# Special Needs Children Present Unique Issues To Divorce Cases

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*A practical guide to representing a divorce client with a special needs child.*

When parties to a divorce have a child with special needs, their case becomes instantly more complex than a typical divorce case. “Special needs” is usually determined by categories that the public school system considers eligible for special education services such as autism, learning disability, physical and health impairment, developmental delay, emotional disturbance and hearing and visual impairment. There are unique issues that must be considered to avoid landmines when your client has a special needs child, such as properly structuring child support so a disabled child does not lose valuable public benefits. Attention must also be given to several areas of planning including the special needs child’s transition into adulthood, which attention is not usually given in a typical divorce case. The following is a guide to representing a client who has a special needs child.

At the outset, do not simply have your client tell you his/her child’s diagnosis. Instead, also have your client walk you through a “day in the life” of the child so you are aware of the day-to-day challenges the child faces. These challenges can easily affect custody and parenting time. For example, many special needs children have problems with transitioning. They need more structure and consistency than the average child. As a result, a standard parenting time schedule where a child goes back and forth between the parents’ houses may be traumatic for that child.

Raising a special needs child after divorce requires a high degree of collaboration between the parents. As a result, you need to explore with your client the relationship he/she has with their spouse as it relates to co-parenting time. If the parties have a toxic relationship, then joint legal custody may not be appropriate. You also should explore if a parent coordinator is needed to assist the parties with making

decisions for their special needs child that is in their child's best interest after their divorce.

You need to know if your client's child is receiving public benefits and/or if the child is entitled to receive public benefits in the future. This is extremely important because a child could forfeit current and/or future benefits if child support is not properly structured. A child will lose present and/or future benefits such as Social Security, Supplemental Security Income and Medicaid, if child support is paid directly to the custodial parent or the child rather than to a trustee of a special needs trust. When child support is properly court-ordered to be paid to the trustee of a special needs trust, these benefits will remain intact. Caution: just because a child is not receiving public benefits does not mean that the child is not eligible for benefits either now or when he/she turns 18. You need to consider all possible benefits now, as well as in the future.

You need to obtain a breakdown and proof from your client of the expenses that are extra and/or unique to his/her child's special needs such as therapy (speech, occupational and physical), special education, home health care, special medical care, supplements, non-prescription drugs, dietary needs, home environmental modifications, respite for the primary caretaker, and equipment (e.g., hearing aids, cochlear implants and wheelchairs). In New Jersey, the Child Support Guidelines do not consider these extra and/or unique expenses. Therefore, the Child Support Guidelines should not be used in determining child support for a special needs child. You must be prepared to demonstrate to the court why the court should deviate from the Child Support Guidelines. A breakdown and proof of these extra and/or unique expenses is critical for this deviation to occur.

You need to discuss with your client the likelihood of their special needs child becoming emancipated one day, moving beyond the "sphere of influence" of his/her parents. Many special needs children will never become emancipated. This must be addressed to avoid the child from losing support when he/she turns 19. In these cases, child support may continue indefinitely.

If you are representing the custodial parent, you need to know if their child rearing responsibilities directly impact his/her employment or the ability to be gainfully employed. Many special needs children need constant care and supervision. Primary caretaker parents not only provide daily care to their special needs child, but also manage doctors' appointments, therapy sessions and treatment

regimens. They also manage and track medical insurance reimbursement and research how to secure funding for their special needs child's expenses. As a result, the custodial parent may not be able to work a traditional schedule or have full-time employment. The impact that these child rearing responsibilities have on the custodial parent's employment must be considered when determining spousal support and/or equitable distribution. A greater amount of spousal support and/or equitable distribution to the custodial parent may be warranted to offset the loss or disrupted employment and/or inability to be gainfully employed.

You need to discuss estate planning with your client. Child support, life insurance, retirement plans or any other financial accounts where your client designates his/her child as the beneficiary, as well as lifetime gifts or bequests by family members, should be directed into a special needs trust to avoid the child from forfeiting benefits.

You need to ask your client if his/her child receives special education and has an Individualized Education Program (IEP). If your client's child has an IEP, then you need to discuss whether both parents should sign the IEP, which is reviewed annually, or if only one parent should sign it. Schools only require one parent to sign an IEP even if the parties are divorced and have joint legal custody. If there are issues with your client's school district as to his/her child's eligibility for services, classification or the services the child is receiving or is not receiving, then it is important for the parties to be a united front when dealing with their school district. If the parties cannot be a united front, then it is probably in their child's best interest to designate one parent to address their child's special educational needs.

You also need to discuss what, if any, are the additional costs associated with your client's child's special education, including tutors and independent evaluations if your client believes that his/her child is not receiving the appropriate services. If your client's child has an IEP, then relocation of the custodial parent after the divorce, especially if the non-custodial parent lives or is relocating out of the school district, needs to be discussed. A new school district might not accept their child's IEP. Eligibility for special education services may have to be re-determined and services may be denied or changed.

You need to discuss with your client the plan for their special needs child's transition into adulthood. You need to explore with your client the child's likelihood for financial independence and living on

his/her own as an adult. Unique issues will arise when your client's special needs child transitions into adulthood, such as eligibility for governmental and quasi-governmental or private agency benefits, employment, recreational and social skills, independent living or custodial care. If a child is disabled, but not incapacitated, when the child turns 18 years old, he/she may need to execute a durable power of attorney to allow one of the parents to make financial decisions on his/her behalf.

If the child is incapacitated at the age of 18, a guardianship or co-guardianship should be considered. Guardianship gives the guardian the authority to make all decisions on behalf of the child including financial and medical decisions. Many families find it easier to pick one parent as the guardian to avoid disagreements about what is best for their now adult child. The non-guardian parent will still have an active role in their now adult child's life as many state-funded service systems recognize the non-guardian parent in the annual service planning process such as New Jersey Division Developmental Disabilities and Medicaid.

In conclusion, representing a client with a special needs child is a substantial undertaking. There are many issues involved that are not present in a typical divorce case. You need to know and understand these unique issues to properly represent your client and to avoid losing substantial benefits for your client's special needs child.

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