

Child Support, Eligibility for Public Benefits and the Use of Special Needs Trusts

Planning for a child with special needs presents unique challenges arising from the nature of the disabilities involved and the child's long-term financial needs. As a result, parents involved in divorce proceedings need to consider the effect of child support payments on certain public benefits that may be available to provide additional assistance for a child with disabilities.

In particular, Supplemental Security Income ("SSI") and Medicaid are needs-based public benefits programs which offer financial and medical assistance to persons with disabilities. SSI is a monthly cash benefit specifically intended to pay for food and shelter for individuals who are disabled, and who have less than \$2,000 in resources and limited or no monthly income. In 2009, a full SSI check is \$674/month. Medicaid is public benefits program that provides necessary medical assistance. There are many types of Medicaid programs and each has slightly different eligibility requirements, although all Medicaid programs have some form of *income* and *resource* eligibility criteria.

For SSI, and most Medicaid programs (but not all), the parents' income is "deemed" to the child – that is, the parents' income will be considered the child's own income when determining the child's financial eligibility for these needs-based programs. However, once a child turns 18, there is no further "deeming" of parental income.

Many people do not realize that child support payments are considered "unearned income" to the child on whose behalf the payments are made. This is true for both Medicaid and SSI. If the child is under the age of 22, the SSI program will disregard one third of the value of the child support payments, but the remaining two-thirds will be counted as income to the child (the rules are complex, but the income is not counted on a dollar-for-dollar basis). This one-third disregard is not applicable to the Medicaid program.

In New Hampshire, the obligation to pay child support generally ends when a child turns 18. However, the courts have authority to extend child support obligations beyond the age of 18 if a child is disabled. Therefore, if a court requires the payment of child support (e.g., unearned income) beyond the age of 18, such payments, even if made to a custodial parent, would affect the child's financial eligibility for both Medicaid and SSI.

If the divorce decree directs that child support payments be made to the Trustee of an irrevocable special needs trust ("SNT"), rather than to the custodial parent, such payments should not be considered "income" to the child under either the SSI or Medicaid rules. The central purpose of a SNT is to set aside assets for a child with disabilities without affecting that child's financial eligibility for public benefits programs. In a properly drafted SNT, the child has no right to demand distributions of principal or income from the SNT; rather, full discretion over the timing and amount of distributions rests solely with the trustee. Since the child cannot demand distributions or use the funds for general support and maintenance, the assets also are not considered a countable resource to the child. And, as noted above, SSI and Medicaid have both an income and resource eligibility component.

There are two primary types of SNTs and it is important to know which type to use when child support payments are at issue. The first is a “self-settled” trust which contains assets previously owned by the trust beneficiary (e.g., the child), or to which the beneficiary had a legal claim. The second is a “third-party” trust which contains assets that belonged to someone other than the beneficiary, such as a parent or grandparent. The important distinction between these two types of trusts is that a self-settled SNT must contain a Medicaid “pay-back” provision, which requires that any funds remaining in the trust at the child’s death must be paid to the State as reimbursement for Medicaid paid on that child’s behalf. In contrast, a third-party SNT has no Medicaid pay-back requirement at all.

If the parent is legally obligated to pay child support – i.e., the child is under the age of 18 – and if the child support payment is court ordered in any way, the payment must be directed to a self-settled SNT containing a Medicaid payback provision. In such a circumstance, the payment by the parent to the SNT will not count as income to the trust beneficiary.

If there is no legal obligation to pay child support – i.e., the child is over the age of 18 – and if no court has ordered child support payments to be made, a parent voluntarily could make payments to a third-party SNT with no payback provision. Contributions to a third-party SNT could be made in a lump sum, or in periodic payments, as the parents agree. Either way, the payments to a third-party SNT would not be considered income to the child.

By directing payments to a SNT, whether voluntary or by court order, a child can receive the benefit of the child support payments without such payments rendering the child over income for SSI and Medicaid. Once established and funded with assets, the SNT then could be used to pay for uncovered medical and educational expenses (including summer camps), to buy any item the child might want or need (such as furniture, computers or adaptive equipment) and to pay for the child's travel and vacations, without such trust disbursements being counted as income to the child. It is important to remember, however, that certain payments from a SNT *will* count as income to the child – specifically payments made directly to the child or payments made for the child's *food and/or shelter* costs. In addition, the SNT may benefit *only* the child with disabilities, not an entire household.



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