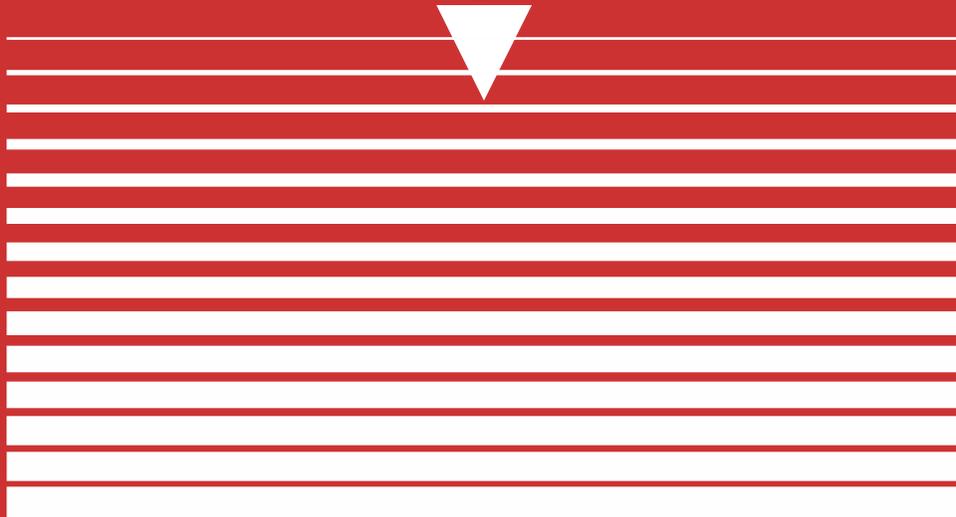


Disability, Divorce, SSI, and Medicaid

*Using Creative Alimony, Child Support and Property
Settlements to Maximize SSI, Ensure Medicaid Eligibility,
and Create Funding for Assistive Technology*

National Assistive Technology Advocacy Project
Neighborhood Legal Services, Inc. - Buffalo, N.Y.

September 2008



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Preface

This version of the publication, *Disability, Divorce, SSI and Medicaid: Using Creative Alimony, Child Support and Property Settlements to Maximize SSI, Ensure Medicaid Eligibility, and Create Funding for Assistive Technology*, is published through the National Assistive Technology (AT) Advocacy Project of Neighborhood Legal Services, Inc., as part of its Funding of AT manual series. Information about the AT Advocacy Project, and the federal grant that supports it, appears in the Publication Credits and Disclaimer on page iii, below.

This funding manual was originally published in 1999 under the title, *SSI and the Family Law Attorney: Using Creative Alimony, Child Support and Property Settlements to Maximize SSI, Medicaid and Create Funding for Assistive Technology*. This is both an update and expansion of the original, 1999 publication. Our targeted audience, in 1999 and again in 2008, includes Protection and Advocacy (P&A) program staff (attorneys and advocates) and attorneys who specialize in divorce law in both the private and public sectors (i.e., legal services and legal aid lawyers). The 1999 publication appeared in three formats: as a featured article in the July-August 1999 issue of *Clearinghouse Review*, a bi-monthly journal distributed primarily to legal services and P&A programs nationwide; as one of several funding manuals published as part of our Funding of AT series; and as one of many publications that appear on the Neighborhood Legal Service website, www.nls.org.

Why have we published this funding manual? Prior to 1999 the co-authors, James R. Sheldon, Jr. and Diana M. Straube, both employed as attorneys at Neighborhood Legal Services, Inc., in Buffalo, New York, regularly found themselves counseling divorce attorneys whose clients with disabilities received SSI and Medicaid. Mr. Sheldon approached these calls as an attorney with many years of experience with SSI and Medicaid, but minimal experience in divorce or family law; Ms. Straube approached these calls as an attorney with many years of experience in divorce or family law, but minimal experience with SSI and Medicaid at the time. Without advertising or holding themselves out as “disability and divorce” specialists, many private attorneys found their way to Ms. Straube or Mr. Sheldon, through word-of-mouth, as the private attorneys struggled with how to best settle a case when an adult client or that client’s child had a disability and received SSI and Medicaid benefits.

As Ms. Straube and Mr. Sheldon consulted with more and more private attorneys on these issues, often collaborating to analyze each new set of facts, two things became clear: first, that failure to structure a family law or divorce resolution, in a way that ensures and maximizes SSI eligibility, could cost a client and his/her children thousands of dollars through lost SSI benefits, lost opportunities to directly fund disability-related services and equipment, and lost Medicaid coverage; and second, that very few family law attorneys possessed enough knowledge of SSI and Medicaid law to either structure a resolution geared to maximize those benefits or to fully understand the implications of failing to do so.

This publication covers the basic SSI rules an attorney must know to competently represent the interests of an adult or child with a disability who receives SSI and is expected to benefit from alimony, child support, or any other cash or property settlement that results from a divorce or related action. We explain SSI’s income and resource rules, the types of cash and property settlements that will affect SSI, and those that will not. We also explain how SSI becomes the conduit to automatic Medicaid eligibility in most states and why the retention of Medicaid may be more important than the retention of SSI.

The hypothetical examples which are included should provide the reader with guidance as to how these principles will apply in real life cases.

When this publication first went to press in 1999, we believed that the information and settlement strategies outlined could be of great benefit to adults and children who would need funding for a range of medical equipment that is often classified as assistive technology or AT. By avoiding monthly alimony or child support payments and substituting “vendor payments” for items other than food and shelter, the SSI program would not treat these alternative payments as income and SSI eligibility would not be affected. Similarly, by structuring property settlements and lump sum distributions to avoid the receipt of cash, the divorcing spouse would be able to keep resources within the SSI program’s \$2,000 limit. In many cases, these alternative vendor payments or property settlements could be structured to allow for purchase of disability-related services and equipment that might not otherwise be available through Medicaid or a private insurance program. More importantly, if the settlement strategy could be used to ensure SSI eligibility it would also ensure Medicaid eligibility in most states. Based on the many calls and emails we have received from attorneys who were using our publication as a guide, we know that many individuals with disabilities have benefitted from these strategies.

What has changed since our 1999 publication? Two major changes have occurred, as discussed in the manual, that will affect when something is counted by the SSI program as either income or a resource. In 1999, income included anything received as cash or in-kind that could be used to meet needs for “food, clothing or shelter.” Similarly, resources included most liquid assets that could be converted to cash to meet needs for “food, clothing and shelter.” Effective April 2005, “clothing” was removed from these definitions, meaning that an SSI recipient could receive clothing as a gift or as part of a family law resolution and not have it affect SSI eligibility. Also, effective April 2005, all “household goods and effects” are considered to be exempt assets, where prior to that a \$2,000 limit applied. This change means that kitchen appliances, living room and dining room furniture, T.V. and stereo equipment, and bedroom furniture, for example, could now be provided in lieu of a cash property settlement without any adverse consequences to SSI eligibility. These changes are discussed in the body of the publication.

Many have asked whether the strategies suggested in this publication are legal as a matter of SSI law. Keeping in mind that SSI law and policy changes from year to year, all the information and examples used in this publication have been thoroughly researched and represent what is possible under SSI law and policy as of mid-2008. Readers must also keep in mind that any minimal changes in the facts of our case examples could lead to a different legal analysis. What we can say is that tens of thousands of hard copies and electronic copies of this publication have been distributed through Clearinghouse Review, through our Funding of AT manual series, and through our website, and we have never heard from an attorney that we had misstated what is possible.

We do hope that attorneys, advocates, and others find this publication helpful. If you have experiences in using this guidance that might be helpful to others, please share it with either of the co-authors whose contact information appears on the title page.

Publication Credits and Disclaimer

This publication, *Disability, Divorce, SSI and Medicaid: Using Creative Alimony, Child Support and Property Settlements to Maximize SSI, Ensure Medicaid Eligibility, and Create Funding for Assistive Technology*, was originally published in 1999 under the title, *SSI and the Family Law Attorney: Using Creative Alimony, Child Support and Property Settlements to Maximize SSI, Medicaid and Create Funding for Assistive Technology*. Both the 1999 version of this publication and this 2008 version are published and distributed through the National Assistive Technology (AT) Advocacy Project.* That project is fully funded under a Cooperative Agreement, number H224B050003 from the Rehabilitation Services Administration, U.S. Department of Education, to the Rehabilitation Engineering Society of North America (RESNA) and its subcontractors. Neighborhood Legal Services, Inc. and its National AT Advocacy Project are subcontractors of RESNA as part of the National AT Technical Assistance Partnership.

The co authors of this publication are James R. Sheldon, Jr., the Supervising Attorney of the National AT Advocacy Project, and Diana M. Straube, a Staff Attorney with the project. Both authors work part time with the AT Advocacy Project (see *About the Authors*, p. v.).

This publication contains an extensive discussion of the Supplemental Security Income (SSI) program's income and resource rules, particularly as they relate to the practice of a family law specialist. The opinions and positions expressed herein are those of the individual authors and do not necessarily reflect the position of the Social Security Administration, the U.S. Department of Education, or any other federal agencies, and no official endorsement by the Social Security Administration, the U.S. Department of Education, or any other federal agency, of the opinions and positions expressed herein should be inferred.

**The National AT Advocacy Project provides technical assistance, training, and a range of other support services, nationwide, to attorneys and advocates who work at Protection and Advocacy programs and specialize in assistive technology issues. For access to our many publications, you can go to our website at www.nls.org/natmain.htm.*

About the Authors

James R. Sheldon, Jr. is a 1978 graduate of the University of Buffalo Law School and is the Supervising Attorney of the Disability Law Unit at Neighborhood Legal Services (NLS). He joined NLS in late 1980 and focused his work, initially, in the areas of consumer law, public benefits, Social Security, and SSI. Beginning in the mid 1980s, Mr. Sheldon focused exclusively on disability-related issues, including administrative appeals and litigation. He focused on both the medical issues of Social Security/SSI (supervising an SSI appeals unit from 1989 to 1996) and Social Security's work incentives (supervising four separate work incentives projects between 1998 and 2008). He has worked on AT-related advocacy since the late 1980s, having handled cases involving Medicaid, Medicare, special education, vocational rehabilitation agencies, private insurance plans, state specific programs, and the SSI work incentives as AT funding sources. Since 1995, he has supervised NLS's State AT Advocacy Project and since 1996, he has supervised the National AT Advocacy Project. During the past 13 years, Mr. Sheldon has: authored numerous newsletter articles for IMPACT and AT Advocate; authored or co-authored publications for the funding of AT manual series on Medicare, Social Security/SSI work incentives, funding of work-related AT, and the prior version of the current Disability, Divorce, SSI and Medicaid publication (co-authored with Ms. Straube); served as editor of all AT-related publications; provided technical assistance to attorneys and advocates throughout the country; and presented on all of the aforementioned funding sources at many conferences throughout the country.

Diana M. Straube is a 1987 graduate of the University of Buffalo Law School and is a Staff Attorney with the Disability Law Unit at Neighborhood Legal Services (NLS) in Buffalo, New York. Ms. Straube worked for one year in a private firm handling personal injury litigation before joining the staff at NLS in 1988. Between 1988 and 2003, she worked in NLS's Family Law Unit, handling a range of divorce, child support, custody, and related cases. She served a three-year term (2000-2003) as Chair of the Bar Association of Erie County's Policy and Procedure in Family Court Committee. In late 2003, Ms. Straube moved into NLS's Disability Law Unit where she now spends all her time on assistive technology (AT) issues, splitting her time between individual appeals and litigation (the New York State AT Advocacy Project), and technical assistance and training (the National AT Advocacy Project). Her individual practice and technical assistance work focuses primarily on Medicaid, including the special rights of children under Medicaid's Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program. She is a regular contributor to both the IMPACT and AT Advocate newsletters, as published by the State and National AT Advocacy Projects. During the past several years, Ms. Straube has presented at numerous conferences, both within New York and around the country, on a range of Medicaid issues and on using the Department of Veterans Affairs as an AT funding source. Ms. Straube co-authored, with Mr. Sheldon, the earlier, 1999 version of the current Disability, Divorce, SSI and Medicaid manual.

Visit the Neighborhood Legal Services web site at www.nls.org and check out the growing number of references that are disability-related. Our National AT Advocacy Projects website, www.nls.org/natmain.htm, includes past newsletters, all publications from our funding of AT manual series, and many of the handouts from our past national conferences.

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Using Creative Alimony, Child Support and Property Settlements to Maximize SSI, Ensure Medicaid Eligibility, and Create Funding for Assistive Technology

I. Introduction

Mary has severe rheumatoid arthritis and uses either crutches or a wheelchair to get around.¹ She is separated from her husband and her only income is Supplemental Security Income (SSI) benefits of \$637 per month.² She lives in one of 39 states, the District of Columbia, or the Northern Mariana Islands in which an SSI recipient automatically qualifies for Medicaid. Medicaid pays for Mary's doctor visits, physical therapy, prescription drugs, crutches, and the wheelchair. If her condition worsens, Medicaid could also pay for home health care services.³

Starting next month, Mary will receive \$657 per month in alimony payments under a negotiated settlement. The SSI program will disregard the first \$20 of her alimony, but the remaining \$637 will be counted to reduce her monthly SSI check to \$0. Thus, despite a \$657 per month alimony award, the net benefit to Mary is \$20 per month. The net benefit could turn into a net loss, however, because her loss of SSI benefits means that she also loses her automatic eligibility for Medicaid.⁴

Mary's case may be settled in such a way as to maximize her benefits. Consider this alternative. Mary's ex-husband agrees to pay up to \$637 as direct payments to Mary's creditors to cover a car payment and insurance, a phone bill, a house-cleaning service, a landscaping service, and a cable television bill. Since Mary receives neither cash nor an in-kind payment for "food and shelter,"⁵ these payments will not be treated as income by the SSI program and will have no effect on her eligibility. She will continue to receive a monthly SSI check of \$637. Mary's retention of SSI guarantees that she will also retain Medicaid.

When a family law attorney has an SSI recipient as a client, it is difficult to competently settle a case or advocate for a particular court order without a good working knowledge of SSI's income and resource rules. Without that expertise, a substantial part of an otherwise good settlement or court-ordered payment could inadvertently go into government coffers in the form of reductions to SSI. Worse yet, in most states a client could also lose Medicaid if alimony or child support makes that client ineligible for SSI.

¹The examples used in this article are purely hypothetical, but may be used as guides in real life cases.

²The examples in this article use the 2008 SSI federal benefit rate, with no state supplement.

³As noted in section IV, some of the services which Medicaid covers for Mary are optional and will not be covered by Medicaid in every state.

⁴Mary loses her right to automatic Medicaid as a recipient of SSI. However, in some states she may be able to retain Medicaid through an application to her state's Medicaid agency. For example, in New York Mary would still be able to retain Medicaid, at no cost to her, if her 2008 monthly income, after allowable exclusions, was \$725 or less. N.Y. COMP. CODES, R. & REGS., tit. 18, § 360-4.7.

⁵20 C.F.R. § 416.1102.

In this article we cover the basic SSI rules an attorney must know to competently represent the interests of an adult or child with a disability who receives SSI and is expected to benefit from alimony,⁶ child support, or any other cash or property settlement that results from a divorce or related action. We explain SSI's income and resource rules, the types of cash and property settlements that will affect SSI and those that will not. We also explain how SSI becomes the conduit to automatic Medicaid eligibility in most states and why the retention of Medicaid may be more important than the retention of SSI.

Although this article is written primarily for family law attorneys, it will be valuable to attorneys and advocates who specialize in disability law as well. We expect that it will also be read by many persons with disabilities and their families. The hypothetical examples which are included should provide the reader with guidance as to how these principles will apply in real life cases.

This article should not be viewed as the last word on any particular case. The SSI program is heavily regulated and new SSI laws, regulations, and policies appear every year. This article was originally written in 1999 with the title, Supplemental Security Income and the Family Law Attorney. Since that time, significant changes in the SSI program have occurred. Further, our understanding of the SSI program and how it relates to family law has expanded. Before relying on a law or regulation cited in this article, attorneys should ensure that it applies to their unique case and has not changed. Attorneys should also be mindful of the collateral consequences that any SSI-induced resolution may have on other matters such as tax liability,

eligibility of the family or family members for state welfare benefits, housing subsidies, or other means-tested programs. This article will not directly address those collateral issues.

The principles stated in this article will allow the family law attorney to creatively design resolutions that will greatly enhance clients' quality of living. In selected cases, the creative resolution of alimony, child support or property issues may lawfully bring thousands of extra dollars into the family and allow a child or adult with a disability to obtain funding for expensive services and equipment to enhance independence and self sufficiency.

II. Sources of Cash Benefits and Health Insurance for Adults and Children with Disabilities

Social Security, SSI, Medicare, and Medicaid are all potential sources of cash benefits and health insurance insofar as they are available to children and adults with disabilities.

A. Social Security

Social Security, an insurance program authorized by Title II of the Social Security Act, is administered by the Social Security Administration.⁷ A person qualifies for Social Security benefits when a wage earner has paid into the Social Security trust fund. Benefits may be paid to the wage earner and/or the wage earner's dependents.

Social Security Disability Insurance (SSDI), a benefit for adults with disabilities over the age of 18, is paid to wage earners who have accumulated sufficient quarters of coverage (or "credits") and then become disabled.⁸ Benefits

⁶As noted in section V.B, the terms "alimony" and "maintenance" are used interchangeably in this article to describe periodic payments from one spouse or ex-spouse to the other.

⁷42 U.S.C. §§ 401 et seq.

⁸42 U.S.C. § 423(c).

are also available to widows and widowers of wage earners,⁹ as well as disabled adult children, and dependent children who are either under the age of 18 or are full-time primary or secondary students under age 19.¹⁰

A person need not have limited income and resources to receive SSDI benefits. This distinguishes SSDI benefits from SSI which requires that a person have limited income and resources. With SSDI, any income or resource received as alimony/maintenance or child support is irrelevant. Social Security eligibility will never be affected by the financial settlement of a family law matter. The importance of Social Security benefits, to the family law attorney, is that they represent part of the income stream that will support clients and their families.

B. Medicare

Medicare, a federal health insurance program authorized by Title XVIII of the Social Security Act,¹¹ is most frequently associated with the receipt of SSDI benefits.¹²

Adults under the age of 65 can establish eligibility in three ways: 1) after 24 months of eligibility for SSDI benefits; 2) after 24 months of eligibility for Railroad Retirement disability benefits¹³; or 3) if suffering from kidney disease and not receiving SSDI benefits, upon entering end stage renal disease or developing a kidney

impairment that requires regular dialysis or kidney transplantation to maintain life.¹⁴

A person who is eligible for Medicare will qualify automatically for Medicare Part A. Part A, known as hospital insurance benefits, covers such things as inpatient hospital care, post-hospital extended care, some home health services, and hospice care.¹⁵ Part B, known as supplemental medical insurance, is optional and requires payment of a monthly premium.¹⁶ The 2008 Part B premium is \$96.40 per month.¹⁷ (The premium will be higher for persons with adjusted gross incomes exceeding \$82,000 in 2008.) Part B covers various outpatient services including physician services, durable medical equipment, physical and occupational therapy, comprehensive outpatient rehabilitation services, prosthetic devices, orthotic devices, and home health services.¹⁸ Medicare Part D, the prescription drug benefit, was added in January 2006 as an optional Medicare benefit.¹⁹ Part D coverage can be subject to considerable out-of-pocket expenses for monthly premiums, coinsurance, deductibles, and prescription co-payments. Many or even most of these costs can be eliminated if an individual qualifies for Part D's low-income subsidy program, commonly referred to as "extra help."²⁰ Effective January 2006, an individual who is dually eligible for both Medicare and Medicaid must obtain their prescription drugs through the Medicare Part D program.

⁹20 C.F.R. § 404.335.

¹⁰20 C.F.R. §§ 404.350, 404.367.

¹¹42 U.S.C. §§ 1395a et seq.

¹²42 U.S.C. § 426.

¹³42 U.S.C. § 426(b).

¹⁴42 U.S.C. §§ 426-1, 1395c, 1395rr; 42 C.F.R. § 406.13(b).

¹⁵42 U.S.C. § 1395d.

¹⁶42 U.S.C. § 1395j.

¹⁷See Centers for Medicare and Medicaid Services, Medicare Premiums and Coinsurance Rates for 2008, www.medicare.gov/spotlights.asp.

¹⁸42 U.S.C. § 1395k.

¹⁹42 U.S.C. § 1395w-101 et seq.

²⁰42 U.S.C. § 1395w-114.

As with Social Security, the amount of income or resources received as alimony/maintenance or child support is irrelevant for Medicare Parts A and B. This distinguishes Medicare from Medicaid, which is for persons with limited income and resources. Eligibility for Medicare Parts A and B will never be affected by the economic settlement of a family law matter. However, eligibility for a Medicare Savings Plan, under which the state's Medicaid program will pay for Part B premiums and, in some cases, for co-payments and deductibles, will be based on financial need.²¹

Medicare Part D is not itself subject to a means test. However, as noted above, Medicare Part D's low-income subsidy is a means-tested benefit and, as such, eligibility for the subsidy could be affected by a family law resolution which creates a cash monthly payment or property settlement. Importantly, individuals who are dually eligible for both Medicare and Medicaid are automatically eligible for the full Part D low-income subsidy,²² potentially saving them \$3,500 or more per year in out-of-pocket expenses. If the creative family law settlement results in Medicaid eligibility being created or continued, that will ensure eligibility for the full Part D low-income subsidy for those individuals who must now get their prescription drugs through Medicare.

C. SSI

SSI, a welfare or needs-based program for the aged, blind and disabled, is authorized by Title XVI of the Social Security Act.²³ To qualify for SSI, a child or adult must have limited income

and resources.²⁴ SSI can be a person's only form of income or it can supplement other income such as Social Security benefits or wages. Like Social Security, SSI is administered by the Social Security Administration.

SSI benefits may be affected by a traditional family law resolution that involves a periodic payment, lump sum, or transfer of property. For this reason, it is important to determine whether a client or client's child is receiving SSI benefits or whether the adult or child in question might be eligible for SSI if his or her income and resources were limited. Unfortunately, because both the SSDI and SSI programs are administered by the Social Security Administration, they are often mistaken for each other. It is critical that the family law attorney accurately identify the source of income as either SSDI, SSI, or a combination of both. The income and resource rules for SSI, that are most relevant to the family law attorney, are described in section III.

D. Medicaid

Medicaid, also known as Medical Assistance, is a cooperative federal-state program authorized by Title XIX of the Social Security Act.²⁵ As explained in section IV, Medicaid can pay for a wide range of health-related costs for both children and adults with disabilities.

In 39 states, the District of Columbia, and the Northern Mariana Islands, a person who receives SSI benefits automatically qualifies for Medicaid.²⁶ In 11 states, known as section 209(b) states, Medicaid eligibility is not auto-

²¹See Center for Medicare Advocacy's Medicare Savings Program, available at www.medicareadvocacy.org/FAQ_MedicareSavingsProgs.htm.

²²42 C.F.R. § 423.773(c).

²³42 U.S.C. §§ 1381 et seq.; 20 C.F.R. pt. 416.

²⁴See 20 C.F.R. §§ 416.1100 et seq. (regarding SSI's income rules); §§ 416.1201 et seq. (regarding SSI's resource rules).

²⁵42 U.S.C. §§ 1396 et seq.

²⁶42 U.S.C. § 1396a(a)(10)(A)(i).

matic for SSI recipients. These states use their own Medicaid eligibility criteria, which differ from SSI eligibility criteria.²⁷ The states which exercise the 209(b) option include: Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, and Virginia.²⁸ In any individual family law case, particularly those in which an adult or child is heavily dependent on expensive services or equipment that are covered by Medicaid, it may be important to preserve SSI eligibility to ensure the continuation of Medicaid.²⁹

III. Application of SSI Income and Resource Rules to Money Received as Alimony, Child Support, or a Property Settlement

In all states, SSI is available as a cash benefit to children and adults with disabilities who have limited income and resources. When arranging alimony, child support, and property settlements, attorneys should think creatively and consider options which will minimize countable income and resources and thus maximize the amount of benefits to which their clients may be entitled.

A. Determining the Monthly SSI Check Amount

An individual's monthly SSI check is based on

a federal benefit rate (FBR) and optional state supplement. The FBR combined with the state supplement provides an SSI base rate for calculating monthly benefits. The amount of the monthly SSI check is determined by subtracting countable income from the SSI base rate.

The FBR for 2008 is \$637 per month for an individual and \$956 for an eligible couple. Each year, the FBR is adjusted to compensate for increases in the cost of living. So, for example, effective January 1, 2008 the FBR for an individual was increased \$14 from the 2007 level of \$623 per month.³⁰

Many states do not provide a state supplement and the state's SSI base rate is the FBR. For example, Texas and West Virginia, two states which have chosen not to supplement the FBR, have 2008 SSI base rates of \$637 per month. Many other states, including New York, Vermont, and California, have chosen to supplement the FBR. These states all have chosen different amounts for their optional state supplement. The examples in this article will use the 2008 FBR of \$637 with no state supplement.³¹

B. SSI Income Rules

The SSI program defines income as anything received in cash or in-kind that can be used to meet needs for food and shelter.³² If you compare the original 1999 version of this article, you will notice that clothing is no longer a part

²⁷42 U.S.C. § 1396a(f).

²⁸Social Security Program Operations Manual System (POMS) SI 01715.010, SI 01715.020. Social Security's POMS are available at Social Security's "Representing Claimants" site, www.socialsecurity.gov/representation (go to "resources" and click on "POMS," then "Table of Contents").

²⁹Some former SSI recipients, who work and lose SSI benefits due to budgeting of their wages, can continue eligibility for Medicaid under the provisions of the section 1619(b) program. 42 U.S.C. § 1382h; 20 C.F.R. §§ 416.260-.269. See Edwin J. Lopez-Soto et al., Chapter 3: Work Incentives, in *BENEFITS MANAGEMENT FOR WORKING PEOPLE WITH DISABILITIES: AN ADVOCATE'S MANUAL*, 3-13, 3-14 (Edwin J. Lopez-Soto & James R. Sheldon, Jr. eds., Empire Justice Center 2007).

³⁰See Social Security Admin., 2008 Social Security Changes (Oct., 2007), www.ssa.gov/pressoffice/factsheets/colafacts2008.htm.

³¹The 2008 optional state supplements for each state appear in POMS SI 01415.040.

³²20 C.F.R. § 416.1102.

of the definition. This change occurred in 2005 when the regulations were revised. There were similar revisions to the definition of countable resources, which will be discussed later in this article.

Earned income includes gross wages, net earnings from self-employment, and a variety of other payments received for a person's labors.³³ Unearned income is any form of income other than earned income.³⁴ Unearned income includes income from a responsible relative, such as a parent or spouse, that is "deemed" available to the SSI recipient.³⁵ Both alimony and child support payments, whether in cash or in-kind, will meet SSI's definition of unearned income if available to meet the individual's need for food and shelter.³⁶

1. Spousal Income and Alimony Payments

When calculating the amount of benefits for SSI recipients and applicants, the SSI program distinguishes between spouses who reside in the same household and those who reside apart. If a spouse resides in the same household and has income that is high enough, the SSI program will treat a portion of that income as available to the spouse with a disability. After determining the spouse's income, a portion is allocated to meet the needs of any minor children who are not eligible for SSI.³⁷ Then, under a complicated "deeming" formula, a portion of the

remaining income is considered available, or "deemed" to the spouse with a disability.³⁸ If spouses live apart, the SSI program will not automatically consider the income of the non-disabled spouse as available to the spouse who is the SSI recipient (i.e., it will not "deem" the spouse's income).³⁹ The SSI program will only count income from the spouse who is living in a separate household if some of that income is paid to the SSI recipient either voluntarily or by court order.⁴⁰

If an adult SSI recipient receives alimony payments, the SSI program will ignore the first \$20 of alimony received each month.⁴¹ The remaining amount will count as income and reduce the amount of the monthly SSI check that a person would otherwise receive.

2. Parental Income and Child Support Payments

The SSI program also distinguishes between residential and non-residential parents. If a child receiving SSI is under 18 and is living with a parent or stepparent with high enough income, the SSI program will treat a portion of that income as available to the child.⁴² After first allocating a portion of the income to meet the needs of the parent(s) and other minor children, the program uses a complicated formula to deem a portion of the parental income to the child with a disability.⁴³

³³20 C.F.R. § 416.1110.

³⁴20 C.F.R. § 416.1120.

³⁵See 20 C.F.R. §§ 416.1161, 416.1165 (regarding deemed income of a responsible parent); 20 C.F.R. §§ 416.1161, 416.1163 (regarding deemed income of a responsible spouse).

³⁶20 C.F.R. § 416.1121(b).

³⁷20 C.F.R. § 416.1163(b).

³⁸20 C.F.R. § 416.1163(d).

³⁹20 C.F.R. § 416.1160(a)(1).

⁴⁰20 C.F.R. § 416.1121(b).

⁴¹20 C.F.R. § 416.1124(c)(12).

⁴²20 C.F.R. § 416.1165.

⁴³20 C.F.R. § 416.1165(a)-(e).

The non-residential (absent) parent's income will be counted by the SSI program only to the extent that it is paid and is available to meet that child's needs for food and shelter. For example, Cheryl, who is 11 years old and receives \$637 per month in SSI benefits, lives with her father, Tom. Tom works part time and earns \$14,000 per year. Tom's ex-wife, Susan, earns more than \$42,000 per year, but the SSI program will not treat any part of that as available to Cheryl unless the money is, in fact, being paid. Assume that Susan pays \$600 per month in child support pursuant to court order to meet Cheryl's needs. The SSI program will treat these payments as income to Cheryl and, under special rules, will exclude one third of the \$600 to reduce that amount to \$400.⁴⁴ An additional \$20 is excluded under the general unearned income exclusion, reducing the income to \$380. Cheryl will be eligible for a monthly SSI check of \$257 ($\$637 - 380 = \257).⁴⁵

Cheryl need not receive so little. Consider this option. As an alternative to traditional child support, Tom's ex-wife agrees to pay up to \$600 as direct payments to a private school to cover the cost of Cheryl's tuition. Since no cash nor in-kind payment has been received on Cheryl's behalf for "food and shelter," the payment for the tuition will not be treated as income and will have no effect on her SSI eligibility. Her monthly SSI check will remain at \$637.

Let's examine the concrete benefit from this creative settlement. In the first example, Cheryl and her father receive a net benefit of \$220 per month despite receiving \$600 per month in child support. In the second example, they receive

the full value of the \$600 which is used to pay for private school expenses. The extra \$380 per month (\$4,560 per year) has made a tremendous difference for this family.

3. Special Rules: The One-Third Reduction and Presumed Value Rules

There are special rules for valuing food or shelter received as unearned income (in-kind support and maintenance). In-kind support and maintenance is defined as any food or shelter that is paid for by someone else. Shelter includes room, rent, mortgage, real property taxes, electricity, gas, water, sewer charges, garbage collection, and heating fuel.⁴⁶ If the individual lives in the household of another person and receives both food and shelter from the person, the SSI program reduces the SSI base rate by one third the federal benefit rate (\$212.33 in 2008), making the new SSI base rate \$424.67.⁴⁷

If the individual receives in-kind support and maintenance and the one-third reduction rule does not apply (for example, if the individual lives in a separate household, or does not receive both food and shelter), the SSI program uses the "presumed value rule." Instead of determining the actual dollar value of the income received, the SSI program presumes that it is worth a maximum one-third of the federal benefit rate plus the general income exclusion of \$20.⁴⁸ The actual dollar value will be used if the individual can prove that the actual value is less than the presumed value.⁴⁹

⁴⁴20 C.F.R. § 416.1124(c)(11).

⁴⁵20 C.F.R. § 416.1124(c)(12).

⁴⁶20 C.F.R. § 416.1130(b).

⁴⁷20 C.F.R. § 416.1131(a), (b).

⁴⁸20 C.F.R. § 416.1140(a)(1).

⁴⁹20 C.F.R. § 416.1140(b)(2).

While the presumed value rule may be seen as having negative consequences in other contexts, application of this rule can be used to improve the quality of the housing options for the divorcing spouse with a disability. For example, Sally and Tom are divorcing. Sally still resides in the couple's home and receives \$637 per month in SSI benefits. Sally has used a wheelchair since her spinal cord injury and significant modifications were made to their home to make it wheelchair accessible. She wants to stay in the home but the mortgage payments, including taxes and insurance, are \$1,000 per month. Tom is willing to pay the mortgage payment as alimony. If he pays the mortgage, SSI will presume the maximum value of those mortgage payments is one-third the federal benefit rate plus \$20 (i.e., \$232.33). After subtracting the \$20 general unearned income exclusion, Sally's SSI benefit will only be reduced by \$212.33 even though Tom is paying the \$1,000 per month mortgage payment.

C. SSI Resource Rules

A resource is defined by the SSI program as cash or other liquid assets or real or personal property that an individual owns and could convert to cash which could be used to provide for food or shelter.⁵⁰ This article will not cover every last rule governing when something counts as a resource and when the resource is treated as exempt or excluded. Instead, we will cover the general SSI rules and some examples typically encountered by the family law attorney.⁵¹

SSI's general resource limit for 2008 is

\$2,000 for an individual and \$3,000 for an eligible couple.⁵² We typically say that the SSI recipient can have no more than \$2,000 in the bank, but countable resources include more than just bank accounts. A parent's resources will be considered available to the child and counted against the child's \$2,000 resource limit to the extent that they exceed \$2,000 for one parent or \$3,000 for two parents in the household.⁵³

In addition to cash and bank accounts, the SSI program will count "liquid resources," i.e., property that can be converted to cash within 20 working days. Such resources include stocks, bonds, mutual fund shares, promissory notes, mortgages, savings and checking deposits, certificates of deposit, and the cash surrender value of life insurance policies.⁵⁴ The SSI program also counts "non-liquid resources," i.e., property that is not cash and cannot be converted to cash within 20 working days. This includes loan agreements, trucks, tractors, boats, machinery, livestock, buildings, and land. Only the equity value of the non-liquid resource is countable.⁵⁵

Since many family law resolutions involve property transfers, the attorney should know some of the more common resource exclusions, i.e., resources that are not counted for purposes of the \$2,000 resource limit. Again, the 2005 revisions in the regulations significantly changed common resource exclusions. Prior to the 2005 revisions, household goods and personal effects were excluded if they had an equity value of less than \$2,000. Now, household goods are excluded, regardless of value, if they are items found in or near the home that

⁵⁰20 C.F.R. § 416.1201(a).

⁵¹A very detailed summary of the SSI income and resource rules is contained in *BENEFITS MANAGEMENT FOR WORKING PEOPLE WITH DISABILITIES: AN ADVOCATE'S MANUAL*, Chapter 2: SSI Income & Resource Rules, note 29, above.

⁵²20 C.F.R. § 416.1205(c). (The resource limits have remained at the same levels since 1989.)

⁵³20 C.F.R. § 416.1202(b).

⁵⁴20 C.F.R. § 416.1201(b).

⁵⁵20 C.F.R. § 416.1201(c).

are used on a regular basis, or are needed by the householder for maintenance, use and occupancy of the home. These include furniture, appliances and electronic equipment such as computers and televisions.⁵⁶ Personal effects are excluded, regardless of value, if they are items of personal property ordinarily worn or carried by the individual; or have an intimate relationship to the individual, such as jewelry, including wedding and engagement rings; items of cultural or religious significance; items required because of an individual impairment; books; and musical instruments.⁵⁷ Prior to the 2005 revisions, up to \$4,000 of the current market value of an automobile was excluded unless it was necessary for employment of a household member, for medical reasons, or was specially modified for a person with a disability. Now, one automobile is excluded regardless of value if it is used for transportation for the individual SSI recipient or a member of the household.⁵⁸ In addition to passenger cars, the term automobile includes other vehicles used to provide necessary transportation.⁵⁹

In addition to these items, a number of other items are also excluded. The following list, although by no means complete, includes those excluded resources most likely to come up in the context of a family law case:

- the principal residential home, regardless of its value⁶⁰
- the proceeds from the sale of a home which

are excluded from the individual's resources to the extent they are intended to be used and are, in fact, used to purchase another home, which is similarly excluded, within three months of the date of receipt of the proceeds⁶¹

- the full value of burial spaces and funds clearly set aside for burial, up to \$1,500 each for the individual and spouse, if any⁶²
- up to \$6,000 of an individual's income producing property is excluded as essential to self support if it produces a net annual income of at least six percent of the equity⁶³
- federal income tax refunds⁶⁴
- personal property which is required by the individual's employer for work, regardless of value, while the individual is employed⁶⁵

Consider Darlene, who has multiple sclerosis and receives SSI payments, which make her automatically eligible for Medicaid. The resolution of Darlene's divorce requires her ex-husband to deed over his interest to the couple's home and give her a lump sum of \$25,000. The deed to the home will not affect Darlene's SSI eligibility, as it falls within the residential home exemption as long as she continues to live in the house. However, the \$25,000 cash payment is not exempt. Since it is more than the \$2,000 general resource limit, retention of that money will make Darlene ineligible for SSI until that amount, combined with all other non-exempt resources, goes below \$2,000.

⁵⁶20 C.F.R. § 416.1216(a).

⁵⁷20 C.F.R. § 416.1216(b) (see 20 C.F.R. § 416.1216(b)(2), which states that gems held for their value or as an investment are subject to the resource limits).

⁵⁸20 C.F.R. § 416.1218(b). Equity in any other automobile is considered to be a non-liquid resource.

⁵⁹20 C.F.R. § 416.1218(a).

⁶⁰See 20 C.F.R § 416.1212(b) (income-producing property located on the home property does not qualify for the home exclusion).

⁶¹20 C.F.R. § 416.1212(d)(1).

⁶²20 C.F.R. § 416.1231.

⁶³20 C.F.R. § 416.1222(a).

⁶⁴20 C.F.R. § 416.1210(o).

⁶⁵20 C.F.R. § 416.1224.

A viable alternative to the \$25,000 cash payment would be to direct the ex-spouse to use that money to pay off, or pay toward reducing the principal on the existing mortgage, make repairs to the property, or both. Such a payment would not affect Darlene's SSI eligibility as it is not money available for food or shelter. Instead, the payment only adds equity value to an exempt resource. Later, if Darlene uses the equity in her home to secure a home equity loan or line of credit, the loan proceeds will not be treated by the SSI program as income.⁶⁶

IV. Medicaid: a Valuable Health Insurance Benefit for Children and Adults with Disabilities

State Medicaid programs provide funding for medical care, rehabilitation, and other services for eligible individuals "whose income and resources are insufficient to meet the costs of necessary medical services."⁶⁷ Although states are not required to operate a Medicaid program, all states have opted to do so. Having opted into Medicaid, a state must meet all the requirements imposed by federal Medicaid law and regulations.⁶⁸

Medicaid is a complicated maze of state and federal laws, regulations, and policies. This section will not discuss the many Medicaid recipient categories under the federal law and the eligibility criteria that apply to each category. This article will only discuss Medicaid

to the extent that it is a derivative benefit of SSI eligibility.

A. Services Available Through State Medicaid Programs

Medicaid has enumerated services which are considered mandatory, meaning that any participating state must offer those services.⁶⁹ These include such items as inpatient hospital care, physician's services, skilled nursing facility services for persons over age 21, laboratory and x-ray services, and nurse-midwife services.⁷⁰ Medicaid has also enumerated services which are considered optional, meaning that states may offer these services if they so choose.⁷¹ These services include physical therapy, prosthetic devices, personal care services, dental services, preventive and rehabilitative services, private duty nursing services, and prescription drugs.⁷²

Medicaid can be a very important benefit to both adults and children with disabilities. In all states, Medicaid covers mandatory service categories such as home health services for persons over age 21 who are eligible for skilled nursing services.⁷³ The home health services category covers durable medical equipment (DME), often referred to by advocates and other programs as assistive technology.⁷⁴ Under the DME category, adults with disabilities have obtained funding for expensive items like custom and power wheelchairs and augmentative communication devices.⁷⁵ These and other expensive items may

⁶⁶20 C.F.R. § 416.1103(f). (See 20 C.F.R. § 416.1208(b). If Darlene retained loan proceeds in a bank account, they would be counted as a resource in the following month and interest derived from the account would be counted as income.)

⁶⁷42 U.S.C. § 1396.

⁶⁸42 U.S.C. § 1396a(a).

⁶⁹42 U.S.C. §§ 1396a(a)(10), 1396d(a)(1)-(5), (17), (21).

⁷⁰42 U.S.C. § 1396d(a)(1), (3), (4), (5), (17).

⁷¹42 U.S.C. § 1396d(a)(6)-(16), (18)-(20), (22)-(25).

⁷²42 U.S.C. § 1396d(a)(8), (10), (11), (12), (13), (24).

⁷³42 U.S.C. § 1396a(a)(10)(D).

⁷⁴42 C.F.R. § 440.70(b)(3). See Assistive Technology for Individuals with Disabilities Act, 29 U.S.C. §§ 3001 et seq.; Education of Individuals with Disabilities, 20 U.S.C. § 1401(1), (2), (26); 34 C.F.R. § 300.5-300.6.

⁷⁵See, e.g., *Fred C. v. Texas Health & Human Servs.* Comm'n, 988 F.Supp. 1032 (W.D. Tex. 1997), *aff'd mem.*, 167 F.3d 537 (5th Cir. 1998); *Hunter v. Chiles*, 944 F.Supp. 914 (S.D. Fla. 1996).

also fit within optional categories such as physical therapy, prosthetics, and preventive and rehabilitative services.⁷⁶ As the family law attorney evaluates the importance of Medicaid for his or her adult client, both the medical needs of the client and the extent of the state's coverage of optional Medicaid services will be factors.

B. The Early and Periodic Screening, Diagnosis, and Treatment Program for Children Under Age 21

Obtaining Medicaid for children under age 21 can be even more important than it is for adults. This is because the Medicaid Act entitles poor children to receive comprehensive medical and behavioral screening and treatment services through the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program, a mandatory service in all states.⁷⁷ Under EPSDT, a state must provide to Medicaid beneficiaries under age 21 any service among those listed in the Medicaid Act, including optional services, whether or not the service is included in the state's Medicaid plan or is provided to adults.⁷⁸ Since children, under EPSDT, have the full range of optional services available to them, the family law attorney's analysis of what services Medicaid will cover for a child with a disability should be the same in every state.

V. Family Law Issues

Much of family law practice is dictated by individual state laws. Options for resolving a case

generally fall into some combination of periodic payments, lump sum payments, and transfer of property. Traditionally, an attorney advocates for the periodic payment, lump sum, or property settlement that best serves the client. The client's circumstances and those of the spouse or parent who is the payer often prescribe the option or combination of options selected as a financial resolution of the case.

This article will not detail every possibility for resolving the rights of a spouse or child under state laws. To put the article into context, however, we will summarize the more important laws and selected court holdings which govern child support, alimony, and marital property in New York. We will also provide selected references to laws and court holdings from other states.

A. Child Support Payments

1. Federal Law and the Family Support Act of 1988

Congress passed the Family Support Act of 1988 because it was concerned about the disproportionate number of children who reside with single parents in poverty.⁷⁹ The Act requires states, as a condition of receiving federal grants for aid to needy families,⁸⁰ to establish guidelines for use in any judicial or administrative proceeding wherein child support would be determined.⁸¹ The Act mandates that the guideline calculation result in the presumptively correct amount of support, and allows the presumption

⁷⁶42 U.S.C. § 1396d(a)(11), (12), (13).

⁷⁷42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4)(B), 1396d(r); 42 C.F.R. §§ 440.40(b), 441.50-441.62.

⁷⁸42 U.S.C. § 1396d(r)(5); U.S. DEP'T OF HEALTH & HUMAN SERVICES, CENTERS FOR MEDICARE AND MEDICAID SERVICES, STATE MEDICAID MANUAL, Part 5: EPSDT, § 5010

⁷⁹Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988).

⁸⁰Personal Responsibility and Work Opportunity Act of 1996, Pub. L. 104-193, Title I, § 103(a)(1), 110 Stat. 2112 (codified at 42 U.S.C. § § 601 et seq.), (replacing Pub. L. 90-248 Title II, § 240(b), 81 Stat. 911, relating to Aid to Families With Dependent Children).

⁸¹42 U.S.C. § 667(a), (b)(1).

to be rebutted by written findings or findings on the record that the amount so calculated would be unjust or inappropriate.⁸² A state's child support guidelines must consider all earnings and income of the absent parent, provide for the child's health care needs, base its computations on specific descriptive and numeric criteria, and take into account the best interests of the child when establishing criteria for rebutting the presumption.⁸³ Otherwise, the details are left to the individual states.⁸⁴ The methods of calculation vary greatly from state to state, as do the definitions of income, the allowable deductions and the specified reasons for deviation.⁸⁵

2. Child Support as Regulated by the States: The New York Experience

This section will discuss, for illustrative purposes, New York's child support guidelines. We hope that by highlighting certain New York provisions, we can point out possible resolutions that can be used in most, if not all states for the benefit of children who receive SSI.

New York responded to the Family Support Act's federal mandate with passage of the Child Support Standards Act (CSSA), effective September 15, 1989.⁸⁶ The CSSA shifted emphasis away from the needs of the child, placing the focus on total parental income and children's

right to share in their parents' income.⁸⁷ It attempted to balance uniformity, predictability, and fairness of child support awards with the need to allow judicial discretion when unique circumstances warrant individualized computations.⁸⁸

The CSSA presumes that it takes 17 percent of the combined income of both parents to support one child, 25 percent to support two, 29 percent to support three, 31 percent to support four, and 35 percent to support five or more.⁸⁹ New York's legislature arrived at the percentages by concluding that it costs less to support each succeeding child in the same household as a result of "shared resources."⁹⁰

New York's statute speaks in terms of combined parental income. A literal application of the statute requires adding the income of both parents, multiplying up to \$80,000 of the parental income by the statutory percentage for the number of children involved, and pro rating the obligation between the parents based on their respective incomes.⁹¹ One may simplify the calculation by multiplying the non-residential parent's countable income by the appropriate percentage. In addition to this calculation, the court is required to determine an appropriate amount of child support for the combined parental income exceeding \$80,000⁹²; determine the availability of health insurance coverage for the

⁸²42 U.S.C. § 667(b)(2).

⁸³45 C.F.R. § 302.56.

⁸⁴42 U.S.C. § 667(a); See *In re Marriage of Peterson*, 888 P.2d 23 (Or. Ct. App. 1994).

⁸⁵E.g., compare the formula utilized in California, WEST'S ANN. CAL. FAM. CODE § 4055, to the use of the "Schedule of Basic Child Support Obligation" by Arizona, ARIZ. REV. STAT. ANN. § 25-320, Child Support Guidelines. Compare the reasons for deviation in Oregon, OR. REV. STAT. § 25.280, to the criteria in Georgia, GA CODE ANN. § 19-6-15 (2006).

⁸⁶1989 N.Y. Laws, c. 567, § 2, amending N.Y. FAM. CT. ACT, Art 4 et seq.

⁸⁷*Cassano v. Cassano*, 85 N.Y.2d 649, 652 (N.Y. 1995).

⁸⁸85 N.Y.2d at 652.

⁸⁹N.Y. DOM. REL. LAW § 240(1-b)(b)(3), N.Y. FAM. CT. ACT § 413(1)(b)(3).

⁹⁰*Commissioner of Social Services of the City of New York v. Daniel T.*, 180 A.D.2d 510, 513 (NY 1st Dept. 1992).

⁹¹N.Y. DOM. REL. LAW § 240(1-b)(c)(2); N.Y. FAM. CT. ACT § 413(1)(c)(2).

⁹²N.Y. DOM. REL. LAW § 240(1-b)(c)(3); N.Y. Fam. Ct. Act § 413(1)(c)(3).

children⁹³; and pro rate the cost for health insurance premiums, uninsured medical expenses, and necessary day care expenses in the same proportion as each parent's income is to the combined income.⁹⁴ Courts may include in the order of support the requirement that shelter, clothing, food, care, medical attention, educational expenses, funeral expenses, confinement expenses, life or accident insurance, and other reasonable and proper expenses be provided.⁹⁵

Courts may deviate from the guideline's amount of support if the resulting order would be unjust or inappropriate, based upon consideration of 10 enumerated factors.⁹⁶ One factor a court may consider is the financial resources of the custodial and non-custodial parents and of the child.⁹⁷ Another factor is the physical and emotional health of the child and the child's special needs and aptitudes.⁹⁸ In determining whether application of the guidelines would be unjust or inappropriate under the circumstances, a court in New York may consider that the child receives SSI and that the child has special needs.

Once the court finds that support calculated pursuant to the guidelines would be unjust or inappropriate, it must set support that it finds to be just and appropriate under the circumstances, and set forth in a written order, the factors it considered.⁹⁹ Neither the Family Support Act nor the CSSA provide further guidance for determining a just and appropriate level of support, leaving it instead to judicial discretion.

In New York, prior to enactment of the CSSA, we consistently saw orders for multiple children in the same household in which support was allocated between the children. For example, a child support award of \$50.00 per week for two children was usually allocated as \$25.00 per week per child. Under the CSSA, child support is usually not allocated and the order will read, "\$50.00 per week for two children."

This change from allocated to unallocated support can have far-reaching consequences when one of the children in the home receives or becomes eligible for SSI. Assume a custodial parent is receiving \$100.00 per week for two children pursuant to the CSSA, and the younger child is eligible for SSI. If the order is unallocated, what amount will be considered child support for the child with the disability? Half? All? An amount equivalent to 17 percent of parental income? Eight percent of parental income? Since child support affects the amount of SSI paid on behalf of that child, it becomes important to know how much of the \$100.00 should, or would, be allocated for that child. An allocated order may eliminate the possibility that the entire amount will be considered child support for the SSI recipient. At least one state, California, resolves this issue by providing that unless the order specifies otherwise, support for the youngest child will be the amount of support for one child, and the amount of support for the next youngest child will be the difference between that amount and the amount of support for two children.¹⁰⁰

⁹³N.Y. DOM. REL. LAW § 240(1)(c); N.Y. FAM. CT. ACT § 416(e)

⁹⁴N.Y. DOM. REL. LAW §§ 240(1)(d), 240(1-b)(c) (4), (5), (6); N.Y. FAM. CT. ACT §§ 413(c)(4), (5), (6); N.Y. FAM. CT. ACT § 416(f).

⁹⁵N.Y. FAM. CT. ACT § 416(a), (b).

⁹⁶N.Y. DOM. REL. LAW § 240(1-b)(f); N.Y. FAM. CT. ACT § 413(1)(f).

⁹⁷N.Y. DOM. REL. LAW § 240(1-b)(f)(1); N.Y. FAM. CT. ACT § 413(1)(f)(1).

⁹⁸N.Y. DOM. REL. LAW § 240(1-b)(f)(2); N.Y. FAM. CT. ACT § 413(1)(f)(2).

⁹⁹N.Y. DOM. REL. LAW § 240(1-b)(g); N.Y. FAM. CT. ACT § 413(1)(g).

¹⁰⁰See WEST'S ANN. CAL. FAM. CODE § 4055(b)(8).

B. Alimony or Maintenance for the Adult Spouse: The New York Experience

The term “alimony” is used here in the generic sense to include both maintenance and spousal support. The word “alimony” comes from the word “alimonia,” which means sustenance and refers to the sustenance or support owed a wife by her divorced husband. It emanates from the common law right of the wife to support from her husband.¹⁰¹ Historically, alimony was a continuation of the husband’s duty to support when his conduct toward his wife was so reprehensible as to justify her separation from him.¹⁰² In the 1979 case of *Orr v Orr*, the United States Supreme Court held that a statute that provided alimony for women only was unconstitutional.¹⁰³ The obligation must now be gender neutral.

Unlike child support, there are no federally mandated guidelines for the calculation of alimony, and the purpose and objectives of alimony differ from state to state. By way of illustration, we will discuss the possibilities that exist under New York law. Advocates should adjust the ideas proposed in the examples that follow to suit the laws of their states.

Temporary or permanent alimony may be ordered after the commencement of an action for divorce, separation, or annulment and may be payable in one sum or periodic sums.¹⁰⁴ One spouse may be directed to pay third persons for real and personal property and services fur-

nished to the other spouse, or for rental or mortgage amortization or interest payments, insurances, taxes, or repairs or other carrying charges on premises occupied by the spouse.¹⁰⁵ During the period when the duty to support exists, one spouse may be ordered to provide a health or life insurance policy for the other spouse.¹⁰⁶ Since a married person in New York, possessed of sufficient means or able to earn such means, is chargeable with the support of his or her spouse,¹⁰⁷ a court-ordered support obligation may also arise when the couple separates informally.

Whether an award of alimony is appropriate is within the discretion of the court, “as justice requires.” The court will consider the standard of living the parties enjoyed together, whether one party needs alimony in order to meet his or her reasonable needs, and whether the other party can afford to pay alimony.¹⁰⁸

The amount of alimony awarded is discretionary and is based upon consideration of 11 factors, including each party’s income and property; the length of the marriage and the age and health of both parties; the present and future earning capacity of the parties; the ability of the party seeking alimony to become self-supporting, including the time and training necessary for obtaining employment; and any other factor which the court expressly finds to be just and proper.¹⁰⁹ Otherwise, there are no guidelines, formulae, or charts showing the correct amount of alimony to be awarded.

¹⁰¹BLACK’S LAW DICTIONARY (8th ed. 2004).

¹⁰²B. FRANK ET AL., 1 ALIMONY, CHILD SUPPORT & COUNSEL FEES--AWARD, MODIFICATION & ENFORCEMENT § 6.02[4], at 6-15, 6-16 (1992).

¹⁰³*Orr v. Orr*, 440 U.S. 268 (1979).

¹⁰⁴N.Y. DOM. REL. LAW § 236, pts. A(1), B(6).

¹⁰⁵N.Y. DOM. REL. LAW § 236, pt B(8)(b).

¹⁰⁶N.Y. DOM. REL. LAW § 236, pt B(8)(a).

¹⁰⁷N.Y. FAM. CT. ACT § 412.

¹⁰⁸N.Y. DOM. REL. LAW § 236, pt. B(6)(a).

¹⁰⁹N.Y. DOM. REL. LAW § 236 pt. B(6)(a)(1), (2), (3), (4), (11).

Absent guidelines, the advocate may find missing the fairness and predictability underlying the determinations of child support awards. However, what is left is a great deal of flexibility not only for courts, but for advocates attempting to improve the quality of the lives of their clients with disabilities. This flexibility is important when one goal of the outcome is to maximize eligibility for SSI and Medicaid.

C. Division of Property: The New York Experience

Upon dissolution of a marriage in New York, the court must determine each party's separate property and fairly distribute marital property. Marital property includes all property obtained during the marriage and before the execution of a separation agreement or commencement of a matrimonial action.¹¹⁰ New York courts have held that marital property includes the value of a pension or retirement earned during the marriage, as well as the increased earning potential acquired through training, education, or professional licensing.¹¹¹ Separate property is statutorily defined, and includes property acquired before the marriage from someone other than the spouse; property acquired in exchange for separate property; the increase in the value of separate property during marriage except to the extent the increase was due to the efforts of the spouse; and compensation for personal injuries.¹¹² Property distribution can take a number of different forms, such as transfer of title, lump sum buyouts, and periodic payments. The method of distribution can affect eligibility for SSI differently, depending on the type of asset or resource and its value.

Although alimony is not seen as a property right, it can be tied into property distribution. For example, alimony might be ordered until such time as the spouse becomes eligible for his or her share of a pension. Alimony also might be increased to help compensate for dissipation of assets by the other spouse. The advocate should know how each form of distribution will affect the client's eligibility for SSI, so that a resolution can be fashioned which will maximize the financial resources of the person with a disability.

VI. Options for Settlement for Child with Disability

The following examples are all based on New York child support guidelines. For simplicity's sake, they assume the custodial parent is not also receiving alimony payments. A parent's receipt of alimony could, if high enough, affect the child's SSI eligibility. An example of a case involving alimony and child support is contained in section VIII.

The application of the SSI rules to these scenarios will be the same in every state. The nature of the child support guidelines and one's ability to fashion alternative relief will, of course, vary state by state. Based on experience in New York, we believe the scenarios and the alternative resolutions of these cases are realistic.

A. Child Scenario # 1

Wanda lives with her two children, Bonnie, age 11 and Chris, age 13. Chris is profoundly deaf

¹¹⁰N.Y. DOM. REL. LAW § 236 pt. B(1)(c).

¹¹¹*Majauskas v Majauskas*, 61 N.Y.2d 481 (N.Y. 1984); *O'Brien v. O'Brien*, 66 N.Y.2d 576 (N.Y. 1985).

¹¹²N.Y. DOM. REL. LAW § 236 pt. B (1)(d).

and is eligible for SSI; Bonnie does not have a disability. The family's only income is \$1,500 gross each month from Wanda's job and monthly SSI of \$637 for Chris.¹¹³ Wanda has been awarded child support payments of \$1,000 per month for her two children, which is 25 percent of her ex-husband's \$4,000 in monthly income as required by New York child support guidelines. The New York Family Court order does not specify how much of the \$1,000 is allocated for each child.

Affect on Chris's SSI. We can expect the SSI program to presume that half of the child support money is for Bonnie and half for Chris. The SSI program would then exclude one-third of Chris's child support payments, reducing the amount from \$500 to \$333.33. Another \$20 would be deducted as an unearned income exclusion, reducing Chris's income to \$313.33 and his monthly SSI check to \$323.67 (\$637 - 313.33). Chris will continue to receive Medicaid, as he lives in a state in which SSI recipients automatically qualify. Chris receives a net value of \$186.67 from the child support payment, the amount that was excluded by SSI.

Alternative resolution # 1. At the time of disposition, Wanda's attorney asks the Family Court judge to allocate \$680 of the \$1,000 as payment for Bonnie, and \$320 as payment for Chris. The legal rationale is that \$680 represents 17 percent of the father's income, New York's child support guideline for one child; \$320 represents the amount added on when payments are made for two children at 25 percent of the father's income. The court's support order

reflects this allocation. The SSI program will now exclude one third of the \$320 (\$106.67) per month and an additional \$20 as an unearned income exclusion. Chris's countable income is now \$193.33 per month (\$320 - 126.67) and the SSI check will now be \$443.67 per month (\$637 - 193.33). This minor change to the court's order will allow the family to retain an extra \$120 of Chris's monthly SSI benefits.

Alternative resolution # 2. Wanda's attorney seeks the same \$320 per month allocation for Chris. She also asks that the ex-husband be required to pay the \$320 directly to vendors or creditors for the benefit of Chris and his family. She asks that the first month's payment of \$320 be paid to XYZ Electronics for a telecommunication device for the deaf (TDD). The TDD will allow Chris to communicate on the telephone through a keyboard and screen display despite his lack of hearing. For subsequent months, she asks that the \$320 be paid directly to vendors or creditors as follows: \$80 for therapeutic dance lessons; \$30 for cable TV (a part of monthly charges)¹¹⁴; \$30 for a separate phone line to allow Chris to use the TDD in his bedroom; \$50 for the lease of a laptop computer that will allow Chris to use it at home and at school; \$50 for Wanda's car insurance; and \$80 each month toward the \$960 fee for a two-week summer residential camp for deaf teenagers. The ex-husband agrees to this arrangement and the Family Court judge orders it.¹¹⁵

Under SSI income rules, none of these payments will be treated as income to Chris. Therefore, his SSI check will remain at \$637.

¹¹³For simplicity's sake, all the examples will use the 2008 SSI federal benefit rate (FBR) of \$637 per month with no state supplement. As noted in section III.A, if New York is the family's state of residence, there would be a state supplement to the FBR. Wanda's \$1,500 in monthly earnings is low enough that it would not affect Chris's SSI check.

¹¹⁴Chris is able to view television, despite being deaf, through closed captioning (text which appears on the screen).

¹¹⁵To the extent that this or similar alternative resolutions could be described as running afoul of the state's child support guidelines, Wanda's attorney can argue that the more traditional resolution would be "unjust or inappropriate" in that it would result in less money available to meet Chris's needs. 42 U.S.C. § 667(b)(2).

This is because income, for SSI purposes, must be something received in cash or in kind that can be used to meet Chris's needs for food or shelter.¹¹⁶ No part of the \$320 allocation comes as cash and none of the items paid for fall into the categories of food or shelter. Comparing the financial result of this resolution to the traditional resolution, it is clear that this creative alternative will result in an enhanced quality of life for Chris and his family. In this last example, Chris will receive an SSI check of \$637 monthly – \$193.33 more than he would receive under alternative resolution # 1, and \$313.13 more than he would have received under the traditional resolution.

It is worth noting that the alternative resolution used by Chris's parents could have also provided some provision for clothing purchases, such as providing for a monthly or periodic gift card for a store which sells clothing but not food. Since clothing was removed from the SSI definition of income in 2005, a creative resolution can now include a provision for clothing to the SSI recipient without any adverse consequences.

B. Child Scenario # 2

Ten year old Jenny has a spinal cord injury and is paralyzed from the waist down. She uses a power wheelchair to get around. Jenny lives with her mother who has no other children. Jenny's mother earns \$1,200 gross each month (\$14,400 per year) which allows Jenny to qualify for a full monthly SSI check of \$637. Jenny's father earns \$3,530 per month or \$42,360 per year. In a divorce settlement, Jenny's father agrees to pay \$600 per month, which meets New York's child support guidelines for one child (i.e., $\$3,530 \times .17 = \600). The SSI program will exclude one third of the child support payments, reducing Jenny's countable income from

\$600 to \$400. Another \$20 will be deducted as an unearned income exclusion, reducing her countable income to \$380. Jenny now qualifies for a \$257 SSI check ($\$637 - 380$). The child support helps balance the family's budget, but Jenny's mother does not have enough money left to purchase a lift-equipped van to allow her to easily transport Jenny to medical appointments, family outings, and recreational activities. Jenny's mother currently pays \$160 per month in loan payments for a used car that is not suitable for transporting Jenny in her wheelchair.

Alternative resolution. A more creative resolution will help finance the lift-equipped van. In lieu of paying child support, the father agrees to pay the following monthly bills directly: telephone (\$45), cable TV (\$55), YMCA membership for Jenny (\$30), and loan payments on a new lift-equipped van (\$470). The court approves this arrangement. Since the \$600 is now paid directly to the vendors and bank, the money is not available to Jenny's mother to pay for Jenny's food and shelter. Therefore, Jenny has no countable income for SSI purposes and her SSI check will remain at \$637.

Compare the family's balance sheet using the old and new divorce settlements. Under the original settlement, Jenny and her mother wind up with \$1,897 per month to meet expenses other than car payment expenses (\$1,200 wages + \$600 child support + \$257 SSI - \$160 car payment). Under the new settlement, they net \$1,967 to meet expenses other than van payment expenses (\$1,200 wages + \$637 SSI + \$130 for telephone, TV and YMCA). They now have \$70 more for household expenses and will have the needed lift-equipped van.

C. Child Scenario # 3

Robert is a 17 year old high school junior who lives with his 12 year old sister, Carol, and his

¹¹⁶20 C.F.R. § 416.1102.

father, Harry. Harry works and earns \$36,000 per year. Robert has cerebral palsy which affects his legs, arms, and speech. He walks with great difficulty and writes with great difficulty. His speech can only be understood by familiar listeners. Robert meets SSI's definition of disability. Robert is a good student, is on the honor roll, and plans to study engineering in college. Robert would like to obtain a Dynavox, a \$7,000 device that would allow him to produce speech through an electronic voice. He would also like to obtain his own car, equipped with hand controls for operating the accelerator and brakes.

Robert's parents divorced three years ago. Robert's mother, Sharon earns \$4,000 per month or \$48,000 per year. Under terms of the divorce, Sharon put \$11,000 into a bank certificate of deposit (CD) for Robert three years ago and agreed to pay child support of \$1,000 per month for Robert and Carol, the amount required under New York's guidelines (we will assume that Sharon's income has not changed). The court order allocates \$500 each for Robert and Carol. The child support payments for Robert will continue until his 21st birthday, approximately four years from now.¹¹⁷

There are two reasons why Robert is not eligible for SSI. First, the CD, which is now valued at \$12,000, is considered an available resource and is more than the \$2,000 in non-exempt resources allowed by the SSI program.¹¹⁸ Second, Harry's income is too high even if Robert's resources were below the \$2,000 limit.

Even if the \$12,000 CD and the father's income did not stand in the way of SSI eligibility, the child support income would substantially reduce Robert's potential eligibility for SSI.

Alternative resolution. One critical SSI rule that the attorney must understand is that Harry's income and resources will only be considered available to Robert until his 18th birthday.¹¹⁹ At age 18, Harry's income will no longer count but the SSI program will continue to count two thirds of the child support payments made by Sharon.

Armed with this understanding, the attorney explains to Harry that his income will not be relevant to Robert's SSI eligibility when he turns 18. The attorney suggests that they plan to reduce the \$12,000 CD to bring it within SSI's \$2,000 limit by the time Robert is 18. Harry and Robert agree that: \$1,500 will be placed in Robert's regular savings account; and \$5,500 will be used as a down payment on a new car or newer used car. They will then propose to the Social Security Administration to place \$5,000 into something known as a Plan for Achieving Self Support (PASS) to allow Robert to pay for future college tuition and related expenses to pursue a career in engineering. If the PASS is approved, the SSI program will not count the \$5,000 as a resource.¹²⁰ Harry's attorney will also seek a modification of the child support order to require that Sharon pay \$300 per month as a car payment on a three-year car loan, and \$200 per month for Robert's car insurance. (Our scenario assumes that Robert purchases a

¹¹⁷Under New York law, a parent's obligation to provide child support continues until the child's 21st birthday. N.Y. FAM. CT. ACT § 413(1)(a).

¹¹⁸20 C.F.R. § 416.1205(c).

¹¹⁹20 C.F.R. § 416.1165.

¹²⁰42 U.S.C. §§ 1382a(b)(4)(A)(iii), (B)(iv), 1382b(a)(4); 20 C.F.R. § 416.1112(c)(9), 416.1124(c)(13), 416.1161(a)(9), 416.1180-416.1182, 416.1210(f), 416.1225-416.1227. For a thorough discussion of the Plan for Achieving Self Support, see James R. Sheldon, Jr. & Edwin J. Lopez-Soto, PASS: SSI's Plan for Achieving Self Support (2003), available at: www.ilr.cornell.edu/ped/dep/PP_12.pdf.

new car for a total of \$15,000 with taxes, uses the \$5,500 as a down payment on the car, and finances \$9,500 for 36 months at a nine percent interest rate.)

Sharon agrees to the revised child support order and the court approves it. Upon Robert's 18th birthday, Sharon will pay monthly for the car payment and insurance and continue to pay \$500 directly to Harry for Robert's sister, Carol. Harry and Robert arrange to purchase a car that will be modified to add hand controls to allow Robert to drive despite his disability. The PASS proposal was submitted and approved by the Social Security Administration, making the \$5,000 an exempt asset for SSI purposes. With the \$5,500 down payment and the \$5,000 exempt account, Robert's countable resources will now be \$1,500, well within SSI's \$2,000 limit. On Robert's 18th birthday, he will now qualify for a full \$637 SSI check since he has no income. The payments on the loan and for insurance will not count as income to Robert as they do not meet Robert's needs for food or shelter.

Robert will also qualify for Medicaid as he lives in one of 39 states in which SSI recipients automatically qualify for Medicaid. Anticipating Robert's Medicaid eligibility, his speech pathologist begins to prepare the paper work to submit a claim to the state's Medicaid program to fund the Dynavox communication device. The speech pathologist informs Robert that, over the past two years, nearly all of her Medicaid requests for communication devices have been approved so there is reason to believe this

request will be approved as well. If the request for approval of the communication device is denied by the Medicaid agency, Robert can be referred to his state's Protection and Advocacy agency for free representation at a Medicaid hearing.

The last thing the attorney suggests is that Robert start the application process with his state's vocational rehabilitation (VR) agency.¹²¹ The attorney explains that the VR agency serves individuals with disabilities who seek assistance in pursuing vocational goals. Depending on whether Robert meets the VR agency's financial need criteria (and he should as an SSI recipient¹²²), they may be able to fund such things as college tuition, books, room and board, and the cost of installing the hand controls on his car.¹²³ If most or all of Robert's tuition is funded by the VR agency, Robert could amend his PASS to include other items, such as adapted computer equipment or maintenance costs for the car, that will help him achieve his vocational goal.

VII. Options for Settlement for Adult with Disability

The following examples are all based on New York law governing alimony. For simplicity's sake, they assume there will not also be issues involving child support. An example involving both child support and alimony is presented in section VIII.

¹²¹Title I of the Rehabilitation Act gives money to states to provide vocational rehabilitation services for persons with disabilities. 29 U.S.C. §§ 701 et seq.; 34 C.F.R. pt. 361. For a thorough discussion of the services available through state vocational rehabilitation agencies, see Hager, Ronald M., *Funding of Assistive Technology: State Vocational Rehabilitation Agencies and Their Obligation to Maximize Employment* (1999), available at www.nls.org/vrbooklt.htm.

¹²²34 C.F.R. § 361.54(b)(3)(ii).

¹²³See 29 U.S.C. § 723(a); 34 C.F.R. §§ 361.48 and 361.5(b).

A. Adult Scenario # 1

Jason is seeking a divorce from Janet. Jason is diabetic and has not worked in three years. His only income is \$420 in monthly Social Security Disability Insurance benefits. He asks his attorney to see to it that any alimony payment be set up so that it will not affect his SSDI. The attorney learns that Jason lives in his own apartment and faces eviction because he cannot afford his rent. Jason has no bank account and no resources other than his modest household furnishings.

The first thing the attorney does is have Jason apply for SSI. Since he already meets the disability standard and has very limited resources, Jason should qualify for an SSI check of \$237 per month and will qualify for Medicaid, automatically, in most states. Jason applies and is approved for SSI benefits of \$237 per month. The attorney can now proceed with the alimony and property issues of the divorce, having made sure that Jason is getting the SSI benefits for which he is eligible.

B. Adult Scenario # 2

Helen is going through a divorce. Helen recently returned to the community from a two-month stay at a psychiatric hospital. She is currently unable to live independently and will be living in a supported apartment run by a community agency. Helen will also be attending a therapeutic day program, five days per week. Helen receives SSI benefits of \$637 per month and also qualifies for Medicaid, as she lives in one of 39 states in which SSI recipients automatically qualify for Medicaid. Medicaid pays for Helen's monthly psychiatrist appointments, her medications, and the cost of the day program.

Based on the resources of Helen's spouse, Helen's attorney believes that alimony payments in the range of \$600 to \$700 is likely. Helen

may also be able to obtain one half of the equity from the sale of the marital residence or about \$15,000 as her share. The attorney learns that Helen's condition precludes her living in the home she shared with her husband and it is not likely that Helen will be able to live independently in the foreseeable future.

Helen's attorney does a thorough job of investigating the possibility of alternative resolutions. The attorney determines there is limited opportunity for a creative resolution to pay for items other than food or shelter, or to purchase items that are considered exempt resources by the SSI program. It is very possible that this could be a case in which Helen is advised to accept less than the full amount she could get from a court order. In fact, Helen's attorney will probably want to make sure that the alimony payment is low enough to ensure Helen's continued eligibility for some SSI payment and automatic Medicaid. Helen may also want to accept a cash settlement of less than \$2,000 to avoid exceeding SSI's resource limit. Are there any alternatives that can ensure continued SSI and Medicaid eligibility that do not forego any rights Helen may have to alimony and a property settlement?

One potential resolution of this case would be to create what is commonly referred to as a "supplemental needs trust" for Helen and then have her husband agree to put all or part of Helen's \$15,000 share from the sale of the residence into the trust. Another trust instrument that is gaining popularity in New York is commonly referred to as the "pooled trust." If set up properly, a trust can ensure that Helen is able to benefit from the trust distributions, at the discretion of the trustee, for items other than food and shelter (thereby ensuring that the distributions are not counted as income by the SSI program). While either of these trusts could offer a suitable and legal approach, in many states, to ensure that Helen can benefit from a property

settlement without adverse consequences to SSI eligibility, a discussion of trusts is beyond the scope of this publication. If a family law attorney wishes to pursue a trust in connection with a resolution of alimony or property distribution issues, we suggest contacting an attorney in your state who specializes in setting up trusts that benefit individuals with disabilities.

The ability to design a creative resolution is, of course, always dependent on individual circumstances. Changing a fact or two, in Helen's case, could make the attorney's approach change considerably. For example, if Helen is well enough to return to her residence with some support, the property settlement could involve transferring title to her. Then in lieu of alimony, the ex-husband could be directed to pay for things such as the phone bill, car insurance, a landscaping service, and a housecleaning service – all items that are neither food nor shelter and will not be counted as income by the SSI program.

C. Adult Scenario # 3

Arlene is legally blind and has a severe arthritic condition. She receives \$637 in monthly SSI benefits. Under a divorce settlement, Arlene is to receive \$420 per month from her ex-husband in alimony. Since the \$420 is unearned income, the SSI program will disregard the first \$20 and count \$400 to reduce her SSI check to \$237.

Arlene plans to open an accounting business out of a home office. To accommodate her visual impairment, she will need an enhanced computer screen and a computer with voice output. Since her arthritis limits her ability to type for prolonged periods, she needs a scanner to enter documents directly into her computer and voice dictation software. After receiving the maximum assistance from her state's vocational

rehabilitation agency, Arlene will still need approximately \$12,000 for additional computer equipment, office furniture and supplies, advertising, and business cards.

Under an alternative resolution of Arlene's case, the ex-husband agrees to pay a \$12,000 lump sum rather than pay the first three years' worth of alimony. The intent is to allow Arlene to use this money for business start-up costs. However, this lump sum distribution would create an SSI eligibility problem. The SSI program will still treat this as income in the month of receipt and as a resource in later months, making her ineligible until all combined bank accounts total \$2,000 or less.¹²⁴

There are two alternatives which will preserve SSI eligibility. Arlene could propose a Plan for Achieving Self Support (PASS) in anticipation of receiving this money.¹²⁵ She could designate in her PASS how she will spend the \$12,000 to purchase items related to her home accounting business. If approved, the PASS would make the \$12,000 an exempt asset and Arlene would continue to receive a full SSI check of \$637 per month. The husband could also agree to hold the \$12,000 and make payments directly to vendors as money is due. This latter method also preserves SSI eligibility as Arlene never has this cash available to her to pay for food or shelter.

What about the expected \$420 per month in alimony that will begin in year four? Remember that the property settlement in this case was in lieu of the first three years of alimony payments. Assuming that the obligation to pay alimony will extend into year four and beyond (this may depend on state practice and individual circumstances), we can assume that Arlene will start to receive monthly alimony payments in year four. If no steps are taken to create an

¹²⁴20 C.F.R. § 416.1207(d).

¹²⁵See section VI.C, and note 120, above.

alternative resolution to start in year four, the SSI program will count \$400 of the \$420 and reduce Arlene's SSI payment by \$400. While we do not know yet how successful Arlene's home business will be, there is a good possibility that she may still be eligible for a small SSI payment if the alimony payments are not counted as income by the SSI program. For this reason, Arlene and her attorney should either arrange for an alternative to cash payment of alimony in year four or plan to revisit the issue as year four approaches. Of course, using the approaches discussed in the other examples, an alternative resolution must ensure that payments go directly to vendors to cover items other than food and shelter.

D. Adult Scenario # 4

Sally and Jack are separated and getting a divorce after 20 years of marriage. Several years ago, Sally was diagnosed with multiple sclerosis, a degenerative disease, and for the past 3 years, she has been receiving \$320 per month in Social Security Disability Insurance (SSDI) benefits.

Sally and Jack purchased their home 15 years ago and have built up \$60,000 in equity on a home that is now valued at \$100,000. The mortgage payments including taxes and insurance total \$1,000 per month with a balance of \$40,000 remaining on the mortgage. The couple have a number of other assets which would be subject to equitable distribution as marital property, including the pension Jack has accumulated at his place of employment, mutual funds with an approximate value of \$40,000, and certificates of deposit in the total amount of \$20,000.

Already, Sally's illness has progressed to where she needs a wheelchair in order to get out in the community. Health insurance is a huge concern for her and her need for comprehensive

coverage will only intensify as time goes by. She has Medicare but fears that Medicare may not cover all the equipment and other services she will need in the coming years. Sally comes to you to represent her in the divorce.

Based on preliminary discussions with Jack's attorney, we can expect Jack to pay about \$800 per month in alimony and for Sally to obtain as a combined property settlement a 50 percent share in the home's equity (\$30,000), the mutual funds (\$20,000), and certificates of deposit (\$10,000). She is also entitled to some future share in her husband's pension. Of course, in order to realize her share of the home's equity, it will have to be sold.

Sally would like to establish SSI eligibility, knowing that in her state it would mean her automatic eligibility for Medicaid. She would also love to find a way to stay in the home she owns with her husband, a ranch-style home that is well-suited for a person, like her, who uses a wheelchair and does not want a home with stairs.

The traditional resolution of this case will make Sally ineligible for SSI. First, since the \$800 per month in expected alimony is unearned income this, combined with \$300 in SSDI (after a \$20 unearned income disregard), will give Sally \$1,100 in monthly countable income, making her ineligible for SSI. Second, Sally stands to receive up to \$60,000 in cash as her share in the home sale, mutual funds, and certificates of deposits – well above the \$2,000 SSI resource limit.

Alternative resolution. First, you recognize that if Sally had no income, other than her \$320 in SSDI payments and assets within the SSI program's \$2,000 limit, she would be able to get a \$337 monthly SSI payment to supplement her SSDI benefits ($637 - 300 = 337$). Since she lives one of the 39 states where eligi-

bility for Medicaid is automatic with receipt of SSI, receipt of SSI would make her eligible for Medicaid as well. How can you fashion a resolution that would make Sally financially eligible for SSI? Fortunately, Jack is willing to arrive at a resolution that will most benefit Sally.

Reviewing the SSI program's list of exempt resources, you notice that the residential home of any value would be an exempt resource. Jack would be willing to give Sally title to the home including his share of the equity, in exchange for full title to the mutual funds and certificates of deposit. Jack is also willing to pay alimony in the amount of \$1,000 to settle her claims for traditional alimony and the future share of his pension. However, if paid in cash, Sally would not be eligible for SSI. Instead of paying cash, Jack agrees to pay the \$1,000 mortgage payment for Sally. Under the presumed maximum value rule, the SSI program would value the mortgage payment (mortgage, taxes and insurance) at \$232.33, i.e., one third the SSI federal benefit rate (\$212.33) plus \$20. Since the \$232.33 will be treated as unearned income to Sally and since the \$20 unearned disregard has already been used to reduce her SSDI benefit, her additional countable income will be \$232.33, making her total countable income \$532.33 (including the \$300 of her SSDI payment). Thus, after completing this alternative resolution, Sally will be eligible for an SSI check of \$104.67 per month (\$637 - 532.33). While this is a modest SSI check, the receipt of SSI ensures that she is eligible for Medicaid in her state.

Because Sally's attorney was able to work within the SSI rules to craft a creative settlement, Sally will be able have the pieces in place to ensure that she can remain independent in her own home. With this alternative resolution, she will:

- retain the home with its \$60,000 in

equity;

- ensure payment of her \$1,000 monthly mortgage cost, which includes taxes and insurance;
- have combined monthly SSI and SSDI payments of \$424.67;
- establish Medicaid eligibility, allowing for coverage of a range of items not covered by Medicare; and
- with dual eligibility established for Medicare and Medicaid, this will ensure that Sally is eligible for the full Medicare Part D low-income subsidy program.

The creative use of the presumed maximum value rule can permit the spouse with a disability to remain in a home even when the mortgage is \$1,000 per month or higher so long as the ex-spouse is paying the mortgage payment directly to the bank or lender. We must caution the reader that an individual like Sally must be prepared to meet the remainder of her monthly needs based on the combined monthly SSI and SSDI payments of \$424.67. Sally will still have a tight monthly budget, but two very major expenses, housing and medical insurance, will be largely covered.

VIII. Alternative Resolutions Involving Both Child Support and Alimony

Many family law cases involve both child support and alimony, with or without the added feature of a transfer of property. This kind of example is more difficult to present hypothetically in an article because of the very complex formula used by the SSI program to determine how much of the custodial parent's income is "deemed" available to the child who is seeking SSI. Within the deeming formula, earned income is treated one way and unearned income is treated another way. As additional children are added to the SSI recipient's household,

the complexity of the calculation increases as deductions are allowed to account for the cost of supporting the other children.

The following example illustrates some of the issues involved when an attorney and his or her client must decide whether to allocate periodic payments as child support or alimony. To limit the complexity of the budgeting, we purposely picked an example in which the custodial parent's income is very low and there are no other children.

Mark and Beverly are about to get a divorce. Mark will retain custody of nine year old Cindy, who is autistic and attends a special class for children with similar disabilities. The couple has no other children. Although Cindy clearly meets the disability criteria for SSI, she never was eligible for SSI while her parents were together because their combined incomes were too high.

Following negotiations, the parties agree to the following: Mark will go from a full-time to part-time work status to devote more time to Cindy; Mark's wife will pay \$1,000 per month as child support payments for Cindy or 17 percent of her income as required under New York child support guidelines; and neither party will receive alimony from the other. By going to part-time status, Mark will earn \$1,000 gross per month.

Under this agreement, if approved by the court, Cindy will still not be eligible for SSI. The SSI program will disregard one third of the child support payments, reducing Cindy's income to \$666.67. It will then disregard an additional \$20 as an unearned income deduction, leaving Cindy with \$646.67 in countable income or just enough to make her ineligible for SSI.

Alternative resolution #1. Upon consulting with an SSI specialist, Mark's attorney learns that Mark can receive up to \$220 per month in alimony payments without any of his income being deemed available to Cindy.¹²⁶ Beverly agrees to amend the agreement to pay \$220 per month in alimony and \$780 per month in child support. The court approves, making a written finding that it would be unjust or inappropriate to strictly follow New York's child support guideline under these circumstances.¹²⁷ One third of the child support payment (\$260) plus an additional \$20 will be disregarded by the SSI program, leaving Cindy with \$500 in countable income (\$780 - 280). She will now qualify for a monthly SSI check of \$137 (\$637 - 500). She will also qualify for Medicaid automatically.

Alternative resolution #2. Beverly will pay Mark \$220 per month in alimony. Of the \$780 that has been designated as child support, \$720 per month will be specifically earmarked to pay for the following items: car payments (\$300), car insurance (\$90), telephone (\$50), cable T.V. (\$80), special day care (\$140), and Saturday morning program for autistic children (\$60). Now Cindy's income is reduced to \$60 per month. One third of that amount (\$20) is excluded and an additional \$20 is disregarded as an unearned income exclusion, reducing her countable income to \$20 per month. Cindy will now qualify for a \$617 per month SSI check and automatic Medicaid.

IX. Realistic Creative Resolutions

Family law attorneys will find that in some cases a creative solution is unrealistic. For example, there may not be any alternative ways of directing periodic payments to minimize the impact on SSI. There may also be tax considerations that will dictate the attorney's strategy. The attorney may also encounter clients who

¹²⁶See 20 C.F.R. §§ 416.1160-416.1169.

¹²⁷See 42 U.S.C. § 667 (b)(2); N.Y. DOM. REL. LAW § 240(1-b)(f); N.Y. FAM. CT. ACT § 413(1)(f).

have been victims of domestic violence, who prefer to quickly sever all ties with the abusive spouse. The paying spouse may be employed sporadically or may be unreliable in his or her handling of obligations. In those cases, creative resolutions may realistically be limited to a transfer of property or lump-sum buy out in lieu of alimony.

A creative resolution typically will depend on the cooperation of the payer parent or ex-spouse. If the other party is not willing to agree to a creative approach, it may not be realistic. In some cases, it may be necessary to provide the payer with a “better deal” in order to get them to agree to the special arrangement. The creative resolution in that case could be one that serves the interests of both parties. When a creative resolution is available, it can make a tremendous difference in the quality of life of the individual or family.

X. Conclusion

Any attorney with a significant family law practice will encounter clients who are SSI recipients. In those situations, it is incumbent on the attorney to factor SSI’s income and resource rules into the equation. Equipped with a knowledge of the SSI rules, the attorney can proceed to advocate for a resolution that will best serve the needs of clients and their families.