

Issues That Must Be Considered In A Divorce With A Special Needs Child

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Right out of the gate, a divorce between a couple with a special needs child is more challenging than your typical divorce case. There are issues that must be considered that usually do not come into play in your typical divorce case. At minimum, the following issues must be addressed:

First, child support. In New Jersey, the Child Support Guidelines do not consider the extra and/or unique expenses of a child with special needs. As a result, the Child Support Guidelines should not be used in determining child support for a special needs child and as such, an attorney must be prepared to demonstrate to the Court why the Court should deviate from the Child Support Guidelines. To assist with this demonstration, the attorney should have a breakdown of all of the expenses that are incurred in excess and/or unique to raising a child without special needs such as, therapy (speech, occupational and physical), special education, home health care, special medical care, non-prescription drugs, dietary needs, respite for the primary caretaker and equipment (e.g. hearing aids, cochlear implants and wheel chairs).

Second, how will child support be paid? Is it paid to the custodial parent, directly to the child or in a special needs trust? A child can lose significant governmental benefits depending on how child support is paid. For example, a child could lose Supplemental Security Income and Medicaid if the custodial parent receives child support on his/her behalf because this support is deemed income to the child. One way to avoid losing these benefits is with a special needs trust. Unlike child support, payments made into a special needs trust are not deemed income to the child for SSI and Medicare purposes.

Third, emancipation. In New Jersey, a child is automatically deemed emancipated (i.e. able to “move beyond the sphere of influence” of his/her parents) at the age of 19. As a result, child support obligations automatically terminate when a child turns 19 unless there is a Court Order stating

otherwise, or a parent seeks the continuation of child support. Therefore, it is critical for parties of a special needs child to specifically address this automatic termination at the age of 19. In some cases, a child may never be deemed “emancipated” and this fact or possibility should be specifically addressed.

Fourth, education. When dealing with a school district of a special needs child, it is important for the child’s parents to be a united front to ensure the child receives the appropriate services he/she needs through an educational plan such as an Individualized Education Plan (IEP) or a 504 Plan. If parents cannot be a united front, then it is probably in the child’s best interests for one party to make all of the educational decisions. Further, if a child has an educational plan, this must be considered when determining where the child will live after the divorce, because a new school district may not accept the former school district’s educational plan.

Fifth, transition into adulthood. There are issues that may arise when a special needs child transitions into adulthood that must be considered such as, employment, independent living, long-term care and government and/or private agency benefits. For example, the New Jersey Division of Developmental Disabilities (DDI) offers services that will assist a special needs child when he/she transitions into adulthood such as, finding him/her a job and locating appropriate group housing. Parties should also consider guardianship. If their special needs child will need assistance with decision making after he/she turns 18, then the parties need to agree to a guardian.

Lastly, support of the primary caretaker. Caring for a child with special needs is often a full-time job. As a result, primary caretakers are often unable to work or they are unable to work on a full-time basis. This care can also extend well beyond the age of majority. The loss of earnings of the primary caretaker, as a result of having to care for a special needs child, can be addressed through the payment of alimony (the amount and the term) and/or through an unequal division of property.

As a result, if you are going through a divorce and you have a special needs child, then it is imperative that that you have an attorney who understands the unique issues associated with these cases.