

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

example, forms of swimming therapy can be beneficial for a child with low muscle tone or cerebral palsy, and horseback riding therapy and sensory gyms can also be valuable for a child with special needs.

Without a full and complete list of the expenses of the special needs child, it is difficult to determine the child support requirements. One cannot just apply a formula and come up with a number for support when that number may be so inadequate to support the child's basic needs. Since most courts will not deviate from child support guidelines without evidence of extraordinary need, it is incumbent upon the professional to work with the parent and come up with the details to support the expenditures.

UNDERSTANDING THE MEDICAL ISSUES

The professional's understanding of the medical issues of the child is very important for both the financial and the custodial issues involved in the case. For apparent reasons, the medical needs of a special needs child are often foremost in the parent's mind. The disputes between parents regarding a child's medical needs may be a big factor in a custody battle. Parents often disagree as to the seriousness of a condition or whether the other parent is trained and capable of providing for the child's medical needs. In addition, understanding the condition is important for purposes of support, particularly where treatments or therapies may not be covered by medical insurance. In order to properly address and understand the medical needs, it is helpful to review the following documents:

Two years of EOBs;

Pediatrician's records (if possible, the court should ask the parents to agree to designate the court as the holder of the child's doctor/patient evidentiary privilege for the duration of the litigation, and further stipulate that neither will seek to involve the doctor as a forensic witness to any custody hearing. It is probably best to obtain these consents at the outset of the custody dispute);

- The child's complete medical history, including doctor's notes and complete record of child's doctor's visits;
- Names of all of the child's doctors;
- List of the child's doctor's visits over the past year;

- List of all medications, including timing, procedure, and reasons for administering medications;
- List of the child's food allergies and diet restrictions; and
- Any journals and/or notes that might be kept by parents regarding their child's special needs.

UNDERSTANDING THE EDUCATIONAL ISSUES

In addition to understanding a child's medical needs, in order to address custody issues and child support issues, it is imperative to understand how the child's special needs will affect his or her education. In some instances the special needs will not alter a child's ability to attend a mainstream school; however, in other instances, the child may require special education, and familiarity with the Individuals with Disability Education Act (IDEA) is necessary.

IDEA is a federal law that applies to all states, but individual states can also enact special education laws which work in conjunction with it. IDEA sets forth certain substantive and procedural rights for children with disabilities and their parents. It mandates that children with disabilities from three to twenty-one years old be provided with a "free and appropriate education," which includes "special education and related services designed to meet their unique needs and prepare them for employment and independent living."¹² Children with disabilities are not only entitled to specially designed instruction, but also related services such as speech, physical and occupational therapies, transportation, audiology, rehabilitation counseling, social work and psychological services.¹³ Older children are entitled to a consideration of vocational education needs and transition services designed to promote the student's progression from school to adult education, vocational training, employment and independence.¹⁴ IDEA and state laws stress that parents are the "decision makers" for their children.¹⁵ Therefore, parents remain the decision makers with regard to special education after a divorce unless a settlement agreement between them or an order of the court alters that right. If the parents have joint legal custody, the school must provide written notice of special education meetings to each parent who has provided the school with an address.¹⁶ Both parents retain the right to receive information, view records, and make decisions regarding the child's special education. Parents should try

to avoid conflict between themselves and work in a cooperative manner with regard to their child's special education despite their divorce since there is often enough conflict in obtaining the necessary and appropriate services for the child through the educational system. For example, some parents choose to come to an agreement before meeting with the other members of the Individualized Education Program (IEP) team and if the parents cannot come to an agreement, most school professionals use informal means such as school meetings to try and resolve conflict. If an agreement is still not reached, parents may be able to use the alternative dispute resolution processes available in that particular state. If the parents still cannot agree, either parent can request a due process hearing. Indeed, if the failure to reach an agreement regarding special education reflects deeper conflict and communication issues between the parents, counseling or private mediation may allow the parents to work at the IEP table on the child's behalf. Finally, if the parents are in so much conflict that they are unable to work in the child's behalf in the special education process, either parent has the option of consulting an attorney about returning to court and requesting that the divorce decree be altered.

In light of the necessity of having "decision makers" under IDEA, the issue of educational decisions must be specifically addressed, and in the event of a custody dispute, it must be determined who the "decision maker" will be.

In fully addressing the educational issues, the divorce professional should review the following documents:

1. An annual individualized educational program (IEP).

A child with special needs is entitled by law to a timely and comprehensive evaluation, stemming from an annual IEP meeting during which the parents, school personnel, and the child—if appropriate—meet to establish goals and objectives, and to determine the appropriate educational program and services.¹⁷ The IEP report is a written plan documenting the educational program and services for the child and must be reviewed and updated annually. Every three years, the child is entitled to a comprehensive reevaluation of his or her disability by a multi-disciplinary evaluation team.¹⁸ The IEP is crucial to understanding the child's educational needs.

2. The most recent clinical/developmental pediatrician report, which includes all of the child's testing data.

Developmental pediatricians (as distinguished from a purely medical pediatrician) play a central role in monitoring the development of infants and children and are essential in determining whether a child has a temporary lag in development, a serious delay or disorder, or a significant behavior problem that should be addressed. By employing a strategy of surveillance, with periodic screening, the developmental pediatrician can determine when a child should be referred for more extensive developmental or psychological testing, which will aid in the process of diagnosis and treatment of developmental disabilities and behavioral disturbances. Once delays are diagnosed and treatment is initiated, repeated assessments over time will serve to identify areas in need of continuing intervention while indicating gains made in specific areas of developmental functioning. The clinical report from the developmental pediatrician is crucial in assessing the needs of the child for many purposes, including education.

3. Therapy progress reports.

Reports from the child's various therapists, including but not limited to, occupational therapists, physical therapists, or speech and language therapists, are also useful in analyzing and presenting the child's special needs. It should be noted, however, that unlike an IEP or a developmental pediatrician report, which includes objective testing data, therapy reports can be easily manipulated and may be therefore subject to criticism based on bias.

4. Relevant reports from school professionals.

Another important source of information is a child's school. Indeed, the school professionals that work with a child, often on a daily basis, can provide a wealth of important information in the form of a written report regarding the child's special needs.

CUSTODY—SPECIAL CONSIDERATIONS

Once all of the foregoing objective information is reviewed, it will be much clearer what the special needs of the child will be and how to address the custody and access issues. The assignment of who is legally responsible for making medical and educational decisions takes on a heightened importance particularly where the parents disagree as to medical diagnoses and treatment, or educational options. In most states, courts have the option to grant parents joint legal custody thereby

permitting both parents the right to make important decisions about their children's well-being, including their education, health care, and religious training. Unfortunately, joint legal custody does not always work and a dispute as to custody may ensue, ensuring more turmoil for the family. In such a case, a court will typically appoint a forensic psychologist or psychiatrist who will evaluate the parties and their relationship with their children and, depending on the court's instructions to the neutral evaluator, either recommend which parent might be more appropriate to have sole custody or report to the court on the various factors involved with the particular family. Once the various documents discussed above have been obtained, they should be given to the evaluator to assist in making a thorough review of the facts and considerations involved in the case.

Standard parenting plans are often grossly inappropriate. One parent may not have the training and may not be willing to learn how to care for the child's medical needs. Since, as described above, there is a wide range of disabilities, the proper care necessary for a child may also vary greatly. There is the diet for a child with diabetes; lifting, feeding, toileting and dressing a wheelchair-bound child; dealing with medication issues and urgent care issues for a terminally ill child; signing or communicating with a child who has a hearing impairment; understanding and responding appropriately to a child with an emotional disturbance; modifying their new home environment for the special needs of the child; spending the necessary hours doing the therapy with the child that would be done if the child were at home with the primary caregiver parent; taking the child to therapy and treatments; and consistently and reliably giving the child medications.

Where there is disagreement between the parents, a custody evaluation may be necessary to adequately assess home environmental factors such as the presence of pets, smoking, dust, cold, and damp air or known food allergies of the child. It will also provide the court with general familiarity as to the child's special needs and an overview of the parents' willingness to follow the child's treatment plan. The evaluator may also ascertain which parent is better educated and trained in the child's urgent care and to what degree each parent is involved with the child's health. In cases where one party clearly has superior experience and knowledge regarding the child's special needs, the court can direct the other parent to become educated and equipped to care for the child before allowing extended periods of access time for that parent. In

addition, it is generally in the best interests of the child to keep the same caregiver or nanny that the child had prior to a divorce. Often times, a long-time caregiver is very knowledgeable as to the child's special needs and therefore is best suited to care for the child. Furthermore, it may disrupt the child's emotional and physical well being to change a long time caregiver after a divorce.

With respect to children with learning disabilities, including but not limited to ADHD, difficult issues may be presented in determining both decision making and the schedule of time between the child and the parents. Often parents are feuding as to the child's appropriate diagnosis and treatment, which may lead to the necessity of the court having not only to decide custody but the specific treatment plan for a child as well. A court appointed forensic must then gather information about the child based on the child's academic progress, past and current EOBs, medical interventions, medications and treatment plans in order to make recommendations of custody plans that will reduce chaos for the child.¹⁹ This is particularly the case with autistic children whose needs for sameness of environment supersede any other factor.²⁰

In addition, it is important not to forget that the needs of siblings of a "special needs" child must be taken into account. Siblings of special needs children are often overlooked. A good parenting plan will provide for one-on-one time of the non-special-needs siblings with the parents.

FINANCIAL SUPPORT—SPECIAL CONSIDERATIONS

The costs of raising a special needs child can be enormous. It is essential to have a detailed list of the actual costs known. Even with this, it is difficult to address the unknown costs the child may have and insure coverage for them. Support orders and settlement agreements must be drafted in a way to take into account the unknown costs. Set amounts of money may pose problems in the long run whereas pro rata sharing may better provide for such costs.

Medical Insurance is extremely important and there must be a process put in place for submitting claims for reimbursement (if any) of payments made to medical providers. The issue of medical insurance becomes particularly important after a divorce because each spouse will have their own separate health insurance. Although typically the children are covered under one spouse's medical insurance plan, it may be beneficial because

of the many medical costs involved for a special needs child that both parents cover the child under separate insurance policies. This may not always be possible because of finances. If both parents may obtain separate insurance policies, they must properly coordinate their policies to ensure that all medical claims are sent to the agreed upon primary insurance policy first, with submission to the secondary insurance policy second. Practitioners and divorce professionals should address the coordination of health benefits particularly in cases involving special needs children where the health care costs are extremely high.

In addition, the therapies that the child may need outside of the educational system must be addressed. The cost for child care is also very relevant. A child with special needs may require supervision at all times, and such supervision may need to continue into a child's teenage years.

When the parties and their counsel are unable to reach agreement on these issues and a court must decide them, the documents referenced above will be necessary to present to the Court in order to support a party's position.

SPOUSAL SUPPORT

The issue of spousal support is particularly difficult in matters involving children with special needs. Every state has its own criteria for determining the need and extent of spousal support. Generally, however, the following factors may be considered: each party's income and property, the length of the marriage and the age and health of both parties, the present and future earning capacity of the parties, and the ability of the party seeking alimony to become self-supporting, including the time and training necessary for obtaining employment. While child support orders can address the financial needs of the children, the predicament of a non-working spouse or a spouse with a reduced income must also be considered both in a typical divorce case and certainly in a divorce case involving a child with special needs. For example, where a special needs child requires round-the-clock care, the custodial parent may not be able to reenter the work force on a full-time or even part-time basis and thus may require additional spousal support for a longer duration of time due to the inability to obtain employment. On the other hand, where a child's special needs are not as severe, although a parent may want to stay home and care for his or her special needs child, he or she

may be forced to obtain employment based on the foregoing factors considered in awarding spousal support. Indeed, in typical divorce cases, a court or practitioner will often discount a parent's claim that he or she is simply "unable" to work because he or she is caring for the children. Where a spouse takes a similar position in a case involving a child with special needs, however, his or her stance should be carefully evaluated as it is less likely to be considered disingenuous.

FORMATION OF A SPECIAL NEEDS TRUSTS

There are several important issues to consider when developing a financial plan for a special needs child. In order to make the appropriate decisions, a parent should assess the prognosis of a child's development and consider whether or not the child will be able to earn a living or manage assets, take inventory of their financial affairs, consider the living arrangements for the special needs child after the parents' death, and understand what government benefits the special needs child will need or be eligible for. All future planning for a child with special needs *must* be done in a way so as to maintain the disabled child or adult's eligibility for governmental benefits. If a special needs child inherits from his or her parents, those assets would disqualify him or her from receiving government benefits. In addition, it is also important to reevaluate *any* documents, including special needs trusts, that were drafted during the marriage and after the special needs child was born, since new documents and trusts will likely need to be drafted after a divorce.

In 1975, the Social Security Administration allowed trusts to be set up to care for the needs of persons with disabilities, so long as the beneficiary could not control the amount or frequency of the trust distributions and the trust was irrevocable.²¹ Then, in 1993, the Omnibus Budget Reconciliation Act of 1993 (OBRA 93) set forth certain requirements, which, if met, allowed for the creation of a supplemental or a "special needs trust."²² The primary purpose of this trust is to preserve government benefits eligibility and yet allow families to provide for the supplemental needs of a person with a disability, needs that generally go beyond that provided for by the government—food, shelter and clothing. This eligibility focuses on Social Security insurance, as well as Medicaid. The creation of the trust allows parents to have peace of mind in that they no longer have to disinherit their child or rely on a sibling to use the money left to them to

support the special needs sibling. Parents can now set up this trust and know that their child will have health care coverage while also having the quality of life that they envisioned. The trust can pay for therapies, dental work, eye glasses or other health care not covered by Medicaid. It also might fund quality of life items such as vacations, televisions, computers, or other items for which the child had developed a fondness while residing with his or her parent. The trust funds may not be distributed directly to the person with the disability; rather it must be paid to third parties for goods and services to be used by the beneficiary.²³ The special needs trust is managed by a trustee on behalf of the child and it is essentially the only way to ensure that a child receives an inheritance without jeopardizing government benefits.²⁴

The creation of a special needs trust is an issue that is critically important to face during the course of the divorce proceedings. Because of the frequent changes in the law and the importance of the decision as to who will be the trustee, the special needs trust should be carefully drafted in accordance with the stringent rules established by the government for recipients of Social Security and Medicare benefits. In drafting the trust, it is critical to review the assets of the family and consider the funding of the trust within the divorce proceedings.

Once the basic details of the trust are established, parents and practitioners must then consider whether it should be revocable or irrevocable. A revocable trust, retains the right to add and subtract assets as time passes; however choosing this route may have major tax and estate implications. If parents choose to make the trust irrevocable, the assets they place in the trust will remain there for the benefit of the person with the disability. The only major disadvantage to this method is that parents cannot remove the assets for their own care; it is solely for the person with the disability. With this option, however, neither the government nor creditors can touch the assets in this trust. It has its own tax number and is considered a separate entity from the parents' estate.

Once the issues have been resolved, the trustees who will manage the resources must be determined. As for the resources to be directed to the trust, those should be determined in the divorce proceeding.

A family law attorney should provide important guidance in order to ensure that the trust is funded to the extent possible by the divorcing parents prior to dissolution of the marriage. It can be extremely costly to provide for the care of some children, and

the creation of the trust is of little value if it is left unfunded. In sum, it is very important to give serious consideration to the creation and funding of a special needs trust when negotiating the division and distribution of assets. Not doing so can have devastating long-term effects on the future quality of life of the special needs child.

LETTER OF INTENT

As part of the resolution of the divorce action, parents should each write a "letter of intent" which explains how they would wish their child to be cared for in the event of their death. This letter should include information about the child's likes and dislikes in things like food, clothes, music, doctors, therapies, medications, religious wishes, and more.²⁵ The letter should be started as soon as possible and should be updated as the child grows and if possible, annually. Indeed, it may be beneficial to stipulate in a divorce agreement that the parents must update the letter of intent on an annual basis. The letter is not a binding legal document, rather it is simply written to provide guidance.²⁶ The letter should include information concerning the child's residence and where the child should live should something happen to a parent; the child's capabilities and any special education issues; the child's goals, aspirations and limitations with regard to employment; the child's medical history and medical care (parents should refer to a current set of medical records on their child including hospitalizations and letters from specialists); and the child's favorite social and religious activities. The letter should also address behavior management; conservatorship versus self-sufficiency once the child reaches majority; who will act as an advocate for the child once the parents have died; and generally how the child will be cared for in the future. If the child will not likely be able to independently support him or herself, the parents need to consider living arrangements, issues of health care, health insurance, advocacy, transportation, social life, job or day program, and all other issues of daily living.

CONCLUSION

The existing standard child support guidelines and parenting plans clearly do not address the needs of "special needs" children. Failure to meet the unique needs of these children and their

families can have tragic consequences. Forward-thinking family law practitioners should become informed as to the varying types of special needs and develop an understanding as to how these special needs affect their divorce cases. Children are often the most affected parties in any divorce, and in a divorce where there is a special needs child, it is incumbent upon practitioners and divorce professionals to carefully analyze the issues involved in order to insure that these most vulnerable children—those with special needs—are protected legally and financially to the maximum extent possible.

NOTES

1. Kraus, *Planning is Important Even When Life Does Not go The Way we Plan*, 43 Family Court Review 607 (2005). Interestingly, researchers are reporting slightly lower divorce rates for families raising a child with Down syndrome. See Richard Urbano and Robert M. Hodapp, *Divorce in Families of Children with Down Syndrome: A Population-Based Study*, 112 American Journal on Mental Retardation 261 (July 2007). Lower divorce rates in the Down syndrome group may be due in part to the "Down syndrome advantage," which refers to the idea that due to certain sweet and affectionate characteristics associated with most Down syndrome children, parents are able to cope better than families of children with other disabilities. *Id.* In addition, many parents of children with Down syndrome are often older, more educated and married before having children, which may constitute other-than-child variables potentially responsible for the well-being of these families. *Id.* However, "when divorce did occur in the Down syndrome group, a higher proportion occurred within the first two years after the child's birth." *Id.*

2. R. Sneed, M.D., W. May, Ph.D and C. Stencel, *Training of Pediatricians in Care of Physical Disabilities in Children with Special Health Needs*, 105 Pediatrics 554 (2000).

3. C. Brown, S. Goodman, L. Kupper, *The Unplanned Journey: When You Learn That Your Child Has a Disability*, News Digest 20, 3rd Ed. (2003).

4. Acute, life threatening medical conditions include asthma and allergies. Indeed, asthma is the leading cause of chronic illness in children and teenagers, and because of the tendency of children with asthma to be biologically sensitive, asthma is often accompanied by a variety of other allergic conditions. The number of those suffering with asthma has more than doubled in

the past 15 years, and the number of childhood deaths attributed to childhood asthma has nearly tripled over the past 15 years. The primary triggers of acute asthma are house dust mites, cockroaches, mold, animal dander, tobacco smoke, and upper respiratory viral conditions. Treatment of asthma includes a combination of preventive measures—typically taking multiple doses of inhalant daily and always carrying a fresh supply of inhalant which acts rapidly to stop an attack in emergency situations. Parents may also be required to (a) maintain dust-free, mold-free, pet-free and smoke-free environments, (b) keep stress at a minimum because stress exacerbates asthma, (c) maintain regular doctor's appointments, and (d) treat colds vigorously. Food allergies are also becoming increasingly prevalent, affecting about six percent of school-age children. Parents who are caretakers of a severely food allergic child must significantly alter their home eating habits and vigilantly monitor their child's contact with foods in stores, restaurants, friends and relative's homes, or at school that may contain a substance to which the child is allergic. See D. Saposnek, H. Perryman, J. Berkow and S. Ellsworth, *Special Issue: Special Needs Children in the Family Court: Special Needs Children in Family Court Cases*, 43 Fam. Ct. Rev. 566 (October 2005); C. Brown, S. Goodman, L. Kupper, *The Unplanned Journey: When You Learn that Your Child Has a Disability*, News Digest 20, 3rd Ed., (2003).

5. The spectrum of chronic and pervasive developmental disorders begins with mild learning disabilities to increasingly severe and pervasive disorders, such as Attention Deficit Hyperactivity Disorder (ADHD) and at the extreme of the spectrum are conditions such as autism, or its milder version, Asperger's Syndrome. These genetic, neuro-developmental disorders are present from birth and can result in life long disabilities. Children with learning disabilities constitute the majority who receive special education services in North America. Multiple areas of a child's functioning are affected including intelligence, attention, memory, language development, and sensory-perceptual integration. In general, parenting a child with learning difficulties requires vigilant advocacy for specialized educational and behavioral training, often coupled with complex regimes of medications that require frequent monitoring and evaluating of the doses and types taken. See *Id.*

6. The most common non-medical disorders of children include internalizing conditions (*i.e.* anxiety disorders, with a prevalence of two percent to 10 percent, and depressive disorders with a prevalence of two percent to eight percent), externalizing conditions (*i.e.* conduct disorders, with a prevalence of two percent to 12 percent) and children with difficult temperaments (with

a prevalence of 10 percent). Indeed, when a child is under the stress of a divorce, internalizing conditions tend to be magnified, which can severely interfere with a child's functioning. Responsive consistency is the key to parenting such children. These children do poorly when living in a chaotic, loud, over-stimulating and unstructured environment. *See Id.*

7. A. Pabon, Financial Planning for Special Needs Children: A Review of Available Information for Parents, 4 Journal of Personal Finance 40 (2005).

8. The nine states are: Georgia, Kansas, Mississippi, Montana, Nebraska, New York, North Dakota, Rhode Island, and Wisconsin.

9. The twenty-four states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Kentucky, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, Vermont, Virginia, Washington, West Virginia, and Wyoming.

10. The eighteen states are: California, Delaware, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, New Hampshire, Oregon, South Carolina, South Dakota, Tennessee, and Utah. The District of Columbia also recognizes this duty.

11. Jennifer Field, Comment: Special Needs Trusts: Providing for Disabled Children Without Sacrificing Public Benefits, 24 J. Juv. L. 79 (2003/2004).

12. 20 USC 1400; L. Athens, *Special Education Disputes*, Divorceonline.com (Feb. 24, 2007).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*; *See also* Divorce and Special Education, Pacer Center, PHP-c-103 (2004).

18. *Id.*

19. D. Saposnek, H. Perryman, J. Berkow and S. Ellsworth, Special Issue: Special Needs Children in the Family Court: Special Needs Children in Family Court Cases, 43 Fam. Ct. Rev. 566 (October 2005).

20. For example, autistic children may desire to maintain a primary home and few or no overnights at the other parent's home. Thus, the parenting plan must accommodate the basic needs that arise out of a very unique disorder like autism in order to keep a child's stress to a minimum and prevent exacerbation of symptoms. Indeed, in cases with autistic children, it is essential to determine whether the child is emotionally capable of changing residences. Parents of autistic children may even have to consider allowing the child to remain in the family home temporarily and have the parents scheduled to alternate in and out of the family home (the "bird-nesting" arrangement). Time is also a key factor for autistic children and they may need more time to adjust after transitions. Parenting and custody plans may also include arrangements for the non-autistic siblings to have regular periods of respite from their autistic siblings. Finally, autistic individuals may pose a danger to themselves, accordingly specific safety factors, *i.e.* planning for such a child to make his or her way home from school, should be addressed in the parenting and custody plan. Sheila Jennings, *Autisms in Children and Parents: Unique Considerations for Family Court Professionals*, 43 Fam. Ct. Rev. 582 (Oct. 2005).

21. Marla B. Krause, Planning is Important Even When Life Does Not Go The Way We Planned, 43 Fam. Ct. Rev. 607 (Oct. 2005); *See also* Planning Your Child's Future, 2 NICHCY News Digest No. 1 (1992); Jennifer Field, Comment: Special Needs Trusts: Providing for Disabled Children Without Sacrificing Public Benefits, 24 J. Juv. L. 79 (2003/2004);

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*