

Through The Labyrinths: Using Collaborative Practice And Special Needs Counsel To Help Parents Of Children With Special Needs Restructure Their Families

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ABSTRACT

The pitfalls at the intersection of family restructuring and special needs parenting are numerous, consequential, and often invisible to Family Law attorneys and their clients. Traditional, one-size-fits all, adversarial litigation is ill-suited to the unique legal, financial, and logistical challenges parents of children with special needs confront during separation, divorce, and other forms of family restructuring. Collaborative Practice offers a coordinated, interdisciplinary, individualized approach that empowers parents to achieve creative, responsive, feasible solutions to the complex challenges they face when restructuring their families. For parents who have a child with special needs, a Collaborative process that includes special needs counsel may reduce the risk of serious mistakes and expand the possibilities for outcomes that protect, benefit, and strengthen their families, even as their needs change in the future.

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Utilizing special needs counsel in Collaborative Practice offers parents of children with special needs a peaceful, secure path through divorce, separation, and family restructuring.

I. INTRODUCTION

Parents of children with special needs who are restructuring their families stand at the intersection of two bewildering labyrinths, often blindfolded.⁴ Each experience—family dissolution and transformation and special needs parenting—generates its own maze of legal, financial, logistical, and emotional challenges. Those who are entangled in both simultaneously are especially vulnerable and in need of what our courts and adversarial processes are least equipped to provide: coordinated, interdisciplinary, individualized

problem-solving. For these families—and the professionals serving them—a very promising path forward is through Collaborative Practice.

In Part II, we clarify our use of the term “special needs,” discuss what we know and can infer about the incidence of divorce between parents of children with special needs and describe some of the perils these parents face in a one-size-fits-all, adversarial process. We offer an overview of Collaborative Practice in Part III, emphasizing features that could make it particularly responsive to the needs of parents of children with special needs. In Part IV, we highlight a few of the more common legal pitfalls these parents face that underscore their need for coordinated, interdisciplinary, individualized representation during family restructuring. Finally, Part V explores how special needs lawyers might ethically engage in Collaborative family conflict resolution processes on behalf of parents of children with special needs, or the children themselves, in accordance with the Pennsylvania Rules of Professional Conduct.

4. We use the term “restructuring” in this article to honor the fact that family disputes and transitions take many forms. The parents may have never married or even shared a residence, the disputing parties may include other relatives other than the two parents, and these disputes may occur well after the parties have separated and settled into new residences. However, since these disputes frequently arise during and following divorce and separation, we use these terms as well.

II. RESTRUCTURING FAMILIES OF CHILDREN WITH SPECIAL NEEDS

A. What We Mean by “Special Needs”

The term “special needs” is imprecise and controversial. There is no consensus on its meaning, or even whether it should be used at all. Some view it as an “ineffective euphemism,”⁵ and many favor other terms, such as disabilities,⁶ exceptionalities,⁷ challenges,⁸ and different abilities. Some scholars reject all these classifying terms, given how potentially stigmatizing and harmful they may be for those who are so labeled, particularly for people whom society already marginalizes.⁹ Others favor labels when their use advances efforts to improve lives.¹⁰ We use the person-centric¹¹ term “children with special needs” as inclusively as possible, and with the utmost respect for the individuals to whom we refer. We use it not to create hierarchies or categories, but to call attention to the complex needs of extremely vulnerable families that the legal community has overlooked and underserved.¹²

While we use the term generally and inclusively, we caution that “special needs” and other related terms, e.g., “handicapped person,”¹³ “physical or mental impairment,”¹⁴ “child with a disability,”¹⁵ and “protected handicapped student,”¹⁶ typically have specific statutory and regulatory definitions. Understanding these legal definitions is a crucial component of effective advocacy for children’s legal rights, including their eligibility for important protections and benefits.

B. The Incidence of Divorce and Separation Between Parents of Children with Special Needs

Research and scholarship on the incidence of divorce, separation, and other types of family restructuring, between parents of children with special needs is sparse. The available evidence suggests that the incidence of divorce is comparable to that of the general population, or perhaps somewhat higher for parents of children with certain special needs. We found no evidence supporting the often-touted claim that the divorce rate for these parents is 80%, which appears to be more myth than sta-

5. Morton Ann Gernsbacher *et al.*, “Special Needs” is an Ineffective Euphemism, 1 COGNITIVE RESEARCH: PRINCIPLES & IMPLICATIONS 29 (2016).

6. See, e.g., American Association of People with Disabilities.

7. See, e.g., EDUCATING YOUNG CHILDREN WITH & WITHOUT EXCEPTIONALITIES: NEW PERSPECTIVES (Festus E. Obiakor, *et al.*, eds., 2019).

8. See, e.g., Lori Korinek, *Supporting Students with Mental Health Challenges in the Classroom*, 65 PREVENTING SCHOOL FAILURE: ALT. EDUC. FOR CHILDREN & YOUTH 97 (2021).

9. Moniqueka E. Gold & Heraldo Richards, *To Label or Not to Label: The Special Education Question for African Americans*, 26 EDUC. FOUND. 143 (2012).

10. See, e.g., Catherine Lord *et al.*, *The Lancet Commission on the Future of Care and Clinical Research in Autism*, LANCET ___ (December 6, 2021), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)01541-5/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)01541-5/fulltext).

11. Dana S. Dunn & Erin E. Andrews, *Person-first and Identity-first Language: Developing Psychologists’ Cultural Competence Using Disability Language*, 70 AM. PSYCH. 255 (2015).

12. While this Article focuses on families with children with special needs, we recognize that many families also have adults with special needs that may require specialized knowledge by involved legal and other experts and supportive processes such as Collaborative Practice.

13. 34 C.F.R. §104.3(j).

14. 34 C.F.R. §104.3(i).

15. 34 C.F.R. §300.8.

16. 22 Pa. Code §15.2 (“A student who . . . [h]as a physical or mental disability which substantially limits or prohibits participation in or access to an aspect of the student’s school program.”).

tistic.¹⁷ Some scholars even point out that parenting a child with special needs strengthens some marriages,¹⁸ while others underscore the unique and sometimes profound ways the experience strains them.¹⁹ Never-married parents face even higher rates of dissolution of their relationships.²⁰ Clearly, every family and their conflicts are unique, and those between parents of children with special needs are affected by their children's unique needs.²¹

While both marriage and divorce rates in the United States have been declining in recent years,²² more than 32,000 Pennsylvanians completed divorces in 2019 alone.²³ Around the same time, there were nearly 200,000 Pennsylvanians aged 0-20 with special needs.²⁴ Nationwide, there were approximately 750,000 divorces in 2019,²⁵ while in the 2019-2020 school year, 14 percent of all public school students (7,300,000 students aged 3-21) received special education services under the Individuals with Disabilities Education Act (IDEA).²⁶ Thus, legal practitioners and courts are likely to encounter many divorcing or separating families that include children with special needs.

III. UNDERSTANDING COLLABORATIVE PRACTICE AND ITS SUITABILITY FOR FAMILY RESTRUCTURING INVOLVING CHILDREN WITH SPECIAL NEEDS

The labyrinths of family restructuring and special needs parenting are not only complicated; they are minefields. Decisions about custody, support, residency, education, property division, and estate planning challenge all parents. But for parents of children with special needs, these decisions are fraught with additional, interconnected legal, financial, and logistical complexities, which often carry severe consequences for missteps.²⁷ Agreements around custody and co-parenting could affect

17. Marina Sarris, *Under a Looking Glass: What's the Truth about Autism and Marriage?*, INTERACTIVE AUTISM NETWORK (April 11, 2017), <https://iancommunity.org/dev/whats-truth-about-autism-and-marriage>.

18. See Sigan L. Hartley, et al., *The Relative Risk and Timing of Divorce in Families of Children with an Autism Spectrum Disorder*, 24 J. FAM. PSYCHOL. 449 (2010).

19. Christian Ryan & Elizabeth Quinlan, *Whoever Shouts the Loudest: Listening to Parents of Children with Disabilities*, 31 J. APPL. RES. INTELL. DISABILITIES 203 (2018).

20. Sara McLanahan, *Fragile Families and the Reproduction of Poverty*, 621 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 111, 120 (2009).

21. See Nycole C. Kauk, *The Experience of Coparenting Within the Parameters of Divorce: Perspectives from Parents of Children with Autism Spectrum Disorder* (2018) (Graduate Thesis, University of South Florida), <https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=8509&context=etd>; see also, J. Aaron Resch et al., *Giving Parents a Voice: A Qualitative Study of the Challenges Experienced by Parents of Children with Disabilities*, 55 REHAB. PSYCH. 139 (2010).

22. Lydia Anderson & Zachary Scherer, *U.S. Marriage and Divorce Rates Declined in Last 10 Years, America Counts: Stories Behind the Numbers* (Dec. 7, 2020), <https://www.census.gov/library/stories/2020/12/united-states-marriage-and-divorce-rates-declined-last-10-years.html>.

23. Pennsylvania Department of Health, Marriage and Divorce Statistics 2020 (May 2021), https://www.health.pa.gov/topics/HealthStatistics/VitalStatistics/MarriageDivorce/Documents/Marriage_Divorce_2020.pdf.

24. William Erickson, Camille G. Lee & Sarah von Schrader, *2018 Disability Status Report: Pennsylvania*, Cornell University Yang Tan Institute on Employment and Disability 11-15 (2021), https://www.disabilitystatistics.org/StatusReports/2018-PDF/2018-StatusReport_PA.pdf?CFID=7ccd6d13-1b5d-4cf3-bc74-c630dbd118d5&CFTOKEN=0.

25. National Center for Health Statistics, *National Marriage and Divorce Rate Trends*, <https://www.cdc.gov/nchs/data/dvs/national-marriage-divorce-rates-00-19.pdf> (including data from 45 states).

26. Véronique Irwin et al., *Report on the Condition of Education 2021 at 13* (May 2021), <https://nces.ed.gov/pubspubs2021/2021144.pdf> (citing statistic for the 2019-2020 school year).

27. Sarah E. Kay & Maria C. Gonzalez, *Working with Experts and Families with Special Needs Children*, 33 J. AM. ACAD. MATRIM. LAW. 419 (2021).

the child's access to publicly funded special education and related services. A decision to provide financially for a child with special needs could result in the loss of crucial public benefits. Given the logistical and practical challenges inherent in raising a child with special needs, one-size-fits-all adversarial processes suit these families poorly.

Collaborative Practice empowers parents living in complex family circumstances to create flexible, individualized, comprehensive agreements that are both feasible in the short term and adaptable as the family's needs change over time.

A. What is Collaborative Practice?

Collaborative Practice is a holistic method of dispute resolution that offers the parties an effective, efficient, and dignified alternative to litigation. In Collaborative family law practice, the parties themselves, with the aid of their attorneys and, where needed, an interdisciplinary group of professionals, develop specific agreements to shape their family's transition and future. This process is voluntary and relies upon the parties' transparency, respectful and good faith participation, and openness to learning from each other and their team of professionals to reach individualized solutions to their conflicts. The parties must agree to resolve their conflicts through Collaborative Practice rather than litigation. Employing a process that encourages parents to work together to tailor their agreements to their specific family needs is especially beneficial for families with members with special needs.

Collaborative Practice was originally developed in 1990 by a Minnesota family law attorney, Stu Webb, who saw firsthand the damage of litigation to families.²⁸ Since then, it has become a widely accepted and respected method of resolving conflict and is practiced around the globe in family law and other areas of practice.²⁹ It has been formalized through organizations such as the International Academy of Collaborative Professionals (IACP), which honor the interdisciplinary nature of the process by bringing together the legal, mental health, financial and other professionals involved in Collaborative Practice. Together, they have developed shared expectations for training and practice, continually refined its methodology and requirements, and created standards and ethical guidelines for practitioners.³⁰ Collaborative practitioners in Pennsylvania and other states have created local and regional practice groups to advance IACP objectives.³¹

Collaborative Practice has been gaining legal recognition in the United States through the influence of the Uniform Collaborative Law Act (UCLA), which has been adopted in some form in 22 states and the District of Columbia and is under consideration in other states.³² The UCLA includes minimum requirements for Collaborative Practice participation agreements to ensure their voluntariness, authorizes courts to approve agreements, and permits counsel to enter into disqualification agreements with their clients.³³ The disqualification agreements ensure that

28. Stu Webb, *Collaborative Law: A Practitioner's Perspective on Its History and Current Practice*, 21 J. AM. ACAD. MATRIM. LAW. 155, 155-157 (2008).

29. Ann Levin, Mary McKinney Flaherty, Linda S. Pelish, Mary S. Timpany & Zanita A. Zacks-Gabriel, *Collaborative Practice in Pennsylvania: The Pennsylvania Collaborative Law Act*, 90 PA. BAR. ASSOC. Q. 71,72 (2019).

30. *Id.*

31. A list of Collaborative Practice groups in Pennsylvania is available through the IACP website at https://www.collaborativepractice.com/collaborative-practice-groups?country=1228&state_province=1037.

32. UNIF. COLLABORATIVE LAW ACT (2010).

33. *Id.*

if the Collaborative process is unsuccessful, the lawyers and other involved professionals will terminate their involvement and not provide representation or evidence in any resulting litigation.

Pennsylvania has adopted its own version of the UCLA. The Pennsylvania Collaborative Law Act (PCLA) applies to “all disputes between family members,” whether in a family law context, trust or estate matter, business or partnership arrangement, or similar type of relationships.³⁴

The disqualification clause helps create a strong incentive to reach agreement to avoid the loss of all Collaborative counsel and allied neutral professionals who would be conflicted out of further representation or involvement if the matter goes to litigation.³⁵ Although the process is currently used primarily by families with above-average income and assets, there are efforts underway to expand access to this model.³⁶

B. Collaborative Family Conflict Resolution as an Appropriate Process for Parents of Children with Special Needs

In appropriate situations, Collaborative Practice, rather than litigation, may be especially beneficial for families of children with special needs. These families enjoy the same benefits most families gain by avoiding litigation. But the benefits are heightened due to the additional challenges with school, provision of special services, medical concerns, and disability-related financial concerns requiring significant post-separation or post-divorce cooperation.

Collaborative Practice is part of a larger paradigm shift in family law that is especially pronounced in disputes involving children.³⁷ Parents who file custody petitions now often discover they must, at minimum, attend informational sessions about mediation, if not actually engage in mediation.³⁸ These changes in practice are based on the idea that adversarial processes harm children.³⁹ Most experts agree that the higher the level of conflict between parents, the worse the effects of the family dissolution on children.⁴⁰ Experts fear that even if the dispute is settled, the adversarial process leaves scars that impede parenting both during and after the dispute.⁴¹ Furthermore, Pennsylvania family courts are overwhelmed with cases. In 2019 alone, more than 35,000 new divorce cases, 45,000 new custody/partial custody/visitation cases, and 160,000 new spousal and child support cases were filed.⁴²

34. 42 Pa.C.S.A. §7401 *et seq.*

35. For a more in-depth analysis of Collaborative Practice in Pennsylvania, *see* Levin, *et al.*, *supra* note 29.

36. *See, e.g., About the Maryland Academy of Collaborative Professionals*, COLLABORATIVE PROJECT OF MD, <https://collaborativeprojectmd.org/about/>.

37. Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CINN. L. REV. 891, 894 (2010).

38. *See, e.g.*, the complaint form for child custody petitions available on the Montgomery County, Pennsylvania, Court of Common Pleas website, which includes notice of mandatory attendance at both a parenting program and a mediation orientation session, <https://www.montcopa.org/DocumentCenter/View/294/Complaint-for-Custody?bidId=>.

39. Jane C. Murphy & Jana Singer, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* 26 (2015).

40. *Id.*

41. *Id.* at 26-28.

42. In 2019, the Pennsylvania courts reported that 46,920 new custody/partial custody/visitation cases, 38,091 new divorce cases, and 162,275 new spousal & child support cases were filed. Supreme Court of Pennsylvania Administrative Offices of the Pennsylvania Courts, 2019 Caseload Statistics of the Unified Judicial System of Pennsylvania 54, 64, <https://www.pacourts.us/Storage/media/pdfs/20210827/202431-2019report.pdf>.

Encouraging families to resolve their disputes Collaboratively may help relieve our court system of this enormous burden.

While non-litigation options may benefit many, some circumstances may require adversarial court proceedings, particularly cases involving family violence or other safety concerns, such as ongoing, unacknowledged substance abuse.⁴³ Those engaging in non-adversarial conflict resolution should also consider how power imbalances related to gender or other inequalities may undermine the ability of parties to advocate for their own interests in a less formal setting.⁴⁴ True voluntariness and substantial bargaining equality are essential to non-litigation processes like Collaborative Practice.

For many families of children with special needs, however, court processes are especially ill-fitting. Children with special needs may not fit into the standard custody arrangements typical of many court decisions, litigation is a difficult and expensive environment in which to fully address special needs considerations, and it may be burdensome or even impossible to bring the needed professionals from a range of disciplines into the courtroom on the court's timeframe.⁴⁵ Few family court judges are able to schedule enough time to fully address the complex issues involved. The many delays in court proceedings and the length of time it may take to reach a judicial decision could well mean that by the time a decision is reached, the child's needs have already changed. In addition, some of the issues that deserve attention, such as children's special education needs or access to public benefits programs, may be viewed as beyond the court's decisional scope in a child custody or divorce hearing or require further litigation and significant delays.

In contrast, certain features of the Collaborative Process are especially beneficial to families with children with special needs. By committing to a non-litigation resolution, the parties can shift from defending their position to finding ways to meet the interests and needs of all family members.⁴⁶ Collaborative Practice, which emphasizes transparency and information sharing, may help the parties develop agreements that allow for the extensive coordination families need to serve their children's special needs. Collaborative processes are also highly educational, ensuring that all involved truly understand the specific disabilities and their effects on the child and family.

Further, Collaborative Practice is often interdisciplinary. Because many legal practitioners have no knowledge or experience related to individuals and families with special needs, including appropriate neutral professionals in the Collaborative process may greatly increase the likelihood of a good result for the family. Mental health and financial professionals may have special areas of competency, as may legal professionals who specialize in disability law. Bringing in appropriate experts can educate those involved in the Collaborative process and increase their understanding of the children's special needs as well as the complex legal and institutional environments in which parents must try to meet their children's needs.

Finally, Collaborative Practice itself is individualized and adaptable to the individual family's needs, as are the agreements the parties create in it. These agreements may reach well beyond the areas a court would include, which may be especially helpful for families that have to juggle numerous disability-related appointments, school involvement and other challenges. Because Collaborative Practice invites the par-

43. See, e.g., Murphy, *supra* note 37, at 908.

44. Rachel Rebouché, *A Case Against Collaboration*, 76 MD. L. REV. 547, 586-90 (2017).

45. See generally Kay & Gonzalez, *supra* note 27.

46. Levin *et al.*, *supra* note 29, at 75.

ties and professionals to engage in peacemaking rather than litigation, the process is more likely to fully address the child's unique needs and build a style of interaction that will support the entire family in the future.⁴⁷

IV. ASSESSING THE BENEFITS OF INTEGRATING DISABILITY LAW EXPERTISE INTO COLLABORATIVE FAMILY LAW PRACTICE

To appreciate why parents of children with special needs require coordinated, interdisciplinary, individualized representation during family conflicts, it is helpful to consider how the ordinary decisions made during their legal proceedings may have an extraordinary impact on their children's special legal rights. A complete examination of all the ways family restructuring decisions intersect with the complex legal rights of children with special needs is far beyond the scope of this article. Instead, we focus on three areas where the uninformed or unwary face particularly serious risks: (1) access to free and appropriate special education services; (2) establishment of district of residence, including access to transportation; and (3) eligibility for crucial public benefits, such as Medicaid.

A. Unwary Parents May Jeopardize Their Children's Special Education Rights

Many children with special needs are entitled under both federal and state law⁴⁸ to receive important, publicly funded special education services through their local public school districts. As Local Educational Agencies (LEAs), public school districts and charter schools must identify and properly evaluate eligible students and provide them appropriate special education and related services in the least restrictive school environment, all at no cost to the parents.⁵⁰ While "a child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem),"⁵¹ in practice, parents, as their children's decision-makers in the special education system,⁵² may unwittingly forego or waive their children's rights to crucial and often costly services and placements without adequate legal information and advice.

Because parents hold their children's rights under the IDEA, they must first understand how the statute defines "parent" to ensure these rights survive. While the IDEA recognizes biological or adoptive parents, foster parents, and guardians all as

47. Susan Gamache, *Family Peacemaking with an Interdisciplinary Team: A Therapist's Perspective*, 53 FAM. CT. REV. 378 (2015).

48. The two most important federal statutes governing the rights of school age students to special education and related services, and protecting them against discrimination based on their disabilities, are the Individuals with Disabilities Education Act (IDEA), 20 U.S. Code §1400 *et seq.* (implementing regulations at 34 C.F.R. §300.1 *et seq.*), and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794 (implementing regulations at 34 C.F.R. §104.1 *et seq.*). The Pennsylvania School Code adopts and augments these two federal statutes at 22 Pa. Code §§14.1, *et seq.*, and 15.1 *et seq.*, respectively. For a useful "side by side" comparison of the IDEA and Chapter 14 of the Pennsylvania School Code, see <https://s3.amazonaws.com/pattan-live/pattan.net-website/images/file/2011/08/15/sidebyside021209.pdf>.

49. Both the IDEA and Section 504 provide for a "Free and Appropriate Public Education" (FAPE) for eligible students. See 34 C.F.R. §§300.101 and 300.104.33. There is a vast and complex body of case law interpreting, defining, and comparing the meaning of FAPE under these statutes that is beyond the scope of this article.

50. 34 C.F.R. Part 300; 22 Pa. Code Ch. 14.

51. *M.C. v. Central Regional School District*, 81 F.3d 389, 397 (3d Cir. 1996).

52. Under IDEA, parents "hold" their children's right to a FAPE until the age of majority in their state, which is 21 in Pennsylvania. 1 Pa.C.S.A. §1991. The right to attend school may extend as long as the school term in which the student turns 21 years old. 22 Pa. Code §11.12.

“parents,” parents may lose their status if a court order allocates legal custody or educational decision-making to only one parent or other individual.⁵³

If parents agree, or are ordered, to share legal custody, they will both need to agree on special education decisions. Parents who are considering sharing this decision-making post-restructuring should discuss and clarify their understanding of their child’s needs and share their expectations and concerns with each other. Because disagreements between parents will impede the child’s access to important (and often expensive) services,⁵⁴ parents planning to share special education decisions should also decide during their restructuring process how they will resolve disagreements they may have about their child’s special educational needs or programs in a timely manner. Parents who do not decide these issues for themselves should be advised of the risks of having courts decide for them.⁵⁵

While the IDEA imposes most of its obligations squarely on the LEA, meaningful parental participation is a cornerstone of the statute.⁵⁶ Thus, whoever serves as the child’s “parent” will stand in a powerful position. Under the IDEA, the statutory parents are full and equal members of the child’s Individualized Education Program (IEP) Team who must be included in all decisions regarding the child’s special education placement.⁵⁷ They are entitled to access the student’s educational records.⁵⁸ They have the right to prior written notice and an opportunity to be heard before the LEA changes the child’s program or placement.⁵⁹ They are empowered to request (and sometimes to refuse) district-funded evaluations to determine whether the student is a “child with a disability.”⁶⁰ Only the “parents” may seek redress for their child’s IDEA rights in administrative hearings or court.⁶¹ When such disputes result in orders by a hearing officer or court or settlement agreements with the LEA, it is the statutory parents who receive the judgments and who negotiate and sign the agreements. These awards and settlements could include significant compensatory services, educational funds, and even payments for past and future educational services and placements for the child.⁶²

Without expert guidance, parents who hold their children’s special education rights run the serious risk of unwittingly waiving or compromising those rights. For example, parents who remove their children from public school and enroll them in specialized private schools may unknowingly waive their right to recover tuition reimbursement from the LEA by failing to provide the requisite “10-day notice.”⁶³ Parents may also fail to preserve their child’s “stay put” educational placement by

53. 34 C.F.R. §300.30(2).

54. *See, e.g.,* Sheils v. Pennsbury Sch. Dist., 590 F. App’x 159 (3d Cir. 2014) (remanding to District Court for determination of whether LEA could implement IEP with consent of only one parent with shared custody, over other parent’s objection).

55. For a cautionary example of how a court’s award of “sole legal custody” to one parent can strip the other parent of standing to assert her son’s special education rights, *see* W.S. v. Wilmington Area Sch. Dist., 2015 WL 7721840 (W.D. Pa. 2015).

56. 34 C.F.R. §300.322.

57. 34 C.F.R. §300.321(a)(1); 34 C.F.R. §300.327.

58. 34 C.F.R. §300.613(c) (“An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.”); *see also* 34 C.F.R. Part 99 (concerning LEA obligations under Federal Education Rights Privacy Act).

59. *See* 34 C.F.R. §§300.503, 300.518.

60. *See, e.g.,* 34 C.F.R. §§300.300, 300.301(b).

61. 34 C.F.R. §§300.507, 300.516.

62. *See, e.g.,* R.B. v. Downingtown Area Sch. Dist., 509 F. Supp. 3d 339 (E.D. Pa. 2020).

63. 34 C.F.R. §300.148(d).

failing to properly challenge an LEA's proposed change of placement.⁶⁴ Perhaps worst of all, parents may lose their right to recover from their LEA altogether—sometimes even for many years of serious deprivations of educational benefits—simply by failing to file their Complaint within the IDEA's notoriously opaque statute of limitations.⁶⁵ Divorced or separated parents may be especially challenged to meet these deadlines and thus should be informed of the need for quick and coordinated action.

In short, while it is necessary for parents of children with special needs to decide who will hold their child's special education rights, it is not sufficient. They still need guidance from experienced lawyers who can alert them to the myriad pitfalls that await the unwary or uninformed. This Collaborative decision-making process may better prepare the parents for many of the challenges that lie ahead.

B. Custody Decisions May Affect the Child's District of Residence and Access to Transportation

Custody and co-parenting decisions may impact where the child may attend school and receive special education services. In Pennsylvania, a school-age child is entitled to attend the public schools of the child's district of residence. When the parents reside in different school districts due to separation, divorce or other reason, the child may only attend school in the district of residence of the parent with whom the child lives for a majority of the time, unless a court order or court approved custody agreement specifies otherwise. If the parents have shared custody and divide custodial time evenly, the parents may choose which of the two school districts the child will attend for the school year.⁶⁶

Generally, the district of residence is also the LEA responsible for special education services and placements for an eligible child. Parents should be apprised of the local residency rules when negotiating custody and parenting plans so they can consider any potential impact their agreements might have on the child's access to special educational services from a particular LEA. Similarly, parents who depend on their child's school district for transportation to private school need to beware. While the LEA must provide free transportation to an LEA-approved special education placement in a child's IEP, no matter where it is located,⁶⁷ in some other situations the child's eligibility for LEA-funded transportation between home and school will depend on the distance from the school to the boundaries of the district of residence.⁶⁸

C. Parents' Financial Decisions During Restructuring May Imperil Their Children's Eligibility for Crucial Public Benefits

In Pennsylvania, children who are "disabled" under Social Security's guidelines may be eligible for Medical Assistance under the state's Medicaid program (Medical

64. 34 C.F.R. §300.518 (providing that the "stay put" provision protects the child's current educational placement where parents disagree with changes proposed by the LEA during the pendency of the dispute and ensures that when there are disagreements about initial admission to a public school, a child is, with the parents' permission, enrolled in the school and able to attend).

65. See *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015) (clarifying IDEA timelines for requesting an administrative hearing and providing for an unlimited look-back period for relief where hearing request was timely made).

66. 22 Pa. Code §11.11(a)(1).

67. 34 C.F.R. §300.34 (defining "related services" as including transportation).

68. See 24 P.S. §13-1361(1).

Assistance).⁶⁹ These benefits provide coverage not only for critical medical care, durable medical equipment, and prescription medications, but also essential mental and behavioral health services.⁷⁰ Many families of children with special needs cannot afford for their children to lose this coverage. To ensure the child's eligibility for Medicaid and other public benefits survives, the parents must be careful when setting aside assets for their children and planning for the future.⁷¹ While many children (under 18) with special needs qualify for Medical Assistance in Pennsylvania regardless of their *parents'* income and assets, they may be disqualified if their *own* income exceeds the statutory limits.⁷²

To ensure that support payments, insurance proceeds, inheritances, gifts, or any other funds do not disqualify the child for vital public benefits, parents who have the financial ability to do so should consider working with an experienced estate planning attorney to establish a "Special Needs Trust."⁷³ Decisions about creating, funding, and preserving the Special Needs Trust can be part of a larger conversation about creating or modifying other estate documents, such as wills, health care directives, and durable powers of attorney.

Special education, district of residence and transportation, and public benefits are only a few of the myriad areas where family conflict and special needs parenting overlap. At each of these intersections lurk pitfalls, invisible not only to laypeople, such as most parents, but also to many family law attorneys, who are unlikely to also have legal expertise in the numerous practice areas attendant to representing families of children with special needs. Holistic representation of these parents requires a team effort. The Collaborative process should coordinate family law considerations with these intersecting areas of law. An interdisciplinary team that includes disability-related legal expertise may be essential to meet the varied legal, financial, emotional, and practical challenges inherent to these family conflicts. And because "special needs" take many forms, and impact each family differently, the team's expertise, services, and guidance should be individualized to each family's unique circumstances.

V. TOWARD AN EFFECTIVE AND ETHICAL COLLABORATIVE FAMILY LAW PROCESS FOR PARENTS OF CHILDREN WITH SPECIAL NEEDS

The benefits of integrating disability law experts in Collaborative Practice for families of children with special needs have been outlined above. How might lawyers with special needs expertise properly engage in Collaborative Practice? Currently, Collaborative lawyers serve as counsel to only one of the parties, while other "neutral" professionals may be engaged to support the process.⁷⁴ However, these other professionals typically are not lawyers and are thus not bound by the legal profession's ethical rules. Rather, they are financial experts, mental health pro-

69. See 55 Pa. Code §140.601 *et seq.*

70. See *Medical Assistance for Children in Pennsylvania: An Overview*, Disability Rights Pennsylvania (revised July 2017) <https://www.disabilityrightspa.org/wp-content/uploads/2018/03/MAForChildrenInPAFEB2018.pdf>.

71. There are similar concerns with regard to a minor or adult child's potential eligibility for Supplemental Security Income (SSI). See 20 C.F.R. §416, Subparts K-Income and L-Resources and Exclusions.

72. See The Pennsylvania Health Law Project's guide, *Getting Medical Assistance for a Child with a Disability, Behavioral or Autism Spectrum Disorder under the PH-95 Category*. <https://www.phlp.org/uploads/attachments/ck70i90ve0007x8u8d07hx2ok-ph-95-guide-update-april-2019.pdf>.

73. 62 P.S. §1414.

74. Levin *et al.*, *supra* note 29, at 74-75.

professionals, or other specialists who are governed by different ethical standards. The PCLA specifies that the Pennsylvania Rules of Professional Conduct (PRPC) apply to all lawyers participating in Collaborative Practice.⁷⁵ How might lawyers with disability expertise participate in accordance with their ethical obligations?

The rules governing the legal profession are founded on a model of loyalty to the lawyer's client and supported by strong conflict of interest and confidentiality rules.⁷⁶ Under Rule 1.7, lawyers may not represent clients whose interests are directly adverse, or where "there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client . . . or by a personal interest of the lawyer."⁷⁷ Clients may waive such conflicts only if their lawyers reasonably believe they can provide competent and diligent representation to each client, the representation is not prohibited by law, the matter does not involve claims by one client against another, and each client provides informed consent.⁷⁸

These rules are easily followed where each parent hires their own disability law expert to complement the expertise of their family lawyer. The more complicated question is whether, in concert with the underlying philosophy of Collaborative Practice, which emphasizes shared interests and cooperation, the disability lawyer may be brought into the process as a shared consultant to both parents.⁷⁹ The use of expert lawyers as consultants to the Collaborative process considered here evokes the "lawyer for the situation" model arguably used by Justice Louis Brandeis when he was a practicing lawyer, or the "lawyer for the family" model espoused by Professor Thomas L. Shaffer.⁸⁰ This section analyzes the conflict of interest issues that may arise in this situation, the circumstances under which the clients may waive those conflicts, and when lawyers considering adopting such a role should obtain further advice about its propriety. Given the focus in the conflict of interest rules on loyalty to a client, a shift to the widespread use of lawyers as experts on disability law to the Collaborative family law process itself, rather than on behalf of an individual client, may require specialized rules or statutory reform.

A. Earlier Ethical Challenges in Collaborative Practice and Their Resolution

A fundamental premise of Collaborative Practice, described briefly earlier, is that all involved lawyers and clients enter into a disqualification agreements ("DA"), which requires the lawyers to withdraw from representation of their clients if one of the parties decides to terminate the Collaborative process and enter into litigation in the same or a related matter.⁸¹ The DA ensures that the parties cannot take advantage of the information sharing, negotiations, and trust that are key to Collaborative

75. 74 Pa.C.S.A. §7411 ("This chapter shall not affect the professional responsibility obligations and standards applicable to an attorney . . .").

76. Benjamin Zipursky, *Loyalty and Disclosure in Legal Ethics*, 65 AM. J. JURIS. 83, 89 (2020).

77. Pa.R.Prof.Conduct 1.7(a)(2).

78. Pa.R.Prof.Conduct 1.7(b).

79. Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 OHIO ST. J. DISPUTE RES. 73 (2005) (arguing for separate professional conduct rules for Collaborative Practice).

80. John S. Dzienkowski, *The Contributions of Louis Brandeis to the Law of Lawyering*, 33 TOURO L. REV. 177, 189-191 (2017); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 970-971 (1987) (advocating view that client is the family, not the separate individuals within the family).

81. Pauline H. Tesler, *Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts*, 2008 J. DISPUTE RES. 1 (2008).

ative Practice if they subsequently choose to litigate.⁸² However, as Collaborative Practice initially developed, the DA created much concern that it would create conflicts of interest between the Collaborative attorneys and their clients.

While the Colorado state bar association opined that DAs would violate R. 1.7 by creating a non-waivable conflict, other bar associations, including the American Bar Association (“ABA”), found the potential conflict to be waivable, and that DAs were valid as long as the client was advised of the risks and benefits, gave informed consent, and the lawyer adhered to all relevant rules of professional conduct.⁸³ The Pennsylvania Bar Association, in an informal ethics opinion, refused to conclude that every Collaborative law process violated the PRPC, but did flag issues of concern.⁸⁴ The informal opinion strongly rejected the framing of the Collaborative lawyer’s representation as complying either with the Brandeis model of lawyer for the situation or the Shaffer model of lawyer for the family.⁸⁵ In Pennsylvania, as in many other states, concerns about the propriety of DAs were settled instead by the adoption of the PCLA, which specifically permits these agreements when the statutory terms are met.⁸⁶

B. Special Needs Lawyer-Consultants: Individual or Shared Representation?

In traditional forms of representation, lawyers representing a party in a dispute may hire another lawyer as an expert consultant to assist the lawyer in the client’s representation. Thus, Collaborative lawyers may each consult with a disability law expert as part of their representation of their client. This raises no special ethical considerations, as the disability attorney would be clearly aligned with only one client. While no ethical opinions detail the role of expert legal consultants in Collaborative Practice, the ABA has described the legal consultant in a litigation matter as one who “occupies the role of co-counsel to the attorney who arranges for the consultation” and must avoid conflicts of interest and maintain confidentiality.⁸⁷ The opinion, however, is silent on whether this conclusion applies to a non-litigation matter, such as a Collaborative family conflict resolution process. Nor does any provision of the Pennsylvania Rules of Professional Conduct exempt a disability law expert who wishes to consult with all parties in a Collaborative process from meeting the requirements of R. 1.7.

As a first step, a Collaborative lawyer for one party who believes it would be helpful to bring in a disability law expert to represent both parents should provide the disability lawyer with enough information to support an initial determination under R. 1.7 of whether there is any direct adversity between the parties or whether the lawyer reasonably foresees any material limitations arising from the shared representation. Some situations may be well-suited to clearing this initial hurdle, such as when the parents agree about the special educational needs of their shared

82. Levin *et al.*, *supra* note 29, at 74.

83. *Id.* at 73-74.

84. Pennsylvania Bar Ass’n Comm. on Legal Ethics and Pro. Resp., Inf. Op. 24 (2004).

85. *Id.* at 4 (It is not acceptable to view yourself as “the lawyer for the situation”); *id.* at 6 (lawyer cannot “act on behalf of the ‘family’ since the interests of the family may not be clear and since the constituents from whom the lawyer takes direction may not be able to agree on a particular course of action and there is no mechanism for establishing a hierarchy [f]or resolving such differences”).

86. 42 Pa.C.S.A. §7405.

87. ABA Standing Comm. on Ethics & Prof. Resp., Lawyer as Expert Witness or Expert Consultant, Formal Op. 97-407 (1997).

child(ren) and seek advice about how to advocate for them, or when the parents have already agreed to a special needs trust but require assistance to develop it.

Where there are serious disputes about disability-related matters between the parents, however, it may be clear that a single lawyer cannot ethically enter the Collaborative process except as the clearly defined legal consultant for only one party. Such circumstances may include when the child's special needs have become a point of contention regarding the appropriate physical custody schedule. It may also arise when parents disagree about whether the child should be identified as in need of special education under the IDEA or accommodations under Section 504, or whether the child requires a residential special education placement. Such disagreements would prevent the lawyer from reasonably finding that the representation would not involve direct adversity or materially limit representation of one of the clients. In addition to encountering parental conflicts specific to the disability-related issues, the disability lawyer may determine that conflicts unrelated to the child's special needs prevent shared representation, or the lawyer may need to withdraw if one party refuses to share information and requests confidentiality related to a disability issue.⁸⁸

Many situations, of course, will fall someplace in between these two poles. They will require the lawyer who has been asked to provide shared consultation to obtain adequate information to fully assess the potential for conflicts of interest. If the lawyer determines that all the criteria of R. 1.7 are met, the lawyer must inform the potential clients of any potential conflicts and obtain each client's informed consent. While the PBA declined to issue a blanket ruling about the propriety of disqualification agreements in Collaborative Practice, it did so in part because the question was presented in general form, rather than tied to individual facts and circumstances.⁸⁹ Thus, disability lawyers who are considering a request to enter a Collaborative process as a legal consultant to both parties, and who find that it is a close call whether any potential conflicts may be waived, should consider requesting an informal ethics opinion from the PBA to guide their decision-making. In addition, lawyers should remind their clients that the clients may revoke their waiver of potential conflicts at any time.⁹⁰

Even where representation of both parties to the Collaborative process is inappropriate, it may still be helpful to the parties to have one or both Collaborative lawyers seek advice about disability-related legal issues for their individual client under the traditional model of legal consultation, which only creates professional obligations to an individual client. Collaborative processes would require the parties to share any information gleaned from these separate consultations.

A third approach to obtaining disability law expertise in Collaborative processes might involve retaining the expert to represent the interests of the child or children with special needs.⁹¹ While some Collaborative processes for divorce and other family conflicts involve child specialists, these are often described as mental health professionals.⁹² Inclusion of an attorney specifically to represent the child, however, would permit that Collaborative lawyer to raise concerns related to the issues, such as legal and physical custody and child support, all from the perspective of meeting

88. Pa.R.Prof.Conduct 1.7, cmts. 28, 31.

89. Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp., Informal Op. 2004-24 (2004), at 2-3.

90. Pa.R.Prof.Conduct 1.7, cmt. 21.

91. Hon. Amy M. Pellman, Robert N. Jacobs & Dara K. Reiner, *A Child-Centered Response to the Elkins Family Law Task Force*, 20 WM. & MARY BILL RTS. J. 8,100-06 (2011).

92. See, e.g., Susan Reach Winters & Thomas D. Baldwin, 12 N.J. Prac., Family L & Prac. §55.3 (Dec. 2021).

the child's special needs. In addition, the child's attorney could raise concerns related to the child's special educational or other financial needs, such as the importance of creating a special needs trust at the time of divorce or other family restructuring. Depending on the circumstances, the child's representative may adopt either a legal counsel or guardian *ad litem* role.⁹³ Including a child-centered attorney in the Collaborative process to raise issues related to the child's disability and educate the other participants about the child's needs may improve the Collaborative process and avoid some of the potential conflicts of interest that may arise if the disability lawyer is brought in as a consultant to both parents.

VI. CONCLUSION

Parents of children with special needs face a multitude of risks when they divorce, separate, or otherwise attempt to restructure their families. Many of these risks are hidden, even to experienced Family Law attorneys, leaving these parents, and their children, exceptionally vulnerable to serious mistakes and missteps along the way. Adversarial court-based proceedings may not offer the flexibility, individualization, and coordinated, interdisciplinary support these parents require to effectively navigate the complex, intersecting labyrinths in which they stand. To minimize risks and maximize the potential for achieving successful, enduring outcomes, parents of children with special needs—and the attorneys and other professionals who support them—may benefit from using a Collaborative process that includes special needs counsel as a member of the Collaborative Team. This approach may offer the parents, and their children, the peaceful path they need toward a more stable, secure future for their entire family.

93. See, e.g., 23 Pa.C.S.A. §5335(a).