

BEST INTERESTS OF THE SPECIAL NEEDS CHILD: MANDATING CONSIDERATION OF THE CHILD'S MENTAL HEALTH

Hindi Mermelstein, Jamie A. Rosen, and Carolyn Reinach Wolf

There has been a considerable increase in the number of separation and divorce cases in family court involving special needs children. However, most states do not consider the mental and physical health needs of the child in determining what is in the best interests of the child. The special needs of the child due to a mental illness or behavioral disorder must be a statutorily required factor when a court makes a custody decision and/or designs a parenting plan under the "best interests of the child" standard.

Practitioner's Key Points:

- The existence of a mental illness or behavioral disorder in a child presents unique challenges to the family court in determining custody and designing a parenting plan.
- Commonly recommended parenting plans may not be appropriate for a special needs child, especially when that child will require parental involvement beyond age eighteen.
- The special needs of the child due to a mental illness or behavioral disorder must be a statutorily required factor when a court makes a custody decision and/or designs a parenting plan under the "best interests of the child" standard.
- Family court judges can consult with clinical experts to adequately understand the child's needs and address them in the custody decision and parenting plan.

Keywords: *Behavioral Disorder; Best Interests; Custody; Divorce; Mental Health; Mental Illness; and Special Needs.*

I. INTRODUCTION

In adjudicating child custody or designing a parenting plan, the court is required to weigh multiple factors to determine what is in the best interests of the child.¹ In most states there is no prescribed formula, only a list of factors that the court should consider, including the parenting skills of each parent, the physical and mental health of the parents, domestic violence, existing custody agreements, and finances of the parents, among others.² This list of factors to consider in determining the best interests of the child, while not exhaustive, is heavily focused on the parents. Absent from this list, and from the list of factors that most family courts in the United States consider in making a custody determination, is the psychological well-being and mental health of the child.³ When a child suffers from any type of mental health, psychiatric, or behavioral disorder, the family will likely face a variety of challenges that must be addressed throughout the process of a custody dispute.⁴

Custody decisions and parenting plans⁵ for typical children do not contemplate many of the unique decisions that must be made for those with special needs. Commonly recommended parenting plans may not be appropriate for a special needs child, especially when that child will require parental involvement beyond age eighteen. First, children with special needs are more likely to thrive in a structured environment, requiring "consistent and predictable routines" and "advanced preparation for changes."⁶ Second, parenting plans must contemplate the child's increased need for supervision and/or professional intervention in order to ensure that the child has the necessary psychiatric, behavioral, and medical support s/he needs. Lastly, an appropriate parenting plan for a special needs child should provide flexibility, allowing the parents to plan ahead and hopefully avoid court intervention to modify any agreements.

Correspondence: drhmermelstein@optimum.net; jrosen@abramslaw.com; cwolf@abramslaw.com

The special needs of the child due to a mental illness or behavioral disorder must be a statutorily required factor when a court makes a custody decision and/or designs a parenting plan under the best interests of the child standard. This article will examine the specific challenges facing a family court judge when determining custody and designing a parenting plan for a special needs child, specifically a child that suffers from a mental illness or behavioral disorder. Part II presents an overview of a “best interests of the special needs child” analysis, including the unique needs of a special needs child, parenting capacity to attend to those unique needs, and consideration of other family members, particularly siblings, if any. Part III discusses the issues of a typical parenting plan and how parenting plans must be catered to the child’s specific mental health needs. Part IV explores a proposal for statutory change, requiring that the mental health needs of the child be considered in a best interests analysis. Part V addresses how judges can consult with clinical experts in order to adequately understand the child’s needs and address them in the custody decision and parenting plan. Finally, Part VI concludes by reinforcing that when evaluating what is in the best interests of the child, we must focus on the child’s specific needs.

II. UNDERSTANDING THE SPECIAL NEEDS CHILD AND THE FAMILY DYNAMIC

Determining parenting plans and living arrangements that are grounded in a child’s best interests requires an individual analysis of each family member. All states have statutes requiring that the court consider the child’s best interests when decisions are made “regarding a child’s custody, placement, or other critical life issues.”⁷ However, there is no standardized list of factors, and few states have mandatory factors that the court must consider in its best interests analysis. In New York, for example, the court must base its custody determination on the totality of the circumstances.⁸ Courts view each of the factors independently and no one factor is determinative.⁹ In the case of a custody dispute over a special needs child, the court must be required to examine the child’s specific psychological or mental health needs; the parents’ ability to understand, support, and pay for those needs; and the needs of any siblings.¹⁰

A. THE SPECIAL NEEDS CHILD

The safety and well-being of the child is the family court’s primary concern in making a custody decision. That being said, it should follow that the court must evaluate the particular needs of the individual child in order to ensure that s/he is safe and well cared for. For the special needs child, the safety risks and the need for care is often elevated. A custody decision and parenting plan should, in part, be based on the nature and severity of the illness; the necessary medical or mental health and behavioral treatment; and the child’s emotional, social, educational, and financial needs.¹¹

The treatment regiment of a special needs child typically occupies part of the child’s daily routine. The child may require ongoing medical or mental health care, medication, and/or appointments with professionals in the medical and mental health fields.¹² Because the individual in question is a minor, all of this care and treatment requires constantly evolving decision making and consent of the child’s parents. The court, in determining custody and designing a parenting plan, must delineate who will be responsible for making these critical decisions, who will monitor the process, and how information will be shared.

A special needs child often requires increased emotional or social support and encouragement. Special needs children frequently have worse school performance, face many societal issues, and in turn may experience elevated risks of self-harming behavior.¹³ The special needs child may qualify for special education and/or require an Individualized Education Program. All of these needs incur costs and may require financial support throughout the child’s life, extending well beyond the age of eighteen. When it comes to planning for the special needs child’s future, the parenting plan should consider options for postsecondary education, employment, and independent living.¹⁴ In fact, many

psychiatric disorders are often exacerbated with age or may lead to dual diagnoses with a substance or alcohol abuse problem.¹⁵ Additional expenses include, but are not limited to, private education or tutoring, medical care and therapy, mental health treatment and medication, and residential living or supervised living arrangements.¹⁶ Parents may need to plan in advance how they will support the adult special needs child who is incapable of supporting him/herself.¹⁷

B. THE PARENTS

A special needs child demands a higher level of supervision and care. As a result, a special needs child requires “extraordinary parenting.”¹⁸ The court must consider the parents’ insight and understanding of the child’s special needs and the parents’ respective commitment and availability to pursue medical, educational, therapeutic, and financial assistance for the child.¹⁹ In a perfect world, both parents would acknowledge and understand their child’s mental illness or behavioral disorder, inquire about the child’s unique needs, find appropriate clinical professionals to provide the necessary evaluation and treatment, and work together to support and advocate for that child in an ongoing way.²⁰ Unfortunately, this ideal is not a reality especially if the couple is involved in a custody dispute before a family court judge.

The court must evaluate each parent’s awareness and acceptance of the child’s special needs, history of involvement with treatment, and willingness to provide the multifaceted supports required. An obvious issue occurs when a parent denies a psychological or mental health issue exists, refuses to cooperate with treatment, and impedes or actively intervenes to prevent treatment. On the other hand, a parent might be extremely devoted to the child and his/her needs, advocating zealously for that child to succeed, making and attending doctor appointments, researching therapies or advancements in psychology or psychiatry, handling insurance issues, and appropriately administering medication. Somewhere in the middle might be a parent who acknowledges a mental health issue exists, but is careless or even irresponsible when it comes to attending doctor appointments or administering medication, or a parent who does not have the energy, emotional stamina, time, or money to properly tend to the child’s needs.

The parents’ availability and financial resources are two very important factors to consider when determining which parent should have physical custody of the child.²¹ Often the parent with the most time and means will be the best option for primary caretaker.²² The court must review records of all the current and potential future costs of the child’s care and treatment including therapy, counseling, doctor visits, medications, possible hospitalization costs, hiring of case managers or other clinical professionals, nonparental caregiver costs, transportation, and any other costs.²³ With the extreme cost of a contested divorce proceeding in addition to the high costs of care required for the child, one or both parents may not be available as a full-time caregiver. There is frequently a need for employment outside of the home, which further limits the availability of even the primary parent.²⁴ Unfortunately the costs do not end when the child turns eighteen. It is important for the court to understand, in detail, how the child’s potential inability or decreased ability to earn a living will impact the finances of each of the parents, taking into consideration the child’s job potential, future income, need for comprehensive health insurance, and eligibility for public benefits, among others.²⁵

C. THE WELL CHILD OR TYPICAL SIBLING

If there are other children within the family unit, the court’s determination of what is in the best interests of the children must also adequately consider the other siblings who may be well or who may themselves have special needs. The court must weigh the benefits and risks of splitting up siblings versus keeping them together. For example, if the children are close, they should remain with each other as much as possible. If one sibling has parenting time with the noncustodial parent, the special needs child should also be permitted the same parenting time, if possible. If the children are separated or not permitted the same visitation, the child with special needs may feel different or not

good enough.²⁶ However, the court's determination must adequately address the needs of all of the children, both healthy and disabled, and assess each child's needs individually.²⁷ The parenting plan should specifically include the typical children.

III. DEVELOPING A PARENTING PLAN FOR A SPECIAL NEEDS CHILD

Childhood is a time of physical, cognitive, psychological, and social growth. The successful negotiation of the stages of maturation allows entry into adulthood with relational and emotional health, having completed a series of developmental milestones. Unfortunately, some children are beset by significant problems in bio-psycho-social arenas with resultant emotional, behavioral, cognitive, and even physical difficulties.

All development is the product of the interaction of interrelated biological and psychosocial influences. Divorce, which disrupts the family structure, the primary environment, and social context for children, has now become a normative event affecting a large number of marriages in the United States. Though each child will react to the trauma of divorce in his/her or own unique way, overall, children of divorce are affected by the experience both immediately and in the long term. A series of studies has reported that children of divorce are more likely to suffer from lower self-esteem, increased depression, lower academic achievement, poor social competence, and acting-out behaviors during childhood and adolescence and may have increased risk for problems with intimacy and adult relationships.²⁸ Postdivorce childcare, custody, and living arrangements are ideally based on the best interests of the child. However, the problematic elements considered may be limited in scope, tend to lack fluidity and flexibility, and lack adequate attention to future needs. The explosive growth in the number of children affected by divorce has led to increased attention to this topic in general, but the special needs of the mentally ill or behaviorally disordered child remains an active area of concern.

A. NEED FOR CONSISTENCY, STABILITY, AND STRUCTURE

A healthy psychological outcome is most likely when children are raised in a milieu that is psychologically and physically safe while providing a consistent, supportive, and nurturing environment. By tending to basic needs, primary caretakers, most often parents, create the setting in which children can develop into their optimal selves. Divorce, which disrupts the protective nest, is most often experienced by children as sudden and traumatic, even in families marked by high conflict. It is the stable attachment and consistency of primary caregivers that enable children to internalize the concept that others are trustworthy, to develop a positive sense of self, and to have confidence in their ability to effectively respond to the world around them.²⁹ In the immediate postdivorce period children yearn for and fantasize about reunification and may suffer from the grief at the threat of loss, real or perceived, of the primary parent.³⁰

Furthermore, for the noncustodial parent there is a loss of time spent with children as well as a decrease in the level of closeness. Divorce can lead to a change in the financial status of the parents, particularly when the custodial parent is the mother. There is frequently a need for employment outside of the home, which further limits the availability of even the primary parent. Additionally there is a high incidence of postdivorce depression among the adults, which adds to the emotional withdrawal felt by the children with an exaggerated effect for preschoolers.³¹

Jeopardizing the constancy and integrity of the parent-child relationship is psychologically traumatic. It is the second most significant contributor to the negative impact of divorce on children, second only to high levels of conflict.³² For the child who already suffers from anxiety and depression, psychotic thinking, or severe attention deficit disorder, this breach of security and threatened destabilization of the usual psychological support system puts the child at a greater risk for increased symptoms (both emotional and behavioral), declining function, and decompensation. Children who are

psychiatrically ill are fragile and have a limited ability to cope with change in the best of times, let alone during the tumult of a divorce. This is exacerbated by the loss of the stable family unit, particularly the mother–child relationship, which provides consistency, support, and modeling.³³ Young children’s tendency to engage in imaginary thinking is fraught with risk for psychiatrically unstable children. Such children have an increased predilection to assume responsibility for the conflict and therefore the divorce causes them to suffer from feelings of guilt, failure, exacerbated depression, and poor self-efficacy and esteem.³⁴

When the structure of the household is ruptured, as in divorce, there is a resultant loss of the ability to provide the necessary stable platform. Children who are psychiatrically ill often struggle in school, irrespective of intellect level, due to a variety of factors including disorganized thinking, decreased concentration, mood symptoms, sleep disturbance, amotivation, psychotic ideation, or hallucinations. Learned adaptive behaviors can moderate the impact of divorce, but children whose cognitive ability is affected lose important skills for handling trauma.³⁵ Parents play a pivotal role in the development and application of educational-treatment plans.³⁶ They provide the platform on which children can learn behavioral regulation and learning habits.³⁷ A number of studies have shown that divorced custodial parents invest less time, have fewer rules, and less supervision than married couples, but at the same time are harsher with discipline and have more parent–child conflict.³⁸ As with the psychological stressors, the education-related impediments experienced by both the custodial and noncustodial parent exacerbate an already problematic situation and lessen the potential for stabilization and adaptation for the child that requires structure, patience, tolerance, behavioral practicing, time, and consistency.

Mentally ill and behaviorally disordered children require an increased degree of constancy because they have a reduced ability to cope with change. Though alienation of the noncustodial parent can occur in any population, the high level of anxiety, difficulty adjusting, acting-out behaviors, and regressed relationships frequently present during divorce add to the risk.³⁹ In this population there may be a benefit to sole physical custody where the child remains physically with the primary parent. This may limit the disruption divorce causes for the child and decrease his/her terror of abandonment and anxiety about an unpredictable future. Particularly in the immediate postdivorce period, there is likely to be a temporary worsening of the symptoms, increased levels of stress, and intensification of acting-out behaviors. Maintaining normal routines that are stable, predictable, and consistent can help reassure the child and create a dependable base on which adaptation to the new normal can begin to occur. Custody decisions and parenting plans for this population should underscore these serious concerns. When assessing the best interests of the child, all the components (psychological, psychiatric, educational, social, medical, legal, and financial) should be acknowledged and carefully assessed from a risk–benefit perspective for this very vulnerable population.⁴⁰

B. NEED FOR SUPERVISION AND INTERFACE WITH MENTAL HEALTH PROFESSIONALS

Special needs children already suffer from many of the problems that normally occur in the predivorce period, which amplifies their distress and dysfunction and reduces their adaptive ability. At this time when their needs are most heightened, the very person(s) they rely on for guidance, support, coping skills, and care may not be psychologically or physically available to them. Adverse events, such as divorce, amplify the risk for decompensation with a resultant increase in psychiatric morbidity and even death. A study of adolescents admitted to psychiatric units found a disproportionate percentage were children of divorce.⁴¹ Depression involves an inherent risk of suicide or parasuicidal behavior, as do psychotic disorders, particularly in the early stages. Substance abuse, school problems, poor socialization skills, and high levels of psychological distress plague these children and are all exacerbated by the crisis of divorce. Parenting plans should attend to the need for supervision both for safety and to ensure that the parent(s) are themselves able to function and to provide the necessary emotional, cognitive, and behavioral support that the children require.

Families undergoing divorce find themselves caught in a judicial system that may be alien to them. There are often multiple people involved in a variety of capacities. However, for the special needs child there must be an active interface with mental health professionals to assess, recommend, consult, and treat the child and the family system. Psychiatric symptoms can be ameliorated, quality of life can be improved, and distress can be diminished with the possibility for an improved prognosis over time. Mental health professionals should ideally have familiarity with forensics as well as child and family issues. The children's need for bio-psycho-social care is ongoing and the parenting plan should include a component mandating this care and monitoring the delivery of care.

C. NEED FOR FLEXIBILITY AND PLANNING AHEAD

Parenting plans are typically predicated on the current needs and the relatively predictable future development of the child. The level of functioning of the special needs child has wide variability depending on the nature of the illness, the child's clinical state, and the level of symptom control. Psychiatric illness is dynamic; the child's clinical status and hence his/her care needs continually change. It is nearly impossible to accurately predict or even approximate what will be required in the future.⁴²

That being said, it is difficult to reopen a custody case or modify a parenting plan without encouraging litigation.⁴³ Most parenting plans agreed upon by both parents "will govern the daily rhythm and schedule of children without change until they turn [eighteen]."⁴⁴ All parenting plans must provide for a method of making modifications, as well as a schedule of periodic review of the plan. This type of provision is absolutely essential to ensure the needs of the child are adequately met as that child ages or as the child's mental illness progresses. For example, children with mood disorders can function far below their developmental level while depressed, but function at grade level between episodes.⁴⁵ Children with prodromal psychosis are at risk for worsening social and academic outcomes, which presages the illness. However, the first break of schizophrenia most commonly occurs in late adolescence or even young adulthood and will likely require special care for life.⁴⁶ Older children with attention deficit disorder may appear childlike or age appropriate depending on the setting and circumstances.⁴⁷ Clear drafting of a parenting plan will help parents overcome disagreements and make decisions in their child's best interests without delaying needed treatment or returning to court.

The parenting plan for a special needs child must contemplate that child's future beyond age eighteen, including an evaluation of several legal and financial issues. For example, who will care for the child once s/he reaches the age of majority? It may be wise for parents to discuss guardianship or conservatorship in anticipation of the fact that the special needs child will require care and treatment as an adult. There are also several long-term financial obligations to consider such as housing arrangements, medical and mental health treatment, medications and medical equipment, education, and potential unemployment throughout the child's future adult life.⁴⁸ It is important for parenting plans to anticipate these uncertainties and provide avenues for modification as the child ages to avoid continuous litigation.

Parenting plans for the psychiatrically ill, special needs child are best designed with inherent flexibility. The assignment of a professional to oversee the child's progress should also be charged with modifying the treatment and parenting plan as clinical situations and needs change. Particularly in this population, it is critical to not only think about the state of the child at present, but also contemplate the fluctuating impact of the condition over time.

D. CONCLUSION

Children function best when they are attended to and cared for in a stable, consistent, and loving way. Children with mental illness or behavioral disorders struggle with the added burden of illness that can affect their ability to think clearly, behave rationally, and even experience life at its fullest. Disruption of the family unit affects everyone it touches. Most individuals recover and may even develop

hardiness, a resiliency that will serve them well in the future. The special needs child is at greater risk for adverse reactions to, and outcomes of, the traumatic event both immediately, at the time of divorce, and in the long term. Parenting plans for this pediatric subgroup needs to address the multidimensional clinical situation, attend to the need for stability and consistency, and provide the supervision and risk assessment required, all while maintaining a flexible, optimistic, and future-oriented approach.

IV. PROPOSAL FOR STATUTORY CHANGE: MANDATORY CONSIDERATION OF THE CHILD'S MENTAL ILLNESS OR BEHAVIORAL DISORDER

The special needs of a child due to mental illness or behavioral disorder must be a mandatory factor to consider in making a custody decision and designing a parenting plan under the best interests of the child standard. While the presence of domestic violence in the home, for example, is a mandatory factor that New York courts must consider when determining the best interests of the child, the special needs of a child is only a possible factor the court *may* consider. No legislation currently exists that specifically mandates courts to consider the custody and safety issues for divorcing families with special needs children.⁴⁹

Almost every state and the District of Columbia list in their statutes specific factors for courts to consider in making determinations regarding the best interests of the child. While the factors vary considerably from state to state, some factors considered include parenting capacity, the child's wishes, age of the child, parents' respective willingness to support the child's relationship with the other parent, and physical and mental health of the parents, among others. In determining what is in the best interests of the child it only makes sense that the court should be required to evaluate the mental and physical health of all individuals involved, especially the children, and specifically the child's mental illness or behavioral disorder, if any.

A. DOMESTIC VIOLENCE IS A MANDATORY FACTOR IN ALMOST EVERY STATE'S BEST INTERESTS OF THE CHILD STANDARD

As of 2008, the presence of domestic violence in the home was listed as a specific factor to be considered in the best interests of the child statute of forty-three states.⁵⁰ In addition, nineteen state statutes provide extra weight for domestic violence as a factor when considering custody determinations.⁵¹ In New York, domestic violence is a mandatory factor to be taken into consideration when making a custody or child support decision based on the best interests of the child standard.⁵² The statute provides that "the court must consider the effect of such domestic violence upon the best interests of the child, together with such other factors and circumstances as the court deems relevant."⁵³

It is time for New York and the remaining states to implement the "mental and physical health needs of the child" or some other variation, as a mandatory factor to be evaluated in a best interests of the child analysis. This will allow courts to make better determinations when dealing with a family separation where a child has special needs, but more importantly it will benefit the special needs child who has more critical and distinct needs than the typical child.

B. REQUIRING CONSIDERATION OF THE SPECIAL NEEDS OF THE CHILD IN A BEST INTERESTS ANALYSIS

Family court judges are more frequently facing separating or divorcing families who have a special needs child.⁵⁴ There have been considerable increases in the number of young children diagnosed with special needs, including but not limited to acute, life-threatening medical conditions; chronic developmental disorders; and psychiatric illness and behavior syndromes.⁵⁵ Added to the explosive growth in the number of children diagnosed with autism, attention deficit disorder, and other neuropsychological problems, there is hardly a day that a family law judge across the country is not faced with a special needs child.⁵⁶ However, as of 2012, only eight states and the District of

Columbia specifically consider the mental and physical health needs of the child.⁵⁷ For example, Virginia courts determining the best interests of the child consider the “physical and mental condition of the child, giving due consideration to the child’s changing developmental needs”.⁵⁸ Maryland case law provides the court with a list of factors that the court *may* take into consideration in determining the best interests of a child, including the “stability and mental health of each child.”⁵⁹ In addition, there are often guiding principles for the court when making best interests determinations, but only nineteen states provide a specific principle in regards to the “health, safety, and/or protection of the child.”⁶⁰

The number of court decisions in which the judge had to consider the special needs of a child in the best interests standard has been increasing. For example, in *Walter v. Walter*, the Supreme Court of Wyoming found that shared custody arrangements were not appropriate for the special needs children.⁶¹ Moreover, visitation schedules were changed on appeal due to the children having difficulty with transitions between the households.⁶² In *Maillet v. Maillet*, the Superior Court of Connecticut determined that the mother was best able to manage the unique needs of her three special needs children and should therefore be the primary custodial parent.⁶³

In recent years, New York cases have specifically mentioned and factored in the special needs of a child. In *Mark RR. v. Billie RR.*, the court determined it was in the special needs children’s best interests to award sole legal and primary physical custody to the father.⁶⁴ The court found that the mother’s inability to understand or cope with the children’s special needs contrasted with the father’s maintenance of a stable home environment as well as his involvement in ensuring that the children’s medical, emotional, and educational needs were satisfied.⁶⁵ In *Goldsmith v. Goldsmith*, the court awarded sole custody of the child to the father because the mother refused to cooperate with school officials in addressing the child’s special educational needs and had consistently made unilateral decisions affecting the child’s care and development.⁶⁶ In *Ganzenmuller v. Rivera*, the Supreme Court, Appellate Division, held that the father was better equipped to provide a stable home environment and to provide for the child’s special needs.⁶⁷

Failing to incorporate the special needs of a child due to mental illness, behavioral disorders, and other disabilities as a mandatory factor for courts to consider in a best interests of the child analysis will lead to a slippery slope of future risks to the special needs child. Courts must “keep everyone’s focus on the duty to protect the weakest, most vulnerable actor in the separation or divorce process.”⁶⁸ To achieve this goal, state standards regarding the best interests of the child must mandate the mental health of the child, as they have already done with domestic violence. Changes need to be made as the number of families appearing in court with a special needs child continues to increase.

V. CONSULTING EXPERTS TO PROVIDE A CLINICAL REVIEW OF THE CHILD’S SPECIAL NEEDS

The family court system must navigate the unique needs of the special needs child in resolving a custody dispute.⁶⁹ Judges are not mental health professionals, nor do they usually have the essential behavioral and social science or medical training needed to evaluate the pertinent clinical information and understand how it impacts a child’s life and the ability to parent. Therefore, it is highly recommended that family court judges use a variety of experts available to them such as custody evaluators and/or co-parenting counselors. The court may also wish to review information from the child’s teachers, therapists, or other clinical professionals currently treating the child, including school and medical records.⁷⁰ These individuals can provide the clinical analysis needed to appropriately evaluate all of the information relevant to a final custody determination and parenting plan.

A. CUSTODY EVALUATORS IN CHILD CUSTODY PROCEEDINGS

One of the family court’s greatest obstacles in a child custody proceeding is the lack of adequate and credible information regarding the child’s special needs and the parents’ respective abilities to

provide for those needs.⁷¹ The parties almost invariably disagree on the severity of the disability and/or the child's abilities. Through the appointment of an expert, in the form of a custody evaluator or forensic evaluator, the court can obtain the necessary information about the child's condition, treatment, and prognosis as well as the parents' skills and deficits.⁷² Such evaluation may be requested by the parents or attorneys or ordered by the court.⁷³ The expert is usually a licensed mental health professional, such as a psychologist, psychiatrist, or clinical social worker.

The purpose of a child custody evaluation is to assist the judge in determining the best interests of the child. This requires an objective assessment of the needs of the child, the parents' respective ability to meet those needs, and the overall family dynamic. The evaluation should encompass a review of medical and mental health records, interviews and psychological testing of both parents and the children, home visits with each parent, and collateral contacts such as friends or other family members. The Association of Family and Conciliation Courts Model Standards of Practice for Child Custody Evaluation specifies that child custody evaluators should have professional knowledge and training when special issues arise in child custody evaluations.⁷⁴ Consistent with such standard, where parenting plans and custody decisions will be made for families with special needs children, evaluators should have specialized knowledge of child mental illness or behavioral disorders and/or any disabilities in question.⁷⁵ In general, child custody evaluators must demonstrate a certain level of expertise requiring constant training and education about psychiatric illness, child and family development, and the impact of divorce on children, among others.⁷⁶

In New York, the Mental Health Professionals Panel was established by the Appellate Division, First and Second Judicial Departments, to ensure that courts and parties have "access to qualified mental health professionals" that are available to evaluate the parties and to assist courts in reaching appropriate decisions as to custody and visitation.⁷⁷ This panel is responsible for recommending eligible professionals and recommending removal of those that are not fit. While courts cannot delegate to a mental health professional its authority to determine issues involving the best interests of the child,⁷⁸ the court has the ability to read the reports, and make decisions incorporating the unbiased determinations of such a professional.

A court-appointed forensic evaluation is a well-established part of custody litigation, intended to provide the court with an unbiased professional opinion.⁷⁹ The result of the evaluation is a written report with recommendations such as parenting time, medical or mental health care, and education. This report may encourage parents to reach an agreed-upon parenting plan or, if not, can assist the judge in making a final determination of custody by providing a credible clinical review of the child's needs.⁸⁰

B. CO-PARENTING COUNSELOR FOR ONE OR BOTH PARENTS

Raising a special needs child after divorce requires a high degree of collaboration between the parents. Even without this dynamic, parents will often use a child as a pawn to get back at their ex-spouse. A parent may reject a choice of school or camp simply because the other parent supports it. In extreme cases, a parent in denial of the child's needs may not take the child to appointments or administer medication. Putting a special needs child in the middle of this kind of tug-of-war and manipulation can have only harmful consequences, both to the parents and, more importantly, to the child.⁸¹ The court must evaluate each parent's ability to accurately assess and meet the emotional, intellectual, and physical needs of the child.⁸² In contentious cases like this, the court may require a co-parenting counselor for one or both parents. These counselors, who can be psychologists, psychiatrists, social workers or marriage and family counselors, will help parents forge a working relationship that puts their child's interests first.⁸³

In New York, a court may appoint a parent coordinator to resolve issues of visitation between the parents and the child. Where the record shows a need for therapeutic intervention to end destructive behavior toward each other and themselves, a co-parenting counselor or parenting coordinator is encouraged.⁸⁴ Co-parenting is an arrangement where both parents share responsibility for raising

their child or children in a spirit that promotes cooperation, healing, and growth. This counselor allows parents the opportunity to discuss the best interests of their children in a neutral environment and get input and advice from a professional who is experienced in working with children and families of divorce.⁸⁵ Parents of a special needs child may need clinical or family counseling to discuss the unique therapy, medical, and educational needs of the child, as well as discuss that child's future beyond age eighteen.

VI. CONCLUSION

Divorce is a distressing, painful, and disruptive process for all involved. The impact on both adults and children is often significant in the short term and may persist over time. For many children, divorce is a major life event and can have negative emotional, behavioral, social, and academic consequences. For special needs children, particularly those who struggle with mental illness and behavioral disorders, this trauma exacerbates their everyday symptoms, adding to the already present risk for poor psychological, social, and academic outcomes. The universal need of children for consistency, stability, and structure is even more critical in this pediatric group.

Custody arrangements are designed with the safety and well-being of the children in mind and are predicated on the best interest of the child. However, what factors must be considered in these decisions vary and hereto most courts have not recognized the specific, critical issues that exist when dealing with children with special needs due to mental illness and behavioral disorders. Similarly, common parenting plans may not sufficiently take into account the challenges that occur in this population. As outlined above, there are factors that should be mandatory considerations when these cases are adjudicated. In addition, judges should consult with professionals who can best evaluate the multifaceted elements for both the children and the parents, and whose involvement may be required over time, perhaps even for a child's lifetime. Though the pain of divorce is unavoidable, perhaps in this way the cost to the children need not be further amplified.

NOTES

1. Andrew Schepard, *Best Interests of the Child*, available at <https://www.childcustodyproject.org/essays/best-interests-of-the-child/> (last visited June 30, 2015). See, e.g., N.Y. DOM. REL. LAW § 240 (2014).

2. Susan L. Pollet, *Impact of Separation or Divorce on Special Needs children*, 244 N.Y.L.J. (2010), available at <https://www.nycourts.gov/ip/parent-ed/pdf/specialneedsarticle.pdf>.

3. There are several types of special needs children that appear in family court matters. For the purposes of this article we use the term "special needs" to focus specifically on children suffering from a mental illness, psychological dysfunction, or behavioral disorder, including anxiety, mood, and psychotic disorders; problems with adjustment and temperament; and conduct disorders, among others. While some of the concepts in this article may apply to children suffering from a medical condition, physical disability, developmental disorder, or autism spectrum disorder, this article does not specifically address those syndromes. See Donald T. Saposnek et al., *Special Needs Children in Family Court Cases*, 43 FAM. CT. REV. 566, 567 (2005).

4. Renée A. Rubino, *Marital Settlement Agreements: The Key to Life After Divorce*, 279 N.J. LAW. MAG. 46, 48 (Dec. 2012).

5. A parenting plan is a document created to govern the relationship between the parents relating to how decisions about the child will be made, how information will be shared between the parents, and often a time-sharing schedule for the parents and child. Jacqueline W. Silbermann, *Child Custody in Contested Matrimonials*, 80 N.Y.S.B.J. 16 (Jan. 2008).

6. Saposnek, *supra* note 3, at 572.

7. Child Welfare Information Gateway, *Determining the Best Interests of the Child* (2012), available at https://www.childwelfare.gov/pubpdfs/best_interest.pdf.

8. *Eschbach v. Eschbach*, 56 N.Y.2d 167, 171, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982); *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765 (1982).

9. Joel R. Brandes, *Judging the "Best Interests of the Child"*, N.Y.L.J., Feb. 23, 1999.

10. Ingrid B. Keller, *Raising Children on the Spectrum in Florida: Navigating the Road Less Travelled*, 83 FLA. B.J. 35, 36 (Jan. 2009).

11. *The Child's Best Interests in Custody Arrangements*, available at <http://family-law.lawyers.com/child-custody/the-childs-best-interests-in-custody-arrangements.html> (last visited June 30, 2015).

12. Barbara Epperson, *When Parents of Children with Disabilities Divorce*, 25.3 GPSOLO (April/May 2008), available at https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/parentsdivorce.html.
13. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).
14. Epperson, *supra* note 12.
15. See *Mental Illness Exact Heavy Toll, Beginning in Youth*, Press Release, NAT'L INST. OF MENTAL HEALTH (June 6, 2005), available at <http://www.nimh.nih.gov/news/science-news/2005/mental-illness-exacts-heavy-toll-beginning-in-youth.shtml>.
16. Sherri Donovan, *Listen to Our Children in Need: Special Needs Children and Divorce*, HUFFINGTON POST, May 4, 2012, available at https://www.huffingtonpost.com/sherri-donovan-esq/special-needs-children-and-divorce_b_1446587.html.
17. If unable to obtain employment, the adult child might be eligible for public benefits such as Supplemental Security Income and Medicaid. The parents may also choose to set up a Special Needs Trust to protect access to those government benefits. See Carolyn Wolf & Ellyn Kravitz, *Who Will Stand in My Shoes?*, 83.6 N.Y.S.B.A. J. (July/Aug. 2011).
18. Saposnek, *supra* note 3, at 566.
19. See Daniel B. Pickar & Robert L. Kaufman, *Parenting Plans for Special Needs Children: Applying A Risk-Assessment Model*, 53 FAM. CT. REV. 113, 125 (2015).
20. Heidi P. Perryman, *Parental Reaction to the Disabled Child: Implications for Family Courts*, 43 FAM. CT. REV. 596, 596 (2005).
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22. Sunni Ball, *Children with Special Needs in Divorce*, at 3 (Dec. 2002), available at <http://www.familymattersassociates.ca/images/SPECIALNEEDSCHILDRENINDIVORCE2.pdf>.
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52. N.Y. DOM. REL. LAW § 240 (2014).
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56. Michelle Robins, *Child Custody, Education and the Special Needs Child*, SAN FERNANDO VALLEY BUS. J. 25, July 4, 2011.
57. Child Welfare Information Gateway, *supra* note 7. These states include Connecticut, Delaware, Florida, Kansas, Maine, Michigan, Nevada, and Virginia. *Id.*
58. VA. CODE ANN. § 20-124.3(1) (2012).
59. Darin Rumer, *Child Custody in Divorce* (2015), available at <http://www.jgllaw.com/blog/child-custody-divorce>. The factor “stability and mental health of each child” looks at whether or not there are special needs of the child, the willingness to recognize special needs of the child, and how each parent can meet the special needs. *Id.*
60. Child Welfare Information Gateway, *supra* note 7. These states are Arizona, Arkansas, Colorado, Hawaii, Idaho, Illinois, Kansas, Louisiana, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Washington, West Virginia, and Wyoming. *Id.*
61. *Walter v. Walter*, 346 P.3d 961 (Wyo. 2015). The wife was the primary caregiver, but the court’s decision to award custody to the father was based on the mother’s history of mental instability, lack of credibility, inability to communicate with the father, refusal to foster a positive relationship between the father and the children, and inability to respect the father’s rights and responsibilities. *Id.* All of these factors relate directly to the special needs of the three children. *Id.*
62. *Id.*
63. *Maillet v. Maillet*, 2012 WL 6582561 at 3 (Conn. Super. Ct. 2012). The court found that the husband’s philosophy of parenting the three special needs children would have an extreme emotional cost to the children given their specific needs and it would not lend itself to be a productive, long-term parenting technique for the children. *Id.* See also CONN. GEN. STAT. ANN. § 46(b)–56(c) (2014) (listing factors to consider when determining the best interests of the child).
64. *Mark RR. v. Billie RR.*, 95 A.D.3d 1602 (2012).
65. *Id.*
66. *Goldsmith v. Goldsmith*, 50 A.D.3d 1190, 1192 (2008). See also *Adriano D. v. Yolanda A.*, 94 A.D.3d 448, 448 (2012) (the court held the best interests of the child were served by awarding custody to the father because he was “able to provide for the child financially and emotionally and demonstrated that he has been actively involved in the child’s education and special needs”).
67. *Janzenmuller v. Rivera*, 40 A.D.3d 756, 757 (2007). See also *In re Marriage of Thompson v. Thompson*, No. C0-96-854, 1996 WL 636223 (Minn. Ct. App. 1996) (the court awarded joint legal and physical custody of the special needs child). The trial court’s concerns about the mother’s ability to meet the child’s special needs was more important than the close relationship between the mother and the child, thus precluding the award of sole custody to the mother. *Id.*
68. *Schepard*, *supra* note 1.
69. *Price*, *supra* note 23, at 178.
70. ABA CHILD CUSTODY AND ADOPTION PRO BONO PROJECT, A JUDGE’S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 104 (2d ed. 2008), available at http://apps.americanbar.org/legalservices/probono/childcustody/judges_guide.pdf.
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73. Association of Family and Conciliation Courts, Task Force for Model Standards of Practice for Child Custody Evaluation, *Model Standards of Practice for Child Custody Evaluation* 5, 6 (2006).
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76. American Psychology Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65.9 AM. PSYCHOLOGIST 863, 864 (2010).

77. 22 NYCRR §623.1; *see* Lieberman v. Lieberman, 112 A.D.3d 583, 584 (2013).

78. Sullivan Cnty. Dep't of Soc. Servs. v. Richard C, 260 A.D.2d 680, 683 (1999).

79. *See* Stern v. Stern, 225 A.D.2d 540 (1996) (stating that forensic evaluations of the parents in a custody dispute “has long been recognized by the courts of this State”).

80. Philip M. Stahl, *Anatomy of a Child Custody Evaluation*, 22 FAM. ADVOCATE 1 (1999), available at <http://www.parentingafterdivorce.com/articles/anatomy.html>.

81. Lisa Helfend Meyer, *Divorce and the Child with Special Needs*, HUFFINGTON POST, Mar. 10, 2011, http://www.huffingtonpost.com/lisa-helfend-meyer/divorce-and-the-child-wit_b_833639.html.

82. VA. CODE ANN. § 20-124.3(3) (2012).

83. Meyer, *supra* note 81.

84. LS v. LF, 10 Misc. 3d 714, 725, 803 N.Y.S.2d 881 (Sup. Ct. 2005).

85. *Id.* at 726.

Hindi Mermelstein has been a board-certified general psychiatrist in New York for over twenty-five years with added board-certified expertise in psychosomatic and geriatrics, treating the spectrum of individuals and families suffering from complicated medical and psychiatric conditions using a variety of modalities including telemedicine. Additionally, her work as an educator, researcher, and administrator informs her clinical work and academic interests.

Jamie A. Rosen is an associate attorney at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, & Wolf, LLP, located in Lake Success, New York. Her practice is primarily focused on mental health, health care, and elder law. As part of the firm's Mental Health Law practice, she represents major hospital systems, individuals, and families. This includes mental hygiene law matters such as Kendra's Law applications (Assisted Outpatient Treatment), involuntary psychiatric treatment and retention, and adult guardianship proceedings, among others. She received her J.D. from the Maurice A. Deane School of Law at Hofstra University in 2013 where she was an associate editor of the Hofstra Law Review.

Carolyn Reinach Wolf is an executive partner in the law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP and director of the firm's Mental Health Law practice. Her practice concentrates in the areas of mental health and health care law, representing mental health and health care professionals, major hospital systems and community hospitals, institutional and community outpatient programs, skilled nursing facilities, higher education institutions, individuals, and families. In addition, she often serves as co-counsel in matrimonial matters involving mental health law issues. She is a frequently invited speaker and consultant to health care institutions and institutions of higher education, specifically university counseling centers and administrators, throughout the country regarding risk management and mental health law issues. The New York Times Sunday Edition (February 8, 2013) ran a front-page story entitled “A Guide in the Darkness” in the Metro section on her and her unique mental health law practice as it impacts the lives of people with serious mental health issues and their families.