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Breaking Up is Hard to Do: Divorce in Families that Include a Son or Daughter with I/DD

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Legal Issues to Consider

In any divorce where there are children, the parents need to make decisions about:

1. **Custody** - who has primary custody of the child who is a minor or has an intellectual or developmental disability (I/DD) and cannot live alone
2. **Visitation** - when can the non-custodial parent visit and/or have the child stay with them
3. **Support** - who must pay money to support the child, how much should be paid, how long should the payments last, and to whom should they be paid
4. **Decision making** - who has authority to make decisions affecting the child: medical care, therapies, school, birth control, living arrangements, etc.



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Child with I/DD - Custody

1. If the child with I/DD is a minor at the time of the divorce, the court will decide who will have custody
 - Even if joint custody, typically the child will live or spend most time with one parent (“custodial parent”) and the other (“non-custodial parent”) will have visitation rights
 - Which parent has ability / time / living space / willingness, etc. to care for child with I/DD?
2. If the child is an adult with I/DD, the same questions need to be resolved.
 - Although unless there is a guardianship, no parent will have legal custody

Child with I/DD - Support

Typically, non-custodial parent will pay money to the custodial parent for support of the child while a minor

1. **Rational** - so child has same amount of financial support as child would have received if parents had not divorced
2. **Amount** - state guidelines take into account relative income of parents and normal costs of housing, raising, and educating the child.
 - A. They do not take into account unique circumstances when child has I/DD
 - B. Ex: costs of healthcare, therapies, equipment, special diets, support services, transportation, support if custodial parent cannot work due to time required for care, and so on
 - C. These need to be factored into the support amount

Child with I/DD - Support

3. How long child support must be paid

A. States require child support to be paid until child is “emancipated”

- Age 18, or older if still in high school
- Unless child marries, enters military, or permanently leaves home
- Some States extend through 21 if attending any school

Child with I/DD - Support

3. How long child support must be paid

B. Majority of states (37) recognize parent's duty to support child with a disability after majority age if the child cannot support himself or herself.

- Some by statute, others by case law.
- Most require the disability to have begun prior to "emancipation"

Child with I/DD - Support

3. How long child support must be paid

- C. In states without a statute, many courts apply the “Emancipation Rational” - If child has a disability and not capable of supporting self, child never becomes emancipated and remains a “minor” and parent has continuing duty to support the child even if over the age of majority.
- If disability occurs before child is emancipated, parent’s support duty continues.
 - If disability occurs after child is emancipated, parent typically does not have a duty to support the child

Child with I/DD - Support

4. Who receives the child support

A. If child not emancipated, then it is normally the custodial parent.

- This is fine if child not receiving SSI or Medicaid
- But if child or household is receiving SSI or Medicaid, this will cause problems

B. If child is emancipated, then child is entitled to the support payments, unless child is under guardianship

Child with I/DD - Support

5. Effect of child support on SSI

- A. SSI defines child support as “a payment from a parent to or for the child to meet the child’s needs for food and shelter. Child support can be in cash or in-kind. It can be voluntary or court ordered.” POMS SI 00830.420A.1
- B. Normally, child support payments will reduce SSI
- C. In many states, if SSI is lost, so is Medicaid
- D. This means that unless careful planning is done, child support may actually harm the child rather than help.

Child with I/DD - Support

6. Effect of child support on SSI - Child Not Emancipated

- A. If child support is paid to custodial parent and child or family **not on SSI or Medicaid**, then all is ok
- B. But if child is **receiving SSI**, then 2/3 of child support payment less \$20 is “countable income” and reduces the SSI by that amount.
- C. Example: Maximum SSI is \$733 and child support is \$600. $2/3 \text{ of } \$600 = \$400 - \$20 = \380 . $\$733 - \$380 = \$353$.
- D. Result: Custodial parent receives \$600 of child support and \$353 of SSI, for total monthly income of \$953.
- E. This is not the \$1,333 (\$600 child support + \$733 SSI) that was expected at the time of the divorce

Child with I/DD - Support

7. Effect of child support on SSI - Child Is Emancipated

- A. If child support is paid to emancipated child on SSI, then all of the child support, less \$20, reduces SSI dollar for dollar
- B. Example: Maximum SSI is \$733 and child support is \$600.
 $\$600 - \$20 = \$580$. $\$733 - \$580 = \$153$.
- C. Result: Child receives \$600 of child support and \$153 of SSI, for total monthly income of \$753.
- D. This is not the \$1,333 (\$600 child support + \$733 SSI) that was expected at the time of the divorce.
- E. If child support was \$760, then SSI is reduced to \$0 ($\$760 - \$20 = \$740 - \$733 \text{ SSI} = \0).
- F. In most states, this will cause the child to also lose Medicaid benefits

Child with I/DD - Support

8. Effect of child support on SSI - How To Save SSI

- A. Instead of paying child support directly to custodial parent or child, pay it to a self-settled special needs trust (SNT)
 - A trust authorized by 42 U.S.C. 1396p(d)(4)(A)
- B. Requirements:
 - 1) Trust must be established by the child's parent, grandparent, guardian, or by a court, AND
 - 2) A court must order that child support be paid into this trust.
- C. Example: Child support of \$600 paid to SNT and SSI of \$733 paid to custodial parent (or child, if emancipated).
- D. Result: Total of \$1,333 will be received each month.

Child with I/DD - Support

9. Potential tax issues for paying support voluntarily (not subject to a court order) -

- A. If child is a minor - no issues since both parents have a legal duty to support their minor child
- B. But if child is an adult (age 18 or older), then non-court ordered payments made to or for the benefit of the adult child will be a “taxable gift” unless:
 - 1) No more than \$14,000 in a calendar year (for 2016) and can be immediately used for the benefit of the adult child, or
 - 2) For the medical or educational expenses of the adult child, but only if the payments are made directly to the provider of those services.

Child with I/DD - Support

9. Potential tax issues for paying support voluntarily (not subject to a court order) -
- C. If a “taxable gift”, then person making the gift must file gift tax return and offset the taxable gift by using some of the credit that is available to offset estate taxes when the gift maker dies.
 - D. There is no adverse tax impact on the adult child who receives the benefit of the gifted money.

Child with I/DD - Decision Making

While Child is a Minor -

- Divorce/Family court will grant “custody” to one parent (sole custody) or both parents (joint custody).
- A parent with “custody” has legal authority to make decisions affecting the minor child just as any parent of a minor child.
- Disagreements among the parents that cannot be resolved can be brought back to the Family Court for a ruling
- Because the child is a minor, no guardianship is required
- Only exception is if the child receives money directly (through inheritance or law suit). Then someone needs to be appointed by a probate court as the child’s “conservator” with authority to handle the child’s money

Child with I/DD - Decision Making

When Child is an Adult (i.e., age 18 or older) -

1. The law presumes that an adult has sufficient intellectual capacity to make his or her own decisions and it is The Arc's position that people with I/DD can make their own decisions with or without informal support and, if guardianship is essential, it should be used only to the extent necessary, with a presumption in favor of limited rather than full guardianship. No one has legal authority to make decisions on behalf of an adult, unless:
 - A Durable Power of Attorney (DPA) is signed by the adult, or
 - A court appoints a guardian
- An adult with sufficient intellectual capacity can sign DPAs and delegate decision making authority to another person
 - Health care, and legal/financial decisions
 - Advanced Directive (stopping life support)
- But doing so does not remove any decision making authority from the person making the DPA
- An adult can also seek informal decision-making support from one or both parents or from other people



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Child with I/DD - Decision Making

When Child is an Adult (i.e., age 18 or older) -

2. However, if an adult does not have the capacity to make the decisions and understand that he or she is delegating them, the DPA will not be valid.
 - Instead, **for another person to have decision-making authority**, a court needs to be asked to rule that the person needs a guardian (to make personal decisions), and/or a conservator (to manage assets).
 - This can be one of the person's parents, or anyone else the court deems appropriate, with priority given to someone the person needing the guardianship chooses, and then family and friends
 - It is rare for a court to appoint both parents as guardians if they are not married to each other

Child with I/DD - Decision Making

When Child is an Adult (i.e., age 18 or older) -

3. If there is conflict over a decision affecting the adult son or daughter and there is no guardianship in place, then it is the adult son's or daughter's decision as to how the conflict is resolved.
4. If there is conflict over a decision affecting the adult child and there is a guardianship in place, then:
 - The guardian is the only person who has legal authority to make decisions affecting the adult child
 - However, an “interested party”, which should include the non-guardian parent, can petition the court to raise concerns about the decisions being made by the guardian
 - Ultimately, the court will decide what is in the best interest of the adult for whom a guardian is appointed.

When to Make these Decisions

It is far better to resolve at the time of the divorce what happens after the child with I/DD turns age 18

1. If the child is a minor, age 18 may be many years away. It is easier to agree to something that takes effect in the future than if it is starting immediately.
2. It is hard to modify a divorce decree. Most states require:
 - Something big to have changed since the divorce, or
 - There were facts not known at the time of the divorce
3. Even if a child is clearly in need of additional support after age 18, most courts will not order the non-custodial parent to pay support if the child is already emancipated when the petition to modify is filed.



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When to Make these Decisions

Usually these decisions are negotiated between the parents at the time of the divorce and are incorporated in a Settlement Agreement.

- Then, if approved by the judge, they are incorporated into the Divorce Decree in addition to termination of the marriage
- Even those states who have a statute terminating all child support after a certain age will honor a Settlement Agreement and Divorce Decree that requires support payments to continue after the child is emancipated.

Goal: To develop mindfulness around behavior patterns of parents who are divorcing or who have divorced

- Emotional fall out—emotions come in waves
 - Grief
 - Sadness
 - Anger
 - Shame/Humiliation
 - Fear
 - Relief
 - Excitement



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People experiencing stress are more likely to take risks and to act based upon emotion

- If there is high conflict, the divorcing family can become a crucible
- Formerly reasonable, rational people may act out of fear—behavior may change in unpredictable ways
- When negative affect increases, mindfulness decreases

Possible outcome: The child can become the pawn in a terrible chess game

The goal is to keep parents using their “wise minds”



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Special needs, special considerations

- The child with special needs may have had one parent as the primary caretaker.
- The child with ID may have different needs in a joint custody arrangement than same aged siblings
- The parents are more likely to have strong emotions around making decisions for the child with ID
- Parents may have increased fear of abuse/maltreatment/neglect if a step parent or significant other enters the picture
- The child may be asked to fulfil needs formerly provided by the spouse—companionship, affection, socialization



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Divorcing couples over time: Getting to 'business as usual'

- Some couples have grown apart, and have not worked together for a long time
- Others may still be enmeshed for a while—may want to be friends or try to live in the same house
- Many go through periods of emotional intensity and preoccupation with the other, a 'hot zone'
 - After the 'hot zone' settles down, the relationship can become more business-like, less volatile

Becoming mindful: Recognizing the ‘need behind the need’

- Both parents need to feel respected, valued, and in control
- Both parents need to feel competent
- Both parents need to feel they can protect their children
- Both parents need to preserve the relationship with the child, even if that relationship changes after the divorce
- When working with divorcing families, identify for the symbolic need behind the need. The need drives decisions and behavior



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Common ground: Same needs, different plans

Parents will often be at different places along continuums

Minimizing differences	>>>	Focusing on specialness
Inclusion	>>>	Special care
Autonomy for the child	>>>	Protecting the child
Acceptance	>>>	Maximizing potential



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Decisions with high emotional valence

- Selecting the right school
- Mental health services and therapies
- Choosing post secondary options
- Career choices
- Identifying the right living situation
- When is the child ready for dating, sexuality, marriage etc.
- Deciding to obtain birth control



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Promoting mindfulness

- Look for the common ground—the “need behind the need”
- Keep the focus on the child’s best interests, not on winning
- Encourage parents to “stop and step-back”
- Remind parents that the more they can work together, the more control they both keep over their lives
- The more the legal system is involved, the more strangers will make decisions about your child



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Resources:

- Difficult Questions Kids Ask (and Are Afraid to Ask) about Divorce by Dr. Meg Schneider
- Putting Children First: Proven Parenting Strategies for Helping Children Thrive Through Divorce by Dr. JoAnne Pedro-Carroll
- Collaborative Divorce, Collaborativedivorce.net
- Parenting Coordinators (PC), Parent Coordination Services



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Questions?

Please raise your hand and we will call on you OR type your question into the chat box.

