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“Divorcing” and How do You Handle Children with Special Needs!

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Divorcing When You Have Children with Special Needs

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I. INTRODUCTION

Any divorce is stressful enough. Even if the major issues are quite straightforward – there are limited assets, there are no unemancipated children, or the spouses are civil with one each other – there is always some kind of emotion that comes along with this process. Often, spouses who have this idea in their heads that their divorce will be simple and quick unfortunately come to realization that the process is actually much more complicated or adversarial than they originally thought.

A divorce that involves child custody and support will likely, of course, be quite more contentious. Custody battles can stall a divorce for months or years and turn the situation into an expensive headache. We all know of the basic issues involved with custody and it's difficult enough to formulate resolutions that will satisfy two bickering spouses.

However, in situations that are unfortunately becoming much more common, some custody disputes will involve children who have special needs. These scenarios create whole new classifications of issues. There many more layers that litigants and their attorneys will need to consider when evaluating custody and parenting time for special needs children. While the same basic principles apply, the typical approaches and considerations in these divorce matters may have to be thrown out the window in a child(ren) with special needs context. These situations will undoubtedly vary greatly from case to case and it is rare that an attorney will be able to apply similar approaches in all of these situations.

An attorney representing a parent of a special needs child needs to be open-minded and creative. The attorney will need to consider unique issues and evaluate circumstances in ways they may not be used to doing. For instance, an attorney must be able to parse out all of the possible care and costs associated with raising the specific special needs child. The expenses laid out in a Case Information Statement may not be enough to capture the whole picture. Does the child require certain home accommodations? Will they require additional accommodations in the future? Is the nature of the child's disability stable or will it progress over time, forcing the necessitating the attorney to address situations that may happen years down the road?

Research has shown that families with special need children have a higher rate of separation than families with non-disabled children.¹ It should be a priority for both spouses and sets of attorneys to peacefully resolve issues in cases where there are special needs children. The emotional toll on both the parents and the children on these cases can be astronomical and sensible, jointly-made solutions should be the end goal.

¹ Marsha Mailick Seltzer, Jan S. Greenberg and Gael Orsmond, Adolescents & Adults with Autism: A Study of Family Caregiving, Report #14 (2011).

Attorneys, judges, and all professionals involved in these cases must educate themselves to the children's specific disabilities. Family lawyers especially should be knowledgeable of at least the basics of common childhood disorders or disabilities and what kind of standard services children with these ailments need. These disabilities also require specific parenting skills and approaches. Family attorneys need to be able to identify what types of parenting approaches and arrangements typically work for certain disorders. If your client does not possess some of the necessary skills to parent a special needs child on their own, you may need to make the difficult decision of advising your client that they should defer to the other parent on certain matters. While we are advocates for our clients, we also must be aware of just how critical it is that special needs children are placed in the best and most stable situation possible. Sometimes, practitioners need to face the truth that this reality may not be particularly beneficial to their clients.

II. ADDRESSING SPECIFIC TYPES OF SPECIAL NEEDS

Family practitioners need to be aware of the unfortunate reality that childhood neurological and developmental conditions have dramatically increased over the recent years. For example, as of last year, 1 out of 59 children were estimated to have some form of autism.²

“Special needs” is a very broad category that encompasses a huge range of disorders, syndromes, and other ailments.³ The most common neurological disorders in family courts are:

² <https://www.autismspeaks.org/science-news/cdc-increases-estimate-autisms-prevalence-15-percent-1-59-children>

³ Daniel B. Pickar and Robert L. Kaufman, *Parenting Plans for Special Needs Children: Applying a Risk-Assessment Model*, Fam. Court Review, Vol. 53 No. 1 (Jan. 2015).

autistic spectrum disorders, ADHD, and depressive disorders.⁴ While not as common, family lawyers may also encounter children with cerebral palsy, Downs' Syndrome, visual or hearing impairment, or high risk medical conditions, which could include both physical and mental impairments.⁵

Children with learning disorders and ADHD are likely to suffer academically in school and develop additional disorders into adulthood.⁶ Children with ADHD are more likely to develop antisocial personality disorder, increasing the risk for additional issues like substance abuse disorders.⁷ Children with autism are more likely to have difficulty in obtaining gainful employment.⁸ Family lawyers and judges need to heavily consider the child's special needs when assessing the child's best interests. There is no current legislation in existence that specifically deals with the unique issues for divorcing families with special needs children.⁹ Some states do have statutes that deal with the financial issues associated with divorcing families with special needs children.¹⁰

Child custody evaluators need to be familiar with the issues associated with special needs children. The Association of Family and Conciliation Courts (AFCC) Model Standards of Practice for Child Custody Evaluation specifies that evaluators should have professional knowledge and training when special issues arise in a child custody evaluation.¹¹ Evaluators should also be able to apply a systematic approach to opine about best interests in these

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

¹¹ Id.

circumstances, but, unfortunately, not such approach exists.¹² Many pundits have proposed various approaches that family courts should adopt when dealing with custody issues for special needs children.¹³ No approach has been adopted yet despite the growing number of special needs children exposed to family courts.

¹² Id.

¹³ Id.

III. LEGAL CUSTODY CONSIDERATIONS

Custody, of course, has two components – legal and residential. Generally speaking, most family lawyers do not deal with many cases in which legal custody is an issue. Most of the time (again, emphasizing in general), even the most bitter of spouses will agree to share legal custody. Decision-making authority will usually stay with both parents regardless of the outcome of the rest of the case.

However, with special needs children, decision-making authority is such a more crucial factor than with non-disabled children. While joint legal custody is mostly the norm, it also invites more possible conflict. For the children, there will remain two decision-makers, only now it may involve ex-spouses who can no longer agree on what color the sky is. Feuding parents are never good for children, but for children with special needs, who often need great stability and routine, uncooperative parents can be incredibly damaging. Delays caused by these feuds could actually be physically harmful to these children. Children with special needs often need much more intense medical care, including psychological treatments, dealing with government benefits, and invasive medical procedures. Any halt in these processes can be critical to the child's well-being.

Parents of any child, especially of one with special needs, should do everything possible to be amicable and make quick decisions for the child. If this is not possible, parents should consider appointing an expert, such as a parenting coordinator or guardian ad litem, who will be tasked for quickly resolving differences in accordance with the child's best interests.

The unfortunate truth is that parents will use their child as a pawn to get back at their ex-spouse.¹⁴ This is devastating for any child and can be irreparably harmful for children with special needs. A parent may reject a treatment option, school, or activity simply because the other parent supports it.¹⁵ To avoid these potential petty conflicts, designating one parent to make the major decisions may indeed be appropriate for many children with special needs.

Education

Parents of children with special needs face significant issues regarding their children's education. The choice of just where to attend school can be a difficult one and has the ability to be involve conflict between parents. Many special needs children also have specialized curriculums, such as Individualized Education Programs (IEP). These plans require extensive parental involvement in the child's schooling. A parent will need to collaborate with teachers, medical professionals, and therapists, which is difficult enough. Often, parents and school officials will conflict on what is best for the children. Add in the possibility of two parents who cannot agree with each other and the level of conflict could be catastrophic for the child. In these situations, it may be wise to designate a specific parent to have the majority of the decision-making authority for education matters. This does not mean that the other parent needs to give up decision-making power entirely, but to avoid further conflicts, some parents may need to put their egos aside and let the other parent make these decisions, if it is appropriate. This can be a very tough sell for the attorney representing the parent who would lose the decision-making power. However, if this is truly an appropriate arrangement, the attorney should keep the client

¹⁴ Lisa Helfend Meyer, *Divorce and the Child with Special Needs*, Huffington Post (Mar. 10, 2011).

¹⁵ Id.

advised on the bigger picture, encouraging settlement and compromise where appropriate for the benefit of the child.

Extracurricular activities also become much more difficult to coordinate for special needs children. Depending on the child's disability, he or she may be involved in several therapies or treatment programs. These programs should, of course, take priority over extracurricular activities and it likely will not be possible to have the child participate in every activity the parents wish. It is nearly impossible to completely control which days the treatment programs will take place. As a result, extracurricular activities should be planned around the child's treatment, not the other way around. Unfortunately, this may require at least one parent to forego enrolling the child in a certain activity.

Medical Decisions

As with education, appointing one parent responsible for medical decisions may be appropriate for special needs children. The child's parenting plan should detail all of the child's specific medical needs. In some cases, these needs can be incredibly extensive. As a result, collaboration between both parents regarding some medical decisions may not be feasible. As discussed, delays in making these decisions can be especially harmful to special needs children. In the best interests of the child, it may be a good idea to simply allow one parent to make the major medical decisions to avoid possible conflict. If one parent cannot stomach the other parent making decisions without their input, appointing a parent coordinator other third party expert to make decisions or provide input is another option.

IV. LITIGATION TIPS AND TECHNIQUES

Starting the Case off Right

If a case involves a special needs child, the judge should be made aware of the issue as soon as possible. At the initial case management conference, attorneys should make it clear to the judge that the parties have a special needs child, which may require that the case be given a longer track than a standard family case.¹⁶ If appropriate, at the conference, the attorneys should discuss with the judge about appointing a guardian ad litem (GAL) or other type of advocate for the child.¹⁷ A GAL can help alleviate a lot of the conflict typically involved in matrimonial cases. Special needs children can suffer serious harm in high-conflict cases, as the parents' bickering could lead to them psychological neglect the needs of their child.¹⁸ A GAL will be able to facilitate obtaining evidence and act as a buffer between the parties while presenting the evidence to the judge.¹⁹ The GAL will also be responsible of crafting an appropriate custody and parenting time schedule, taking into account the obtained evidence obtained.²⁰ Ideally, this will take some conflict out of this situation as the parents will not be arguing as much over custody,

¹⁶ Margaret "Pegi" S. Price, *Best Practices in Handling Family Law Cases Involving Children with Special Needs*, 28 Journal of the American Academy of Matrimonial Lawyers 1 (2015).

¹⁷ Id.

¹⁸ Steven W. Kairys et al., *The Psychological Maltreatment of Children – Technical Report*, 109 Pediatrics 68 (Apr. 2002).

¹⁹ Price, *supra*, 2015.

²⁰ Id.

ultimately leaving the big issues in the hand of an expert. As Margaret “Pegi” Price points out in her 2015 American Academy of Matrimonial Lawyers (AAML) journal article, starting these cases off on the right track at the initial appearance is crucial for special needs children. Litigants cannot be expected to adequately articulate their child(ren)’s issues to the Court and even experienced attorneys can find these types of situations challenging. Educating the judge early and often, with the possible help of a court-appointed expert, can make a huge difference in effectively and swiftly litigating a complex special needs case.

The term “special needs” is quite broad. Litigants may state to their attorney during their initial consultation that they have a child with special needs, inadvertently misusing the phrase.²¹ If the litigant brings up his or her special needs child, the attorney must conduct a significant and detailed inquiry to determine exactly the nature, extent, and severity of the child’s issues.

“Special needs” is defined as those “children who have or are at increased risk for chronic physical, developmental, behavioral, or emotional condition and who also require health and related services of a type or amount beyond that required by children generally.”²² As we are not medical experts, special needs cases are often going to require consultation with those that are in the field.

A. The Initial Consultation

Litigants may not realize that the children’s special needs are relevant or important in a matrimonial dispute. Moreover, some lawyers may not think to ask this question of their litigants initially. Of course, it’s on the attorney to get as much information as they can out of

²¹ Id.

²² Id. citing Merle McPherson et. Al., *A New Definition of Children with Special Health Care Needs*, 102 Pediatrics 137 (July 1998), cited in Paul W. Newacheck et al., *Children at Risk for Special Health Care Needs*, 118 Pediatrics 334 (July 2006).

their client, and this question should be routine for any attorney prospectively handling a matter involving custody issues. Attorneys should address these issues in their initial consultation(s), which will allow for the most amount of time possible to generate appropriate discovery requests and begin the process of obtaining, often times, lengthy medical records.²³ Attorneys must be prepared that special needs cases are going to take longer than the average custody case. Addressing the issues as early as possible is the best way to be prepared for the unique issues that lie ahead.

Attorneys should be prepared to ask both general and specific questions regarding prospective clients' special needs children.²⁴ Asking directly if any children have special needs is, of course, a good start, but attorneys should be prepared to follow up even if the initial answer is "no."²⁵ Many parents may not fully understand the question or misinterpret what "special needs" entail so it is important for the attorney to inquire diligently. The attorney should give the broad definition of "special needs" and ask whether the child receives any special assistance in school.²⁶ It is not uncommon for a child to receive some kind of schooling assistance, while the parent may not realize that this qualifies as "special needs." The attorney should also ask whether the children are taking any medication, receiving physical or behavioral therapy, or other forms of counseling.²⁷

²³ Price, *supra*, 2015.

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Id.

If a client identifies that they have children with special needs, an attorney should be prepared with a separate intake form exclusively dedicated to the special needs aspect of the case.²⁸ Ms. Price recommends specifically inquiring about the following:

- 1) Whether any of the children have had an official diagnosis, either by a healthcare provider or through the school;
- 2) The reasons the parent thought the child needed to be evaluated;
- 3) How the child's condition impacts the family's daily routine;
- 4) The child's current condition and prognosis;
- 5) Whether the condition is treatable, curable, or terminal;
- 6) The child's life expectancy;
- 7) Whether the child is expected to ever obtain a high school and/or college diploma;
- 8) Whether the child can be expected to live independently, be employed, marry, and/or have children; and
- 9) How the child's condition impacts the child, the siblings, and the parents both now and in the future.
- 10) The current primary caregiver(s) for the child; and
- 11) How caring for the child impacts the parents' careers and retirement plans, both now and in the future.²⁹

Ms. Price also stresses to begin collecting medical records as soon as possible. Attorneys should know that gathering these records can take a significant amount of time and may involve jumping through procedural hoops. In addition, the records could be quite

²⁸ Id.

²⁹ Id.

voluminous, especially if the child's condition is severe or has been present for a long period of time. At the consultation, the attorney should ask the client to list the following regarding the child's medical history:

- 1) Contact information of all professionals the child sees to treat the condition;
- 2) All medications the child takes, including frequency, dosage, reasons for the medication, and the expected results of taking the medication(s);
- 3) Therapies received both in and outside of the home and school;
 - a. Where the therapies are received;
 - b. Who provides the therapies;
 - c. The type and methodology of the therapies;
 - d. Frequency and duration of the sessions;
 - e. How long the therapies are expected to continue;
 - f. Cost of the therapies and how they are paid for;
 - g. Who takes the child to therapy;
 - h. Who referred the child to those therapies; and
 - i. Expectations regarding future therapies.³⁰

At the consultation, the attorney must also make sure that the client provides, or is asked to provide promptly, information on all of the direct and indirect costs of the child's condition. Considerations may include costs for all healthcare providers, nutritional requirements, home modifications, vehicle modifications, special clothing, respite care, special transportation, and caregiver costs.³¹ Being sufficiently prepared as early as possible will be extremely beneficial

³⁰ Id.

³¹ Id.

for the attorney. It will limit the amount of “surprises” that may pop up throughout the litigation. It will give the attorney a good glimpse into the current and future lives of his or her client, especially financially. Moreover, it will prepare the client for the potentially arduous journey ahead. It is unlikely that a litigant in a divorce matter considered their child’s special needs to the degree in which the attorney will inquire about them. A thorough consultation can paint a more accurate picture of what the client should expect going forward and have them jump start the process of gaining relevant information so that the attorney is not scrambling at the last minute to answer discovery requests. In addition, it will make the attorney prepared at the initial case management conference to brief the judge on the parties’ situation, which, as discussed, is crucial for the judge to know as early as possible so that he or she is prepared that the case may take longer than the typical divorce matter.

B. Drafting Complaints and Answers

In the initial Complaint for Divorce (or Answer to the Complaint), the attorney should include an allegation that a child in the matter has special needs.³² Ms. Price recommends the following method: include a paragraph identifying the names and birth dates of all unemancipated children born of the marriage, setting in bold the special needs child’s name and date of birth followed by the language, “**AND THAT SUCH CHILD HAS SPECIAL NEEDS, SPECIFICALLY ____**”.³³ It can also be effective to ask for a different amount of child support, a non-standard parenting plan, alimony, and/or custody and parenting time arrangement depending on the child’s specific needs.³⁴ If the respondent’s attorney believes that a guardian

³² Id.

³³ Id.

³⁴ Id.

ad litem is appropriate, and the complainant's attorney has not requested one, the respondent's attorney should also request the appointment of a GAL in the Answer.³⁵

Discovery

A family attorney should be prepared with specific interrogatories and requests for production concerning a child's special needs. In addition to addressing the topics discussed at the initial consultation, the attorney should inquire about specific issues regarding the child's special needs, which may not be initially obvious. For instance, the attorney should question about the percentage of each parent's involvement with the child's caregiver(s), the specific financial impacts for the parent and family as a whole, and all specific information about modifications necessary in each parent's home and vehicle, including ones that may be necessary in any new home a parent may obtain during or following the case.³⁶

When requesting and providing documents, attorneys should keep in mind the need to obtain applicable school records, like IEPs and 504 Plans.³⁷ These records can provide the court with a very accurate and trustworthy picture of the child's condition, needs, and expectations. Like anything else in a divorce matter, parents may disagree on the severity or nature of their child's disability. These detailed school records provide a thorough and unbiased narrative for the judge, who will be likely to give great weight to these records when making decisions throughout the case.³⁸

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

If the client's child has an IEP or 504 Plan, the attorney should familiarize him or herself with it.³⁹ Sometimes, an attorney will be able to get a clearer picture of the child's condition and needs from reading these plans than from speaking directly to the client. These plans can also provide insight to the child's financial needs. The plans will include mandated and suggested services and treatment plans. With the help of a forensic accountant, family attorneys can use the IEP to verify the proffered expenses associated with plan.⁴⁰ Attorneys also need to consider whether the family paid for any private evaluations and be prepared to review the findings and expenses associated with those plans.⁴¹

Attorneys must also be mindful of both their client and client's spouse either exaggerating or minimizing the child's condition. For instance, the obligor spouse likely will try to downplay the severity and financial impact of the child's condition. On the other hand, the obligee may try to contend that the child's disability is even more severe than it seems, thereby requiring additional support. Judges that are provided with substantial records, such as IEPs, will be able to identify a pattern in litigant(s) holding these positions, if that is indeed occurring.⁴² An attorney must be able to identify these patterns. If the other spouse is engaging in this behavior, it is crucial to point it out to the court, especially when submitting certifications and briefs. If the attorney's client is guilty of this, the attorney must advise that this behavior can backfire.⁴³

³⁹ Francesca O'Cathain and Alexander Krasnomowitz, *Divorce and Children with Special Needs: Financial Issues and Practice Tips for Lawyers and Forensic Accountants to Consider*, N.J. Fam. Lawyer (2018).

⁴⁰ Id.

⁴¹ Id.

⁴² Price, *supra*, 2015 citing Sheila Jennings, *Autism in Children and Parents: Unique Considerations for Family Court Professionals*, 43 Fam. Ct. Rev. 582 (2005).

⁴³ Price, *supra*, 2015.

There is bound to be disagreement over whether certain services are actually required. For example, children with autism have many different types of therapies available, such as applied behavioral analysis (ABA), verbal behavior (VB), pivotal response treatment (PRT), discrete trial training (DTT), and early start Denver model (ESDM).⁴⁴ There are also other therapies which are typically not covered by insurance, such as art therapy and playgroup therapy.⁴⁵ These services may be helpful to the child, but an obligor-parent may argue that the services are not necessary in order to reduce their support obligation. Attorneys should piece together a timeline of how and when the parties decided on these services, confirming the timeline with associated proofs.⁴⁶ Doing so can prepare the attorney for arguing on behalf of their client whether the relevant services are necessities or luxuries.

Crafting Parenting Plans

Even court-appointed professionals are often unable to effectively consider the unique and sensitive care required to address a special needs child when developing parenting plans.⁴⁷ Unfortunately, these professionals are often tasked with formulating and heavily influencing parenting plans for special needs children. Ideally, parents will be able to work with one another to develop these plans, since they know their children better than any professional. Of course, in the family court arena, the existence of cooperative parents is often a myth rather than a reality, and, therefore there is a good chance that third parties will have at least some input on these plans.

⁴⁴ O’Cathain et. al, *supra*, 2018.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Price, *supra*, 2015 citing Donald T. Sapsonek, *Editorial Preface to Special Issue of Family Court Review*, 43 Fam. Ct. Rev. 563 (2005).

Standard parenting plans usually will not work for special needs children. When the parents end up in different households, especially if they are a considerable distance away, it is not reasonable to expect a special needs child to just split time between the parents' homes.⁴⁸ If a child requires home modifications, for example, the parents will have to figure out how to afford and implement two sets of them. Transitions between homes will require that the child always has his or her medication. If the child is physically limited, it may be difficult and costly to get the child between homes. Overall, logistical issues that lawyers and other professionals may not think about during standard cases may be very prevalent in special needs situations, necessitating very specialized parenting plans. There is also the emotional aspect to consider. All children have difficulty in handling these transitions, but for some special needs children, it may be too much to handle.⁴⁹

Parenting plans should also address the allocation of costs for modifications and accommodations. In some situations, this will require thinking prospectively. If a child suffers from a progressive condition that is expected to worsen, attorneys need to prepare their clients for the financial hardships that not only currently exist but will or are expected to exist.⁵⁰ Parents also need to maintain realistic expectations. The non-custodial parent, for instance, may need to expect a delay in parenting time until he or she equips the home and/or vehicles with the appropriate accommodations.⁵¹ While it will undoubtedly be difficult for one to have a delay in parenting time, a reasonable parent (and his or her attorney) need to be realistic and know that any delay is in the best interests of the child. Another unique consideration is that it may

⁴⁸ Price, *supra*, 2015.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

advantageous to appoint one parent the ultimate decision-maker on medical or educational issues. This is not to “punish” the other parent but rather to avoid any unnecessary delays in significant decisions, which could be harmful to a special needs child. If this is not possible, attorneys should add an alternative dispute resolution clause or designate a parent coordinator to mediate potential issues. It is worth stressing that cooperation in the special needs context is so critical and attorneys should try to guide their clients away from confrontation. Another way to ensure that a child will not be harmed by potential delays in parent feuding is setting up an escrow account that will be used for the benefit of the child for agreed-upon services.⁵²

Attorneys need to expect that a parenting plan for a special needs child will be much more detailed than a standard plan.⁵³ Developing parenting plans in these contexts will require great creativity and open-mindedness from everyone involved. For example, if the special needs child has nondisabled siblings, an appropriate parenting plan may involve splitting the children up during parenting time.⁵⁴

Special attention must also be paid to each parent’s work schedules. A good parenting plan needs to ensure that someone is always available to take the child to all treatment sessions.⁵⁵ Many family attorneys are adversarial in nature, which can make them effective litigators. However, with special needs children, a better approach is often to work more collaboratively with the family and other attorney(s) than just as an advocate for your client.⁵⁶ Of course, this will require a shift in mindset for many family attorneys, and practicing in this way may not

⁵²Madeline Marzano-Lesnevich et al., *Navigating the Divorce Process When You Have a Child with Special Needs*, American Academy of Matrimonial Lawyers (2015).

⁵³ Price, *supra*, 2015.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

seem as natural as typical cases. However, for the good of the child(ren), civil collaboration and openness is often a better method than promoting conflict.⁵⁷

Child Support

It is much more expensive, on average, raising a special needs child than a nondisabled child.⁵⁸ A 2014 study conducted by JAMA Pediatrics, for example, estimated that the cost of raising one child with autism spectrum disorder and intellectual disability spend \$2.4 million for that child over the course of the child's life.⁵⁹ As a result of these monumental costs, most states' child support guidelines or charts will need to be deviated from greatly to effectively meet the special needs child's needs. To be prepared to calculate and litigate child support, attorneys need to obtain as much information as possible about the child's and family's day-to-day lives. Attorneys that conduct thorough inquiries at consultation, as discussed herein, have a much better chance of obtaining an accurate picture early on, assessing their clients' and the children's support needs, and will be in a better position to advocate for their clients' positions.

Attorneys should be aware of public assistance available to special needs children. Children may receive benefits from both the federal and state governments. The benefits may be cash or contributions to educational, housing, or other living expenses.⁶⁰ These benefits are usually financially means-based and require thorough documentation.⁶¹ Common benefits include, but are not limited to, the following:

⁵⁷ Id.

⁵⁸ Id. citing Vicky Barham et al., *Are the New Child-support Guidelines "Adequate" or "Reasonable"?*, 26 Can. Pub. Pol'y – Analyse De Politiques, 1 (Spring 2000).

⁵⁹ O'Cathain et al., *supra*, 2018 citing Ariane V. S. Buescher et. al, *Costs of Autism Spectrum Disorders in the United Kingdom and the United States*, 168 JAMA Pediatrics, 721 (Aug. 2014).

⁶⁰ Marzano-Lesnevich, *supra*, 2015.

⁶¹ Id.

- United States Social Security Disability
- United States Social Security Supplemental Security Income
- United States ABLE Act Benefits
- State Cash and/or Supplemental Assistance Benefits
- State Housing Assistance
- State Property Tax Relief
- State Supplemental Nutrition Assistance Program
- State Mental Health and Intellectual Impairment Assistance
- United States Medicare Benefits
- State Medicaid Benefits
- Veterans' Benefits⁶²

Supplemental Security Income (SSI) and Medicaid are two of the most common programs available to families of special needs children.⁶³ SSI is a means-based federal program that provides income through a cash assistance grant to individuals with disabilities.⁶⁴ SSI provides a modest monthly stipend for food and shelter needs, but does not pay for medical expenses. In most states, receiving SSI automatically qualifies the recipient for Medicaid.⁶⁵

⁶² *Id.*

⁶³ O'Cathain et. al, *supra*, 2018.

⁶⁴ *Id.* citing *Understanding Supplemental Security Income (SSI) Overview-2018 Edition*, <https://www.ssa.gov/ssi/text-over-ussi.htm> (last visited May 4, 2018).

⁶⁵ O'Cathain et. al citing *Understanding Supplemental Security Income SSI and Other Government Programs—2018 Edition, Supplemental Security Income (SSI) and Eligibility for Other Government Programs*, <https://www.ssa.gov/ssi/text-other-ussi.htm> (last visited May 4, 2018)

Medicaid is a means-based program funded by the federal government and managed by the individual states.⁶⁶ Medicaid provides access to healthcare and other programs that provide ancillary services.⁶⁷

A. Special Needs Trusts

Creating a Special Needs Trust (SNTs) for the child may prevent the reduction or elimination of government benefits. SNTs can be complicated, so it is imperative that family attorneys keep up with their basic requirements and principles. There are two types of SNTs, which are designated usually as first-party and third-party SNTs.⁶⁸ If the property that funds the SNT originates with the beneficiary, it is a first-party SNT. If the property funding the SNT belongs to someone else, it is a third-party SNT.⁶⁹

Third-party SNTs are often used by parents of special needs children.⁷⁰ The SNT can be included in one's Will, established within an *inter vivos* trust, or drafted as a stand-alone SNT.⁷¹ These SNTs are usually funded upon the death of the beneficiary's parents or the other person(s) who originally established the SNT.⁷²

A stand-alone SNT exists during the lifetime of the person who established it, which allows the SNT to receive gifts from other parties, such as grandparents or other family members besides the child's parents.⁷³ A third-party SNT does not need to be irrevocable in order to

⁶⁶ O'Cathain et. al, *supra*, 2018.

⁶⁷ *Id.*

⁶⁸ Special Needs Alliance, *The Voice Newsletter*, Vol. 11, Issue 6 (Sept. 2017), <https://www.specialneedsalliance.org/the-voice/two-different-types-of-special-needs-trusts/>

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

preserve the child's eligibility for public benefits.⁷⁴ However, if the child (beneficiary) has the ability to revoke the SNT, its assets would be considered an available resource for Supplemental Security Income and Medicaid purposes.⁷⁵ As such, a revocable SNT has the potential to limit the child's eligibility to receive benefits if the child at any time chooses to revoke it. One must keep this in mind when establishing a SNT. In addition, the SNT agreement should allow the person establishing the SNT to amend the SNT to address future changes in law or circumstances surrounding the beneficiary.⁷⁶ If a SNT is appropriate, family attorneys should consult with an attorney that specializes in creating these trusts to craft the appropriate language in the eventual Matrimonial Settlement Agreement.⁷⁷

Attorneys should be mindful of the effect that child support could have on the child's eligibility for government benefits. Depending on the nature of the benefits, attorneys need to carefully consider whether support should be paid directly to the parent, the child or to a SNT.⁷⁸ For instance, child support payments reduce SSI benefits dollar for dollar.⁷⁹ This could, in turn, jeopardize the child's eligibility for both SSI and Medicaid benefits. Children typically cannot remain on their parents' health insurance plans past the age of 26, making it crucial that these children remain eligible for Medicaid.⁸⁰ According to the Social Security Administration's Program Operations Manual System (POMS), child support payments made on behalf of a child after the age of 18 are treated as unearned income to the child.⁸¹

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ O'Cathain et. al, *supra*, 2018.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id. citing POMS S.I. 00830.420

Preparing for the Additional and Unique Costs Associated with Special Needs Children

In the initial pleadings, an attorney should raise the issue that deviating from the standard guidelines or charts will be necessary.⁸² Of course, the attorney needs to be prepared to back up this claim. This is another reason why it is so essential to obtain complete records of everything associated with the child's special needs. When it comes time to submit child support proposals, an attorney who backs up the proposed figure with adequate records will undoubtedly be in a better position than attorney that cannot. Attorneys need to keep detailed notes and refer back to them at this stage. Hopefully, the attorney would have made some kind of checklist or otherwise easily organized their notes applying all of the items that contribute to the direct and indirect costs associated with the child's needs and, once obtained, have the records to substantiate and calculate those costs accurately. These costs may include pre-existing expenses, therapy, medication, dietary costs, doctors, special clothing, and virtually anything else that is somehow attributable to meeting the child's needs.⁸³

Support obligations will often extend longer than for nondisabled children.⁸⁴ Depending on the child's condition, emancipation may be delayed or never occur at all. If this is a possibility, it needs to be addressed early on so that the parents are not feuding over it in the future, at the expense of the child. If there is disagreement over the child's ability to be financially independent in the future, medical experts will need to weigh in on the child's long-term prognosis.

⁸² Price, *supra*, 2015.

⁸³ *Id.*

⁸⁴ Marzano-Lesnevich, *supra*, 2015.

Adult children with special needs may also need help with decision-making and other day-to-matters. Families in these situations should explore the possibility of guardianship, which is especially appropriate if the adult child outlives the parents.⁸⁵ Even with young children, attorneys need to consider whether guardianship needs to be considered, even if it may be many years away. Being able to ascertain the long-term prognosis can assist the attorney in deciding whether to advise their client on guardianship. Special Needs Trusts can also be helpful in these instances and family attorneys should consider referring their clients to estate attorneys for assistance in establishing these trusts.⁸⁶

Attorneys must also keep in mind that the current costs, or the costs that existed at the beginning of the matter, may not accurately reflect the future situation. Even during the divorce, a child's condition can, unfortunately, worsen which will cause the costs to increase even before the divorce is finalized.⁸⁷ Therefore, it is important to keep as up-to-date as possible on the child's situation and frequently urge clients to provide updated figures and records. A child's worsening condition may also be temporary or permanent.⁸⁸ Sometimes, the worsening condition may be due to the stresses of the divorce, which can often be much harder on special needs children than nondisabled children. Other times, the child's deterioration may be a direct result of the child's health condition. Also keep in mind that the child simply growing may contribute to the need for additional costs. For example, the child may outgrow their equipment or other accommodations, necessitating the purchase of new materials.⁸⁹ Many of the child's

⁸⁵ O'Cathain et. al, *supra*, 2018.

⁸⁶ *Id.*

⁸⁷ Price, *supra*, 2015. citing Donald Wertlieb, *Converging Trends in Family Research and Pediatrics: Recent Findings for the American Academy of Pediatrics Task Force on the Family*, 111 *Pediatrics* 1572 (2003).

⁸⁸ Price, *supra*, 2015 citing Brian D. Johnston et al., *High-Risk Periods for Childhood Injury Among Siblings*, 105 *Pediatrics* 562 (2000).

⁸⁹ Price, *supra*, 2015.

services may not be covered by insurance or public assistance, adding to the need for additional support.⁹⁰

B. Unreimbursed Medical Expenses

Parents must allocate unreimbursed medical expenses, of which there may be many depending on the child's condition. The common practice is to split these costs in proportion to the parents' income, pursuant to the guidelines.⁹¹ However, dividing these costs in another manner may be appropriate.⁹² Attorneys may consider hiring a benefits expert to analyze which expenses will and will not be covered by government benefits and private insurance.⁹³ Health insurance premiums and deductibles must also be considered, especially in the event that the party carrying the insurance policy loses the ability to maintain his or her current insurance plan.⁹⁴

When representing the potential obligee-spouse, attorneys need to advise their clients that they will need to justify much of the child's expenses to the court.⁹⁵ This can be quite difficult for the parent, and the attorney needs to be prepared for the emotional fall out that may result from this. Parents are used to raising their child in a certain way. It is unlikely that a parent has gone in depth as to whether certain costs are "required" or not. Rather, parents in these situations have typically done what they feel is best for their child. During divorce, it is common that the parents' views of what is best will suddenly be in conflict. A parent that has typically enrolled the child in art therapy, for example, likely did it because they truly felt that it helped

⁹⁰Id. citing Ana L. Pabon, *Financial Planning for Special Needs Children: A Review of Available Information for Parents*, 4(2) J. Personal Fin. 40 (2005).

⁹¹ O'Cathain et. al, *supra*, 2015.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

the child. However, art therapy may be difficult to justify as a “required” expense. Confronted with the possibility of changing a child’s routine in this context just because the service is not “required” could be devastating for the parent. It is an unfortunate reality that attorneys need to prepare their clients for ahead of time so that they are not blindsided by it during the course of the litigation.

Spousal Support and Distribution of Property

The custodial parent of a special needs child will likely have to less time to devote to their career.⁹⁶ The custodial parent will probably have to greatly cut their work hours or remain at home entirely. Special needs children will also probably miss school more often, furthering the need for the custodial parent to be as available as possible.⁹⁷ All of these factors will have an adverse impact on the custodial parent’s income over time.⁹⁸ A custodial parent may not be eligible for their employer’s retirement plan if they need to reduce their work hours, and even a full-time employed custodial parent will likely have to reduce their contributions to a retirement plan.⁹⁹ These needs must be considered when deciding on spousal support and property distribution. In equitable distribution states¹⁰⁰ particularly, equity may entitle a custodial parent to a greater distribution of the marital property. To make up for the exuberant costs that the custodial parent will have to undertake, the other parent must be tasked with contributing their fair share to the child’s expenses, even if they will not be spending nearly as much physical time

⁹⁶ Price, *supra*, 2015 citing Sunhwa Lee et al., *The Impact of Disabilities on Mothers’ Work Participation: Examining the Differences Between Single and Married Mothers* (2004).

⁹⁷ Price, *supra*, 2015 citing Paul Newacheck et al., *An Epidemiological Profile of Children with Special Health Care Needs*, 102 *Pediatrics* 117 (July 1998).

⁹⁸ Price, *supra*, 2015

⁹⁹ *Id.*

¹⁰⁰ Equitable distribution is followed by a majority of the states. It stands for the principle of “fair” distribution rather than strictly equal or 50-50 distribution of marital property. A minority of states follow equal distribution, often referred to as “community property states,” whereby marital property is automatically divided 50-50.

with the child. Attorneys must be prepared to argue that the custodial parent's decreased work hours are justifiable or exaggerated, depending on which parent the attorney represents. When representing the custodial parent, attorneys can instruct the parent to create a calendar outlining their potential work schedule and the child's school and services schedule to demonstrate how caring for the child will impact the parent's employment.¹⁰¹ Attorneys representing the obligor-spouse must be prepared to support their clients' claims that the obligee-spouse is inflating the child's potential costs. To do this, the obligors' attorneys should review the history of what the parties spent on their expenses and assess what the family's ability to spend will be in the future as a result of the parties' separation.¹⁰² Attorneys need to keep special attention to the fact that two homes will likely create the need for additional expenses, as more caregivers may need to be hired or that additional accommodations will need to be purchased for the child.¹⁰³

Attorneys may also consider hiring a vocational expert. The expert will opine on what the caregiving parent may have earned had he or she continued his or her career and assess any barriers to re-entry given current and future caregiving responsibilities.

In some cases, parties may have entered into a pre-marital agreement. In these agreements, it is common that one spouse agrees to a waiver of alimony. Of course, raising a special needs child likely was not considered by the parties when entering into these agreements. An alimony waiver in a pre-marital agreement may not be viable or enforceable if the parties have a special needs child.¹⁰⁴

¹⁰¹ O'Cathain et. al, *supra*, 2015.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id.

Parents must also address what to do with the marital residence. For special needs children, stability is key and selling the marital home is, in general, probably not the best option.¹⁰⁵ Moving away from the marital residence may be physically or emotionally difficult for the special needs child.¹⁰⁶ Logistically, it may not even be possible, especially if the home has been equipped with modifications to accommodate the child's needs. In addition, proximity to the child's school, health professionals, and therapy sessions must be considered. Moving to a new place may hinder the parents' ability to keep the child on schedule with his or her treatments.

¹⁰⁵ Marzano-Lesnevich, *supra*, 2015.

¹⁰⁶ Id.