

# Divorce and Disability

## Identifying and Resolving the Unique Issues of a Spouse with Disabilities

By Michele P. Fuller-Urbatsch and Kevin Urbatsch

Professionals assisting their clients during a divorce encounter challenging issues when one of the spouses is a person with disabilities. A strategic planner will spot and solve these critical issues and can provide an excellent service to the clients. This article explores the issues that may arise for the divorcing spouse with disabilities, the effect of marital property settlement agreements and spousal support income on public benefits eligibility, and the planning tools to create or preserve government benefits. Child support and planning for families with children with disabilities are beyond the scope of this article and not discussed here.

Disability and divorce are prevalent. Nearly one in five individuals has a disability; one in four is affected by a severe disability.<sup>1</sup> Couples are divorcing at a rate roughly one-half of marriage.<sup>2</sup> Approximately 14 percent of men and 12 percent of women with a disability are divorced.<sup>3</sup> Considering the occurrence of disability, family law attorneys and their clients would be well served by including questions about special needs; disability benefits; diagnosis, treatment, and educational plans; and chronic illnesses during initial interviews and on intake questionnaires.<sup>4</sup>

Family law attorneys are often unaware of the issues surrounding disability during a divorce. Most family law attorneys are simply not trained to deal with disability and the required financial and legal planning. Special needs planning is nearly always cross-disciplinary and requires particular skills. Special care financial planners are beneficial team members, as they have specialized training, certification, and experience necessary to support attorneys on behalf of the spouse with disabilities. In addition, special needs planning attorneys are also called to co-counsel on legal issues. As a team, these individuals can provide the knowledge necessary to ensure the spouse with disabilities is properly cared for throughout his or her lifetime.

The most common scenario I see in my practice involves a spouse who suffers from a chronic or progressive condition such as multiple sclerosis, Parkinson's disease, mental illness, Huntington's disease, or a traumatic injury or illness. The well spouse may have been providing care, income, resources, and insurance for the disabled spouse, which will end when the marriage ends. To make up the shortfall, special needs planners are instrumental for providing advice on how to

qualify or maintain financial government benefits, pay for medical care, or assist with related services such as caregiver expenses.

Basically, there are two streams of income for which adults with disabilities under these circumstances apply: Social Security Disability Income (SSDI) and Supplemental Security Income (SSI). A person can have severe disabilities and not qualify for SSDI benefits. To qualify for either program, an adult must meet the Social Security Administration's definition of disability.<sup>5</sup> To qualify for SSDI, the individual must also have adequate wage contributions from employment.

Paying into Social Security is like buying insurance. Those who have paid into Social Security for a sufficient number of work quarters will qualify for SSDI. After receiving SSDI for two years, an individual also qualifies for Medicare. These are entitlement benefits and do not have a separate income or asset test to qualify. A divorce decree, judgment, or marital settlement will not affect SSDI or Medicare. This does not mean they do not require additional planning; for example, some benefits such as in-home care are only available through Medicaid, which has an income and asset test. Additionally, the spouse with disabilities may have high medical costs. Medicare covers only 80 percent of those costs. The spouse with disabilities may then need Medicaid benefits to pay the remaining 20 percent. Medicare also does not cover prescription co-pays, Medicare part B premiums, in-home unskilled caregiving services, or nursing home care. Finally, the spouse may need assistance simply managing his or her assets.

If the spouse with disabilities was not employed or has an insufficient work record, he or she will need to qualify for SSI. This program is means-tested; there are income and asset limits, and one must be below these limits to qualify. The spouse may not have qualified for SSI during the marriage because of a concept called deeming,<sup>6</sup> in which the government agency views a married couple as a single entity. The Social Security Administration treats a well spouse's assets and income as if the spouse with disabilities owned them, oftentimes disqualifying the spouse with disabilities from SSI. Deeming ends when the marriage ends. This can occur after the partners divorce or if they live apart, live with another in a marriage-like relationship, change their permanent home to a state where their marriage is not recognized, or no longer



## FAST FACTS

Considering the occurrence of disability, family law attorneys and their clients would be well served by including questions about special needs; disability benefits; diagnosis, treatment, and educational plans; and chronic illnesses during initial interviews and on intake questionnaires.

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hold themselves out as married.<sup>7</sup> Once deeming ends, governmental agencies review only the income and assets of the spouse with disabilities.<sup>8</sup> It is imperative that proper planning takes place for the spouse with disabilities for his or her long-term stability and independence. Timing is critical in this instance, and planning must be done *before* the entry of the order dissolving the marriage and awarding property and income to the parties, as any outright award of income or assets may prevent an individual from qualifying for need-based governmental benefits like SSI and Medicaid.

One important issue is spousal support for the individual with disabilities. There is a potential loss of important government benefits if proper planning is not done. The Social Security Administration considers spousal support as Social Security unearned income.<sup>9</sup> This means that a support payment would reduce the SSI check of the person with disabilities dollar for dollar after the first \$20.<sup>10</sup> At worst, this income will eliminate a person's SSI check if the spousal support is too large. At best, it provides no real benefit to the spouse with disabilities other than an additional \$20.

This entire issue can be avoided. The language in the divorce decree is important. Spousal support must be *irrevocably assigned* to a qualifying first-party special needs trust to prevent it from being treated as unearned income. Some judges may be uncomfortable with issuing such an order if they are

unfamiliar with government benefit rules and policies. A special needs planner can provide a thorough brief and advocate for how these benefits will enhance the quality of life of the spouse with disabilities.<sup>11</sup> The planner should also understand and educate the judge about whether SSI and Medicaid eligibility may affect the amount of spousal support awarded. The preservation or creation of SSI and its linked medical insurance (Medicaid) may become a factor in calculating spousal support, and jurisdictions vary in the awarding of temporary support versus permanent support.

The distribution and allocation of marital property to an SSI recipient must also be irrevocably assigned to a first-party special needs trust. This language is required in any order or judgment dissolving the marriage to comply with Social Security Administration policy. Under some court systems, the family court judge cannot approve the trust language; in other jurisdictions, the judge can. However, the family law court can irrevocably assign income and assets to a first-party special needs trust. Again, advocacy and education may be required by an experienced special needs planning attorney. This way, otherwise countable assets that eliminate SSI or Medicaid eligibility can be protected and managed by a special needs trustee for the lifetime needs of the spouse with disabilities.<sup>12</sup> A court must order the *establishment* of a special needs trust to comply with Social Security Administration and state

Medicaid requirements. The trust can be created by a person who is legally competent, a parent, grandparent, court, or guardian.<sup>13</sup> Any agreement between the parties to create and fund a special needs trust will not meet administration policies as they exist today.

There are additional issues in dealing with specific assets common to married couples. Retirement plans are treated as a countable resource for SSI and Medicaid purposes. Equally at issue are pensions, which are generally nonassignable, and thus no planning can prevent future negative consequences for the spouse with disabilities. Also, if a periodic payment is available, the fund is a countable resource to the SSI recipient. To effectuate planning, the spouse with disabilities must exercise this option to preserve eligibility, which may trigger negative income tax consequences.<sup>14</sup> One option under the circumstances would be to allocate more qualified assets to the well spouse and more nonqualified assets to the spouse with disabilities. A financial planner can model scenarios to maximize benefits and the probability of a plan's success.

more effective option for professional administration as well as a better return on the funds, especially of modest assets.

Another tool for the special care planner is the Achieving a Better Life Experience (ABLE) account, which allows individuals with disabilities another way to set aside funds to increase their quality of life by providing for goods and services otherwise unavailable through governmental programs. It has limited use because of some of its requirements.<sup>17</sup> It is state-sponsored and offers tax-free savings as long as the funds are used for "qualified disability expenses."<sup>18</sup> For the individual who wants control over his or her funds and is able to use them within the proscribed guidelines, this type of account may be a great option.

There are also special funding considerations for a person with disabilities, depending on his or her legal capacity. As described above, a judge must irrevocably assign income to the first-party special needs trust, but the income must be legally assignable. Some types of income, such as Social Security, cannot be legally assigned. If the spouse with disabilities has

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A court may order that the death benefit of a life insurance policy be assigned to a divorced spouse. If the beneficiary is disabled, consideration should be given to using a third-party special needs trust. Direct payment of a death benefit could inadvertently disqualify an individual with disabilities from SSI and Medicaid. Under most circumstances, the tools employed to create or preserve eligibility for means-tested government benefits are first-party special needs trusts. It is important to have familiarity with the benefits and burdens of these types of trusts.

Two types of special needs trusts are commonly called (d)(4)(A) SNTs and pooled SNTs. A (d)(4)(A) SNT refers to 42 USC 1396(p)(d)(4)(A),<sup>15</sup> which codified the trust exception to the general premise that all trusts are countable resources. Transferring property or assignable income into a qualifying first-party special needs trust preserves eligibility for SSI and Medicaid.

A pooled SNT refers to a trust established pursuant to 42 USC 1396(p)(d)(4)(C).<sup>16</sup> It is unique in that there is one master trust agreement and a nonprofit organization that serves as trustee, and generally only cash is accepted to fund it. An individual joins a pooled SNT by signing a contract, usually called a joinder agreement. A participant's funds are then pooled with other trust beneficiaries for purposes of investment and management to lower overall transaction fees. Depending on the administrator, it may be a less-costly and

legal capacity, he or she can transfer title of the assets to the first-party special needs trust. However, if the spouse lacks legal capacity, title must transfer via a court-appointed fiduciary, such as a conservator; special order of the probate court depending on the local court rules; or agent under power of attorney. There are other consequences if the spouse is over age 65, and an experienced special needs or elder law attorney should be consulted.

At the death of the disabled beneficiary, first-party (d)(4)(A) SNTs, pooled (d)(4)(C) SNTs, and ABLE accounts have a Medicaid payback requirement. Generally, a beneficiary's assets remaining after Medicaid payback in a pooled SNT remain an asset of the sponsoring nonprofit in the pooled SNT. Assets remaining after Medicaid payback in a first-party (d)(4)(A) SNT may pass to other beneficiaries. There is no Medicaid payback of assets in a third-party SNT.

Being aware of issues in family law as well as the tools currently available to preserve or create government benefit eligibility can allow the special care advisor to be a key team member for a family going through divorce. Irrevocable assignment of legally assignable income and marital property to a qualifying first-party special needs trust allows those persons with disabilities to receive income and Medicaid benefits that would otherwise be inaccessible. The special needs trust will supplement their needs, preserve independence, and protect them from misspending and mismanagement. ■



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## ENDNOTES

1. Brault, *Americans With Disabilities: 2010* (Washington, DC: United States Census Bureau, 2012), p 4. Approximately 18.7 percent of the civilian noninstitutionalized population had a disability and 12.6 percent had a severe disability.
2. Elliot & Simmons, *Marital Events of Americans: 2009* (Washington, DC: United States Census Bureau, 2011), p 5. The marriage rate is 19.1 marriages per 1,000 men and 17.6 marriages per 1,000 women; the divorce rate is 9.2 for men and 9.7 for women.
3. *Id.* at 9.
4. Price, *The Special Needs Child and Divorce* (Chicago: ABA Book Publishing, 2009), pp 12–17, 200–204.
5. Social security defines “disability” as the “inability 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 12 months.” 20 CFR 416.905(a).
6. Deeming occurs when one party has a legal obligation of support to another. The income and resources of one are considered available to both. 20 CFR 416.1163.
7. 20 CFR 416.1832; POMS SI 00501.150(D).
8. To qualify for SSI, someone must have low, or no income, and less than \$2,000 in countable assets. Some noncountable assets an individual can own and still qualify for SSI are a primary residence, one car, an irrevocable prepaid funeral, and a life insurance policy with less than a \$1,500 face value.
9. 20 CFR 416.1121(b); POMS SI 00830.418.
10. Under SSI, the first \$20 of unearned income has no effect on benefits, but for every \$1 of unearned income, there is a reduction of \$1 of SSI income until the benefit is eliminated. As long as the individual remains eligible for \$1 of SSI, he or she will retain Medicaid benefits. 20 CFR 416.1124(c); POMS SI 00830.050.
11. Special consideration should be taken for those approaching age 65 who may need 24-hour care. Despite rules prohibiting additional funding of a (d)(4)(A) SNT over age 65, there is an exception for spousal support irrevocably assigned before age 65. POMS SI 01120.203B(1)(c). A resource for locating an experienced special needs planning attorney is available at <http://specialneedsanswers.com/> (accessed June 13, 2017).
12. Caveat: if the spouse transferring assets to a court-ordered SNT has unpaid creditors at the time of the transfer, and if the transfer will render them insolvent, the application of the Uniform Fraudulent Transfer Act, 11 USC 544, should be considered, as a creditor can attack a marital settlement agreement and seek to set aside transfers between them or the trust.
13. Before the signing of the Century Cures Act on December 13, 2016 (2016 HR 34), Section 5007, entitled “Fairness in Medicaid Supplemental Needs Trusts,” a mentally competent individual could not create his or her own first-party special needs trust. With the signing of the act, it added the necessary two words, “the individual,” to the list of grantors in the federal statute, allowing for the establishment of a special needs trust in 42 USC 1396p(d)(4)(A).
14. SI 01120.210B.
15. Elements of a (d)(4)(A) SNT are (1) the trust contains the assets of a disabled individual under age 65; (2) it was established for his or her benefit by a parent, a grandparent, a legal guardian, or the court; and (3) the state Medicaid agency will receive all amounts remaining in the trust on the beneficiary's death up to the amount of benefits paid.
16. Elements of a pooled SNT are (1) the trust is established and managed by a nonprofit corporation and maintains separate accounts of pooled assets; (2) the accounts are established by a parent, a grandparent, a legal guardian, the individual beneficiary, or the court; and (3) the state will, on the beneficiary's death, receive all amounts remaining in the beneficiary's account (unless the account is retained by the nonprofit corporation) up to the amount of Medicaid benefits paid.
17. It can only be funded with \$14,000 (which increases commensurate with the annual gift tax exclusion) a year total and can only increase up to \$100,000 and be eligible for SSI, and an individual can only have one account.
18. Several states have created ABLE accounts; some are open to state residents only. To establish an ABLE account, one must be an individual with “significant disabilities” with onset before age 26, which severely limits the applicability of the account.