

Divorce and the Special Needs Child

OR
HOW TO SAVE THE
DAY BY KNOWING A
LOT ABOUT A LITTLE

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About Kim Martin

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- ▶ Attorney whose practice focuses on special needs planning, guardianship, and divorce settlement consultation
- ▶ Board of Directors member for a number of organizations whose mission is to meet the needs of children and adults with special needs
- ▶ Member, Academy of Special Needs Planners, State Bar of Georgia, Atlanta Bar Association, FOCUS Parent Advisory Council
- ▶ Past Member, Easter Seals Policy Council; 2010 Easter Seals Parent of the Year

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Talking Points

- ▶ What is the problem?
- ▶ What can we do about it?
- ▶ Issue-spotting/Damage Control

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POMS Terminology

- ▶ **Child:** a person who is under age 18 (or under age 22 if regularly attending school or training designed to prepare the child for a job), who is unmarried, and who is not the head of a household. POMS SI 00501.010, SI 501.020.
- ▶ **Adult Child:** a son or daughter who is no longer a child. POMS SI 00830.420A.5.
- ▶ **Child Support:** a payment from a parent to or for the benefit of a child to meet the child's needs for food and shelter. POMS SI 00830.420A.1.
- ▶ **Absent Parent:** a parent who does not live in the same household as the child (as determined on the first day of the month). POMS SI 00830.420A.2.
- ▶ **Custodial Parent:** the parent who has care, guardianship or custody of the child. POMS SI 00830.420A.6.
- ▶ **Child Support Arrearage Payment:** a child support payment that is past due and is paid to meet a past obligation to support the child. POMS SI 00830.420A.7.

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Significant Ages (Divorce vs. Special Needs)

- ▶ Age 18: significant for SSI qualification purposes; also potentially important in the context of the settlement agreement.
- ▶ Age 20: irrelevant for benefits purposes; significant in some states for child support.
 - ▶ Georgia vs. California example
- ▶ Age 22: oldest possible age for the child to be considered a "child" under the POMS.

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Support Payments: SSA Rules (Child)

Child support paid fbo a "Child" counts as *the child's* unearned income

- ▶ Exclude 1/3
- ▶ \$20 Personal Allowance
- ▶ Apply the remainder to reduce SSI dollar for dollar

Example: Absent parent pays \$900/m in child support.

- ▶ SSA excludes 1/3 (\$300), disregards \$20
- ▶ \$580 offsets the \$794 SSI payment; child receives \$214 in SSI

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Exception to the Previous Rule

Child support paid to a “child” whose paying parent is *living in the child’s household* gets no 1/3 disregard

Example: (non-absent) parent pays \$900/m in child support

- ▶ SSA disregards \$20
- ▶ Apply the remainder to reduce SSI dollar for dollar
- ▶ \$880 offsets the \$794 SSI payment, reducing it to zero.
- ▶ Child’s failure to qualify for any SSI eliminates Medicaid in many states.

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Support Payments: SSA Rules (Adult Child)

Child support paid fbo an “Adult Child” still counts as *the child’s unearned income*

- ▶ No 1/3 exclusion
- ▶ \$20 Personal Allowance
- ▶ Apply the remainder to reduce SSI dollar for dollar

Example: Absent Parent pays \$900/m in child support.

- ▶ SSA disregards \$20
- ▶ \$880 offsets the \$794 SSI payment, reducing it to zero.
- ▶ Child’s failure to qualify for any SSI eliminates Medicaid in many states.

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What Can We Do? (Terrible, Marginal, and Ideal Solutions)

- ▶ Do nothing; pay post-majority child support and kiss SSI goodbye
- ▶ Make sure the settlement agreement provides that child support stops at age 18
- ▶ Have the settlement agreement allocate more (or all) of the child support for the non-special needs children, rather than for the special needs child
- ▶ Have the settlement agreement require the paying parent to fund an ABLÉ account
- ▶ Have the settlement agreement require the paying parent to fund a 3P SNT to avoid Medicaid payback

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Less-than-perfect, But Possibly OK Solutions

- ▶ Modified alimony
 - ▶ Effect on SSI
- ▶ Have the settlement agreement require the paying parent to pay directly for the child's food and shelter
 - ▶ ISM
- ▶ Have the settlement agreement require the paying parent to pay directly for the child's non-food and shelter expenses
 - ▶ Effect on SSI
 - ▶ Custodial parent gets no help with food and shelter
 - ▶ Expenses may go away

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The Ideal Solution

- ▶ Settlement agreement requires paying parent to pay child support to a (d)(4)(A) or (d)(4)(C) trust
 - ▶ Just post-majority (beginning at 18)
 - ▶ Must be court-ordered or irrevocably assigned
 - ▶ Can pay for food and shelter with no ISM

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How To Review the Settlement Agreement: Issue-spotting

- ▶ Alimony
- ▶ Life insurance
- ▶ Medical insurance

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Things I Learned the Hard Way

- ▶ Get a copy of the *entire draft* of the settlement agreement in Word
- ▶ Advise that the trust be executed before the agreement
- ▶ Refer to the trust by name in the agreement
- ▶ Attach the trust to the agreement and incorporate it by reference
 - ▶ You might see a provision like this: “The paying party will pay child support for the benefit of Johnny to a SNT [or worse yet, to a trust for Johnny’s benefit].”
 - ▶ Or like this: “The parties agree to create a trust to hold child support payments for Johnny.”
 - ▶ It should read like this: “Beginning on the day Johnny reaches age eighteen, the paying party will pay all child support payments for the benefit of Johnny to the then serving Trustee of the Johnny Smith Self-Settled Special Needs Trust, signed October 14, 2021; a copy of said trust is attached hereto as Exhibit A, and is hereby incorporated by reference into this agreement.”

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More Things I Learned the Hard Way

- ▶ Don’t tell the drafting attorney what to do; do it for them!
- ▶ Give options, in order of preference, when you make notes on the draft
- ▶ Stay in your lane
- ▶ Know who your client is. If possible, choose one party.
- ▶ Know your state’s child support rules.

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What To Do When Your Client Is Your Biggest Obstacle

- ▶ The parties are sick of paying lawyers; they refuse to spend the money on the (d)(4)(A) trust.
- ▶ Paying parent refuses to agree to the (d)(4)(A) if custodial parent is trustee.
- ▶ Custodial parent hates the idea of the (d)(4)(A) because of the Medicaid oversight, the sole benefit rule, the chance that the paying parent will use it as a way to harass them.
- ▶ Both parents ignore your advice; the final settlement agreement calls for post-majority child support to be paid with no special provisions. Years later, one parent comes back wanting to fix this.

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Money-laundering Opportunities

- ▶ Child lives with custodial parent, who wants to use (d)(4)(A) funds to pay the mortgage, fix the roof, etc.
 - ▶ Sole benefit rule
 - ▶ Room and board agreement
- ▶ Custodial parent wants to use (d)(4)(A) funds for food and shelter costs at a private facility, but doesn't want to trigger the 1/3 reduction in SSI for ISM
 - ▶ ISM rule
 - ▶ ABLE account provision

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Can we ever use a third-party SNT
in a divorce settlement?

No.

But we can sometimes use it *independently*
of the divorce settlement.

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QUESTION AND ANSWER TIME

Thank you for listening!

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