

Special Needs Planning in Divorce

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Divorce is hard. It is one of the greatest stressors a human being can experience, as the partners come to grips with the reality that a relationship they hoped would be happy and life-long is over. They are riding an emotional roller-coaster. Often the divorcing partners are angry at each other, sometimes bordering on absolute hatred. Even “amicable” divorces are rife with complications.

In the midst of this negative emotional miasma, they must deal with difficult issues: How does each survive financially? Will one pay alimony to the other? Who gets what? This is more complex when there are young children. Who gets custody? Visitation rights? Child support? Providing inheritance for the children? Life insurance?

At least when minor children do not have special needs, custody and child support will end when the children are emancipated. But what of the child who will require lifetime care? Emancipation will never occur. Who will have custody and guardianship? Will the child need SSI, Medicaid or other needs-based government benefits?

Where there are no children, or only children who do not have special needs, the divorcing parents will eventually be free of each other. If the child has special needs, the parents will be joined at the hip for life, no matter how much they dislike each other.

What if one of the spouses has special needs and requires needs-based government benefits? How do you handle alimony and asset division? If the divorce settlement does not consider the requirements for needs-based benefits, the spouse receiving those benefits may forfeit those benefits.

There are a lot of questions. Many can be handled by the divorce attorneys. However, most divorce attorneys are not

familiar with the unique issues arising when a child or spouse has special needs. As advisors, you may be the first to learn that divorce is imminent. Tell your clients about the issues unique to special needs in the divorce context. Recommend the involvement of a special needs planning attorney at the early stages of the divorce negotiations. Such early involvement is critical to help the parties and their divorce attorneys craft the divorce settlement so as not to jeopardize needs-based benefits and to avoid problems with guardianship. Trying to get divorced spouses to cooperate to fix problems after the divorce is finalized may be very difficult.

FOLLOWING ARE SOME OF THE KEY ISSUES TO CONSIDER.

The Child with Special Needs (CSN)

Someone has to care for the CSN for the rest of their life. They will need the basics: food, clothing, and shelter. They will need medical care and personal attention. They may need Supplemental Security Income (SSI), Medicaid and other needs-based programs. How do we identify and meet those needs?

Ideally, a life care plan should be prepared by a life care planner. The life care plan outlines the child’s present and future needs, describes how to meet those needs, calculates the cost, and factors in government benefits, such as SSI and Medicaid, to help meet the needs. A life care plan can help you as advisor fashion an appropriate financial plan to meet the financial needs identified in the life care plan. Unfortunately, in many cases, clients will not pay for a life care plan. If not, do the best you can to identify, assess, and cost-out the child’s needs.

Once the cost is determined, the divorce attorneys negotiate who will pay those costs and how the payments will be made. One approach is child support. While the CSN is under eighteen she may not qualify for SSI and Medicaid due to the deeming rules: the income and assets of the parent with whom the CSN was living on the first day of each month are considered available to the CSN that month. Once the CSN turns eighteen, the deeming rules no longer apply. Only the CSN's own income and assets are considered in determining eligibility. Child support is income to the child. That income may exceed the income limits for SSI (currently, \$771 per month for 2019) and Medicaid, causing the CSN to lose those benefits.

It is also common for one or both parents to buy life insurance to provide for the CSN. If the CSN is the beneficiary then, when the death benefit is paid to the CSN, she will likely have assets in excess of the permissible limit (currently \$2,000 for SSI for 2019). The CSN will have to spend the insurance proceeds on items that would otherwise be paid by programs such as SSI or Medicaid until she gets under the resource limit. The same goes for inheritance.

One solution is to reduce or eliminate child support and increase alimony to the custodial parent in the hope that the additional alimony will be used to care for the CSN. If this approach is used, the divorce agreement should not specifically require the spouse receiving the alimony to use the alimony to support the CSN lest the alimony be re-characterized as child support. Another problem with this approach: most divorce agreements provide for an end to alimony upon certain events such as remarriage or death of the alimony recipient. If alimony ends, so does the funding for the child's needs.

The better solution is to have any funds for the benefit of the CSN, whether child support, life insurance proceeds, inheritance or otherwise, paid to a special needs trust (SNT). There are two kinds of SNTs: a self-settled SNT; and a third party SNT. The type of SNT to be used depends on the type of funds to be placed in the trust.

The self-settled SNT is used when the funds to be used for the CSN are funds that the CSN has a right to receive, such as child support payments. For this technique to work, the court that grants the divorce must order that the child support payments be made directly to the CSN's self-settled SNT. When the CSN dies, Medicaid will seek to be paid back from the self-settled SNT for any expenditures Medicaid made for the CSN. Any funds left in the self-settled SNT must first be applied to pay back Medicaid. If there are funds remaining in the self-settled SNT after the Medicaid payback, those funds can be distributed in accordance with the distribution provisions of the trust agreement.

The third-party SNT is funded by assets belonging to third parties. For example: proceeds of life insurance owned by the parents and/or inheritance that may be negotiated as part of the divorce settlement. Those funds should be paid directly to a third-party SNT. The third-party SNT does not have a Medicaid payback obligation.

In both the self-settled SNT and the third-party SNT the funds in the trust should only be used to supplement, not supplant, any needs-based benefits the child may be receiving.

Problems may be encountered when drafting both the self-settled SNT and the third-party SNT. First question: who will be the initial trustee and who will succeed the initial trustee if the initial trustee can no longer serve? Selection of the appropriate trustee and successor trustee requires an understanding of the role of an SNT trustee as well as of the family dynamics. Should parents who just underwent an angry divorce serve as co-trustees? Should a relative? If so, from whose side? Should a corporate fiduciary be considered, either as sole trustee or as co-trustee with a family member or other individual?

Often equally contentious is the question of who gets the remaining assets in the trust when the child dies. This is less of an issue with the self-settled SNT since there will not likely be much left after Medicaid payback. However, there may be substantial sums left in a third-party SNT. Are they to be distributed to other children, if any? If not, should the remainder be equally divided between the families of the two former spouses? What if the funding of the trust comes predominantly from one spouse? Should the family of the other spouse receive half when the child passes away?

The Spouse with Special Needs (SSN)

When a spouse has special needs many of the same issues must be addressed as when there is a CSN. The needs of the SSN must be considered. The amount of money needed to meet those needs must be calculated. The source of that money must be set forth in the divorce settlement agreement. As with the CSN, the SSN may require needs-based government benefits in order to meet his needs. Alimony and property division must take needs-based benefits into consideration. Proper structuring is critical to avoid loss of benefits.

If alimony is paid directly to the SSN, it will be considered income and may cause loss of needs-based benefits. One solution is to pay alimony directly into a SSN's self-settled SNT. The court granting the divorce should order that the alimony be paid to the self-settled SNT. If so, the alimony payments will not be considered income.

Another option is for the other spouse to pay directly for goods and services needed by the SSN. Such direct payments to vendors and other providers will not be considered income to the SSN, though it likely will reduce SSI by one-third. Medicaid should be preserved as well.

A second issue is division of the marital property. Countable assets, such as cash, stocks and bonds, received by the SSN as part of the property settlement, will cause loss of SSI if the SSN ends up with more than \$2,000 in countable assets. Medicaid will be lost if the SSN ends up with countable resources in excess of the permissible Medicaid limit. To avoid this result, any marital property to be given the SSN should be transferred directly to a self-settled SNT. Again, this should be part of the court order of divorce.

Retirement benefits are commonly part of the divorce negotiation. Payments to the SSN from the other spouse's pension plans, 401(k)s, IRAs and deferred-compensation plans will be considered income to the SSN. This may result in loss of needs-based government benefits. In that case, consider giving more of the non-retirement benefits marital property, such as cash, stocks and bond, or real estate, to the SSN, using the self-settled SNT, and let the other spouse retain her pension, IRA, 401(k) or deferred compensation plans.

Conclusion

When a child or spouse has special needs severe enough to warrant needs-based government benefits, there are many additional complications that must be considered during the divorce process. Most divorce attorneys are not aware of these issues or how to address them. When you learn that your clients are getting divorced you should:

1. Check if a spouse or one of the children has special needs;
2. Alert the clients of the complexity of special needs planning in the context of divorce;
3. Inform the clients that their divorce lawyers may not know anything about government benefits or special needs planning – they are family law specialists;
4. Give the clients an overview of the issues identified in this article; and
5. Urge the clients and their divorce attorneys to involve a special needs planning attorney early on to help preserve needs-based government benefits.

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