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Family Law

Divorce and the Special-Needs Child

Ending a marriage does not mean the end of a couple's commitment to their special-needs child

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The end of a marriage does not end the parents' commitment to their child with special needs. Parents going through a divorce (and the attorneys advising them) should pay particular attention when the parents have a child with special needs to (i) the allocation of child support for the child with special needs, (ii) the parent's own estate-planning and guardianship and education decisions.

If a child with special needs has been deemed disabled under the Social Security Administration definition by the appropriate agency, child support dedicated to that child should be allocated under the separation agreement to a special-needs trust so that these assets do not affect the child's ability to receive government assistance. Child support, although paid directly to a spouse, is considered to be an asset of the child for purposes of determining eligibility for means-tested governmental programs. To avoid disqualifying the child from governmental benefits, the divorce agreement should direct child support payments to be made directly to a first-party special-needs trust, instead of directly to the custodial spouse. The child with special needs will be the sole beneficiary of the trust and the custodial parent can be the trustee. In this way, the child support will be used for the child's benefit without disqualifying the child from benefits he or she may receive now or in the future.

For a minor, a person would be considered disabled under the Social Security Administration definition if he or she "has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." An individual age 18 and older is "disabled" if he or she has a medically determinable physical or mental impairment, which results in the inability to do any substantial gainful activity and can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months.

Under a first-party special-needs trust, the trustee can use trust assets to supplement (but not replace) any benefits or governmental assistance such person is or may become entitled to receive. At the beneficiary's death, the remaining trust assets will reimburse Medicaid for any monies expended while the trust was in existence, such as medical care, home health care, nursing home care and housing costs of the person with special needs. Thereafter, any other public assistance programs, which have a valid right of reimbursement under state or federal law, will be repaid. Any remaining trust assets will pass to those persons appointed by the person with special needs in his or her will to receive the assets. If a person with special needs is under the age of 18 and/or is incompetent, then the assets will pass to those persons entitled to receive the assets under the intestacy laws of New Jersey.

In addition to child support, it is important that each spouse consider the impact of the separation on his or her individual estate planning. Each parent must have appropriate special needs planning in place in order to protect the child's eligibility for assistance. All assets passing at a parent's death to a child with special needs should pass to that child in a third-party special-needs trust. Unlike the first-party special-needs trust, discussed above, a third-party special-needs trust is created to receive gifts and bequests from

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third parties, such as parents and other friends and family members. These trusts can be set up at any time to receive gifts or bequests from various friends and family members or can be set up under a parent's (or other family member's or friend's) will to just receive assets from that person's estate. Unlike a first-party special-needs trust, under a third-party special-needs trust, at the death of the person with special needs, all of the remaining trust assets can pass to anyone that the grantor (creator) of the trust decides at the time of the creation of the trust. These beneficiaries are often siblings or other family members of the person with special needs. None of the assets in a third-party special-needs trust are used to pay back government agencies.

Each spouse can create his or her own special-needs trust with different trustees and different beneficiaries, or they can work together to just create one trust. Whether each parent creates his or her own trust or they create one trust together, it is important that where possible, the parents of the child with special needs coordinate the funding of the trusts to ensure that adequate resources will be available to the child, and to ensure that the both spouses have incorporated the planning necessary to preserve the child's eligibility for assistance.

If one parent incorporates special-needs planning in his or her estate plan, but his or her former spouse has not, the planning that one spouse has done will not be enough to protect a child's eligibility for assistance at the time that the former spouse dies. If the former spouse dies and leaves assets to a child with special needs in any way other than in a special-needs trust, such as outright or in another type of trust, those assets will be deemed available to that child for purposes of qualifying for government benefits. If one spouse is concerned that the other spouse may not properly plan for the child with special needs, then the separation agreement should require that any assets left to the child with special needs be left to them in an appropriate trust. A special-needs trust could even be created as part of the separation agreement.

During a divorce, one issue that is not often contemplated is who is responsible for becoming the guardian of the child upon the child's attainment of age 18 (one parent or both together), if such guardianship is necessary. Once a child reaches the age of 18, a parent has no legal right to make decisions on behalf of the child. Therefore, if the child is not able to handle his or her own medical or financial decisions as a result of special-needs issues, one or both of the parents should apply to become legal guardian of the child.

In New Jersey, limited guardianships are also an option. This permits guardians to be named to assist a child where needed, without taking full control away from the child. For example, a limited guardianship could permit a child to obtain a driver's license, retain control over a bank account with some set dollar amount or participate in medical decisions.

Alternatively, a full guardianship gives complete control and total decision-making power over the child and his or her finances to a parent or other named individual. In New Jersey, judges will not build in successor guardians when naming guardians, so often families will name multiple individuals as guardians from the inception (such as both parents, or both parents and an adult sibling together).

Finally, as a part of a separation agreement, the issue of who makes education-related decisions on behalf of a child with special needs through such child's attainment of age 21 should be considered. Often times there are various choices regarding appropriate education, and to the extent that the separation agreement can memorialize who is responsible for making these decisions, conflicts can be avoided in the future.

Divorces can be messy without the additional factors involved when the divorcing couple has a child with special needs. It is important to consider the issues raised above to minimize future problems, both for parents and for their child. ■