

Divorce And Special Needs Planning: Issues When a Party In a Divorce Has a Disability or Has a Child With a Disability

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Persons who are disabled, as well as parents of children with disabilities, have special planning needs which need to be addressed if the parties are in the midst of a divorce.

When a party in a divorce action has a disability or has a child with a disability who is receiving Supplemental Security Income (SSI) and/ or Medicaid or who may need these benefits in the future, the divorce agreement needs to be structured so that the divorcing spouse or child does not lose his or her eligibility for SSI, Medicaid or other needs based benefits. SSI and Medicaid may be affected if the custodial parent receives alimony or if the custodial parent receives cash child support for the benefit of the special needs child. In the case of a spouse who is disabled, he or she will want to be sure that the receipt of alimony or split in assets does not disqualify him or her from continued receipt of needs based benefits.

In the case of minor disabled children, if the custodial parent receives alimony in the form of a monthly cash payment, SSI will count the amount of the alimony received in determining the allowable family income allowance. If the alimony exceeds the family income allowance, which is based on a sliding scale fee, the child may be ineligible for SSI. Once the child reaches the age of 18, cash alimony to the custodial parent is no longer countable income for SSI purposes. That is because income received by a parent is no longer deemed as available to a disabled child who is 18 years or older.

Child support is treated differently than alimony. Assuming the family income is below the family income allowance, prior to the age of 18, child support will merely reduce the child's SSI check by one third. However once the child is 18, the receipt of cash child support will result in a dollar for dollar loss of SSI. In many cases, child support disqualifies the adult disabled child from being eligible for SSI and Medicaid. This is because child support is treated as 'unearned income' and no longer counted as in-kind support once the child reaches the age of 18. Under SSI rules, unearned income has a \$20 limit. Anything in excess of \$20 results in a dollar for dollar loss in SSI.

Alimony paid to a spouse who is disabled also counts as unearned income and may place the spouse who is disabled in a worse off position if critically needed government benefits are reduced or lost as a result of the alimony. As in the case of a special needs child who is over the age of 18, alimony for a disabled spouse will result in a dollar for dollar loss of SSI and may keep the party from being eligible for either SSI or Medicaid.

Under current regulations, SSI will not count the value of alimony received as unearned income if it is not received in the form of a cash payment. The non custodial spouse or the non disabled spouse could agree to pay the same amount each month in the form of goods and services. If the goods or services received include basic shelter expenses such as rent, mortgage, taxes, or utilities, this will result in a one third loss of SSI but at least the disabled spouse or parent of special needs child will continue to receive SSI even though in a reduced amount. This is because if the alimony is used toward basic living expenses, it is counted as in-kind income which, as stated above, results in a loss of one third of the SSI monthly payment.

Goods and services such as after school child care, additional therapies, private school tuition, automobile expenses (car payments, insurance, and gas), housekeeping services, telephone, cable tv, internet, etc. are not counted by SSI as income.

Another option for parties who are disabled or who have children who are disabled is to use a qualified special needs trust to receive funds that would ordinarily be distributed outright to the disabled spouse or to the custodial parent. A properly drafted special needs trust may allow, in some circumstances, for a party in a divorce who is disabled to receive a split of assets and/or alimony income as long as the income and assets are placed in a trust. This type of trust is different than the typical 3rd party special needs trust which is often used to protect an inheritance or gift for a disabled individual. Not all persons with disabilities can use these type of qualified special needs trust. For those for whom it is appropriate, it may allow much greater flexibility in structuring a divorce settlement agreement so that the spouse with a disability or custodial parent of a special needs child can better protect assets and income.

The average family law attorney is not likely to be familiar with qualified special needs trusts. Lawyers drafting these trusts require knowledge in trust law, tax law, Medicaid law and guardianship law. My recommendation is that all parties in a divorce who are challenged with a disability or who have a child with a disability ask their family law attorney to consult an attorney who is familiar with this special type of special needs trust. If you cannot find an attorney in your community familiar with qualified special needs trusts, you can contact the Arc of MA (781-891-6270) for a list of attorneys who have a working knowledge of special needs planning in divorce situations.

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