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Divorce Actions and SNTs

Mary Alice Jackson

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I. Introduction

Divorce is hard even under the best of circumstances, if there is such a thing. Emotions like anger and pain often mean that people lose sight of reason. The family law attorney is charged with taking hold of the situation and finding solutions that will work now, and in the future. But when there are disability issues and public benefits at stake, a special needs attorney must counsel the parties on the effect of settlement options on continued or upcoming eligibility benefits. An inadvertent loss of benefits can be catastrophic because the private payment of care to individuals with disabilities who need services such as rehabilitation, meal preparation, assistance with toileting or hygiene, and who are immobile in their own homes and in danger of falls or acute illness are far too expensive for most people. These are just a few of the needs which individuals with disabilities depend upon to live and thrive. These benefits reduce the incidence of institutionalization, allowing people to remain in their homes or in a less restrictive environment, and to be safe. Disability is a fact of life and protecting benefits has to be considered when a case involves child support and alimony.

A. *The Parties.*

When necessary and appropriate, the parties to these proceedings need to advocate to protect public benefits. As in all elder law and special needs practices, there are many people with an interest in how things turn out; their interests do not always align, or there is partial alignment. Distrust can lead the plaintiff and respondent to refuse to decide in the best interest of the individual with the disability. The special needs attorney has a duty to offer counsel on what course of action is in the best interest of the beneficiary. We are responsible for educating the parties and clarifying the ramifications of a settlement provision affecting benefits. A discussion on options is found later in this paper.

If the individual with the disability has capacity, he or she will advocate on his or her own behalf. This best-case scenario avoids the needs for the lawyer and/or legal representative to use a “best interest” standard. Many times, that standard is unavoidable, however having direct input from the beneficiary assures a confidential lawyer-client relationship which reflects the wishes of the individual with the disability.

At times, the special needs lawyer will assume that the individual with the disability is completely mentally incapacitated for purposes of special needs planning. If the case is referred to you by the family law attorney, he or she will already have made a judgment about the individual’s capacity to understand the complexities of a support or spousal maintenance proceeding. However, there are cases in which the individual with the disability is able to participate in a conversation about public benefits, and in some instances, his or her capacity can change during the course of representation. If the lawyer has questions about whether the affected party has capacity, guidance can be found in the Model Rules of Professional Conduct issued by the American Bar Association.¹

¹ ABA Model Rules of Professional Conduct, Rule 1.14, *Client with Diminished Capacity*.

The parties will include the attorneys for each side, the clients or legal representative(s) - perhaps a guardian or agent under a Durable Power of Attorney, or Next Friend. A mediator will be involved at some point. Finally, the court staff and the judge are involved. The special needs attorney may be the only party who understands public benefits and special needs. He or she may need to contact a social security retirement specialist so that the timing and coordination between benefits are well understood. Most practitioners who have only a passing understanding of SSA retirement and death benefits can do the research and get the information that's needed. A checklist of issues to be considered is found later in this paper. You may find that the checklist is not complete; it is intended to be a starting point.

On the public benefits front, someone has to direct the show. When too many people think they are in command, time consuming and expensive delays result. Public benefits law is not flexible, and we have to acknowledge the ambiguity of the application of laws. The special needs attorney needs to be in charge of counseling so that informed decisions can be made by the interested parties.

B. *Guardianship.*

Guardianship may be an issue when a party lacks capacity to participate in the dissolution proceeding and has no representative with authority to proceed in bringing or defending a dissolution suit. Adult children with disabilities (those who have reached the age of 18) are no longer affected by the disability of minority. While some parents seek to be appointed as the guardian of their adult child, many do not unless they run into a roadblock when a decision for the child needs to be made. A guardianship proceeding can be pursued in the probate court (or court of appropriate jurisdiction where there is no statutory probate court); or the attorney for the disabled party can proceed in accordance with ABA Rule 1.14.

C. *Public Benefits in General.*

We do special needs planning in child and spousal support cases because we want to protect eligibility for public benefits which have a limit on assets owned by the individual with a disability. Certain government programs have a limit on assets, others do not. For those that do, the limit is typically \$2,000. There are also limits on income which can be met by using special needs trusts. Every family is different, so while some elements are standard, every family needs a customized plan.

The phrase "public benefits" refers to government funded programs which provide services and supports to individuals who are aged, blind or disabled, and who meet certain medical, income and/or resource requirements. These programs are either "means-tested" or have other eligibility criteria. "Means-tested" means that access to the services are dependent on the amount of income and assets received and owned by the applicant, and in some instances, his or her spouse, or parents(s). Attributing income of parent(s) or a spouse to a public benefits recipient is known as "deeming". Deeming can reduce or eliminate public benefits, but the

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