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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DIVORCE AND PLANNING FOR THE DISABLED CHILD OR SPOUSE

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DIVORCE AND PLANNING FOR THE DISABLED CHILD OR SPOUSE

I. INTRODUCTION:

Although there have been many “studies” to show that a disabled child dramatically increases the likelihood that the parents will divorce, as high as 86% for parents of a child with a disability, the number of divorces in all marriages is a staggering 50%. The additional fact that nearly 10% of the US population has a family member with a disability requires that the issue of the disability of a party to the divorce, be it the spouse or a special needs child, must be considered and planned for. Financial and estate planning, eligibility for government benefits, support or alimony payments, planning for the care and residential needs to the person with a disability all are impacted when there is a divorce. This paper reflects current law in IL and MA but it is our experience that the legal principals applied in MA and IL are similar throughout many other states.

It is clear under Massachusetts and IL statute and case law that parents may be obligated to provide financial support to their adult, disabled child. Specifically, the general equity jurisdiction of the Massachusetts Probate and Family Court, conferred by statute, may be invoked to order a divorced, financially able non-custodial parent to contribute to the support of a mentally or physically incapacitated adult child. See M.G.L. c. 215, sec. 6; Feinberg v. Diamant, 378 Mass. 131, 132 (1979). In support of its determination that a parent is obligated to provide support for that adult child to the fullest extent possible, the Feinberg Court recognized the following:

The duty and obligation of a parent to care for his offspring does not necessarily terminate when the child arrives at age or becomes an adult; nor is it limited to infants and children of tender years. An adult child may from accident or disease be as helpless and incapable of making his support as an infant, and we see no difference in principle between the duty imposed upon the parent to support the infant and the obligation to care for the adult, who is equally, if not more, dependent upon the parent. In either case, the natural as well as the legal obligation is the same, if the parent is financially able to furnish the necessary assistance.


Illinois statutes provide:
(750 ILCS 5/513)

Sec. 513. Support for Non-minor Children and Educational Expenses.
(a) The court may award sums of money out of the property and income of either or both parties or the estate of a deceased parent, as equity may require,
for the support of the child or children of the parties who have attained majority in the following instances:

(1) When the child is mentally or physically disabled and not otherwise emancipated, an application for support may be made before or after the child has attained majority.

In addition, case law supports the obligation to continue support past majority: (in re Marriage of Kennedy, 170 ILL. App. 3d 726, 525 N.E. 2ds 168, 121 Ill. Dec. 362 (5th Dist. 1988). Strom v. Strom, 13 ILL App. 2d 354, 142 N.E. 2d 172 (1st Dist. 1957)).

This paper is intended to provide an overview of special needs issues and to help reconcile the obligation of one party to provide alimony or child support with the need to maintain and preserve eligibility for government benefits for the disabled spouse or a dependent child. The topics covered here should provide the family law attorney with sufficient information to recognize whether special needs planning should be considered in divorce negotiation, child support or alimony planning or post decree modifications to child support or alimony.

II. AS A FAMILY LAWYER, WHY WORRY ABOUT SSI, MEDICAID OR OTHER GOVERNMENT BENEFITS?

If the parties are in the midst of a divorce and the family includes a spouse who is disabled or a child or children with disabilities, there are special planning needs which need to be addressed during the negotiations and when drafting the settlement agreement and judgment or post-decree order.

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 child support in the form of cash for the benefit of the special needs child. A prior child support order which effectively renders the child ineligible for government benefits may need to be modified (for example if the order was entered when the child was a minor and disability had not manifested itself). It is essential that the parties understand why it is important for a child to be eligible and why the child support order may need to be amended, as I more fully explained below.

In the case of a minor disabled child, if the custodial parent receives alimony in the form of a monthly cash payment, the Social Security Administration (“SSA”) 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 based on family size, the child may be ineligible for SSI.
Alimony paid to a spouse who is disabled also counts as unearned income and may render the spouse totally ineligible for critically needed government benefits including Medical care or residential placement.

Child support is treated differently than alimony. Assuming the family income is below the family income allowance for government benefits, child support to the custodial parent while the child is under the age of 18, will reduce the child’s SSI check by as much as one-third. However, once the child is 18, the receipt of cash child support (which is considered “unearned income” to the child) will result in a dollar for dollar loss of SSI. If the child support paid is greater than the current SSI ($674/month in 2011), the child will not only lose the SSI but may also lose eligibility for Medicaid.

Certain kinds of payments are not counted by SSA as income. Thus the non-custodial spouse could pay directly for goods and services such as after school care, additional therapies, private school tuition, automobile expenses (car payments, insurance, and gas), housekeeping services, telephone, cable TV or internet and not jeopardize eligibility for benefits.

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 paid outright to the disabled spouse or to the custodial parent. The use of special needs trusts to alleviate an undesirable outcome is discussed below.

Each of these issues is discussed below including an explanation of the loss of benefits that is likely to occur as well as suggestions including sample language for post-decree orders to avoid or reduce the unintended consequences.

III. WHAT ARE SPECIFIC GOVERNMENT PROGRAMS FOR AN ADULT DISABLED CHILD AND HOW ARE THEY AFFECTED BY CHILD SUPPORT?

As set forth above, the receipt of child support affects the child’s eligibility for means tested benefits, (note: the use of “child” in this paper is intended to show familial relationship not minority.) For purposes of government benefits planning, child support for a child over the age of 18 is the child’s right, not the right of the custodial spouse. The child support is therefore “unearned income” to the adult child and counted in determining eligibility for benefits.

A. DEFINITION OF “DISABLED”

Under current law a person is “disabled” for social security purposes if he or she meets the definition in the Social Security Act Sec. 1614(a)(3), (42 U.S.C. Sec. 1382c(a)(3)), which is an individual who is a citizen of the U.S. or lawful resident who is “unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” The standard of “substantial gainful activity” (“SGA”) is set annually as determined by changes in the Cost of Living Adjustment. For 2011, SGA is the ability to earn at least $1000 per month. Thus if a child with a disability who is 18 years or older is unable to work and earn at least $1,000 per month and is otherwise
eligible pursuant to the means-testing, the child will be eligible for Supplemental Security Income (SSI).

B. SUPPLEMENTAL SECURITY INCOME (‘‘SSI’’)

SSI requires that in addition to a person meeting the above definition of ‘‘disabled’’ and being incapable of substantial gainful activity, s/he must be poor and have very little income and very few resources. The following is a list of resources that an individual is allowed to retain and still be eligible for SSI:

- savings or checking accounts totaling a maximum of $2,000;
- life insurance with a face value of up to $1,500;
- burial plots (including for immediate family);
- burial funds up to $1,500 (or irrevocable pre-paid funeral);
- one car of a reasonable value so long as it is used for individual’s household’s transportation needs;
- furniture and household goods of reasonable value;
- a house or condo, regardless of its value, if the individual resides there.

In addition, Social Security does not count the following income in deciding SSI eligibility:

- the first $20 per month of most income from any source;
- the first $65 per month of most earned income, and half of any earned income more than $65 per month;
- food stamps;
- home energy assistance under certain conditions;
- food, clothing, and shelter from certain private non-profit organizations approved by the local Social Security office.

If something is not counted in determining eligibility, it is not a ‘‘resource’’.

Finally, in addition to asset and income limitations, eligibility for SSI and Medicaid requires that the individual not have transferred assets for less than face value or made gifts. If the child has assets in his or her name (e.g. UTMA accounts) or the right to child support, special needs planning must be done (as outlined below).

C. MEDICAID

Like SSI, Medicaid is a medical assistance plan for persons who are elderly, blind or disabled and poor. Like SSI, eligibility is means-tested. Although this is a two step process, SSI then Medicaid, the means testing is generally the same for both.

Medicaid is a comprehensive medical plan but is the payer of ‘‘last resort’’. If a person is covered by private insurance (Blue Cross, Humana, for example) or Medicare, the private insurance or Medicare coverage will be tapped first and Medicaid last. Other than long term care
insurance, Medicaid is the only medical insurance to cover long term residential care. Eligibility for Medicaid may be important in the negotiation and planning for child support if the child is likely to need residential placement if a parent is no longer capable of caring for the child or if developing independence and residence in a Title XIX Medicaid waiver residential program or group home is a goal for the child. Although the likelihood of residential placement may be “down the road” it is wise to plan ahead to ensure eligibility if necessary. Although Medicaid will cover comprehensive medical services many doctors don’t take Medicaid. It is essential for the parents to maintain private coverage for the special needs child. It may mean the difference between marginal care and care from a physician who specialized in the child’s disability.

A more immediate need for Medicaid eligibility arises if the adult child needs or could benefit from day placements, job training, workshops, or other Medicaid eligible programs.

After aging out of the local school district programs, which can provide workshops and job training until age 22, an adult has very few options unless he or she is Medicaid eligible. (Even with Medicaid eligibility, options may be limited, but Medicaid eligibility is the key to most, if not all, programs for adult individuals with a disability).

Where a child in a divorcing family is still young, the need for such programs may not yet be evident, but with proper planning and court ordered support, the child will not later be determined ineligible for appropriate programs which require Medicaid eligibility. For many families the cash benefit of SSI (currently $674/month) is not the main purpose for the planning, it is rather Medicaid eligibility that moves the planning.

In planning for child support for an adult child who is receiving or may be eligible for SSI, it is important that the assets and income guidelines for SSI and Medicaid are followed.

**D. SOCIAL SECURITY DISABILITY INCOME (“SSDI”)**

Social Security Disability Income (“SSDI”) (sometimes referred to simply as “SSD” or “Disability”) is an entitlement not a welfare or means-based benefit. The disabled adult child must have worked and paid into the Social Security system sufficient quarters to be eligible for disability benefits. Depending on the age of the individual at the time of claiming disability, the number of required quarters varies.

If the adult child has not worked and paid into the system, the child may be eligible for SSDI if a) he or she was determined to be disabled prior to the age of 22 and is single and b) if either of his or her parents worked and paid into the system and is retired, disabled or deceased.

If the adult child is eligible for SSDI under any of the above scenarios, he or she can have assets in excess of those maximums outlined above for SSI recipients. Again, this is because SSDI is an entitlement. “Premiums” were paid into the Social Security system by the adult child himself or by a responsible parent and, as a beneficiary under the social security systems rules, the disabled adult child is entitled to the benefits.
In disability law, a disabled adult child who was disabled prior to the age of 22 and entitled to SSDI is often referred to as a “DAC (a disabled adult child).” Until one of the parents of the disabled adult child is retired, disabled or deceased, the child is not technically a DAC. Unofficially the child is a “DAC in waiting”, i.e. waiting to receive SSDI until a parent retires, becomes disabled or is deceased.

There are benefits to being a DAC as opposed to just an adult child with a disability. The SSDI a DAC will receive is likely to be greater than the SSI received by an adult disabled person. The DAC will receive ½ of the amount receivable by the retired parent (if both are retired, ½ of the parent who receives the greater amount) and ¾ of the amount of a parent who is deceased. This is likely to be greater than $674. In addition the DAC will be entitled to Medicare after receiving SSDI for two (2) years. (Note: the ½ or ¾ the child receives does not reduce the parent’s amount; it is in addition to what the parent gets.)

In negotiations for child support or modifications of prior orders, it is essential to know if the adult child receives SSI, SSDI or a combination of the two.

An adult child could be receiving some SSDI and some SSI. If the amount of SSDI (remember the DAC gets ½ of the parent’s amount) is lower than the then current SSI amount, the DAC will receive SSI on top of the SSDI to equal the maximum SSI monthly amount. In 2011, if the SSDI is $250, the DAC would also receive $444 in SSI (the first $20 of SSDI is disregarded) to equal the $674, the current SSI amount, (the child would actually receive $694 with the $20 disregard).

E. OTHER PROGRAMS

There are other programs that a disabled adult child may need which require pre-planning to ensure eligibility. These include for example: Section 8 housing and food stamps. These are linked to SSI and Medicaid and special needs planning, such as establishing a special needs trust, affect eligibility for these other benefits. There is not room to cover these other benefits here, but note that eligibility for Section 8 and food stamps is affected by child support or alimony received by the individual.

IV. CHILD SUPPORT FOR A MINOR CHILD WITH DISABILITY

A minor child, who is disabled, may be eligible for SSI if his or her custodial parent is also poor, as the custodial parent’s income is “deemed” to the child for eligibility. In addition to the deemed income of the custodial parent, SSA counts the child support received – but not all of it. SSA subtracts and disregards one-third (1/3) of the child support. The remaining two-thirds (2/3) will reduce the child’s SSI dollar for dollar. (POMS SI 00830.420)

If the custodial parent’s earned or personal income is at or near the cutoff for eligibility for a minor child’s SSI and Medicaid, alimony or child support in the form of cash received by the custodial parent would render the child ineligible. In order to maintain eligibility for the child, the non-custodial parent could pay for goods and services the custodial parent would otherwise use the alimony to pay for: mortgage, car payments, after school programs,
housekeeping services. However, the non-custodial parent must pay directly to the mortgage lender, for the car loan or to the after school program. By “paying” alimony in this manner, the child’s SSI and Medicaid could be preserved.

Court ordered child support for an adult child with a disability is the right of the child. As such, the child (or a guardian on his or her behalf) cannot direct the child support to another person or to a trust that benefits a person other than the child himself or herself. The non-custodial spouse cannot pay the child support to the custodial spouse directly without the child support (as a right of the child) counted as income to the child. POMS SI 008330.420. As set forth earlier, if the income (including child support) pushes the child over the income limits, he or she may be rendered ineligible for SSI and Medicaid. What, if anything can be done to rearrange the payment of support by the non-custodial parent to avoid ineligibility of the child?

A. SPECIAL NEEDS TRUST PLANNING

Federal legislation allows certain parties to establish a trust for the benefit of a disabled individual and fund it with the individual’s own assets and allows the individual to remain eligible for means-tested SSI and Medicaid so long as the trust meets the federal guidelines and directs that at the death of individual, the trustee reimburses Medicaid for the medical assistance provided to the individual during his or her life. The legislation was called the Omnibus Budget Reconciliation Act of 1993 (often referred to as “OBRA ‘93”), 42 U.S.C. §1396p(d)(4)(A). A trust established under this legislation is often referred to as an “OBRA ‘93” trust, a “d4A”, a “first party special needs trust” or “special needs payback” trust.

There are many statutory requirements to ensure the trust is not a “resource”. If a resource, the assets are counted against the child. In addition, the Social Security Administration (“SSA”) has promulgated many rules which further refine what is allowable language in an OBRA ‘93 Trust that remains not a resource. SSA has its own internal procedures manual: the Program Operations Manual System, otherwise referred to as POMS which is found at SSA’s website: www.ssa.gov.

If the child support is court ordered and the right to the child support is irrevocably assigned to a properly drafted OBRA ‘93 trust for the child, the child support will not be a resource and the monthly receipt by the trust will not be counted as income to the child (POMS § SI 01120.200).

B. THIRD PARTY SPECIAL NEEDS TRUSTS

The OBRA ‘93 Trust must not be confused with other special needs trusts or supplemental needs trusts which don’t require a payback because the assets in the trust were owned by and transferred into the trust by someone other than the beneficiary. A special needs or supplemental needs trust funded by someone other than the individual with a disability is often referred to as a “third party trust.” Funds in a properly drafted third party trust can be used for the benefit of the beneficiary for supplemental needs and the trust does not count as a resource, but there is no payback requirement. Clearly the benefit of the third party trust is the ability to name a remainder beneficiary such as another child or children rather than having to
pay back to Medicaid. Since the child support is the child’s right and therefore the child’s funds, a third party trust is not an option for child support.

An alternate arrangement may be a combination of the OBRA ‘93 trust and a third party supplemental needs trust (“SNT”). Arguably, child support is for the support and maintenance of the adult child with disability. There is no legal duty for the non-custodial parent to provide for supplemental needs, extras or luxuries for the child. In addition, the parties may recognize that the custodial parent is more likely to suffer financially from the additional cost for services and respite care for an adult disabled child and the inability of the custodial parent to fully assume outside employment. As such in addition to child support paid to an OBRA ‘93 Trust or directly for goods and services, the non-custodial parent may wish to fund a third party supplemental needs trust to provide for non support items and services not covered by Medicaid and SSI.

Also in planning where finances are tight, the non custodial parent’s obligation could be tied to SSI received by the child. For example, if support needs total $1,000 month and the child gets $674; the non custodial parent’s payment into a trust could be set at $326. If the divorcing parties agree and obtain court approval of a settlement that provides for child support payable to an OBRA ‘93 trust and agree to an additional voluntary payment to a third party supplemental needs trust (for non-support expenses), at least some of the funds for the adult child will not be subject to payback to Medicaid.

Often times a settlement agreement requires that either or both of the parents carry life insurance for the benefit of the children. If life insurance is required, it is essential that the proceeds payable to or for the benefit of a child with special needs or spouse with disability be payable to a special needs trust and not to the person directly. The special needs trust needs to be established before the beneficiary designation is changed.

If IRAs are part of the planning and asset division these too, need to have special needs trusts as beneficiary for children or spouses with disability.

V. ALIMONY

Alimony paid to a spouse who is disabled counts as unearned income and is likely to reduce or preclude critically needed government benefits for the spouse.

As is the case of a special needs child who is over the age of 18, alimony for a disabled spouse is “unearned income” (POMS SI 00830.418) and, after disregard of $20, will result in a dollar for dollar loss of SSI and may preclude the party from being eligible for either SSI or Medicaid. In the case of a spouse who is disabled, he or she will want to be sure that the receipt of alimony or the split in assets does not disqualify him or her from continued receipt of needs based benefits.

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 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
A. USE OF SPECIAL NEEDS TRUST – OBRA ‘93

A properly drafted special needs trust may allow, in some circumstances, a party who is disabled in a divorce to receive a split of assets and/or alimony income as long as the income and assets are placed in an OBRA ‘93 payback style 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 OBRA ‘93 special needs trusts. To establish an OBRA ‘93 trust the person must meet the definition of “disabled” under SSA rules. 42 U.S.C. Sec. 1382c(a)(3). 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 can better protect assets and income and enjoy a better quality of life.

Asset settlement and alimony paid to a disabled spouse are the right of the disabled spouse and therefore, if transferred to a trust, must be placed in an OBRA ‘93 payback style trust. According to statute, only certain persons can establish an OBRA ‘93 Trust: the beneficiary’s parent or grandparent, guardian or a court. Thus if the disabled spouse’s parents and grandparents are deceased or unable to establish a trust and the spouse is not under a guardianship, the domestic relations court could, by court order, “establish” the trust. To meet SSA regulations, the court must actually order that the trust be established, not just approved such a trust (POMS SI 01120.203Bf). However, if a parent of the disabled spouse is able and willing, he or she can be the Settlor to establish a trust to hold assets allocated to the disabled spouse and to receive an irrevocable assignment of the alimony to the trust (POMS SI 01120.200G). The trustee of the OBRA ‘93 trust could then expend funds as needed for the disabled spouse for his or her life. At the beneficiary’s death, the trust must first payback Medicaid for the medical assistance provided. This trust allows the disabled spouse to enjoy a greater quality of life while preserving his or her eligibility for Medicaid.

Asset allocation is an important planning point as assets allocated to the OBRA ‘93 Trust are subject to payback to Medicaid. If the home is in the OBRA ‘93 Trust, it may need to be sold to pay the Medicaid.

B. THIRD PARTY SPECIAL NEEDS TRUST

Generally, assets allocated to the disabled spouse and alimony cannot be placed in a third part special needs trust. Such assets and alimony belong to the disabled spouse and transfer to a trust without a payback violates SSI and Medicaid regulations. However, if for example, the home is by far the most valuable asset, allocating full title to the home to the spouse may not be a fair allocation of assets. If the disabled spouse has ongoing needs that the alimony (irrevocably
assigned to an OBRA ‘93 Trust) can meet, the right to reside in the house for life could be assigned to a third party special needs trust with the remainder to the children (perhaps to pay for college). Careful and reasonable planning could allow for better quality of life for the disabled spouse and also preserve some of the family assets for children. It is essential that the asset allocation and funding of trusts be scrutinized to ensure it will not violate SSI’s transfer for less than value/gifting which would render the disabled ineligible for benefits at least for some period of time.

Crafting a settlement with the use of an OBRA ‘93 and a third-party special needs trust may be the only way the disabled spouse could continue to be eligible for Medicaid.

Also what may appear to be an unequal split of assets may be in the disabled spouse’s best interest. The loss of Medicaid for a spouse who requires expensive medication, attendant care services or residential placement is likely to put him or her in a worse position than loss of the right to ½ of an IRA or pensions. Also an important planning point is that certain pensions (by their own rules) cannot be irrevocably assigned to an OBRA ‘93 or third party special needs trust.

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. Our recommendation is that all parties in a divorce who are themselves 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.