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## **Divorce and the 'Special-Needs' Child**

By Judith Poller

Unfortunately, the stress of raising a child with special needs increases the divorce rate for that family considerably. The myriad issues and considerations that must be addressed for the family with the special-needs child during the divorce process are numerous and complex. There has been little published on this topic, and divorce professionals are often at a loss as to how to manage divorce cases accurately and effectively where there is a special-needs child. (See C. Brown, S. Goodman, L. Kupper, *The Unplanned Journey: When You Learn That Your Child Has a Disability*, *New Digest* 20, 3rd Ed. (2003)). This article explores some of the issues of a divorcing family with a special-needs child so that appropriate custodial arrangements and financial resolutions can be fully and appropriately addressed in the divorce process.

### **What Is a Special-Needs Child?**

A special-needs child typically falls into one of three major categories: 1) acute, life threatening medical conditions (*i.e.*, severe asthma, food allergies, Type I diabetes); 2) chronic and pervasive developmental disorders (*i.e.*, cognitive/language delays, learning disabilities, ADHD, pervasive developmental spectrum disorders of autism and Asperger's Syndrome); and 3) psychological and behavioral disorders (*i.e.*, anxiety disorders, depressive disorders, and conduct disorders.) (See D. Sposnek, H. Perryman, J. Berkow and S. Ellsworth, *Special Issue: Special Needs Children in the Family Court Cases*, 43 *Fam. Ct. Rev.* 566 (October 2005)). In order to address the issues in a divorce case with a such a child properly, time must be taken to understand the developmental, physical and psychological nature of the child's special needs. (See A. Pabon, *Financial Planning for Special Needs Children: A Review of Available Information for Parents*, 4 *J. Personal Finance* 40 (2005)). There are national and local organization Web sites for each particular disability (*i.e.*, the National Down Syndrome Society and the Autism Society of America), which are extremely reliable and informative sources of information.

### **Financial Considerations**

Divorce professionals working with a party who has a special-needs child should have their client make a comprehensive list of the child's needs and expenses. The list should include: 1) 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); 2) the source of the funding (*i.e.*, Board of Education, Private Pay, or Insurance); 3) the details or explanation for each service (*i.e.*, how many hours per week or visits per year); and 4) the total cost for each service or item and the annual out-of-pocket cost. In preparing such a list and in order to ensure accuracy, the following documents should be reviewed: 1) relevant invoices and bills for medical providers; 2) Explanation of Benefits ("EOB") (drafted by one's health insurance company); 3) relevant invoices and bills for educational providers; and 4) relevant invoices and bills with respect to the child's extra-curricular activities. Gathering this information is particularly critical in states like New York, where courts will not deviate from the child-support guidelines without evidence of extraordinary need.

It may also be necessary to become familiar with the benefits and services for which children with special needs are eligible through various government agencies. For example, Social Security provides income to those who qualify, and Medicaid provides medical coverage, as well as other benefits. It is important to note, however, that individuals can lose their eligibility for government benefits or have their benefits reduced if they have assets over a certain amount. (See Jennifer Field, *Comment: Special Needs Trusts: Providing for Disabled Children Without Sacrificing Public Benefits*, 24 *J. Juv. L.* 79 (2003/2004)). For example, parents of special-needs children in New York can refer to the New York State Department of Health Web site to carefully evaluate the funding available to ensure that their children remain eligible to receive these benefits.

In developing a financial plan for a special-needs child, parents and divorce practitioners should consider whether or not the child will be able to live independently and become financially self-sufficient, and if not, how he or she will be cared for. This issue is particularly critical in states like New York, where a parent's obligation for the financial support of their child does not extend beyond the age of majority (21 years old). Absent an agreement to assume financial support beyond the age of majority, a parent is under no obligation to support his or her child beyond age 21, even where a child has significant special needs. Not only do special-needs children often require expensive services throughout their lifetime, which are often not covered by insurance, but many children with special needs require round-the-clock assistance with daily activities, such as eating, bathing, grooming, communicating, moving and general behavior management.

Although not typically the role of the divorce lawyer, assistance and direction should be given as to arrangements for the special-needs child after the parent's death to insure that planning is done in a way so as to maintain the disabled child or adult's eligibility for government benefits. The creation of a supplemental or "special-needs" trust should be considered in connection with the divorce. The primary purpose of this trust is to preserve government benefits eligibility while also allowing families to provide for the supplemental needs of a person with a disability. A divorce practitioner should provide important guidance in order to ensure that the trust is funded to the extent possible by the divorcing parents.

### **Medical Issues**

The divorce professional's understanding of a child's medical issues is also crucial in a divorce proceeding where there is a child with special needs. For example, disputes between parents regarding a child's medical needs may be a relevant factor in a custody proceeding, particularly where the parents disagree as to the severity of the child's condition. In order to address and understand the child's medical needs properly, it is helpful to review at least two years' worth of EOBs and the child's pediatrician's records. Those records will likely include the child's complete medical history, names of all his or her doctors, and a list of all of the child's medications.

On a related note, medical insurance is extremely important to consider during a divorce proceeding with a special-needs child. Although children are generally covered under one spouse's medical insurance plan, because of the many medical costs involved in caring for a special-needs child, it may be beneficial for both parents to cover the child under separate insurance policies. If both parents 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.

### **Educational Options**

In addition to understanding a child's medical needs, it is imperative to understand how the child's special needs will affect his or her education. In some instances, a child's special needs will not alter his or her 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. The IDEA is a federal law that applies to all states, including New York. IDEA mandates that children with disabilities from three to 21 years old be provided with a "free and appropriate education," which includes "special education and related services designed to meet their unique need and prepare them for employment and independent living." (20 USC § 140; L. Athens, *Special Education Disputes*, Divorceonline.com (Feb.24, 2007)). 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. (*Id.*) Older children are entitled to a consideration of vocational education needs and transition services designed to promote the child's progression from school to adult education, vocational training and/or employment. (*Id.*) Despite the foregoing, IDEA still requires that parents remain the ultimate decision makers with respect to their child's education.

In reviewing educational issues, the divorce professional should become familiar with the following documents:

#### ***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. (*Id.* See also *Divorce and Special Education*, Pacer Center, PHP-c-103(2004)). 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 re-evaluation of his or her disability by a multi-disciplinary evaluation team.

#### ***The Most Recent Clinical/Developmental Pediatrician Report***

Developmental pediatricians 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. The clinical report, including the testing date, from the pediatrician is crucial in assessing the educational needs of the child.

### ***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 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, be subject to scrutiny.

### ***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 daily basis, can provide a wealth of important information in the form of a written report regarding the child's special needs.

### ***Custody and Access***

Whether divorcing parents of a special-needs child can make joint decisions together regarding important issues is critical. Medical and educational needs are more complex and parents may disagree as to a medical diagnosis, treatment or educational options. Joint decision-making may be neither appropriate nor in the best interests of the child.

Scheduling of time for both parents also involves different issues to consider and standard parenting plans may not be appropriate. Depending on the special needs involved, the transition from one home to the next may create certain difficulties for the child. Care for medical needs, special diets and emotional disturbances must be fully understood in creating parenting schedules. In addition, the needs of the siblings of the child must be specially considered and scheduling one-on-one time for such children with the parents is critical.

### ***Conclusion***

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 matrimonial practitioners to analyze the issues involved carefully to ensure that children with special needs are legally and financially protected.

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