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Special Needs Planning in Divorce: Preserving Disability Benefits

Special Needs Trusts, Child Support and Alimony Considerations
in Settlement Agreements and Parenting Plans

THURSDAY, JANUARY 5, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Judith L. Poller, Partner, **Pryor Cashman**, New York

Marisa W. Higgins, Officer, Partner, **Fletcher Tilton**, Worcester, Mass.

Frederick M. Misilo, Jr., Special Needs & Elder Law Practice Group Chair, **Fletcher Tilton**,
Worcester, Mass.

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Special Needs: Special Divorces

Judith L. Poller
Pryor Cashman LLP
7 Times Square
New York, NY 10036-6569
212-326-0130
jpoller@pryorcashman.com

Quotes

- “You’ve developed the strength of a draft horse while holding onto the delicacy of a daffodil.....you are the parent, advocate and protector of a child with a disability”.-*Lori Borgman*
- “Anyone can give up, it’s the easiest thing in the world to do. But to hold it together when everyone else would understand if you fell apart, that’s true strength”.-*Christopher Reeves*

Special Needs Statistics

- Divorce rate is approaching 90% for families with a special needs child (2005 Family Court Review)
- 1 in 110 children have an Autism spectrum disorder (4:1 prevalence in males v. females)
- 7% of children between ages 3-17 have ADHD (11%-boys, 4%- girls)
- Data show 1 in 303 children have Cerebral Palsy
- 1 in 691 babies born with Down syndrome

Statistics, Cont'd

- 19% of Americans are classified as a person with a disability, which equals the population of the states of FL and CA combined

INTAKE-Evaluating the Special Need

- What constitutes a special need?
- How to collect the unique data and help the attorneys/mediators/collaborative team/Judges understand- **IN PLAIN ENGLISH** (many lawyers and judges unaware of the numerous costs involved in raising a child with special needs. Our job is critical).
- Quantifying, evaluating and illustrating the special financial needs
 - State, local, federal benefits/entitlements; Educational needs and issues; health insurance benefits and the special needs child

Checklist for Documents Needed

- Should have the following items for a case with a special needs child:
 1. Medical reports, test results, diagnoses
 2. Evaluations
 3. Treatment Plans
 4. Therapy Plans
 5. Medication Plans
 6. Child's safety plans for home, school, away
 7. Medical bills
 8. Documentation of all costs
 9. IEP's (Individualized Education Plans)
 10. Information of every treating professional
 11. Copies of articles (or books) providing basic information on the condition

State Law

- All 50 states have statutes that deal with divorce. Few have legislation that involve children with special needs. Washington State- has a child support worksheet that allows for deviation from the standard child support calculation for “special needs of disabled children”. (worksheet in handout book).
 - California- Part 3
 - CO-Title 14, Article 10 (Statute #14-10-106)
 - FL-Title 6, Chapter 61
 - GA-Sections 19-4-1 through 19-6-47
 - Illinois-Chapter 750
 - IA-Chapter 598, Sections 1-42
 - MA-Chapter 208
 - MD-Sections 8-101 through 8-213
 - MN-Chapter 518
 - MO- Chapter 452
 - NC-Chapter 50
 - NH-Title 43, Chapter 458
 - NJ-Title 2A, Sections 34-2 through 34-6
 - NV-Chapter 125
 - NY-Chapter 14, Article 10-12
 - OH-Title 31, Chapter 31-05
 - TX-Title 1, Chapter 6 (Family Law)

Case Law

- Other than Washington state, there is currently no case law interpreting the unique issues of special needs children
- Decisions all made on a case-by-case basis, rather than by specific case law (Favrow vs. Vargas (CONN.1992); Greer v. Greer (N.C. App. 1991))
- **COURTS PRECLUDED FROM AWARDING CHILD SUPPORT FOR A DISABLED CHILD BEYOND THE AGE OF MAJORITY IF PROHIBITED BY STATE STATUTE** (In Hendricks v. Sanks, 143 N.C. App. 544, 545 S.E. S.E. 2d 779 (2001), allowed child support to continue for a limited time beyond age 18 for a child with Down syndrome- but only to the age of 20, which was the age for termination of child support for a non-disabled child in mainstream education under N.C. law).
- A great deal of case law dealing with the education of special needs children- this ties back to the application of federal IDEA legislation

Case Law, cont'd

- **Missouri-** a child who is “physically or mentally incapacitated from supporting himself or herself and insolvent and unmarried” may be eligible for court-ordered parental child support beyond the age of 18. (Mo. Ann Stat. 452.340(4) (West Supp. 2002))
- **USUALLY WITHIN THE DISCRETION** of a Family Court Judge to decide if it is appropriate to deviate from standard child support amounts based upon showing of the greater costs for raising a child with special needs (See, e.g. Nev. Rev. Stat. Ann. 125B.200(2)(c) (Michie 2001); Minn. Stat. Ann. 518.54(2) (West 1990); Utah Code Ann. 78-45-2(6)(c) (Supp. 201) and Ohio Rev. Code Ann. 3109.01 (Anderson 2000))

OIS-'Other Important Stuff'

- Practitioner Do's and Don'ts
- The Letter of Intent
- Child Support Language
- Co-Parenting/Visitation/Custody considerations

Special Needs Planning in Divorce: Preserving Disability Benefits

Frederick M. Misilo, Jr.

Fletcher Tilton PC

(508) 459-8059

fmisilo@fletchertilton.com

Special Needs Planning Objectives Within the Context of Divorce

- Maximize eligibility for and receipt of important government means-tested benefits for a son/daughter with a disability or an ex-spouse with a disability.
- Provide a mechanism to hold funds to be used for the benefit of a son/daughter with a disability or an ex-spouse with a disability

Strategies to Achieve Special Needs Planning Objectives

- Ask the questions:
 - Do any children of the marriage have a disability?
 - Are any children from the marriage receiving special education services?

If so, obtain specific information about the nature and degree of the disability, such as, psychological testing, Individual Educational Plans, educational achievement testing, etc.

When in doubt, engage in special needs planning.



**“Pray to God,
but
tie up your camel.”**

Government Benefits Overview

- Means-tested benefits
(Supplemental Security Income/Medicaid)
- Entitlement benefits
(Special Education, Survivor Benefits, Childhood Disability Benefits)
- Sliding Scale
(Housing vouchers, some state welfare benefits)

Supplemental Security Income (SSI)

- A welfare program (means-tested) supported by tax revenues
- Federally supported and administered by the Social Security Administration, see www.socialsecurity.gov/ssi
- For specific statutory authority, see Title XVI of the Social Security Act
- SSI imposes tough and strict income limits:
 - “Income” almost always eliminates or reduces benefits
 - Much more is counted as “income” such as in-kind support and maintenance which is considered to be unearned income
- SSI imposes strict asset limitations
- Details at SSA’s Program Operational Manual System (POMS)

SSI Eligibility Criteria – Four Factors: Protected Groups, Citizenship, Income and Assets

- Protected Groups: Elderly, Disabled and Blind
 - Adult with a Disability: Unable to engage in substantial gainful activity due to a physical or mental impairment which is expected to last for 12 months or to result in death.
 - Child with a Disability: The applicant child has a medically determined physical or mental impairment that results in marked and severe functional limitations.
 - Important Practice Point: Parent's assets and income are "deemed" to children until the age of 18, which makes most, but the most poor, ineligible until the son or daughter with a disability reaches 18 years old when under SSA rules they are considered emancipated and "Head" of their own household.

Continued.....

SSI Eligibility – Four Factors

- Citizenship:

- ❖ Resident in U.S. for 30 days
- ❖ U.S. Citizen or a “qualified” alien
- ❖ Lawfully residing in the US on August 22, 1996

- Income Limits:

- ❖ Cash income, earned income, pensions, gifts, inheritance, disability benefits
- ❖ Non-cash income, e.g. in-kind support and maintenance (ISM's) such as food and shelter costs

- Income Exclusions:

- ❖ First \$20 at the end of the month
- ❖ \$65 from earnings, plus one-half per \$65

Continued.....

SSI Eligibility – Four Factors

- ❖ Income tax refunds
- ❖ Loans (but if not spent because in the next calendar month.
- ❖ Outside non-cash services/supports that are not ISM's received for special needs trust
- Asset limits:
 - ❖ \$2,000 individual/\$3,000 couple
 - ❖ Countable assets – cash and other liquid assets and real and personal property that could be converted to cash for some support and maintenance such as:

Continued.....

SSI Eligibility – Four Factors

- Asset limits, continued..
 - ❖ Bank accounts
 - ❖ Revocable trust
 - ❖ Irrevocable trusts under Foster Care Independence Act of 1999. For trusts established after 1/1/2000, assets in an irrevocable trust are countable if SSI beneficiary or spouse transferred assets into the trust and there are any circumstances under which payment from the trust could be made to the beneficiary or spouse.
 - ❑ Note: Sole benefit payment trusts created by 42 USC 1396p (d)(4)(a) are not considered assets for individuals with disabilities under the age of 65
 - ❑ Also note: Discretionary supplemental needs trusts created by third parties are exempted.

Continued.....

SSI Eligibility – Four Factors

– Non-countable Assets:

- ❖ Home
- ❖ Automobile
- ❖ Personal effects and household property
- ❖ Miscellaneous- see SSI website for miscellaneous non-countable assets

SSI Benefits

- Federal Benefit Rate (FBR) = \$678/month for a single person and \$1,048/month for a couple in independent living. Annually reviewed for COLA.
- State supplements vary
- Medicaid – in most states. Medicaid is categorically linked to SSI under Section 1643 of the Social Security Act, e.g.
 - SSI eligible = Medicaid eligible.
- Medicaid is the real objective in most special needs planning cases. It serves as a gateway to community-based supportive services and other benefits, e.g. food stamps.

Continued.....

SSI Benefits

- Benefit reductions
 - Housing situations - complicated rules
 - Applicant with board and care, could increase;
 - Applicant in a skilled nursing facility (SNF), no SSI, just personal needs allowance (\$47 federal plus state supplements)
 - Living in home with another and receiving board (ISM) without paying a pro rata share results in a 1/3 reduction value of 1/3 rule (VTR)
(1/3 of \$698 = \$232.66)

Continued.....

SSI Benefits

- Living independently, with ISM will reduce SSI at a “presumed maximum value” (PMV) of the Federal Benefit Rate plus \$20 ($1/3$ of $\$698 + \$20 = \$252.66$)

Two Types of Supplemental Needs Trusts

Self-Settled Trusts

under

42 USC 1396p(d)(4)(a)

- Receive irrevocable assignment of support payments
- Contains assets owned by SSI applicant or by son/daughter with a disability

Third Party Trusts

(common law)

- Receives assets gifted by third parties
- Beneficiary of life insurance on parent(s) plan
- Inheritance at the time of parent's death

Self-Settled Trusts under 42 USC 1396p(d)(4)(a)

- POMS SI 01120.203
- Irrevocable
- Beneficiary meets federal definition of disability
- Created by a parent, grandparent, guardian or by a court
- Assets held for the sole benefit of the beneficiary
- Beneficiary is under 65 years old
- Contains payment provisions providing for reimbursement to State Medicaid agency for benefits provided to the beneficiary upon the death of the beneficiary

Third Party Trusts

- Common law discretionary trust
- Grantor's intention is to supplement available government benefits
- Revocable if left unfunded
- Irrevocable upon the death of parent or upon funding
- No pay back provision

Common Elements of Both Self Settled and Third Party Trusts

- Full discretion given to trustee to pay income and distribute principal
- No right of withdrawal power given to beneficiary
- Should identify successor trustees and method of selection of future trustees
- If state law permits, add spendthrift and creditor protection provisions
- Consideration should be given to persons who are entitled to receive annual accountings and who are entitled to object thereto

Assignment of Child Support for Government Benefits Planning

- See POMS: SI 011 20.200

General Rule: A legally assignable payment that is assigned to a trust/trustee is income for SSI purposes **unless** the assignment is irrevocable. For example, irrevocable child support or alimony payments paid directly to a trust/trustee as a result of a court order, is not income for SSI purposes.

Continued.....

Assignment of Child Support

- If the assignment is revocable, the payment is income to the individual legally entitled to receive it.
- If the assignment is irrevocable, the payment is not income for SSI purposes.
- Certain payments are not assignable by law and, therefore, are income to the individual entitled to receive it:
 - Temporary Assistance to Needy Families/Aid to Families with Dependent Children (TANF/AFDC)

Continued.....

Assignment of Child Support

- Railroad Retirement Board administered pensions
- Veterans pensions and assistance
- Federal employee retirement pensions
- Social Security Title II and SSI payments
- Private pensions under ERISA

Special Needs Planning in Divorce: Preserving Disability Benefits

Marisa W. Higgins

Fletcher Tilton PC

(508) 459-8041

mhiggins@fletchertilton.com

OVERVIEW

- When settling alimony, child support and property division on behalf of clients with disabilities or with disabled children, it is imperative for attorneys to advocate options which will minimize countable income and resources and thus maximize the amount of needs-based benefits to which their clients may be entitled.

Determining Monthly SSI Benefit for a Child Under 18

- When determining a child's monthly SSI benefit (under 18 years of age), one-third of the child support payment received is excluded from countable income.
- The remaining child support payment is subject to a \$20 income exclusion.
- The balance reduces the child's monthly SSI benefit dollar for dollar.

Determining Monthly SSI Benefit for a Child Under 18 (continued)

- The example below shows how child support payments are counted for a child under 18 who has no other income. For purposes of this example, we will assume the child support payments equal \$450 per month.

Monthly benefit rate for 2012	\$698
Monthly child support	\$450
Minus 1/3 of the child support payment	\$150
Minus \$20 general income exclusion	\$ 20
Total countable income	\$280
SSI benefit (\$698-\$280)	\$418
Total Income available to the child (\$450 + \$418)	\$868

Determining Monthly SSI Benefit for a Child Over 18

- However, once the child is 18, the receipt of child support (which is considered “unearned income” to the child) will result in a dollar for dollar reduction in SSI.
- If the child support paid is greater than the current SSI , the child will not only lose the SSI but also lose eligibility for Medicaid.

Determining Monthly SSI Benefit for a Child Over 18 (continued)

- The example below shows how child support payments are counted for a child over 18 who has no other income. For purposes of this example, we will assume the child support payments equal \$800 per month.

Monthly benefit rate for 2012	\$698
Monthly child support	\$800
Minus the child support payment	\$800
Minus \$20 general income exclusion	\$ 20
Total countable income	\$780
SSI benefit	\$0

How to Avoid Child Support Payments Being Deemed Unearned Income by SSI

- **Option #1**

- ❖ If the child support is court ordered and the right to the child support is irrevocably assigned to a properly drafted OBRA '93 trust for the child, the child support will not be a resource and the monthly receipt by the trust will not be counted as income to the child (POMS § SI 01120.200).
- ❖ The child support paid into the trust must be used to supplement, but not supplant, those government benefits to which the child is entitled by virtue of his/her disability.

How to Avoid Child Support Payments Being Deemed Unearned Income by SSI

(continued)

- **Option #2**

- ❖ In lieu of direct child support, the payor parent could make payments directly to vendors or creditors on the child's behalf in an amount equal to his/her child support obligation.
- ❖ Such payments could include expenditures for entertainment, recreational activities, vacations, education, transportation, or long term care insurance.

How to Avoid Alimony Payments Being Deemed Unearned Income by SSI

- Alimony paid to a disabled spouse is “unearned income” (POMS SI 00830.418) and, after the general income disregard of \$20, will result in a dollar for dollar loss of SSI and may render the disabled spouse ineligible for Medicaid or SSI.

How to Avoid Alimony Payments Being Deemed Unearned Income by SSI

(continued)

- Under current regulations, SSI will not count the value of alimony received as unearned income if it is not received in the form of a cash payment.
- The non-disabled spouse could agree to pay the same amount each month in the form of goods and services.
- If the goods and services received are considered exempt resources by SSI, there will be no reduction in the SSI benefit.
- If the goods or services received include payment of basic shelter expenses such as rent or mortgage, this will result in as much as a one-third (1/3) loss of SSI. (POMS SI 00835.300)

How to Avoid Alimony Payments Being Deemed Unearned Income by SSI

(continued)

- An alternative would be for the alimony to be assigned to an appropriately drafted special needs trust.
 - ❖ Alimony payments paid directly to a trust as a result of a court order are not considered unearned income for SSI purposes.
 - ❖ If the alimony payments are irrevocably assigned to the trust, the payments are not counted as income for SSI purposes. (POMS SI 01120.200G).

Property Division and SSI Eligibility

- Under SSI rules, the following are excluded resources for purposes of determining SSI eligibility
 - ❖ the principal residential home, regardless of value
 - ❖ the proceeds from the sale of a home if they are intended to be used and are, in fact, used to purchase another home, which is similarly excluded, within 3 months of the date of receipt of the proceeds
 - ❖ One automobile, regardless of value if it is used for transportation of SSI recipient or a member of the household
 - ❖ Household goods, regardless of value, if they are items that are found in or near the home that are used on a regular basis
 - ❖ Personal effects, regardless of value, if they are items of personal property normally worn or carried by the individual. Such personal property includes, books, jewelry, musical instruments, etc...

How to Avoid Exceeding SSI's Resource Limit When Dividing Property Upon Divorce

- Creatively divide assets to provide SSI recipient with exempt resources, such as the residence and automobile.
- Assets received by SSI recipient, including proceeds from the sale of a house and funds received after cashing out retirement assets may be placed in a properly drafted OBRA '93 trust.

Questions/Answers

Elder Law & Special Needs Practice Group

"A Commitment that Lasts a Lifetime"

Fletcher Tilton PC

www.flechertilton.com

Frederick M. Misilo, Jr.

(508) 459-8059

fmisilo@flechertilton.com

Marisa W. Higgins

(508) 459-8041

mhiggins@flechertilton.com