



Divorce and Children with Special Needs

Of the many life challenges and circumstances that can potentially disrupt the life of a child with special needs, divorce is undoubtedly one of the most difficult situations to contend with.

While the rate of divorce remains lower for couples with a child with special needs, the stress and added responsibilities on parents can lead to broken relationships that necessitate a divorce, causing the child with special needs potentially a significant amount of upheaval during the process.

Parents need to consider the full scope of health, medical and legal issues that will potentially alter the situation for the child and be aware of state and federal laws that might affect eligibility and benefits.

Guardianship

In addition to coordinating beneficiary designations, [Brian K. Carroll, CELA](#) encourages parents to make sure they update their typical estate planning documents such as power of attorneys, wills and any trust they might have. All such documents should be reviewed early on in the divorce, not just after the divorce is final.

Once the child with special needs turns 18, a court-appointed guardian will need to be appointed if signing a power of attorney is not an option. If the parents are able to get along it might be that both parents would be co-guardians, despite the divorce. They may decide that one or the other may be the Guardian or possibly another family member. The important point is that they talk about who should be the guardian or co-guardians, who the alternate guardian or guardians might be with an emphasis on what arrangement would be in the child's best interest.

Child Support

Financial support for children without special needs typically ends when a child turns 18 or completes high school; however, some states require that child support be continued indefinitely once an individual with special needs becomes a legal adult. Depending on the situation, it's important to find out what child support will be required, particularly if the child with special needs is over age 18 when the divorce is finalized. According to [Neal A. Winston, CELA](#), parents and their legal teams additionally need to carefully review all current financial and planning instruments involving the child including health insurance,

life insurance, a special needs trust, Uniform Gift to Minors Act (UGMA), and 529 College Savings Plan accounts.

Another issue to address is determining how each respective state's probate courts count Social Security and Supplemental Security Income benefits and whether they take funds in a Special Needs Trust into consideration when determining what each parent is obligated to pay.

If a parent's health insurance covers dependents, children can remain on the parent's health insurance until at least age 26 in most cases. Life insurance may be required to be purchased by a parent to insure ongoing support, and some states mandate permanent life insurance for children with special needs. In some states such as Illinois, Indiana, Michigan, and Wisconsin, child support does not count against the child's Medicaid eligibility.

ABLE Accounts

A major change in recent years is the creation of ABLE accounts, which offer an individual with special needs a tax-free savings option that does not interfere with the individual's eligibility for government benefits, including Supplemental Security Income, public housing assistance, and Medicaid. Contributions to ABLE accounts are currently limited to \$16,000 per year and can hold up to \$100,000 without affecting a Supplemental Security Income beneficiary's eligibility when properly used.

In a new development, some states are now permitting child support to be paid to an ABLE account rather than requiring it be paid to a first party special needs trust so as to not impact Supplemental Security Income and Medicaid eligibility. It should be remembered that due to the annual contribution limit on ABLE accounts child support of more than \$16,000 per year cannot be ordered to an ABLE account but must instead be paid to a first party special needs trust to avoid an impact on government benefits. Essentially it's a new tool to get spending money and support paid for the child without having the SSI or Medicaid benefits being reduced or needing to create a first party special needs trust notes [Benjamin A. Rubin, Esq., LLM](#).

ABLE programs are run by individual states. Many states now have ABLE programs, and, like a 529 College Savings Plan, most allow out-of-state residents to open an account.

Special Needs Trust

In cases involving divorce, it is usually helpful to draft specific language in the custody agreement to direct child support payments into a Special Needs Trust. This can preserve the individual's eligibility for and reduce reduction of government benefits while also

ensuring that there is additional money available to supplement the services provided by the government.

The Trustee also should be mindful of how they make distributions from the trust and use the funds in a manner that least affects the child's eligibility for benefits. A Special Needs Trust can supplement SSI payments for anything other than food or shelter related expenses without reducing those benefits. For example, payments can be made for clothing, a vehicle, transportation, extra medical care, telephone and internet, electronic devices — and many other things that would benefit the child with special needs.

Disbursements are made from the trust for the child's food or shelter related expenses, then the child's SSI will be reduced due to the receipt of income in the form of "in-kind support and maintenance" up to one-third of the federal SSI benefit amount. However, a Special Needs Trust can be authorized to fund an ABLE account to pay food and shelter related expenses that will avoid this reduction in SSI benefits.

States vary in their willingness to consider the use of the assets of a Special Needs Trust to provide child or spousal support or otherwise reduce the support obligation of a spouse or parent.

Other Considerations

As Winston notes, law and court practice can greatly vary between states, so that while the SSI program is a uniform federal program, some programs such as Medicaid have joint federal-state shared rule making that create significant differences. The rules for different public benefit programs can also treat the same trust and trust distributions differently, so it is important to plan in advance and prioritize the benefits most advantageous to the child when presenting to the court for approval.

Planning ahead for future changes is also important. Moving to a different state might create a dramatic change in benefit eligibility, particularly Medicaid. When a child reaches age 18, or other age of majority in some states, the rules can also change. For example, if child support is not paid directly into a trust or ABLE account, two-thirds of the support payment up to age 18 reduces SSI benefits dollar for dollar, and 100% is counted age 18 and over. UGMA accounts also become countable for SSI according to state law, which is age 21 in Massachusetts. The key to a successful child support plan involving public benefits for a child with special needs is to build in flexibility for changes to the plan over time.

The ideal scenario is that the parents are able to file for divorce with minimal disruption of the environment of the child with special needs. Equally important for financial reasons is for the parents to cooperate in their agreement to maximize continuing public benefit

eligibility for the child. Maintaining the support services and financial resources for the child requires advanced planning and decision-making on behalf of the attorneys and parents, and the cooperation by the court, to ensure continuation of the quality of life the child needs and deserves, and for which the parents, their own differences and needs aside, should desire.

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