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WHEN PARENTS OF CHILDREN WITH SPECIAL NEEDS DIVORCE

Few people question the commonly reported statistic that half of marriages in America end in divorce. Reports vary, however, about whether parents of a special needs child face even higher divorce rates. People react differently to the numerous challenges and expenses, such as life-long therapy, that a child's disability condition may bring to a marriage. While the situation may bring the parents closer together, many special needs organizations report that it is more likely to cause excess strain in the marital relationship.

The *Wall Street Journal* reported in November 2008 on recent research suggesting that divorce rates of couples raising a child with a disability are even higher than the national average. Some nonprofit organizations have reported divorce rates as high as 75 to 85 percent for this population. Other reports have claimed these percentages are overestimated. Indeed, a recent study by Vanderbilt University's Kennedy Center actually found divorce rates of parents who have a child with Down Syndrome to be 33 percent lower than in marriages where

the parents do not have a child with a disability. Compare that, however, to the 2008 study by the University of Buffalo cited by *The Wall Street Journal* which reported that parents of a child with Attention Deficit Hyperactivity Disorder are nearly twice as likely to divorce before the child reaches 8 years old as a couple with a child without a disability.

In calculating child support, the divorce settlement agreement usually provides specific details regarding how each parent will share in the financial responsibility for the child's care and education until the time the child reaches the age of majority or finishes college. In the case of a child with special needs, however, state statutes or case law may continue the support obligation of both the custodial and non-custodial parent for the lifetime of the child. This is true in Alabama. Even if a state does not have a formal requirement of this type, the non-custodial parent often agrees to pay a monthly sum to the custodial parent or to a trust for the benefit of the adult child with a disability. Discussions or negotiations about payments

to a trust for the special needs of a child who will never be adequately self-supporting may even help to settle a divorce case.

Unfortunately, child support payments may end up reducing or eliminating the child's SSI benefit. In 36 states, including Alabama, loss of SSI also causes loss of Medicaid, which provides the child's medical coverage, including important drug therapy and home or institutional services that help the child and the custodial parent. Because many programs for individuals with disabilities are only available to individuals who have Medicaid eligibility, preserving this eligibility does more than just keep medical coverage in place. If Medicaid is lost, the custodial parent may feel as if he or she has won the so-called "battle," but lost the "war." The postdivorce child support that was intended to benefit the child and custodial parent thus may result in unintended, detrimental consequences.

Divorce attorneys do not always know how child support payments made directly to a custodial parent interact with "means-tested" government ben-

efit programs like SSI and Medicaid, or that these unintended consequences can be avoided with a few careful steps. This article discusses how child support payments for a child of any age with special needs should be handled in order to maintain existing or future eligibility for SSI and Medicaid for the child.

Government benefits can be protected if the divorce decree directs the non-custodial parent to make child support payments to a special needs trust for the sole benefit of that child. Alternatively, an irrevocable assignment by the custodial parent of the child support to the special needs trust may also work. This trust must be carefully drafted and in most states the trust must be what is referred to as a self-settled trust. Support payments to a special needs trust do not displace SSI, greatly benefitting both parents and the child.

To understand this process, a review of the Social Security regulations governing SSI is needed. The SSI program provides a basic monthly cash subsidy for an individual with a disability who has very limited (under \$2,000) countable resources and income. The maximum federal SSI payment in 2010 is \$674 per month. All income above \$20 paid to or on behalf of the individual, including child support payments, offset or reduce the SSI payment.

Child on SSI under age 18: For a child on SSI who is under the age of 18, Social Security regulations specify that two-thirds of a child support payment is "countable income," which causes a dollar-for-dollar reduction in the SSI benefit. For example, if child support of \$500 is paid to the custodial parent of a child on SSI, the \$674 SSI benefit will be reduced by \$313.33 ($2/3$ of $500=333.33$, minus \$20) to \$360.67. Total support will be $500 + 360.67$ SSI, or \$860.67. This reduction

also appears for children who remain in school full time up to age 21.

Child on SSI age 18 or older: For a child age 18 or older, however, 100 percent minus \$20 of the child support payment counts as a reduction against SSI. For example: The \$674 SSI payment before child support for a child age 18 will be reduced by \$480 (500 minus 20) to \$194 SSI plus \$500.00 in child support, for aggregate support of \$694, afterwards. In other words, once child support payments begin, the aggregate monthly amount received by the custodial parent may not change much, just the source of the payments.

The amount of a child's SSI payment also depends upon several other factors, including the age of the child, the living arrangements in the household, whether the custodial parent is charging rent for the child's living at home, the amount of any earned income from a child's employment and other cash or gifts a child receives during a month. The child's SSI can easily be eliminated by child support payments being made directly to the custodial parent or other person who applies

it for the child's benefit. The policy behind SSI may help parents and divorce lawyers understand this better. SSI payments, in theory, provide government assistance with food and shelter (rent, garbage and sewer charges, heating, cooling, water, property taxes and insurance) for the individual with a disability. When other funds such as child support, that can be used for food and shelter items, are supplied for the child's benefit, the government regulations require the SSI amount to be reduced because this additional support source exists, whether used for these purposes or not.

While limitations apply concerning the amount of reduction to a person's SSI when another individual, trust, or other entity directly pays an SSI recipient's food, power bill, rent or other shelter expenses, this differs when child support is paid directly to the custodial parent. Except for excluding one-third of the child support payment for a child under 18 and the first \$20 of any type of income, no other exclusions apply.

Social Security regulations require that all changes in financial circumstances





of a person receiving SSI must be promptly reported by the person who receives the SSI check. SSI recovers overpayments made in error. When a person with a disability is not eligible for the full SSI amount he or she has already received, the overpayment must be repaid (sometimes by reduction of the future monthly benefits). If the monthly child support payment of an age 18 or older child exceeds the child's SSI amount by \$19, then in 36 states, the child's SSI and Medicaid will both be lost.

Some children with special needs will not qualify for SSI or Medicaid if they are under age 18 because of the parents' assets and income. In that case it may be advisable to wait on having support payments assigned to a special needs trust until the child is 18. Upon reaching age 18, the child may likely qualify for SSI when the income and assets of the parents no longer count. Be careful not to confuse age 18 with the state's age of majority (the age a person becomes an adult – which varies among the states from ages 18 to 21). In Alabama, a person becomes an adult at age 19.

Some children below age 18 do qualify for SSI, however. The child may have a disability that prevents the custodial parent from full-time employment, so that earnings in the post-divorce, single-parent household are low enough for the child to qualify. The "countable" resources (note that a home, furniture, car, personal effects, and some other items do not count) of that parent may be below the \$2,000 resource threshold, allowing the child to qualify for SSI.

Consider this example of the benefits of ordering the payment to a trust: a 16 year old child, John, is eligible for \$475 per month of SSI. The divorce decree orders the non-custodial parent to pay \$750 per month in child support directly to the custodial parent. Since Social Security regulations exclude one-third of the child support payment from countable income, \$500 counts. When the \$500 is applied against the \$475 of SSI, the first \$20 is ignored, but the remaining \$480 completely displaces the \$475 of SSI, causing John's loss of SSI eligibility. Eventually, his Medicaid will also be terminated. The custodial parent

who anticipated having the \$750 child support plus \$475 of SSI and Medicaid co-pays to pick up drug costs not covered by other health care insurance will be disappointed, at the very least.

If instead the divorce decree required the non-custodial parent to make the \$750 monthly payment for John directly to his special needs trust, John would also receive the \$475 of SSI. The non-custodial parent would not be any worse off under this arrangement, and John and his custodial parent could have much more. The additional costs to have the self-settled special needs trust and carefully crafted divorce order prepared in the divorce proceeding are quickly recouped by the retention of SSI and Medicaid. In this example, note that if John had been 18, and even if he was then eligible for the maximum SSI amount of \$674, the \$750 of child support directly to his parent would have offset all of his SSI, and caused immediate termination or reduction of his Medicaid.

It is far better to address these issues during the divorce process, rather than after discovering that SSI has been reduced or lost. After the parents agree upon (or the court determines) the monthly contribution by the non-custodial parent for the child with special needs, the divorce lawyer(s) should contact an attorney with experience drafting the appropriate special needs trusts. This type of special needs trust differs from the more traditional type of special needs trust that a parent would set up to receive an inheritance intended for a child with a disability. The divorce decree should direct the non-custodial parent to make a monthly payment for the child's "special needs" each month to the Trustee of the Special Needs Trust prepared for this purpose. The custodial parent may serve as Trustee.

Follow-up to this transaction is also crucial. The Court Order and the trust must be reported to Social Security promptly. Because many Social Security case workers may not be familiar with the regulations allowing this exception, it is best to attach a copy of the regulations when the transaction is reported. The regulation added in February 2009 to Social Security's POMS (Program Operating Manual System) at POMS SI 01120.200 G.1.d., regarding self-settled special needs trusts provides: *A legally assignable payment (see SI 01120.200G.1.e. for what is not assignable), that is assigned to a trust, is income for SSI purposes unless the assignment is irrevocable. [For example, child support or alimony payments paid directly to a trust as a result of a court order, are not income.] If the assignment is revocable, the payment is income to the individual legally entitled to receive it.*

Because the regulation refers to the assignment of income, instead of relying upon the court order, a custodial parent may prefer to irrevocably assign his or her right to the child support payment stream to a self-settled trust. This may work to avoid an unnecessary trip to court where the divorce decree has already been issued. The same follow-up would be required.

In most states the type of trust to receive the child support payments must meet the requirements of Section 42 U.S.C. §1396p(d)(4)(A) of the Social Security Act. This is because child support is viewed by Social Security as belonging to the child. Among other features, the trust must provide that Medicaid is paid back at the child's death from any funds remaining. As a practical matter, since the Trustee would likely spend all of the child support payments for the child's benefit on a regular basis, there is little chance that much would be left in the special needs trust when the child passes away.

It is important that the lawyers and court fashioning the child support order avoid structuring the child support in terms that reduce the required payment each month by the amount of SSI or any other cash government benefits received on the child's behalf. Instead, the divorce decree should state a specific amount that will be paid each month and avoid the offset calculation, which will create continuing problems. The following example illustrates the consequences of tying the child support amount directly to the SSI amount. Consider the case of Robert, a 15 year old with a disability on SSI, who recently became a child of divorce. The parents' divorce decree stipulated a dollar-for-dollar offset between SSI and child support. As Robert's needs increased, his mother went back to court and was awarded a large increase in child support from Robert's father. As required under SSI regulations, his mother reported the new child support amount to SSI, which caused a reduction. The lesser amount of SSI then increased the father's child support obligation, which caused a further reduction in SSI, and an increase in the monthly child support payment, and on and on.

The downward, then upward, spiral would never end. In order to stop the cycle, Robert's mother went back to court to have the divorce decree revised to eliminate the offset and to require that Robert's father pay a lesser amount to a special needs

trust for Robert of which she will serve as Trustee.

The reasons discussed in this article for directing child support to a self-settled special needs trust may also apply to alimony or maintenance (hereafter "alimony") for a former spouse with a disability who is under age 65 at the time of divorce. A court order directing alimony to a self-settled special needs trust (or an irrevocable assignment of the right to alimony to the trust) provides the same benefits as described here for child support and, depending on other circumstances, might allow the spouse with the disability to qualify for SSI and/or Medicaid services.

Each divorce case affecting a child or spouse with a disability is unique and must be considered in light of his or her state's laws regarding alimony and child support, and its Medicaid regulations. Nevertheless, it is well worth the effort to investigate. Many lawyers and judges do not know that SSI is a "means-tested" program and how child support or alimony payments will affect it. Even if they know SSI is means-tested, rarely will they understand the complexities for the SSI and Medicaid programs and keep up-to-date on changes in these laws and policies governing eligibility for those programs. Thus, it is important to consult with an attorney experienced in the interrelationship of divorce law with special needs planning and means-tested public benefits eligibility requirements. **C**



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Kathy is a shareholder at Sirote where she practices estate planning and estate administration. She was recently selected as an Alabama Super Lawyer and named to *The Best Lawyers in America*. Her estate planning practice is heavily involved in disability and special needs planning. She was invited to become Alabama's first member of Special Needs Alliance and is a Fellow in the American College of Trust and Estate Counsel. Kathy is also a Supervisory Council Member of the American Bar Association's Real Property, Trust and Estate Section.