SNTs and Alimony and Child Support Claims

QUESTION PRESENTED TO OUR FIRM: "Our client, A. H., the Special Needs Trust beneficiary, is currently seeking dissolution of his marriage. Opposing counsel is seeking alimony, among other requests. We would like to know and were hoping you might be able to provide, information regarding how his special needs trust fund can be used.

"Specifically, we would like to know:

1. Can the trust be taken into account in an overall determination of his "ability to pay" spousal support?
2. In terms of the child support calculations, can the funds in the trust be used to determine income?"

RESPONSE: The questions you are asking involve two areas of law - trust law and family law, both of which state specific. There is an issue of whether the assets in the Special Needs Trust are marital property subject to the wife's claims for distribution, but even if they are not available to her in an equitable distribution claim, can they be counted in determining ability of the disabled spouse to pay alimony or child support.

Trust law issue. In general, funds in a Florida self-settled first party trust, including those in a Special Needs Trust, are NOT exempt from the claims of creditors. Ironically, failure to include a "spendthrift clause" in a Special Needs Trust will make the SNT fail as a safe harbor (non-countable resource for SSI and Medicaid purposes). Pursuant to federal law, a Special Needs Trust, to be valid, must contain a spendthrift clause. See the Social Security Program Operations Manual System, or POMS, at SI 01120.200. The purpose of requiring the clause is insure that the beneficiary, who is the recipient of SSI monthly checks and Medicaid health care, is not able to force the trustee to pay the beneficiary's bills. However, creditors are NOT thwarted by the "spendthrift clause" and may pursue the trust assets to satisfy their claims.

Florida is one of the majority of states that does not have an "asset protection trust" statute, that would allow us to put our own money into a trust, and make it exempt from the claims of our own creditors. A proposal to create such a statute, popular in Delaware, Alaska and a few other states, was rejected by the Real Property, Probate and Trust Law Section of the Florida Bar, and there seems to be no interest in the legislature to do so in the future; more importantly, it is not in place now to shield your client's assets from spousal claims for equitable distribution of trust assets or monthly support.

Family Law issues. I stopped practicing family law on November 15th, 2002, at 12 noon. So do your own follow-up research on these points.

Whether the funds in the trust are subject to distribution, or reaching on a claim for alimony, depends on the source of the funds. If the assets that funded the Special Needs Trust were from an inheritance belonging to Mr. H., and never commingled with his wife's, then traditional equitable distribution family law would protect them. If the source of the funds was the settlement of a personal injury action, then generally speaking, you will need to follow (and get the court to do so) the analytical approach suggested by Florida case law to determine whether the trust funds are separate property belonging solely to Mr. H., or are marital property subject to distribution. Judge Renee Goldenberg in her treatise on Florida Family Law describes the following rules:

- The separate property of the injured spouse (Mr. H.) includes noneconomic compensatory damages for pain, suffering, disability, and loss of ability to lead a normal life, and the economic damages which occur subsequent to the termination of the marriage of the parties, including the amount of the award for loss of future wages and future medical expenses.

- The separate property of the non-injured wife includes loss of consortium.

- The marital property subject to distribution includes the amount of the award for lost wages or lost earning capacity during the marriage of the parties and medical expenses paid out of the marital funds during the marriage.

- The marital property should also include those funds for which no allocation can be made.

The issue is often complicated by the fact that personal injury attorneys often settle cases without a neat allocation that fits into the family law principles. They get an unallocated lump sum for their client without specific amounts assigned to each category above.

The family courts that have wrestled with your question in the past have indicated that the only way to have these funds properly into or out of the equitable distribution pie, is to have a court make such determinations retrospectively. Probably, to do that, you would want to bring in the personal injury attorney that settled the case, and ask her or him to assist in such a hearing, unless you are also skilled in PI injury claims.

Some of the cases you may want to look at are:

- *Weisfeld v. Weisfeld*, 545 So 2d 1341 (Fla 1989) **** A Supreme Court case
- *White v. White*, 705 So 2d 123 (Fla 2d DCA 1998) - settlement funds not subject to automatic eligibility for equitable distribution – courts have to do a special analysis
- *Hardee v. Hardee*, 929 So 2d 714 (Fla 1st DCA 2006)
- *Bollaci v. Bollaci*, 863 So 2d 440 (Fla 4th DCA 2004)
- *Stern v. Stern*, 636 So 2d 735 (Fla 4th DCA 1993)

See also **Administration of Trusts in Florida**, 2012, 7th Edition, § 18.18, *Creditors' Claims, Spendthrift and Discretionary Trusts*:

> *"F.S.* 736.0502 gives statutory recognition to spendthrift provisions. No special language is necessary to create a spendthrift trust. (A trust term to the effect that beneficial interests are subject to a spendthrift trust or words of similar import are sufficient to do the trick. *F.S.* 736.0502(2).) To be effective, a spendthrift provision must restrain both voluntary and involuntary transfer of a beneficiary's interest. *F.S.* 736.0502(1). (This requirement may be a departure from the law prior to the enactment of *F.S.* Chapter 736. As such, it does not apply to any trust the terms of which are included in an instrument executed before July 1, 2007.) Assuming that is the case, a beneficiary may not transfer his or her beneficial interest in the trust and, with two exceptions discussed next, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before it is received by the beneficiary. *F.S.* 736.0502(3).
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> …

The second exception relates to so-called "exception creditors." When it comes to the effectiveness of spendthrift provisions, not all creditors are created equal. For public policy reasons, some creditors may proceed against a beneficiary's interest in a trust even though the trust includes a spendthrift clause. Thus, *F.S.* 736.0503(2) and (3) provide last resort exceptions for claims by a beneficiary's child, spouse, or former spouse for support or maintenance and for a judgment creditor (such as an attorney) who has provided services for the protection of a beneficiary's interest in the trust. In addition, *F.S.* 736.0503(2) provides an exception for claims by a state or the United States, but only to the extent provided in a statute separate from the Code. (Practitioners should note that the Code's "last resort" requirement differs from that established by the Florida Supreme Court in its 1985 decision, *Bacardi v. White*, 463 So.2d 218 (Fla. 1985), in that the Code requires only a single initial showing that traditional remedies are inadequate. *F.S.* 736.0503(3).)

The fact that spendthrift clauses are unenforceable against these exception creditors means only that these creditors have remedies against a beneficiary's interest similar to those of creditors of beneficiaries with interests in a trust that does not include a spendthrift provision. That is, exception creditors may attach present or future distributions to or for the benefit of the beneficiary. *Id. F.S.* 736.0503(3) also preserves the procedures available under the Uniform Interstate Family Support Act, *F.S.* Chapter 88. The creditors cannot, however, compel distributions from or otherwise reach beneficial interests in discretionary trusts."

Monthly Support Issues. Regarding monthly alimony or child support, *White v. White,* 820 So 2d 432 (Fla 4th DCA 2002) held that even where a lump sum award is not a marital asset, it can be regarded as a source of income for payment of alimony. *Hoffner v. Hoffner*, 577 So 2d 703 (Fla 4th DCA 1991) held that disability benefits – presumably the monthly check from SSA or a private long term disability policy – may also be considered as a source for payment of alimony.

There are no federal regulations or policy guidance on Special Needs Trusts that would indicate that such funds are exempt from claims for alimony or child support, or that the funds and income derived from them would be exempt from consideration in determining child support under various child support guidelines and formulas.

My friend and author, Tom Begley, a New Jersey special needs attorney, reported that an Ohio court did find that distributions from a Special Needs Trust ARE COUNTABLE INCOME in determining the amount of support owed to the child. *Myers v. DeVore*, Court of Appeals, No. WD06-031 (Oct. 6, 2006). A California court held that funds in a Third Party Trust can be invaded to satisfy child support claims. *Ventura County Dep't of Child Support Servs. v. Brown*, 11 Cal. Rptr 3d 489 (Ct. App. 2004). The defense of a Special Needs Trust, which is by definition a self-settled trust, would be even weaker.

In any event, as noted above, there is nothing in the character of the Special Needs Trust that would shield the funds UNDER TRUST LAW AND FEDERAL OR STATE PUBLIC BENEFITS LAW. You will need to look at traditional family law to shelter the funds, based on the genesis of those assets and subsequent Florida case law on counting trust funds in determining the amount of alimony or child support owed.

Finally, be aware that if Mr. H. is receiving Title 2 Social Security Disability Insurance Benefits, in addition to his SSI disability benefits, the child or children may have independent claims against the Social Security Administration for monthly support checks as dependent SSA beneficiaries. Whether those

payments by SSA to the children, based on a parent's disability, are to be a credit against any other child support owed by Mr. H., is a matter of state law. I believe there is a AmJur article on that topic.

Good luck.

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