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FROM THE FAMILY LAW PRACTITIONER'S PERSPECTIVE:
DIVORCE ACTIONS AND SPECIAL NEEDS TRUST

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	SPECIAL NEEDS: A SPECTRUM OF NEEDS	2
III.	MINOR CHILD WITH SPECIAL NEEDS.....	2
	A. Preliminary Investigation: Do not make assumptions. Each child is unique.....	2
	B. Assessment of Needs	3
	C. Special Considerations Regarding the Parents	4
	D. Educating the Court.....	4
	E. Changing Needs.....	5
	F. Court’s Authority to Tailor Non-Standard Orders Related to Rights and Duties.....	5
	G. Tailoring Orders Regarding Rights and Duties of Parents of the Child with Special Needs	7
	1. Rights at All Times.....	7
	2. Rights and Duties during Periods of Possession	8
	3. Rights under Family Code Section 153.132.....	9
	H. Access to and Possession of the Child with Special Needs	17
	1. Legal Standards for Possession Orders	17
	2. Using Factors for Underage Children for the Child with Special Needs.....	18
	3. Temporary Possession Orders	19
	4. Evolving Possession Schedule Post-Final Orders.....	20
	5. Different Possession Schedules from Siblings.....	22
	6. Respite Care for Parents	22
	I. Child Support for the Minor Child with Special Needs.....	22
	1. Amount of Support for the Minor Child with Special Needs	23
	2. Spousal Maintenance as Support for the Parent Caring for a Child with Special Needs	24
	3. Property Division to Help Meet the Needs of the Child with Special Needs..	26
	4. Medical Support for the Child with Special Needs	26
	5. Death of Obligor	27
IV.	ADULT CHILD WITH DISABILITIES.....	28
	A. When a Child with Special Needs Becomes an Adult	28
	B. Appointment of Guardian in Probate Court.....	28
	C. Possession of and Access to an Adult Child with Disabilities.....	29
	D. Support of the Adult Child with Disabilities.....	30

1.	Proof of Disability.....	30
2.	Who May Seek Support for the Adult Child with Disabilities?	32
3.	Procedure for Seeking Support for the Adult Child with Disabilities.....	32
4.	Amount of Support for the Adult Child with Disabilities after Age Eighteen ..	33
5.	Annuities as Support for the Adult Child with Disabilities	34
6.	Death of Obligor	34
7.	Spousal Maintenance and Disproportionate Property Division as Support for the Adult Child with Disabilities.....	34
V.	PRACTICE TIPS	35
A.	Payment of Child Support to Special Needs Trust.....	35
B.	Life Insurance Related to Child Support	35
C.	Child Support as Obligation of Estate.....	36
D.	Medical Support.....	36
E.	Additional Child Support.....	37
F.	Child Support for Multiple Children, both Typical and Special Needs	37
G.	Special Needs Trust and the State Disbursement Unit.....	37
VI.	CONCLUSION	38

From the Family Law Practitioner's Perspective: Divorce Actions and Special Needs Trust

I. INTRODUCTION

Every person with a disability - or special needs - is unique. Every family law case involving the family of a person with special needs is also unique. This article will attempt to address some possible approaches to handling and resolving such cases, and considerations for tailoring the investigation, advocacy, presentation of evidence, and drafting of orders in such cases. This article will also address the continuing need to parent an adult child with disabilities, and some of the legal options in those circumstances. Because the range of the different special needs is so broad, it is impossible to address all of the potential issues that a child with special needs and/or an adult with disabilities may encounter. This article will also attempt to explore some of the governmental benefits available, the need for special needs trusts, and the impact of those benefits on family law cases; however, Mary Alice Jackson's article for this seminar titled Child and Spousal Support: The Impact on Means-Tested Public Benefits will explore those areas in much greater depth. Ms. Jackson's article is hereinafter referred to as "Jackson's Article."

Certain parts of this article draw from the following articles:

My article with Pi-Yi Mayo titled Child Support for Children with Disabilities, presented at Advanced Family Law in 2010;

My article titled Issues for the Disabled or Special Needs Child, presented at 2014 Innovations—Breaking Boundaries in Custody Litigation;

My article with Carol Bertsch titled Cases with Special Needs Children and Spouses, presented at the 2014 Advanced Elder Law Course;

Jonathan J. Bates and Kevin Spencer's article titled Kids with Special Needs: What You Need to Know to Prepare, Including Financial Issues at the Time of Divorce and Needs in the Future, presented at Advanced Family Law in 2018; and

My article titled From the Family Law Practitioner's Perspective: Planning for the Child with Special Needs During Divorce and SAPCR Proceedings, presented at Innovations in Child Custody Litigation 2019.

At points in this article, there are critical references to the Texas Family Law Practice Manual formbook language. These references should not be interpreted as a criticism of the hard work by the Practice Manual Committee over the years. The Practice Manual is an invaluable resource to family law practitioners; however, some of the formbook language may be problematic in cases involving children and adults with special needs, and special drafting is often needed in those instances. See Practice Tips below for some alternative language options.

II. SPECIAL NEEDS: A SPECTRUM OF NEEDS

Persons with special needs function on a very broad spectrum. For example: autism is now generally referred to as Autism Spectrum Disorder. This description recognizes that the symptoms of an individual with autism cover a broad range. Some individuals with Autism Spectrum Disorder have limited impairments and can live typical lives, while others can be non-verbal and live very impaired lives. Likewise, certain individuals with special needs need minor accommodations in education, or limited medical or therapeutic interventions to help them succeed and live fairly typical lives, while others may have severe physical/medical or intellectual disabilities that require constant medical attention, assistance with feeding, toileting, and self-care. Some individuals with special needs may have life-threatening disabilities, or disabilities that severely impact their life expectancy. Some conditions may be overcome with time and treatment, while other conditions may be life-long conditions. Some conditions may have a fairly predictable impact on the child and the family, and other conditions may involve a great deal of uncertainty about the future. Where an individual falls on this spectrum will influence how the case should be developed, presented, and resolved.

III. MINOR CHILD WITH SPECIAL NEEDS

A. Preliminary Investigation: Do not make assumptions. Each child is unique.

The first step the practitioner should take is to learn everything they can about the needs of the child with special needs. Obviously, the client will be an incredible source of information, but the practitioner should also try to conduct independent research to obtain a better understanding of the child's condition and needs. A client can only provide his or her perspective of a circumstance. We have all learned the hard way that the stories our clients tell us should be investigated. Often, the two parents' perspectives of their child will be very different. In those instances, it is crucial to develop corroborating evidence regarding the needs of the child.

It is often helpful to ask the client what the child's other parent will report, and how they will describe the child and his or her needs. This line of questioning may expose potential conflicts between the parents' views, but may also provide information from another perspective. There is likely some truth in both parents' perspective. Asking what the other parent may say will, at least, provide the client's perception of the other parent's viewpoint. Don't stop there; interview other persons familiar with the child and the parents. Third parties and, ultimately, the judge might have a different outlook than either of the parents, but this technique can be fruitful during the initial interview.

It is often informative to ask the client to describe daily routines. The on-going schedule of doctors' appointments and therapy is crucial to the issues that will need to be addressed in the orders. Often, managing a child's treatment plan can be a full-time occupation. In addition, the daily routine description will give insight into the abilities the child possesses, the level of care the child requires, and who provides that care. Make sure to find out who is involved with each step of caregiving and have the client describe each parent's role in caregiving. Find out if there are third-party caregivers – they can be very beneficial in describing the child's circumstances and needs, the parents and their historic involvement, and may be crucial witnesses in the case. Third-party caregivers will often offer a more objective assessment of the child's abilities and needs, as well as information regarding the abilities and involvement of both parents.

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