



Monthly Newsletter

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## Special Needs Planning Issues Following Divorce

Divorce can be complicated, frustrating, disappointing, expensive, along with a whole range of other emotions, as anyone who has endured this type of proceeding can attest. As difficult as the issues can be in a divorce proceeding, can you imagine what happens when divorce involves a child with a disability?

This issue of *The ElderCounselor*<sup>™</sup> focuses on one case study to illustrate how much more difficult the issues can be when a child with a disability is involved in the marital split, and how important it is to have someone knowledgeable in government benefits and special needs planning issues participate in the proceedings

### The Facts

Consider the following situation: Husband and wife divorce in 1996, when their child, who is disabled, was 4 years old. The husband was ordered to pay approximately \$2,800 per month in child support (considered to be about three times an ordinary child support order based upon his assets and income) for the life of the child. While it is unusual to see lifetime child support payments, and the award was larger than is customary, the husband agreed to this primarily because of the guilt he felt around the divorce. He also knew that his daughter was disabled and would require as much help as possible.

Fourteen years later, in 2010, the daughter turns 18 years old. The husband has since remarried and had another child. He feels he can no longer continue to make child support payments at the current level, and in fact his current wife now assists him in making these payments each month.

The husband wishes to seek a modification of the child support award, and he hires the attorney that handled his divorce years earlier to file the court papers seeking a downward modification of child support payments. The theory behind seeking this downward modification of child support payments is twofold. First, the husband would like to argue that since his daughter has just turned age 18, she can now qualify for Supplemental Security Income (SSI) benefits. Second, his daughter could receive services through a Medicaid waiver program, but her income from the child support payment could prevent her from qualifying. Therefore, the husband would like to know if establishing a court-ordered special needs trust to receive the child support payments would protect the child support payments from being counted as income to the daughter.

### **Can the Daughter Qualify for SSI?**

During the course of the proceedings, the wife appears to be the only person testifying as to the question of whether her daughter can qualify for SSI benefits and the utility of creating a special needs trust for her daughter. According to the wife, her daughter cannot qualify for SSI benefits due to the so-called deeming rules, pursuant to which a parent's income and assets are deemed to be available to the child for purposes of determining the child's eligibility for SSI benefits. The husband argues that the wife should apply for SSI for their daughter, but she refuses to do so, citing the deeming rules as an obstacle to her daughter's eligibility, and arguing that her own work income and \$400,000 in assets will result in a denial of eligibility.

Without expert testimony, the court may have determined that the daughter was not eligible for SSI benefits, based solely on the testimony of the wife, who had apparently "done her own research on the issue." In fact, the deeming rules stop when a person turns age 18 under CFR Sections 416.1165 and 416.1851, and their daughter could qualify for an SSI benefit of up to \$674, plus any additional state supplement. With this testimony now on the record, the husband is able to argue, credibly, that his daughter is entitled to a monthly SSI benefit of \$761 and, if she were to avail herself of this benefit, then this increased income should be taken into account by the court in evaluating husband's request for a downward modification of the original child support payment.

### **Can a d4A Trust Hold the Daughter's Income?**

The second major issue in this case pertained to the daughter's income surplus for Medicaid purposes. As a Medicaid recipient, daughter's income (solely in the form of child support payments she received from her father) could have prevented her from receiving Medicaid benefits as an adult. The husband wanted the court to order the creation of a self-settled special needs trust under 42 USC Section 1396p(d)(4)(A) (often referred to as a "d4a trust"), and have the child support payments irrevocably assigned into the newly established trust, thereby eliminating any surplus income.

Unfortunately, the husband and wife could not agree on the establishment of a d4A trust. The wife questioned whether such a trust could legitimately receive child support payments. She also testified that she may move to a different state to be with family, and that such a move would require a payback to the first state, reducing available trust funds that would be needed to care for her daughter. What the wife didn't realize was that under the Social Security Program Operations Manual System (POMS) Section SI 01120.200G(1)(d), an irrevocable assignment of child support payments (i.e., as a result of a court order), is not income for SSI purposes, and therefore would not count for purposes of determining daughter's SSI or Medicaid eligibility, or the amount to be received under either program.

In addition, there is no such requirement for payback when a Medicaid recipient and d4a trust beneficiary moves from one state to another, a point that was made through expert testimony. The only time payback to any state would be required is when the disabled daughter dies.

### **The Lesson Learned**

The issues in the case study above make it clear that when a child with a disability becomes part of a divorce proceeding, difficult issues arise that warrant the expertise of elder law and special needs planning attorneys. Matrimonial or family law attorneys will very likely not possess the expertise needed to address these issues.

Please contact us if you would like additional information on any of the topics addressed in this newsletter or if you would like to discuss a specific issue.

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