

**SPECIAL NEEDS TRUSTS AND DIVORCE**

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# Special Needs Trusts and Divorce

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## **SPECIAL NEEDS TRUSTS AND DIVORCE**

### **I. Introduction**

Often the parents of a child or adult disabled individual have or will divorce. Many divorce attorneys are unaware of the interplay of the divorce court's orders and the impact that may have on various benefits that the child may otherwise be able to benefit from. At the time of the divorce serious consideration should be given to whether the child is or may need to access benefits in the future due to a disability. If it is possible that the child will receive or apply for benefits, then both parents should consult with an attorney that is very familiar with government benefits and Special Needs Trusts (SNTs).

### **II. Issues in Calculating Support and Maximizing Financial Resources**

When presented with a case involving the parents of a child with disabilities one of the first things we should do is to find out whether or not the child is receiving government benefits. If so, it will need to be determined whether the child has qualified for the benefits based on economic eligibility and if so, will the payment of child support directly to the custodial parent jeopardize the child's benefits? If the family lawyer does not know the answer to these questions or if they do and they fear that the support may jeopardize the benefits, then the family lawyer should contact a probate / elder law lawyer who knows the rules of the government benefit programs and understands the use of special needs trusts to determine if a Special Needs Trust ("SNT") can be used to protect the child's eligibility for benefits while they continue to receive their monthly support payments. If the child is not receiving benefits then it might be worth investigating whether there are benefits available to the child that the parents have not yet accessed. Once again a probate / elder law attorney might be more familiar with benefit programs that may be available to the child. Even if the child is not currently eligible for or in need of benefits at the time it may be important to plan for the possibility that the child might need to seek benefits at some point in the future, either when they become an adult or even at some point before they reach age 18.

Unfortunately many government assistance programs have long waiting lists making it even more important for parents to plan ahead for the possibility of future eligibility. Nevertheless these benefit programs can dramatically change the quality of life of the special needs child and his or her parents. The Community Living Assistance and Supportive Services (CLASS) Program for example, can provide in home respite care providers, attendants for children in their classrooms, and different therapies that are tailored for the needs of children with disabilities.

Some benefit programs are not based on financial needs, however, and child support payments will not impact the child's ability to receive such benefits. An attorney that provides services for the parents of disabled children should become familiar with the various benefit programs or alternatively should associate with a professional that clients may be referred to assist them with researching and applying for potential benefit programs that may be available for the child.

### **A. Government Assistance Programs Providing Medical Benefits**

In order to do the simplest assessment of a person's eligibility for state and federal benefits programs, it is necessary for the attorney to know at least a little bit about the types of programs available to qualifying applicants and to be able to properly identify the programs and their areas of assistance for the client in both family law and guardianship cases. The four most commonly used assistance programs are Medicare health insurance, Medicaid medical benefits, Social Security (retirement or disability) benefits and Supplemental Security Income benefits.

#### **1. Medicare**

Medicare is a federal health insurance program available to individuals who: 1) meet either the required disability or age guidelines of the program, and 2) have paid money into the program through self-employment taxes and/or Social Security/Medicare withholding payments from the person's earnings and income or, in some cases, through the countable payments of a spouse or parent. Medicare is federal health insurance

coverage that is available to all citizens, and in certain circumstances to their disabled children, who have paid in to the system through federal taxes and who are drawing either Railroad or Social Security Retirement or Social Security Disability benefits, or who are over age 65 and who pay the monthly premiums charged for the coverage.

The scope of the coverage, i.e. what the program will pay for, is set by federal laws and regulations and is administered through the federal regional offices of the Centers for Medicare and Medicaid Services (“CMS”). As with any health insurance program, some medical services are covered by Medicare and some are not, and some co-payment or deductible amounts are normally charged to the patient for most of the covered medical services. Often children with disabilities can qualify for Medicare benefits based on the coverage eligibility of one or both of their parents regardless of the eligible parent’s marital status.

Because people receive Medicare coverage if they, or their parents in the case of children with disabilities, have paid into the Medicare program and they elect to pay the premium rates charged for Medicare coverage, Medicare is not typically considered to be a “means-tested” or income or asset-restrictive governmental program. In other words, it makes no difference, in terms of a person qualifying for and receiving Medicare coverage, what that person’s current monthly income is, or what assets she or he may own, or whether, in the case of a child or spouse with disabilities, the person has a right to receive court-ordered support payments.

Because the Medicare program is not based on the financial eligibility of those who qualify for it, attorneys do not need to consider the use of a special needs trust for a client in order to qualify the client for Medicare coverage. Instead, in doing an analysis of a client's benefits needs, the lawyers should be considering the advantages or disadvantages of using special trusts to qualify clients or their children for Medicaid and/or other income and asset-restrictive government programs such as Supplemental Security Income (SSI).

## **2. Medicaid**

Medicaid is a federal government health care program used to provide medical care and related services to indigent (read as poverty level) persons. As such it is linked with other federal government poverty assistance programs such as Supplemental Security Income (“SSI”). Under these income and asset-restrictive programs, the federal government pays an amount of money to each of the individual fifty states who then become responsible for administering and matching a percentage of those federal funds and providing the covered services to state residents. 42 U.S.C. §1396a and 42 U.S.C. §1396d. Funds administration and covered services are provided through contracts with state agencies and approved service providers. Currently in Texas, Medicaid programs are administered and controlled by the Texas Health and Human Services Commission hereafter referred to as “the Department” or “HHSC.” The states have some latitude within the federal laws and regulations in setting their own individual guidelines for people qualifying for and receiving the federal funds and services assistance. Therefore, the programs become creatures of both federal and state law, meaning that both must be considered when making determinations about who may be eligible for benefits under the programs. As is the case with SSI, in order to be eligible for assistance through a Medicaid program, an applicant must meet both the income and resource restrictions of the program.

The term “Medicaid” may be used to mean one or more of several different programs administered by the Department. For example, “Nursing Home Medicaid,” or “Long-Term Care Medicaid” covers most of the nursing home expenses for persons, including minor children with special needs, who reside in qualified nursing or residential facilities and whose physical or mental condition requires that they receive continuous skilled care and supervision. The term, “Community Medicaid” refers to comprehensive medical assistance programs that can pay for doctor visits, hospital stays, prescription drugs, and adaptive aids for persons with disabilities residing outside nursing homes or facilities meaning that they are living in the “community”.

In addition to paying for medical services and expenses, there are other Medicaid facility or alternative care programs that cover some or all of

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