

## Child custody and Special Needs Children

**Jake:** All right. So this week I was working on some blogging on this topic and we wanted to do a podcast on going through a divorce or child custody situation when there are special needs children involved, either one or multiple children of the family that have a special needs and how we address that in family court.

So when we talk about special needs it can obviously be a wide range of issues that we deal with, and ranges I know we've represented. People with children ranging from a food and nut allergy, all the way to somebody that has muscular dystrophy or a child with down syndrome. Obviously you have lots of children with dyslexia or learning differences, autism spectrum disorder. Sometimes you have children with behavioral issues like a bipolar disorder, anxiety disorders, stuff like that. This is something that's going to have to be addressed in a child custody order be that just a standalone child custody order, or if you're going through a divorce with children, those are the types of things that we're dealing with. Every single case is unique, just like every single child is unique. Every single special need is unique. it's a challenge.

I have a child who's on the autism spectrum disorder and me and his mom are divorced and I spend a lot of time talking to my clients about my own personal experience, and how my divorce decree comes into play when we're raising my child with my co-parent, with his mom. Issues that could possibly come up and issues that I personally had to deal with.

Then obviously, talking to clients about things I've seen the courts do in my cases when folks can't agree on how to raise a special needs child. So that's when the child is the challenge in of itself, it's certainly a blessing. but it's, it can probably present quite a bit of challenges, particularly when you're young about two households.

To start off, we'll talk about how the special need affects the custody stuff situation. Brian, talk to us about when you have parents that are going through a custody fight and there's a child with special needs and how that plays into the jury's decision as far as where a child lives with primarily, and then we'll talk about other conservatorship issues.

**Brian:** Yeah, I think it adds another layer of complexity and difficulty to an already difficult situation because, if there weren't those issues it might be a more straightforward or predictable outcome. When there are those issues, I think it's a more complicated decision with more factors.

There also can be I think more reasons for parents to disagree or to see things differently. There can be a different approach to or a different view of the severity of the problem, there can be a different view of how to treat or deal with the disability. That can just add a further layer of conflict on top of complexity, which are the two biggest problems, the two biggest things to drive difficult cases and then just adds to both of them.

**Jake:** Yeah, I think that's right. What you hope is that if a child has a diagnosis and has special needs, you hope that the parents are at least somewhat on the same page about

how to address the special needs. Even if they can't agree with where a child lives primarily, that they are both listening to doctors or professionals and addressing the child's needs.

There are times where you have a dispute about whether or not a child has special needs, or the severity of it, like you were saying. And I think that's when it comes into play, when a court determines who has the right to have custody of the child. It could be a minor disagreement or one parent thinks "My child has special needs, but I think the reaction from the other parent is too extreme. I think the intervention that he or she wants is too extreme, or I think he or she is doing above and beyond what the doctors want or the professionals want."

On the other extreme of two extreme examples we have one parent that says "I don't think my child has that." You have one parent that says "I think my child has ADHD and the other parent says, I don't think that's right." I've had more extreme experiences than that. I always remember one of the first cases I dealt with as an associate right out of law school was a parents' disagreement on whether or not the child was bipolar.

And the child is actually bipolar one and was seeing a psychiatrist and had actually been inpatient. And yeah, I was a lawyer right out of law school. I had no idea that parents could disagree about when a child has a diagnosis, when there's a doctor saying the child has the diagnosis, but we represented mom and sure enough, dad came in and sued him for custody and said "I think the psychiatrist is wrong. I think the inpatient people are wrong. I think the diagnosis is wrong. I think there's nothing wrong with my child. And so judge, you should give me custody because I'm gonna take him out of all this treatment." Which, the court obviously didn't do, the court listened to the professionals.

I was working with Jim Piper, who works with us now. Jim had asked the father "Do you disagree with the doctor's diagnosis?"

The dad said "Yeah."

"Okay. What is the doctor's diagnosis?"

"I don't know."

"Okay. So you're telling me you disagree with the psychiatrist diagnosis and you don't even know what it is?"

"Yeah, that's right."

That's obviously an extreme example. That father also botched the question of what grade is your child in, which turned out to be an unexpected trick question that he wasn't able to answer, but that is the extreme. Of course you have the other extreme cases where, and these are really sad situations, where you have a parent that thinks their child has a special need, but the doctors are saying "No, this child is not."

You have a parent that claims for whatever reason, probably a mental health issue of the parent's, but claims all these issues that all the professionals were saying aren't there. That

obviously creates a big situation too and the court can look at that when determining custody.

But let's go and talk about concerns with other conservatorship issues. If you remember earlier parts of the podcast, when we talk about custody we're talking really about conservatorship, right? That's the right to determine the primary residence. There's other conservatorship issues that come up with a child with special needs.

So Brian, what are the most common conservatorship issues that you see that come up, when dealing with a special needs child?

**Brian:** Yeah, it depends on what the special need is, but if it's going to involve mental health professionals for example, then those rights related to making decisions about mental health professionals is going to be key.

Who their psychologist or psychiatrist or counselor is, that's an important decision because you don't want the child being balanced between two or three different people that are going to give different treatment or different recommendations. If it's a physical disability that involves more along the lines of physician treatment, then those decisions would be important as well.

Then if it's one that involves the need for some type of different educational approach or schooling or that type of thing then conservatorship decisions related to education are going to be important to make, so it's important to decide who's going to make those decisions or if there's a disagreement then how those disagreements are going to be resolved.

**Jake:** Yeah. I think people forget when they think about the right to make educational decisions, which is a conservatorship, right? That's in the family code, but people think that's just the picking school and you have to remember that there's a lot more educational decisions that can be made if a particular child has special needs.

So if you have a child with learning differences, dyslexia or ADHD, that child may need a 504 education plan, And that would be a decision that needs to be made by the parents, so that's actually an educational decision.

Again, this could range from issues with food and nut allergies, all the way to learning differences and behavioral differences. That's if the child is in public school, then that's something that we'll chop that care with the special needs it's got to deal with. If parents are ordered to make joint decisions and one parent says "I think my child needs to follow four accommodations" and the school recommends 504 accommodations or an IEP that's actually something that is a conservatorship decision and educational decision.

The parents would in theory, have to agree on it. If a court order says that they have to make joint decisions, if you have a divorce decree that says you have to make joint decisions with the other parent and the school says the child has a 504 plan or the parent says no, and we lost the divorce decree or custody order, then that's going to result in probably a modification suit being filed to reallocate those conservatorship rights.

Then yeah, if you say Brian, there's some other ones that we'll talk about, like medical appointments and noninvasive recent medical decisions, access to medical records, the right to consult with a doctor or a psychologist. Those are conservatorship rights that are generally speaking in 99/100 cases, those types of things where both parents have the right to do them. But, I have had extreme circumstances where because the court does have the right to limit that in extreme circumstances, where a judge has gone in and said, you know what? you're such an obstructionist parent that you're not going to be allowed to go to the doctor's appointments. You're not even gonna be allowed to make noninvasive medical decisions for routine medical decisions. In the extreme cases, some judges said you're not even allowed to talk to the doctors. You can get the information from the other parent, but you're so obstructionist and you talk to the other parent, not the professional.

And those are extreme situations, but you do have some parents that are extremely obstructionist with professionals or combative so the judge just says "you can't even talk to these people. It's going to be too detrimental to this child if you mess up the treatment."

Moving on from that, the most common topic we get questions about is child support. So how does the special needs of a child affect child support, Brian?

**Brian:** Yeah. It's one of the few times when courts deviate in the real world from the guidelines that they have, specifically the calculation for the paying parent's obligation, which is usually simply math in Texas.

It's very clearly laid out and it typically ends at the time a child is either 18 or graduates from high school. Those are usually really set in stone and nothing is going to be debatable or changeable about those, but both of those factors, both the amount and the length of time can be affected. With the amount, the court can reallocate those expenses. Now, sometimes those expenses come out in the way the health insurance and the uninsured expenses are managed or paid, which is certainly a form of child support. But the court, rather than doing a typical, let's say a 50/50 split on uninsured, if the court thinks there's going to be a lot of that related to treatment, then the court might allocate it, 75, 25 or 100 and zero or something like that.

But on top of that, the court can then allocate additional requirements for other items, whether that means special schooling or additional counseling or additional treatment that's not going to be covered by insurance. That can be a substantial amount. That can be a really large amount in certain circumstances. This is one of the few times that happens and also some of those numbers can change over time, so you might see multiple attempts to modify those amounts over time.

Related to time is that it may not end when the child turns 18 or graduates from high school because the child's disabilities or challenges may extend into adulthood and require essentially lifetime care or certainly care for a certain period of time. Like the usual rule, a parent can be on the hook for that and that can cause a conflict too, because then something strange happens at that point. The child falls out of the courts' control as far as visitation goes. It could go into a guardianship type situation, but usually doesn't. And at

least in most child support situations, the parent paying child support is also seeing the child on a regular basis.

And I guess they feel some buy in or some result from that. But in this case, if the court doesn't control the child's time anymore, because they're not a child, then they may still be paying support, which can be a particularly unpleasant feeling for certain parents and certain situations.

So there's a lot of consequences financially for parents who have a child and go through the family court system.

**Jake:** Yeah, I think that's right. I think what you said is right. That you try to set it up as best as you can, when you have the original order a lot of times, but these things have changed because nobody really knows what a child's situation's gonna look like as they get older and closer to adulthood.

I guess picking up on what you were saying about possession and access. We talked about this a little bit when talking about custody, but just like the custody discussion when determining possession access, I think a judge is going to be looking at the same types of issues and same topics when at the type assigned time from the household if it was standard possession or presumption, but just like in custody, if you have a parent that isn't taking a situation seriously or aren't taking a child to doctor appointments or treatment from trained professionals, or vice versa, are taking them when they're not needed to go, then the court with possession access can deal with that.

They'll limit a parent's possession access to a child, if he or she is not adequately approaching or dealing with the special needs issues. Then finally, I think something that people forget about is that the court also has the ability to enter injunctive relief.

We talk about conservatorship, possession, access support, and then finally there's some junk to relate to what the court can do and what judges do. Junctions are specific orders to deal with special needs. For example, a child has food allergies. I couldn't have the allergy then have one parent, for whatever reason, who doesn't listen to the professionals on it.

You could see a judge and our orders that say you're actually court ordered to not expose your child to certain foods. And you're court ordered to take the certain precautions. If you have a child on medication and a parent isn't compliant with the child's medication requirements, then you can see a judge order the parent that you're ordered to give this child this medication during your periods of possession, or your order to take this child to these medical appointments.

That also, comes up quite a bit when you have a child with special needs. I guess to wrap up, overall, these are difficult cases. There's a lot of things that I think about, as a parent that's going through a child custody case and that's just compounded when you're going through a custody situation.

So it's important to find a lawyer that has experience with this. It's unfortunate when we have folks come to us that have a court order in place that doesn't adequately address your

child's needs, or you can tell nobody was really thinking through what was going to happen. Or we would inherit a case that has been handled by different law firms so far and they're coming in and nobody's really thought through, how are we going to address these various issues that can come up with a child's life? It's a challenge to do these cases, but it's also a blessing being able to see the difference that we can make them in a child's life and just a little bit of interaction that we have or interplay that we have with th with the raising of a special needs child is, it's really unique and it's special.

And, like I said, it's challenging, but I really enjoy getting involved in these cases because you really can make a difference, and in a family's life.

So that's a very broad look at the topic. I think you'd agree. Brian, that there's a lot more stuff that we could talk about a lot more detail, but that's a good broad stroke. Obviously we blogged about it. I think that's a good overview. Don't you agree?

**Brian:** It is. It is quite a complex issue,

**Jake:** let's wrap up with that for this week and we will be back next week.

**Brian:** Sounds good.