

ADULT DISABLED CHILDREN, MANDATORY CHILD SUPPORT AND SSI BENEFITS: WHAT EVERY DIVORCE ATTORNEY SHOULD KNOW

BY RICHARD D. CHATWIN, ESQ.

NRS § 125B.110(1)-(2) requires parents to make child support payments beyond the age of majority when the child is handicapped, not self-supporting and the handicap occurred prior to the child reaching the age of majority, unless the child receives public welfare assistance that meets the child's needs.¹ These payments cannot be altered or removed by stipulation or agreement between the parties in a divorce action.²

This law often creates a conflict with the Supplemental Security Income (SSI) program. Many such adult disabled children receive SSI benefits, which currently pay an adult disabled child a maximum of \$733 per month.³ However, SSI can be lost or reduced if the adult disabled child receives "too much" child support income as required under NRS § 125B.110.



Fortunately, federal law offers a solution. Through the combination of a properly-prepared special needs trust and a specific order from the divorce court, adult disabled children may receive the statutorily mandated child support payments under NRS § 125B.110 and retain their needs-based benefits, such as SSI or Medicaid.

The Supplemental Security Income Program in General

The SSI program is administered by the Social Security Administration and provides financial assistance to certain aged, blind and disabled persons. The law for SSI can be found at Title 42 of the United States Code, Title 20, Part 416 of the Code of Federal Regulations and in the Social Security Administration's Program Operations Manual System (known as "POMS" or the "POMS Manual" for short).⁴

In general, individuals become eligible for SSI benefits when they are disabled and do not exceed a certain amount of income and assets (called resources in SSI parlance).⁵ In Nevada, an individual eligible for SSI also becomes

automatically eligible for Medicaid benefits—typically an adult disabled child’s primary source of health insurance.

Under the SSI program, income is divided into two types: earned and unearned. Child support required under NRS § 125B.110 is considered unearned income, but it is generally countable when determining whether or not someone qualifies for SSI benefits.⁶ If the adult disabled child has too much unearned income, SSI benefits will be terminated.

Resolving the Dilemma of Mandatory Child Support and SSI Benefits

A solution may be reached through the use of a special-needs trust and a specific order of the divorce court. The most common special needs trust is a payback trust, generally described in 42 USC § 1396p(d)(4)(A), and often called a “(d)(4)(A) Trust.”⁷ Pursuant to federal law, the assets of an adult disabled individual can be held in a (d)(4)(A) Trust and not count against SSI’s asset limits when the (d)(4)(A) Trust:

1. Contains the assets of an individual under age 65 and who is disabled;
2. Is established for the benefit of such individual through the actions of a parent, grandparent, legal guardian or a court; and
3. Provides that any state Medicaid program (but not SSI) from which the disabled individual received benefits, will receive all amounts remaining in the (d)(4)(A) Trust upon the death of the adult disabled child, up to the amount equal to the total medical assistance paid on behalf of the child by Medicaid.⁸

Further, child support payments paid into a properly-prepared (d)(4)(A) Trust should be made irrevocable by the divorce court. SSI rules state that:

A legally assignable payment ... that is assigned to a trust/trustee, is income for SSI purposes unless the assignment is irrevocable. For example, child support or alimony

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payments paid directly to a trust/trustee as a result of a court order, are not income. If the assignment is revocable, the payment is income to the individual legally entitled to receive it.⁹

Therefore, when the requirements are met to properly establish a (d)(4)(A) Trust, and the child support obligation is irrevocably made to the (d)(4)(A) Trust through an order of the divorce court, the child support payments don't count against the adult disabled child for SSI eligibility purposes. Social Security's POMS Manual offers additional guidance that further supports this view:

A disabled SSI recipient over age 18 receives child support which is assigned by court order directly into the trust. Since the child support is the SSI recipient's income, the recipient is the grantor of the trust and the trust is a resource, unless it meets an exception ... [by being a valid (d)(4)(A) Trust]. If the trust [is a valid (d)(4)(A) Trust] and is not a resource, the child support is income, unless it is irrevocably assigned to the trust or trustee.... In this example, the court ordered the child support to be paid directly into the trust, so we consider it to be irrevocably assigned to the trust/trustee.¹⁰

Application of These Rules in a Divorce Action with an Adult Disabled Child

When NRS § 125B.110 applies in a divorce action and an adult disabled child has SSI benefits, a parent, grandparent, legal guardian or court can establish a (d)(4)(A) Trust for the disabled adult child before the final divorce decree is entered.

Then, as part of the divorce action, the court should declare in a written order that the support payments to the adult disabled child are irrevocably assigned to the (d)(4)(A) Trust for the benefit of the child.

Careful consideration should be taken when preparing the (d)(4)(A) Trust and determining who will be the trustee. It will be the trustee's job to administer the (d)(4)(A) Trust to preserve SSI (and other benefits) that belong to the adult disabled child. With proper handling, both NRS § 125B.110 and SSI's eligibility rules can be satisfied, thereby ensuring the maximum benefit for the adult disabled child. **NL**

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1. See also *Edgington v. Edgington*, 119 Nev. 577, 80 P.3d 1282 (2003) (defining disability and what constitutes being self-sustaining under NRS § 125B.110).
2. *Scott v. Scott*, 107 Nev. 837, 822 P.2d 654 (1991) ("[NRS 125B.110] indicates a strong public policy that cannot be vitiated by stipulation or agreement of the parties") overruled on other grounds by *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009).
3. SSI payments are adjusted periodically for inflation at the same time, and at the same rate, as general Social Security Retirement cost of living adjustments, pursuant to the Consumer Price Index.
4. The POMS Manual is considered a secondary legal source, and federal courts typically do not rely upon, or cite to, it. However, the manual offers

5. 42 USC §§ 1382, 1382c(a); 20 CFR § 416.202.
6. 42 USC 1382a(a)(1)-(2); POMS SI 00830.420(C)(1); see also *Lunderby v. Dept. of HHS*, 921 F.2d 246 (9th Cir. 1990) (defining and explaining earned and unearned income rules for SSI recipients).
7. (d)(4)(A) Trusts were statutorily created through Section 1917(d)(4)(A) of the Social Security Act. See, e.g., POMS SI 01120.203(B).
8. See POMS SI 01120.203(B)(1). It is critical that the adult disabled child is not considered the "grantor" (or creator) of the (d)(4)(A) Trust or the trust is considered invalid under federal law. There is also a common misconception that the payback terms apply to SSI benefits, which is not true. Only state Medicaid programs must be repaid after the death of the recipient of those benefits.
9. POMS SI 01120.200(G)(1)(d) (emphasis in original); see also POMS SI 01120.201(J)(1)(d) (using the exact same language as POMS SI 01120.200(G)(1)(d)).
10. POMS SI 01120.201(C)(2)(b).



RICHARD D. CHATWIN is a partner at Gerrard Cox Larsen. He is a certified specialist with the State Bar of Nevada in elder law, a Nevada representative with the Special Needs Alliance and a certified elder law attorney with the National Elder Law Foundation. He works extensively with clients who need help with SSI, Medicaid, Veterans and other benefits, as well as special needs planning, estate planning, guardianship and probate matters. He received his B.A. from BYU and his M.B.A and J.D. from UNLV.