

NOT FOR PUBLICATION WITHOUT THE  
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C. ROONEY<sup>1</sup>,

Plaintiff,

v.

T. WALL,

Defendant.

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SUPERIOR COURT OF NEW JERSEY  
OCEAN COUNTY  
CHANCERY DIVISION  
FAMILY PART

DOCKET NO. FM-15-1229-09

CIVIL ACTION  
OPINION

Decided: September 19, 2014

Plaintiff, pro se

Defendant, pro se

L. R. Jones, J.S.C.

When divorcing or divorced parents have a child with autism, there are often very specific concerns regarding custody, parenting time, and a child's need for specific therapies and special education services. This case presents such a scenario, involving post-judgment litigation between divorced parents of a five year old autistic boy. There is little precedential case law on the

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<sup>1</sup> The court utilizes pseudonyms and initials in place of the actual names of the parties and child.

subject of autism and divorce in New Jersey. This litigation, however, raises important issues on what separated or divorced parents may need to do in order to jointly help, rather than hurt, their child's progress and well-being after the marriage has ended.

### **FACTUAL BACKGROUND**

Plaintiff and defendant married in 2006. In 2009, plaintiff filed for divorce. At the time, she was pregnant, with H.W., the parties' son and only child. Plaintiff gave birth during the litigation. When the child was nine months old, the parties finally settled the case in April, 2010. Due to the infant's tender age, neither party was aware at the time that their son was autistic. Under their settlement agreement, the parties agreed to share joint legal custody of H.W., with plaintiff serving as primary residential custodian and defendant having reasonable and frequent parenting time two to three times per week.

In February, 2012, nearly two years after the parties' divorce, H.W. was formally diagnosed with Autism Spectrum Disorder (ASD). The clinical diagnosis followed the child's ongoing manifestation of several classic behavioral symptoms and early warning signs of autism, including but not

limited to poor eye contact, delayed speech, and impaired social interaction. Following receipt of the official diagnosis, plaintiff arranged for H.W. to begin receiving multiple professional interventions and therapies for young children with autism, including behavioral therapy (“Applied Behavioral Analysis”, or “ABA” therapy), speech therapy, and occupational therapy, all through New Jersey’s Early Intervention program.

Upon H.W. reaching his third birthday, and pursuant to applicable special education law, the child’s home school district began providing academic services and developed an Individual Education Plan (IEP)<sup>2</sup> for the child, including the child’s enrollment in a pre-school disabled program providing behavioral therapy for children with autism. Additionally, plaintiff arranged for the child to receive additional hours of private and supplemental behavioral, speech and occupational therapy to the extent available under her health insurance policy. Plaintiff’s position, however, was that defendant was not working with her as a co-parent, but in fact was refusing or otherwise failing to accept the reality of the child’s autistic diagnosis by responding to respond to his special needs.

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<sup>2</sup> The Individuals with Disabilities Education Act (IDEA), requires school districts to supply a free and appropriate education to developmentally disabled children as young as three years of age. See 20 U.S.C. 1401; 20 U.S.C. 1412.

Notwithstanding multiple ongoing therapies and interventions, the teachers and professionals overseeing the child's behavioral development began to notice emerging inconsistencies between the child's social and emotional functioning in the school setting, as compared to other settings in the home and community. Specifically, while the child was apparently making some positive progress at school, his development was comparatively stagnant or regressive outside of the school environment.

Believing a cause to be an apparent lack of joint cooperation between the parties in jointly working together on reinforcing the child's educational program, and in meeting his needs in a consistent fashion, the therapists and professionals recommended, among other suggestions, that the child's divorced parents work on improving their personal dealings with each other on child-related issues. The professionals also recommended the parents maintain an ongoing autism "communication log" between them, so as to enhance consistency of approach between their respective homes. Still further, the therapists recommended that, for the child's sake, the parents needed to better synchronize and coordinate their efforts in taking what the child was learning in therapy and then reinforcing same by working with the child during "down time," thereby consistently helping generalize the child's progress into their respective homes and other environments outside of a educational formal setting.

Notwithstanding these recommendations, the parties have continued to have an ongoing problematic relationship. As regarding the communication log, plaintiff contends that defendant has not only refused or otherwise failed to appropriately utilize the notebook, but in fact has misused same by writing inappropriate communications in the log for her to read. Plaintiff also asserts or implies that defendant does not cooperate with her relative to following the child's special education program and therapeutic needs, and that he insists on parenting time schedules which obstruct or conflict with the child's therapy schedule. She further contends that the child's educational progress has been impeded in substantial part because of a lack of consistency by defendant in his approach to, and reinforcement of, the child's educational program. Plaintiff alleges that because defendant disagrees with, and does not accept, the child's diagnosis of autism, he does not support or follow through with the child's therapy program as is necessary for the child to achieve progress. She asserts that defendant's actions and inactions are ultimately obstructive to the child's chances for meaningful improvement, and are therefore contrary to the child's health, well-being and best interests. Under the circumstances, plaintiff requests that the court modify the joint legal custodial arrangement at this time and grant her sole legal custody of the child until further order of the court, so that she can make decisions

regarding the child's autism program and oversee his progress in order to make sure he stays on course without derailment.. She further asks the court to reduce defendant's parenting time so as to decrease the risk of the child's behavioral regression while in defendant's care, while simultaneously providing more time for consistent therapy.

Defendant strongly opposes plaintiff's motion. He denies that he is refusing to accept the child's diagnosis of autism, and further asserts that he has been doing his own online research into the disability. He further objects to any change in his status as joint legal custodian, or diminishment of his existing parenting time with the child.<sup>3</sup> He denies that he is responsible for impeding the child's development and progress. Additionally, while admitting that there is presently a sub-par relationship between the parties, he professes that he would like to improve the situation and move forward in the future for the sake of the child.

### **LEGAL ANALYSIS:**

#### **Autism Spectrum Disorder: Overview**

The United States Center for Disease Control (CDC) reports that nationally, 1 in 68 children have autism spectrum disorder (ASD).<sup>4</sup> Further, the CDC reports

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<sup>3</sup> Each party asks for further additional post judgment relief as well, which is outside the scope of this opinion.

<sup>4</sup> See <http://www.cdc.gov/ncbddd/autism/states/ADDM-New-Jersey-fact-sheet.pdf> (last visited November 1, 2014).

that New Jersey has the highest incidence of autism in the country, with 1 in 45 children having ASD.<sup>5</sup> Given the high rates of both autism and divorce, there is a substantial likelihood that every divorce judge in New Jersey will confront at least one case involving a child with autism over the next several years. Historically, however, there has been relatively little formal education of New Jersey's family court judiciary on special issues which may arise when divorcing or divorced parents have a child with autism. For this reason, over the past several years there has been an increased effort and focus on the need for judicial education in autism spectrum disorder, in order to support a greater general awareness of, and familiarity with, the disorder and the special needs which may follow a child's diagnosis.<sup>6</sup>

In 2007, the State Legislature created the New Jersey Adults with Autism Task Force, (A4057/S2559), which was signed into existence on September 12, 2007 by Governor Jon Corzine (P.L. 2007, c. 173). This legislation charged the task force with studying, evaluating and making recommendations intended to meet the needs of adults associated with the significant challenges presented by autism. In October, 2009, the Autism Task Force released its report of findings to the Governor and Legislature entitled, "Addressing the

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<sup>5</sup> Id.

<sup>6</sup> The court notes that this opinion is posted on April 2, 2015, which is National Autism Awareness Day.

Needs of Adults with Autism: Recommendations for a Plan of Action for the State of New Jersey,” which contained multiple recommendations for addressing the needs of New Jersey's vastly growing population of individuals with autism. While the Task Force technically dealt with the needs of adults” with autism, several recommendations and goals expressly also related to the needs of children with autism, especially those in the family court system. The Task Force recommendations included a focus on the state judiciary and need to educate Superior Court judges on autism.<sup>7</sup> The report to the Governor and Legislature contained multiple recommendations, including a finding that, as a matter of public policy, members of the Judiciary’s Family Court will benefit from having ongoing judicial education about autism spectrum disorder . The Task Force report expressly noted the following:

- a) A high percentage of marriages end in divorce when the parties have a child with ASD. Thus, children with ASD are often the subject of court proceedings relating to custody, visitation schedules, support and funding of special needs.
- b) The court and counsel must advocate for the best interests of the child with ASD under parens patriae jurisdiction, so that the child may hopefully grow to be an adult who can be a functioning member of society.

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<sup>7</sup> The report’s content may be read at <http://www.state.nj.us/humanservices/ddd/boards/AATFrpt.pdf>.



c) Accordingly, public policy supports the establishment of autism education for family court, in conjunction with the Judicial College through the Administrative Office of the Courts.

Id. at 35-37.

The report further stated the following:

. . . In New Jersey's judicial system, Superior Court Judges often must address legal issues concerning persons who have ASD. Judges are often personally unfamiliar with ASD. In view of the growing number of persons diagnosed with ASD, it is in the public's interest for judges and attorneys to learn as much as possible about ASD as such education may significantly impact how cases are viewed by judges in matters involving persons with ASD. Education should be developed through such educational outlets as the Judicial College and other court-sponsored or supported programs.<sup>8</sup>

Id. at 43-45:

**Children with Autism:**

**Importance of Early Diagnosis, Intense Intervention,  
and Consistency of Approach**

In considering the needs and best interests of a child with autism, it is logical, as a starting point, for family court judges to have a basic understanding of autism, as well as a general grasp of the importance of early diagnosis, intense behavioral intervention, and consistency of parental

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<sup>8</sup> Thereafter, the 2010 Judicial College included in its curriculum a first-time ever course entitled: Family Court: Issues Involving Developmentally Disabled Children, which included, as a participating panelist, a representative from the State of New Jersey's Department of Human Services and newly created Office of Autism Services.

approach, even when the parents are divorced and are living in separate homes.<sup>9</sup>

Autism is a pervasive developmental disorder of the brain, which can significantly impair a child's ability to learn, communicate, and socially interact with other people. Infants and young children who are diagnosed with autism are said have "infantile autism". The exact cause is unknown, and the State of New Jersey's Department of Health acknowledges that there is no known universal cure.<sup>10</sup>

While no two autistic children are exactly alike, the behavioral and social deficits of children with ASD sometimes manifest themselves in common fashion. For example, young autistic children often have little or no speech, and those who do speak might only initially parrot what they hear others say (a behavior known as "echolalia"), and/or speak in monotone with a blunt affect. Additionally, autistic children often have great difficulty making eye contact, and frequently engage in obsessive-compulsive, perseverative, repetitive and self-stimulatory behaviors such as spinning in circles, flapping their arms, rocking their bodies back and forth, persistently lining up objects

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<sup>9</sup> Many of the following general points and principles regarding childhood autism are summarized in the article: "Autism and Divorce: Guidelines for Family Court Practice", New Jersey Lawyer, No. 256 (February 2009), pages 7-17, by Lawrence Jones and Dr. David Holmes.

<sup>10</sup> <http://www.nj.gov/health/fhs/documents/autismguidelines.pdf>

in a row, or endlessly spinning the wheels on a toy car or other toy and staring at the motion in fixated fashion.

Autistic children frequently are unable to read and understand people's facial expressions, or respond to social cues and gestures. Additionally, autistic children often have little or no interest in socializing with other people, and prefer isolation to interaction with same-age peers. Other autistic children may interact with people, but only adults. Some autistic children engage in explosive temper tantrums and self-injurious behaviors, such as head-banging on walls and floors. Additionally, many autistic children do not readily appreciate or understand the concept of danger, or easily learn from past experience. For example, a child with autism might put his or her hand on a hot stove even if he or she burned his or her hand on the same exact stove the previous day.

As noted, there is no known "cure" for autism. It is well-documented and critical to note, however, that young children who receive an early diagnosis, followed by intense behavioral intervention often make very significant improvement to the point that they can effectively mainstream with non-autistic children, both in school and otherwise. Perhaps the most recognized form of behavioral intervention for young autistic children known as Applied Behavioral Analysis (ABA), with a sub-category known as discrete

trial techniques (DTT). This therapy is based on a 1987 study conducted at UCLA known as the “Lovaas”<sup>11</sup> study, which supports intense behavioral intervention for a young autistic child of 25-40 hours a week or more. Thus, such a therapy program generally involves an extensive and consistent commitment of time, energy, and effort by the parents of the autistic child, usually in conjunction with trained professionals such as behavioral therapists, speech therapists, and other appropriately educated professionals. As stated by Dr. Sandra Harris in the autism text, Right from the Start: Behavioral Intervention for Young Children with Autism. 2d edition (2007):

There are several features that make applied behavioral analysis (ABA) special in the treatment of young children with autism. One is the intensity of the treatment. . . . It should be done for at least 25 to 40 hours a week with most of the teaching being done in a one to one student to teacher ratio. Second ABA is a highly structured approach to teaching. . . .(which) is carefully designed and follows very predictable patterns of instruction. Third, there is very little downtime during which the child is not actively learning. Brief breaks are followed by brief lessons at a rapid pace. . . . In addition, applied behavior analysis is based on well-studied principles of human learning and is designed to capitalize on the capacity of children to benefit from proven methods of instruction. Id., at 5-6.

Generally, the earlier the diagnosis and start of intense therapeutic intervention, the greater the chance for possible success in improving the

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<sup>11</sup> The study was conducted by Dr. Ivar Lovass of UCLA,, who is considered one of the major pioneers in the treatment and education of children with autism. See Right from the Start: Behavioral Intervention for Young Children with Autism. 2d edition (2007), page 32.

autistic child's functional abilities. Id. at 33-34. Some professionals refer to the age bracket of two to five as the greatest "window of opportunity to improve an autistic child's functionality, since the brain is still forming (i.e., the age of "plasticity of the brain"). Id. at 13. Failure to provide a young autistic child with intense behavioral intervention during his or her early years of life may have significant negative consequences on the child's progress and future.

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 not only understand how autism therapy works, but also to learn how to reinforce such therapy at home when the professional therapists and special education teachers are no longer present. Since most parents may not be able to afford to hire professionals for up to 40 hours a week, there is a clear importance for parents to learn how to reinforce the therapists' and teachers' lesson plans themselves so the child receives the maximum benefit reasonably possible under the circumstances. This way, the autistic child constantly receives opportunities to practice generalizing his or her progressive steps and skills in different environments and situations, spearheaded by properly instructed and motivated parents.

Since autistic children frequently have difficulty generalizing what they learn in one environment into other environments, it is generally in a child's

best interest for both parents to constantly reinforce the child's learning steps in a uniform fashion with specifically coordinated intensity and consistency. This point becomes extremely important and challenging in cases of divorce, where parents not only live in separate homes, but may have an impaired and compromised ability to effectively communicate and cooperate with each other on any issue at all.

Autistic children often do poorly with "down time" and unstructured routine. Additionally, without constant reinforcement, some autistic children regress, i.e., go backwards, by losing skills they have previously learned and mastered. Still further, autistic children often do not transition well into different environments, and often resist changes to their set routines. For this reason, constant changes in the child's schedule, including fluctuating parenting schedules between separated or divorced parents, may in some cases ultimately be detrimental to an autistic child's need for consistency and predictability. Accordingly, for purposes of establishing an autistic child's behavioral therapy schedule, it is generally in the child's best interest for separated or divorced parents to jointly coordinate their schedules in a way that the child can constantly learn in a uniform and predictable manner, without unnecessary disruptions to the routine or point of focus.

Further, it is logical for both parents to coordinate their parental education and training efforts, in conjunction with the child's therapists and teachers, so that there is as much consistency as possible in approach between the two homes, and so the child optimally continues to receive the benefits of consistent education, skill reinforcement and generalization, irrespective of whether the child is in one parent's care or the other parent's care at any particular point in time.

Even in an intact family where two parents live under the same roof, the challenges of raising a newly diagnosed, young child with autism can for some parents be stressful. This is particularly true when one parent is unable or unwilling to accept and handle the additional parental responsibilities which are necessary to advance the child's progress and best interests. Some parents unfortunately choose a road of inaction and inattention, or sit back contently while the other parent carries the entire load of responsibility.

In addition to the emotional challenges of raising a developmentally disabled child, there can be serious economic challenges as well. For example, a parent might have to leave or alter his or her career path and goals in order to care for an autistic child on a full-time basis, including transporting the child to and from necessary behavioral therapy sessions. In such instance,

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” and other activities to focus on their child’s needs, and to learn behavioral therapy reinforcement techniques and how to effectively apply them on a regular basis in their ongoing interactions with the child.

Further, parents of autistic children are often faced with costs and expenses of therapy and special education services which may not be fully covered by insurance, and which are sometimes not voluntarily provided by the child’s school district. In such circumstance, there is often the need for additional 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.

There are, however, numerous invaluable rewards in raising a child with autism, including the joy and satisfaction of seeing a young child progress, improve, and hopefully grow to meet his or her greatest potential, hopefully at all times with the full support and effort of both parents. For such success to have the greatest chance to occur, however, it is logical that parents, whether married, separated, or divorced, strive to develop a united front in (a) obtaining, and accepting the diagnosis ; (b) educating themselves as parents in the intricacies of the disability; (c) formulating a joint plan for



therapeutic intervention with the help of trained professionals, and (d) most importantly, approaching and working the plan as a unified parental team with as much intensity, consistency and focus as possible, free from unnecessary drama and marital or post-marital battles having little or nothing to do with the child's needs and best interests.

Unfortunately, when one layers a contentious divorce on top of the inherent challenges and responsibilities of raising a child with autism, a complex family dynamic often emerges. Specifically, two participants in an unsuccessful marriage must now nonetheless step up to the plate as joint parents, and work together to accept, understand, and meet the special needs of their autistic child, while living in two separate houses. Inherent in this joint obligation is the further need of each parent to fully and fundamentally appreciate how a failure of joint cooperation between them can wholly and irreparably threaten the child's progress and permanently damage the child's chance to fully reach his or her potential regarding behavioral improvement, mainstreaming and future independent functioning. While parents may divorce each other, there is no divorce between parent and child. Even in the most strained marriages and contentious divorces, there remains an ongoing, critical obligation of each parent to rise above the ashes

of their failed union and work together to meet the special needs of their autistic son or daughter.<sup>12</sup>

The court recognizes that, as a general proposition, parents who divorce often have difficulties in effectively cooperating with each other thereafter as joint legal custodians. See Madison v. Davis, 438 N.J. Super 20, 44-45 (Ch. Div. 2014). As a result, many children of divorce grow up in two homes, raised by “joint legal custodians” who in theory are supposed to cooperate with each other, but who in actuality have no real-life practical ability to do so. Yet, the most basic and fundamental element of a joint custodian’s job description is a willingness and ability to leave the hurt feelings and dirty laundry from an unsuccessful marriage behind, and move forward by constructively and effectively working with the other parent to the extent reasonably possible on important child-related issues. When one or both parents are unable to do so or unwilling to even try, a child of divorced, “joint legal custodians” may be raised in two separate homes where he or she must endure a complete lack of parental consistency while struggling from being buried alive in an avalanche of back and forth fighting between the adults.

Unfortunately, divorcing or divorced parents sometimes subordinate a child’s interests to their own, including an often paramount interest in

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<sup>12</sup> If there is a domestic violence restraining order in place between the parties, however, then the restraints must be honored at all times.

demonstrating that their ex-spouse cannot “tell them what to do.” In the case of a child with autism, such a breakdown in parental cooperation can have a catastrophic consequence upon the child’s development. The reason is that, as previously noted, an autistic child may have a heightened need for consistency, which can easily be derailed by two parents who spend more time trying to show each other who is in charge than presenting a joint front in meeting the child’s needs and challenges.

In family court, there is a “real responsibility in matrimonial actions to remain above the fray and try to preserve the best interests of the child.” Quinn v. Johnson, 247 N.J. Super. 572, 580 (Ch., Div., 1991). This point is overwhelmingly true in a case involving divorced parents of a young child with autism. For this reason, in divorce litigation, if the evidence reflects that a parent either cannot or will not accept and meet this basic responsibility, there may be legal consequences relating to both custody and parenting time in the child’s best interest.

A judge presiding over a family court action has broad discretion in determining custody and other provisions regarding the child’s welfare, which is the controlling consideration. See Sobel v. Sobel, 46 N.J. Super. 284, 286 (Ch. Div., 1957). 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.A 9:2-4. In the context of a custody battle over an autistic child, some of the most relevant factors listed in N.J.S.A 9:2-4 include the fitness of the parents, the needs of the child, the safety of the child, and the quality and continuity of the child's education. In addition to the stated statutory factors, however, the family court also has equitable discretion to consider supplemental factors it deems relevant and appropriate on a case-by-case basis. Specifically, a court presiding over a custody or parenting dispute involving an autistic child may consider the relevancy of additional significant factors, including but not limited to the following <sup>13</sup>:

- 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

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<sup>13</sup> See Autism and Divorce: Guidelines for Family Court Practice, New Jersey Lawyer, No. 256 (February 2009), pages 7-17.

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 challenges which may involved with raising a child with special needs;
- 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.

In a given case, any or all of the above factors may be very relevant in considering whether a parent is ready and able to assist his or her autistic child on an ongoing basis, and to assist in a positive, intense, consistent and significant manner in the child's progress and development.

In the present case, plaintiff seeks an order of sole legal custody over the parties' child. Defendant objects and wishes to remain a joint legal custodian. In New Jersey, there are generally two kinds of custody: legal custody and physical (residential) custody. See N.J.S.A. 9:2-4. While the residential custodian is one with whom the child primarily resides (in this case plaintiff, by prior agreement of the parties), the legal custodian is the parent who makes the major decisions on the child's behalf.

Generally, even if one parent has primary physical custody, both parents may still have joint legal custody. In the present case, the parties previously agreed to such an arrangement at the time of divorce, when their son was an infant, but when neither party knew of his autism and special needs.

In some cases, a parent may seek joint residential custody of the child, and a schedule under which each parent has the child approximately fifty 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 in some cases not be in the best interest of a particular child, especially an autistic child whose parents either cannot or will not coordinate either the therapy schedules or their follow-up reinforcement of behavioral therapy in a compatible and consistent manner. Specifically, the back-and-forth nature of shared 50/50 residential custody may in some cases work against the need of an autistic child to have a predictable and consistent schedule, especially when the parents cannot effectively communicate and cooperate in synchronizing the implementation of the child's behavioral intervention program in each home. Autistic children often do not do well handling inconsistency or significant deviations in their schedules. The need for a relatively regimented schedule of

behavioral therapy may be compromised if the child has to be passed back and forth between two households with two completely different and unpredictable parental methods of overseeing, or not overseeing, the autistic child's need for consistent and intense reinforcement of those skills taught to the child by therapists and other professionals.

An autistic child may have enough hurdles to overcome without parental dysfunction further complicating matters by requiring the child to bounce between two totally inconsistent educational and therapeutic programs and expectancies. A parent who cannot or will not engage in a consistent program with their ex-spouse, for the child's sake, and who replaces consistency with defiance and refusal to recognize an autistic child's needs while under his or her care, may be compromising the child's best interests. Hence, unless there is reason to believe the divorcing parents can effectively and cooperatively work together to consistently coordinate their schedules and seamlessly reinforce the child's therapy and progress from one household to another, shared custody might in some cases not be appropriate or in the child's best interests.

In the present case, there appears to be no issue that plaintiff is, and continues to be, the child's primary residential custodian. The issue in serious dispute is not residential custody, but legal custody of the child.

Under a joint legal custodial arrangement, parents are supposed to confer in a mutually dignified and respectful manner and attempt in good faith to reasonably agree on significant issues affecting the child's health, education and welfare. If there is a disagreement on a significant issue after such reasonable efforts have been mutually attempted, then either party may seek judicial intervention and the family court may have to resolve the disputed issue in dispute.

N.J.S.A. 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. N.J.S.A. 9:2-4. In some cases, however, the evidence reflects that joint legal custody between two specific parties is simply unworkable, as a result of the conduct and attitude of one or both parties.

Pursuant to N.J.S.A. 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 may have the right to parenting time 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, 86 N.J. 480 (1981). As a matter of public policy, New Jersey generally favors joint legal custody. Grover v. Terlaje, 379 N.J. Super. 400 (App. Div., 2005). Theoretically, joint legal custody enables both parents to share an equal right to participate in the decision-making process regarding significant issues 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 at all — 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. See N.J.S.A. 2A:34-2(i) (establishing “irreconcilable differences” as a legal ground for divorce). See also Madison v. Davis, *supra*.

In New Jersey's custody statute N.J.S.A. 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 matters involving a child with autism, 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 long 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 damaged to the child's clear detriment.

Some parents are in fact able and willing to prioritize their autistic child, put aside their differences and learn to communicate, and cooperate, and even agree on important issues as joint legal custodians. Other parents, however simply do not have the ability or selflessness to do so. 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, a court may conclude that joint legal custody is *not* in the child's best interests. Rather, for the child's sake, there may be a necessity under such conditions to grant one parent sole legal custody and authority to make decisions relative to the child, particularly regarding treatment and therapy for autism spectrum disorder.

In Nufrio v Nufrio, 341 N.J. Super. 548, 550 (App. Div., 2001). the Appellate Division ruled that the prime criteria for establishing a joint legal

custodial relationship between divorced or separated parents centers on the respective abilities of the parents to agree, communicate and cooperate in matters relating to the health, safety and welfare of the child. Without such abilities, joint legal custody may be inappropriate. The facts in Nufrio did not involve an autistic child. Nonetheless, the principles of Nufrio may be logically applied by a family court judge presiding over a case involving custody of a child with autism. 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. Quinn v. Johnson, 247 N.J. Super. 572, 574 (Ch. Div., 1991). 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 interests.

As regarding parenting time, the state generally supports the right of the noncustodial parent to have such time with the parties' child. Wilke v. Culp, 196 N.J. Super. 487 (App. Div., 1984). In fact, the right of a parent to companionship with his or her child is a fundamental right protected by the U.S. Constitution. Wilke v. Culp, 196 N.J. Super. 487, 496 (App. Div., 1984). See In re J.S. & C., 129 N.J. Super. 486, 490 (Ch. Div., 1974). See also DYFS v. J.Y and

E.M., 352 N.J. Super. 245 (App. Div., 2002). When weighed, balanced and tested against competing constitutional principles, however, the welfare of the child must have paramount importance. See Fiore v. Fiore, 49 N.J. Super. 219, 225 (App. Div., 1958); Hoefers v. Jones, 288 N.J. Super. 590, 608 (Ch. Div., 1994). The child's best interests is always the controlling consideration in deciding issues of parenting time, including schedules and conditions relating to same.

There are many different types of parenting schedules which vary from case to case depending on various factors. In the case of an autistic child who is actively involved with an ABA therapy schedule, it is important that any proposed parenting schedule include due consideration to the child's need for a continued and consistent schedule of therapeutic intervention. For example, an autistic child might be enrolled in a year-round extended school year (ESY) special education program provided by the school district, for the purpose of helping prevent regression and loss of previously learned skills over the summer when there is no ongoing school or other professional structure and support. In such case, removal of the child from the program for several weeks to accommodate either parent's extended summer vacation plans must be looked at with due caution, as such an arrangement may unwittingly have a detrimental effect on the child's behavioral progress. While

relatively short absences to accommodate vacations of brief length might possibly be reasonable, periods of longer length may be inappropriate and in fact unreasonable under the circumstances.

Similarly, if a child is involved in an intense behavioral intervention program which has been successful in overcoming past significant behavioral challenges,, such a program may require daily behavioral reinforcements from the caretaking parent in order to be truly effective. In such a case, it is critical that both divorced parents receive appropriate parental education and training in behavioral intervention and reinforcement. Taking this concept one positive step further other members of the parents' respective households (second spouses, teenage siblings, etc.) should logically and optimally receive similar training as well. Even during short stays such as weekday dinners or alternating weekend parenting time, a non-custodial parent's lack of understanding of autism can lead to serious problems if the child has a behavioral meltdown, temper tantrum, or engages in other challenging behaviors. For this reason, a court exercising parens patriae jurisdiction over a child with autism may in some appropriate circumstances order that parenting time be conditioned upon the parent demonstrating ongoing participation with ongoing parental training and education in autism.

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. Further, 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 is consistent. In such fashion, the child can better generalize what he or she learns in different environments such as, each party's home.

#### The Present Case: Logical Goals and Interim Arrangements

Against this general backdrop, the court considers the parties' present positions and the child's best interests. A best interest analysis logically extends beyond what is best for a child only on the motion return day, but rather what is more likely than not best in terms of a reasonable long range plan.

First, notwithstanding plaintiff's assertion that defendant has historically refused to accept their son's diagnosis, defendant does presently assert and acknowledge under oath that the child has autism, and that he accepts the reality of the diagnosis. This stipulation is the first important step in the parties moving forward in jointly addressing their child's present and very important needs.

As regarding the viability of continued joint legal custody, the court is not presently inclined to grant plaintiff's application for sole legal custody, and will maintain the parties' joint legal custodial status at this time. While theoretically the court may enter an order in the future modifying joint legal custody to sole legal custody if necessary to protect the child's best interests, this court presently finds that a different approach is more appropriate and more potentially beneficial to the child in the long run. Similarly, the court denies any modification in either party's parenting time at this juncture.

The court schedules this matter for a status conference and further proceedings which will take place in approximately eight weeks, on November 17, 2014 at 1:30 pm, at which time both parties will be in attendance. In the interim, between this present court date and November 17, 2014, the court will afford both parties the opportunity to demonstrate, both to the court and to themselves through a series of specific interim steps, whether they can or cannot work together as parents for their child's sake, and whether their child does or does not come first in their lives, even above whatever animosities they may feel towards each other at the present time.

First, the court orders that between the date of this order and the next court date, both parties will jointly attend parental training classes, together, in raising a child with autism. Parents in intact families often attend

such classes together when their child is diagnosed with autism, and therefore there is logically no reason why the two divorced parents in this case, as “joint legal custodians” with no restraining order between them cannot attend as well. In its role as parens patriae, the family court may require two divorced parties to attend professional interventions, together, as an ongoing condition of joint legal custody. See Madison v. Davis, supra, 438 N.J. Super at 45-46 (Ch. Div. 2014) (authorizing mandatory, court-ordered joint attendance by both parties together at co-parenting counseling sessions, for the child’s sake).

In this case, the parties, as joint custodians, must communicate with each other and within fourteen days either meet jointly with the child’s autism therapist, or alternatively jointly select a program from an appropriate agency or recognized autism organization designed to coordinate their education, training and commence parental training in assisting their son’s needs. The parties will jointly attend a minimum of three sessions prior to the next court date, and will jointly supply proof of attendance. Further, the parties will at all times treat each other courteously and respectfully in such sessions, with a common goal of obtaining a consistency in approach to educating their child in their respective homes and generalizing the education which the child receives from his therapists, teachers and other professionals. If a parent refuses to attend with the other party,



the court may issue sanctions or other relief including, if necessary, suspension of the violating party's status as a legal custodian of the child.

Second, the court further orders that the parties may reasonably communicate with each other on child-related issues in person, or by text, email, phone, or as otherwise agreed. All such communications, however, shall at all times be mutually respectful. While the parties are not obligated to agree with each other on all issues, they are obligated for their child's sake to treat each other at all times in a mutually courteous and dignified manner. They will further jointly recommence use of the communication log book, and maintain same either by hard copy or by email, with the purpose of providing each other with ongoing updated information as to the child's progress, and observable deficiencies as applicable.

Third, the parties will communicate as joint legal custodians with the child's teachers and therapists and commence the establishment of a group email listing for ongoing communication on the child's gains and deficiencies between the date of this Order and the November 17, 2014 conference, to further discuss the child's progress so that parents and professionals alike are all active participants in the information loop, with an opportunity to share relevant observations and discuss issues relevant to the child's ongoing progress. The parties will cooperate with, and follow, the advice and recommendations of the child's ABA therapist on how

to improve the consistency of approach and scheduling of the child's educational development in each home, so that the approaches are consistent rather than inconsistent with each other.

Fourth, the Court directs that the parties jointly obtain from both the child's teacher as well as home ABA therapist, private speech therapist, and occupational therapist, updated reports dated no later than November 10, 2014 indicating what if any progress the child has made following the date of this Order and what deficiencies if any have developed or remain intact without improvement, along with any ongoing recommendations and suggestions for how the parties may together best address such deficiencies as well as the child's ongoing educational needs.

Fifth, between the date of this decision and the November 20 status conference, the parties will fully cooperate with each other with maximum flexibility in attempting to reach a mutually agreeable parenting schedule which accommodates not only both parties' schedule, but most importantly, the child's ongoing therapy schedule as well. If they are unable or unwilling to do so, then pursuant to Rule 5:8A, a court may appoint a guardian ad litem, at both parties' costs, to investigate and report to the court with recommendations on parenting time as well as any other autism-related issues. In a case involving (a) an autistic child with special needs, and (b) parents who, for whatever reason, have

fundamental issues in dealing and cooperating with each other, such appointment may be particularly helpful and consistent with the court's role in exercising parens patriae jurisdiction, which is to protect and watch over the interests of children who are incapable of protecting themselves. In re Baby M, 217 N.J. Super 313, 324 (Ch. Div., 1987), rv'd on other grounds, sub.nom., Matter of Baby M, 109 N.J. 396 (1988).

In dealing with the custody and control of infants, the touchstone of the court's jurisprudence is the safeguarding of the children's welfare and happiness. A court may make such order touching the care, custody, education and maintenance of the children as the circumstances of the parties and the nature of the case renders fit. See Henderson v. Henderson, 10 N.J. 390, 395 (1952). In this case, the court will presently refrain appointing a guardian ad litem, opting instead to provide the parties with one more opportunity to demonstrate to the court, and to themselves, that they can co-function in a cooperative manner for the sake of their disabled son. If, however, the parties return to the court with a record of ongoing continuous disharmony relative to their son's needs, and choose contentiousness and litigiousness over mutually mature and respectful cooperation, the Court may exercise its discretion to appoint a guardian ad litem at both parties' expense for the child's sake.

The court enters this order with the hope and expectation that these two parties have within themselves the ability, and desire, to help their son. The question which remains to be answered is whether that desire outweighs all of the personal negative feelings which the parties may have against each other. If their true top priority is to help their child, they now each have a fresh opportunity to prove this point to the court, through actions rather than words.

As noted, the court orders both parties to return to court on November 17, in person, to advise of any and all progress over this upcoming two month period in meeting the specific steps set forth in this opinion.<sup>14</sup>

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<sup>14</sup> On November 17, 2014, the parties returned to court and jointly reported that since the last court proceeding, they did in fact jointly attend parental training for autism together, and have further begun to deal with each other in a positive and mutually respectful fashion. More significantly, the child's home therapist confirms this development, writing a report to the court indicating that since the prior court date, ". . . we have seen continued progress with (H.W) in areas of academics and communication." Further, "(A)s everyone has started to focus and working on improving his communication, his expressive communication has started to improve . . . ." The therapist adds that the most important point is for the child's parents to continue this course and "present a united front, keep their lines of communication open, and be consistent and positive." Finally, both parties, as parents, stipulate that based upon the noticeable improvement in the situation, there is no further need for ongoing court proceedings, and by joint stipulation the court concludes and closes the litigation and court proceedings at this time, without prejudice, and with all prior orders remaining in effect.