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Outside Counsel

## IMPACT OF SEPARATION OR DIVORCE ON SPECIAL NEEDS CHILDREN

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Disability is a matter of perception. If you can do just one thing well, you're needed by someone.

Martina Navratilova

The American Bar Association has commented that family lawyers are 'dealing with a burgeoning number of cases involving special needs children.'<sup>[FN1]</sup> According to a recent book on the topic of the special needs child and divorce, these families 'have much higher divorce rates and their cases often involve more specialized handling.'<sup>[FN2]</sup> In this article, I will highlight some of the issues facing families with a special needs child who are undergoing separation or divorce, and will provide resources for further exploration of the topic.

### Psychological Issues

Children with special needs 'require extraordinary parenting and place extraordinary demands upon the adults who care for them.'<sup>[FN3]</sup> Experts in the field have written about the fact that 'conflict, marital separation, and divorce are often an unfortunate consequence of trying to raise these high-maintenance children.'<sup>[FN4]</sup> They state, further, that 'the stress of parental separation and divorce exacerbates the symptoms of these children, makes them harder to care for at a time when there are fewer resources to go around, and impacts the entire family in unique and often profound ways.'<sup>[FN5]</sup> Hence, these families are seen in ever increasing numbers in family court.

The literature is contradictory. There is psychological literature that 'calls into question assumptions that children with special needs irreparably harm marriages.'<sup>[FN6]</sup> Some authors have found increased stress within the family, while others have found no difference in comparison to non-disabled families.<sup>[FN7]</sup> One metaanalysis of marital adjustment in parents of children with disabilities found a much smaller effect on parents' marital relationship than would be expected under older assumptions about disability and family, such that there was only an

average increase of 5.97 percent in the divorce rate for families with disabled children.[FN8]

And, it depends upon which disability you are talking about. For instance, with certain disorders, such as autism spectrum disorder, which is a complex developmental disability that is said to affect one in every 94 boys, the divorce rate of these families is estimated to be nearly 80-90 percent.[FN9] Other researchers disagree with that percentage and assert that marriages are more stable than that.[FN10] One study found that couples who have a child with attention deficit hyperactivity disorder are 'nearly twice as likely to divorce or separate as couples who do not have children with the psychiatric disorder.' [FN11]

One community-wide study in Rochester found that children separated from one or both parents are at increased risk for learning difficulties and 'that these separations are good predictors of which children may require special educational interventions to succeed.' [FN12]

One study found that children with disabilities are more likely to live with single parents and especially with their mothers, than are other children, and that when children do not live with their biological parents, those with disabilities are more likely to live in the households of women.[FN13]

The types of special needs children most commonly seen in family court fall into three major categories: 'Acute, life-threatening medical conditions; chronic and pervasive developmental disorders; and psychological and behavioral disorders.' [FN14] In order for the court to make appropriate decisions for these families, information is needed regarding: '(1) the child's particular condition, treatment options, and prognosis; (2) Each parent's general parenting skills as well as specific skills related to the child's special needs including, but not necessarily limited to, knowledge of the condition and treatment; (3) deficits in co-parenting skills in a given case, which exacerbate the child's problems, and in turn exacerbates the co-parenting problems; and (4) the impact of particular parenting plans (frequency of exchanges and duration of visitation) on the child's special needs.' [FN15]

Psychologists have long recognized that divorce triggers a difficult grieving process, and this is exacerbated by the feelings of 'shame and isolation that can be associated with raising a disabled child.' [FN16] As aptly stated by one expert, 'many parents of special needs children may find themselves facing 'double jeopardy.' The end of the marriage has damaged their public and private image as a loving adult, while the child's diagnosis has called their caregiving abilities into question.

It is no wonder that some parents will struggle to avoid being painted into these painful corners by blaming the other party and pursuing fruitless (even harmful) custody battles.' [FN17] Divorce professionals need to familiarize themselves with these dynamics and how they manifest in the matrimonial and family court cases. Accordingly, a 'successful intervention will require sensitivity not only to the child but also to the parents' reaction to that child. In order to best understand where conflict is likely to arise, efforts should be made to identify where the parents are in the grieving process. ' [FN18]

Legal and Financial Issues

With regard to custody and living arrangements when divorcing and separating parents have children with special needs, there has to be discussion about the effect of the child's special needs on every decision, and there has to be an expeditious process to change or modify decisions.[FN19] There must be a fundamental understanding of the 'developmental, physical and psychological nature of the child's needs.' [FN20] Particular attention must be paid to the medical and educational issues of this child. Parenting plans need to be crafted to address the needs of a 'special needs' child in a comprehensive manner.

As to child support, in New York State parents have a duty to provide child support for their children until the age of [FN21], which is the age of majority.<sup>21</sup> This may be wholly inadequate for a child with special needs. Commentators have noted that 'standard child support charts do not address the higher costs inherent in raising a child with special needs, and generally divorce support orders do not cover the care of children for their entire lifetime.' [FN22] As to spousal support, the 'predicament' of a nonworking spouse or a spouse with a reduced income because of the care required for a special needs child should be addressed.[FN23]

It is recommended that as part of the resolution of the divorce action, the following legal and financial issues must be attended to: guardianship if one or both parents should die before the child reaches majority; conservatorship vs. self-sufficiency once the child reaches majority; a determination of who will act as advocate for the child once the parents have died; and a determination of how the child will be cared for in the future (living arrangements, social and medical support, etc.).[FN24] Longterm financial implications of caring for a child 'over the course of a normal life expectancy' must be considered by the parents.[FN25] For most people private insurance is prohibitive, and there will be a need to transition to receiving government benefits (e.g., Medicaid; Supplemental Security Income (SSI); Social Security).[FN26]

During the divorce, the creation of a special needs trust may be considered to ensure that it is funded before the dissolution of the marriage, which trust would provide for health care coverage and quality of life items for the special needs child.[FN27] The special needs trust is designed to 'hold assets for a beneficiary receiving public benefits, particularly needsbased such as Supplemental Security Income (SSI) and Medicaid, so that the trust assets can be used to enhance the beneficiary's quality of life while maintaining eligibility for the benefits.' [FN28]

## Educational Issues

According to commentators in this field, 'divorce does not affect most education rights. However, the divorce decree...should clearly describe relationships among the parents, child, and education system.' [FN29] The child's special needs may not alter his/her ability to attend a mainstream school, but where it does, the child 'may require special education, and familiarity with the Individuals with Disabilities Education Act (IDEA) is necessary.' [FN30] According to one commentator, most of the litigation involving the rights of noncustodial parents to direct the education of their children has concerned 'examination of both the language of federal and state statutes and divorce decrees with regard to parental rights.' [FN31]

## Conclusion

Families undergoing separation or divorce with a special needs child face unique challenges, which must be faced squarely to insure the best outcome for the child and for the parents.

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FN1. <http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5>.

FN2. *Id.* citing Margaret S. Price, 'The Special Needs Child and Divorce: A Practical Guide to Evaluating and Handling Cases,' ABA publication, April 24, 2009.

FN3. Donald T. Sposnek, Heidi Perryman, Josanna Berkow, Sherrill Ellsworth, 'Special Needs Children in Family Court Cases,' 43 *Fam. Ct. Rev.* 566 (Oct. 2005).

FN4. *Id.*

FN5. *Id.*

FN6. Linda L. Eddy and Alexis J. Walker, 'The Impact of Children With Chronic Health Problems on Marriage,' *Journal of Family Nursing* (1999) at 10; <http://jfn.sagepub.com/cgi/content/abstract/5/1>

FN7. Paul Withers and Lara Bennett, 'Myths and Marital Discord in a Family With a Child With Profound Physical and Intellectual Disabilities,' *British Journal of Learning Disabilities*, 31, 91-95 (2003).

FN8. Don Risdal and George H.S. Singer, 'Marital Adjustment in Parents of Children with Disabilities: A Historical Review and Meta-Analysis,' (2004); <http://www.atypon-link.com/TASH/doi/abs/10.2511/rpsd.29.2.95> See, also, Don Risdal and George H.S. Singer, 'Marital Adjustment in Parents of Children With Disabilities: A Historical Review and Meta-Analysis,' *Research & Practice for Persons with Severe Disabilities*, Vol. 29, No.2, at 95 (2004).

FN9. Ingrid A. Keller, 'Raising Children on the Spectrum in Florida: Navigating Roads Less Traveled,' 83 *Fla. B.J.*35 (January 2009).

FN10. *Id.*

FN11. See [http://www.washingtonpost.com/wp-dyn/content/article/2009/03/02/AR2009030201787\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/03/02/AR2009030201787_pf.html); and <http://www.healthcentral.com/adhd/c/849319/63213/child-adhd-divorce/pf/>.

FN12. <http://www.sciencedaily.com/releases/2008/05/080516094416.htm>.

FN13. Philip N. Cohen and Miruna Petrescu-Prahova, 'Gendered Living Arrangements Among Children With Disabilities,' *Journal of Marriage and Family* 68 (August 2006) at 630.

FN14. Donald T. Sposnek, Heidi Perryman, Josanna Berkow, Sherrill Ellsworth, 'Special Needs Children in Family Court Cases,' 43 Fam. Ct. Rev. 566, 567 (October 2005).

FN15. Donald T. Sposnek, Heidi Perryman, Josanna Berkow, Sherrill Ellsworth, 'Special Needs Children in Family Court Cases,' 43 Fam. Ct. Rev. 566, 573 (October 2005).

FN16. Heidi P. Perryman, 'Parental Reaction to the Disabled Child: Implications for Family Courts,' 43 Fam. Ct. Rev. 596, 597 (October 2005).

FN17. Id. at 597.

FN18. Id. at 605.

FN19. Marla B. Kraus, 'Planning Is Important Even When Life Doesn't Go the Way We Plan,' 43 Fam. Ct. Rev. 607 (October 2005).

FN20. Judith L. Poller and Alicia Fabe, 'Legal and Financial Issues in a Divorce When There Is a 'Special Needs' Child,' American Journal of Family Law, at 193.

FN21. [New York Family Court Act Section 413](#); See Laura W. Morgan, 'Promises to Keep. Support Obligations After Age,' 31 SUM Fam. Advoc. 18 (Summer, 2008).

FN22. Judith L. Poller and Alicia Fabe, 'Legal and Financial Issues in a Divorce When There Is a 'Special Needs' Child,' American Journal of Family Law, at 193.

FN23. Judith L. Poller and Alicia Fabe, 'Legal and Financial Issues in a Divorce When There Is a 'Special Needs' Child,' American Journal of Family Law, at 198.

FN24. Marla B. Kraus, 'Planning Is Important Even When Life Doesn't Go the Way We Plan,' 43 Fam. Ct. Rev. 607 (October 2005).

FN25. Id.

FN26. Id.

FN27. Id.

FN28. Brian K. Carroll, 'Divorce and Your Special Needs Child,' [http:// www.jcglaw.com/divorce%20&%20y](http://www.jcglaw.com/divorce%20&%20y)

FN29. Carolyn Anderson and Beth-Ann Bloom, 'Divorce: It Can Complicate Children's Special Education Issues,' [http://www.Idonline.org/article/12388? theme=print](http://www.Idonline.org/article/12388?theme=print); See, also 'Divorce and Special Education,' [www.PACER.org](http://www.PACER.org) ACTION Sheet: PHP-c103.

FN30. Judith L. Poller and Alicia Fabe, 'Legal and Financial Issues in a Divorce When There Is a 'Special Needs' Child,' American Journal of Family Law, at 195; [20 U.S.C.A. Sec. 1400](#) et al.

FN31. Ralph D. Mawdsley, J.D., Ph.D., 'Noncustodial Parents' Right to Direct the Education of Their Children,' 199 E. Law Rep. 545, 559 (Sept. 8, 2005).  
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