

Legal and Financial Issues in a Divorce When There is a "Special Needs" Child

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The divorce rate in the United States is approximately between 40 and 50 percent. The stress of raising a child with "special needs" increases the divorce rate to between 85 and 90 percent.¹ More and more children are being diagnosed with special needs every year. It has been estimated that up to 31 percent of children under the age of 18 have two or more special needs.² The presence of a "special needs" child in a divorce presents special issues, considerations and planning that if not properly addressed can have disastrous consequences for the child and his or her family as a whole. For the most part, the family law legislation in the various states is virtually silent on the issue of "special needs" children. In addition, since "little to nothing [has been] published on this topic in the professional literature as guidance, divorce professionals have been at a loss as to how to accurately and effectively manage these cases."³ Yet, these cases are prevalent and becoming more and more so.

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How does a child's special needs affect the custodial arrangement being considered in the divorce process? What is the appropriate amount of child support to be paid? How does one address the issue of support continuing beyond emancipation if the child will never become self-supporting? What is the duration for spousal support when the special needs child requires constant care and attention? These are all difficult and important issues for the professional to

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evaluate and assess with the parent of a special needs child. This article will explore these issues and the relevant documents which should be reviewed and considered in order to properly address the complex needs of the divorcing family so that appropriate custodial arrangements and financial resolutions can be made.

WHAT IS A "SPECIAL NEEDS" CHILD?

When first presented with a case involving a special needs child, it is critical to understand what those special needs are. The most common types of special needs fall into three major categories: (1) acute, life threatening medical conditions (*i.e.* severe asthma, food allergies, Type I diabetes);⁴ (2) chronic and pervasive developmental disorders (*i.e.* cognitive/language delays, learning disabilities, ADHD, pervasive developmental spectrum disorders of autism and Asperger's Syndrome);⁵ and (3) psychological and behavioral disorders (*i.e.* anxiety disorders, depressive disorders, difficult temperaments, and conduct disorders).⁶ While it is beyond the scope of this article to present a comprehensive list of the special needs of children, representative samples from each category are addressed in the endnotes.

In order to properly address the issues in a case with a special needs child, time must be taken to understand the developmental, physical and psychological nature of the child's needs. Without such an understanding, one cannot properly advise or advocate for specific positions or defend against them. There is typically an abundance of material available to learn about the special needs child. In fact, the national and local organization Web sites for each particular disability, such as the National Down Syndrome Society and the Autism Society of America Web sites, are extremely reliable and informative sources of information. Indeed, not only do these organizations provide extensive resources and information, they also typically have departments that focus on issues affecting new parents with special needs children. These new parent divisions can help parents to better understand their child's disability, as well as provide them with the names of other similarly situated parents who are willing to share their experiences, including any relevant financial, educational and medical issues they have encountered in raising a special needs child. This type of parental support system is an extremely valuable resource, particularly for new parents with special needs children.

DETERMINING THE FINANCIAL NEEDS FOR THE "SPECIAL NEEDS" CHILD

Once there is an understanding of what the child's "special needs" are, it is necessary to understand the financial costs involved in dealing with them. Understanding the financial aspect is not only necessary for determining child support but also provides a greater understanding of the child's situation which is relevant for addressing custody and parental access issues.

Standard child support charts do not address the higher costs inherent in raising a child with special needs. Although a financial statement typically includes a section for "extraordinary expenses," these are usually limited to medical costs. It has been estimated that health care costs are only half of the extra costs of caring for a disabled child. Additional "special needs" costs include: therapy, equipment, medications, supplements, dietary costs sensory items, respite care, professionals, modifications to the home and the continually changing needs of the child. In addition, there are expenditures for transportation to distant hospitals or sources of medical care, extra laundry, babysitting of other siblings while care is being given to a special needs child and other medical expenses not covered by public or private insurance. Furthermore, if the primary caregiver parent has to go back to work, increase work hours or take a second job after a divorce, the child may require longer days in day care or before- or after-school care.

It is often difficult to arrive at a precise dollar amount for the cost of raising a special needs child. Indeed, families raising special needs children "face an avalanche of expenses that far outstrip cost projections for a normal healthy child." Special needs children often require expensive services throughout their lifetime that are often not covered by insurance or are limited by government assistance. Many of these children require assistance in daily living activities such as eating, bathing, grooming, communicating, mobility and behavior management.

Generally, divorce support orders do not cover the care of children for their entire lifetime. For children with special needs, a central issue is whether the child will be able to live independently, and, if not, how he or she will be cared for. While some states provide for support beyond the age of emancipation, many do not. Indeed, generally, the duty of parents to support children extends *only* until the child reaches majority or is emancipated. The question of whether child support for an adult

disabled child can be awarded incident to a divorce is treated in a variety of different ways by different states. Beyond the basic requirement that all states have requiring parents to support their children until they reach the age of majority, the states differ as to whether parents have a duty to support their adult disabled children. In general, the differing jurisdictions can be divided into three broad categories. The first group of nine states follows the common law rule that does not extend a parent's duty beyond the age of majority, despite the child's existing or subsequent disabilities.⁸ The second group of twenty-four states holds parents liable for their adult child's support if the disability arose before the child's majority.⁹ Finally, a third group of eighteen states mandates that parents have a duty to support their adult disabled child regardless of whether the disability arose prior or subsequent to the age of majority.¹⁰ Therefore, depending on the state, divorcing parents with special needs children may not be legally required to support them past the age of majority.

GOVERNMENTAL BENEFITS

In reviewing the financial issues, it is necessary to be familiar with the benefits and services for which children with special needs are eligible through various government agencies. Social Security will provide income to those who qualify, and Medicaid will provide medical coverage, as well as other benefits. Accordingly, it is important to note that individuals can lose their eligibility or have their benefits reduced if they have assets over a certain amount. With some exceptions a recipient of benefits can only retain \$2,000 in assets.¹¹ If assets are accumulated over this amount, the disabled individual is expected to spend those assets for his or her care with reduced benefits from Social Security and Medicaid, or they are required to pay the state back for the services previously provided. Thus, it is vital for parents of special needs children to carefully evaluate the funding available in their state to ensure that their children remain eligible for such support. In addition, as will be discussed later, children should not be the outright beneficiaries of life insurance or any retirement plans upon the death of either parent or any other family member. Instead, a "Supplemental Needs Trust" or "Special Needs Trust" should be created to receive such assets and have them available for the child without interfering or jeopardizing government benefits.

A COMPREHENSIVE LIST

Each parent with a special needs child involved in a divorce must make a comprehensive list of the child's needs and expenses which should be provided to the divorce professionals. That list should include (i) the necessary service or item (*i.e.* therapy, doctor, machine, caretaker, medications, insurance deductibles, blood work, eyeglasses, hearing tests, dental visits and adapting costs for new home), (ii) the source of the funding (*i.e.* Board of Education, Private Pay, or Insurance), (iii) the details or explanation for each service (*i.e.* how many hours per week or visits per year) and (iv) the total cost for each service or item and the annual out of pocket cost.

In preparing such a list, the following documents should be reviewed in order to insure accuracy for the costs which are often expansive and expensive:

1. Relevant invoices and bills for medical providers;
2. Explanation of Benefits (EOB);

An EOB is drafted by one's health insurance company and is a vital tool for tracking a special needs child's health care expenses. EOBs explain why and how the fee for a doctor appointment was paid or not paid. The EOB is a record of the fee the doctor requests, the co-payment paid, the amount the insurance company agrees to pay to the doctor, and any remaining amount to be written off or billed to the patient. An EOB looks a lot like a bill, because it is a detailed account of the billing process. The EOB also includes information about why a claim was paid (or not), and how to dispute a denied claim. No matter who the patient is and what health insurance plan he or she has, if a claim is submitted, the insurance company will create an EOB for every doctor's visit. Indeed, an EOB is a vital document for divorcing parents to have in order to accurately account for their child's health care expenses.

3. Relevant invoices and bills for educational providers;
4. Relevant invoices and bills with respect to the child's extra-curricular activities;

These extracurricular activities might include "non-traditional" therapies that can assist in a special needs child's physical development. For

