

Child's Needs First

Decisions when acting for family with child with disability

By **Melanie Battaglia**

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(April 5, 2019, 2:15 PM EDT) -- Family law clients come to us with myriad issues, including supporting a child with a disability. While resolving child-related disputes can be challenging on their own, parents caring for a child with a disability creates additional complexity.

Family lawyers must exercise the necessary diligence to ensure that they not only understand the specific needs of their client's child, but that they engage the appropriate professionals to resolve the family dispute in accordance with the child's best interests. I propose some considerations for family lawyers when acting for a client with a child with a disability that will help to better meet the needs of the child.

How aligned are parents?

When assessing the decision-making capabilities of the parents, it is important to understand whether the parents agree with their child's diagnosis and/or the needs of their child in relation to their disability. If they are not aligned, it will no doubt be difficult for them to make joint decisions regarding their child's education and health care. If you act for a client with a teenage child with a developmental disability, one of the first questions you should ask your client is if their child knows about his or her disability. It is not uncommon for parents not to speak to their child about his or her disability, particularly children living with autism spectrum disorder (ASD). Your client's disclosure to their child about his or her diagnosis at the age-appropriate time will provide insight into negotiating decision making on behalf of your client and what clinical intervention and supports you may need through the dispute resolution process.

Relatedly, the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, provides for presumptions of capacity, namely age 16 for personal care and 18 for property.

For a child with a disability, presumptions of "incapacity" for personal decision making may prevail incorrectly among lawyers and judges for many reasons, including misunderstanding and social stigma related to certain developmental disabilities, particularly ASD. The child may have a disability but very well have capacity to make decisions for his or her personal care, including where he or she wants to live and decisions with regards to his or her education. We are seeing an increase in the use of the "Voice of the Child" Reports (see, for example, Justice Frances Kiteley's decision in *Canepa v. Canepa* 2018 ONSC 5154, although the children in that case were very young which raises different concerns) and the use of these reports should be equally extended to children living with a disability without discrimination in the appropriate cases (as Justice David Corbett considered in *Perino v. Perino* 2012 ONSC 328).

What are child's needs?

Clinical assessments, including psychoeducational assessments, are important to identify the needs of the child and his or her evolving strengths and skills. Ask your client for a copy of the child's Ontario School Record which will likely have copies of prior assessments and clinical reports. If your client has a child with ASD, it is recommended to engage a parenting mediator with expertise in neurodevelopmental disorders. Among other things, transitions may be an area of need for the child

and the appropriate expertise may be required when developing the parenting schedule to ameliorate the transitions between two homes and school, activities, and so on for the child. Ask your client whether their child has been identified with an exceptionality at school through an Identification Placement Review Committee, if they have an Individual Education Plan and what accommodations are needed for their child at school, including, for example, assistive communication devices or other technology accommodations (which will also be important considerations in the child support analysis).

Will client need to advance guardianship application?

If there is a possibility that the child may be deemed incapable of making his or her own decisions in the future and your client seeks to retain future decision making, try to negotiate the ability of your client to do so in the separation agreement. To that extent, include terms that (i) the other parent will not contest any future applications that may be brought by the decision-making parent in order to maintain decision-making authority for the child at the appropriate time and (ii) identify a dispute resolution mechanism process for such applications.

Keeping these considerations in mind family lawyers will be better equipped to assist clients who are parents of a child with a disability to ensure that the child's needs are fully met in accordance with their best interests.

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