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USING PUBLIC BENEFITS TO PAY FOR MATRIMONIAL SETTLEMENTS

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I. CASE STUDIES

1.1. *Disabled Spouse – Case Study #1 – No Public Benefits*

Bill and Linda are in their mid-30s. Linda has contracted Multiple Sclerosis. Bill and Linda have decided to divorce. Linda is unable to work because of her disability. She wants alimony and equitable distribution. Linda's attorney succeeds in having Bill pay Linda \$500,000 lump sum as equitable distribution and proposes \$2,500 per month alimony. However, Linda requires a home health aide for approximately 20 hours per week at a cost of \$1,540 per month and her other medical bills are approximately \$3,000 per month and she will soon lose her medical coverage under Bill's policy. Linda is concerned that her medical bills will consume her share of the equitable distribution. Linda demands \$7,000 per month alimony. The case drags on at increasing cost and bitterness for both sides.

1.2. *Disabled Spouse – Case Study #2 – Public Benefits*

Harry and Sally are in their mid-30s. Sally has contracted Multiple Sclerosis. Harry and Sally have decided to divorce. Sally is unable to work because of her disability. She wants alimony and equitable distribution. Sally's attorney succeeds in having Harry pay Sally \$500,000 lump sum as equitable distribution and Harry's attorney proposes \$2,500 per month alimony. Sally will require approximately 20 hours per week of home care at a cost of \$1,540 per month. Sally's other medical bills are approximately \$3,000 per month and she will soon lose her medical coverage under Harry's policy.

Harry's attorney, working with a special needs trust attorney as consultant, arranges for the equitable distribution and alimony to be paid into a special needs trust. The lawyer drafting the trust was a member of the *Special Needs Alliance*. As a result, Sally became entitled to SSI paying her approximately \$600 per month and Medicaid which pays her medical bills. Medicaid also pays for a home health aide to come to Sally's home for 20 hours per week. Medicaid also pays Sally's other medical bills. The trustee of the Special Needs Trust uses the alimony to pay for that portion of Sally's living expenses that exceed the amount of her SSI payment. The trustee makes payments directly to the providers of goods and services rather than to Sally. The payment of equitable distribution does not have to be used for Sally's medical bills.

When equitable distribution is paid directly to the trustee of a self-settled special needs trust the assets in the trust are not countable to the disabled person for purposes of determining public benefits eligibility. Where alimony is paid into a self-settled special needs trust it is not considered income to the disabled person for determining public benefits eligibility.

2. WHEN IS A SPECIAL NEEDS TRUST REQUIRED?

A Self-Settled Special Needs Trust is required for a disabled person if the person is currently receiving SSI, Medicaid, Section 8 Housing, certain types of state disability benefits or benefits under any other means-tested program, or if the person is likely to receive such benefits in the future.

3. IN WHAT SITUATIONS IN A MATRIMONIAL CONTEXT SHOULD A SPECIAL NEEDS TRUST BE UTILIZED?

By accessing public benefits the amount of money required from the non-disabled divorcing spouse can be reduced while the benefit to the disabled spouse can be increased. Cases are easier to settle, because public benefits are filling some of the need.

3.1. Using A Special Needs Trust For Equitable Distribution

Equitable distribution is a division of the marital assets. If one of the divorcing spouses is disabled, the existence of the equitable distribution will prevent that person from accessing public benefits and will cause a loss of any existing public benefits. The solution is to have the equitable distribution paid in to a Self-Settled Special Needs Trust for the benefit of the disabled spouse.

3.2. Using A Special Needs Trust For Alimony

Payment from one spouse to a disabled spouse for maintenance and support during legal separation and/or after the divorce is finalized results in the alimony payments being counted as income to the disabled spouse for SSI eligibility purposes. The alimony reduces the SSI payment dollar-for-dollar and if the alimony completely eliminates the SSI, not only is the SSI lost but the accompanying Medicaid is lost as well. The solution is to establish a Self-Settled Special Needs Trust and have the court direct payments to the trustee of the Special Needs Trust rather than directly to the disabled spouse.

3.3. Using A Special Needs Trust For Child Support

Payment of child support to a child is income to that child. For SSI purposes, one-third of the support payment is excluded from the child's countable income. However, the remaining two-thirds of the support payment reduces the child's SSI payment dollar-for-dollar. If the payment is reduced to \$0, the child will lose not only SSI but also the accompanying Medicaid. By paying the child support directly into a Self-Settled Special Needs Trust, the income is not counted to the child and public benefits can be maintained. Social Security claims officers have been inconsistent as to whether a Self-Settled Special Needs Trust can be used for child support.

The converse issue is whether assets in a Self-Settled Special Needs Trust for a disabled person can be reached to enforce a child support order. Assets in the Self-Settled Special Needs Trust must be for the *sole benefit* of the disabled person. While there are no court rulings, there are a number of cases where it has been argued that payment of a child support order is a proper distribution from a Self-Settled Special Needs Trust, because it is for the sole benefit of the disabled person since that person avoids contempt of court and possibly jail. Self-settled trusts are not exempt from claims of creditors unless they are established in a state having legislation authorizing domestic asset protection trusts.¹

A third issue arising in situations where there is a Self-Settled Special Needs Trust for child support is whether those assets are available for the support of the child when determining the parent's obligation of support. A Missouri case has held that they are not available for purposes of child support and that the court determining the level of child support should not take those assets into consideration when determining the parent's obligation of support.²

¹ Alaska, Delaware, Missouri, Nevada, Oklahoma, Rhode Island, and Utah.

² *Louis v. Dept. of Soc. Servs.* 61 S.W. 3d 248 (Mo. 2001).

4. ***REQUIREMENTS OF A SELF-SETTLED SPECIAL NEEDS TRUST***

Self-Settled Special Needs Trusts are authorized by Congress, but there are certain requirements:

- *Assets of the Individual.* The trust must be funded with assets of the individual. Litigation proceeds are considered assets of the individual.
- *Age.* The individual must be under 65 years of age at the time the trust is funded.
- *Disabled.* The individual must be disabled as defined in the Social Security Act.
- *Establishment.* The trust must be established by a parent, grandparent, guardian, or a court.
- *Payback.* The state Medicaid agency must be reimbursed upon the death of the disabled person.

In addition, the trust must give the trustee discretionary authority to make distributions and the trust must be irrevocable.



Begley & Bookbinder, P.C. is a law firm that specializes in Elder & Disabilities Law. We are based in Moorestown, NJ, with offices in Stone Harbor & Lawrenceville.

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