

Stetson 2024 National Conference on Special Needs Planning and Special Needs Trusts

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Divorce and SNTs

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Outline of Topics:

1. Overview of Divorce and Parents of a Child with Special Needs (EJO)
 - a. Divorce between Couples
 - b. Interplay of involvement of parents of a Child with Special Needs and Divorce Factors
2. Challenges Facing a Family and Logistics to Consider (EJO/BCM)
 - a. Professionals Involved
 - b. Family members
 - c. Life Care Plan
 - d. Letter of Instruction
3. Settling a Divorce and Practice Points regarding Agreement between Parents (BCM)
 - a. Provisions to Include in Settlement Documents
 - b. Custody Considerations
 - c. HIPAA
 - d. Authority of Guardians
4. Estate and Trust Planning for Divorced Parents with a child with Special Needs (BCM)
 - a. Documents Inclusions
 - b. Practice Points
5. Financial Considerations and Asset/Debt/Income Checklist (EJO)
 - a. Inventory of Assets/ Death benefits
 - b. Proper titling with Financial Institutions
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1. Overview of Divorce and Parents of a Child with Special Needs

Divorce between couples remains a prevalent part of society. Despite the desire of individuals to maintain marital bliss, a number of factors play into the dissolution of a marriage. While statistics on the topic of the trend in divorce rates of couples with a child with special needs vary based upon the individuals polled to secure the information utilized, it is recognized that a couple with a child with special needs often have increased logistical considerations and matters to deal with and/or resolve which can complicate their relationship. While all couples can have complications in their relationships, with or without the inclusion of a child with a special need, some specific issues arising, or which may be heightened or increased if a child with special needs is a consideration, include but not be limited to, the following:

- Differences in parenting style
- Commitment associated with medical care/treatment/therapy
- Financial requirements
- Demands of employment
- Complications with rearing of other children/siblings of child with Special Needs
- Lack of a “Marital” like relationship
- Disagreement over decisions related to children and their needs
- Mental Health Considerations

It is recognized that all parents of a child with a special need, married or unmarried, want to ensure that the needs of the child, and for that matter all of their children are met. Parents are often called upon to engage not only in difficult decisions impacting their children, but also to deal with complex issues involving medical care/treatment, legal matters, school considerations, physical care needs, insurance matters, public benefit systems and eligibility, increased financial commitment/responsibility, etc. It seems, in working with individuals who have experienced divorce from their partner in a situation involving a child with a special need, that the foundation

of the relationship is paramount to the success of navigating the resulting circumstances which arise in these matters. Client(s) explain, in those circumstances where the child with a special need was born into the relationship, that they had never discussed/considered how they might deal with or handle the inclusion of a child with special needs into their family. That said, even individuals who knowingly brought a child with known special needs into their relationship, can struggle in their relationship given the variety of decisions and issues which can arise in the raising of and/or corresponding care needs of a child with a special need. Same can be true for a parent of an individual with a child with a special need who seeks to foster a further marital like relationship and the importance of the understanding of a proposed partner as to the time commitments or other factors which may impact the success thereof.

Unfortunately, in dealing with these types of cases as an estate planning/special needs practitioner, it is often stated by clients, who are going through or have gone through a divorce, that they had wished they had been better informed and/or had worked with professionals sooner in the process in an effort to better understand issues that, in many cases, led to differences with their partners, ultimately leading to the filing for divorce.

2. Challenges Facing a Family and Logistics to Consider

As a premise to the scope of estate planning/legal representation required for a family that has a child with a special need, it is recognized that a parent/parents are often facing decisions which they might have previously had no experience/training. Moreover, these individuals are often seeking information and guidance on matters which are new to them and which, in themselves, have complexities and considerations which can often seem overwhelming. While it is recognized that many couples who welcome a child into their lives may not have extensive formal training or prior preparation into parenting and could feel

overwhelmed, a couple who has welcomed a child with a special need often have further issues to contend with accordingly. Furthermore, it is also important, when dealing with or addressing a parent or parents of a child with a special need to understand if the special need was a natural occurrence or one stemming from a complication at birth or other resulting injury which may require additional consideration/action.

Professionals and Team

While the scope of the needs of the child, as well as financial considerations, will play a major role in the development of a “team” that is required to address or cover the numerous issues/action items that might need to be resolved, the parent/parents should be mindful of and explore relationships that are necessary to provide guidance and/or expertise. These professionals/members will often include, depending on the circumstances, but may not be limited to, the following:

- General Practitioner (Doctor)
- Specialty Practitioners (Doctor)
- Estate Planning/Trust Attorney
- Education Attorney
- Personal Injury Attorney
- Disability Attorney
- Public Benefits Specialist
- Life Care Planner
- Accountant
- Financial Advisor
- Therapist
- Family Members/Relatives

While Family Members/Relatives are often included in the key figures to maintain in the communications regarding a plan, regardless, they may play an even larger and essential role when parents are divorced in an effort to ensure that “both” sides, to the extent same may be in dispute, have some involvement, particularly if a parent or the parents were to pass away. It is one thing for another child of the divorced parents to assume a more active and perhaps permanent role in the care of the child with a special need, but often the individual designated may have been chosen or considered when the parents were married. Similarly, with many of the professionals or members of the team, it is prudent for both parents, to the extent desired/necessary, to have communications with the professionals involved and develop a relationship to avoid turmoil at the time of a divorce to ensure some continuity in the continued relationship with the child with a special need and the professionals involved.

It is important, as may be required or directed by the parents, to ensure that the professionals involved have some level of communication with one another as to the plan developed and the critical role played by each in the process. Furthermore, as individual(s) may be chosen to participate or be involved with the child with a special need after the passing of a parent/parents, maintaining and having update available from professionals, as well as including such individual(s) in certain communications/meeting, especially critical to the health and well-being of the child, in addition to ones that may impact medical care, residential placement and/or the financial matters associated with the child, is advisable.

Life Care Plan

Not just for litigation purposes... more and more families who are engaging in planning for a child with a special need, want to be able to understand trends and issues which they should be mindful of in the care/treatment plan for their child, in addition to the costs associated. For

litigation purposes, a life care plan is often so different from the perspective of the costs or expenses contained in the Plaintiff v. Defendant report. Notwithstanding, it can be a valuable tool, if the focus is directed accordingly, for parents, as well as those who may assume responsibility/control of the child, to have access to a life care plan. Given the circumstances and the extent to which an individual may have formerly been involved with or kept apprised of decisions impacting the child, a life care plan may provide valuable insight into the condition of the child and anticipated medical/personal needs, in addition to the corresponding costs associated therewith. A life care plan can even become more crucial when parents of a child with a special need decide to get divorced to understand the scope of potential financial commitments or need that the child may have to ensure that one party does not bear a greater burden for no other reason other than a lack of understanding of the potential needs.

Letter of Instruction

For parents of a child with special needs, married or unmarried, it is recognized that such individual(s), in most instances, have realized significant involvement in the development of a care plan, including visits with physicians, dealing with education logistics, realization of financial commitments, understanding the personality and specific likes and dislikes of their child, in addition to many other specific occurrences which might be crucial and beneficial to the maintenance and management of a child with a special need, particularly if the parent(s) are no longer alive and/or able to manage the needs of the child.

One of the most important aspects of planning, specifically in furtherance of the recognition by a parent of a child with a special need, is the coordination of their drafting of a letter of instruction. Therein, a parent or parents, have the opportunity to describe vital knowledge they have obtained in the care of their child, but also recognize the scope of potential

hurdles or obstacles, in addition to the future goals or desires that they would want to advance in furtherance of the care of their child. Depending on the involvement of the individual/family members who has been earmarked for potential involvement with the care or who is in line to be named as a fiduciary, i.e. agent under Power of Attorney/Guardianship, this is often a valuable resource to remember or learn about specifics as it pertains to the history of the child with a special need and/or be guided by the direction of those who had formerly been entrusted with and/or dealing with these matters.

3. Settling a Divorce and Practice Points regarding Agreement between Parents

There are many issues to address during settlement negotiations; it is to everyone's benefit to have a special needs attorney involved from the inception. It is incumbent upon the special needs attorneys to educate the family lawyers about the potential consequences of leaving certain issues unaddressed. Although the age of a child with special needs will dictate which issues are immediate and which can be deferred, it is best to encourage the parties to address all issues within the settlement agreement, with time frames for decisions to be made, and a framework for resolution if the parties cannot agree.

a. Child support. When parents of children with special needs get divorced, child support is an issue with respect to the amount, the duration, and the method of payment.

i. Calculation of child support. Most states have guidelines for calculating child support. Typically, the calculation considers both parents' incomes, the standard expenses of raising a child (i.e., food, shelter, clothing, childcare, entertainment costs, transportation), and parenting time. However, these guidelines are developed by economists and do not account for extenuating circumstances, like the often-increased costs of raising a child

with special needs, or the often-reduced income experienced by one of the parents. Therefore, the courts have discretion to deviate from the guidelines, when appropriate.

The child support amount is usually set to support of all the children, without designating a “per child” amount. For example, the agreement might provide for “\$xxx per month for the benefit of the parties’ three (3) unemancipated children.” Then, as each child emancipates, the child support amount may be reduced (though not necessarily by 1/3, this will vary by case and be dependent on the facts therein). Such provision will jeopardize the benefits eligibility for a child with a disability. Therefore, this should be discussed with the parties and the family lawyers so that the share for the child with special needs is easily discernible for the purpose of payment into a self-settled special needs trust, if necessary, or for the purpose of reporting the child’s income, if the parties decide not to utilize a special needs trust.

ii. Duration: Child support ends when a child is emancipated.

Emancipation is triggered by events like college graduation, marriage, military enlistment, living independently. If at the time of the divorce the parties know that their child will never be emancipated, the agreement should so state. However, if the child with a disability is too young for the parties to know the impact on independence, or if the child is older and there is hope for eventual emancipation, which should also be reflected in the agreement. In those cases, the provision should also include a date by which the parties should either agree on emancipation (or not emancipation) and a plan for resolution of a conflict if there is not an agreement.

iii. Method of payment: Parents and family lawyers are often surprised to learn that child support is deemed income to the child at age 18. It is imperative that the parties be fully advised of the impact of child support on their child’s benefits eligibility, and the steps they can take to protect it. If child support is irrevocably assigned to a self-settled special

needs trust (“(d)(4)(A) trust”), it will not be counted as income to the child for purposes of means tested benefits eligibility.¹ The age of the child will likely determine whether or not the decision of whether or not to direct payment of child support into a (d)(4)(A) trust will be made now or in the future. As with the issue of emancipation, it is best to schedule a date by which this decision will be made, and a plan for resolution if there is not an agreement. Of course, delaying that decision has its risks. Primarily, the risk that the parties will not revisit the issue as planned, and the child will be denied benefits. Secondly, the risk that the parties will revisit the issue within the framework agreed upon, but will then disagree on issues like selection of a trustee. Many parties decide to play it safe by providing that when the child with special needs reaches age 18, that child’s support will be paid into a (d)(4)(A) trust. In the best of circumstances, that trust will be drafted, with trustees selected, and attached to the agreement.

Depending on the facts and finances of a particular family, the parents may choose not to direct child support into a (d)(4)(A) trust. For example, sometimes parents do not want to be restricted as to how the child support is spent, as would be the case if it were in a (d)(4)(A) trust. If a family has sufficient means to provide for a child without the need for government benefits, there is no reason for them not to do so. However, some adult programs and supported housing for which families cannot privately pay, require Medicaid eligibility. Therefore, even wealthy families may need to have child support directed into a (d)(4)(A) trust.

iv. Ancillary child support issues. Regardless of whether or not parents choose to prioritize benefits eligibility at the time of their divorce, they should consider what will happen when the payor of child support and the caretaker parent are no longer able to provide financial and daily physical support. It is likely that they will each purchase a life

¹ POMS SI 01120.200 G 1 d; POMS SI 01120.201 J 1 d.

insurance policy to provide funds to replace what they are currently providing (financial and otherwise). It is important to advise them about the resource limits in order to qualify for means tested benefits, and the ramifications of naming that child as the beneficiary of a life insurance policy. Depending on their relationship, the parties can jointly create a third-party special needs trust to be the beneficiary of both of their policies. They may even agree that the survivor of them will serve as trustee, and then agree upon a successor. This trust should also be created at the time of divorce and attached to the agreement.

b. Custody Considerations. Special needs attorneys are often called upon by family lawyers, mediators and judges to opine on issues of physical and legal custody of children with special needs. Although our legal knowledge is important, sometimes we bring even more value to the table by raising issues that do not come up in families without children with disabilities, or by connecting them with experts to opine on the needs of the children with disabilities.

i. Physical custody. Although many families decide that physical custody will be shared equally, this is not so easy when children have disabilities. Families must consider a child's physical limitations and mobility issues. Is there medical equipment that is not easily transported between 2 homes? Are both homes geographically convenient to regular medical/therapeutic/tutoring appointments? How important is routine to a child's daily success? How does a child transition from one environment to another? If the family lives close to a state border, and one parent is going to establish domicile in the other state, consider the child's benefits eligibility if 50% of their time is spent in another state.

What about the child's education? After the divorce, will the parents be living in the same school district? If so, does the child's IEP provide transportation? If it does, it is very likely that the district will only transport to and from one house. If the parents

will not live in the same school district, there should be a discussion about how the districts will determine the child's domicile if physical custody is 50/50. Additionally, the parents should consider which district will be better for the child. For example, if the parents had to fight for special education and related services in the current district, it might be best to have the child remain in that district. On the other hand, if the parents are not happy with the current provision of special education and related services, they might consider having the child domiciled in the other district. If the parents disagree on which district would be in the child's best interest, they should engage the services of an expert to evaluate the programs and render an opinion. However, it is important to keep in mind that a new district does not have to implement the old district's IEP. They will have 30 days to review and propose their own IEP. There is no guarantee that this will be better, or even as good as, the current IEP.

ii. Legal custody. Joint legal custody, which has become the norm, means that divorced parents have equal decision-making power. This becomes problematic mostly in 2 realms.

The first is with respect to the child's healthcare and therapies. If parents disagree on treatments, therapies, etc., the healthcare providers will find themselves in the middle of the dispute and not want to continue to treat the child. Consider having one parent be the primary parent for healthcare decision-making, at least for day-to-day decisions, while requiring that the other parent be informed, and even consulted. It is in the child's best interest for current doctors and therapists to continue to provide needed healthcare.

The second area is education. Unless one parent is the primary parent for education decisions, both parents will have equal say in a child's program and placement. When parents disagree on implementation of an IEP, it will result in a cessation of services unless and

until they either reach an agreement, or a court orders that one of them has sole authority to make decisions. Consider having one parent be the primary parent for education decisions while requiring that the other parent be informed, and possibly entitled to participate in child study team meetings. It is in the child's best interest for there to be continued provision of special education and related services.

c. Transition to adulthood. Just as child support may not stop when a child with special needs reaches age 18, the need for decisions to be made for that child may also continue.

i. Guardianship/Conservatorship. A child's level of independence and ability to make their own decisions may not be ascertainable at the time of divorce. Even so, it should be addressed in the settlement agreement. The parties should agree on a date by which they will discuss the issue of guardianship/conservatorship, including but not limited to: the specific application to be filed (i.e., limited guardianship, full guardianship), and who should seek appointment as guardian. Even if the parents cannot work together as co-guardians, there is often opportunity for compromise if one parent becomes guardian of the person and the other becomes guardian of the property, with both having the obligation to consult and inform the other. The agreement should also address how any disagreement should be resolved.

**** Guardian Practice Point/Consideration****

A parent may want to be involved in some manner when there is a guardianship filing, although he or she may not have been as actively involved with the child or the care plan developed. In instances of divorced parents this is seen even more and can lead to litigation of the scope of the guardian appointment. Particularly when there is ongoing visitation/custody issues to contend with, it may make sense to include, even if a parent might not want to serve as a Guardian, the recognition of such individual as a HIPPA authorized designee so that the parent can communicate with medical professionals and secure information to the extent deemed necessary. This discussion has led the resolution of multiple divorce parent guardianship proceedings

ii. Benefits. The agreement should address who will be responsible for applying for benefits when the child becomes eligible, and who will be the contact person for programs and representative payee, if necessary.

iii. Protective Arrangement Succession. It is important for the parents to consider, in addition to their own agreement related to the scope of authority and type of protective arrangement that will be pursued upon their child with a special need turning eighteen, it is also equally important to consider who might be involved in future proceedings/documents as guardian/conservator/agent for the child, specifically if the parents have passed away and/or are no longer able to handle the duties and responsibilities.

4. Estate/Trust Planning for Divorced Parents with a child with Special Needs

After all of the points are negotiated and agreed upon, the parties must execute the necessary documents and beneficiary designations to ensure proper implementation.

a. Documents. If the settlement agreement included trusts, those documents must be created. Best practice would be to execute them contemporaneously with the settlement agreement, but the parties might have agreed to address them later. It is important to explain the interplay between 1st and 3rd Party Special Needs Trusts and the impact of improper planning or simply a failure to finalize recommended planning.

b. Beneficiary designations. Some beneficiary designations cannot be changed until after the divorce. The importance of reviewing, and changing where necessary, beneficiary designations cannot be overemphasized. This is important whether or not there are children with special needs, but it is essential when an improper beneficiary designation renders a person with disabilities ineligible for needed programs and services.

c. Practice points. Provide family lawyers with lists of questions to ask, and documents to obtain from clients. Ask for a list of assets and proof of how they are titled, as well as any beneficiary designations in place.

5. Financial Considerations and Asset/Debt/Income Checklist

Inventory of Assets

As indicated above, all individuals, but perhaps even more importantly for a family in the process of a divorce, should have an accurate and up-to-date listing of all assets, debts, obligations and anticipated amounts that might be received, i.e. inheritance, lawsuit settlement, workers compensation benefit, etc. Furthermore, an individual should be able to provide the titling of all assets, in addition to confirmation of the present beneficiary designations, if any, which exist at the time of planning/divorce proceedings. When an individual is asked to engage in the completion of the forms/intake, it is always surprising to them the scope of their assets and/or benefits that they did not realize they even had, i.e. work death benefit, disability, etc. In furtherance of recognizing planning, especially for the purposes of future income, it is also important for individuals, to the extent possible, to understand what potential retirement benefits, i.e. pension, social security, retirement distributions, etc., which might or could be received by them when they retire.

Proper Titling with Financial Institutions

In reviewing accounts, it is also important to ensure that the client(s) are aware of the titling of accounts, i.e. in the name of the client, jointly, beneficiary/TOD/POD designated, etc. It is a consistent issue in the transition of assets that the titling disrupts the planning that has been effectuated because of the manner in which assets have been titled. Moreover, as new accounts, particularly life insurance/retirement accounts may be secured by a client, especially if they have

a child with a special need, given the possible titling to a Special Needs Trust, but really in all circumstances, they must make sure to have proper designations included on the beneficiary pages. Often, when meeting with Counsel, a client engaging in planning will be guided on how to direct for the designations. When they are outside the scope of the planning process, they will often forget or simply be uncertain of the specific inclusion that would be required for the designation of that benefit to a child, trust, etc.

Insurance (Whole v. Term Life)

While most practitioners fully understand and are well versed in the types of life insurance and are able to review a policy and provide guidance and understanding to clients, it is a consistent issue that the clients themselves are unaware of the differences and focus upon the costs and the figure of the insurance without fully understanding the potential downside of limiting their insurance needs. This relationship with the types of insurance, particularly in a situation involving a divorce, if there is a requirement of the securing of/maintaining of a policy must be addressed to ensure is adequately protects or meets the requirements of the agreement, but also, for more prudent purposes, simply is the right fit under the circumstances. Often, clients reach an understanding of this logistical issue when it might be too late to secure a more appropriate policy because of age, costs, medical condition, etc. It can be financially difficult for any individual to maintain a life insurance policy, but it is imperative to educate and direct guidance on the topic to the extent reasonable and plausible.

IF INSURABLE, YOU ARE NEVER MORE INSURABLE THAN YOU ARE TODAY!!