work, Welfare, and the Burden of Disability: Caring for Special Needs of Children in Poor Families*, U.S. Dep’t Health & Human Servs., Income Security Policy Series (Paper No. 12) (Apr. 1996), *available at* <http://aspe.hhs.gov/sites/default/files/pdf/73611/wrkwlfs.pdf>.

<sup>30</sup> Ana L. Pabon, *Financial Planning for Special Needs Children: A Review of Available Information for Parents*, 4(2) J. PERSONAL FIN. 40 (2005).

<sup>31</sup> Jennings, *supra* note 13, at 588.

As if this were not enough, attorneys should carefully monitor to see if the child's condition worsens during the divorce, as this happens frequently in these cases.<sup>32</sup> Divorce is hard on children,<sup>33</sup> even those without special needs. Special needs children can react to divorce very differently from typical children.<sup>34</sup> They can also react in different degrees compared to typical children.<sup>35</sup> Sometimes the regression is temporary,<sup>36</sup> but other times it is permanent.<sup>37</sup> Also the child's needs can change over time. Medication that is appropriate for a three-year-old might not be effective on a teenager. The child may outgrow lift equipment, orthopedic devices, and mobility equipment. Children with special needs often require extensive services throughout their lifetime,<sup>38</sup> services that are often not covered by insurance or by public assistance.<sup>39</sup> While this may seem overwhelming to the practitioner, attorneys are able to close the file and go home at night. The family with a special needs child will live with the outcome of the case night and day.

#### *F. Spousal Support and Property Distribution*

Being the primary caregiver of a child with special needs often results in that parent having less time and attention to devote to his career.<sup>40</sup> Depending upon the child's condition, caring for and managing the needs of the disabled child can be a full-time job.<sup>41</sup> Many children with special needs require assistance with daily living activities, which can include eating, dressing, grooming, toileting, bathing, communicating, mobility, and behavior management.<sup>42</sup> In addition to the increased amount of time to provide the daily care of a child with a disability, the primary caregiver also manages the child's therapy, doctor appointments, treatments,

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<sup>32</sup> Donald Wertlieb, *Converging Trends in Family Research and Pediatrics: Recent Findings for the American Academy of Pediatrics Task Force on the Family*, 111 PEDIATRICS 1572 (2003).

<sup>33</sup> American Academy of Pediatrics, Committee on Psychosocial Aspects of Child and Family Health, *The Child in Court: A Subject Review*, 104 PEDIATRICS 1145 (1999).

<sup>34</sup> Heidi P. Perryman, *Parental Reaction to the Disabled Child: Implications for Family Courts*, 43 FAM. CT. REV. 596 (2005).

<sup>35</sup> Sunni Ball, *Children with Special Needs in Divorce* (Dec. 2002), <http://sondur.com/SPECIALNEEDSCHILDRENINDIVORCE2.pdf>.

<sup>36</sup> Brian D. Johnston et al., *High-Risk Periods for Childhood Injury Among Siblings*, 105 PEDIATRICS 562 (2000).

<sup>37</sup> *Id.*

<sup>38</sup> Raphael C. Sneed et al., *Training of Pediatricians in Care of Physical Disabilities in Children with Special Health Needs: Results of a Two-State Survey of Practicing Pediatricians and National Resident Training Programs*, 105 PEDIATRICS 554 (2000).

<sup>39</sup> Pabon, *supra* note 30, at 40.

<sup>40</sup> Sunhwa Lee et al., *The Impact of Disabilities on Mothers' Work Participation: Examining Differences Between Single and Married Mothers* (2004), <http://www.iwpr.org/publications/pubs/the-impact-of-disabilities-on-mothers2019-work-participation-examining-differences-between-single-and-married-mothers>.

<sup>41</sup> Garry Hornby, *Fathers' Views of the Effects on Their Families of Children with Down's Syndrome*, 4 J. CHILD & FAM. STUD. 103 (2005).

<sup>42</sup> John Agosta, *Family Support Policy Brief*, National Center for Family Support, Human Services Research Institute (1995).

medications, and transportation.<sup>43</sup> The primary caregiver also works to obtain and maintain funding for the child's expenses, researches treatment options and additional resources, and navigates through the educational process of IEPs and 504 plans.<sup>44</sup> Children with special needs have, on the average, three times as many sick days and school absences as nondisabled children.<sup>45</sup>

The primary caregiver parent will be limited in the types of work he or she can do. If that parent has been a flight attendant or held another job involving frequent travel, he or she might have to quit that line of work to be physically present to care for the child. The daily extra hours required to appropriately parent a child with a disability may preclude one parent from being able to work full-time. The child's frequent sick days may result in the primary caregiver being fired from a job for absence. Even if the primary caregiver parent is able to maintain full-time employment, that parent may be less available to put in the extra effort on-the-job in order to receive promotions, pay raises, and bonuses. This will have a cumulative effect on that parent's income over time. If the primary caregiver is reduced to part-time employment, he or she might not be eligible to participate in an employer's retirement plan. Even if the primary caregiver is eligible, the contributions to the retirement plan will be lessened by the reduced income and lesser career advancement.

In agreeing to be the primary caregiver parent for the disabled child, the parent will face a future of career and financial losses, and an uncertain retirement situation. The stress level for the family raising a child with special needs is extremely high.<sup>46</sup> These factors should be considered when determining spousal support, distribution of retirement accounts, and distribution of other property. Sometimes a parent becomes the primary caregiver by default, because the other parent emotionally abandons the child and has no interest in devoting himself or herself to the level of care required by a child with special needs.<sup>47</sup> Children with special needs often hear people comment that their parents divorced because of the stress and pressures of raising the child with special needs.<sup>48</sup> Living in poverty is not in the best interests of any child. The decision to be the primary caregiver parent should be respected, and the expenses should be appropriately addressed for the best interests of all the parties.

#### **IV. Risks of Not Handling These Cases Appropriately**

If courts ignore all these factors, and continue to treat family law cases with special needs children like typical divorce cases, there will be a huge social price to pay. Nearly two-thirds of

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Paul Newacheck et al., *An Epidemiological Profile of Children with Special Health Care Needs*, 102 PEDIATRICS 117(July 1998).

<sup>46</sup> Anne E. Kazak, *Families with Physically Handicapped Children: Social Ecology and Family Systems*, 25 FAM. PROCESS 265 (June 1986).

<sup>47</sup> J. Lane Tanner, *Parental Separation and Divorce: Can We Provide an Ounce of Prevention?* 110 PEDIATRICS 1007,(2002).

<sup>48</sup> George J. Cohen, *Helping Children and Families Deal with Divorce and Separation*, 110 PEDIATRICS 1019 (2002).

families with special needs children have incomes at or below the poverty level.<sup>49</sup> Twice as many children are reported as going hungry in families with special needs children, with adults going hungry reported at 16 to 24 percentage points higher than in families with non-disabled children.<sup>50</sup> Some primary caregiver parents quickly become so exhausted that institutional care may be necessary for the child.<sup>51</sup> Primary caregiver parents often go for years without a good night's sleep or a day off.<sup>52</sup> These outcomes are simply not acceptable in a time when a society has the ability to do better.

While there are risks to handling special needs cases inappropriately, there are also rewards to handling these cases appropriately. It is possible for attorney to use their legal education and skills to achieve a good outcome for these families. It takes a little more work than in some routine cases, but it is a worthwhile endeavor. America is a land of opportunity – for all people – regardless of disability. Many people who have faced disabilities and special needs have gone on to have successful, productive careers, to marry and raise families, and to have happy, fulfilling lives. All people deserve this opportunity.

## V. Conclusion

Some people might say the needs of these families are too great, and there simply is not enough money to go around for everyone. Other people may argue that judges do not like to risk being overruled when a case calls for a creative solution. Still others want to wait until there is more case law and legislative directive. Perhaps tackling these giant issues is a bit like jousting at windmills sometimes. But with each family law attorney who passionately advocates for respectful treatment of special needs issues, a step forward is taken. Things are unlikely to change overnight, however, things will change. Since this article began with the words of President Abraham Lincoln, it is appropriate to end with his words. “I do the very best I know how – the very best I can: and I mean to keep on doing so until the end.”<sup>53</sup>

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<sup>49</sup> Meyers et al., *supra* note 29.

<sup>50</sup> *Id.* at 23.

<sup>51</sup> Jennings, *supra* note 13, at 583.

<sup>52</sup> Karen L. Lawson, *Contemplating Selective Reproduction: The Subjective Appraisal of Parenting a Child with a Disability*, 19 J. REPRODUCTIVE & INFANT PSYCHOL. 73 (2001).

<sup>53</sup> FRANCIS B. CARPENTER, *THE INNER LIFE OF ABRAHAM LINCOLN: SIX MONTHS AT THE WHITE HOUSE* 258-59 (1995).