

Special Needs Children– How Divorce Can Impact Your Estate Plan

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As we continue to explore the impact of divorce on an estate plan, another issue that arises is the care and support of children, particularly children with disabilities. Presumably, the property settlement agreement will handle ongoing financial support and initial custody, but what happens during the incapacity or upon the death of a parent? An earlier article discussed the benefits of planning for any life insurance requirements under the [property settlement agreement](#). But in addition to a general plan for life insurance, it may be necessary to designate the life insurance to a special or supplemental needs trust to allow the disabled child to qualify for public benefits. The special or supplemental needs trust can be created within one's personal estate plan (e.g., a subtrust under a Last Will and Testament or revocable living trust) or as a standalone trust created prior to incapacity or death. Setting the proceeds of the life insurance aside in such a trust will help protect those proceeds for the disabled child's benefit, protect those proceeds from the child's potential creditors and allow for flexibility in public benefits planning.

And what if the child is receiving public benefits like **Social Security Income (SSI)**, is on **Medicaid** or receives a [Medicaid Waiver](#) and child support is awarded? In that situation it is prudent to consider the creation of a self-settled or (d)(4)(A) special or supplemental needs trust to receive the child support payments. Such self-settled trusts have very particular required provisions in order for the disabled child to maintain eligibility for public benefits, but will avoid reduction or elimination of the available benefits if properly structured and implemented. This is an issue that should be addressed during negotiations and to include in the property settlement agreement, and therefore, not to figure out after the divorce is final.

As for the guardianship/custody of the disabled child, how will that be handled? If the child is a minor, then the parents will hopefully reach an agreement as to co-parenting and incorporate that agreement in the property settlement agreement (or as determined by the court if agreement cannot be reached). For an adult child who is disabled, a guardianship proceeding to establish that the child is disabled and to appoint a guardian must be commenced. The resulting court order will address the parents' authority to act jointly or separately, after making reasonable efforts to contact each other, regarding the child's medical care and housing, including (a) emergency medical treatment, (b) non-emergency hospitalizations, (c) personal care appointments, (d) immunizations, (e) routine dental and vision appointments, (f) admission to a facility, and (g) developmental assessments, among other things. Furthermore, the court order will address what happens if a parent cannot continue acting as

guardian due to incapacity or death. Ultimately, guardianship of a child with disabilities ends up being less about which parent has the child on a particular holiday (also important) and more about the type and quality of care the child will need and how that care will be provided.

So consider the following: (1) If you are divorcing and have a disabled child, how is that child being provided for upon the incapacity or death of a parent? (2) Is eligibility for public benefits preserved through a properly structured special or supplemental needs trusts? (3) Who has authority to make healthcare decisions for the child and in what manner?

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