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Editor's Comments

In this edition I am happy to present an article by Lili A. Vasileff highlighting crucial considerations for family law attorneys when representing divorcing clients with special needs children. We have seen a marked increase in the number of clients with such children and need to be aware of the special factors that impact their custodial and financial care. A certified financial planner, certified divorce financial analyst and single mother of a special needs daughter, Lili brings a broad perspective to this issue. Thank you, Lili, for your valuable contribution.

This edition also marks Lydia Milone's first as Chair of our Section. I am particularly grateful to Lydia, since she was Co-Editor-in-Chief of this publication with me when I first took on this work and taught me the ropes. She will be a wonderful Chair and we look forward to her tenure. I also thank our retiring Chair, Larry Braunstein, for his outstanding work for the Section, including his informative and useful contributions to this publication.

I extend a very warm welcome and thanks to Lisa Zeiderman, who with this edition take on the demanding work of Recent Decisions Editor, so important to keeping our members up-to-date on important developments in our case law. Lisa's excellent work is evident in these pages. And last, but certainly not least, my continuing gratitude to Lynn Maier for her invaluable support and tireless work as Articles Editor.

I wish everyone a good autumn and look forward to seeing you at our CLE programs

Tamara A. Mitchel
Editor-in-Chief

DIVORCE AND THE SPECIAL NEEDS CHILD

By Lili A. Vasileff, CFP¹

There are few challenges more difficult than going through divorce while having a special needs child. When a special needs child is involved, issues of child custody, visitation, support and property division can be significantly more complex.

Divorcing parents with a special needs child confront singular issues. For example, that child often has more expenses than a child without special needs. The uncertainty about the nature, cost and predictability of future care expenses makes enumerating child related add-on expenses relating to a disability challenging in a divorce agreement. Particularly important, the child's eligibility for governmental agency benefits may be threatened or reduced by providing a custodial spouse child support or maintenance. Parents also need to be aware of how to navigate the educational system and take advantage of estate planning strategies to maximize necessary support for their child.

Family law legislation does not yet sufficiently recognize the unique considerations of these families in the areas of custody and support. Child support guidelines may be inadequate for resolving lifelong issues for families with a special needs child. "The U.S. court system is overwhelmed when it comes to dealing with all the divorces, child custody, and child visitation and support issues. As a result, it cannot adequately address the unique needs inherent in family law cases involving children with special needs -- an especially critical situation as the number of special-needs children is skyrocketing."² Until the law of divorce provides properly for special needs

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² Yavorcik, Carin, "**Special-Needs Children and Divorce**", <http://support.autism-society.org>, April 22, 2009.

children, family law attorneys have an unparalleled opportunity and responsibility to educate their clients and provide viable resolutions by agreement.

This article will outline following key aspects of divorce for families with a special needs child:

1. Defining Special Needs
2. Parenting Plans
3. Public Benefits Planning & Coordination with Support Payments
4. Child Support & Add-ons
5. Special Education
6. Transition Planning
7. Spousal Maintenance
8. Estate Planning

Defining Special Needs

Be aware that legislation and case law are evolving in this area as more family lawyers deal with a burgeoning number of cases involving special needs children. As part of your client's divorce, make sure you know what their child's special needs are and have your client walk you through a "day in their life" taking care of their child.

"Special needs are often determined following categories that the public education system considers eligible for special education services, including autism, physical limitation and health impairment, emotional disturbance, learning disability, and developmental delay, among many others."³

Special needs cover (1) life threatening illnesses; (2) chronic and physical disabilities, and; (3) mental and/or behavioral disabilities. Many special needs children cannot perform many of the six activities of daily living skills, which are defined as eating, bathing, dressing, toileting, transferring (*i.e.*, walking), and continence. Accurately assessing a child's capacities in the activities of daily living is ongoing, and is

³ Price, Margaret (Pegi) S., "The Special Needs Child and Divorce: A Practical Guide to Evaluating and Handling Cases," American Bar Association, April 24, 2009.

critical to determining what type of care the child needs and accessing appropriate services.

The Special Needs Child

The “best interest of the child” is the doctrine used by most courts to determine a wide range of issues relating to the well-being of children. The goal, then, is to identify and understand how to determine the best interests of the child when that child has special needs. These interests will impinge on the following decisions:

- With whom will the children live? Standard visitation schedules and parenting plans often are unacceptable and unsuitable for the proper care and environment of the special needs child.
- How much contact ("access" or "visitation") will the parents, legal guardian, or other parties be allowed (or required) to have? Routines versus change affect every child but change may have a heightened impact on a child with special needs.
- What are the extraordinary child-related expenses to evaluate and address? For how long will they be shared between the parents?
- To whom and by whom will child support be paid and in what amount? When is spousal maintenance appropriate and for how long? How do we preserve a special needs child's eligibility to maximize government benefits? Why is 18 a “magic age” in the life of a special needs child?

Parenting Plans

A good starting point is to explore both spouses' similar or dissimilar visions of what their child's disabilities and abilities are. A parenting plan should spell out essential information and instructions. The noncustodial parent may not be familiar with managing behaviors, giving medicines, monitoring consistency of foods, adapting physical surroundings or understanding specific preferences of their nonverbal child.

Details become paramount in communication between ex-spouses concerning not only their special needs child, but also their other children. Their other children undoubtedly are affected by the amount of time, energy and attention required by the special needs child. While not intentional, it is important for both parents to make a commitment to spend one-on-one time with their non-special needs children so that those children, too, can feel “special” and important.

Access/Visitation Schedules

A typical visitation schedule used in most divorces may not be appropriate for your client’s family. Special needs children often require consistency, structured lives, and familiar routines. Unless the non-residential custodial parent will see their special needs child on that child’s own “turf” (*i.e.*, the primary residence), a residential custodial parent has to plan for travel. It is important to determine how the child will travel (*e.g.*, with a care giver, with their siblings or with one parent). The primary parent may have special medical and physical equipment to send back and forth because insurance usually covers only one apparatus of its kind at a time. The noncustodial parent may have to be flexible because of health issues and maintain proximity to familiar medical professionals.

Child Support and Add-Ons

Caring for a special needs child can be expensive and stressful. There is increased need for specialty medical care, prescriptions, therapy services, private special education, tutors, medical equipment, physical equipment/furniture, non-prescription treatments, vitamins and nutritional needs, paid respite care for the custodial parent, modifications to the home, transportation, extra babysitting care for siblings, travel for medical care, and out-of-pocket care and expenses not covered by any insurance or agency. Deviation from the standard child support guidelines is warranted. Few states have statutes or case law that allow for continuing the support obligation of both parents for the lifetime of their (adult) child. Advance planning to secure all available public benefits for the child is crucial.

Public Benefits Planning

Securing government and agency benefits for a special needs child can enable that person to have the resources necessary for quality long-term care. It is important to know what government benefits are available to a special needs child and when these benefits are available. Because government programs can be confusing and since they change often, those seeking to learn more about receiving government benefits for a special needs child should consult an attorney specializing in this area or review current documentation on eligibility from each individual government program.

There are four relevant government benefit programs available to special needs families. These are Supplemental Security Income ("SSI"), Medicaid, Medicare and Social Security Disability Insurance ("SSDI"). A special needs child can receive SSI, SSDI, Medicaid and Medicare all at the same time.

SSDI and Medicare are not means-based programs. In other words, there is no investigation into the parents' finances to determine if they qualify for the program based on their income or their resources. Medicare is a form of sponsored health insurance available for the elderly and the disabled, and SSDI is available to individuals and minors or special needs children of an individual who has died, retired or become disabled. A special needs child who is under age 22 and who is not working can obtain SSDI benefits based on his or her parents' prior earnings.

Both SSI and Medicaid are means-based programs. Eligibility for those programs is based on financial need and strict requirements must be met before benefits are authorized. SSI makes a disabled person eligible for food stamps and Medicaid, which pays for a child's medical expenses, mental health services, important drug therapy, and home and institutional services that help the child and family. The distinction between means- and non-means-based programs is important to understand.

In the context of support negotiations during divorce, it is critical to address **in-kind support** in lieu of **cash maintenance and/or cash child support**, or a **combination** of in-kind support and cash payments, **so as to preserve SSI and Medicaid benefits for the child.**

“SSI will not count the value of alimony received by the custodial parent as unearned income if it is not received in the form of a cash payment. The noncustodial parent could agree to pay the same amount each month in the form of goods and services. If the goods or services received include basic shelter expenses such as rent, mortgage, taxes, or utilities, this will result in a one third loss of SSI but at least the custodial parent of the special needs child will continue to receive SSI even though in a reduced amount. This is because if the alimony is used toward basic living expenses, it is counted as in-kind income, which results in one third loss of SSI. Goods and services such as after school child care, additional therapies, private school tuition, auto expenses, housekeeping services, telephone, cable TV, internet, etc. are not counted by SSI as income.”⁴

Age 18 can be akin to a “magic age” for a special needs child. How divorcing parents pay child support, maintenance, share extraordinary costs, allocate assets, and coordinate efforts to attain benefits for their child, all must be configured *for before and after age 18*. Divorce agreements must allow for flexibility for the child’s changing needs as well as to their aging out of various public benefit and educational programs.

Under Age 18

- ❖ **Income and Assets** held in the parent’s name are relevant to determining whether a child is eligible to receive means-tested government programs such as SSI and Medicaid, which may be linked. These resources are deemed to be available for the child and as little as \$2,000 can disqualify eligibility for SSI benefits.
- ❖ **Child support paid in cash** to a custodial parent will reduce a child’s SSI amount by one third (not totally disqualify him/her).

⁴ Varnet, MSW, JD, Teresa M., “Divorce and Special Needs Planning: Issues When a Party in a Divorce has a Disability or a Child with a Disability,” Fletcher Tilton, PC, 2011.

- ❖ **Special educational supports and services** may be mandated and provided at no cost to the family and child under federal and state laws.

Over Age 18

- ❖ **Assets** held in the parents' name no longer count against the adult disabled child.
- ❖ **Assets** cannot exceed \$2,000 for an adult disabled individual in order to qualify for SSI.
- ❖ **Child support paid in cash** will result in a dollar for dollar loss of SSI. It may also risk disqualifying an adult disabled child from receiving Medicaid at age 18 and when they turn 20, from Medicare.
- ❖ **Cash maintenance** paid to the custodial parent is no longer countable income for SSI purposes.
- ❖ All entitlements to the many supports and services received during educational years terminate with aging out of the **educational system** anywhere from 18 – 21 years.

Special Education

Through age 21, federal educational initiatives ensure that children with disabilities receive education and related services necessary to enable them to become independent, productive, and contributing members to their communities. If a child receives special education and is eligible for an Individualized Education Program ("IEP"),⁵ the school via state funding may offer at their own cost segregated special education; full inclusion with nondisabled persons in a least restrictive environment to

⁵ Individual Educational Program assessments are mandated under the federal legislation, the Individuals with Disabilities Education Act, which sets forth substantive and procedural rights for children with disabilities and their parents.

the maximum extent possible, and; extended school year services to ensure children with disabilities do not regress over the summer.

Schools do **not** require the signature of both parents even if they have joint legal custody to implement planning strategies. Consequently, it is important to resolve in divorce whether both parents should be required to sign an IEP or whether only one parent should exercise this power for practical reasons. And if the school system does not pay for all costs, the divorce agreement should address parental cost-sharing for any out-of-pocket, additional educational expenses, such as private tuition, independent evaluations, tutors, consultation, advocacy, legal fees, and other future support services for the child as he or she transitions out of the educational system.

Transition Planning

In preparing for children with disabilities aging out at 21 years, schools engage in transition planning to enable them to successfully access community activities, such as vocational and adult living, after they exit school. These efforts focus on guardianship, eligibility for quasi-government or private agency benefits, employment, recreation and social skills, independent living, or custodial care. Whereas basic child support typically ends at the age of majority at 18 or 21, divorcing parents of children with special needs who have severe impairments face the reality of lifelong care giving and, perhaps, co-parenting. Incorporating transition planning is critical during divorce negotiations because it often underscores the disparity between the parents' expectations about what their future obligations will be for their young adult child with special needs. Transition planning is also a helpful tool to engage parents with attorneys in a useful dialogue about eligibility for and securing public benefits.

Spousal Maintenance

The degree to which a care-giving custodial parent's career and earning capacity are affected by a special needs child is highly variable; often, managing the care of a special needs child is akin to a full time job.

"The primary caregiver parent not only provides daily care to their special needs child, they also manage doctor appointments, therapy sessions, and treatment regimens. They also research and secure funding for the special needs child's expenses, maintain the funding year after year and track the family's medical insurance reimbursements. Since many of these activities can interfere with the primary caregiver parent's employment, they often may find it difficult to maintain a full time job. Due to these challenges, the primary caregiver parent's income earning potential is often compromised. This should be a factor when determining whether spousal maintenance is required."⁶

Maintenance may be crucial in light of decreased earning capacity, the likely impossibility for rehabilitation, or the burden of unusual care giving responsibilities. When a parent's economic activity is reduced because of the needs of the child, the parent may never catch up financially.

Recognizing the foregoing, the care of disabled adult children "that has inhibited or continues to inhibit a party's earning capacity" was added in 2010 as a factor in setting post-divorce maintenance, in New York Domestic Relations Law Section 236B (6) (a) (11). In opting out of the presumptive award of temporary maintenance, a factor for the court to consider under New York Domestic Relations Law Section 236B (5-a) (e) (1) (j) is the care for "disabled adult children...that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment."

Estate Planning

Parents also can use a qualified special needs trust to receive funds (assets and cash payments) that would ordinarily be distributed outright to the custodial parent or to the adult disabled child. In most cases, these contributions will not preclude the child

⁶ "Special Circumstances: Why Divorce with a Special Needs Child is More Challenging," ClearviewDivorce.com, June 24, 2011.

from receiving government assistance, although special needs trusts are fairly restrictive in their use and operation.

Special needs trusts are designed to protect the assets of a physically or mentally disabled person, while still allowing that individual to receive government benefits and have funds to pay for extra care beyond what the government provides. A special needs trust enables a physically or mentally disabled person to have an **unlimited** amount of assets set aside for their needs without being disqualified from government benefits. Your client's retirement plans, life insurance or any other financial accounts where they designate the child as a beneficiary, and any lifetime gifts or bequests by anyone in their family, need to be directed to a special needs trust or a supplemental benefits trust. The benefits of a special needs trust are:

- ❖ Special needs child remains eligible for government benefits;
- ❖ Parents' wishes as to asset management are implemented as intended;
- ❖ Minimizes family conflict and turmoil;
- ❖ Protects against creditors and litigation, and;
- ❖ Creates a succession plan for any assets remaining after the death of the special needs child.

Conclusion

Divorce presents unique long-term implications for families with special needs children. Appropriate strategies for paying maintenance and child support, navigating the educational system, setting up special needs trusts, and maximizing estate planning to preserve eligibility for public benefits should be considered by the matrimonial attorney together with the assistance of other professionals. Collaborating with knowledgeable experts in this complicated arena will help produce more comprehensive and helpful outcomes in divorce for these families.

