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PROTECTING DISABLED CHILDREN WHEN PARENTS DIVORCE  
By Thomas D. Begley, III, Esquire

For many years, it has been commonly reported that half of all marriages in America end in divorce. Divorce affects parents of special needs children as well. Unfortunately, reports vary tremendously-in some states the divorce rate is higher, others opine that it is lower. In any event, one point is clear-a disabled child can often bring couples together or often can drive them apart.

Divorcing parents of special needs children have three very special issues to address. Two of these issues, estate planning and protective arrangements, are somewhat common to those which face those parents which remain together. The third, though, is unique in the establishment of child support. Bluntly, if these three issues are properly addressed, the health and financial well-being of a disabled child can be protected and even enhanced. If not, the disabled child may face substantial disruption in their personal, financial and medical well-being.

The manner in which a divorce is handled can often impact a disabled child. Traditionally, divorces can have up to three financial components: (a) property distribution, (b) alimony, and (c) child support. Obviously, payments by a non-custodial parent to a custodial parent are essential in order for the custodial parent to properly provide for the health, maintenance and support of all of the couple's children including the disabled child. However, the outright distribution of child support can be problematic. For non-disabled children, child support may cease at the age of 18. However, for a disabled child, courts may order the payment of child support for the remainder of the disabled child's lifetime.

Typically upon attaining the age of 18 years, the disabled child is entitled to Supplemental Security Income (SSI), which could provide a monthly income. This income varies from state to state. In New Jersey it is \$705.25. However, this income can be negated by a child support payment. For example, if a non-custodial parent is to pay \$750 per month in child support for a disabled child, two-thirds of same, or \$500, would be considered as countable income. As such, if a disabled child was receiving

a \$705.25 monthly SSI benefit, it would be reduced to \$205.25. If the child was receiving \$1,200 in child support, the result would be even worse as the countable child support, \$800, would negate the SSI altogether. In many states, the negation of SSI would eliminate any eligibility for Medicaid benefits. Being that many disabled children have physical, mental and other medical issues that require substantial care, this effect could be extremely adverse to the medical and financial well-being of the disabled child.

A divorce attorney may not know how to personally maintain the benefits of a disabled child. However, he or she should recognize the need to consult with a qualified estate planning attorney who has experience in disability issues.

The better route to take would be the establishment of a special needs trust on behalf of the disabled child. If properly established, this trust could be the conduit for the income after the age of 18. This would allow the child support to be maintained and a vehicle which could supplement any government benefits received by the child rather than replacing same. As such, rather than child support reducing the benefit, both the child support and benefit could be completely maintained.

That concept segues into the need to have parents properly undertake estate planning for this particular scenario. If one or both of the divorced parents have wills which provide outright distribution to children, the disabled child could likewise lose his or her benefits. In New Jersey, if said child has more than \$2,000 in assets, his or her needs-based benefits are terminated. Some parents are given poor advice to disinherit their children or to leave assets behind to another child as a quasi-trustee. These suggestions are impractical and have many perils. The best way to provide for a disabled child is through the establishment of a special needs trust. A special needs trust is a vehicle that allows a third party (a trusted family member or a financial institution) to act as a fiduciary to invest and distribute assets on behalf of the disabled child. There are a host of rules and regulations that the trustee must follow and the language of the trust must conform to exacting government requirements. However, the establishment of the trust will ensure that the inheritance supplements, rather than replaces, government benefits, thereby protecting the government benefits of the disabled while providing resources for him or her through the trust vehicle.

These trusts can be established through a will or separate documents. In many cases, it is advisable to set up a separate document. Of course, it allows for assets to be placed in the document during the lifetime of the parents. Also, many parents will come together to establish a single trust rather than spend funds on two trusts established separately.

The final issue which divorced couples must face is the protective arrangements which are provided on behalf of their children. Typically, prior to attaining the age of 18, these matters can be expressed through a divorce decree-most notably issues regarding child custody and visitation. However, all children-whether disabled or not-are considered emancipated at

the age of 18. As such, in order to make personal, financial or medical decisions on behalf of a disabled child, a protective arrangement needs to be established. If a child has relatively high cognitive functioning, he or she may be able to execute an advance directive (living will) and power of attorney. If not, a guardianship can be established to handle all legal issues. Both parents have equal statutory priority to act as guardian. As such, it is quite beneficial to work together to establish productive and amicable arrangement.

In conclusion, divorcing parents of disabled children have special issues which need to be addressed to ensure the health and well-being of said children. These issues need to be addressed not only with the children, but with the parents' estate planning and divorce procedures as well.

## Speakers

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