

# **Family Law and Special Needs Issues**

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**NYSBA ELDER LAW & SPECIAL  
NEEDS SECTION  
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**FAMILY LAW AND SPECIAL NEEDS  
ISSUES**

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**BASIC FACTS**

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**Half of all marriages in America end in divorce.**

**Percentage increases when there is a child with disabilities.**

**Children with special needs require extra attention.**

**Unintended consequence is additional pressure in a marriage.**

**Stress of coping with the special needs of a child can:**

- **Draw the couple closer together**
- **Pull them apart**

## **ISSUES AFFECTED BY A CHILD WITH SPECIAL NEEDS**

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**Custody and time sharing**

**Child Support**

**Alimony**

**Private education**

**Health Insurance**

**Emancipation**

**Life Insurance**

**Dependency Exemptions**

**Equitable Distribution**

## **EDUCATING THE CLIENT**

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**Identify the special needs of the child**

**Try to project into the future**

**Discuss the divorce process and how the special  
needs of the child may be affected**

**Governments Benefits**

**Child Support**

## IMPORTANT DEFINITIONS

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**CHILD** – an individual who is under 18, or under 22 attending school regularly who is not married or head of household (POMS SI 00501.010, SI 00501.020)

**ADULT CHILD** – a son or daughter who is no longer a child (POMS SI00830.420A.5)

**CHILD SUPPORT** - payment from a parent to or for the benefit of a child to meet the child's needs for food and shelter (POMS SI00830.420A.1)

**CUSTODIAL PARENT** – parent who has care, guardianship, or custody of the child (POMS SI00830.420A.6)

## Child Support Whose Income is it?

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Payments made on behalf of the child are unearned income to the child, which will reduce SSI payments dollar for dollar

Payments for an adult child received by the parent and not given to the child are considered income to the child

Payments made to an adult child are income to the child

## **Child Support as Income**

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### **What about in-kind support payments?**

**1/3 of the amount of child support that is received in the form of food and shelter is excluded from income**

**Remaining 2/3 is considered ISM (POMS SI00835.350C)**

**Any in-kind support payment that is not food or shelter would not be income to the child (POMS SI00830.420 B 2)**

## **How to Protect Child Support**

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**Assign child support to a Special Needs Trust**

**Must be a First Party SNT or a pooled trust**

**Assignment must be irrevocable**

**Have the assignment ordered by the Court**

**Notify Social Security and Medicaid of both the Court Order and SNT**

## LIFE INSURANCE

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**Divorce Agreement may mandate that one or both parents maintain a specific amount of life insurance to ensure financial support will be available to the couple's children in case of the death of a spouse**

**Consider how the death benefits are going to be paid**

**Use of Special Needs Trust**

## GUARDIANSHIP

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**What is the definition of emancipation?**

- **Matrimonial attorney**
- **Special Needs attorney**
- **18 years vs. 21 years**

***Other considerations:***

- **Marriage**
- **Military service**
- **Full-time employment**
- **Change of permanent residence from parents' home**

# **GUARDIANSHIP**

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**What if child is never emancipated?**

- Incorporate guardianship into divorce agreement
- Set forth who will be the guardian
- Provide a time frame for the commencement of the guardianship proceeding
- Put a safety net in place if an agreement is not reached

**AVOID THE NEED FOR A CONTESTED  
GUARDIANSHIP!**

# **EDUCATIONAL DECISION MAKING**

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**Services provided through local school districts**

**Consider who will be primarily responsible and who will have the authority to make these decisions**

**Avoid the denial of services if parents can't agree**

**Decide which primary residence will be used**

**School programs**



# Marriage

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## Capacity to enter into a marriage

**Article 17- A of the Surrogate's Court  
Procedure Act**

**Article 81 of the Mental Hygiene Law**

**Marriage Ceremony vs. Marriage License**

# Marriage

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## Effect on government benefits

### **SSDI**

**If receive SSDI under your own work record – marriage  
won't effect benefits**

**If adult disabled child receiving benefits under  
parent's work record – marriage will cause SSDI  
benefits to stop**

### **SSI**

**Spouse's income and resources may change SSI  
benefit**

**If both get SSI – benefit amount changes from  
individual to couple**

# **Marriage**

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## **Effect on government benefits – cont'd**

**Medicaid – Spousal Refusal**

**Medicaid Waiver Programs**

**Gifts**

tangible personal property  
cash

**SNT**

# **ESTATE PLANNING**

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**Review advance directives**

**Review Last Will and Testament and any Trusts**

**Confirm that bequests to child with special needs  
will be held in a SNT**

**Questions?**

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50 Misc.3d 666, 19 N.Y.S.3d  
867, 2015 N.Y. Slip Op. 25364

**\*\*1** In the Matter of the  
Appointment of a Guardian for D.D

Surrogate's Court, Kings County  
2014-2185  
October 28, 2015

CITE TITLE AS: Matter of D.D.

### HEADNOTE

**Incapacitated and Mentally Disabled Persons  
Guardian for Mentally Retarded and Developmentally  
Disabled Persons**

**Requirement That Guardianship is Least Restrictive  
Alternative**

In a guardianship proceeding pursuant to SCPA article 17-a, petitioners, the mother and brother of a 29-year-old man with "Down Syndrome with Low Mild" mental retardation, failed to demonstrate that the appointment of a guardian was necessary and in his best interest where he presented as a capable, thoughtful and engaging adult with mild intellectual disability who was high functioning, well integrated socially, able to work, to travel independently, to exercise self care and management, and to make decisions about his health and finances, albeit at times with assistance and supervision from his family and supportive programs. To support the immense loss of individual liberty which an article 17-a guardianship entails, the petitioner must prove that the appointment of a guardian is necessary and in the respondent's best interests and must exclude the possibility of the respondent's ability to live safely in the community supported by family, friends and mental health professionals. Here, respondent's needs could be met through supported, instead of substituted, decision-making. Alternate, less restrictive legal tools, such as a power of attorney and a health care proxy, could be utilized to allow family members to make financial and medical decisions for him when he was no longer able to do so, and a wide range of supportive services, some of which he already utilized, were offered by the Office for People with Developmental Disabilities. Moreover, the strong objection of respondent's mother, one of the

proposed guardians, to his aspiration to one day marry and have a family raised concerns as the right to marry was central to his personal dignity and autonomy and his pursuit of happiness. The standard was not whether petitioners could make better decisions than respondent, but whether or not he had the capacity to make decisions for himself with support.

### RESEARCH REFERENCES

[Am Jur 2d, Guardian and Ward §§ 24–26, 30, 64–66.](#)

[Carmody-Wait 2d, Guardians and Guardianship §§ 155:115, 155:116, 155:121, 155:122, 155:125.](#)

[NY Jur 2d, Infants and Other Persons Under Legal Disability §§ 498–501, 507, 517.](#)

### ANNOTATION REFERENCE

See ALR Index under Guardian and Ward.

### FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

**\*667** Query: appoint! /4 guardian /p intellectual! /2 disab!  
& restrictive

### APPEARANCES OF COUNSEL

*Curtis, Mallet-Prevost, Colt & Mosle LLP*, New York City (*Nancy Delaney* of counsel), for petitioners.

*Advocates for Adults with Intellectual and Developmental Disabilities Legal Clinic*, Brooklyn (*Natalie Chin* of counsel), guardian ad litem.

### OPINION OF THE COURT

Margarita López Torres, S.

This is a proceeding brought by Ms. D. and M.D. (collectively, the petitioners) to be appointed the coguardians of the person of D.D. pursuant to article 17-a of the Surrogate's Court Procedure Act. Ms. D. is D.D.'s mother and M.D. is one of D.D.'s brothers. Petitioners also seek the appointment of W.D. and A.D., D.D.'s brothers, as standby guardian and alternate standby guardian, respectively. The petitioners are represented by counsel.

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### Statutory Framework

SCPA article 17-a governs guardianship of persons who are intellectually or developmentally disabled. This court uses the term “intellectual disability” in lieu of “mental retardation” even though SCPA utilizes the latter to describe the same condition. This change in terminology has been approved and used in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), one of the standard texts used by psychiatrists and mental health professionals in classifying mental disorders. (See *Hall v Florida*, 572 US —, —, 134 S Ct 1986, 1990 [2014], citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders at 33 [5th ed 2013].)<sup>1</sup>

An intellectually disabled person is defined by SCPA 1750 as one who is permanently or indefinitely incapable of managing oneself and/or one's own affairs because of an intellectual disability. \*668 The condition must be certified by a licensed physician and a licensed psychologist or by two licensed physicians, one of whom has familiarity with or knowledge of the care and treatment of persons with intellectual disabilities. It must appear to the satisfaction of the court that the best interests of such person will be promoted by the appointment of a guardian. (SCPA 1754 [5].)

A developmentally disabled person is defined by SCPA 1750-a as one who has an impaired ability to understand and appreciate the nature and consequences of decisions which result in one's incapacity to manage oneself and/or one's own affairs. The developmental disability must be permanent or indefinite and attributable to cerebral palsy, epilepsy, neurological impairment, autism, traumatic brain injury, or any condition found to be closely related to intellectual disability. The condition must have originated before the age of 22, except for traumatic brain injury which has no age limit. As with SCPA 1750, the condition must be certified by a licensed physician and a licensed psychologist or by two licensed physicians, one of whom has familiarity with or knowledge of the care and treatment of persons with developmental disabilities. Also as with SCPA 1750, the court must determine that it is in such person's best interest that a guardian is appointed. (SCPA 1754 [5].)

The legal determination of the need for guardianship is functionally the same whether an individual's disability

is categorized under section 1750 or 1750-a of SCPA and relies upon the same body of law. Under article 17-a, appointment of a guardian of the person of an intellectually disabled individual wholly removes that individual's legal right to make decisions over one's own affairs and vests in the guardian “virtually complete power over [such individual]” (*Matter of Mark C.H.*, 28 Misc 3d 765, 776 [Sur Ct, NY County 2010]). In order to support this immense loss of individual liberty, the petitioners bear the burden of proving, to the satisfaction of the court, that the appointment of a guardian is necessary and in the best interest of the person with intellectual disability or developmental disability. (SCPA 1750, 1750-a; *Matter of Maselli*, NYLJ, Mar. 29, 2000 at 28, col 4 [Sur Ct, Nassau County 2000].) The extreme remedy of guardianship should be the last resort for addressing an individual's needs because “it deprives the [individual] of so much power and control over his or her life” (*Matter of Dameris L.*, 38 Misc 3d 570, 577-578 [Sur Ct, NY County 2012] [“To the extent that New York courts have \*669 recognized least restrictive alternative as a constitutional imperative, it must, of necessity, apply to guardianships sought pursuant to article 17-A” (citations omitted)]). If there are less restrictive alternatives that are sufficient and reliable to meet the needs of the person, guardianship is not warranted. (*Matter of Guardian for A.E.*, NYLJ, Aug. 17, 2015 at 22, col 4 [Sur Ct, Kings County 2015].)

The term “best interest” has been aptly described as “amorphous” (see *Matter of Chaim A.K.*, 26 Misc 3d 837, 844-845 [Sur Ct, NY County 2009]) and the criteria necessary to support a finding that appointment of a guardian is appropriate in a particular case are rarely articulated but frequently assumed. (*Matter of Udwin*, NYLJ, June 11, 2013 at 31 [Sur Ct, Kings County 2013].) Understanding the functional capacity of an individual with disability, what an individual can or cannot do, is a necessary inquiry in determining best interest and the necessity of guardianship. This is especially true in light of the emerging awareness that there is a wide range of functional capacity found among persons with diagnoses of intellectual disability and developmental disability. (*Chaim*, 26 Misc 3d 837.) As such, the perfunctory removal of decision-making rights from persons with cognitive limitations is increasingly disfavored. The New York State Legislature recognized this shift when it amended article 17-a in 1990, noting

“[S]ince this statute was enacted in 1969, momentous changes have occurred in the care,

treatment and understanding of these individuals. Deinstitutionalization and community-based care have increased the capacity of persons with mental retardation and developmental disabilities to function independently and make many of their own decisions. These . . . rights and activities which society has increasingly come to recognize should be exercised by such persons to the fullest extent possible.”<sup>2</sup>

In order to identify “the least restrictive alternative [to guardianship] to achieve the State’s goal of protecting a person with intellectual disabilities from harm connected to those disabilities,” an inquiry into the availability of resources to assist the individual, including a support network of family, friends, \*670 and supportive services, is required. (*Matter of Dameris L.* at 579.) Indeed, “proof that a person with an intellectual disability *needs* a guardian must exclude the possibility of that person’s ability to live safely in the community supported by family, friends and mental health professionals.” (*Id.* at 578.)

“SCPA article 17-A must be read to require that supported decision making must be explored and exhausted before guardianship can be imposed or, to put it another way, where a person with an intellectual disability has the ‘other resource’ of decision making support, that resource/network constitutes the least restrictive alternative, precluding the imposition of a legal guardian.” (*Id.* at 580.)

Before “the drastic judicial intervention of guardianship can be imposed,” which completely supplants the decision-making ability of the individual with disability, guardianship “may be granted only if it is the least restrictive alternative to achieve the goal of protecting a person with a mental disability” (*Matter of Guardian for A.E.*, NYLJ, Aug. 17, 2015 at 22, col 4 [Sur Ct, Kings County 2015]).

### Record Presented

Testimony was presented by both petitioners and D.D. during the hearings held on August 26, 2014, and March 27, 2015. In support of their petition, the petitioners submitted documentary evidence consisting of reports from a psychosocial assessment conducted on April 15, 2014, and a psychological evaluation conducted

on October 31, 2013 (collectively, the reports), in addition to certifications from two licensed physicians (the certifications). A guardian ad litem was appointed and a report containing her findings and recommendations was filed.

The record reflects that D.D. is a 29-year-old adult and, according to a certification, diagnosed with "Down Syndrome with Low Mild MR." The psychological evaluation of D.D. revealed that on the Wechsler Adult Intelligence Scale—Fourth Edition, a test used to measure intellectual functioning, D.D. scored 68 in processing speed, 60 in working memory, 58 in verbal comprehension, and 56 in perceptual reasoning, for a composite full scale IQ score of 54, indicating cognitive ability in the mild range of intellectual disability. On the Vineland Adaptive Behavior Scales, which measure everyday living skills, D.D. has an Adaptive Behavior Composite score of 70. \*671 The two physicians' certifications<sup>3</sup> state, in a conclusory manner in a preprinted form, that by reason of his intellectual disability, D.D. is not capable of managing himself and appreciating the nature and consequences of health care decisions, and of reaching an informed decision to promote his own well being.

**The comprehensive psychosocial report based on an evaluation of D.D. on April 15, 2014, reveals**

“[D.D.] is friendly, funny, engaging and charming man who presents as self confident and inquisitive . . . [D.D.] is a wonderful storyteller and has an excellent memory for detail . . . [D.D.] communicates effectively with good vocabulary and complex sentence structure . . . [He] displays a sensitivity towards others and expressed concern for those he loves . . . [D.D.]’s entire family embraces and supports him; they live fairly close by and see one another regularly . . . He shares a close relationship with his brothers . . . [D.D.] has three young nieces and enjoys spending time with them. Mrs. [D.] remarked on how good he is with assisting in the care of his nieces . . . [D.D.] was proud to tell me that he is the godfather for one of his nieces.”<sup>4</sup>

During the evaluation, D.D. spoke often about his father, who died unexpectedly in 2011. D.D. stated he was “thick headed” like his father, but “I get my charm from my

father too!" D.D. is protective of his mother "and wants to make sure that she doesn't work too hard or do too much." The psychological report based on an evaluation of D.D. on October 31, 2013, concludes "[D.D.] appears to be doing well in his current program and current supports appear appropriate."<sup>5</sup> Said report recommended D.D.'s continued participation in his current work program and continued enhancement of his independent living skills and work skills. None of the reports specifically address D.D.'s capacity to engage in informed medical consent or to make medical decisions. No medical or mental health professionals testified.

**\*672** The record reflects that D.D. is able to work, both through enrollment in a supportive work program run by the Guild for Exceptional Children (the Guild) and at a restaurant in Brooklyn. Through the Guild program, D.D. works, under supervision, at various Petco stores and at Kingsborough Community College on a volunteer basis, where his responsibilities include cleaning tables, removing labels from shelves, collapsing cardboard boxes, and preparing for recycling and sanitation pickup. D.D. also works at Gargiulo's Restaurant in Brooklyn, where he has worked for several years mainly as a busboy. He has also served from the buffet table, passed hors d'oeuvres, and helped set up tables during catered functions. He works Saturday shifts "whenever they need me" and is paid in wages and in tips. According to other employees at the restaurant, D.D. is well liked, "is good at his job, does not need extra help, and never forgets a face." A supervisor at the restaurant opined that she believed "[D.D.] is capable of working there 20 to 30 hours a week because he has no physical impairments and works well." When asked if he would like to work more, D.D. seemed reluctant, testifying that he likes to do other things on Sundays.

D.D. has an active social schedule involving family, friends, and participation in recreational programs. D.D. bowls, takes karate lessons, plays sports, skis, and is an altar server at his church. In addition to Guild related activities, D.D. belongs to Rockaway Beach Special Athletes, an adaptive sports program that meets on Monday evenings.

D.D. is able to travel independently to familiar destinations using public transportation. On a daily basis he walks by himself to the Guild's Fischetti Center, an approximately 15-minute walk from his house. D.D.

possesses and uses a phone and cell phone to make and receive calls. He knows what to do in the event of an emergency. He tells time and uses the computer for games and to access the Internet.

D.D. is independent in his personal care and hygiene. He is able to bathe, shave and dress himself. Ms. D. testified that D.D. sometimes needs to be reminded to brush his teeth, which he does not enjoy. He assists at home with different chores, including taking out the garbage, setting and clearing the table, loading and unloading the dishwasher, making his bed and keeping his room in order. He sets his alarm, gets himself up and ready in the morning. He packs his lunch, taking care to wrap his bottles of water and fruit in aluminum foil, but prefers **\*673** that his mother make his sandwich. Ms. D. does the cooking at home and, while she testified that she has not given D.D. the opportunity to cook, she felt he did have the capability. At the Guild, D.D. is provided training in food preparation.

D.D. is healthy, has had no medical complications or serious health issues, and does not take any prescription medication. D.D. does use a cream to treat foot fungus. Ms. D. believes he is not capable of making medical decisions. In support of her position that D.D. is in need of a guardian who will ensure he makes good medical decisions, she testified that one time, D.D. hurt his ankle and she took him to the orthopedist. The orthopedist recommended that D.D. wear an ankle brace for two to three weeks, which D.D. did. At the end of that period, D.D. continued to wear the ankle brace and did not want to take it off. Only after D.D.'s work supervisors at the Guild spoke with him did D.D. decide to remove the brace. There were no other medical incidents about which testimony was given.

D.D.'s main source of income is from Social Security, for which Ms. D. is his representative payee. She testified that she manages his finances and they have a joint checking account. D.D. contributes to the expenses of the household. D.D. also keeps some cash for spending money. He makes purchases and can identify money, but testified that he doesn't count his change. Ms. D. and M.D. testified that on two occasions a few years ago, they were concerned that D.D. would not tell them how he spent his spending money. They fear someone will take advantage of D.D. in a financial situation. When asked if he would sign a contract if a stranger offered him money, D.D. testified unequivocally that he would not. D.D. has



never been shown how to use the ATM machine or, aside from a lesson in high school, write a check. When D.D. wishes to spend money from his bank account, he and Ms. D. have a discussion and she will write a check for him. There was no testimony or evidence presented that D.D. is incapable of learning how to use an ATM machine or write a check.

D.D. testified he would someday like to get married and have a family. He has a girlfriend named Janice and is saving up for an engagement ring. Ms. D. does not support D.D.'s desire to marry Janice. At the hearing, Ms. D. testified adamantly that she is opposed to D.D. marrying at all. She testified "[i]f a child were to come of the union, that child would have Down syndrome. I have concerns about who would take care of that \*674 child. I don't feel [D.] and Janice are capable of taking care of her." In the guardian ad litem report, it states, "Ms. [D.] thinks Janice is too pushy and said she would never give her blessing to a marriage between [D.D.] and Janice."

In court, D.D. testified that he wants Ms. D. and M.D. to be appointed his guardians. However, when the guardian ad litem interviewed D.D. outside the presence of his mother and M.D., D.D. declared that he did not want a guardian. The guardian ad litem reports, "[d]uring our home visit on March 2, 2015, [D.D.] expressed his desire to make his own decisions about healthcare, moving out on his own, and marriage." In any event, D.D.'s preference with respect to guardianship is not controlling on the issue of whether guardianship is appropriate and does not supplant the court's function to determine if a need for guardianship pursuant to SCPA article 17-a has been satisfactorily demonstrated and is in his best interest.

The guardian ad litem interviewed Ms. D., M.D., D.D.'s other two brothers, D.D.'s primary care physician, Medicaid service coordinator, social worker, psychologist, supervisor at the Guild, and employees of Gargiulo's Restaurant. As a result of her investigation, the guardian ad litem reports that D.D. appears to be capable of making his own decisions albeit with the help and support of his family, those close to him, and his supportive services. She further reports that given his history of consulting with family before making significant decisions, guardianship is not appropriate. It is the recommendation of the guardian ad litem that D.D. is not in need of a guardian. The guardian ad litem recommends alternatives to guardianship, such as

a durable power of attorney and health care proxy, to meet any financial and health care concerns expressed by petitioners and if desired by D.D.

M.D. testified that they wish to protect D.D. with making health care decisions, finances, and "protecting him from somebody else, without his best interest at heart, having him do something that [is] not in his best interest." Ms. D. testified that D.D. needs help with finances and medical decisions and it would be good for him to have someone to talk to, that she was looking toward the future more than the present and worries that someone down the line will take advantage of him.

Based upon the documentary proof proffered, the oral testimony presented at the hearings, the report of the guardian ad litem, and the personal appearance and demeanor of D.D., the court finds that the petitioners have failed to sufficiently \*675 demonstrate that the appointment of an article 17-a guardian for D.D. is necessary and in his best interest.

D.D. presents as a capable, thoughtful and engaging adult with mild intellectual disability who is high functioning, well integrated socially, able to work, to travel independently, to exercise self-care and management, and to make decisions about his own affairs, albeit at times with assistance and supervision from his family and supportive programs. The petitioners' contention that D.D. is unable to make medical decisions is unsupported by the record. On the contrary, it appears that D.D. makes decisions, including those affecting his health, in consultation with the people he trusts, and there is no evidence presented in the psychological and social evaluations of D.D. to substantiate petitioners' contention that D.D. is incapable of making medical decisions. There is also no evidence presented that D.D. is incapable of making financial decisions. There is no indication that, if taught, D.D. would not be able to use an ATM or write checks. To the extent that D.D. may require assistance with more complex fiscal matters, that need has been largely met by D.D.'s designation of Ms. D. as his representative payee. Ms. D. already manages D.D.'s primary source of income and their joint account.

To the extent needed, alternate, less restrictive legal tools, such as a power of attorney, may be utilized to handle other financial matters, and advance directives, such as a health care proxy, may be utilized to allow family

members to make medical decisions for D.D. when he is no longer able to do so. D.D. may also authorize his physicians to speak with his family and those he trusts to discuss his medical needs, which he appears to have already done. Furthermore, a wide range of services, some of which it appears D.D. already utilizes, are offered by the Office for People with Developmental Disabilities to support individuals with intellectual disabilities, such as supportive housing, including supervised semi-independent living options, adaptive skill development, adult educational programs, vocational training, community inclusion and relationship building, and self-advocacy, informed choice and behavioral skills development.<sup>6</sup> These alternative resources enable individuals with disabilities to maintain as much control over their own life decisions as they are capable to make in the least restrictive setting.

\*676 Finally, D.D. presents as a young man who aspires to someday do what many people desire—to marry. The strong objection of the proposed guardian Ms. D. to D.D. ever marrying raises concerns. As most recently articulated by the United States Supreme Court in *Obergefell v. Hodges*, “[r]ising from the most basic human needs, marriage is essential to our most profound hopes and aspirations” (576 US —, —, 135 S Ct 2584, 2594 [2015]). “[T]he right to marry is of fundamental importance for all individuals” (*Zablocki v. Redhail*, 434 US 374, 384 [1978]) and “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]” (*Loving v. Virginia*, 388 US 1, 12 [1967]). This is no less true for D.D., a young man who has expressed that, like his brothers, he wants to marry and have a family. The right “to marry, establish a home and bring up children” is a central part of liberty protected by the Due Process Clause. (*Meyer v. Nebraska*, 262 US 390, 399 [1923].) “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred” (*Griswold v. Connecticut*, 381 US 479, 486 [1965]). The right to have children is “a right which is basic to the perpetuation of a race” (*Skinner v. Oklahoma ex rel. Williamson*, 316 US 535, 536 [1942]). The right to have a family of one’s own is not reserved only for persons with no disabilities, and the yearning for companionship, love, and intimacy is no less compelling for persons living

with disabilities. D.D. desires to choose whom he loves, to marry, to establish a home, and, perhaps, to bring up children some day; these are choices central to his personal dignity and autonomy and his pursuit of happiness, and they are his to make.

The petitioners believe that they know what is best for D.D. and can provide him with excellent care and guidance in the event he needs it. There is no doubt that the petitioners deeply love and are devoted to D.D. and are motivated by what they believe is in his best interest. However, the standard here is not whether the petitioners can make better decisions than D.D., it is whether or not D.D. has the capacity to make decisions for himself with the support that he abundantly has. (*Matter of Rupper*, Sur Ct, Kings County, Dec. 9, 2011, López Torres, S., file No. 2011-783.)

#### \*677 Conclusion

The loving and supportive environment in which D.D. is enveloped has enabled him to thrive despite his limitations. It has not been demonstrated to the satisfaction of the court that guardianship pursuant to article 17-a is the least restrictive means to address D.D.’s needs where the presence of supported, instead of substituted, decision-making is available for D.D. It is evident that D.D. seeks advice and direction from his loving family before making significant decisions, and nothing in this court’s ruling precludes D.D. from continuing to do so, nor does it preclude his family members from continuing to be involved in his medical and financial decisions. The network of supported decision-making provided D.D. that has characterized the past 11 years of his adulthood has yielded a safe and productive life where he has thrived and remained free from the need to wholly supplant the legal right to make his own decisions.

It has not been sufficiently demonstrated that D.D. is a person in need of a guardian pursuant to SCPA article 17-a and that it is in his best interest to have a guardian appointed for him. Accordingly, the petition for the appointment of a guardian of the person is dismissed.

#### FOOTNOTES

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Footnotes

- 1 The shift away from usage of "mental retardation" is reflected in federal statutes (see [Pub L 111-256](#), 124 US Stat 2643 [111th Cong, Oct. 5, 2010] [termed "Rosa's Law"] [all references in federal law to "mentally retarded individual" are changed to "individual with an intellectual disability"]). New York has renamed its "Office of Mental Retardation and Developmental Disabilities" to "Office for People With Developmental Disabilities."
- 2 L 1990, ch 516, § 1, reprinted in McKinney's Cons Laws of NY, Book 58A, [SCPA 1750](#), Historical and Statutory Notes at 427 (2011 ed).
- 3 These certifications are boilerplate forms that include sections where the affirrant checks off preprinted conclusions relating to the decision making capabilities of an intellectually or developmentally disabled individual. The court has found the certifications wanting in useful information and requires, at a minimum, psychological and psychosocial evaluations as well as the individualized education program (IEP).
- 4 Comprehensive Social Evaluation of D.D., Guild for Exceptional Children.
- 5 Psychological Evaluation of D.D., Guild for Exceptional Children.
- 6 See New York State Office for People With Developmental Disabilities, [http://www.opwdd.ny.gov/opwdd\\_services\\_supports](http://www.opwdd.ny.gov/opwdd_services_supports) (accessed Oct. 13, 2015), for a description of services available to persons with disabilities.

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## Social Security

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### Program Operations Manual System (POMS)

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TN 74 (11-12)

## SI 00835.350 Computation of In-Kind Support and Maintenance (ISM) from Outside a Household (Including Vendor Payments by a Third Party Outside the Household)

### A. Actual Value (AV) Of ISM Provided From Outside The Household

The purpose of this ISM computation is to determine the AV of food and shelter someone outside a household provides to a recipient. The result of this computation is added to the result of the computation described in SI 00835.340 Computation of In-Kind Support and Maintenance from Within a Household if the recipient receives ISM both from outside the household and from within the household (other than the value of the one-third reduction (VTR)). The sum of the AV's of ISM from within, ISM from outside a household, and ISM benefiting only one person is subject to the presumed maximum value PMV, see SI 00835.400 In-Kind Support and Maintenance (ISM) to One Person.

**NOTE:** If a recipient alleges a loan for the value of food or shelter received from outside the household, the following instructions do not apply. Develop such a loan allegation per SI 00835.482 Loans of In-Kind Support and Maintenance.

### B. Procedure For Determining Outside ISM

#### 1. Who is a household member

To use this ISM computation, refer to the definitions in SI 00835.020 Definitions of Terms Used in Living Arrangements (LA) and In-Kind Support and Maintenance (ISM) Instructions. Consistent with the definition of "household," do not count persons who live under the same roof but who are not members of the recipient's

economic unit as household members. To be a household member, a person must reside in the household as of the first moment of the month.

## **2. Determine the current market value (CMV) of food and shelter**

In computations of ISM from outside a household, use the CMV of the item of food and shelter after conversion (if necessary) as described in SI 00835.470 ISM and Households - Conversions.

Deduct from this amount the cash payment made by all members of the household toward that item, if any. The payment by the household toward the item of ISM is generally equal to the household operating expense for that item in the month(s) in which the household receives ISM from outside the household.

Occasionally, you must convert vendor charges for food and shelter shown on a bill or statement to monthly amounts, see SI 00835.470 ISM and Households - Conversions. If you convert a CMV for this reason, you must convert the household payment in the same manner.

**EXAMPLE:** If a household pays \$600 of its annual \$1,200 real property tax bill and a third party pays the remainder, divide the \$1,200 CMV by 12; divide the \$600 household payment by 12. Subtract the converted household payment from the converted property tax bill. Use the resulting \$50 household payment in the computation of monthly outside ISM.

## **3. Rent-free shelter or prepayment of rent**

See SI 00835.370 Rent Free Shelter, which explains special rules applicable to household payments in rent-free situations. Also, SI 00835.380 Rental Subsidies defines prepayments of rent (a type of household payment) and discusses situations in which a household prepays rent in both rent subsidy and other rental liability situations.

## **4. Allocate ISM to household members**

The final step in the computation of ISM from outside a household is to allocate the ISM equally among all household members.

Use this formula to compute ISM from outside the household.



Enter Converted Current Market Value		_____
Deduct Household Payment Toward Item	-	_____
Balance		_____
Divide by Number of Household Members	÷	_____
Actual Value to Individual		_____

Compare the amount yielded by this computation to the PMV for the recipient. The lesser is "H" income if the recipient is not receiving any other ISM.

### C. Procedure For Determining AV For A Couple Or Eligible Child

For eligible couples, the AV that results from the computation above is the AV of ISM to each member. Multiply this amount by 2 and compare the result to the PMV for a couple receiving no other ISM.

For an eligible child, when an absent parent provides the ISM, apply the one-third exclusion explained in SI 00830.420B.2. to the AV and then compare this amount to the PMV and charge the lesser amount.

#### **EXAMPLE 1: Conversion of a bill and household payment**

Bernie and Alex Bell are cousins who are both supplemental security income (SSI) recipients. They share the household operating expenses of the house in which they live. Bernie Bell has ownership interest in the house, and he receives a \$1,300 real property tax bill for a prospective 12-month period beginning June 1. His sister, who lives elsewhere, pays \$400 directly to the county in June; the cousins pay the remaining \$900. After the claims representative (CR) converts the CMV to \$108.33 (\$1,300 divided by 12), the CR also converts the household payment to \$75 (\$900 divided by 12). The CR then computes the AV to them as follows:

Converted CMV \$108.33

Less Converted Household Payment Toward Item - \$75.00

Balance = \$33.33

Divided by Two Household Members 2

Actual Value to Each beginning June 1 = \$16.66

**NOTE:** The CR divides the household payment of \$900 by 12, just as it divided the vendor charge by 12. It is immaterial whether Bernie and Alex split the household payment equally; both receive the same amount of outside ISM.

### **EXAMPLE 2: Computing AV of ISM to a Couple**

Bruce O'Neill is an eligible recipient who lives with his eligible spouse, Gracie, in a home they own jointly. The only other household member is their 25-year-old daughter. Each March, an adult son (who lives elsewhere) pays all of their annual real property taxes. These taxes, due in March, are \$1,300 and cover services for the following 12 months. Thus, the O'Neill's receive ISM from outside their household in each month of the year. (See SI 00835.474B. and SI 00835.360.) To compute the amount of ISM to charge the couple, the CR performs the following calculation for the period beginning April 1, 2010.

1. Vendor Charge (annual taxes) \$1,300.00
2. Divide by 12 = Converted CMV of \$108.33
3. Less Household Payment - 0 = \$108.33
4. Divide by 3 household members = Actual Value to each \$36.11
5. Multiply by 2 = Actual Value to couple \$72.22

Since this AV is less than the couple's PMV, the couple's "H" income is \$72.22.

### **EXAMPLE 3: Third Party Vendor Payment Involving an Arrearage**

Bessie Marshall, an ineligible parent, has two eligible children, Karen and Jacob. She also has two ineligible children. They all live in an apartment, which Mrs. Marshall rents for \$210 per month. In February 2010, Mrs. Marshall's brother (who lives elsewhere) pays part of Mrs. Marshall's rent (\$150) to help her out. This payment is a gift, and he sends it directly to the landlord. Mrs. Marshall pays an additional \$35 and



still owes \$25. She elects rebuttal and furnishes evidence of these facts. The CR computes ISM from outside the household to the two eligible children as follows.

1.	Rent Due	\$210.00
2.	Rent Arrearage	\$25.00
3.	Converted CMV	\$185.00
4.	Less Household Payment	- \$35.00
5.	Balance (Paid by Third Party)	\$150.00
6.	Divided by 5 Household Members	÷ 5
7.	Actual Value to Each	\$30.00

Since \$30 is less than the PMV for a recipient, we charge each disabled child "H" income of \$30 for February, the month in which the third party makes the vendor payment.

#### **EXAMPLE 4: Individual Receives both Inside and Outside ISM**

Michael O'Keefe, an eligible recipient, lives in a household with three other persons. A third party outside the household pays the entire mortgage of \$235, directly to the bank. The household expenses are \$407. (**NOTE:** These expenses do not include the mortgage paid by the third party.) Mr. O'Keefe is not paying his pro rata share (\$101.75) of all household operating expenses, but he is paying his share (\$50) of the food expenses for the household (\$200) with his earmarked contribution of \$60. Therefore, Mr. O'Keefe is federal living arrangement (FLA-A) based on contributing an earmarked share of household food costs.

This case has issues of both ISM from within the household (in the form of shelter) and ISM from outside the household (in the form of a third party vendor payment resulting in shelter). The computation of ISM from within the household is as follows.

1.	Total Household Operating Expenses	\$407.00
2.	Divided by Number of Household Members	÷ 4

3.	Mr. O'Keefe's Pro Rata Share	= \$101.75
4.	Less Mr. Okeefe's Contribution	- \$60.00
5.	Actual Value	= \$41.75
6.	The computation of ISM from outside the household is: CMV of Mortgage	\$235.00
7.	Less Household Payment	- 0
8.	Balance	= \$235.00
9.	Divided by Number of Household Members	÷ 4
10	Actual Value	\$58.75
11.	Add the two results:	
12.	Actual Value of ISM From Within	\$41.75
13	Actual Value of ISM From Outside	+ \$58.75
14.	Total Actual Value	\$100.50

Since the total AV is less than the PMV for an individual, the CR charges Mr. O'Keefe "H" income of \$100.50.

## D. Develop And Document ISM From Outside The Household

### 1. When to develop ISM from outside a household

Develop ISM from outside a household when its receipt is alleged or otherwise indicated and the recipient is not subject to the VTR. See SI 00835.320 for instructions on when to offer a rebuttal and an explanation of the rebuttal rules. See SI 00835.370 and SI 00835.380 for additional development instructions for outside ISM in the form of rent-free shelter and rental subsidy.

### 2. When to obtain evidence of the AV of outside ISM

Obtain evidence of the AV of outside ISM whenever the recipient wishes to rebut the PMV or rental subsidy See SI 00835.320 for an explanation of the rebuttal rule. The following describes evidence of the factors that determine the AV of outside ISM.

**a. Evidence of the CMV**

We base the CMV of an item of food or shelter provided by someone outside the household on the vendor charge if there is a vendor charge associated with it or the provider's estimate of the CMV of the item if there is no vendor charge associated with it.

Obtain evidence of the CMV in accordance with the chart below.

Type of ISM	Evidence (Signed Statement or DROC)
Food	A statement from the person who paid for the food or a statement from the provider.
Shelter	A copy of the bill or receipt, or a statement from the person who paid the bill or a statement from the provider.

**NOTE:** If you cannot obtain the CMV from the provider, contact a knowledgeable source (e.g., a real estate or rental agent for the value of rent) and document the contact on a report of contact (DROC) screen or other form.

**b. Evidence of the household payment**

If the household makes any payment towards the item of food or shelter (e.g., the household pays part of its electric bill and a third party pays the rest), obtain evidence of the payment. Preferred evidence is a receipt, a cancelled check, or a corroborative statement from the third party who paid the rest of the bill or from the householder (if the recipient does not have ownership interest or rental liability). If no preferred evidence is available, accept the statement, signed or DROC screen, of the eligible recipient.

**c. Evidence of household composition**

Obtain a signed statement from the recipient, or a DROC, as to the number of household members in the month in which the recipient receives ISM (household membership always includes persons who are temporarily absent, see SI 00835.040). It is not necessary to corroborate this statement.

### **3. Breakpoints and a change in ISM**

Breakpoints are certain identifiable events that may indicate that the ISM the recipient receives changed. (See SI 00835.510 for an explanation of breakpoints.) Report of breakpoints may be timely or they may come to our attention during a redetermination. We should evaluate breakpoints to see if they actually affect ISM and we should document any change in ISM according to the rules in SI 00835.350D.2. in this section. Changes due to breakpoints are effective with the breakpoint effective month.

See SI 00835.520C. for an explanation of when to redevelop outside ISM at a redetermination.

*To Link to this section - Use this URL:*

<http://policy.ssa.gov/poms.nsf/lnx/0500835350>

*SI 00835.350 - Computation of In-Kind Support and Maintenance (ISM) from  
Outside a Household (Including Vendor Payments by a Third Party Outside  
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## Social Security

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### Program Operations Manual System (POMS)

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TN 50 (06-16)

## SI 00501.010 Determining Child Status for Supplemental Security Income (SSI) Purposes

**CITATIONS:** Social Security Act, Sec. 1614

20 CFR 416.1101; 416.1160; 416.1165; 416.1851; 416.1856;  
416.1866; 416.1872; 416.1881

### A. Introduction To Determining Child Status For SSI Purposes

A child for SSI purposes, according to the Social Security Act, is neither married, nor the head of a household, as defined in SI 00501.010D in this section; and is either:

- under age 18, or
- under age 22 and a student regularly attending school, college, or training that is designed to prepare him or her for a paying job, according to instructions in SI 00501.020.

There are different requirements for determining SSI child status in particular situations, as follows:

#### 1. When we use these instructions

Follow instructions in this section and in SI 00501.015 to determine if someone is a child who is in a parent-child relationship for purposes of:

- deeming parental income and resources;

- applying allocations for ineligible children in an SSI eligible individual's or an SSI eligible child's household; and
- excluding one-third of the child support received from a parent who is absent from the household.

## **2. When we do not use these instructions**

Do **not** follow these instructions when you need to determine child status for certain purposes other than those specified in SI 00501.010A.1. in this section. Instead, follow instructions in:

- DI 11055.001 to apply the SSI childhood disability definition;
- DI 11005.016 to complete childhood disability forms and questionnaires;
- GN 00501.010 to determine whether someone is a parent for representative payment purposes;
- SI 00501.020 to apply the student earned income exclusion (SEIE);
- SI 00502.000 to determine the alien status of a child;
- SI 00515.004 to determine whether a "minor child" is required to give permission to contact financial institutions;
- SI 00830.314 to determine the portion of a veteran's augmented Veterans Affairs benefit attributable to a child;
- SI 00830.099 (income) and SI 01130.050 (resources) to exclude assistance to a child as specified by certain Federal statutes other than the Social Security Act;

- SI 01150.120 through SI 01150.123 to apply an exception to the ineligibility period for transferring a resource to a child at less than fair market value; and
- SI 02101.007 to determine if a parent may be paid SSI benefits due a deceased child.

## **B. Determining Child Status For Parent-Child Deeming, Applying The Ineligible Child Allocation, And Excluding One-Third Of The Income From Child Support**

Use these instructions to determine SSI child status for the purposes listed in SI 00501.010A.1. in this section.

### **1. Determining SSI eligible child status for deeming of income and resources**

For purposes of deeming of income and resources from an SSI ineligible parent or the current spouse of an ineligible parent (i.e., a stepparent), an SSI eligible child:

- is under age 18;
- is eligible for or applying for SSI disability or blindness payments;
- is neither married nor the head of a household; and
- is a member of the household of at least one ineligible parent. If the SSI eligible child's parent has permanently left the household, deeming from a stepparent does **not** apply.

### **2. Determining SSI ineligible child status for the ineligible child deeming allocation**

For purposes of applying the ineligible child deeming allocation, an SSI ineligible child:

- is either under age 18, or under age 22 and regularly attending school, college, or training designed to prepare him or her for a paying job as described in SI 00501.020C.1.;
- is not eligible for SSI payments;
- is neither married nor the head of a household;
- is a member of the household of an SSI eligible individual/child who is subject to deeming of income; and
- is himself or herself the child of either:
  - a. the SSI eligible individual;
  - b. the living-with ineligible spouse of the SSI eligible individual;
  - c. the SSI eligible child's living-with parent; or
  - d. the SSI eligible child's stepparent. If an SSI eligible child's stepparent has permanently left the household, we continue to provide the ineligible child allocation for each of the stepparent's children remaining in the eligible child's household.

### **3. Determining SSI eligible child status for excluding one-third of the child support received from an absent parent**

For purposes of applying the one-third exclusion of child support from countable income, a child:



- is either under age 18, or under age 22 and regularly attending school, college, or training designed to prepare him or her for a paying job as described in SI 00501.020C.1.;
- is eligible for or applying for SSI disability or blindness payments;
- is neither married nor the head of a household; and
- receives child support from an absent parent (according to instructions in SI 00830.420).

## C. Determining When Child Status Ends

Status as an SSI child ceases effective with the month after the month he or she last meets the applicable requirements in SI 00501.010B.1. through SI 00501.010B.3. in this section.

## D. Establishing Head Of Household

### 1. Determining whether someone is the head of his or her household

A head of household is someone who is no longer under his or her parent's or stepparent's control, and:

- has left his or her parent's or stepparent's home on a permanent basis to be responsible for the day-to-day decisions on the operation of his or her own household;
- has left his or her parental home on a permanent basis to live with others, where everyone has an equal voice in the decision-making (e.g., a group of students sharing off-campus housing); or
- lives with his or her parent(s) or stepparent and makes the day-to-day decisions of the household (e.g., due to parental illness).

## **2. Initial simultaneous development claim systems input instructions for head of household under age 18, not transitioning out of foster care**

If you establish in MSSICS that a claimant under age 18 is head of household (claim ID of DI) before having transferred the case to the Disability Determination Services (DDS) for a medical decision, you will prevent case handling in the Electronic Disability Collect System (EDCS), because EDCS assigns the conflicting claim ID of DC.

Instead, do **not** answer the head of household question on the MSSICS Home Ownership and Rental Liability screen for a simultaneously developed case until you have first established the disability portion of the claim in EDCS for any claimant who is:

- under age 18 and
- the head of his or her household but
- **not** in the process of transitioning out of foster care (under Title IV-E).

Re-enter MSSICS to answer the head of household question after you have established the claim in EDCS.

## **3. Initial claim systems input instructions for head of household under age 18, transitioning out of foster care**

See systems input instructions in SI 00601.011D for a claimant who is under age 18 and transitioning out of foster care (under Title IV-E).

## **E. Obtaining Evidence Of Child Status**

### **1. Evidence of a child's age**

Develop proof of age requirements according to instructions in GN 00302.290.

### **2. Evidence of a child's marital status**

Generally accept an allegation regarding the marital status of a child; however, develop marital status according to instructions in SI 00501.150 and SI 00501.152, when:

- the individual is under age 22 and has been married but now alleges that the marriage has ended; or
- you have information contrary to the allegation regarding the individual's marital status.

## F. References

- DI 11005.016 Forms Used in Disability Claims
- DI 11055.001 Title XVI Disability Claims
- GN 00302.290 Proof of Age Requirements for Supplemental Security Income (SSI)
- GN 00501.010 Definitions of Common Representative Payment Terms
- SI 00501.015 Determining Parent-Child Relationships for Supplemental Security Income (SSI) Purposes
- SI 00501.020 Student - SSI
- SI 00501.150 Determining Whether a Marital Relationship Exists
- SI 00501.152 Determining Whether Two Opposite-Sex Individuals Are Holding Themselves Out as a Married Couple
- SI 00502.000 SSI Alien Eligibility

- SI 00515.004 Good Cause — Minor Children
- SI 00601.011 Filing Supplemental Security Income (SSI) Applications for Disabled Youth Transitioning out of Foster Care
- SI 00820.510 Student Child Earned Income Exclusion
- SI 00830.099 Guide to Unearned Income Exclusions
- SI 00830.314 Augmented VA Benefits
- SI 00830.420 Child Support Payments
- SI 01130.050 Guide to Resources Exclusions
- SI 01150.120 Exceptions to the Ineligibility Period—General
- SI 02101.007 SSI Underpayment Due - Deceased Individual Was A Blind or Disabled Child When Underpayment Occurred - Payment to Parent(s) and/or Spouse

To Link to this section - Use this URL:

<http://policy.ssa.gov/poms.nsf/lnx/0500501010>

*SI 00501.010 - Determining Child Status for Supplemental Security Income*

*(SSI) Purposes - 02/08/2012*

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## Social Security

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### Program Operations Manual System (POMS)

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TN 123 (07-17)

## SI 00830.420 Child Support Payments

**Citations:** Social Security Act, as amended, sections 1612(a)(2)(E) Meaning of Income and 1612(b)(9) Exclusions From Income; 20 Code of Federal Regulations 416.1121(b) Alimony and support payments and 416.1124(c)(11) Other unearned income we do not count.

### A. Glossary Of Child Support Terms

#### 1. Child support payment

A child support payment is a payment from a parent to meet the child's needs for food and shelter. Child support can be in cash or in-kind; it can be voluntary or court ordered.

#### 2. Absent parent

An absent parent is a parent whose parental rights are not legally severed or is a stepparent currently married to a parent of the child who does not live in the same household as the child. We determine household status on the first of the month.

If the periods of living together are brief and the child remains independent or under the care and control of another person, agency, institution, or is living in the home of another, usually consider the parent absent unless such parent retains parental responsibility and control.

Do not consider a parent absent if such parent is away due to employment, intends to resume living with the child, and retains parental control and responsibility. Do not consider an "absent" military deemor "absent" for purposes of the child support exclusion.

For more information on deeming from an "absent" military deemor, see SI 01310.170.

Do not consider a child (or parent) who is a boarding student in an educational facility absent.

**NOTE:** This definition of an absent parent does not apply when determining "temporary absence" for deeming purposes.

When determining temporary absence from a deeming household, refer to SI 01310.165.

### **3. Supplemental Security Income (SSI) child**

A child, for SSI purposes, according to the Social Security Act, is neither married, nor the head of a household and is either:

- under age 18, or
- under age 22 and a student regularly attending school, college, or training that is designed to prepare him or her for a paying job.

For more information on SSI child status, see SI 00501.010.

### **4. Student**

A student is a child who is under age 22 and regularly attending school. For more information on SSI student child status, see SI 00501.020.

### **5. Adult child**

An adult child is a number holder's son or daughter who no longer meets the definition of a child (e.g., is now head of a household). For more information on SSI child status, see SI 00501.010.

### **6. Custodial parent**

A custodial parent is a parent who has care, guardianship, or custody of the child.

## **7. Other person**

An "other person" is an individual, other than a parent who has care, guardianship, or custody of the child.

## **8. Child support arrearage payment**

A child support arrearage payment is a payment that was due, but not paid in a timely manner for the appropriate period. The payment is paid to comply with an unfulfilled past obligation to support the child.

# **B. Child Support On Behalf Of An SSI Child**

## **1. Treatment of child support as income**

To treat child support payments made on behalf of an SSI child:

- When an eligible child receives child support payments (including arrearage payments), the payments are unearned income to the child. For information on an SSI child, see SI 00501.010.
- When an absent parent makes a child support payment for an eligible child, exclude one-third of the amount. This exclusion does not apply when determining the income of ineligible children in a deeming computation.

For information on the ineligible child allocation, see SI 01310.110D.

To treat child-support payments made on behalf of a deceased SSI child:

- Child support payments (including arrearage payments) made on behalf of a deceased SSI child are unearned income to the parent or other person who receives them.
- The one-third child support exclusion does not apply.

## **2. Food or shelter received as in-kind child support**

Exclude one-third of the amount of child support that an eligible child receives in the form of food or shelter from an absent parent as income. The remaining two-thirds are in-kind support and maintenance (ISM) subject to the presumed maximum value (PMV).

For more information on computing ISM from outside a household, see SI 00835.350C.

**EXAMPLE: Absent parent provides ISM to child:** Joe Smith's father provides all Joe's food as part of his child support agreement. In November 2011, Joe's father gives him food with a value of \$600.

Exclude \$200 of that amount from income. The remaining \$400 is subject to the 2011 PMV, which is \$224.66. Charge (the lesser of the two) \$224.66 to Joe as ISM in the month of November.

Any in-kind child-support payment that is not for food or shelter (e.g., for health insurance) is not income to the child. However, deduct court-ordered support payments made for any purpose (e.g., for health insurance) from the deemor's income.

### **3. Child support and deeming**

#### **a. Treatment of child support for specific deemors**

Exclude the income used by an ineligible spouse, ineligible parent, ineligible child, or eligible alien to make court-ordered or Title IV-D support payments. Deduct the court-ordered or Title IV-D support payments from the parent's income prior to deeming by selecting deductions on the parent's applicable Income Selection page (e.g., Child Support page) and enter the amount of the support on the page. The system deducts the support amount from the ineligible parent's countable income.

For more information on excluding the income used by specific deemors to make support payments, see SI 01320.145.

#### **b. Treatment of child support when a child's household changes**

The child may leave the home of the custodial parent, or begin living with an absent parent, or the absent parent may begin living in the household of the



child and custodial parent. For purposes of deeming, change of status is effective with the month following the month the change occurs. For more information on deeming policies when a child's household changes, see SI 01320.550.

If the child lives in a household and receives child support payments from a parent in that same household, do not consider the parent absent. The support is unearned income (type "SS") to the child. The one-third exclusion does not apply to these payments because the one-third child support exclusion only applies to payments from an absent parent. On the SSI Claims System Child Support page, "Court ordered-parent in household" and the system does not apply the one-third child support exclusion.

**EXAMPLE 1: A parent who was absent moves into household with eligible child and custodial parent**

A mother who was absent moves into the same household with the father and their children. She continues to give the father a child support payment each week as required by the court order.

The payments are type "SS" unearned income to the children. The one-third exclusion does not apply to these payments. On the Child Support page, select "Court ordered-parent in household" as the "Type" of income the person receives from the drop-down list. Begin deeming the mother's income in the month following the month the parent and children begin living in the same household. Deduct the court-ordered child support from the mother's income prior to deeming by selecting deductions on the mother's applicable income page and enter the amount of the court-ordered child support on the Child Support page. The system does not include the amount of the court-ordered child support in the deeming computation.

**EXAMPLE 2: Child lives with both parents and father contributes to household**

Both parents and their children live in the same household. The father works and gives the mother a money each week to help run the household and pay for the family's needs.

Do not charge income to the mother or children due to this exchange of money. However, include the support amount in the father's deemed income.

**EXAMPLE 3: Child lives with both parents and mother contributes to household**

Both parents and the child live in the same household. The mother works and uses her income to pay the rent, utilities, other bills, and provide for her family's other needs.

The amount of money the mother spends to support her family is included in her income that is subject to deeming. Do not charge the mother's contribution as support income to the father or child.

**4. Child support paid to the State child support enforcement agency under Title IV-D**

When a child is in the custody of the State (i.e., in foster care), and the State collects child support and keeps the money, the support payment from the parent is not income to the child. Consider the support payment a reimbursement to the State for the foster care payment. Also, child support collected and retained by the State, as reimbursement for prior Temporary Assistance for Needy Families (TANF) payments, is not income to the child.

A custodial parent or other person may ask the child support enforcement agency to collect child support payments from the absent parent, and the child support agency may give the custodial parent or other person the support they collect. Treat the support the same as if the non-custodial parent sends the support payment directly to the custodial parent or other person.

For more information on the treatment of child support as income, please see SI 00830.420B.1. in this section.

**C. Child Support On Behalf Of An Adult Child****1. Current child support received on behalf of an adult child**

When a parent or other person receives current child support payments for an adult child after the adult child stops meeting the definition of a child, the income belongs to the adult child. The support payments are income to the adult child even if he or she does not live with or receive any of the child support payment from the parent or other person. Such support payments are not subject to the SSI one-third child support exclusion.

When a parent or other person receives current child support payments on behalf of a deceased SSI adult child, consider it income to the parent or other person who receives the payments. Support payments are not subject to the SSI one-third child support exclusion.

## **2. Child support arrearages received on behalf of an adult child**

### **a. Policy for child support arrearage payments effective June 1, 2002**

Child support arrearage payments received on behalf of an adult child are not subject to the SSI one-third child support exclusion. The policy on the treatment of child support arrearage payments made on behalf of an adult child changed as a result of a court-approved settlement agreement. Effective June 1, 2002, when a parent or other person receives a child support arrearage payment on behalf of an adult child:

- Any amount of that payment that the parent or other person receives and does not give to the adult child is unearned income to the parent or other person in the month they receive it. The portion of the arrearage payment the parent or other person retains is not income to the adult child and does not affect the adult child's SSI eligibility or payment.
- Any amount of that payment that the parent or other person gives to the adult child is unearned income to the adult child in the month given, not income to the parent or other person.
- Any payment that a parent or other person receives on behalf of a deceased SSI adult child is unearned income to the parent or other person in the month they receive the payment.
- Any child support arrearage payment an adult child receives directly from the absent parent is unearned income to the adult child.

### **EXAMPLE: Child support paid for an adult child**

A non-custodial father pays child support on behalf of his 19-year old disabled son who lives in his own apartment. Consider the son an adult child.

The former custodial mother receives a \$100 child support payment. The \$100 child support payment consists of both a current payment of \$75 and \$25 to pay for an arrearage. The mother keeps the child support arrearage payment of \$25, and gives her son his current \$75 child support payment.

If the mother is SSI eligible or a deemor, the arrearage payment is her income. The current child support payment of \$75 is type "SS" unearned income to the adult child. The one-third child support exclusion does not apply.

**b. Policy for child support arrearage payments prior to June 1, 2002**

Prior to June 1, 2002, if a parent or other person received child support arrearage payments on behalf of an adult child, the income belongs to the adult child. The support payments are income to the child even if he or she does not live with or receive any of the child support payment from the parent or other person.

Child support arrearage payments are not subject to the one-third exclusion.

## **D. Verifying Child Support Payments**

### **1. Procedure for developing and verifying child support payments effective June 1, 2002**

- Verify the amount and frequency of child support payments.
- Unless you doubt the allegation, accept the individual's allegation of the relationship of the payer to the payee and type of payment (voluntary or court-ordered).
- Determine if any of the child support payments represent an arrearage.
- Develop and document dates and amounts retained by the parent or other person, or dispersed to the adult child when a parent or other person receives a child support arrearage payment on behalf of an adult child.

- Charge the arrearage payment as unearned income to the adult child when an adult child receives a child support arrearage payment directly from the absent parent.
- Post to the SSI record, the date and amount of the arrearage payment as unearned income to the adult child when a parent or other person who receives an arrearage payment gives the payment to the adult child.
- Post to the SSI record, the date and amount of the arrearage payment as unearned income to the parent or other person when the parent or other person retains the arrearage payment and he or she receives SSI (or is a deemor on an SSI record).
- Post to the SSI record, the date and amount of the child support payment (including arrearages) as unearned income to the parent or other person when the parent or other person receives the payment on behalf of a deceased SSI child or adult child and he or she receives SSI (or is a deemor on an SSI record).
- Use associated Remarks in MSSICS or a MSSICS Person Statement (DPST) screen to record a statement of retention or disbursement of child-support arrearage payments over the penalty clause.

## **2. Developing and verifying child support payments prior to June 1, 2002**

- Verify the amount and frequency of child support payments.
- Accept the individual's allegation of relationship of the payer to the payee unless you doubt the allegation.
- Develop child support arrearage payments to an adult child depending on the month(s) he or she receives arrearage payments.

- Post the amount of the payment to the SSI record as income to the adult child who is receiving SSI payments. Do not charge any of the income to the parent or other person receiving the income on behalf of the adult child.
- Use associated Remarks in the Modernized Supplemental Security Income Claims System (MSSICS) or a MSSICS Person Statement (DPST) screen to record a statement of retention or disbursement of child support arrearage payments over the penalty clause.

### **3. Procedure when we make one payment for two or more recipients**

Apply the procedures in this section when you make a single support payment (e.g., one check) for two or more recipients:

- a. Review the legal document that describes the support payments:
  - If the legal document states the amount of each person's share, divide the payment according to the terms of the document.
  - If the legal document does not indicate the amount of each person's share, divide the payment equally.
- b. If no legal document exists, contact the source of the payment to establish intent and allocate the support payment according to that intent.
  - If contact with the source is not successful, accept the payer's signed allegation about who the support is for and how to allocate the support. If the payer cannot tell you how he or she wants to allocate the support payment, divide the payment equally among the intended recipients.
  - Use associated Remarks in MSSICS or a MSSICS Person Statement (DPST) screen to record a statement of retention or disbursement of child support arrearage payments over the penalty clause.

#### **4. Developing evidence for child support payments**

Consider the following child support evidence:

- Court records (For information on accepting court orders, see GN 00301.030B.3.);
- Records of the agency that released the payments;
- Official documents in the recipient's possession (e.g., legal documents) that establish the amount and frequency of the support;
- Report of contact with the source of the payment containing the date, amount, and frequency of the support.

If none of the evidence in SI 00830.420D.4. is available, document the recipient's signed statement of the amount of the support, dates received, and the retention or disbursement of the payments on the DPST screen in MSSICS. In non-MSSICS cases, fax an SSA-795 (Statement of Claimant or Other Person) into the Electronic Disability Collect System (EDCS) or Non-Disability Repository for Evidentiary Documents (NDRed). Document the reason we did not obtain evidence (e.g., the documentation does not exist, the court or agency will not release the information, or the source refused to cooperate) in associated REMARKS or in COMMENTS on the EVID screen in MSOM EVID 001.003.

### **E. Procedure To Code SSI Claims System Claims**

#### **1. Payment on behalf of an SSI child when payer is an absent parent**

Apply these procedures for a payment from an absent parent on behalf of an SSI child.

In the SSI Claims System:

Enter the date and the full amount of cash child support payment and income type on the Child Support (ICHS) page for the child.

For more information on the Child Support (ICHS) page, see [INTRANETSSI.014.025](#).

For information on deeming and the income used to comply with a court order, see SI 01320.145.

If the claimant meets the definition of "child," the system:

- posts the income to the Social Security Record (SSR) as type "N" unearned income,
- applies the one-third exclusion to the type "N" income, and
- uses only two-thirds of the support payment in the SSI payment computation.

Enter the total child support payment that is In-Kind Support and Maintenance (ISM) on the In-Kind Support and Maintenance (LISM) page.

For more information about the In-Kind Support and Maintenance page (LISM) page, see [INTRANETSSI 010.015](#). Select "Yes" for question "DOES ANY PERSON (NOT LIVING WITH YOU) OR ANY AGENCY PAY FOR ANY OF YOUR FOOD OR SHELTER ITEMS, OR PROVIDE YOU OR YOUR HOUSEHOLD (IF APPLICABLE) WITH ANY FOOD OR SHELTER ITEMS." Click "Add ISM Source" button. A separate ISM Source window will be displayed. Select "Yes" for question "Payment from absent parent." The system applies the exclusion and determines the ISM amount based on the selections made.

## **2. Payment on behalf of a deceased SSI child when payer was an absent parent**

If the parent or other person receives Social Supplemental Income (SSI), e.g., parent is a disabled recipient, enter the date and any child support payment (including arrearages) that he or she receives on behalf of a deceased SSI child on the Other Income (IOTH) page of the SSI eligible person's record. MSSICS posts this income as type "SO" unearned income to the Supplemental Security Record (SSR). Document in Remarks that the income is a child support payment or arrearage on behalf of a deceased SSI child.



### **3. Court-ordered payment on behalf of an SSI child when payer is NOT an absent parent**

Enter the date and the full amount of cash child support payments and income type on the Child Support (ICHS) page for the SSI child.

For more information about the Child Support (ICHS) page, see [MS INTRANETSSI 014.025](#).

MSSICS posts the income to the SSR as type "SS" unearned income. The one-third exclusion does not apply to these payments.

For information on deeming and the income used to comply with a court order, see SI 01320.145.

### **4. Court-ordered payment on behalf of a deceased SSI child when payer was NOT an absent parent**

If the parent or other person receives SSI (e.g., parent is a disabled recipient), enter the date and any child support payment (including arrearages) that he or she receives on behalf of a deceased SSI child on the Other Income (IOTH) page. MSSICS posts this income as type "SO" unearned income to the SSR. Document in Remarks that the income is from a child support payment or arrearage from a deceased SSI child.

### **5. Payment on behalf of an adult child**

Apply these procedures for a payment on behalf of an adult child:

- Enter the date and the full amount of cash child support payments (including arrearage payments received, if applicable) to an adult child on the Child Support (ICHS) page in [MS INTRANETSSI 014.025](#).

If the claimant does not meet the definition of a "child," MSSICS posts this income to the SSR as type "SS" unearned income. The one-third exclusion does not apply to support payments received by an adult child. The system uses the entire support payment in the SSI payment computation.

- If the parent or other person receives SSI (e.g., parent is a disabled recipient), enter the date and any child support arrearage payment that he or she received and retained June 1, 2002 or later on the IOTH screen. MSSICS posts this income as type "SO" unearned income to the SSR. Document, in Remarks, that the income is from a child support arrearage.

## **6. Payment on behalf of a deceased adult child**

If the parent or other person receives SSI (e.g., parent is a disabled recipient), enter the date and all child support payments (including arrearages) that he or she receives on behalf of a deceased SSI adult child on the Other Income (IOTH) page. MSSICS posts this income as type "SO" unearned income to the SSR. Document, in Remarks, that the income is from a child support payment or arrearage from a deceased SSI adult child.

## **F. Procedure To Code Non-SSI Claims System Claims**

### **1. Payment on behalf of an SSI child when payer is an absent parent**

Apply these procedures for a payment from an absent parent on behalf of an SSI child:

- Enter the date and the full amount of cash child support payments to a child as type "N" unearned income in the UM field on the SSA-1719-B, (SSI Post Eligibility Data Input) or the SSA-450-SI (SSI Data Input and Determination). The system applies the one-third exclusion when performing the SSI payment computation.
- For child-support payments that are ISM, first compute the amount of child support that is countable. For more information on food or shelter received as child support, see SI 00830.420B.2 in this section. Post the countable child support as type "H" income on the SSA-1719-B (SSI Posteligibility Data Input) or SSA-450-SI (SSI Data Input and Determination). For more information on specific rules for in-kind support and maintenance (Type H) unearned income, see SM 01005.193.

## **2. Payment from an absent parent on behalf of a deceased SSI child**

Post the full amount of the child support payments (including arrearages) to a parent or other person who received the payment on behalf of the deceased SSI child (and who receives SSI or is a deemor) as type "SS" unearned income in the UM field on the SSA-1719-B or SSA-450-SI. The one-third exclusion does not apply to these payments. Document, on a SSA-795, the payer's signed statement that the income is from a child support payment or arrearage from a deceased SSI child and fax it into Electronic Disability Collect System (EDCS) or Non-Disability Repository for Evidentiary Documents (NDRed).

## **3. Court-ordered payment on behalf of an SSI child when payer is NOT an absent parent**

Post the full amount of cash child support payments to the child as type "SS" unearned income in the UM field on the SSA-1719-B or SSA-450-SI. The one-third exclusion does not apply to these payments. For information on deeming and the income used to comply with a court order, see SI 01305.330.

## **4. Court-ordered payment from parent who is not absent on behalf of a deceased SSI child**

Post the full amount of child support payments (including arrearages) as income to the parent or other person who received the payment on behalf of the deceased SSI child. Post the income as type "SS" unearned income in the UM field on the SSA-1719-B or SSA-450-SI. The one-third exclusion does not apply to these payments. Document the recipient's signed statement that the income is from a child support payment or arrearage from a deceased SSI child on an SSA-795 and fax it into EDCS or NDRed.

## **5. Payment on behalf of an adult child**

Apply these procedures for a payment on behalf of an adult child:

- Enter the date and the full amount of cash child support payments (including arrearages received, if applicable) to an adult child as type "SS" unearned income in the UM field on the SSA-1719-B or SSA-450-SI. The one-third exclusion does not apply to an adult child.

- Enter the date and any child support arrearage payments that are income (received June 1, 2002 or later) to a parent or other person who receives SSI as type "SS" unearned income in the UM field on the SSA-1719-B or SSA-450-SI.

## **6. Payment on behalf of a deceased SSI adult child**

Enter the date and the full amount of the child support payments (including arrearages) to a parent or other person who received the payment on behalf of the deceased adult child (and who receives SSI or is a deemor) as type "SS" unearned income in the UM field on the SSA-1719-B or SSA-450-SI. The one-third exclusion does not apply to these payments. Document, on an SSA-795, the recipient's signed statement that the income is from a child support payment or arrearage from a deceased SSI adult child and fax it into EDCS or NDRed.

## **G. References**

- MS INTRANETSSI 014.024 Child Support List
- MS INTRANETSSI 014.025 Child Support
- SI 00501.415 Blind or Disabled Children of Military Personnel Stationed Overseas - Overview
- SI 00501.010 Determining Child Status for Supplemental Security Income (SSI) Purposes
- SI 00501.020 Student - SSI
- SI 00830.005 General Rules for Developing Unearned Income
- SI 01320.550 Deeming - Change of Status - Parents/Children

- SI 01310.110 Deeming Concept - Allocation
- SI 00835.350 Computation of In-Kind Support and Maintenance (ISM) from Outside a Household (Including Vendor Payments by a Third Party Outside the Household)
- SI 00835.400 In-Kind Support and Maintenance (ISM) to One Person
- SI 00830.100 Expenses of Obtaining Income
- MS INTRANETSSI 010.015 In-Kind Support and Maintenance (ISM)

To Link to this section - Use this URL:

<http://policy.ssa.gov/poms.nsf/lnx/0500830420>

*SI 00830.420 - Child Support Payments - 07/25/2016*

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## **SAMPLE LANGUAGE FOR SETTLEMENT AGREEMENTS**

### **GUARDIANSHIP OF SON, JAKE**

Should Wife need to apply for Guardianship of Jake before the age of 18, then Husband shall not object to same.

### **CHILD SUPPORT & EMANCIPATION**

Once the \_\_\_ and \_\_\_\_\_ homes are sold, all debts are paid off, and the parties are able to separate their checking accounts, the Husband shall pay to the Wife as and for the children's support the sum of Three Thousand one hundred and twenty five dollars (\$3,125.00) dollars every month payable to the Wife and Three Thousand one hundred and twenty-five dollars (\$3,125.00) directly into the Jake First Party Special Needs Trust. The amount of basic support shall be adjusted upon the emancipation of any of the children of the marriage. The parties have mutually agreed that should either child be unable to be emancipated due to his special needs, then both parents will continue to equally support the child past the age of 22, with the husband continuing to fund the Special Needs Trust created for the benefit of the Special Needs Child;

### **MUTUAL RELEASE AND DISCHARGE**

The Husband Agrees to execute a new Last Will and Testament which names daughter, Suzie and the "Jake First Party Special Needs Trust" as beneficiaries of a minimum of 50% of his net estate therein.

### **LIFE INSURANCE**

(a) Both Wife and Husband agree to maintain in full force and effect their existing Term life insurance policies. The Husband currently owns two policies with \_\_\_\_\_. The first being policy number \_\_\_\_\_, face amount is one million dollars; and the second being policy number \_\_\_\_\_ whose face value is 2.4 million dollars. Suzie and Jake First Party Special Needs Trust shall be the irrevocable beneficiaries of such policy, and the Wife shall be the irrevocable trustee thereof.

(b) If the policy herein for the benefit of the Children as aforesaid is not in full force and effect at the time of the Husband's death, and the Children or Trustee does not receive the amount to which he or she is entitled, then the Children shall have a priority creditor's claim and a lien against the Husband's estate for the face amount of the policy.

(c) Husband shall submit to Wife a photocopy or other proof of payment receipt evidencing payment of premiums on the policy herein above described upon written request of the Wife. Should the Husband fail to pay a premium when due, the Wife shall have the right, but not the obligation, to make payment thereof and in such event, the Husband shall immediately reimburse the Wife for all premiums paid by her.



(d) The Wife currently owns a policy with \_\_\_\_\_. Policy number \_\_\_\_\_ face amount is one and a half million dollars. Wife shall be the owner of said policy, and Suzie and Jake First Party Special Needs Trust shall be the irrevocable beneficiaries of such policy, with Uncle Joe and Aunt Mary as the irrevocable co-trustees thereof.

(e) If the policy herein for the benefit of the Children as aforesaid is not in full force and effect at the time of the Wife's death, and the Children or Trustee does not receive the amount to which he or she is entitled, then the Children shall have a priority creditor's claim and a lien against the Wife's estate for the face amount of the policy.

(f) Wife shall submit to Husband a photocopy or other proof of payment receipt evidencing payment of premiums on the policy herein above described upon written request of the Husband. Should the Wife fail to pay a premium when due, the Husband shall have the right, but not the obligation, to make payment thereof and in such event, the Wife shall immediately reimburse the Husband for all premiums paid by him.