



Initial Consults with Clients with Special Needs Children

The Good, The Bad, and The Necessary

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Getting to Know You: Intake Forms

Asking your new clients to complete intake forms streamlines the introductory process. Think about where and how to ask about the children's needs. You probably ask for the children's names and ages early in the questionnaire. Add to that question:

Do any of your children have special needs or talents? If yes, please provide a brief description so that we can discuss this in person.

Asking an open-ended question sends the right message to the client—that you are going to be attuned to the critical issues surrounding the child but you know that the subject is too complex to be covered in any introductory form.

Getting to Know You: Face to Face

Attorneys develop their own style and pattern for initial consultations, but if you know in advance that a family includes a child with special needs, be prepared to spend extra time. You will need time for your client to educate you on the child's needs and for you to educate your client on how those needs will build your case.

Legal Custody

Discussing legal custody, including the scope of major decisions to be made by parents jointly or individually, provides you with the perfect segue into discussing each child's unique needs. Address each child separately to give your client ample opportunity to open up to you about a child whose care, costs, and future are particularly worrisome. You definitely need the documentation of any disability.

Ask for the names of the specialists involved in the child's care and diagnoses. Note that the parent who cannot provide any of that information to you may be less involved in the child's care, which may impact future strategy, and be wary of the parent who refuses to provide that information to you. If a parent starts using terms that are new to you, ask questions. Explain that you need information about the diagnosis, medication, treatment, or any other specialized issue concerning that child. Supplement the information you get from your client with your own independent research, which should include a review of doctors' reports and evaluations.

Ask parents to sign authorizations to obtain copies of records and/or speak with treating professionals, if that can be done without prematurely alerting the other parent about

Documents You Need



- Existing custody proposals, orders, or agreements
- Individualized Education Program (IEP), Section 504 Plan, Intervention and Referral Services Action Plan, Behavior Intervention Plan, and/or Individualized Healthcare Plan
- Statements of public benefits the child is receiving
- Judgement of incapacity and/or certificates of guardianship
- Trust documents, including special needs trusts
- Most recent wills or other estate planning documents
- Financial statements for any account in the child's name, including 529s, UTMA, or UGMA accounts
- Life insurance policies on the child's life or naming the child as a beneficiary (including contingent beneficiary)

the plan to divorce or separate. Also counsel your client about protecting the integrity of the relationships between both parents and those treating professionals, who often will not want any involvement in a divorce. Consider the alternative of hiring an independent expert to provide a neutral, current opinion about the child's needs that impact the family. This opinion will not need to address custody or the child's "best interests" insofar as a family court judge is concerned, but instead should serve as an expert endorsement, clarification, or quantification of the child's overall needs.

When parents disagree about any child's needs, how to meet those needs, and how to fund those needs, do not make any assumptions about joint legal custody. Parents will need to clearly establish who can consent to examinations, evaluations, and classification, as well as pursuit, acceptance, and/or rejection of services. The long-term impact on the child, the family, and the family's finances builds quickly.

First, identify whether the parents are of one mind about the disability, the prognosis, and the treatment. In the course of developing your relationship with the client, you will learn more about the scope of the divergence and whether there are practical and reasonable methods for dispute resolution. Then you can better address how to craft a custody agreement that either comports with your state law or expressly overrides any state law that might control, such as one that gives, by default, parents rights to make all decisions jointly. For any acute condition, you may need a detailed description of what constitutes an emergency that would permit one parent to make a unilateral decision.

Physical Custody

Typical parenting-time schedules might not be best for a child with special needs. cursory descriptions of the schedule or imprecise language about which parent has primary residential custody may seriously harm a child who needs his or her domicile clearly established for receipt of supportive services. Even in jurisdictions that will not permit a court to establish a radius clause restricting where parents can live, most custody statutes allow for some extraordinary remedies if needed to protect the best interests of the child.

In some families, physical needs dominate discussions about the custody schedule. A home may be modified already, or need to be modified, and the family may need a customized vehicle to accommodate a child. Children receiving special education and related services from a public school must be domiciled within that school district. Familiarize yourself with your state's particular regulations regarding domicile to ensure that you do not inadvertently upend a child's IEP.

Spousal Maintenance

Whether you are conferring with the primary or secondary caretaker, a wage earner, or a financially disadvantaged spouse, you will have questions about the child's long-term needs, including medical and therapeutic needs, housing, whether the child will ever be emancipated, and how the parents, individually and jointly, may be able to meet those needs. In other words: what's the big picture, and can anyone predict how that picture might change in the future?

As in any other initial consultation, you will discuss whether one parent has already experienced an interruption in a career trajectory or education, which impacts future earnings. Once you know about a child's special needs, you will also need to know whether a customized schedule for education, therapies, medical treatment, or other less common activities impair the parents' ability to seek, obtain, or maintain employment.

Child Support

Standardized child support calculations, pursuant to any state's guidelines, probably fail to meet the needs of a child with a disability. Any child support amount exchanged between parents for a special needs child must be identified separately from spousal support or child support paid for other children. A support agreement that states only that one parent will pay a certain amount "per month for the benefit of the parties' three unemancipated children" jeopardizes a child's eligibility for government benefits and risks a significant future dispute between the parents about how to carve out one child's needs from the others' needs.

The child's actual needs must be separated from the siblings' needs and then quantified in a categorized budget to clearly show the difference between fixed costs, variable costs, and costs that may or may not be subsidized by insurance or

government benefits. Take a tip from our colleagues who handle personal injury matters and present an estimate of the injured plaintiff's future needs and get a life-care plan for the child as one glimpse into the future and into what the child's needs and expenses might be, for example, for housing, transportation, medical equipment, and supplies.

Until a child attains the age of eighteen, financial support can be exchanged between the parents. After that age, however, child support is deemed income to the child and will impact eligibility for the government benefits that could provide lifetime support and services. Parents may protect child support in a special needs trust, and they can plan ahead for that necessity by agreeing to establish that trust, naming one parent as trustee or naming both as co-trustees, and thinking ahead to the future need for a successor trustee.

Parents of young children may not see any obvious candidates for future successor trustees. We recommend naming an "institutional" trustee as a final alternate because (1) the child may outlive all of the named trustees; (2) if, in an effort to avoid situation number 1, the parents name

Simple but valuable advice to a new client: Do a little research about your existing insurance coverage.

another child of theirs as trustee, they do so at the risk of ruining the siblings' relationship or over-burdening a child who, at the time of becoming a trustee, may have many personal and work demands; and (3) the stakes are high, and sometimes well-meaning trustees inappropriately distribute trust funds without regard to the fact that it will jeopardize benefits eligibility. Look in your jurisdiction for a nonprofit group or financial institution that specializes in such long-term fiduciary solutions.

Insurance: Medical, Life, and Disability

At most initial consultations, insurance gets short shrift unless the client expresses concern about a loss of coverage or an intention to change coverage. Usually, waiting to discuss these items further poses no risk to the family. If a family relies heavily on medical insurance, however, then knowing all about the existing insurance plan benefits—and the security of those benefits—matters much more than usual.

Hot Tip

Communications between former spouses about their children via text, email, social media, or other electronic platforms, are not privileged or protected from subpoena or examination in a dispute between a school district and parents about services for a child.



Simple but valuable advice to a new client includes instructing the client to do a little research about existing insurance coverage, including the cost to the family, what deductibles apply, what services and medications are included in network and out of network, and options for maintaining an adult disabled child on a policy. Encourage early investigation so that a realistic temporary budget can be developed.

Life insurance may require a specially scheduled meeting because it is likely that the existing coverage fails to meet the child's lifelong needs. Employer-sponsored coverage is not secured, even if portable, and term life insurance probably expires during the child's lifetime. The cost of obtaining life insurance for a special needs trust will not decrease as the parents age. It is especially crucial to counsel prompt review of life insurance and inclusion of the real costs of obtaining and maintaining that insurance in the positions taken on spousal support, child support, and division of assets.

Similarly, obtaining and maintaining disability insurance for both supporting and caretaking parent must be discussed. Few families can afford to lose income streams or parental efforts when caring for a disabled child.

Beneficiary Designations

Initial consultations always include the warning not to remove the spouse as beneficiary of life insurance policies and retirement funds until after the divorce is final. Often, the former spouse remains named as the beneficiary of a life insurance policy to secure support obligations or of a retirement plan until those benefits are properly divided between the spouses. Then, however, the owner of the policy or the retirement account may have the right to name new beneficiaries. When the couple has a child with special needs, you must also counsel that that child should not ever be a named beneficiary (primary or contingent) of a life insurance policy or retirement plan; rather, a special needs trust established for his or her benefit should be the named beneficiary.

Communication

All families encounter communication challenges when the parents and children live in multiple places and juggle schedules. The challenges increase exponentially when there

Hottest Tip

If your client learns only one thing in the initial interview, let it be this: children with disabilities must not earn too much income or acquire any assets in their own names or with their own Social Security numbers. Having income and assets jeopardizes eligibility for government benefits. Child support paid for a child over the age of eighteen is deemed income to the child. Spread the word to the families now—Uniform Transfers to Minors Act (UTMA) holdings, gifts, and testamentary bequests (even token amounts) can be harmful, and it is okay to be clear that the gifts will be rejected if offered.



is a child whose well-being might quickly and harshly be impacted if communications fail. In that light, use of electronic options seems appealing. Remind your clients, however, that communications between former spouses about their children via text, email, social media, or other electronic platforms are not privileged or protected from subpoena or examination in a dispute between a school district and parents about services for a child

Social Media

The same caution applies to blogging and social media. Any agency seeking to deny or reduce services can use inconsistencies or financially indiscreet posts to bolster a case against the child. In high-conflict custody actions, consider adding restrictions upon the parents' options to post anything on social media that discloses the family's activities or finances, including the activities of the other children. Advise clients to ask their family members to respect the same guidelines and to protect the child's privacy. Use social media settings to prevent enthusiastic friends and acquaintances from connecting their posts to your client's identity or profile. Find out now, or soon, what already exists on the Internet, including "Go Fund Me" efforts or similar public pleas for financial assistance. Remember, however, that ethically, attorneys cannot advise clients to delete or destroy social media posts that might constitute evidence in an upcoming dispute.

Guardianship

Depending on the child's disability, you may need to discuss guardianship for the time the child reaches the age of majority. At the very least, you should write into any settlement agreement a provision that the parties will address guardianship by a date certain (i.e., the child's seventeenth birthday) and how they will resolve any disagreement as to whether or not guardianship is necessary or who the guardian(s) will be. Co-guardianship is the same as co-parenting, so be sure that is a viable option before you put that in an agreement.

Final Words of Advice and Caution

These suggestions presuppose that you know ahead of the initial interview that your client parents a child with special needs. If you learn about this child during the first meeting, or even sometime afterwards, reboot. Everything you already learned about this family could require reassessment based upon that child's needs and your client's own rights and obligations in light of those newly revealed issues.

Some legal issues, such as rights to special education services and government benefits, lie beyond the expertise of most family law practitioners. Do what you do best—advise your client on the legal strategies that will protect the family, even if that means sharing the task with co-counsel or other advisors. The family will thank you for your prudence and your thorough coverage of all of the changing dynamics surrounding their child. **FA**



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