

Understanding Divorce And The Child With Special Needs

By Mary Anne Ehlert

Divorce is one of the most stressful, emotionally taxing events that families can experience. Sadly, one out of every two marriages in the United States now ends in divorce. Divorcing couples face many difficult issues, both short and long-term. The technical details involved in planning for a child with special needs in a divorce often fall to the wayside, as a myriad of other considerations consume the attention of the parents and overshadow important decisions that must be made in the best interest of the child. As a result, parents often find themselves in the unenviable situation of not having a plan in place for that child when the divorce becomes final and each parent must manage independently.

Divorcing parents of a child with special needs have the added responsibility of making sure their child will have everything necessary to provide for ongoing quality care and that the child's assets are protected. As an Advisor it is critical to understand the key considerations that must be addressed when parents of a child with special needs divorce.

Special Needs Trusts: Special needs trusts hold assets for a beneficiary who is receiving public benefits, particularly Supplemental Security Income (SSI) and Medicaid. These assets are used to ensure that the individual with special needs receives consistent, quality care while maintaining eligibility to continue receiving benefits. Also called Supplemental Needs Trusts, the purpose of this trust is to supplement, but not take the place of, public benefits programs.

Different Types of Special Needs Trusts

- **Third Party Special Needs Trusts** is a trust which is created and funded by someone other than the individual with special needs. This trust may be created as a part of the parent's estate plan.
- **First Party Special Needs Trusts**, also known as "d4A" Trusts, are created by, or on behalf of, the individual with special needs using the individual's own funds or property and are allowed under Federal law. The trust must be created before the individual's 65th birthday and requires that the state Medicaid agency be reimbursed for benefits paid on behalf of the individual out of funds remaining in the trust at the time of the individual's death. The use of this type of trust assures government benefits eligibility if a gift or inheritance is paid directly to the individual with special needs instead of directly to a Third Party Special Needs Trust.

Estate Plan Revision – Divorcing parents need to make revising their estate plan and related documents one of their highest priorities. Soon-to-be-former spouses must be removed from wills or revocable trusts, power of attorney and beneficiary designations. This will ensure that all assets intended to benefit the children are not diverted to the former spouse. Property designated for a child with disabilities should be transferred to a Third Party Special Needs Trust from the will or revocable trust. It is also important to change beneficiary designations to name the Third Party Special Needs Trust as the beneficiary. This



will ensure that life insurance or retirement benefits do not go directly to the child with special needs. The Third Party Special Needs Trust should name the child with special needs as the trust beneficiary.

Anyone wishing to provide gifts to the child with special needs should be directed to designate these gifts to the Third Party Special Needs Trust itself, and not the child.

Child Support – Properly establishing child support arrangements is crucial. A typical child support arrangement does not include payments from a special needs trust as a part of its calculations. These payments are considered by the courts as “extraordinary” because Special Needs Trusts are created to provide for “special” needs by supplementing, rather than supplanting, any public benefits available to the child with special needs. The availability of trust assets is not a valid reason for a parent to avoid paying child support. Some courts do allow for a decrease in child support payments when funding comes from a Special Needs Trust.

The obligation to pay child support generally ends when a child turns 18 or 21. Child support for children with disabilities, however, may continue past this age, depending upon state law. When an adult child is receiving child support, it is advisable to pay the support into a First Party Special Needs Trust to protect the child’s SSI or Medicaid benefits. This should be done by court order at the time of divorce.

Future Child Support Obligations – Child support obligations typically do not end when the parent paying the support dies. In some states, future child support obligations can continue from the deceased parent’s estate. It should be noted, however, that filing a claim against a deceased parent’s estate to collect future support payments can have negative consequences if the deceased parent has insufficient assets or significant debt.

Insisting that the parent responsible for making child support payments take out an insurance policy is a good way to ensure that child support payments will continue shortly after the death of the paying parent. This money can be paid directly to the Special Needs Trust or can be paid to a separate trust created by the parent who is making the payments. That parent may also wish to have the life insurance proceeds go directly to a trust which they designate, with that trust paying the Special Needs Trust an amount of child support similar to what the parent was paying prior to their death. By doing this, if the child receiving the payments passes away, any remaining trust funds will be distributed in whatever manner the parent wishes.

Entitlement Benefits – Social Security retirement, disability and survivor benefits are considered entitlement benefits. . When applying for entitlement benefits, it is imperative that the custodial parent disclose that there is a child with disabilities involved.



Instruction Letters – The parent who is the primary caregiver needs to prepare a letter of instruction to the person designated to take their place in the event of their death or incapacity. This letter should include information such as the child's physicians, regularly scheduled appointments, medications, test results, and other important health care or personal information concerning the child. The individual who is handling estate planning arrangements should also receive a letter providing the location of all estate planning documents, life insurance policies and other important financial documents. A list of public benefits, contact information for any advisors and special instructions for the transferring of assets should also be provided.

Divorce is difficult even under the most amicable of conditions. Divorce involving a child with special needs can further complicate an already complicated and emotional situation. Retaining an attorney who is knowledgeable in family law, as well as an attorney who understands the complexities of public benefits planning and special needs trusts is critical. It is imperative that both attorneys work together to ensure that the child with disabilities receives every possible benefit to which they are entitled.

Mary Anne Ehlert is the founder and president of Protected Tomorrows, Inc., the leader in enhancing the lives of families with members who have special needs. By guiding families through its comprehensive, proprietary planning process, Protected Tomorrows helps ensure the well-being of a loved one by creating a Future Care Plan™. Through their work with clients and the family's advisors, and alongside of other advocates and legislators, Protected Tomorrows addresses many concerns of families with special needs such as: future care funding, government benefits, legal considerations, residential options, employment opportunities, recreational choices, education options and family communication. For questions, contact info@protectedtomorrows.com or visit www.protectedtomorrows.com.