

AUTISM AND THE LAW SERIES

Part 4: Separation, Divorce and a Child With Autism

By Lawrence R. Jones

This article is the fourth and final installment of a special series in honor and recognition of National Autism Awareness Month.

The United States Center for Disease Control (CDC) has recently reported that one in 59 children have Autism Spectrum Disorder (ASD). Given the nearly 50% divorce rate in the United States, it is mathematically likely that a reasonably active matrimonial attorney will, over the course of a career, professionally participate in one or more cases involving parents of a child with autism.

Unfortunately, when one mixes a contentious divorce with the unique challenges and responsibilities of raising a child with autism, a complex dynamic often emerges. Specifically, two participants ending an unsuccessful marriage with “irreconcilable differences” must nonetheless attempt to work functionally together as joint parents in accepting, understanding and

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meeting their child’s special and intricate needs. Inherent in this joint obligation is the further need of each parent to fully and fundamentally appreciate how a failure of mutual cooperation can potentially threaten the child’s progress and ability to fully reach his or her potential regarding behavioral improvement, mainstreaming and independent functioning.

Studies repeatedly show that children with autism have an increased chance of improvement when they receive: (a) an early diagnosis and (b) intense early invention via behavioral therapy and other related therapies. What most, if not all, therapies appear to have in common

is the requirement of application of intensity and consistency in reinforcement on a regular (daily) basis. Additionally, studies show that the earlier the child is diagnosed and professional intervention begins, the greater chance there may be of success. This concept is based upon the idea of *plasticity* of the brain, meaning that the brain is more flexible and susceptible to changing its thinking patterns when a child is very young. Conversely, the older a child grows with little or no behavioral intervention, the smaller the window of opportunity may shrink for the child to ultimately achieve results in accordance with his or her inherent potential.

For this reason, it is beneficial for both parents to be fully on the same page in supporting sustained consistency of the therapeutic approach, delivery and reinforcement in the generalized settings of the child's everyday life. In the case of a contentious separation or divorce, however, former partners often have "irreconcilable differences" over absolutely everything, and either cannot or *will not* attempt to respectfully and effectively communicate or cooperate with each other on anything at all. Instead, power struggles often supersede logic and reason, leading otherwise reasonable and responsible parents to spend exorbitant time, money and negative energies on contentious litigation, while emotionally destabilizing their own child in the process.

In the case of a child with autism, parents who engage in a never-ending war with each other may not only stress their child, but can impair the intensity and consistency of the child's ongoing therapeutic program. While some divorced parents of a child with autism are in fact able to put their past marital issues aside and work together to maintain a consistent approach between two homes during each party's respective parenting time, other ex-couples are not so successful. Instead of peacefully, flexibly and constructively synchronizing their efforts for their child's sake, they perpetually fight and create their own impediment to a consistent approach and therapy schedule. This unfortunate circumstance sometimes leads to stagnation or even regression in the child's improvement, which may have long-term consequences on the child's road to mainstreaming, functioning, and his or her possible

chance of achieving independence as an adult.

So long as there is no restraining order prohibiting contact between the parties, separated or divorced parents of an autistic child generally have a clear ongoing obligation to attempt to cooperate and consistently address the needs of the child, rather than dooming the child's chances for improvement as the result of ongoing parental hostility and dysfunction. Often, following educational mediation sessions, counseling sessions or settlement conferences, the parties agree to forge a working relationship as divorced co-parents for the child's sake. When parties are unable or unwilling to do so, however, custody litigation often arises.

In custody litigation, a court's function is to protect the child's best interests. *Hoefers v. Jones*, 288 N.J. Super. 590, 608 (Ch. Div. 1994). The controlling consideration is the child's welfare. *See Sobel v. Sobel*, 46 N.J. Super. 284, 286 (Ch. Div. 1957). For certain, a court in any case must consider the statutory factors in the New Jersey custody statute, N.J.S.A. 9:2-4. Among the relevant statutory factors for consideration are: the needs of the child, the safety of the child, the quality and continuity of the child's education, and the fitness of the parents. Notably, however, the statutory factors for custody under N.J.S.A. 9:2-4 are not exclusive or exhaustive. To the contrary, the statute expressly states that in making an award of custody, "the court shall consider but not be limited to the (statutory) factors."

Accordingly, several years ago, the author of this article joined with noted autism expert Dr. David

Holmes (formerly of Princeton University) to develop proposed additional criteria for family courts to consider when adjudicating custody litigation concerning a child with autism. Labeled as the "Jones-Holmes criteria," these considerations were published in a 2009 article in *New Jersey Lawyer* magazine entitled: "Autism and Divorce: Guidelines for Family Court Practice," and were further presented at the Autism Society of America's annual convention in Pittsburgh in 2013, and the American College of Forensic Psychology symposium in San Francisco in 2008. The author included the criteria in the unreported opinion of *Rooney v. Wall* (Ocean County, 2015), which involved custody of a child with autism.

The Jones-Holmes criteria include the following additional factors, which a court may appropriately wish to consider on issues concerning custody and the child's best interests:

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 acknowledgment 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 which may be involved with raising a particular child;
8. Each parent's understanding and appreciation of the importance of early intense and consistent 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.

Pursuant to N.J.S.A. 9:2-4(a) a court has discretion to establish different types of custody, including joint or sole residential or legal custody. Public policy generally favors joint legal custody. *Beck v. Beck*, 86 N.J. 480 (1981). However, joint legal custody requires an ability of parties to agree, communicate and cooperate in matters involving the health, safety and welfare of the child. If there is no ability to cooperate, then sole custody may be appropriate in some circumstances. See *Nufrio v. Nufrio*, 341 N.J. Super. 548, 552 (App. Div., 2001).

Before granting sole custody to one parent, however, a court has discretion to provide an opportunity for a previously non-cooperative parent of an autistic child to demonstrate the ability to act in a manner consistent with the child's special needs. With regard to parenting time with an autistic child following separation or divorce, it is generally recognized that absent compelling circumstances, each party will be entitled to reasonable parenting time in his/her home. Indeed, public policy favors the right of the parents and child to have parenting time. See *Wilke v. Culp*, 196 N.J. Super. 487, 496 (App. Div., 1984). Yet, in determining the parenting specifics of a custodial arrangement, a primary and controlling consideration is the welfare of the child. See *Fiore v. Fiore*, 49 N.J. Super. 219, 225 (App. Div. 1958). When weighed, balanced against the constitutional principles, *parens patriae* jurisdiction must be of paramount importance. See *Hoefers v. Jones*, 288 N.J. Super. 590, 608 (Ch. Div. 1994).

Accordingly, while it is understood that the accommodation of a reasonable parenting schedule between homes may logically require consideration of some reasonable flexibility or adjustment to a therapeutic schedule that has been in place for the child, a parenting schedule should not unduly or unreasonably interfere with the general ability of the child to attend a regular schedule of behavioral therapy with intensity and consistency. Further, when possible, the parents should attempt to implement similar approaches to

therapy and reinforcement in their homes, so as not to go against the child's need for consistency by presenting inconsistent or conflicting expectations. Additionally, when possible, both parents should be simultaneously receiving the same information, advice, input and feedback from any of the child's treating professionals (therapists, teachers, etc.), so that the parents are on the same page in providing a consistent program to enhance the child's potential progress.

It is advisable for both parents to engage in consistent and ongoing parental training on autism. Additionally, when permissible and not prohibited by a restraining order, parents should strive to engage in positive, constructive, coordinated communication with each other on the child's progress. There should be no parental arguments in the child's presence which may cause the child unnecessary stress.

If the evidence reflects that a parent is acting in a manner which unreasonably interferes with or undermines the autistic child's therapeutic and educational program, or need for parental cooperation and support of a consistent program, a court may take any and all action to protect the child's interests, including short or long term modifications of custody and parenting time schedules, and/or a requirement of further mandatory education for the interfering parent on the nature and intricacies of autism. Hopefully, with responsible and cooperative conduct by both sides, such steps will rarely be necessary to protect a child's best interests. ■