

How to Plan for a Special Needs Spouse or Child During a Divorce

By Gary E. Vegliante and Alina Vengerov

A number of studies have shown that the probability of a divorce is substantially higher in a family where a spouse or a child has special needs. That being said, many factors must be taken into consideration when going through a divorce, particularly what sort of effect spousal support and/or child support may have on the disabled spouse's or disabled child's eligibility for government benefits.

In a family where a spouse or a child has a disability and the parties choose to enter into a settlement agreement, the agreement must be structured in such a way that takes into account the current or potential need for government benefits. Otherwise, the disabled spouse or disabled child may find himself in a worse financial position than previously realized.

In awarding or denying government benefits based on need to a disabled person, the government takes into account the person's income and resources. When a spouse in a divorce action contracts to receive spousal support, the government counts that support as unearned income, potentially rendering the spouse ineligible for benefits like home care or nursing home Medicaid benefits, or Supplemental Security Income. Similarly, if the spouse is set to receive a large lump sum under a settlement pursuant to the equitable distribution guidelines, such an award could put the spouse over the resource limit for Medicaid or SSI, again rendering the spouse ineligible for those benefits. Such ineligibility could certainly be devastating for a spouse who is unable to be self-supporting without that government assistance.

Supplemental Security Income, or SSI, is a program that provides stipends for low-income individuals who are either over the age of 65, or are blind or disabled. Commonly confused with Social Security, SSI is paid from U.S. Treasury, not the Social Security trust fund. Because SSI is a means-tested program, there are financial guidelines which must be met in order for an applicant to be eligible to receive SSI. In order for an individual to be eligible for SSI benefits, they must have no more than \$2,000.00 in resources in their name, or \$3,000.00 for a couple.

Medicaid, also a means-tested program, provides healthcare coverage for people who meet the income and resource eligibility guidelines. If an individual is eligible for SSI benefits, they automatically qualify for Medicaid as well. Otherwise, in order to be eligible for Medicaid, an applicant/recipient may have up to \$14,850.00 in assets, not including IRAs or other retirement assets, and up to \$825.00 in monthly income, including IRA, pension,

and Social Security distributions. Both Medicaid and SSI eligibility guidelines are modified annually.

When it comes to a disabled child who is caught in the middle of his parents' divorce, any child support payments received on behalf of the child under the age of 18 will actually reduce his SSI benefits by as much as one-third. When the child reaches the age of majority, the government then counts the child support as unearned income and reduces the child's SSI check dollar for dollar for the amount of child support. If the child support is greater than the maximum allowable SSI payment, the child loses his eligibility for SSI and, may even lose eligibility for Medicaid. Medicaid provides an adult disabled child with adult services and as such, is imperative for an adult child who ages out of the public school system. Losing eligibility for Medicaid after the child ages out of the public school system is disastrous because without it, the adult child will have no way of receiving necessary services.

What are some ways to work around this problem? As far as child support goes, the parties' agreement can stipulate that child support will take the form of direct payment for things like child care, therapy, private school tuition, additional personal care, cable TV, and the like. Another alternative is for the settlement agreement to provide for the set-up of a Qualified Supplemental Needs Trust. Establishing a Qualified Supplemental Needs Trust requires that the person who will benefit from the trust meets the definition of "disabled" pursuant to 42 U.S.C. Sec. 1382(a)(3). In order to draft a Qualified Supplemental Needs Trust, an attorney must have knowledge of trust law, tax law, Medicaid and Guardianship Law.

What is a Supplemental Needs Trust? Essentially, a Supplemental Needs Trust is a trust that is created in order to provide supplemental products/services to a disabled individual receiving a "means-tested" public benefit, such as Medicaid and SSI. For a Supplemental Needs Trust to be effective, assets that are held in the trust must not be available to the beneficiary directly, meaning that the beneficiary cannot personally withdraw or pay out the funds of the trust. Instead, those funds must be paid out by the trustee. The trust must state that it was created to enhance, **not supplant**, public benefits (NYS E.P.T.L. 7-1.12). Finally, as stated earlier, the beneficiary of the trust must be "disabled."

How may the funds of a Supplemental Needs Trust be used? Because Supplemental Needs Trusts must supplement, and not supplant, government benefits, the trust funds may not be used to pay for anything which might be paid for by or included in the governmental benefits

that the disabled individual is receiving. If the beneficiary is receiving Medicaid, then the Supplemental Needs Trust cannot pay for any medical services which might be covered by Medicaid. Consequently, most other purchases which would go towards the benefit of the beneficiary, such as home repairs or renovations that benefit the beneficiary, utilities and other bills, clothing, groceries, and oftentimes even vacations, may be paid for by the funds held in a Supplemental Needs Trust.

There are three general types of Supplemental Needs Trusts: First Party (or Self-Settled) Trusts, Third Party Trusts, and Pooled Income Trusts. The determination of which trust must be used relies heavily on where the funds that are being placed into the trust come from. A First Party Supplemental Needs Trust must be created by the disabled individual, through a parent, grandparent, the Court, or a legal guardian. A First Party Trust must be used when the funds being deposited into the trust are legally titled to the disabled individual. With regards to a divorce action, if a spouse wants to place funds from a large lump sum settlement into a Supplemental Needs Trust, he or she would need to create a First Party Supplemental Needs Trust, because those funds would be legally titled to her. One downside to First Party Supplemental Needs Trusts is that if there are any funds left in the trust when the beneficiary passes away, those funds must be left to Medicaid in order to help pay back funds expended on the beneficiary's care.

A Third Party Supplemental Needs Trust is appropriate when the funds being used to create the trust are not legally owned by the beneficiary prior to funding the trust. A common example is when a parent passes away and wants to leave a large inheritance to a disabled child, without diminishing his or her government benefits. In that instance the parent may create a Third Party Supplemental Needs Trust in his or her last will and testament, in order to leave money to their disabled child without threatening a loss of crucial benefits. This option could also be utilized in situations where a divorcing couple has a disabled child, as referenced earlier. The parents could create the trust for the benefit of the disabled child, and fund the trust with child support payments made monthly, quarterly or yearly. The biggest benefit of a Third Party Supplemental Needs Trust, as compared to a First Party Trust, is that with a Third Party Trust, there is no payback to Medicaid. This means that the beneficiary may name a successor beneficiary to receive the funds after the first beneficiary passes away.

Lastly, a Pooled Income Trust is a more specified trust, which is utilized only for capturing the excess income of home care (or "Community") Medicaid recipients. Under

the Medicaid rules, a recipient of Community Medicaid benefits is only allowed to receive \$845/month, with any excess income being paid back to Medicaid to contribute to the recipient's cost of care. As an alternative, a Community Medicaid recipient may create a Pooled Income Trust and automatically debit any excess income over the \$845 threshold into the Pooled Income Trust. The funds of the trust can then be used to pay for anything which benefits the Medicaid recipient, and is not paid for by Medicaid. All Pooled Income Trusts are managed by a third party charitable organization. Once the Medicaid recipient passes away, any money left in the trust stays with the charity which manages the trust. For this reason, it is highly encouraged that Pooled Income Trust beneficiaries use those trust funds as much as possible and do not allow a large balance to accrue. While this may sound like a serious detriment to Pooled Income Trusts, one must consider that: (a) without the Pooled Income Trust, those funds would have been lost to Medicaid to begin with; and (b) being able to utilize those excess funds can sometimes be the difference between a Medicaid recipient living a satisfying life at home, and having to move into a nursing home due to not having sufficient funds to remain in the community. As we all know, \$845 a month is not a lot to live on in New York.

Supplemental Needs Trusts are becoming more and more prevalent, and rightfully so. In the correct circumstances, a Supplemental Needs Trust can be an incredibly affective tool for safeguarding assets. Whether it is Medicaid planning, asset protection, child support payments, divorcing a disabled spouse or even personal injury settlements, a Supplemental Needs Trust could be the difference between just getting by and living a more enriched, fulfilled life, and that is a goal that everyone should strive for.

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