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## Parents with Disabilities

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# Parents With Disabilities<sup>1</sup>

By M. Debra Gold



One of the most fundamental and important rights that we as Americans have is the right to raise and care for our own children. Yet, for parents with disabilities, preserving this fundamental right is often an uphill battle. Discrimination grounded in stereotypes and unsubstantiated assumptions about their fitness and ability to parent have historically placed parents with disabilities at a huge disadvantage in family courts.

Current data is sparse. A 2010 study completed by The Looking Glass, home of the National Center for Parents with Disabilities and Their Families, estimated that 6.2 percent of American parents with children under the age of 18 have at least one disability. This is approximately 4.1 million parents. Of those parents, 2.8 percent have a mobility disability; 2.3 percent have a cognitive disability; 2.3 percent have a daily activity limitation; 1.4 percent have a hearing disability; and 1.2 percent have a vision disability. These are the parents of approximately 6.6 million children, or 9.1 percent of the total population of children in the United States.<sup>2</sup>

Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and Title II of the Americans with Disabilities Act (“ADA”) have brought great advances for the legal rights of persons with disabilities in many areas of the law. However, child custody and visitation laws in most states still do not appropriately address the troubles encountered by parents with disabilities in family courts. Standards are vague. And, the lack of good direction in the statutes, appellate decisions and court rules often leads to an implicit and unrecognized bias that discriminates against parents with disabilities. In fact, as *Rocking the Cradle* reported in 2012, parents with disabilities “are the only distinct community of Americans who must struggle to retain custody of their children.”<sup>3</sup> The obstacles they face in family courts are multi-layered.

Georgia is making progress. Effective May 2, 2019, O.C.G.A. §30-4-5, now prohibits discrimination against legally blind persons by the Courts, the Department of Human Services or child placement agencies. The purpose of the new code section is to protect the best interests of children whose parents are legally blind, while safeguarding the parents’ due process and equal protection rights in child custody,

visitation, guardianship, adoption and foster care matters.

O.C.G.A. §30-4-5 is a victory for parents with disabilities. However, the new statute applies only in cases involving parents who are blind. According to the foregoing *Rocking the Cradle* statistics, this is only 1.2 percent of the parents with disabilities population. Hopefully, in the future, the Georgia Legislature will enact similar legislation which will be more inclusive of parents with other disabilities.

## The Legal Background

Historically, people with disabilities have been treated by the law almost as lesser beings, unfit to have, or to parent children. In the early 20<sup>th</sup> century, most States passed laws allowing for persons with physical, cognitive, sensory and psychological disabilities to be segregated from society and/or involuntarily sterilized because of the belief that they would pass on their disabilities to future generations who would become a burden to society. Some states, including Georgia, still have some form of involuntary sterilization on the books.<sup>4</sup> Countless cases have also been reported of infants and children being removed from their parents, and parents with various disabilities being denied the opportunity to raise their children in their own homes.

In 1973, Congress passed the first federal law protecting individuals with disabilities. The Rehabilitation Act of 1973, as amended,<sup>5</sup> was enacted to “[e]mpower individuals with disabilities to maximize employment, economic self-sufficiency, independence and inclusion and integration into society through . . . the guarantee of equal opportunity.”<sup>6</sup> Section 504 prohibits discrimination against people with disabilities by programs receiving federal financial assistance.

In 1990, Congress passed the Americans with Disabilities Act.<sup>7</sup> Title II of the ADA extends the prohibition on discrimination established by the Rehabilitation Act to include public entities and governments, regardless of whether they receive federal financial assistance.

In the context of custody litigation, the intent of Section 504 and the ADA is to protect parents with disabilities from discrimination in family courts so

that they are not stigmatized solely by reason of their disabilities. A “disability” is defined by the ADA and Section 504 as a substantially limiting physical or mental impairment that limits a major activity. This includes, but is not limited to caring for oneself, performing manual tasks, standing, lifting, speaking, walking thinking, reading, learning, concentrating, seeing, hearing, eating, sleeping or working.<sup>8</sup> The two fundamental principles of the ADA and Section 504 are individualized treatment, and full and equal opportunity. Simply put, parents with disabilities are entitled to receive equal justice, just as any other litigant in family courts.

Over the years, however, there has been little consistency in how the courts and other entities have implemented policies, procedures and practices intended to prevent discrimination against disabled parents. Thus, in 2015, the U.S. Departments of Health and Human Services and Justice published technical assistance and guidance to state and local courts “to ensure that the welfare of children and families is protected in a manner that also protects the civil rights of parents and prospective parents with disabilities.”<sup>9</sup>

Every state applies the “best interest of the children” standard in custody and visitation matters. But, the delicate balance between ensuring the best interests of the children and ensuring the rights of disabled parents can be a tenuous one. Since most states still do not provide specific guidance to minimize discriminatory practices grounded in assumptions and inaccurate negative beliefs, parents with disabilities are still experiencing unfairness in family courts. Progress is being made, but it has been a slow process. Georgia’s adoption of O.C.G.A. §30-4-5 which prohibits discrimination against blind parents in custody matters is a step in the right direction.

### **Obstacles Faced by Parents with Disabilities**

Before we can remedy discrimination against parents with disabilities in family courts, we must first acknowledge that their experience in the legal system can be very different than a non-disabled parent’s experience. Parents with disabilities face numerous obstacles in family courts. The basis for many of these obstacles is a general lack of knowledge and understanding of the disabled parents’ limiting conditions and mitigating factors. Also problematic is the lack of appropriate standards, available resources, services and training.

### **1. Obtaining Legal Representation**

The first barrier that parents with disabilities encounter in custody and visitation cases is obtaining good legal representation. Most family law attorneys have little training in representing clients with disabilities, and little disability-relevant experience. Because of their lack of understanding of their client’s abilities and disabilities, their own implicit biases (of which they are usually unaware) may impact their ability to provide good representation. Attorneys representing parents with disabilities, expecting a full and fair evaluation and adjudication of their clients, are often blindsided by broad leaps to conclusions made by Guardians ad Litem (GAL), evaluators and judges. Since they often lack a good understanding of their client’s true abilities as parents, their clients find themselves powerless to redress the unfairness they face.

Attorneys representing parents with disabilities must keep an open mind. They must know the right questions to ask their clients so that they can have a full understanding of their client’s capabilities, strengths and weaknesses. Attorneys also need to understand the services, support systems and assistive technology that might mitigate the impact of their client’s disability, and facilitate their ability to care and provide support for their children.

Clients with disabilities also often have greater difficulties in obtaining good legal representation because financially, they cannot afford it. Generally, the median family income for parents with disabilities is significantly less than a non-disabled person’s income. Many rely on Social Security Income, or Social Security Disability Income. To add to their financial stress, living expenses are often much greater for parents with disabilities. For example, accessible vans or cars are more expensive than a van without the special equipment. Health costs also make a much larger dent in the budgets of individuals with disabilities. Service organizations that provide pro bono legal representation for persons with disabilities rarely become involved in family law matters. Legal aid organizations that do offer assistance in family law cases are sometimes conflicted out if the other party has already consulted with them. Thus, obtaining good legal representation is often almost impossible.

## 2. Physical Barriers

Although the ADA has been the law of the land since 1990, individuals with disabilities still experience physical barriers which negatively impact their ability to effectively present their cases. Courthouses have ramps to allow wheelchair access into the building. But there are still cases of individuals using wheelchairs who cannot access courtrooms or chamber conferences with the judges because the doorways are not wide enough, or there are steps. It is also not uncommon for parents with sight impairments to receive written communications from the Courts regarding court dates and procedures, but not in Braille. American Sign Language interpreters may be necessary for parents with hearing impairments. Yet, particularly in the rural areas, there are not enough certified or well qualified interpreters.

Attorneys representing individuals with disabilities must be aware of their clients' special needs, as it is incumbent upon them to make sure the Courts are notified so that appropriate arrangements can be made. Under the ADA and Section 504, for example, if the courtroom is inaccessible to a parent using a wheelchair, the court must move the hearing or conference to an accessible location so that the parent can fully participate. Not only are special accommodations necessary to properly present their custody cases, but attorneys and litigants with disabilities should be assured that they have an absolute right to such accommodations. And, when properly handled, the use of adaptations during court proceedings can be the ideal demonstration of how successfully a parent with disabilities can function, despite his or her disabilities.

## 3. Lack of Knowledge and Understanding

Family law professionals and judges often do not recognize and appreciate the implications and impact disabilities have on litigants in custody cases. There are reported cases, for example, of courts imposing visitation travel and transportation requirements, without considering how difficult and expensive this may be for a parent with mobility issues.

Litigants with disabilities also find that Courts are sometimes unaware of the role adaptations play in facilitating everyday independent life and parenting. A parent with paraplegia is perfectly capable of changing diapers, cooking meals and getting their children to school on time with proper adaptations to their homes

and cars. Special equipment for parents with sight or hearing impairments enable them to help their children with homework, and to know what is going on in other rooms where their children are playing or sleeping. Equipment such as computer-aided transcription and telecommunications devices are useful for parents with communication disabilities. Other auxiliary aids that mitigate impairments include medical equipment and devices; medications; behavioral modifications; and assistive technologies.

Some judges have imposed supervised visitation on disabled parents even though the parent lives independently, and the disability has little to no impact on the children. Solely because they do not know any better, courts underestimate a parent's capabilities, and the potential for parent-child interaction despite existing disabilities. Courts also underestimate how well children adapt to their parents' disabilities. One mother without sight, for example, reported that her nine-month-old baby led her hand to the bottle when she was hungry.

Additionally, despite research to the contrary, GALs, custody evaluators and judges often jump to the conclusion that children of disabled parents become "parentified," assuming parental responsibilities such as cooking and caring for younger siblings. There is no empirical evidence, however, to substantiate this assumption. Instead, research indicates that parents with disabilities are so concerned about over-burdening their children, that they generally require them to do fewer chores than children of non-disabled parents.<sup>10</sup>

## 4. Attitudinal Biases

Having a disability is often perceived as unnatural, or as a tragedy. Such a view of the parent with disability's station in life often leads to a stigmatization that is not only unfair, but is also insulting. Many people have a knee-jerk reaction that children cannot live a "normal" life with a parent who cannot walk to the park and play baseball with them. This attitude, however, fails to take into account that the essence of parenting is found in the emotional, intellectual and ethical guidance that a parent gives to a child as he or she grows, rather than in the day-to-day responsibilities of cooking, cleaning and carpooling the children to school.

Generalizations and assumptions regarding parents with disabilities often lead to negative speculations about their parenting that are not based

on actual parenting. There are cases of parents who have lived independently as their children's primary caretaker for many years, only to have their ability to parent questioned once they become involved in a custody dispute. Courts speculate as to what could happen in the future, and "foresee" exaggerated potential safety or other issues that have no basis in reality. In one case, a mother with mobility issues complained that she had to prove that she could get upstairs in an emergency by making test-runs while being timed. This is not the kind of treatment non-disabled parents get in most courts.

Many parents with disabilities complain about being disrespected by GALs, custody evaluators and judges who treat their disabilities with disdain. For example, one mother without sight reported that the judge opined that she could not be a "responsible" parent simply because of her blindness. Other litigants have reported that despite medical evidence of their conditions, judges have questioned if they are faking their disabilities.

Disrespect of one's disability is often demonstrated in the language used when talking about individuals with disabilities. For example, referring to a person who uses a wheelchair as "wheelchair bound" or "confined to a wheelchair" is negative and disempowering. He or she does not "suffer" from a "debilitating condition," is not a "cripple," and does not park his or her car in a "handicapped" parking space. Rather, more empowering language places the person first so that they are not defined by their disability. The disability is just one of the many attributes that makes the person who he or she is. Thus, the "parent who uses a wheelchair" may "have cerebral palsy," and he or she parks the car in an "accessible" parking space.

#### 5. Lack of Standards and Training for Guardians ad Litem and Custody Evaluators

Guardians ad Litem and custody evaluators have little training in assessing parents with disabilities, and there is an absence of well-defined standards giving them guidance. Uniform Superior Court Rule 24.9, the Georgia rules governing the appointment, qualification and role of GALs, provides only general direction for evaluating such custody cases. Subsection 2 of U.S.C.R.24.9 provides a laundry list of the general topics in which a GAL should be trained. Yet, special considerations in cases involving parents with disabilities is not one of those topics.

GAL and custody evaluation trainings should include at least a general understanding of the various disabilities and their impact on parenting. The knowledge gained gives meaning to what they observe in the homes and families they investigate. GALs and custody evaluators should also be challenged to recognize their own personal implicit biases. Proper training enables them to be sensitive to issues experienced by parents with disabilities that are outside of their ken. Only with awareness can they move beyond unintended biases, and avoid value judgments that may impede a full and fair investigation.

Trainings should stress that undue weight should not be given to the parent's diagnosis of a disability. Rather, the relevant issue for GALs and custody evaluators is the degree to which a parent's disability affects the parent-child relationship, and the health, safety and welfare of the child. The parent's disability is only one of the many considerations that should factor into a custody recommendation. Thus, GALs and custody evaluators must adopt a non-judgmental posture, and put aside their own assumptions, stereotypes and fears about disabilities. They must also work extra hard to guard against the natural tendency to speculate beyond reasonable probabilities, and ensure that their assessments and recommendations are based on actual facts.

Trainings should also impart knowledge about support services and other resources, many of which are not-for-profit, which can be incorporated into custody recommendations. GALs and custody evaluators should be instructed to be open-minded about adaptations and other accommodations that may be available to enable parents with disabilities to perform parenting duties that would otherwise seem impossible. Personal assistants or help from family members, for example, are an acceptable means of maximizing a disabled parent's functioning, not an indication of weakness in parenting skills.

The GAL's investigation should be a fact-specific inquiry into the individual capabilities, strengths and weaknesses of both parents, whether disabled or not. Both parents should be considered equally. A GAL should never require a parent with disabilities to perform tasks that the non-disabled parent would not be required to do, just to prove his or her fitness as a parent.

The best way for GALs and custody evaluators to overcome misunderstandings and biases regarding a disabled parent's ability to properly care for children, is through personal observations of the parent-child relationship in everyday life in their natural home setting. Clinical observations, interviews and standardized testing in unnatural settings may not give the full picture. Questionnaires and testing used by the evaluator must be adapted to accommodate the disability. For example, some GALs and evaluators ask parents to complete extensive questionnaires or testing using pencil and paper. Yet, a parent with physical disabilities may not be able to hold the pencil, or may not be able to sit for long periods of time to complete the work.

The GAL or custody evaluator should be prepared to ask the right questions, in a respectful manner, regarding auxiliary aids, how and when they are used, and how they facilitate parenting responsibilities. The GAL should also consider expert medical knowledge regarding the nature and limitations of the disability. If a parent has issues with verbal communication, the GAL should refrain from using the children as interpreters.

Custody recommendations should be based on objective evidence, and should be appropriately tailored to the unique needs of the family. If there are special transportation, communication or other issues due to a parent's disabilities, the recommendations may include special conditions and accommodations. It may also be appropriate to recommend legitimate safety requirements, support services and/or treatment to remedy various concerns.

Visitation recommendations for parents with disabilities should ensure opportunities for regular contact with the children, even if it is not physically possible. Bedridden parents, for example, can continue to play a major and positive role in their children's lives via Facetime or Skype contact. Supervised visitation should never be imposed unless the objective facts clearly call for it. And, of course, parents with disabilities should also have the right to participate in the decision making process, and attend school functions, extracurricular activities and doctor appointments, if they are able to do so. It may be appropriate to recommend participation in these parental functions via Facetime or Skype.

## **Applying The Best Interests of the Children Standard**

In the United States, every state applies the best interests of the child standard in custody and visitation cases. Georgia's statute includes a long list of factors to consider in making a best interests determination,<sup>11</sup> Even with this list of statutory factors, and the appellate opinions giving guidance as to how they should be applied by the trial courts, there is still a certain amount of vagueness, and trial courts are vested with great discretion in applying the factors. The end result is that in most cases, there can be a number of ways to piece together the best interests of the child "puzzle" This is particularly true in cases involving parents with disabilities.

At the same time that family court judges are obligated to protect the best interests of the children, they are also mandated under the ADA to protect parents with disabilities from unlawful discrimination. This sometimes results in a perceived conflict for judges, who struggle with balancing the two interests. Yet, protecting parents with disabilities from discrimination, and protecting the best interests of their children are not mutually exclusive goals. Rather, the ADA and Section 504 are consistent with, and, in fact, complement the principle of the best interests of the children. The reality is that in most cases, children benefit from the love, affection, security and care that they get from their parents, whether disabled or not. Thus, ensuring that all parents have equal access to parenting opportunities and equal treatment in family courts also promotes the best interests of the children.

With the addition of O.C.G.A. §30-4-5 to the Georgia Code, the legislature also amended O.C.G.A. §19-9-3(a)(3)(I). This subsection authorizes consideration of the parents' mental and physical health in custody matters, and is one of the main factors upon which trial courts rely in cases involving parents with disabilities. As amended, the code section provides that in making a custody determination, the trial court may consider the mental and physical health of the parents "except to the extent as provided in Code Section 30-4-5. . ." What this means is that if a parent's blindness is one of the considerations in a child custody ruling, the trial court must comply with the provisions of O.C.G.A. §30-4-5. The direction provided by this code section should minimize the perception of conflict that many trial courts have struggled with, so that the best interests of the children standard will not unduly overshadow the rights of parents without sight.

## O.C.G.A. §30-4-5

Georgia joins many states, including Idaho, Missouri, Kansas, Tennessee, Oregon and Washington that have enacted statutes to address the biases and other difficulties parents with disabilities have encountered in family courts. With specific statutory guidance, the intent of the ADA and Section 504 does not become lost in family courts. Parents with disabilities, and their children, are better protected. Georgia, however, limits this statutory protection to parents who are legally blind.

O.C.G.A. §30-4-5(b)(1) expressly provides that custody, visitation, adoption and other child placements may not be denied to a party “solely because the party is legally blind.” Rather, the factors contained in O.C.G.A. §19-9-3(a)(3) may also be considered by the trial court. By explicitly disallowing the presumptions that arise in cases involving parents with visual impairments, trial courts, GALs and custody evaluators must consider the objective facts on a case-by-case basis, free from generalizations and stereotypes. A parent’s blindness is only one of many important factors to consider.

If the issue of a parent’s blindness is raised by either party, pursuant to O.C.G.A. §30-4-5(b)(2), that party carries the burden of proving by a preponderance of the evidence that the disability is endangering, or will likely endanger the health, safety or welfare of the child. A significant weight is now taken off of the parent without sight, as he or she does not have the primary burden of affirmatively proving his or her capabilities, or the falsity of unsubstantiated allegations of incompetence due to the blindness.

If the foregoing burden is met, the parent with impaired vision has the opportunity to show how supportive parenting services can alleviate any issues. O.C.G.A. §30-4-5(a)(3) defines “supportive parenting services” as “services that may assist a legally blind parent or prospective legally blind parent in the effective use of nonvisual techniques and other alternative methods to enable the parent or prospective legally blind parent to successfully discharge parental responsibilities.” This can include special accommodations, assistive technology, personal assistants, and even guide dogs.

Under O.C.G.A. §30-4-5(b)(2) the trial court also has the authority to require supportive parenting services in its custody order. The code section allows for a trial period, as the trial court may “review the

continuation of such services within a reasonable period of time.” Such a provision is reasonable to ensure that appropriate services are in place to protect the safety and well-being of the child.

If a trial court denies or limits custody or visitation to the parent without sight, O.C.G.A. §30-4-5(b)(3) mandates “specific findings stating the basis for such a determination and why the provision of supportive parenting services is not a reasonable accommodation to prevent such denial or limitation.” The trial court should include in its findings what evidence and facts were considered in reaching its custody decision. This should include the impact of a parent’s blindness on the health, safety and welfare of the child, as well as the special parenting services considered, and why those services do not adequately address custody concerns.

O.C.G.A. §30-4-5 provides good direction in custody cases involving parents with blindness. The new code section requires the trier of fact to take a more holistic view of a legally blind parent’s abilities and disabilities. The requirement to consider the benefits of supportive parenting services takes the focus off of the simple fact that the parent is blind, and ensures that the parent receives fairer treatment in family courts. All of this goes a long way to minimize the unjust situations rooted in discrimination experienced by blind parents in family courts.

### What Is[n’t] Next?

O.C.G.A. §30-4-5 is limited to preventing discriminatory practices against blind parents. While this is a good start, what about parents with limited mobility, hearing impairments, cognitive issues and other disabilities? Common sense dictates that the trial courts are required to comply with the ADA and Section 504, and therefore do not need a specific statute to remind them that all litigants with disabilities should receive equal treatment and opportunities.

But, is that enough?

Myths, misconceptions and a widespread bias still exist in family courts with regard to parents with various physical, cognitive, sensory and psychological disabilities. Under the current statutory scheme, except in cases involving blind parents, trial courts can continue to apply stereotypes about parents with disabilities. They can also discount or ignore important factors such as supportive parenting services that

enable disabled parents to perform parenting duties. A statute more inclusive of all disabilities would promote greater awareness and better articulated standards, procedures and practices needed to balance the injustices parents with disabilities still experience in family courts.

Protecting the best interests of the children while also protecting the rights of parents with disabilities is the goal. Ensuring that this is done in a manner that limits discriminatory stereotyping, considers all relevant factors and mitigating support services, and allows the parties to maintain the respect and dignity that all litigants in court deserve is the best way to accomplish this. O.C.G.A. §30-4-5 already provides a good framework for a more inclusive statute. The only thing we have to lose is the bias and discrimination that parents with all types of disabilities have experienced in family courts.

Georgia has come a long way toward recognizing that parents with disabilities are not necessarily disabled when it comes to their parenting capabilities and contributions. A greater awareness is evolving. Judges, GALs and custody evaluators are becoming more aware of the implicit biases that creep into their decision making processes. And, they are more open to evenhanded approaches. O.C.G.A. §30-4-5 is one more door that has opened for parents with disabilities. Continuing this trend is the way to go. . There is a light at the end of the tunnel that is getting brighter every day for parents of all disabilities to receive thorough, fair, unbiased and balanced treatment in family courts. And in the end, it is their children who are the winners.

## Endnotes

1. This article was originally published in 2017 to accompany M. Debra Gold's presentation at the DeKalb Bar Association "Not Your Everyday Custody Case" continuing legal education seminar. The article has been updated since the recent passage of O.C.G.A. §30-4-5.
2. *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, ("Rocking the Cradle"), National Council on Disability.
3. *Id.*
4. O.C.G.A. §31-20-1 et seq.
5. 29 U.S.C. §701 et seq.
6. 29 U.S.C. §701(b)(1)(F)
7. 42 U.S.C. §12101 et seq.
8. 42 U.S.C. §12102(1), (2)(A); 29 U.S.C. §705(9)(B)
9. *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, U.S. Department of Health and Human Services, Office for Civil Rights Administration for Children and Families and U. S. Department of Justice, Civil Rights Division, Disability Rights Section.
10. Lisa Cohen, *Mothers' Perceptions of the Influence of Their Physical Disabilities on the Developmental Tasks of Children* (1998) (unpublished Ph.D. dissertation, California School of Professional Psychology).
11. O.C.G.A. §19-9-3(a)(3)

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