



MEMBER



Special needs require special attorneys.

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*Providing appropriate legal and future planning, with
compassion and understanding, for Brian Rubin's fellow
Illinois families of children and adults with intellectual
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WHEN PARENTS OF CHILDREN WITH SPECIAL NEEDS DIVORCE

Few people question the commonly reported statistic that half of marriages in America end in divorce. People react differently to the numerous challenges and expenses that a child's special needs may bring to a marriage. While the situation may bring the parents closer together, many special needs organizations report that it is more likely to cause excess strain in the marital relationship. The *Wall Street Journal* reported in November 2008 on recent research suggesting that divorce rates of couples raising a child with special needs are significantly higher than the national average. Some non-profit organizations have reported divorce rates as high as 75 to 85 percent for this population. A 2008 study by the University of Buffalo cited by the *Wall Street Journal* which reported that parents of a child with special needs are nearly twice as likely to divorce before the child reaches 8 years old as a couple with a child without special needs.

In calculating child support the divorce settlement agreement usually provides specific details regarding how each parent will share in the financial responsibility for the child's care and education until the time the child reaches the age of majority or finishes college. In the case of a child with special needs, however, Illinois law provides for the ability to continue the support obligation of both the custodial and non-custodial parent for the lifetime of the child. In Illinois, we have a specific statute on this topic. The statute is found at 750 ILCS 5/513 (P.A. 91-204, eff. 1-1-00; 92-876, eff. 6-1-03). The Illinois law provides that the divorce court “may” award sums of money out of the property and income of either or both parties, or even the estate of a deceased parent, for the support of the child or children of the parties who have attained the age of 18, when the child is “mentally or physically disabled and not otherwise emancipated”.

Unfortunately, such child support payments will end up reducing or eliminating the child's SSI benefit as well as Medicaid, unless the Court Order is written in a specific manner.

Divorce attorneys do not always know how child support payments made directly to a custodial parent interact with "means-tested" government benefit programs like SSI and Medicaid, or that the unintended consequences can be avoided. This article discusses how child support payments for a child of any age with special needs should be handled in order to maintain existing or future eligibility for SSI and Medicaid for a child with special needs.

Government benefits can be protected if the divorce decree directs the non-custodial parent to make child support payments to a *special needs trust* for the sole benefit of that child. The version of special needs trust that must be used under the Social Security Administration rules, is **NOT** the form of special needs trust used for leaving gifts and inheritances for the child. That is, it is **NOT** the usual special needs trust that parents may have as part of their estate plan. This trust, as of January 2009, must be what is referred to as a sole benefit, irrevocable, self-settled, also known as “pay-back”, or OBRA, special needs trust. Support payments to such a special needs trust will not displace SSI, or jeopardize Medicaid. The type of special needs trust that must be used to receive the child support payments must meet the requirements of Section 42 U.S.C. §1396p(d)(4)(A) of the Social Security Act. This is because child support is viewed by Social Security as belonging to the child. Among other features, the trust must provide that Medicaid is paid back at the child's death from any funds remaining. As a practical matter, since the Trustee would likely spend all of the child support payments for the child's benefit on a regular basis, there is little chance that much would be left in the special needs trust when the child passes away.

For a child on SSI who is under the age of 18, Social Security regulations specify that two-thirds (2/3) of a child support payment is "countable income," which causes a dollar-for-dollar reduction in the SSI benefit. For a child age 18 or older, however, one hundred percent (100%) minus \$20.00 of the child support payment counts as a reduction against SSI. In other words, without a “self-settled” pay-back special needs trust, once child support payments begin, SSI will be reduced if not eliminated and Medicaid could also be at risk.

Social Security regulations require that all changes in financial circumstances of a person receiving SSI must be promptly reported by the person who receives the SSI check. SSI recovers overpayments made in error. When a person with special needs is **not** (or no longer) eligible for the full SSI amount he or she has already received, the overpayment must be repaid (sometimes by reduction of the future monthly benefits).

Most children with special needs will not qualify for SSI or Medicaid if they are under age 18 because of the parents' assets and income. In that case it may be advisable to wait on having support payments assigned to a pay-back special needs trust until the child is 18. Upon reaching age 18, the child may likely qualify for SSI when the income and assets of the parents no longer count.

Some children below age 18 do qualify for SSI, however. The child may have a disability that prevents the custodial parent from full-time employment, so that earnings in the post-divorce, single-parent household are low enough for the child to qualify.

It is far better to address these issues during the divorce process, rather than after discovering that SSI has been reduced or lost. After the parents agree upon (or the court determines) the monthly contribution by the non-custodial parent for the child with special needs, the divorce lawyer(s) should contact an attorney with experience in drafting the appropriate special needs trust. Again, this type of special needs trust differs from the more traditional type of special needs trust that a parent would normally establish to receive an inheritance intended for a child with a disability. The divorce decree **must** direct the non-custodial parent to make a monthly payment for the child's "special needs" each month to the Trustee of the pay-back Special Needs Trust prepared for this purpose. The custodial parent may serve as Trustee.

It is important that the divorce lawyers and the court fashion the child support order in a manner to provide a specific dollar amount that will be paid each month for the child with special needs, **not** a formula tied to SSI, and should **not** be combined with the amount of child support to be paid for other children. That is, it must be an allocated amount to that child, and **not** an unallocated amount for that child and others. The Court Order must separately state the portion of support that is to be paid for the benefit of the child who has a mental or physical disability. Further, the Court Order must require that all such payments of support be paid irrevocably, directly to the established “Self-Settled”, “d4A”,

“1st Party”, “OBRA 93”, Irrevocable Discretionary Special Needs Trust, containing “pay back” provisions, for that child’s sole benefit, in accordance with 760 ILCS 5/15.1, to be administered in accordance with, and subject to the express limitations, requirements, and provisions of such Trust. This is necessary in order for such support payments to supplement, and not supplant government benefits otherwise available to such child, such as Supplemental Security Income (SSI) and Medicaid.

Many divorce lawyers and judges do not know that SSI is a “means-tested” program and the impact of child support payments. Even if they know SSI is means-tested, rarely will they understand the complexities for the SSI and Medicaid programs and keep up-to-date on changes in these laws and policies governing eligibility for those programs. Thus, it is important to consult with an attorney experienced in the interrelationship of divorce law with special needs planning and means-tested public benefits eligibility requirements. The regulations referenced in this article were added in February 2009 to Social Security’s POMS (Program Operating Manual System) and can be found at POMS SI 01120.200 G.1.d., and e.

About Brian Rubin:

On January 27, 1981, Brian Rubin’s second of his three children, Mitchell, was born. Mitch has Autism among other diagnosed special needs. The birth of Mitch changed the lives of Brian and his wife, Linda. For Brian, an attorney, his professional life, as well as his personal life took a “fork in the road”.

Prior to Mitch’s birth, since 1976, Brian had been in private practice, concentrating in Estate Planning, Estate Administration, Tax Planning and Business Law. Since 1981, with Mitchell’s birth, Brian’s practice became dedicated to appropriate “Special Needs Future Planning” for his fellow Illinois parents and families of children and adults with special needs. This includes Estate Planning, Estate & Trust Administration, Special Needs Trusts, OBRA 93 Trusts, Adult Guardianship Proceedings, Government Benefits’ Planning, and Guidance on navigating the “maze” of Illinois Residential and Day Services, Transition Planning and related matters.

Brian is, by invitation, a member of the Special Needs Alliance (SNA), the national, not for profit, organization of attorneys who concentrate their practices in Special Needs Planning. Brian also serves on SNA’s Board of Directors. Brian also serves on the National Academy of Elder Law Attorneys’ (NAELA) Special Needs Law Section Steering Committee. Brian was a Charter Member of the Academy of Special Needs Planners. Brian has been awarded the AV-preeminent ® rating, the highest rating possible from Martindale-Hubbell Law Directory, the country’s foremost legal directory.

Brian is also the Executive Director of the Illinois Institute for Special Needs Planning, incorporated, an Illinois not for profit corporation. The Institute’s mission is to educate families of individuals with special needs, and the professionals who serve them, as to appropriate special needs planning.

Brian’s personal time, likewise, has been dedicated to assisting and serving his fellow families of children and adults with special needs. Brian serves as Vice President of The Arc of Illinois Board of Directors. Brian served as Chairman of the State of Illinois Department of Human Services Statewide Advisory Council on Developmental Disabilities, by appointment of the Director of the Illinois Department of Human Services’ Division of Developmental Disabilities. Brian serves by appointment of the Governor as a Member of the State of Illinois Department of Human Services’ Quality Care Board. The Quality Care Board monitors and oversees operations, policies, and procedures of the Department of Human Services’ Office of the Inspector General to assure prompt and thorough investigations of neglect and abuse allegations. Brian serves as Co-Chairman of the State of Illinois Department of Human Services Task Force on Autism, by appointment of the Secretary of the Illinois Department of Human Services. Brian serves on the State of Illinois Department of Human Services, Division of Developmental Disabilities, Strategic Planning Team, by appointment of the Director of the Illinois Department of Human Services’ Division of Developmental Disabilities. Brian serves on the State of Illinois Disabilities Services Advisory Committee (The State of Illinois “Olmstead” Committee), by appointment of the Governor of Illinois (First by Governor Ryan, and then by Governor Blagojevich. Brian also serves and has served on other State of Illinois

Department of Human Services Task Forces and Committees.

Brian serves on the Board of Directors of Clearbrook, an agency that serves more than 3,400 children and adults with disabilities (He has served on the Clearbrook Board since 1989). Brian serves on the Board of Directors of PACT, Inc., the PAS/ISC Agent for DuPage County, which also is available to serve as Trustee of Special Needs Trusts and as Guardians of adults with special needs. Brian serves on the Board of Directors of SLSF (Special Leisure Services Foundation) which supports NWSRA (Northwest Special Recreation Association).

Over the years, Brian has served on various Parent and Parent/Teacher Boards, Councils and Committees in and for the Special Education District of Lake County, Illinois (SEDOL), and served as the Founding Chairman of the Board of Trustees of the SEDOL Foundation. Brian has served as an officer and as a member of the Board of Directors of KESHET (Jewish Parents of Children with Special Needs). Brian has served on the Board of Directors of the Northpointe Resources, formerly known as Northpointe Achievement Center. Brian has also served as General Counsel for Countryside Association.

Brian is a former IRS Agent and a former IRS Estate Tax Attorney. Brian served by appointment on the American Bar Association's Sub-Committee on "Special Needs Trusts and Other Protective Vehicles". Brian has served by appointment of the President of the Illinois State Bar Association on that Association's "Section Council" on Estate Planning, Probate and Trust Law. Brian also has served, by appointment, on that Association's "Standing Committee" on the Mentally Disabled. Brian has been admitted as a member of the National Academy of Elder Law Attorneys (NAELA), and serves on NAELA's Special Needs Law Section Steering Committee. Brian has served on the Board of Governors of the Northwest Suburban Bar Association, as Chairman of that Association's Estate Planning Probate and Tax Law Committee, as Co-Chairman of that Association's Continuing Legal Education Committee, and was the co-founder and served as Chairman of that Association's Committee on Planning for Individuals with Disabilities and the Elderly.

Brian serves on the Faculty of the Illinois Institute for Continuing Legal Education (IICLE), specifically on the topic of Special Needs Planning and Special Needs Trusts, and also is a contributing author for the IICLE Special Needs Trusts Practice Handbook. Brian has lectured on Special Needs Trusts and Planning for IICLE at IICLE's Special Needs Trust Course, at IICLE's Elder Law Course, and IICLE's Family Law Course.

Brian served three, four year terms, twelve years, as an elected Village Trustee in Buffalo Grove, Illinois (population 45,000) and was the founder of and served as Chairman of the Buffalo Grove Commission for Residents with Disabilities. Brian is a Past President of the Rotary Club of Buffalo Grove and has also served as an Assistant District Governor for Rotary District 6440.

Brian sincerely feels that Mitchell has allowed him, his wife, Linda, as well as "big sister/assistant mom" Nicole and "little/big brother" Benjamin, to better appreciate what is truly important in life... and what is... maybe... not so important. Brian feels the tremendous responsibility of not only being the parent of a child with special needs, but also as an attorney with the knowledge and ability to assist others in special needs future planning... needed to secure the future of children and adults with special needs.

While Brian wishes for Mitchell to have a long, healthy and enjoyable life, he often admits that he prays that he lives at least one moment longer than Mitchell... for that ultimately is the "Parent's Prayer"... the desire not to ask anyone else to, or to have anyone else have to "take over" the enormous responsibility of caring for their child with special needs... as only a fellow parent could understand.

Brian is a frequent author and lecturer on the topic of appropriate future planning for families of individuals with special needs, and has been interviewed on television and radio, and has been often quoted in newspapers (including the Wall Street Journal, Chicago Tribune and Chicago Sun Times), books and magazines.