

The Divorce Case Involving Children with Special Needs

Areas to Consider When Constructing a Matrimonial Settlement Agreement

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Children with special needs may qualify for and receive much-needed government benefits. As matrimonial attorneys, first we need to determine if the matter involves a child with special needs. This can be achieved in an initial consultation by asking the right question: Do any of the children have special needs? However, that question alone may not suffice, as some parents may not consider their child as disabled or having "special needs." Ask follow-up questions such as: Do any of the children have any learning disabilities or problems in school? Is there an individualized education program (IEP) in place for any child? Do any of the children have physical impairments, hearing or vision problems, psychological issues, autism spectrum disorders, etc.? Asking a variety of questions is better, since some parents may not know or think their child has special needs.

Once it has been determined the matter involves a child with special needs, the issue must be examined thoroughly. This article will discuss and explain some of the prominent government benefits, and will provide a critical analysis of the important issues. The article also will offer practical tips and considerations when dealing with a divorce involving a child with special needs.

The goal of the divorce lawyer handling a case involving a child with special needs should be to

effectuate settlement or final resolution without disrupting government benefits that may be available to a child. The *problem* is that resolving many divorce issues the traditional way may detrimentally affect a child's eligibility to benefit from government programs. For example, resolving support issues the conventional way, by paying outright child support payments to a former spouse, will trigger the disabled child's ineligibility for 'means-tested' programs. The reason is that although child support is paid to a custodial parent, it is considered to be an asset of the child for purposes of determining eligibility for means-tested governmental programs.¹

The *solution* is to have the final settlement agreement direct that funds that would otherwise be considered child support be paid into a special needs trust in order to avoid disqualifying the child from government benefits. This is a solution because child support payments paid directly to a special needs trust are not considered income to the child.²

The above is one of many considerations that surface when dealing with a divorce affecting a child with special needs. This article will examine special needs trusts and supplemental benefits trusts and explain how their use can aid in settling the divorce case while not disrupting any government benefits available to the child with special needs.

PUBLIC ASSISTANCE PROGRAMS AND POTENTIAL PROBLEMS

The state and federal governments offer several programs designed to assist special needs individuals, including Supplemental Security Income (SSI) and Medicaid. Special needs children may be eligible for SSI and Medicaid. As SSI and Medicaid are means-tested programs, payment of child support, obtaining private health insurance coverage, or payment of life insurance proceeds to a disabled beneficiary can disqualify the beneficiary from receiving these valuable government benefits.

SSI is a federal welfare program that provides the recipient with a monthly cash benefit to cover basic needs, such as food and shelter.³ In 2011, the maximum SSI benefit for a New Jersey resident is \$705.25 per month.⁴ To be SSI-eligible, a person must have little or no income,⁵ and his or her countable resources may not exceed \$2,000 (excluding the person's house, car and prepaid funeral contract).⁶ Parental income and resources are deemed available for children under 18 who reside with the parent.⁷ In New Jersey, all SSI recipients are automatically eligible for Medicaid.⁸

The New Jersey Child Support Guidelines presume that every dollar of child support is broken down into 38 percent for fixed costs such as housing, 25 percent for controlled costs such as clothing, and 37 percent for variable costs such

as transportation and food.⁹ Those are the same 'basic needs' covered by SSI. There also is an assumption that the custodial parent always has responsibility for the controlled costs, and that the variable costs move with the child.

Payment of child support the conventional way, directly to a parent, will diminish a child's SSI benefits. This can be illustrated as follows: When determining a child's monthly SSI benefit, program rules under the Social Security Act exclude from countable income one-third of the monthly child support payment. The remaining child support payment is subject to a \$20 general income exclusion. The balance reduces the child's monthly SSI benefit dollar for dollar. For example, if a minor child who receives SSI also receives \$600 per month in child support, the \$600 is reduced by one-third, to arrive at \$400. The \$400 figure is further reduced by the \$20 general income exclusion, resulting in total countable income of \$380. In this example, the child's SSI monthly benefit would be reduced by \$380 due to receipt of the \$600 in monthly child support. However, with proper planning, there is a way to retain all the governmental benefits.

Medicaid covers a broad range of services, including coverage for hospital stays, community-based healthcare and nursing services with no deductibles, co-payments or coverage limits.¹⁰ To qualify for Medicaid, an applicant must be determined to be financially eligible via a means test. The means test looks at the applicant's monthly income and available resources. Generally, to qualify for the highest level of benefits, under the Medicaid Only program, an individual's monthly income may not exceed \$2,022 (in 2011) and countable resources may not exceed \$2,000.¹¹ Under the Medically Needy program, a lower level of benefits is available for individuals who have a monthly income exceeding \$2,022 (in 2011) but whose resources do not exceed \$4,000.¹² Under the

Community Care Waiver program, Medicaid can waive the qualification rules if a child has profound medical needs that would require institutionalization if the child did not receive Medicaid.¹³

An additional government benefits program is Social Security Disability (SSD), which, unlike Medicaid and SSI, is not means-tested. SSD provides a monthly cash benefit to a person who became disabled prior to age 22, and is based on the earnings record of the person's retired or deceased parent.¹⁴

New Jersey has a separate program through the Division of Developmental Disabilities (DDD), which provides day and residential services to people with developmental disabilities originating prior to age 22.¹⁵ DDD requires contribution of income to an individual's care and maintenance for residential services only; otherwise all other support services are fully subsidized by the state.

ESTATE AND TRUST PLANNING— THE SOLUTION

One priority of a divorcing parent of a special needs child should be to revise his or her estate plan and to update beneficiary designations on retirement accounts and insurance policies. Any gifts or bequests to a special needs child should be directed to a supplemental benefits trust rather than outright to the child or into an ordinary trust. Properly drafted trusts can hold assets, including child support, insurance proceeds and inheritance, for the disabled child's benefit, while ensuring that such assets will not be counted as available resources that would disqualify the child from means-tested benefits such as Medicaid and SSI.

A supplemental benefits trust (sometimes called a third-party special needs trust) is an excellent vehicle to hold lifetime gifts or inheritance from parents, grandparents and other family members, life insurance benefits and retirement plan benefits. A special needs trust (also called a first-party special

needs trust) is needed to hold child support payments and any other assets owned by the child. Because the supplemental benefits trust is created by and funded with the assets of a third party, upon the death of the disabled child, there is no payback provision as there is with a special needs trust.

The special needs and supplemental benefits trusts complement government benefits programs and allow parents to use support traditionally found in the divorce settlement to provide for more quality-of-life expenditures for a special needs child. An estates and trusts attorney with knowledge of special needs planning issues should be retained to draft the special needs and supplemental benefits trusts. These can be drafted as standalone trusts or can be incorporated into matrimonial settlement agreements utilizing a Callahan trust.¹⁶

Often, children with special needs require special therapy or extracurricular activities to help them thrive and achieve the most they can despite their disability. These 'extras' can be costly. The assets contributed to these trusts can be spent on extra therapies such as elective surgery, dental care, supplemental medical insurance, transportation, recreation, and other enhancements to the child's life, such as summer camp, airline tickets for travel, sporting events, concerts, electronics/video games, sporting equipment (such as trampolines), sport shoes (such as golf/bowling shoes), bowling balls, basketballs, tennis equipment, swimming or horseback riding lessons, supplies for hobbies and interests, and grooming. Since these extras are not specifically provided for by any government benefits, as they are not 'basic needs,' they may be paid for with trust assets without affecting a child's governmental benefits.

Special Needs Trust

Federal and state law authorize an exception to the Medicaid, SSI and DDD asset availability rules for

transfers made to a special needs trust. In order to qualify as a special needs trust, the trust must be established for the benefit of an individual who is disabled and under 65 years of age; it must be established by a court, or the parent, grandparent or legal guardian of the disabled individual; the trust must be funded with assets of the disabled individual; and the trust must be irrevocable.¹⁷ In addition, the trust is required to contain a 'payback' provision, which states that upon the death of the beneficiary any governmental agency that has a valid right of recovery may claim the remaining assets in the trust up to an amount equal to the value of the total benefits paid to or on behalf of the beneficiary.¹⁸

Because outright child support payments to a former spouse may trigger the disabled child's ineligibility for means-tested programs, the matrimonial settlement agreement should direct that child support payments be made to the special needs trust. As the disabled child will be the sole beneficiary of the trust and the custodial parent will serve as trustee, the support monies will be used for the child without disqualifying him or her from benefits. Also, the matrimonial settlement agreement should memorialize the parties' understanding that the child support paid into the trust might not be used entirely each month and could accumulate, but that such accumulation should not be used by the payer as a basis to seek reduction of child support payments in the future.

The special needs trust generally provides that the trustee has complete discretion to distribute trust income and principal to or for the sole benefit of the child to provide for his or her supplemental care and support. The trustee must give notice to Medicaid when a distribution in excess of \$5,000, or representing a significant portion of trust assets, is to be made to the child or for his or her benefit.¹⁹ Upon the child's death, the trust will termi-

nate, and any governmental agencies which at that time have a valid right of recovery will be entitled to reimbursement from the trust proceeds for amounts expended on behalf of the child.²⁰ To the extent the trust funds exceed any such reimbursements, or if no reimbursements are required, the trust property may be distributed pursuant to the will of the disabled individual, if he or she has the capacity to make a will. If the individual does not have the capacity to make a will, or does not have one, then any remaining funds would be distributed under the laws of intestacy of the state where the child resides at the time of his or her death.

Supplemental Benefits Trust

A supplemental benefits trust, also sometimes called a third-party special needs trust, is designed to receive lifetime gifts or inheritance, including life insurance proceeds, from a divorcing parent or any other person, such as grandparents or other family members, made for the disabled child's benefit. Gifts or inheritances the child receives outright could trigger his or her ineligibility for government benefits. Instead, gifts or inheritances made to the trust may then be paid or applied in the discretion of the trustee to or for the child's benefit to provide for his or her supplemental care and support without jeopardizing benefits eligibility.

Life Insurance is frequently used in a matrimonial settlement agreement to secure the child support obligation of a parent in the event of that parent's untimely death. Naming a disabled child as a beneficiary of the life insurance policy can trigger the termination of means-tested government benefits and claims for reimbursement by the agencies providing services. Accordingly, divorcing parents should have a supplemental benefits trust in place prior to finalizing the matrimonial settlement agreement, which should direct that the insurance proceeds be paid directly to that trust. In this case, the benefi-

ciary designation for life insurance must name the trust as the life insurance beneficiary.

Private healthcare insurance coverage through a parent's benefit package might duplicate the coverage of a child already receiving Medicaid, thereby jeopardizing the special needs child's Medicaid coverage. The matrimonial settlement agreement can provide that if a child is receiving Medicaid, whatever funds were to be spent to obtain private insurance coverage be directed into the child's supplemental benefits trust for extra needs, such as a private room, VCR, vacations, a computer, vitamins, therapeutic treatments or therapies, experimental procedures, private-duty nursing care and private companion services. When drafting the settlement agreement, the practitioner should not indicate that the contribution of funds is in lieu of insurance coverage, but rather, should state, for example, "Homer Simpson shall contribute \$10,000 annually no later than December 31st of each year to the then-serving trustee of the Bart Simpson Supplemental Benefits Trust under agreement dated November 1, 2010, to be administered consistent with the terms thereof."

Divorcing parents also should execute new wills directing that any assets passing to the disabled child upon the parent's demise be distributed to the supplemental benefits trust. Each parent should review the beneficiary designations on retirement accounts, such as individual retirement accounts (IRAs) and qualified retirement plans, to be sure the supplemental benefits trust, and not the child, is named as beneficiary of the plan.

Since a supplemental benefits trust is funded with assets owned by third parties and not assets of the child, there is no requirement that the trust pay back any government benefits on the death of the disabled beneficiary. The parent or parents creating the trust can direct that upon the disabled child's death, any trust assets not expend-

ed on the child's care during his or her lifetime will be paid upon his death to the child's descendants, if any, or otherwise to the child's siblings, other family members, or even to charities. If the divorcing parents cannot agree on the contingent beneficiaries of the supplemental benefits trust, then separate trusts should be established.

GUARDIANSHIP

For a child whose disability is likely to preclude him or her from making important decisions upon reaching age 18, the divorcing parents should consider which parent, if not both, will become the child's guardian. Depending on the extent of the disability, the child may require the appointment of a general or limited guardian.²¹ A general guardian is appointed if the individual is incapacitated, meaning without the ability to govern himself or herself, or manage his or her own affairs.²² A general guardian has the legal responsibility to make decisions regarding healthcare, welfare, finances, living situation and other reasonable areas of concern. A limited guardian is appointed if the individual is incapacitated and lacks the ability to do some, but not all, of the tasks necessary to care for himself or herself, such as manage his or her finances, or make medical decisions.²³ A guardian can be a parent of a special needs child, another family member or a third party.

The matrimonial settlement agreement should memorialize who will be responsible for becoming the guardian of the special needs child upon reaching 18 years of age, and who is responsible for paying the legal fees and costs associated to appoint the guardian. For example, the settlement agreement might state the following: "The parties anticipate that their daughter Maggie Simpson will not be a competent adult. The parties agree that prior to Maggie reaching age eighteen, Marge Simpson will commence proceedings in the Superior Court of New Jersey to have Maggie judicially declared incapacitated

and to have Marge appointed general guardian of the person and property of Maggie. The parties will split the cost of the attorneys' fees and court costs related to such proceeding, with each party contributing fifty percent of such fees and costs."

The divorcing parents also should nominate guardians of the disabled child in their wills, in the event either or both parents pass away while the child is a minor or an incapacitated adult.

The custodial parent should draft a letter of intent or letter of instruction for a future guardian. The letter holds no legal authority, but in the best interests of the special needs child it should list factual information about the child such as educational and medical history, location of vital records, their aspirations for the child (*i.e.*, goals and living arrangements), and day-to-day information such as bedtime rituals. The letter also should list contact information for the child's doctors, regularly scheduled appointments, medications, results of testing, routines and any other important healthcare or personal information about the child.

EDUCATION AND CUSTODY

Federal law provides that children ages three to 21 with disabilities affecting their learning are entitled to special education services at no cost to parents.²⁴ In New Jersey, local school districts are responsible for special education, with the oversight of the New Jersey Department of Education.²⁵ Federal law provides that each child must receive a program that meets his or her unique needs, and school districts must develop a written individualized education program (IEP) that includes goals and details of services to be provided.²⁶ A copy of the child's IEP will provide information about the child's diagnosis and therapies, and is crucial to the custody case.

In situations of divorce or separation, disputes may arise as to which school district is financially

responsible for educating a special needs child. Such disputes can lead to a disruption in educational and busing services for the child, or may cause an issue when one school district seeks reimbursement from another school district for educational costs and services. The resolution of this issue centers on the child's "domicile."²⁷ Parents can agree on the best school district to educate the child. Such an agreement should be memorialized in the matrimonial settlement agreement by use of a provision stating that the residential parent will not move out of the district absent mutual consent.

Traditionally, a child's domicile is that of his or her parents.²⁸ Problems arise when a special needs child resides in two different towns because of divorce or separation. New Jersey courts have provided guidance on the domicile of a special needs child when his or her parents are divorced. A special needs child is domiciled in a school district of his or her parent who has residential custody, regardless of whether the child lives with that parent or in a group home in another district.²⁹ In a joint custody situation, when a special needs child lives with each parent on alternating weeks, the two districts are required to equally contribute to the child's educational costs.³⁰

Family law attorneys need to take into consideration educational services and school district responsibility for those services when negotiating and finalizing custody and parenting time arrangements in matrimonial settlement agreements. A special needs child may need to be in the primary residential care of one parent over the other based on the school district paying for the educational services. Custody evaluators, if any, should be provided with this important information so that it may be considered as a factor in their evaluation. This may also be a factor to consider in allowing one parent to remain in the former marital home and basing support accordingly.

DISCOVERY PROCESS

Often in a family with a child that has special needs, one of the parents has more information than the other regarding medical conditions, benefits information, etc. In preparation for settlement negotiations leading to the finalization of a matrimonial settlement agreement, it is important to obtain from the other party detailed information concerning the government benefits and programs for which a special needs child is eligible or is receiving benefits. The discovery process should focus on these areas prior to resolving support. Below is a list of sample discovery questions to include for cases with special needs children.

1. Itemize and identify any and all government programs in which the special needs child is eligible and/or is receiving benefits, including:
 - Name of the program;
 - Name of government agency administering the program;
 - Benefits provided by the program; and
 - Eligibility requirements and restrictions of the program.
2. Please produce any and all documents related to the programs and benefits.
3. Itemize and identify all education and related services, including but not limited to, schools, day care, after-school care, busing, camps, and any other educational programs in which the special needs child is eligible/and or is receiving benefits, including:
 - Name of educational program or service and a copy of the IEP, if applicable;
 - School district or agency responsible for or administering the program;
 - Benefits provided by the program; and
 - Eligibility requirements and restrictions of the program.
4. Please produce any and all documents related to the programs and benefits.

3. Itemize and identify any and all prescription and over-the-counter medications of the child, including brands and dosages, medical devices used by the child and other therapies.
4. Itemize and identify any and all sources of income or assets of the special needs child.

CONCLUSION

As a family law practitioner, it is imperative to ascertain whether a matter involves a child with special needs and to understand government benefits available to a special needs child when negotiating and drafting a matrimonial settlement agreement. It may be wise to seek assistance from a professional who can assist with the estate and disability planning issues that arise. By failing to do so, the special needs child may be rendered ineligible to receive public assistance benefits and his or her educational programs and benefits may be disrupted. If you represent a parent of a special needs child, stop and think about the benefits the child is entitled to (or may be entitled to in the future) and how to preserve those benefits, *before* the parties enter into a matrimonial settlement agreement. ■

ENDNOTES

1. POMS SI 01120.200(G)(1)(d); POMS SI 01120.201(C)(2)(b).
2. *Ibid.*
3. 42 U.S.C. 1381 *et seq.*
4. 42 U.S.C. 1382f(a); 74 Fed. Reg. 55,614 (Oct. 29, 2009); SSA Publication No. 05-11148.
5. 42 U.S.C. 1382(a)(1); 74 Fed. Reg. 55,614 (Oct. 28, 2009).
6. 42 U.S.C. 1382b(a); 20 C.F.R. 416.1205(c); 20 C.F.R. 416.1210. UGMA accounts and §529 college savings plans in the disabled child's name are considered assets of the child and are countable assets that could disqualify the child from meeting the means-tests of SSI and Medicaid. Be sure to ask your client if his or her special needs child has either type of account.

7. 20 C.F.R. 416.1202.
8. 42 U.S.C. 1396k(a); 42 C.F.R. 435.610. If the child receives \$1.00 of SSI, he or she qualifies for Medicaid.
9. New Jersey Court Rules, Appendix IX-A(14)(g)(1), (2011).
10. 42 U.S.C. 1396 *et seq.*; N.J.S.A. 30:4D-1 to 52.
11. 74 Fed. Reg. 55,614 (Oct. 28, 2009).
12. 42 U.S.C. 1396(a)(10)(C); 42 C.F.R. 435.310(a).
13. 42 U.S.C. 1915(c).
14. 42 U.S.C. 402(d); 20 C.F.R. 404.350.
15. N.J.S.A. 30:6D-1 *et seq.*
16. 142 N.J. Super. 325, 330 (Ch. Div. 1976).
17. 42 U.S.C. § 1396p(d)(4)(A); N.J.S.A. 3B:11-36; N.J.A.C. 10:71-4.11.
18. *Ibid.*
19. 42 U.S.C. § 1396p(d)(4)(A); N.J.S.A. 3B:11-36; N.J.A.C. 10:71-4.11.
20. *Ibid.*
21. N.J.S.A. 3B:12-24.1.
22. N.J.S.A. 3B:12-24.1(a).
23. N.J.S.A. 3B:12-24.1(b).
24. 20 U.S.C. 1400 *et seq.*
25. N.J.A.C. 6A:14-1.1 *et seq.*
26. 20 U.S.C. 1414(d)(1)(A).
27. N.J.S.A. 18A:1-1.
28. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48, 109 S. Ct. 1597, 1608, 104 L.Ed.2d 29, 46 (1989).
29. *Roxbury Bd. of Ed. v. West Milford Bd. of Ed.*, 283 N.J. Super. 505, 521-22 (App. Div. 1995), *cert. denied*, 143 N.J. 325 (1996); *West Windsor Bd. of Ed. v. Delran Bd. of Ed.*, 361 N.J. Super. 488, 502, (App. Div. 2003), *cert. denied*, 178 N.J. 454 (2004); N.J.S.A. 18A:7B-12.
30. *Somerville Bd. of Ed. v. Manville Bd. of Ed.*, 332 N.J. Super. 6, 17 (App. Div. 2000), *affirmed*, 167 N.J. 55 (2001).

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