

**Frequent Post-Decree Problems**  
**Specific to Families That Have Children with Special Needs**

**By: Amy Dawson, Esq. of the Autism Advocacy & Law Center, LLC**

**Introduction**

Chances are that you have handled a case involving children who have special needs - or that you will soon. According to the Centers for Disease Control and Prevention, the rate of autism among children is 1 in 88. For boys, the rate of autism is 1 in 54 (1 in 252 for girls). The rate of autism has increased annually between 10 to 17 percent in recent years. (Developmental disabilities have also increased at the rate of 17%.) Perhaps the most startling statistic is this one: 1 in 6 children have a developmental disability.

Everything is harder for parents of children affected by autism and other disabilities -- including marriage. The divorce rate among parents of healthy neuro-typical children spikes when children are young, before they are all off attending school. For parents of children who have special health care needs, autism, or other disabilities, the risk of divorce stays high -- perhaps because many of the challenges and stressors faced by those parents do not diminish as the child grows older. In fact, they might get more difficult as time goes on.

Divorce seems to be more difficult as well. Too often, the decree of dissolution fails to address -- or fails to properly consider -- important issues that many of these families will face as their children grow older.

In the context of a divorce, understanding the legal issues that are specific to families affected by autism and other disabilities will help you craft a decree of dissolution that, hopefully, will achieve a global resolution that eliminates the need for subsequent litigation about those issues. I hope that this article will help you identify some of those issues, so that you may better serve your clients who have children affected by disabilities.

Some issues are fairly obvious - one parent may have quit his or her job; child care may be more demanding; special education decisions must be made; a child maybe entitled to permanent child support. These types of issues may simply require different approaches to determining your arguments and how to prove them. Other issues are less obvious, including the need for guardianship; implications of child support past age 18; preserving eligibility for social security benefits; use of a supplemental needs trust to receive life insurance proceeds meant to guarantee child support obligations; use of a special needs trust to receive support payments; and parental fees under the Tax Equity and Fiscal responsibility Act. These less obvious issues can present traps for the unwary.

**1. The simple stuff.** Let's start with the simple stuff: tax dependency exemptions and supplemental needs trusts.

**Tax dependency exemptions.** Many parents fight about the tax dependency exemption for a child who has a disability when what they are really worried about is whether they can deduct out-of-pocket medical expenses. If that is their concern, then remind them that, if they can itemize health care deductions, then they can each itemize health care deductions for their child

whether or not they are able to claim the tax dependency exemption for that child. Be sure to consult a tax professional!

**Supplemental needs trusts.** Often, life insurance is used to guarantee a child support obligation. Typically, the decree of dissolution will state that an obligor is required to maintain life insurance and name the minor children as the beneficiaries. When one of those children has a disability, this provision could cause problems with that child's need to be eligible for social security benefits (SSI) and medical assistance (MA). The solution is simple - the life insurance proceeds for the individual who has a disability should be directed to a **supplemental needs trust** rather than to the child in his or her own name. A supplemental needs trust can be funded by anyone other than the beneficiary and the assets held by it are not considered "available" for the purposes of determining whether the beneficiary is eligible for SSI benefits and MA.

## **2. Everything else is complicated.**

The issues of spousal maintenance, child support, special needs trusts, guardianship, health care coverage, and government benefits are all intertwined.

Here is a typical example to consider. According to the decree of dissolution, Joey is not capable of self-support and the obligor is ordered to pay \$300 a month in permanent child support to the obligee. (Under Minnesota law, an individual, despite his or her age, is still a "child" entitled to child support if the individual "by reason of physical or mental condition, is incapable of self-support." Minn. Stat. § 518A.26, subd. 5.) The obligor is also ordered to pay \$500 a month in spousal maintenance for a period of time that extends past Joey's 18th birthday. The parents were awarded joint legal custody and sole physical custody was awarded to the obligee parent.

Different problems can arise from this scenario. When Joey turns 18, he may need government benefits such as SSI and MA. SSI provides a monthly cash benefit and MA provides health care coverage as well as funding for supports and services. At the age of 18, SSI has income and assets eligibility requirements and Joey's child support will be considered income to him. (MA has income and asset requirements that kick in at age 21 for a disabled adult.) At \$300 a month, the child support will not make Joey ineligible for SSI, but his cash benefit will be reduced dollar for dollar. So, should child support be reduced to zero? Even the obligor may not think so - because the cash benefit provided for Joey by SSI is set at 75% of the federal poverty guidelines. Many reasonable people can agree that both parents should continue to provide support for Joey so that he is not forced to live in abject poverty.

One solution is that, instead of making child support payments, the obligor could make payments into a **special needs trust** for Joey. That way Joey would still be eligible for SSI and would also have additional financial resources to meet his "supplemental needs" which are not covered by government benefits. Whether or not the child should continue to receive child support past age 18 is, in my opinion, a case-by-case analysis -- but use of a special needs trust should always be considered.

Of course, not every disabled adult child will need SSI upon his or her 18th birthday. The right to special education continues until a disabled individual turns 21. Depending on a variety of factors, Joey (and the obligee parent) may be better off waiting to apply for SSI until Joey

turns 21. If Joey were receiving a higher amount of child support, then it changes the scenario even more dramatically.

The person in charge of deciding whether Joey applies for SSI and/or MA is Joey's guardian. The guardian also decides whether or not he will continue in school until he turns 21, and, among other things, where Joey will live. So, who is Joey's guardian? Many divorced parents believe that the decree of dissolution has already solved that problem - but it is usually not as helpful as parents believe.

The **guardian** for a disabled individual over 18 must be appointed by the court and the Minnesota Uniform Probate Code sets forth the process. *See* Minnesota Statutes Chapter 524, Article 5. In the example above, the decree of dissolution establishes physical and legal custody, but it is not the same as a court appointment establishing guardianship. If the obligor parent successfully files a petition for guardianship when Joey turns 18, then that parent could take steps to enroll Joey in SSI and MA, and move Joey out of the obligee parent's home into supported housing. Then the obligor could go back to court and argue that Joey no longer needs **child support** and that the obligee parent no longer needs **spousal maintenance**.

So, how do you solve this problem proactively? Or, better put -- *can* you solve the problem of who will be guardian proactively? I think it is important to explain to your client that the wording of a decree of dissolution may have some good effect, but that a guardianship order will need to be obtained before the disabled child's 18th birthday and that this is a developing area of law.

### **3. Failure to understand health care coverage for individuals who have disabilities could cost your client thousands of dollars.**

As mentioned above, MA provides health care coverage. For an adult who has a childhood onset disability, MA is free -- as long as certain income and asset eligibility requirements are met. Children who have disabilities or special health care needs may also qualify for MA, through a program referred to as TEFRA, which stands for the Tax Equity and Fiscal Responsibility Act. [Citation omitted.] Parents may have to pay a "parental fee," however, based upon adjusted gross income. The parental fee currently maxes out at 13.5% of the parent's adjusted gross income. The parental fee is assessed by the Minnesota Department of Human Services (DHS). The DHS Web site has a parental fee estimator that is easy to find and use.

Understanding how parental fees work -- and whether a child should be enrolled in MA/TEFRA -- can help you reach a more lasting settlement. Parents who are separated or divorced are each assessed a separate fee. One parent may have a fee of \$4 a month and the other parent may have a fee of \$4,000 a month. After parents are divorced, one parent may enroll their joint child in MA/TEFRA and both parents will have to pay the parental fee. It doesn't matter if the parent with the higher fee objects to having the child enrolled in MA/TEFRA. If the child is enrolled in MA/TEFRA (which even a grandma can do!), then each parent will be assessed a parental fee.

The actual amount of the parental fee that must be paid is limited by the dollar amount of the benefit received by the child. So, if the child receives only \$10,000 in benefits through MA/TEFRA, then a parent whose parental fee is \$4,000 a month will not have to pay the full

\$48,000. DHS conducts an annual reconciliation and will inform each parent about the value of the benefits. If a parent has over paid their fee, then DHS will hold onto the money as a credit against the next annual fee. In some instances, then, a parent may want to work with DHS to pay a lesser amount in anticipation of lower usage.

Can the divorce decree state that neither parent will enroll a child in MA, or that one parent will reimburse parental fees to the other if a child is enrolled? Sure - but DHS doesn't care what the dissolution decree says. That is something to think about when you craft the wording of the judgment and decree.

So, how can you avoid post-decree problems in this area? This also is a case-by-case analysis, but the risk can be minimized. The most important thing, in my opinion, is to make sure that your client is fully informed about these issues.

It's also important to understand that a child may have both MA/TEFRA and private insurance. In that case, the parent paying the premiums for the private insurance should be entitled to "cost-effective reimbursement" for the cost of the private insurance premium. This means that the county will actually reimburse the parent for the cost of the health insurance premium. If the parent is ordered by the court to pay for private insurance, however, then the cost of the private insurance premium will not be reimbursed.

Minnesota Statutes Section 518A.41 addresses health care coverage for joint children and should be consulted when drafting a provision in the decree of dissolution concerning health care coverage. In my opinion, a decree of dissolution finding that continuation of private health insurance coverage is permissive as long as the child is enrolled in MA/TEFRA both satisfies the statute and would enable a parent to receive cost effective reimbursement of the private insurance premium. This would achieve a good, practical result for many families. Having the private insurance in place could reduce the total amount of the parental fee, and the parent would be reimbursed for the cost of the private health insurance.

## **Conclusion**

This article does not address all of the issues that concern families that have children with special needs. It is meant to be a primer on several issues that arise frequently and are very important. I hope you find it useful.

## **About the Author**

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Amy served on the Minnesota Senate Autism Task Force, and participated in efforts by the U.S. Maternal and Child Health Bureau to develop guidelines on the care of children who have autism within the medical home. Amy is the parent of twins, one of whom has a history of autism and special health care needs. Amy previously served as the Director of the Health Advocacy and Information Center at the PACER Center and is a recent member of the Board of the Arc Greater Twin Cities. **Amy Dawson** is the Executive Director of the Autism Advocacy & Law Center, LLC. She began practicing law in 1992 at the firm of Faegre & Benson, L.L.P. in Minneapolis after graduating from The Indiana University School of Law (Bloomington, IN). Amy's law practice focuses on issues related to autism, disabilities, insurance, supplemental needs trusts, guardianship, estate planning, family law, and special education for families who have children with disabilities.

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