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**Representing the Parents of Special Needs Children**

**By**

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## I. INTRODUCTION

According to the U.S. Census Bureau,<sup>1</sup> based upon the 2000 census, 19.3% of the population aged 5 and older suffered from some type of long-lasting condition or disability. Of these, 3.6% claimed a sensory disability involving sight or hearing, 8.2% claimed a condition limiting basic physical activities, such as walking, climbing stairs, reaching, lifting or carrying, 4.8% claimed a physical, mental or emotional condition causing difficulty in learning, remembering or concentrating, and 2.6% reported physical, mental, or emotional conditions causing difficulty in dressing, bathing, or getting around inside the home.

Although the aforementioned statistics do not solely represent children and, although there is some level of overlap between the different conditions, the census data does indicate that in 2000, the disability rate was 7.2% for boys aged 5 to 15 years of age and 4.3% for girls the same age. This indicates an overall disability rate for children aged 5 to 15 years of 5.75% which translates to approximately one out of every 17 children in that age group suffering from at least one of the aforementioned conditions.

In another survey<sup>2</sup> it was found that close to 9% of parents identified themselves as having "a child of any age, including adults, with a physical, developmental, cognitive, medical or emotional condition." This survey, which was prepared by MetLife, Inc. made some interesting observations that may be of interest to the family law practitioner. It aids in understanding the types of financial needs that parents of special needs children face.

According to the MetLife survey:

- Most special-needs children have health insurance or are covered by some government program.
- 49% are covered by private insurance.
- 41% are covered by Medicaid.
- 8.5% of special-needs children have no health insurance.
- On average, parents spend \$326 per month on out of pocket medical expenses.
- 60% of special-needs children require medication or medical intervention on a daily basis.
- The average time spent providing care to a special needs child is 24 hours a week. 32% spend more than 40 hours per week caring for their child.
- For all special-needs children, 84% of parents have not provided for lifetime financial assistance.

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<sup>1</sup> Disability Status: 2000, Census 2000 Brief, Issued March 2003, US Department Of Commerce, Economics and Statistics Administration, U.S. Census Bureau.

<sup>2</sup> The Torn Security Blanket: Children with Special Needs and the Planning Gap, Executive Summary, April 2005, MetLife.

- 88% of parents have not established a special needs trust to preserve government benefits eligibility.

When representing parents of children with special needs, consideration needs to be given to the legal and financial issues which are unique to families dealing with such adversity. Custodial issues also need to be explored in creative ways as the needs of parents with special needs children will not often be best served by a cookie cutter approach to custody. This manuscript will attempt to address many of the issues that families with special-needs children face once a separation occurs.

## II. WHO ARE SPECIAL NEEDS CHILDREN

The most common types of special-needs children fall into three major categories: "*acute, life-threatening medical conditions* (e.g., severe asthma<sup>3</sup>, food allergies<sup>4</sup>, Type I diabetes); *chronic and pervasive developmental disorders*<sup>5</sup> (e.g., cognitive/language delays, learning disabilities, ADHD, pervasive developmental spectrum disorders of autism and Asperger's Syndrome); and *psychological and behavioral disorders*<sup>6</sup> (e.g., anxiety disorders, depressive disorders, difficult temperaments, conduct disorders)."<sup>7</sup>

This manuscript will not present a comprehensive list of special-needs that children may experience; however, the list above represents a substantial subset of such conditions.

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<sup>3</sup> "Asthma is the leading cause of chronic illness in children and teens, and, because of the tendency of children with asthma to be biologically sensitive, asthma is often accompanied by a variety of other allergic conditions. The number of those suffering with asthma has more than doubled in the past 15 years, and the number of deaths related to childhood asthma has nearly tripled over the last 15 years... 12.9% of children in California alone have a diagnosis of asthma, and 11.4% have visited an emergency room during the previous year because of the condition." See, Donald T. Saposnek, Heidi Perryman, Josanna Berkow and Sherrill Ellworth, Special Issue: Special-Needs Children in the Family Court: Special-Needs Children in Family Court Cases, 43 Fam. Ct. Rev. 566, 567 (October 2005).

<sup>4</sup> "Food allergies are also becoming increasingly prevalent, affecting about 6% of school age children." *Id.*

<sup>5</sup> "Chronic developmental disorders vary in severity and pervasiveness. The spectrum of chronic developmental disorders starts with mild learning disabilities and progresses to increasingly severe and pervasive disorders such as Attention Deficit Hyperactivity Disorder (ADHD). At the extreme end of the spectrum are the most profoundly pervasive conditions such as autism, or, it's related but milder version, Asperger's Syndrome... These genetic, neurodevelopmental disorders are presumed present from birth and can result in life-long disabilities. Children with various forms of learning disabilities constitute the majority who received special education services in North America." *Id.* at 569.

<sup>6</sup> "The most common nonmedical disorders of children include internalizing conditions (e.g., anxiety disorders, with a prevalence of 2 to 10%, and depressive disorders, with a prevalence of 2 to 8%), externalizing conditions (e.g., conduct disorders, with a prevalence of 2 to 12%), and children with difficult temperaments (with a prevalence of 10%), and with slow to warm up temperaments "with a prevalence of 15%)." *Id.* at 572.

<sup>7</sup> Donald T. Saposnek, Heidi Perryman, Josanna Berkow and Sherrill Ellworth, Special Issue: Special-Needs Children in the Family Court: Special-Needs Children in Family Court Cases, 43 Fam. Ct. Rev. 566, 567 (October 2005).

### III. CHILD SUPPORT ISSUES

#### A. Guideline Considerations

In the typical child support case the application of the North Carolina Child Support Guidelines are presumed to meet the needs of a child or children. Unfortunately, in many family law cases in which a special needs child is at issue, the Child Support Guidelines may not provide an adequate amount of support to the custodial parent as the Guidelines can fail to take into account many expenses that families have in these situations.

The 2011 Child Support Guidelines provide that the court "may order that uninsured medical or dental expenses in excess of \$250 per year or other uninsured health care costs (including reasonable and necessary costs related to orthodontia, dental care, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental disorders) be paid by either parent or both parents in such proportion as the court deems appropriate." "Other extraordinary expenses" which are added to the basic child support obligation include "expenses related to special or private elementary or secondary schools to meet a child's particular educational needs" as well as "expenses for transporting the child between the parents' homes" if the court determines that the expenses are reasonable, necessary, and in the child's best interest.

The list of expenses that can be included under the Child Support Guidelines is not exhaustive and the trial courts have generally been granted wide discretionary powers to determine what constitutes an extraordinary expense.<sup>8</sup> These expenses can include payments such as supplemental education at Sylvan Learning Center and summer camp expenses.<sup>9</sup>

Although the Guidelines do allow for the calculation of "extraordinary expenses," those will not always take into consideration each of the added monetary responsibilities that parents with special-needs children have.

Costs for a special needs child can include, *inter alia*: "therapy, equipment, vacations, supplements, dietary costs, sensory items, respite care, professionals, modifications to the home, and the continually changing needs of the child. In addition, there are expenditures for transportation to distant hospitals or sources of medical care, extra laundry, babysitting of other siblings while care is being given to a special needs child and other medical expenses not covered by public or private insurance."<sup>10</sup>

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<sup>8</sup> Mackins v. Mackins, 114 N.C. App. 538, 549, 442 S.E.2d 352, 359 (1994).

<sup>9</sup> Id.

<sup>10</sup> Judith L. Poller, Divorce and the "Special – Needs" Child, Law Journal Newsletters, September 1, 2010.

Additionally, the average time spent providing care to a special needs child is 24 hours a week, and nearly 1/3 of parents spend more than 40 hours per week caring for their child.<sup>11</sup> In the event that a parent is unable to take time away from work in order to care for a child on his or her own, it may be necessary to pay caregivers in order to make certain that a special needs child is properly cared for. In the event that a parent chooses to provide such care on his or her own, there is a great likelihood that his or her ability to earn income consistent with his or her income earning ability will be diminished. Although many of these expenses and costs will fit within the definitions of extraordinary expenses in the Child Support Guidelines, some may not clearly fit into any of the defined categories.

## **B. Deviation from the Guidelines**

A party may request a deviation from the North Carolina Child Support Guidelines, and, in fact, in these types of cases, doing so may be necessary. The court, after hearing evidence and making findings regarding the reasonable needs of a child for support and the relative ability of each parent to provide support, may deviate from the Guidelines if it finds by the greater weight of the evidence that application of the Guidelines would not meet, or would exceed, the reasonable needs of the child. The court must consider the relative ability of each parent to provide support. If the court finds that the application of the Guidelines would otherwise be unjust or inappropriate then the court may deviate from the presumptive child support guideline amount. If the court deviates from the Guidelines, the court must make written findings (1) stating the amount of the supporting parent's presumptive child support obligation determined under the Guidelines; (2) determining the reasonable needs of the child and the relative ability of each parent to provide support; (3) supporting the court's conclusion that the presumptive amount of child support determined under the Guidelines is inadequate or excessive or that application of the Guidelines is otherwise unjust or inappropriate; and (4) stating the basis on which the court determined the amount of child support ordered.<sup>12</sup>

In order to establish the actual reasonable needs of a child in a deviation case, the parties will need to present to the court financial standing affidavits setting forth their respective incomes, their respective expenses and the children's respective expenses.

## **C. Consideration of Costs**

In determining the actual expenses that the parents will or may incur in raising a child with special needs, a practitioner should keep in mind that a child with special needs will often have expenses that do not typically arise in the normal custody case. Specific questions should

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<sup>11</sup> The Torn Security Blanket: Children with Special Needs and the Planning Gap, Executive Summary, April 2005, MetLife.

<sup>12</sup> See, North Carolina Child Support Guidelines, Effective January 1, 2011.

be asked of your client in order to help them identify those expenditures for which there should be a shared responsibility. For example:

(1) **Therapy Costs:** A special needs child may go through varying stages in which he or she receives different forms of therapy, some of which may not be covered by insurance or which may require out-of-pocket contributions such as co-pays or deductibles. A partial list includes "physical therapy, occupational therapy, language therapy, communication therapy, sensory integration therapy, music therapy, art therapy, therapeutic horsemanship, behavior therapy, group or individual therapy, and socialization therapy."<sup>13</sup>

(2) **Equipment Costs:** Equipment needs and costs for a child with special needs can additionally change over time and not be easy to anticipate. Does a child have prosthetics? Will a child outgrow these? Does a child have leg braces which will become too small as the child ages? Will a child outgrow his or her wheelchair? Does a child require a respirator, in home hospital bed, handicapped equipped bathrooms, and wheelchair friendly vehicles? The list goes on; however, a client should be asked to identify such anticipated needs and expenditures early on in the representation so that the costs can be evaluated.

(3) **Dietary Needs:** Some special needs children need special diets. Often, these diets can be more expensive than the typical diet that most children follow. "Children with diabetes, celiac disease and many other disorders must be on very rigid diets."<sup>14</sup> Such diets may impact the ability of a child to eat inexpensive processed foods or "fast foods" and require a parent to prepare more of the child's meals at home with fresh ingredients. Eating healthy will often be more expensive than the alternative. Consequently, costs normally seen for food both at home and away from home can be higher and documentation verifying that the "higher" costs actually exist will bolster any claim in court that the values are reasonable and necessary.

(4) **Respite Care:** Respite care programs provide short-term relief for families and other unpaid caregivers in caring for a child with a disability. Where a child needs continuous care, a parent cannot always be present and a typical "babysitter" may not be trained in how to care for a child with a disability, emotional need or mental impairment. If a parent needs to be away from home for a work commitment, or even to run an errand, a trained caregiver is needed in order to provide appropriate care. Consequently, respite care (the use of a trained or professional caregiver), may be needed. This person will have the skills to appropriately care for a child's particular needs and these caregivers will be more expensive than a standard babysitter.

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<sup>13</sup> Margaret "Pegi" Price, "A Guide for Parents, Divorce and the Special Needs Child." P. 124.

<sup>14</sup> *Id.* at 125.

These services can be utilized by a parent who needs to take a break, go out of town overnight, or provide care during working hours. One agency in Forsyth County charges \$16.85 - \$18.75 per hour for respite care services. The author is aware of one instance where charges were as high as \$33 per hour though for someone with nursing qualifications (which may be needed for a chronically ill or disabled child). Inquiry should be made as to whether any insurance or government aid exists that will cover some of these costs. In calculating support needs for a child, an estimate as to the frequency of such care will also be needed.<sup>15</sup>

**(5) Use of Professionals:** Children with special needs may visit with professionals other than their primary family doctor on a regular basis. These professionals often include "physicians, physical therapists, psychotherapists, occupational therapists, behavioral specialists, social skills therapists... support group facilitators, tutors, parent training teachers... and many others."<sup>16</sup> In order to consider the cost of such services, it would be helpful to review the client's Explanation of Benefit (EOB) forms from his or her insurance company for the past couple of years as these will indicate what portion of those visits were not covered by insurance. In the event that there were providers who were paid out-of-pocket and not covered by insurance, documentation as to those expenses will be needed as well.

**(6) Education Expenses:** Where a parent works and is unavailable to supervise a child during the work day, daycare may be needed. If a child is unable to attend a mainstream facility, the costs associated with said care can be higher due to the added level of training and supervision which is provided in specialized facilities. Some children with learning difficulties such as dyslexia, ADHD, autism and communication disorders may also need the use of "shadows," at daycare or school. A shadow is a person who follows the child at school or daycare and assists him or her. These "shadow" costs vary; however, it is not uncommon for hourly charges to range from \$8.50 per hour to \$20.00 per hour. The needs of the child will affect the cost of the services. Tutoring costs for a child with learning difficulties can also pose an expense that needs to be accounted for.

Although public schools are to accommodate special needs children, it is extremely difficult to obtain a shadow through the school system and it is common, at least in Forsyth County, in extreme circumstances only. In the event that public funding will not cover such expenses, parents will have to privately pay for the services.

**(7) Home Modifications:** Upon separation, one or both parents will be moving from the former marital residence. There may be extraordinary expenses in setting up a new home in such a way that a child with special needs may be properly cared for. Is the residence wheelchair friendly? Will light switches, sinks, countertops and door handles need to

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<sup>15</sup> See, *Id.* at 126.

<sup>16</sup> *Id.* at 126

be lowered? Will bathroom facilities need to be modified? Is there a need for lift equipment or therapy equipment? Will hallways need to be widened? Is there a need for a ramp? Will book cases and heavy furniture need to be bolted to a wall so that they cannot be pulled over? Will an alarm system need to be installed so that a parent will be alerted if a child attempts to leave the residence?<sup>17</sup> Such costs should be considered in determining the spousal support needs of a spouse and the child support needs of a child.

It should also be noted that the costs of raising a special needs child may not remain constant over time. One strategy for avoiding continued court intervention would include setting out a base monthly amount of prospective child support based upon the respective gross incomes of the parties, while also setting forth a proportional share of responsibility for other expenses such as insurance premiums, uninsured costs, and other extraordinary expenses. The shared expenses, however, will need to be specifically spelled out to avoid any misunderstanding.

#### **D. Termination of Child Support & Payment Past Majority**

N.C.G.S. § 50-13.4 (c) provides that child support terminates when a child reaches the age of 18, except in situations where (1) the child is otherwise emancipated, or (2) the child is still in primary or secondary school when the child reaches age 18. In such case, "support payments shall continue until the child graduates, or otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation."<sup>18</sup>

This statute can pose problems in cases involving special-needs children. This is because child support, under North Carolina law, will not continue after a child turns 18 or graduates from school (whichever first occurs) but in no event beyond age 20, even though that child may be incapable of supporting himself or herself.

North Carolina used to follow the common-law which mandated an obligation of a parent to provide necessary support to his child, who, "before and after reaching age twenty-one, is and continues to be insolvent, unmarried, and mentally or physically incapable of sustaining himself."<sup>19</sup> In 1967 the common law was codified and a statutory obligation of parents to support their disabled children beyond the age of majority was mandated.<sup>20</sup> In 1971, the General Assembly diluted the parent's obligation to support a disabled child by exempting parents from

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<sup>17</sup> *Id.* at 127.

<sup>18</sup> See, North Carolina General Statutes § 50-13.4(c).

<sup>19</sup> Jeffrey W. Childers, Recent Development: *Hendricks. v. Sanks*: One Small Step for the Continued Parental Support of Disabled Children beyond the Age of Majority in North Carolina, 80 N.C.L. Rev. 2094, 95 (September, 2002).

<sup>20</sup> *Id.*



the financial liability of the care of a child who is a "long-term patient at a state owned or operated mental health facility."<sup>21</sup> The Gen. Assembly further amended N.C.G.S. § 50-13.8 by removing a parent's obligation to support a disabled child after the age of majority, while retaining custody provisions for such children.<sup>22</sup>

N.C.G.S. § 50-13.8 presently reads:

For the purposes of **custody**, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support. (emphasis added).

Although this language seems to indicate that a child who is incapable of self-support upon attaining the age of majority may be subject to child support obligations of his or her parents<sup>23</sup>, the North Carolina appellate courts have ruled otherwise. In Yates v. Dowless, 93 N.C. App. 787, 379 S.E.2d 79 (1989) the Assistant Attorney General, who was representing the appellee, argued that the State believed that the intention of the Legislature in amending §50-13.8 was not to relieve a parent of the obligation to support an adult child who is mentally or physically incapable of self-support. In this case, the question on appeal was whether or not a father had an obligation to support his "mentally retarded son" past said child's 20th birthday. The Court of Appeals, held that "in light of the plain and definite meaning found in N.C.G.S. §50-13.8, we hold the trial judge erred in ordering respondent [father] to pay "continuing ongoing child support without regard to the child's chronological age," and that portion of the order will be reversed."<sup>24</sup> Consequently, the father had no obligation to pay child support past the child's 20th birthday. Additionally, in Jackson v. Jackson, 102 N.C. App. 574, 575, 402 S.E.2d 869, 870 (1991) the court noted that an order for support of a disabled child beyond her minority had no legal basis.

Notwithstanding the above, parties to a divorce action are free to contract or to enter into a consent order which provides for support to continue past the date that such support would otherwise terminate under North Carolina law. In the case of Smith v. Smith, 121 N.C. App. 334, 465 S.E.2d 52 (1996) the court held that where a party agreed to support a child beyond the

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<sup>21</sup> Id. at 2096

<sup>22</sup> Id.

<sup>23</sup> But see, Bridges v. Bridges, 85 N.C. App. 524, 355 S.E.2d 230 (1987), in which the court stated "North Carolina courts have no authority to order child support for children who have attained the age of majority unless the child has not completed secondary schooling, or, pursuant to G.S. 50-13.8, the child is mentally or physically incapable of self-support. The author contends that the Court of Appeals misinterpreted §50-13.8 and that subsequent cases, such as Yates v. Dowless, 93 N.C. App. 787, 379 S.E.2d 79 (1989) make clear that §50-13.8 does not provide for child support of disabled children after the attainment of the age of majority. Additionally, see Jackson v. Jackson, 102 N.C. App. 574, 575, 402 S.E.2d 869, 870 (1991).

<sup>24</sup> Yates v. Dowless, 93 N.C. App. 787, 379 S.E.2d 79, 80 (1989).

age of 18 pursuant to a consent order, that said provision would be enforceable. The husband had agreed to pay for the child's education and support after high school in the following ways:

3. The Defendant shall pay for the higher education of the minor child which shall include college, technical school or other educational opportunities past the high school level. For the purposes of this Judgment, expenses of higher education shall include fees, tuitions, lodging, books, travel, clothing and other necessary and reasonable expenses, which would customarily be incurred in the pursuit of higher education.

4. The Defendant shall maintain a life insurance policy with the minor child, [\_\_\_\_\_], as beneficiary, in the sum of **Fifty Thousand (\$50,000.00) Dollars**, which policy shall be continuously maintained until the minor child attained the age of twenty-five years or has completed undergraduate school...

5. The Defendant shall provide health insurance for the minor child through age twenty-five or completion of his pursuit of higher education...<sup>25</sup>

The Court of Appeals noted that "a parent can assume contractual obligations to his child greater than the law otherwise imposes."<sup>26</sup> Such agreements are enforceable as any other contract. Therefore, in the event that the parties can mutually agree to enter into a separation agreement or a consent order, in which support obligations extend past the statutory obligation, such provisions will be enforceable by the courts.

Therefore, from a long term point of view, if both parents are willing, a separation agreement or consent order can be a useful mechanism for establishing a long term financial plan for the support of a child who will need financial assistance after the age of majority.

#### **IV. SSI, MEDICAID & RELATED PROGRAMS**

Various government benefits exist which provide financial assistance to children who suffer from certain disabilities. In order to be eligible for some of these benefits, a child's assets and income will be evaluated. Therefore, it is not only important to understand the various possible benefits that can be claimed but also what impact a separation and property settlement agreement or court order may have on a child's ability to continue receiving those benefits.

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<sup>25</sup> Smith v. Smith, 121 N.C. App. 334 465 S.E.2d 52, 55 (1996).

<sup>26</sup> Id. at 56.

Similarly, any assets which may pass to a child as a consequence of estate planning can affect benefits as well.

### **A. Supplemental Security Income (SSI)**

SSI makes payments to children under the age of 18 provided that the child meets Social Security's definition of "disability" for children, and, if the child's income and resources fall within eligibility limits. The income and resources of family members living in the child's household are also considered. Consequently, in a divorce setting, it will be important to review the current rules relating to SSI (as well as Medicaid) regarding income and assets for qualification purposes, as Alimony and Child Support to the custodial spouse could affect eligibility to receive benefits or the amount of benefits received. Specific details with regard to the eligibility requirements for SSI can be found by visiting [www.socialsecurity.gov](http://www.socialsecurity.gov). See, also **FORM A**, which is a publication by Social Security entitled "Benefits for Children with Disabilities."

A child must meet all of the following requirements to be considered disabled and therefore eligible for SSI:

- The child must not be working and earning more than \$1,000 a month in 2011. (This earnings amount usually changes every year.) If he or she is working and earning that much money, the child is not considered disabled.
- The child must have a physical or mental condition, or a combination of conditions, that result in "marked and severe functional limitations." This means that the condition(s) must very seriously limit a child's activities.
- The child's condition(s) must have lasted, or be expected to last, at least 12 months; or must be expected to result in death.<sup>27</sup>

A child is considered an adult upon reaching age 18 for SSI purposes and different medical and nonmedical rules are utilized when deciding if an adult can get SSI disability payments. Income and resources of family members are no longer considered in determining whether an adult meets the financial limits for SSI. Only the adult's income and resources are considered.<sup>28</sup> Therefore, if a child was ineligible for SSI prior to turning 18 because a parent had too much income or resources, the child may become eligible upon reaching age 18. Therefore, consideration should be given in a divorce settlement or action to minimize the child's income and resources.

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<sup>27</sup> [www.SocialSecurity.gov](http://www.SocialSecurity.gov), "Benefits for Children with Disabilities, 2011", P.6.

<sup>28</sup> Id. at 10.

## **B. Medicaid**

Medicaid offers assistance with health care for low income persons. In most states, children who get SSI payments qualify for Medicaid.<sup>29</sup> Some children can get Medicaid even if they do not qualify for SSI.<sup>30</sup> Again, income and resources play a role in determining whether a person can qualify for this benefit.

## **C. CAP/C**

The Community Alternatives Program for Children provides home and community-based services to "medically fragile children who, because of their medical needs are at risk for institutionalization in a nursing home."<sup>31</sup> Children who might be eligible for this program are those with "ventilators, tracheotomies, feeding tubes, severe seizures, and those children who need help with activities such as bathing, dressing, grooming, and toileting when the child, for medical reasons, is not able to do or learn to do those tasks independently."

Case management and in-home nursing or aid care may be included in this program and families may receive some additional services and supplies that Medicaid would not ordinarily pay for. These services can include respite care, home modifications such as wheelchair ramps, widening of doorways, grab bars and safety rails. Children under this program also have access to regular Medicaid services.

This program is available to a child through age 20 who meets both Medicaid eligibility and CAP/C criteria. The Medicaid criteria, however, for CAP programs are not the same as regular Medicaid criteria. In certain circumstances, this program may apply to children who would not normally qualify for regular Medicaid. This program constitutes a Medicaid waiver program and allows children who need the kind of long-term nursing care provided in a nursing home or hospital to stay at home with their family instead of having to stay in the nursing home or hospital. A waiver program "is one in which certain Medicaid rules are "waived"". "In other words, some rules that apply to children in a regular Medicaid program do not apply to children in the waiver program. In CAP/C, one example of this is that [a] family does not have to meet the regular income requirements for Medicaid; only [the] child's income... is counted when determining Medicaid eligibility."<sup>32</sup>

## **D. CAP MR/DD**

The Community Alternatives Program for persons with Mental Retardation/Developmental Disabilities is another Medicaid waiver program that is not based on

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<sup>29</sup> Id. at 16.

<sup>30</sup> Id.

<sup>31</sup> [www.ncdhhs.gov/dma/medicaid/capchildren.htm](http://www.ncdhhs.gov/dma/medicaid/capchildren.htm)

<sup>32</sup> The North Carolina Community Alternatives Program for Children (CAP/C), Parent Handbook, October 2010, page 1-1.

the family's income. It is solely based on the need of an individual with the developmental disability. This is a source of funding that pays for services and support that allow people with developmental disabilities to stay in, or return to, their own communities instead of living in an institutional setting. Provided services include, but are not limited to, augmentative communication devices, crisis services, day support, home and community support, individual and caregiver training, personal care services, respite care, specialized equipment and home adaptation, supervised living, therapeutic case consultation and transportation.

With regard to both of the aforementioned CAP programs, it is worthwhile to explore whether or not a child is eligible to make application for the program(s) in that substantial savings to the parents can be made if they take advantage of these benefits. Additionally, the spouse who may be subject to child support payments can see a great reduction in his or her responsibilities if the family qualifies to receive such assistance.

#### **E. Strategies to Pass Income or Assets to a Child with Disabilities**

Parents need to consider the long-term financial plans for a special needs child so that they can maximize the child's ability to continue receiving benefits from government programs such as SSI and Medicaid. Relevant questions include whether the child will be able to support him or herself, whether the child will need a caregiver other than a parent, whether a child will need a caregiver after the death of his or her parents, what benefits will the child qualify for in a divorce?

In the event that a child with special needs was to inherit assets from his or her parents, or in the event that a child was to obtain income from a parent, the child could potentially be disqualified from receiving certain government benefits if the income and assets exceeded a certain threshold level.

The Omnibus Budget Reconciliation of 1993 provided that if certain requirements were met, a "Special Needs Trust" could be established.<sup>33</sup> "The primary purpose of this trust is to preserve government benefits eligibility and yet allow families to provide for the supplemental needs of a person with a disability, needs that generally go beyond that provided for by the government -- food, shelter and clothing. This eligibility focuses on Social Security Insurance, as well as Medicaid.<sup>34</sup> "The trust can pay for therapies, dental work, eyeglasses or other health care not covered by Medicaid. It also might fund quality-of-life items such as vacations, televisions, computers, or other items for which the child had developed a fondness for while residing with his or her parent. The trust funds may not be distributed directly to the person with a disability; rather it must be paid to third parties for goods and services to be used by the

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<sup>33</sup> See, Poller at 15.

<sup>34</sup> *Id.*

beneficiary."<sup>35</sup> The "Special Needs Trust" should be discussed with an estate planning attorney as most family law practitioners are not fully versed on the requirements for creating a valid trust document that will not negatively impact a person's eligibility. For illustrative purposes, see **FORM B** which utilizes language from a special needs trust. Additionally, a supplemental needs trust, which pays for a child's supplemental needs beyond his or her basic support may also be utilized. **FORM C** provides an example of language used in a supplemental needs trust.

A family law attorney can provide guidance to his client in making sure that an estate planner and or estate attorney is utilized for the purpose of establishing a special needs or supplemental needs trust, or other mechanism which will provide for the care of a special needs child. Discussions regarding the amount of the marital estate that will be used for the benefit of the child as well as discussions about the needs for the client in the future are relevant for consideration.

Parents should also consult with an estate planning attorney to discuss their wishes for the care and custody of their child in the event of their deaths. The advice will be beneficial in that there are strategies that may be used to pass wealth to a special needs child such that government benefits are preserved.

## V. ALIMONY CONSIDERATIONS

Postseparation Support and Alimony, as addressed per N.C.G.S. § 50-16.1A, *et seq.*, should be considered in light of the specific circumstances of each case. It is not uncommon for families with a special needs child to have one parent be primarily responsible for providing supervision and care to a child while the other parent is primarily responsible for earning income for the support of the family. Special needs children usually require greater supervision and care than children without such needs. One study has found that children with special needs have three times as many sick days as do children without special needs.<sup>36</sup> With additional obligations for doctor appoints, therapy appointments, tutoring, hands on care, and other time commitments in parenting, it becomes difficult for both parents to be employed full time, or at least employed to one's full capacity.

Additionally, as discussed previously in this manuscript, there are many extraordinary costs associated with finding and paying for caregivers who are qualified to care for a child with special needs. Unless a parent has a substantial income, it would in many cases be more expensive to pay a private caregiver than it would be to allow a parent to continue being a primary caregiver for a child.

Where a spouse has acted as a primary caregiver of a child with special needs and where that spouse has given up his or her career opportunities in order to remain a primary caregiver, it

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<sup>35</sup> *Id.*

<sup>36</sup> Newacheck, P., Strickland, B., Shonkoff, J., Perrin, J. McPherson, M., & McManus, M., et al. (1998). An Epidemiologic Profile of Children with Special Health Care Needs, *Pediatrics*, 102(1), 117-123.

may not make financial sense to compel that person back into the work force. When representing the caregiver spouse, documentation should be presented which will verify the schedule and routine maintained by that parent in order to care for a child with special needs. It can also be helpful to quantify the expenses that will need to be paid to a private caregiver in order to have the same level of care given to a special needs child that the parent had offered. A comparison can then be made to determine whether it is beneficial for that parent to work in light of the costs (financially) to provide for another person to care for a child, as well as the costs (to the child himself) by no longer having that parent as a direct and primary caregiver.

When evaluating alimony factors under N.C.G.S. §50-16.3A(b), certain considerations will have significant relevance in these cases, particularly subparagraphs:

- **(2) The relative earnings and earning capacities of the spouses.** Where one spouse has been unemployed or underemployed for the purpose of caring for a child with special needs, the difference in incomes is an important consideration that should be factored by the court. Although the caregiver spouse may have an earning capacity which exceeds his or her actual remuneration, the reason for the spouse being unemployed or underemployed is legally important. In order for the court to impute income to a spouse who is unemployed or underemployed, evidence must be presented that the unemployed or underemployed spouse is intentionally depressing income or acting in bad faith.<sup>37</sup> Otherwise, the court should look at the party's income at the time that the alimony order is entered.<sup>38</sup>
- **(4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;**
- **(6) The contribution by one spouse to the education, training, or increased earning power of the other spouse.** Where a spouse taking on the role of primary caregiver of a special needs child has occurred, those actions will often have permitted the working spouse to enhance his or her career, education, training and earning power. Had the working spouse been required to take time off of work during a child's sick days from school, or to take a child to medical or therapy appointments, or to provide direct care and supervision on a more

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<sup>37</sup> See, Megremis v. Megremis, 179 N.C. App. 174 182, 633 S.E.2d 117, 123 (2006).

<sup>38</sup> Id.

equal basis, that spouse may not have the earning power which exists at the time of the hearing.

- **(7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child.** This is arguably one of the most important factors for consideration where a parent has served and will continue to serve as a primary or substantial custodian of a minor child with special needs.
- **(12) The contribution of a spouse as homemaker;**
- **(15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.**

There are other special considerations that will merit the attention of a court in determining an appropriate amount and duration of alimony. Although North Carolina does not have guidelines for determining the duration of alimony, it is not uncommon, at least in the author's home county, for alimony to be granted for one-half the duration of the marriage in many cases. When it is known that a parent will be primarily caring for a child with special needs, and where it is recognized that as a consequence of having to provide such care that he or she will find it difficult to find a job which will provide remuneration meaningful enough to justify the added expense of independent caregivers, that spouse will have a valid argument that alimony should be granted for a longer duration than normal as his or her need to care for a child with special needs will not automatically end at some arbitrary date.

Where the parties have maintained a pattern of savings for retirement during marriage, and where it is likely that a primary caregiver will be unable to obtain meaningful employment such that he or she can contribute towards his or her own retirement needs, the appellate courts have recognized that a pattern of savings can be a valid expenditure on a financial standing affidavit for alimony purposes. This consideration would appear to have more impact in these types of cases because there are legitimate reasons which may prevent a parent from reentering the work force and the entire family unit will benefit from his or her efforts in providing care to a child.

Although each case for spousal support should be treated on its own merits, a family law practitioner should recognize that the needs of a family with a special needs child do differ from those families that are not facing such challenges



## VI. CUSTODY CONSIDERATIONS

### A. Legal Standard

The law with regard to custody of a special needs child is no different than that which exists with regard to other children. There are, however, considerations that should be made in determining how to best determine the custodial arrangement that will best meet the needs of a special needs child.

The welfare of the child is the paramount consideration in custody matters.<sup>39</sup> The best interest and welfare of the child are the principal considerations in determining the right to custody, as well as in determining the right to visitation, and neither the right to custody nor the right to visitation should ever be permitted to jeopardize the best interest and welfare of the child.<sup>40</sup> The welfare of the child is the "polar star" by which the discretion of the court is to be guided.<sup>41</sup>

In determining the welfare of the child, our Supreme Court has said, with regard to custody decisions, that the trial judge is entrusted with the delicate and difficult task of choosing an environment which will, in his or her judgment, best encourage the full development of the child's (a) physical, (b) mental, (c) emotional, (d) moral and (e) spiritual faculties.<sup>42</sup>

### B. Circumstances to Consider

There are many factors that a court may consider in determining the custodial arrangement that is in the best interest and welfare of a child. Under the Blakley case, the North Carolina Supreme Court, however, stated that the trial court's goal is to determine the environment which will best encourage the full development of the child's physical, mental, emotional, moral and spiritual faculties. Some factors to look at in determining how to best evaluate these issues follow:

(1) **Primary Caregiver:** In many cases, one parent, during marriage, takes on the role of being the primary caregiver for a child while the other maintains the role as the primary financial provider. Such a history of having one parent primarily responsible for the care of a child with special needs may provide important guidance to the court in a custody case. This is because a special needs child will often require specialized forms of care requiring certain training or special skills which might not be quickly learned by the parent who is not as well versed on those matters. Some relevant questions to be asked would include:

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<sup>39</sup> Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

<sup>40</sup> In Re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971).

<sup>41</sup> Greene v. Greene, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

<sup>42</sup> Blakley v. Blakley, 285 N.C. 358, 204 S.E.2d 678 (1974).

- Has one parent taken steps to become educated as to a child's special needs, such as through training, independent education, or regular involvement with health care professionals?
- What is the relative daily involvement by each parent with the child?
- Does one parent share a stronger bond with the child?
- Does one parent have a stronger emotional connection with the child?
- Has one parent been primarily responsible for attending visits with health care professionals and the minor child?
- Which parent has handled administrative matters relating to the child, such as making appointments, researching treatments, handling insurance matters, scheduling health care providers, etc.?
- Has one parent sacrificed career opportunities in order to be primarily available for the child's care?
- Which parent is more readily available in the event of a medical emergency or need?
- If a child has any learning difficulties, which parent has been primarily responsible for assisting the child with homework and studies?
- Has one parent been primarily responsible for coordinating Individualized Educational Program (IEP) plans with a child's school?

The answers to these questions, as well as others relating to a history of care provided to the child, can be a strong indicator as to which parent can best provide for the child's needs. In those circumstances where both parents have been substantially involved, a shared custodial arrangement may be appropriate. Where one parent has been the primary caregiver, a custody arrangement granting that parent primary physical custody may be more appropriate.

**(2) Physical Environment:** If a child has physical handicaps, the ability of a parent to provide a more suitable home environment would be particularly relevant. For example, if a child is in a wheelchair, and a parent moves into an apartment which is not accessible by elevator, this would pose an impediment to a successful physical custody arrangement. Similarly, if one parent has medical equipment or items used for therapy and the other does not, it may be determined that the child is best suited by remaining primarily in the home where such equipment exists.

**(3) Educational Issues:** Where a child has learning issues such as autism, Asperger's Syndrome, ADHD or other cognitive disorders, consideration needs to be made as to

which parent is more likely to assist the child in meeting his or her educational goals. Special-needs children often require more consistency and predictability than children who do not have special needs. Consequently, the ability of a parent to consistently work with a child on homework or tutoring would be a relevant consideration in determining the best custodial arrangement. Interaction between a parent and a child's school is also a good indication as to which parent may be best able to meet the child's educational needs. A review of IEP's and school records can be helpful in trying to determine whether or not one parent has been more involved than the other with regard to these matters.

**(4) Child's Schedule:** Does one parent have the ability to meet the child's schedule on a more consistent basis. If a child needs therapy or treatment, which parent is going to provide that transportation? If a child needs to meet with tutors, how will the child get there? If there is sick day, who will remain home with a child?

### **C. Reports from Third Parties**

Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of the child must be heard and considered by the trial court, subject to the court's discretionary powers to exclude cumulative testimony.<sup>43</sup>

#### **1. Guardian Ad Litem**

Considering the importance of custody decisions and their virtual finality as rendered by the District Court, trial judges are becoming more agreeable to obtaining and considering testimony and input from as many informed and objective sources as possible. See In the Matter of Gwaltney, 68 N.C. App. 686, 315 S.E.2d 750 (1984), where the Court of Appeals held that, in child custody matters, the trial court may consider the recommendation of the child's Guardian Ad Litem concerning the needs of the minor child.

In Chapter 50 civil child custody cases, it appears that a Guardian Ad Litem is being appointed by the court to champion the best interest of the minor children who are the subject of the case pursuant to Rule 17(b)(3) of the North Carolina Rules of Civil Procedure.

Although the amounts are not set by statute, Guardian Ad Litem are entitled to compensation by the parents of the children for whom they are advocating.

#### **2. Department of Social Services**

Rather than hear testimony from a parade of traditional witnesses including neighbors, relatives and friends, with regard to such matters as the physical residence of the parties and their

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<sup>43</sup> In the Matter of Loretta Diane Shue, 311 N.C. 586, 319 S.E.2d 567 (1984); N.C.G.S. 7A-640 and 7A-657.

reputations in the community, many judges are granting motions filed by the parties requesting that the local Department of Social Services conduct a "home study" of all persons involved in custody actions. Such reports condense the relevant facts in a concise, objective and professional manner that provide the trial court with a more accurate picture of all the surrounding circumstances than would otherwise be possible. By stipulation, such reports may be received by the court in writing only, with copies being made available to counsel for both of the parties prior to the hearing. Absent a stipulation to the contrary, the social worker who compiled the report would be required to appear in person in court to testify and be subject to cross-examination by counsel for the parties. If the practitioner believes that such a report would benefit his or her client, then he or she may wish to obtain a stipulation for the admissibility of the written report from opposing counsel before the "home study" is undertaken. However, given that most Departments of Social Services around the state are understaffed and are overwhelmed with work in other kinds of cases involving children, it is submitted that this may be a last resort method of obtaining objective third party evidence.

### **3. Psychologist**

It is now accepted that the best interest of the child standard encompasses a consideration of the psychological and emotional welfare of the child as well as the child's physical well-being. Therefore, the legal profession has turned to experts in the field in order to obtain insight into the perceived needs of children generally, as well as the psychological factors actually involved in a particular custody dispute, such as the psychology of the children and the parties involved as well as the dynamics of the relationships between them.

Please note that a psychologist may not ethically talk with a minor child without the custodial parent's permission when the minor child is brought into the psychologist's office by the noncustodial parent.<sup>44</sup> It is also my understanding that psychologists prefer to have the consent of both parents before talking with a minor child when the parents have been granted joint legal custody.

### **4. Parenting Coordinator**

Effective on the 1st day of October 2005, the General Assembly created the position of a parenting coordinator, an individual holding a masters or doctorate degree in psychology, law, social work, counseling, medicine, or a related subject area, to assist the Court, counsel for the parties and the parties themselves in high-conflict child custody cases. See North Carolina General Statutes Sections 50-90 through 50-100. These parenting coordinators may be appointed at any time during the proceedings of a child custody action if all of the parties consent to the appointment. The Court may appoint a parenting coordinator without the consent of the parties upon the entry of a custody order (other than an *ex parte* order), or upon the entry of a parenting plan only if the Court also makes specific findings of fact that the action is a high-

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<sup>44</sup> White v. State Board, 97 N.C. App. 144, 388 S.E.2d 148 (1990).

conflict case, that the appointment of the parenting coordinator is in the best interest of any minor child in the case, and that the parties are able to pay for the cost of the parenting coordinator.

For a case illustrating that the findings of fact required by North Carolina General Statutes Section 50-91 have to be made in an order to appoint properly a parenting coordinator in a child custody action, see Hall v. Hall, 188 N.C. App. 527, 655 S.E.2d 901 (2008).

## **VII. Planing for a Special Needs Child's Adulthood**

### **A. General Power of Attorney**

As children with special needs attain the age of majority, those children may have an inability to manage their own affairs or make certain types of decisions on their own. For a child who has capacity, he or she can execute powers of attorney to a parent, relative or other person granting decision-making authority with regard to issues such as health care and financial issues. N.C.G.S. § 32A-1 provides a statutory short form **general power of attorney**. A copy of this form is attached as **FORM D**. This type of power of attorney can confer the following powers on the attorney-in-fact:

1. Real Property Transactions;
2. Personal Property Transactions;
3. Bond, Share, Stock, Securities and Commodity Transactions;
4. Banking Transactions;
5. Safe Deposit Box Transactions;
6. Business Operating Transactions;
7. Insurance Transactions;
8. Estate Transactions;
9. Personal Relationships and Affairs;
10. Social Security and Unemployment;
11. Benefits from Military Service;
12. Tax Matters;
13. Employment of Agents;
14. Gifts to Charities, and to Individuals Other Than the Attorney-in-Fact;
15. Gifts to the Named Attorney-in-Fact;
16. Renunciation of an Interest in or Power over Property to Benefit Persons Other Than the Attorney-in-Fact;
17. Renunciation of an Interest in or Power over Property to Benefit Persons Including the Attorney-and-Fact.

N.C.G.S. § 32A-2 describes in detail what each of the aforementioned types of transactions mean and provide the parameters under which the powers can be granted.

### **B. Health Care Power of Attorney**

N.C.G.S. § 32A-25.1 provides a statutory form health care power of attorney. Such a health care power of attorney can additionally be used by a competent child to designate broad powers to someone else to make health care decisions on his or her behalf. A copy of this document is attached as **FORM E**.

By designating a health care agent, a person can authorize another to:

1. Have Access to Medical Records;
2. Employ or Discharge Health Care Providers;
3. Consent and Authorize Both Admission and Discharge from Health Care Facilities;
4. Consent to and Authorize Admission and Retention in a Facility for Care or Treatment of Mental Illness;
5. Consent to and Authorize the Administration of Medications for Mental Health Treatment;
6. Provide Consent or Withdraw Consent for X-Ray, Anesthesia, Medication, Surgery, and Other Diagnostic and Treatment Procedures;
7. Authorizing a Withholding or Withdrawal of Life-Prolonging Measures;
8. Provide Medical Information at the Request of any Individual Acting as Attorney-In-Fact under a Durable Power of Attorney or as a Trustee or Successor Trustee;
9. Provide Consent for an Autopsy or Disposition of Remains.

### **C. Special Needs / Supplemental Needs Trusts**

Special Needs Trusts or Supplemental Needs Trusts, *see supra*, can be utilized when a child will receive certain government benefits such as SSI or Medicaid so that a parent can pass wealth for a child's benefit without impacting that child's ability to receive state or federal benefits. At the time of separation and divorce, it would often prove wise to have your client consult with an estate planning attorney in order to review the parties' goals in providing for a child into their adulthood and to ensure that any planned transfers of wealth will not negatively impact benefits that a child is currently receiving or may receive in the future.

## D. Guardianship

Where an adult child is incompetent or incapacitated, a guardian may need to be appointed pursuant to Chapter 35A of the North Carolina General Statutes. Under the guardianship statute, a legal relationship is created under which a person or agency is appointed to make decisions and act on behalf of another person (a ward) with respect to the ward's personal affairs, financial affairs, or both.

There are different types of guardians. A **Guardian of the Person** is "a guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward."<sup>45</sup> A **Guardian of the Estate** is "a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward."<sup>46</sup> A **General Guardian** is "a guardian of both the estate and the person."<sup>47</sup>

More specifically, a **guardian of the person** is "entitled to custody of the person of the guardian's ward and shall make provisions for the ward's care, comfort and maintenance, and shall as appropriate to the ward's needs, arrange for the ward's training, education, employment, rehabilitation or habilitation. The guardian of the person shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects that are with the ward."<sup>48</sup> The guardian may establish the ward's place of abode, including treatment facilities.<sup>49</sup> Additionally, the guardian may give any consent or approval necessary to "enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service; provided that, if the patient has a health care agent appointed pursuant to a valid health care power of attorney, the health care agent shall have the right to exercise the authority granted in the health care power of attorney."<sup>50</sup>

The **guardian of the estate** has the ability to take possession, for the ward's use, of all his estate, to collect all monies due to the ward, and to pay taxes owed by the ward out of the ward's estate.<sup>51</sup> The guardian of the estate must observe "the standard of judgment and care under the circumstances then prevailing that an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary in acquiring, investing, reinvesting, exchanging, retaining, selling, and managing the ward's property."<sup>52</sup>

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<sup>45</sup> N.C.G.S. § 35A-1202 (10)

<sup>46</sup> N.C.G.S. § 35A-1202 (9)

<sup>47</sup> N.C.G.S. § 35A-1202 (7)

<sup>48</sup> N.C.G.S. § 35A-1241 (1)

<sup>49</sup> N.C.G.S. § 35A-1241 (2)

<sup>50</sup> N.C.G.S. § 35A-1241 (3)

<sup>51</sup> N.C.G.S. § 35A-1254 (1)-(3)

<sup>52</sup> N.C.G.S. § 35A-1254 (4)

The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.<sup>53</sup> The guardianship should seek to preserve for an incapacitated ward the opportunity to make those decisions and exercise those rights that are within the ward's comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to competent adults.<sup>54</sup> The ward should be allowed to participate, to the maximum extent of his or her capabilities, in all decisions that will affect him for her.<sup>55</sup>

### **E. Interplay between Chapters 50 & 35A**

There is some possible interplay between the custody statutes under Chapter 50 and the guardianship statutes under Chapter 35A. These were discussed by the Court of Appeals in the case of McKoy v. McKoy, 689 S.E.2d 590, 2010 N.C. App. LEXIS 277 (N.C. Ct. App. 2010). In that case, the Plaintiff and the Defendant had a 26-year-old child who was fully disabled, both mentally and physically. The child suffered from, *inter alia*, cerebral palsy and mental retardation. She has suffered from these conditions since birth. She has been, and continues to be, fully dependent upon both of her parents for her care and well-being.

Prior to the separation of the Plaintiff and the Defendant, the child was adjudicated an incompetent pursuant to a hearing by the Clerk of Superior Court of Forsyth County. Prior to said hearing, which took place pursuant to Chapter 35A of the North Carolina General Statutes, the child had attained the age of 18 years.

As a result of the incompetency hearing, Letters of Appointment - Guardian of the Person, were granted to the Plaintiff and the Defendant and they were granted the custody, care and control of the ward.

Approximately six years later, the Plaintiff and the Defendant separated. The child continued to primarily live with her mother, but visited periodically with her father. In 2004, Plaintiff's counsel, at that time, filed an action for custody of the child pursuant to Chapter 50 of the North Carolina General Statutes. The Defendant, father, filed a counterclaim for custody of the minor child pursuant to Chapter 50 as well.

A custody hearing in the District Court was calendared and during said hearing, Plaintiff's new counsel filed a motion which sought the dismissal of the matter due to the District Court's lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules

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<sup>53</sup> N.C.G.S. § 35A-1201 (3)

<sup>54</sup> N.C.G.S. § 35A-1201 (5)

<sup>55</sup> *Id.*



of Civil Procedure. Plaintiff argued that the subject matter should properly be before the Clerk of Superior Court pursuant to Chapter 35A for a modification of the Guardianship of the Person that had been issued on behalf of both parents. The trial court determined that it had jurisdiction under Chapter 50-13.8 and proceeded to make a determination as to the custody of the child.

The North Carolina Court of Appeals reversed. It noted that Chapter 35A "establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child... the clerk of superior court has original jurisdiction over proceedings determining competency. Here, as a result of a hearing conducted pursuant to N.C. Gen. Stat. § 35A-1112 (2009), [the child] was declared an "incompetent adult."<sup>56</sup>

Chapter 35A defines "an incompetent adult" as "an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition."<sup>57</sup>

After an adjudication of incompetence, the clerk has "original jurisdiction" for the appointment of guardians of the person, guardians of the estate, or general guardians for incompetent persons and of related proceedings.<sup>58</sup>

In this case, the clerk had issued letters of appointment naming both plaintiff and defendant as their child's guardians of the person. By statute<sup>59</sup> the clerk retains jurisdiction following appointment of a guardian and the clerk shall have the authority to remove a guardian for cause and shall appoint a successor guardian's bond. Per Chapter 35A, interested persons can file a motion in the cause with the clerk to request modification of the order appointing a guardian or for the consideration of any other matter pertaining to the guardianship.<sup>60</sup>

The Court of Appeals held that the Clerk of Superior Court is the proper forum for determining custody disputes regarding a person previously adjudicated an incompetent adult and who has been provided a guardian under Chapter 35A. As the custody dispute between the guardians, in this case, was a matter pertaining to the guardianship, the action should have been filed as a motion in the cause under §35A-1207(a) with the clerk.

The district court has concurrent jurisdiction with the clerk of Superior Court with respect to custody of disabled adult children. In this case, the plaintiff and the defendant could have

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<sup>56</sup> See, McKoy at 592.

<sup>57</sup> N.C. Gen. Stat. § 35A-11-1(7) (2009).

<sup>58</sup> McKoy at 592, N.C.G.S. §35A-1203 (2009).

<sup>59</sup> N.C.G.S. §35A-1203

<sup>60</sup> N.C.G.S. § 35A-1207(a) (2009)

decided not to have their child declared an incompetent adult and the district court would have had jurisdiction under §50-13.8 to then determine custody of said child. Chapter 35A, however, "unequivocally provides that the clerk of Superior Court has exclusive jurisdiction over guardianship matters. Once the clerk of Superior Court exercised its jurisdiction under chapter 35A, adjudicating the child as an incompetent adult and providing a guardian, the clerk retained jurisdiction to resolve all matters pertaining to the guardianship."<sup>61</sup>

Where there are courts of concurrent jurisdiction, the court which first acquires jurisdiction retains it. Therefore, the Court of Appeals found that the district court obtains jurisdiction under §50-13.8 to determine custody only when the disabled child at issue has not been declared incompetent and had a guardian appointed.

While the Superior Court clerk retains jurisdiction over all guardianship matters under Chapter 35A, "obviously not all disabled adult children are declared incompetent and provided guardians. In those instances, §50-13.8 fills the gap, authorizing the District Court to determine custody.

There are important difference in how a child is treated under the guardianship statute and under the custody statutes in Chapter 50. Most importantly,

- 35A-1107 provides that a respondent (the disabled child) is, as an adult, entitled to be represented by counsel of her choice or by an appointed guardian ad litem.
- 35A-1201 provides that guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.

Consequently, a person who is granted legal and physical custody of a child under Chapter 50 has complete authority over that child. The child essentially has no rights, in a legal context, over his or her care and control. An adult who is disabled or incompetent does have rights under North Carolina General Statutes §35A and said statutory provisions provide that said person should be represented by counsel of his choice or by an appointed guardian ad litem; that the guardianship should seek to preserve for the incompetent the opportunity to exercise

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<sup>61</sup> Id.

those rights which are within his comprehension and judgment. This provides a level of autonomy for the person subject to a guardianship which, in adults, allows for a greater level of independence and dignity. Therefore, as between Chapter 35A and Chapter 50, at least with regard to incompetent children, a guardianship proceeding will offer the child more freedoms to make the decisions that he or she is able to make and depending upon his or her level of competence can be the more appropriate solution for providing care for that person into adulthood.

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