

The Voice® Newsletter

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The Voice is the e-mail newsletter of The Special Needs Alliance. This installment was written by Special Needs Alliance member Kelly A. Thompson. Kelly has been a lawyer for 36 years, practicing law in Arlington, Virginia for the last 20 years. Her clients include many military families, and her practice focuses on planning for individuals with disabilities and the elderly, special needs trusts, trust administration and estate planning.

Disabled Military Child Protection Act

On December 19, 2014, President Obama signed the Disabled Military Child Protection Act. This law allows a military parent to provide a survivor benefit for a disabled child and have it paid to a special needs trust for that child's benefit.

Until this law was passed, military parents of children with disabilities faced a serious dilemma at retirement — whether or not to choose the military Survivor Benefits Plan (SBP) retirement option for their children. The dilemma was that the benefit could not be assigned to a special needs trust and could potentially interfere with the child's eligibility for government benefit programs such as Supplemental Security Income (SSI) or Medicaid.

Survivor Benefits Plan

Members of the military can elect several options to provide for a spouse or dependent child at the military member's retirement or death. The SBP will pay up to 55% of the military member's retirement pay to a spouse and/or dependent child when the retiree dies. The member can also select a lesser benefit at a lesser cost. The military member can select between coverage for a spouse only, a spouse and children, or children only. The member takes a reduction of about 6.5% in retirement pay for SBP for a spouse and only about \$20/month for dependent children, including adult disabled children.

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The existing law provided that the SBP could only be paid to a “person” and the Defense Department took the position that “person” did not include a trust for a child with disabilities.

Effect on SSI and Medicaid Eligibility

In addition to (or in place of) the survivor benefit, a military member can provide an array of benefits for a child with a disability. In most cases a disabled child over age 18 can be designated as an Incapacitated Dependent (DD Form 137-5) and be permanently eligible for military post privileges as well as TRICARE health benefits. However, these military benefits do not include supportive living programs or vocational opportunities. SBP and TRICARE benefits are often not enough to pay for all the help that may be needed by an adult child with a disability so the military family may need to look to other programs to provide for a child’s needs.

If the disabled child over age 18 has assets of less than \$2,000 and minimal income, the child will usually be eligible for SSI and Medicaid. Medicaid may duplicate TRICARE’s health benefits but Medicaid “waiver” programs pay for a wide variety of services that TRICARE does not. Medicaid waiver benefits pay for supported living programs, in-home caregivers, mental health support services, day activity programs, job coaching and other services. TRICARE and Medicaid provide a complementary mix of health care benefits and support services needed by many adults with disabilities.

SSI pays a monthly cash benefit (\$733 per month in most states in 2015), and any unearned income over \$20 offsets SSI income dollar-for-dollar. In some states a person’s income must be less than the SSI benefit amount to qualify for Medicaid waiver services. In other states a person’s income must be less than three times the SSI benefit amount (\$2,199 in 2015) to qualify for Medicaid waiver services.

SBP income payments paid directly to a disabled child will offset the SSI benefit as unearned income. If the military member elected SBP for his or her disabled child, the child will receive as much as 55% of the parent’s income. If the SBP payment exceeds the SSI benefit amount, the child with a disability will lose SSI and as a result may also lose Medicaid health care and community support benefits. In my home state of Virginia and in many states, if an individual’s income exceeds \$2,199 per month, all supported living assistance, job

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coaching, respite care and other services provided under Medicaid waiver programs are lost.

A recent example from my practice is Tom, a 52 year old man with an intellectual disability who had lived in a group home for 18 years and attended a day program for individuals with disabilities. Tom's only income was SSI, and as a result he

qualified for Medicaid to pay for his group home program and all related health services. When Tom's father, a retired Navy officer, died, Tom began to receive military SBP in an amount just above three times the SSI benefit amount. This SBP payment made him ineligible for Medicaid waiver services. The private pay cost of the programs and services Tom was receiving prior to his father's death was \$10,400 per month, almost five times his SBP payment. Tom lost his group home placement, as well as his day program, and was transferred to a board and care home that was little more than a homeless shelter.

Legislative Solution

If military parents could have the SBP benefit for their disabled child paid to a special needs trust instead of paid directly to the child, SSI and Medicaid benefits could be protected. To change the allowed beneficiary of the SBP seemed like a simple fix. The Special Needs Alliance began lobbying on this issue in 2007, leading to legislation being introduced in 2009. Various members of Congress agreed with the SNA but the "fix" proved to be complicated. After many false starts, a military advocacy organization, the Military Coalition, made this a part of their legislative agenda. Various disability advocacy organizations, the American Bar Association and the National Academy of Elder Law Attorneys also publicly supported the measure.

The Disabled Military Child Act specifically authorizes military parents to elect that the SBP benefits for a disabled child be assigned to a supplemental or special needs trust. The trust must be a first party or self-settled special needs trust that includes provisions to reimburse the Medicaid program on the death of the disabled child for Medicaid benefits the child received during his or her lifetime. Families considering assigning the SBP to a special needs trust should consult an experienced special needs planning attorney to ensure that the correct type of special needs trust is utilized in their plan. (See previous issues of The Voice for more detailed explanations of special needs trusts.)

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Regulations still need to be adopted to implement this new law. It is not clear whether parents who previously declined an SBP benefit for a disabled child can now revise their election given this new option to have the benefit paid to a trust. It is also not yet clear whether SBP benefits already being paid directly to disabled individuals can be assigned to a special needs trust.

Military families who have a family member with a disability face numerous challenges not faced by most families. Frequent transfers make meeting the educational needs of their child a moving target. Those same transfers mean that obtaining Medicaid and other benefits for their child is repeated often as they move from state to state. A military family may spend years on a waiting list for Medicaid waiver services in one state, finally receive benefits, only to be transferred to another state and start the waiting list process all over again. The inability to assign SBP payments to a special needs trust was one challenge facing military families that has at last been fixed!

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