

Special Needs Planning Issues Following Divorce

By Howard S. Krooks, CELA, CAP

When a child with a disability becomes part of a divorce proceeding, difficult issues arise that warrant the expertise of Elder Law and Special Needs Planning attorneys.

Divorce can be complicated, emotional, frustrating, disappointing, expensive, along with a whole range of other emotions, as anyone who has acted as counsel or endured this type of proceeding can attest. As difficult as the issues can be in a divorce proceeding, can you imagine what happens when divorce involves a child with a disability? I recently testified as an expert on government benefits issues in a case seeking modification of child support in the Family Court in Manhattan. This case illustrates how much more difficult the issues can be when a child with a disability is involved in the marital split, and how important it is to have someone knowledgeable in government benefits and special needs planning issues participate in the proceedings.

Lifetime Child Support Payments Awarded

In this case, a divorce between a wife and her husband was finalized in 1996. Husband was ordered to pay approximately \$2,800 per month in child support (considered to be about three times an ordinary child support order

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based upon his assets and income) for the life of the child. While it is unusual to see lifetime child support payments, and the award was larger than is customary, the husband agreed to this primarily because of the guilt he felt around the divorce. He also knew that his daughter was disabled, so she would require as much help as possible. Fourteen years later, in 2010, daughter turns 18 years old. Husband has since remarried and has another child. He feels he can no longer continue to make child support payments at the current level, and in fact his current wife now assists him in making these payments each month.

Husband wishes to seek a modification of the child support award, and he hires the attorney who handled his divorce years earlier to file the court papers seeking a downward modification of child support payments. The theory behind seeking this downward modification of child support payments is twofold. First, husband would like to argue that since his daughter has just turned age 18, she can now qualify for Supplemental Security Income (SSI) benefits. Second, although his daughter is receiving services through a Medicaid waiver program that requires a monthly spenddown of her income before Medicaid will begin paying for her medical expenses, husband would like to know if establishing a supplemental needs trust to receive the child support payments would protect the child support payments from the spenddown requirement otherwise imposed, thereby saving his daughter additional

income each month, and allowing for a reduction in the child support payment itself.

Qualifying for SSI Benefits

During the course of the proceedings, former wife appears to be the only person testifying as to the question of whether her daughter can qualify for SSI benefits and the utility of creating a special needs trust for her daughter. According to the former wife, her daughter cannot qualify for SSI benefits due to the so-called deeming rules, pursuant to which a parent's income and assets are deemed to be available to the child for purposes of determining the child's eligibility for SSI benefits. Husband argues former wife should apply for SSI for their daughter, but she refuses to do so citing the deeming rules as an obstacle to her daughter's eligibility, and arguing that her own work income and \$400,000 in assets will result in a denial of eligibility.

Without expert testimony, the court may have determined that the daughter was not eligible for SSI benefits, based solely on the testimony of the former wife, who had apparently "done her own research on the issue." In fact, the deeming rules stop when a person turns age 18 under CFR Sections 416.1165 and 416.1851, and their daughter could qualify for an SSI benefit of up to \$761 in New York state (the federal SSI benefit of \$674 plus a New York State supplement of \$87). With this testimony now on the record, husband is able to argue, credibly, that his daughter is entitled to a monthly SSI benefit of \$761 and, if she were to avail herself of this benefit, then this increased income should be taken into account by the court in evaluating husband's request for a downward modification of the original child support payment.

Establishing a d4A Trust

The second major issue in this case pertained to the daughter's income surplus for Medicaid purposes. As a Medicaid recipient, daughter's income (solely in the form of child support payments she received from her father) exceeded the income level permitted under New York's Medicaid program by \$411 per month. Thus, in order for daughter's Medicaid benefit to be triggered in any given month, she had to first prove that her medical expenses exceeded (and that she paid) \$411. Only then would Medicaid pay the remaining medical costs she incurred

for the rest of the month. Husband wanted to argue that the court should order the creation of a self-settled special needs trust under 42 USC § 1396p(d)(4)(A), and have the child support payments irrevocably assigned into the newly established trust, thereby eliminating any surplus income, and obviating the need to spend down \$411 per month. This additional cost savings would support a further downward modification in the original child support payment award.

But, as is the case in divorce proceedings, the two spouses could not agree on the establishment of a d4A trust. Former wife provided testimony questioning whether such a trust could legitimately receive child support payments. She also testified that she planned to move from New York to Colorado, and that such a move would require a payback to New York State, reducing available trust funds that were needed to care for her daughter. Here again, expert testimony was crucial in refuting the former wife's position on the above issues. In fact, under POMS § SI 01120.200G(1)(d), an irrevocable assignment of child support payments (i.e., as a result of a court order), is not income for SSI purposes, and would therefore not count for purposes of determining daughter's SSI or Medicaid eligibility, or the amount to be received under either program.

As for the former wife's contention that the trust would need to pay back the state before moving to Colorado, there is no such requirement for d4A trusts, and expert testimony was provided on that issue as well. The only time payback to any state would be required is when the disabled daughter dies.

There were many other difficult issues in this case, but the ones detailed above make it eminently clear that when a child with a disability becomes part of a divorce proceeding, difficult issues arise that warrant the expertise of Elder Law and Special Needs Planning attorneys. Matrimonial or family law attorneys will very likely not possess the expertise needed to address these issues. Some may even need to be educated that these issues need to be addressed in the context of a divorce proceeding. Serving as an expert witness will also enhance your value as an Elder Law and Special Needs Planning attorney and, knowing that you helped to provide the necessary expertise in cases such as these can be very rewarding. ■