

Divorce and Children with Special Needs: Financial Issues and Practice Tips for Lawyers and Forensic Accountants to Consider

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Children with special needs require special attention by all professionals involved. Parents, therapists, attorneys and certified public accountants (CPAs) should work closely together to ensure all available benefits are captured, and that the children receive sufficient support.

Given the dramatic rise in the recognition and treatment of children with special needs over the last 15 years, it is likely that family law attorneys and matrimonial litigation accountants already have worked with multiple families with children with special needs. Those needs may have ranged from relatively minor to requiring substantial care and support. Research studies report higher rates of separation and divorce for parents raising children with special needs.¹ Parents of children with an autism spectrum disorder divorce at a higher rate, especially in the early years.² Lawyers and forensic accountants need to be aware of the distinct issues that face these divorcing families.

To understand each child’s specific educational and behavioral needs, practitioners should be familiar with the child’s individualized education plan (IEP), prepared by school districts and mandated by the Individuals with Disabilities Education Act (IDEA).³ Attorneys should review each child’s IEP, and forensic accountants should verify the accuracy of any expenses associated with the IEP. Also, parents may have paid for additional evaluations by private experts, which should also be reviewed.

Attorney Practice Tip: It is not the matrimonial attorney’s duty to become involved in any disputes the parents have with the school district. This area of law is a specialty that should be referred to an attorney familiar with special education law.

Individual Needs of the Child

Depending upon the nature and severity of a child’s needs, the costs of raising that child may be astronomi-

cal. A 2014 study from JAMA Pediatrics estimated that, in the United States, parents raising one child with an autism spectrum disorder and intellectual disability spend approximately \$2.4 million for that child over the course of his or her life.⁴ In an intact family of children with special needs, these costs frequently cause financial concerns and a strain on families. If the parents divorce, there may be fewer resources available to service those needs, as the family is now providing for two households instead of one.

There may be disagreement on whether certain services are a necessity or a luxury. For example, for children on the autism spectrum there are many different types of therapies available, such as applied behavioral analysis therapy (ABA), verbal behavior therapy (VB), pivotal response treatment (PRT), discrete trial training (DTT), and early start Denver model (ESDM). Many therapies are covered by insurance, but others may not be covered. Uncovered therapies, such as horseback riding lessons, art therapy, and playgroup therapy, among others, may be helpful to the child, but may be viewed as a luxury by one parent.

Attorney Practice Tip: Create a timeline of how and when the parties decided on whether or not expenses were a necessity or a luxury when they were an intact family. Confirm the timeline with associated proofs, such as medical records or doctor, therapist, and school IEP meeting notes.

Accountant Practice Tip: Use the case information statement (CIS) for both litigants to estimate whether proposed forms of untraditional therapy fit into the family’s current budget.

Needs of the Parent

One also needs to consider the specific needs of the parents and how they will be impacted by divorce. There will almost always be a primary caregiver in the family

whose own employment is affected. Statistically, more families with children with special needs are single-income families. Parents with a child with special needs may not be able to work traditional, fixed or full-time work schedules; they are more likely to work reduced hours and to have income decline over time.⁵ There are substantial opportunity costs, as these parents frequently suffer from lost or disrupted employment.⁶

In a divorce, the caregiving spouse must explain to the court why he or she is unable to work or his or her schedule must be reduced, often defending their need for alimony or child support against allegations by the supporting spouse of underemployment, overreaching and exaggeration.

Attorney Practice Tip: Attorneys can help by instructing parents to create a calendar to demonstrate what childrearing responsibilities they have and how it directly impacts their employment.

Attorneys representing the parent seeking additional support should work with the parent to prepare a detailed treatment schedule as well as a detailed daily schedule that shows how the child's condition affects the child's life as well as that of the caregiving parent. A complete schedule that leaves no time for employment will support a claim for alimony and child support without imputation of any income to the caregiving parent. Attorneys representing the supporting spouse must counteract potential allegations of underestimating and minimizing the needs of the child in order to reduce payments. To counteract the allegations, review the history of what the parties spent on all their expenses, as well as what their ability to spend in the future will be, given the increase in costs as a result of supporting two households.

Attorney Practice Tip: When looking at a parent's financial needs, note that the parents are no longer living in an intact home and there may be a need to hire additional caregivers.

Accountant Practice Tip: Provide the retaining counsel with a projected budget accounting for new expenses across two households. Be sure to discuss with counsel how the projected budget can be used in settlement negotiations versus trial.

Determining Child Support

The New Jersey Child Support Guidelines should not serve as the basis for determining financial support for a child with special needs. The majority of states provide for some variance from child support guidelines or other

adjustments in consideration of the special needs of a child. In order to arrive at a fair child support award, attorneys must prove the specific needs of the child and the associated costs.

The guidelines specifically recognize that the special needs of a disabled child may require an adjustment to child support. Child support calculations take into account not only parents' income, caregiving responsibilities and children's expenses, but also allocation of additional, extraordinary expenses such as necessary medical or education costs, day care costs, travel to therapies, child care for any siblings, and equipment. Life insurance costs may also be considered.

The parties should carefully consider whether child support or other benefits should be paid directly to the other parent, to the child directly, or into a special needs trust. Children can lose significant governmental benefits depending upon the manner in which support is paid. N.J.S.A. 2A:34-23 allows the court to order the creation of a trust:

[T]he court may make such order as to the...maintenance of the children...as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders, including, but not limited to, *the creation of trusts or other security devices, to assure payment of reasonably foreseeable medical and educational expenses.*⁷

The statute also permits child support to extend far beyond the typical age of emancipation:

The obligation to pay support for a child who has not been emancipated by the court shall not terminate solely on the basis of the child's age if the child suffers from a severe mental or physical incapacity that causes the child to be financially dependent on a parent. *The obligation to pay support for that child shall continue until the court finds that the child is relieved of the incapacity or is no longer financially dependent on the parent. However, in assessing the financial obligation of the parent, the court shall consider, in addition to the factors enumerated in this section, the child's eligibility for public benefits and services for people with disabilities and may*

*make such orders, including an order involving the creation of a trust, as are necessary to promote the well-being of the child.*⁸

Unreimbursed medical expenses must also be allocated. Often these expenses are shared in proportion to the parties' incomes pursuant to the guidelines; however, in some cases it may be appropriate to divide the uninsured expenses in a disproportionate manner. It may be helpful to consider bringing in a benefits expert to analyze what will and will not be covered by government benefits and any private insurance held by either party. Practitioners should also address the issue of health insurance, including the cost of premiums and deductibles in the event the party carrying the insurance policy loses his or her ability to maintain their insurance plan.

Attorney Practice Tip: As of Feb. 1, 2017, child support obligations established in New Jersey automatically terminate when a child turns 19 unless a court order states otherwise or a parent seeks the continuation of child support.⁹ Practitioners should ensure the appropriate court order is in place.

Accountant Practice Tip: In cases where continued support is sought after 19 years of age, the court will request justification. Accountants must work with clients to provide proofs for current and future expenses for the child.

Role of Family Lawyers and Forensic Accountants

The CIS, required under Rule 5:5-2, is generally the first chance to delve into the child's special needs and the costs associated with those needs. On page five of the CIS, litigants are required to provide information about the child's Social Security income or other government assistance. Although often ignored, Part F on the last page of the CIS provides for a brief narrative of any special issues or problems in the matter.

In creating a historical or prospective budget for Part D of the CIS or a prospective budget, family law practitioners and accountants should include line items for all services and needs of the child, including: physical therapy, speech therapy, behavioral therapy, doctor appointments, specialists, medications, eye care, medical equipment, therapy equipment, specialty clothing, dietary requirements, caregivers, activities, and home and vehicle modifications.

It is important that the parties consider services that are provided for by insurance or the board of education in their location, as well as the services they are fully or partially funding themselves. Attorneys and parents should review and compile all of the therapies the child receives. Every one of the child's doctors and alternative medicine practitioners should be included in the budget. The budget should also include the costs of medications, supplements, specialty foods (*i.e.*, gluten-free and/or organic foods), equipment, supplies, and caregiver training. The caregiving parent should be prepared to explain to the court the costs and necessity of obtaining a nonparent caregiver or other respite care. Special clothing, personal care costs, mileage, and meals should also be included, as these often-smaller costs can add up significantly over years or a lifetime.

Compare the affordability of the marital home to the costs of moving the family, particularly for a child whose needs were specially accommodated in the family home. Consider how a change in the school system may affect that child's IEP, as the new school system may either adopt the child's prior IEP or develop its own. If the parents fought long and hard with the school system, or even obtained special needs counsel to obtain the current IEP, those costs must be taken into consideration in assessing the reasonableness of a move. Other large budgetary items include vehicle, school and home modifications to accommodate the child, should the parties decide to move.

Each line of the budget that is not agreed upon by the parents should be supported by the parties' prior expenditures or a current objective estimate. A forensic accountant can help create schedules of prior expenses for each line item in dispute. For clarity and convenience, the name, address, and credentials of the provider should be detailed; any information, articles, or book excerpts regarding treatment or the child's condition and prognosis should be categorized and developed in the client file. Any waiting lists for therapies, programs, schools, or funding should be explored and understood.

Attorney Practice Tip: Consider attaching the detailed budget to the CIS¹⁰ so the court has the benefit of reviewing the prospective needs of the child in addition to the historical family budget items required by the form.

Accountant Practice Tip: Accountants are often asked to work closely with the client to ensure the CIS is as accurate as possible before the document is filed. If counsel or the client has prepared the budget for the

child with special needs to attach to the CIS, be sure to verify the accuracy and reasonableness of the expenses.

Spousal Support in a Divorce with a Child with Special Needs

Consider how to meet the financial needs of the parent who has provided the majority of care for the child and may continue to do so after the divorce. If the parent has forsaken his or her livelihood to care for the child for many years, it may be impossible for the parent to meaningfully re-enter the workforce. Consideration should be given to how that parent will be able to live during his or her retirement, challenging the general rules of spousal maintenance and how marital property should be divided. In some cases, the caretaker parent may be entitled to spousal maintenance or alimony in a higher amount or for a longer duration,¹¹ or to a larger share of marital property.¹²

In some circumstances, parties may have entered into a prenuptial agreement providing that no alimony or maintenance would be paid in the event of a divorce. The fact that such an agreement may have been entered into at a time when the parties did not anticipate having a child with special needs may have an impact on the viability of the agreement, or on the amount of child support needed, and should be explored during the litigation process.

The parties cannot contractually agree in a prenuptial agreement to custody-related issues, because to do so would be against public policy.¹³

Attorney Practice Tip: Consider retaining a vocational expert to opine on what the caregiving parent may have earned had he or she continued in his or her career, or to assess any barriers to re-entry given current and future caregiving responsibilities.

Accountant Practice Tip: Provide counsel with both current marital after-tax cash flow and single after-tax cash flow if the vocational expert's opinion of projected earnings is reliable.

Equitable Distribution in a Divorce with a Child with Special Needs

Equitable distribution in New Jersey is governed by N.J.S.A. 2A:34-23, which sets forth all factors the court shall consider in determining the equitable distribution of all property that has been “legally and beneficially acquired by the parties or either of them during the marriage.”¹⁴ Although New Jersey is an equitable distri-

bution state, which does not mean a presumption of an equal share of assets, the usual practice is that, absent unusual circumstances, assets are divided equally. Certain factors may allow for an unequal distribution of assets in cases where there is a child with special needs. These factors include the custodial responsibilities of a parent, the need of the child to continue residing in the marital home, and the need for a special needs trust to secure reasonably foreseeable medical or educational costs for the child. Think ahead, and perhaps seek a disproportionate distribution of retirement assets for the caregiver who will not continue accumulating retirement.

Attorney Practice Tip: If the marital home has special modifications to accommodate a child with special needs, consider whether the parent of primary residence should retain the home with delayed compensation to the other party.¹⁵

Accountant Practice Tip: If representing the parent vacating the marital home, and he or she requires special modifications to the new residence, be sure the client provides support (e.g., contractor quotes) for any projected expenses included in the opinion.

Caring for Adult Children

Child support orders, whether entered by the court or reached via consent by the parties, typically expire when the child reaches the age of majority. In New Jersey, they typically expire upon reaching the age of 19, unless extended by court order. The presumption is that the child will be able to begin working and supporting him or herself at that age; however, some children have special needs that are so significant that they will never become self-supporting.

Some adult children with disabilities may need assistance with decision making. If so, the family should consult with legal professionals to explore guardianship. A guardianship may also be appropriate if the adult special needs child outlives his or her parents. As is often the case, the life expectancy of the child exceeds that of the parents. In these cases, practitioners need to consider support provisions for the care of the child once the parents are no longer able to provide care for the child, such as Medicaid/Medicare and other benefits. The private options greatly depend on the financial circumstances of the parties, what resources are available to them, and what resources they qualify for.

Attorney Practice Tip: If a family has sufficient income and assets, consider referring them to an estate

attorney to discuss trusts that can be established for the future support of the child.

Accountant Practice Tip: A CPA involved in the matter should work closely with the estate attorney in preparing the net worth statement, which takes into consideration the marital assets and liabilities.

Federal and/or State Financial Benefits

A child with special needs may be entitled to federal and/or state financial benefits, the purpose of which is to create a financial safety net. These benefits may be in the form of cash or contribution in kind toward educational, housing, or general living expenses. Diagnosis and documentation of need is often critical to a determination of these entitlements. These entitlements are often, but not always, financially means-tested.

There are two important public assistance programs available to families with a special needs child: Supplemental Security Income (SSI)¹⁶ and Medicaid.¹⁷ SSI is a means-based federal program that provides income through a cash assistance grant to persons with disabilities.¹⁸ It provides a modest monthly stipend to meet basic needs of food and shelter, but does not pay for medical care. In most states, however, receipt of SSI automatically qualifies the recipient for Medicaid.¹⁹ Maintaining SSI eligibility is critical because it is the gateway to Medicaid.

Medicaid is a means-based program funded by the federal government and managed by the states. Each state establishes guidelines for eligibility, services, benefits, and coverage limits. Medicaid provides access to health-care and other programs that provide ancillary services. In New Jersey, Medicaid includes the program NJ FamilyCare, which provides healthcare coverage for children and certain low-income parents.

It is critically important to consider the effect that an adult child's receipt of income (such as inheritance or the proceeds of a life insurance policy) has on any benefits he or she may be receiving. Child support, if appropriate past age 19, may be detrimental to a special needs child's qualification for public benefits if handled improperly. For example, child support payments reduce SSI benefits dollar for dollar, which may, in turn, eliminate the child's eligibility for Medicaid. Since many insurance companies will not allow a parent to carry a child on his or her insurance policy past the age of 26, despite the child's special needs, it is imperative to keep the child qualified for Medicaid. The Social Security Administration's Program Operations Manual System (POMS), designed

to provide guidance to administration officials, is also instructive to parents of a special needs child. According to the POMS, after a child reaches age 18, child support payments made on behalf of the child are treated as unearned income to that child.²⁰

This mandate applies to child support arrears as well. If child support is received, one-third of the total support received is excluded and only two-thirds of the funds are considered in-kind support and maintenance, and will factor into the calculation.²¹ Payments for shelter and food expenses are counted as if the child received the cash, rendering two-thirds of the value considered in-kind support and maintenance.²² If the noncustodial parent pays for goods and services for the child, such as child care, tuition, phone, cable, or Internet service, these payments will not be considered income to the unemancipated adult child.²³

Special Needs Trust

In some circumstances, the parties have the financial ability to create a special needs trust (SNT). An SNT allows families of disabled children to create a trust to provide for supplemental support/financial assistance that is not counted as income or in-kind support for determining the child's eligibility for SSI and Medicaid. These trusts are a crucial planning tool when a beneficiary with a disability receives an inheritance or other income.

A trust is a fiduciary relationship where a trustee holds legal title to a property and has the duty to hold, administer, and distribute that property for the benefit of one or more beneficiaries. There are two categories of SNTs: third-party trusts (which hold assets belonging to anyone other than the beneficiary) and first-party trusts (which hold assets belonging to the beneficiary, including child support payments). Any assets remaining in a first-party trust after the beneficiary's death must be used to repay Medicaid for expenditures made on the child's behalf.²⁴

Child support payments are the property of the special needs child. Thus, payments can only be made to a first-party SNT.²⁵ If the trust funds are used for the special needs child's sole benefit and no distributions are made for food or shelter, trust distributions will not reduce SSI. Any assets owned by the child can be held by the trustee (including child support payments, unspent SSI, and gifts or bequests made directly to the special needs child). As first-party SNTs are subject to Medicaid payback provisions, they are ill suited for holding large sums of money. Third-party SNTs are best suited to hold

life insurance proceeds, as the trusts are not subject to Medicaid payback rules.²⁶ As assets in a third-party SNT must not be characterized as support for the child, any voluntary funds paid into a third-party SNT cannot replace child support payments.²⁷

Attorney Practice Tip: Clients with special needs children should consult with an attorney specializing in SNTs. That attorney should then assist the family law practitioner in crafting the requisite language in the marital settlement agreement (MSA).

Accountant Practice Tip: If being called to testify as an expert in litigation, the CPA will have used projections for the child's future care. Be sure that all income and expense projections are justified with sound proofs that the court will understand and consider acceptable.

Conclusion

The costs of raising a child with special needs can be significant. Attorneys handling these cases should be prepared for a substantial undertaking, and should reach out to the specialists involved with the family, including education counsel or financial planners. ■

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Endnotes

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