



Special Needs Divorce

CONSIDERATIONS FOR CLIENTS WHEN A CHILD HAS A DISABILITY

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Statistics: The size of the problem

- Autism affects 1 in every 59 children according to the CDC in 2018.
- 1 out of 9 children under the age of 18 in the U.S. today receives special education services.
- 1 in every 26 American families reported raising children with a disability.
- The National Organization on Disability reported that 32% of parents spend more than 40 hours per week with their special needs child, or time equal to a second full-time job.

Where to Start?

- Many family law attorneys aren't aware of the unique issues presented when a child or adolescent has a disability.
- Get organized for your initial meeting with an attorney.
- Be prepared to provide specific answers about the child's educational and other needs.



Documents:

- IEP or 504 paperwork from the school. This should include evaluations that describe how your child is functioning and the impact of their disability on their education.
- A list of treatment providers
- A list of costs such as therapies, equipment, medications that the child needs on a regular basis
- A schedule of the child's day and week
- A description of who does the primary care giving
- Impact of the child's disability on other siblings

Documents cont.

- Retirement accounts, salary, investments
- Anticipated costs for the child's therapies, care and other needs
- Bring a photo. This helps the attorney understand and personalize the child.



Checklist



- Who is the primary caretaker?
- What are the short and long term care plans for the child? (Will the child be able to live independently? Be employed? Attend college?) You may not know the answers to these questions and will need to give consideration to these issues in the context of a divorce proceeding.
- What are the monthly costs associated with the child? This should include direct and indirect costs.

Examples of the extraordinary costs related to the child's disability

- Advocates/Attorneys
- Therapy
- Equipment
- Respite Care
- Modifications to the home
- Modifications to vehicles
- Medication
- Doctors (may not be covered by insurance)



Primary Caregiver



- Is employment outside the home possible?
- Full-time or part-time?
- How does that impact the child's life?
- Will there be a need to also schedule and manage the child's therapy, doctor appointments, treatments?

Sharing the load

- Can you and your spouse/partner share in the care?
- Can you agree and collaborate on major decisions?
- Major decisions are items such as education, medical care, therapies
- How much communication will that require between the parents
- Should one person make most of the decisions and coordinate care for the child?
- How will the day-to-day caregiving be allocated?
- Do you agree on the costs and how those should be divided?

Areas of Disagreement/Agreement

- List all of the specific areas where you and the other parent disagree concerning the disability or special needs of your child and its impact.
- Is one parent exaggerating or minimizing the impact of the disability?
- Designate the parent who will make decisions and in what areas.
- Do you agree on the care and the impact of the child's disability?



Maintenance

- Caring for a disabled child often results in the caregiving parent's reduction in their career path and/or salary.
- This may impact the amount and duration of maintenance.



Property Distribution

- Being the primary caregiver of a child with a disability has a cumulative impact not only on the salary of that person but impacts their situation.
- If the parent is only able to work part-time, they may not be eligible to participate in an employer's retirement plan.
- The marital residence may already be appropriately outfitted to accommodate the needs of the child. This may be a significant issue in the discussion of "Who gets the house?"
- Even if they do contribute to a retirement plan, their income level may reduce the contribution and negatively impact their retirement and other property accumulated during the marriage.
- This may result in a need to request a greater share of the retirement and other property accumulated during the marriage.

Parent Plan – Considerations:

- What is the impact of the child's disability?
- Difficulty with transitions?
- Caregiving needs in both homes?
- Impact on other siblings?
- Proximity of each household to therapies, doctors, etc.
- Residential parent for school district purposes
- If one parent is going to move out of the school district, there should be a discussion of which is the better school district.

Parenting plan considerations (cont.)

- What will work best for the child with a disability?
- Frequent contact but no overnights?
- Weekend parenting time during the school year to minimize transitions?
- Will the caregivers need a break?
- What is the plan for the non-disabled siblings?

Dispute Resolution

- In the event of a disagreement regarding issues that arise in the context of a parenting plan, there should be a designated mechanism for resolving the dispute. There are a number of options:
- Mediation – Ideally this should be someone who is not only a family law mediator but someone knowledgeable about children with disabilities.
- Parenting Coordinator

Estate Planning

- Will the child need life long care? If so, what kind of care will be necessary?
- Are the necessary estate planning documents in place? (special needs trust)
- How will the care be funded?
- Do the parents need additional life insurance policies?
- Who will be the guardians?
- Social security and other government benefits?

Child Support



- What are the actual needs of the child?
- The costs attendant to caring of the child with a disability may necessitate a deviation from the standard child support formula.
- It is critical to document all the costs associated with caring for the child.

Practical Tip: Provide a list of all possible costs items that relate to the care of the disabled child. Use this as a framework and guide for discussing the financial issues.

Child Support (cont.)

- Duty of support. The court shall determine child support by applying the guidelines..., unless the court makes a finding that the application of the guidelines would be inappropriate after considering the best interests of the child and evidence which shows the relevant factors, including but not limited to one or more of the following:
 - (A) The financial resources and needs of the child;
 - (B) The financial resources and needs of the parents;
 - (C) The standard of living the child would have enjoyed had the marriage or civil union not been dissolved; and
 - (D) The physical and emotional condition of the child and his or her educational needs

Health Insurance

- In orders involving maintenance and support, the court on ordering that a child shall be the beneficiary of any health insurance plan that is available through the party's employer. If such a plan isn't available, the court can order the party or parties to obtain health insurance after considering the following factors:
 - (A) The medical needs of a the child;
 - (B) The availability of the plan to meet those needs; and
 - (C) The cost of such a plan to the obligator
- ...The court can also order the payment of expenses, including deductibles, copayments or other health expenses not covered by insurance. 750 ILCS 5/505.2

Allocation of Parental Responsibilities

750 ILCS 5/602.5

- a) The court shall allocate decision-making responsibilities to according to the child's best interests. Nothing in this Act requires that each parent be allocated decision-making responsibilities.
- b) ...the court shall allocate to one or both parents the significant decision-making responsibility for each significant issue affecting the child. Those significant issues shall include, without limitation, the following:
 - (1) Education, including the choice of schools and tutors.
 - (2) Health, including all decisions relating to the medical, dental, and psychological needs of the child and to the treatments arising or resulting from those needs;

Allocation for parental responsibilities and decision making (cont.)

(3) Religion

(4) Extracurricular activities

[the court utilizes the child's best interest in any determination of allocation of parental responsibilities]



The Parenting Plan

- 750 ILCS 5/602.7 Allocation of parental responsibilities: parenting time
 - (a) The court shall **allocate parenting time** according to the child's best interests.
 - (b) The court will determine the allocation if the parties cannot. Both parents are presumed fit.



Best Interest – Factors:

- 1) the wishes of each parent seeking parenting time;
- 2) the wishes of the child, taking into account the child's maturity and ability to express reasoned and independent preferences as to parenting time;
- 3) the amount of time each parent spent performing caregiving functions with respect to the child in the 24 months preceding the filing of any petition for allocation of parental responsibilities, or, if the child is under 2 years of age, since the child's birth;
- 4) any prior agreement or course of conduct between the parties relating to caretaking functions with respect to the child;

Best Interests (cont.)

- 6) the child's adjustment to his or her home, school, and community;
- 7) the mental and physical health of all individuals involved;
- 8) the child's needs;
- 9) the distance between the parents' residences, the cost and difficulty of transporting the child, each parents' and the child's daily schedule, and the ability of the parents to cooperate in the arrangement;
- 10) whether a restriction on parenting time is appropriate.
- 11)

Best Interests (cont.)

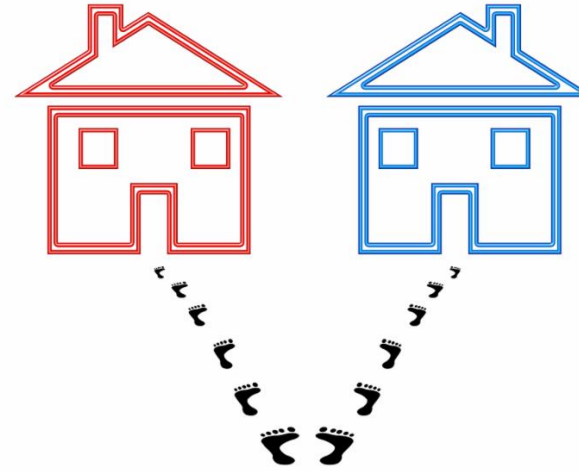
12) the willingness and ability of each parent to place the needs of the child ahead of his or her own needs;

13) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;

....

17) any other factor that the court expressly finds relevant.

Residency:



Divorced or Separated Parents

- In cases of divorced or separated parents, when only one parent has legal guardianship or custody, the district in which the parent having legal guardianship or custody resides is the resident district. When both parents retain legal guardianship or custody, the resident district is the district in which either parent who provides the student's primary regular fixed night-time abode resides; provided that the election of resident district may be made only one time per school year.

Older Disabled Children

- 750 ILCS 5/513.5 Support for a non-minor child with a disability
 - a) The court may award sums of money of the property and income of either or both parties or the estate of a deceased parent, as equity may require, for the support of a child of the parties who has attained the age of majority when the child is mentally or physically disabled and not otherwise emancipated. The sum awarded may be paid to one of the parents, to a trust created for the benefit of the non-minor child with a disability or irrevocably to a special needs trust, established by the parties and for the sole benefit of the non-minor child with a disability....

Support for a non-minor child with a disability

- An application for support for a non-minor disabled child may be made before or after the child has attained majority. Unless an application for educational expenses is made for a mentally or physically disabled child under Section 513, the disability that is the basis for the application for support must have arisen when the child was eligible for support under Section 505 or 513 of this Act.



Support for a non-minor child with a disability

- 750 ILCS 5/513.5 (b)
- In making awards under this Section, or pursuant to a petition or motion to decrease, modify, or terminate any such award, the court shall consider all relevant factors that appear reasonable and necessary, including:
 - 1) the present and future financial resources of both parties to meet their needs, including but not limited to, savings for retirement;
 - 2) the standard of living the child would have enjoyed had the marriage not been dissolved. The court may consider factors that are just and equitable.

Support for a non-minor child with a disability

- 3) the financial resources of the child; and
 - 4) any financial or other resources provided to or for the child including, but not limited to....Social Security, home based support...
- Note: The non-minor child does not have to be adjudicated incompetent in Probate Court in order to be eligible for support as a non-minor child.

Disclaimer

This webinar is intended to provide guidance on relevant issues when a child with special needs is involved. It is not intended as legal advice and given the fact that each situation is unique, individuals should consult with an attorney.

Thank you.

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