

September, 2009

## Special Needs Advocate

By: Misty A. Watson

### Social Security for Disabled Children and Adults

Social Security provides a necessary financial supplement to any individual with a disability as defined under federal law. There are three types of social security available to an individual with a disability. Social Security Disability Insurance is available to those individuals who have worked at least 10 years and do not currently earn more than \$980.00 a month from employment. For those individuals whose disability began before the age of 22, the work history is based upon the individual's parent. Supplemental Security Income is available to any disabled individual who meets the "limited income and resources" test. The third benefit available under Social Security is Medicare. Medicare is a government health insurance program.

#### *Social Security Disability Insurance*

Individuals whose disability began before the age of 22 may be eligible to receive Social Security Disability Insurance (SSDI), or what people commonly refer to as "Social Security." Typically, an individual receives SSDI based upon his or her work history and amount of prior earnings. However, an adult disabled before the age of 22 may have little or no prior earnings and would not typically qualify for SSDI.

Fortunately, an individual over the age of 18 whose disability began before the age of 22 can receive Social Security benefits based upon his or her parents' eligibility for Social Security. Instead of basing eligibility and the amount of benefits on the disabled individual's work history, these items are based upon the parent's work history and prior earnings. Thus, a disabled individual may be eligible to receive Social Security even though he or she has never been able to work.

There are also restrictions on the individual's earned income. If the individual is employed, he or she cannot earn more than \$980 per month from employment or the individual will be disqualified from receiving SSDI benefits.

#### *Supplemental Security Income*

An individual may be eligible to receive Supplemental Security Income (SSI) if he or she is disabled and receives under

\$1,433 from wages or under \$694 in income not from wages. SSI is also available to minors who have been diagnosed with a disability; however, the income and financial resources of the child's parents or guardians will be taken into account when determining eligibility. Resources available to the family must not be over \$2,000.00 with certain exclusions for the family home and vehicle.

In addition to the asset limitations, the child must satisfy the following requirements: (1) he or she has a physical or mental condition (or combination thereof) which results in "marked and severe functional limitations;" and (2) these debilitating conditions must be expected to continue for at least 12 months, or to result in death.

The Social Security Administration will review all of the information regarding the child's disability and may ask for further medical and school records, if such records are available. Determinations of disability may take between three to five months. However, there are 50 medical conditions which will warrant immediate approval for SSI, including but not limited to: cerebral palsy, down syndrome, muscular dystrophy and severe mental retardation.

When a child turns 18, the criteria the Social Security Administration (SSA) uses in determining if that child is eligible for SSI changes. The parent or guardians' financial status is no longer taken into account, and only the individual's income and resources will be used in determining eligibility. Further, the SSA utilizes the adult criteria, instead of the child criteria, in determining if the individual is disabled so as to allow for SSI.

#### *Medicare*

Adults who receive SSDI benefits for more than 24 months, are automatically eligible for Medicare. An individual who is receiving the benefits will receive his or her card in the mail in the 25<sup>th</sup> month of the individual's approval for disability benefits.

To apply for Social Security benefits, call 1-800-772-1213 or visit your local Security Office. When applying, make sure to have available the applicant's social security number card, as well as birth certificate. If a third party is applying for social security for the disabled individual, that third party must have the individual's social security information available as well. A parent or other family member may also apply to become the representative payee in order to receive the funds from the SSA.

Questions? Call 314.889.7155

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## Belleville East High School Hosts Inaugural Special Needs Prom

On May 16, 2009, special education students at Belleville East High School had an experience which, although common to most high school students, was a first for many of these students—Prom.

The event took six months of planning and, with the help of numerous area vendors, more than \$1,400 worth of goods and services were donated. For only \$20 a ticket, students were able to dine on cuisine from an area restaurant and dance the night away at the Hilton Hotel in Shiloh, Illinois.

The event was sensory-friendly for its patrons, keeping the music volume to a lower level and cutting back on the bright lights and fanfare typically found at high school proms.

Ashley Creek, a special education teacher at Belleville East, organized the prom after a step-mom of one of her students called her to suggest the idea.

Although Creek noted the hard work it took to put on the event, she believed that it will most likely become an annual event. “Every person, no matter their abilities,” said Creek, “should be able to have a Junior/Senior prom.” She has already begun planning for Spring 2010.

## Illinois Extends Dependent Coverage for Adult Children to Age Twenty-Six

Beginning June 1, 2009, Illinois law 215 Ill. Comp. Stat. 5/356z.12 requires all individual and group health insurance and HMO contracts to give parent policyholders the right to elect coverage for qualifying dependents up to age 26 and up to age 30 for military veteran dependents. Health coverage that is provided to state, county, and municipal employees must also meet these requirements. Enrollment in higher education is not a prerequisite for this extended coverage.

Dependents may be enrolled during the mandated 90-day enrollment period which insurance companies must provide to eligible parents. For policies that begin after June 1, 2009, the 90-day enrollment period must begin simultaneously with the start of the coverage. For existing insurance policies, the 90-day period will begin on the date the policy is amended or renewed.

It should be noted this law does not apply to insurance policies or HMO contracts which do not include dependent coverage, self-insured non-public employers, self-insured health and welfare plans and insurance policies or trusts issued in other states.

More information can be found on the State of Illinois Department of Insurance web site at <http://www.idfpr.com/DOI/default2.asp>.

## Guardianship

A guardian is an individual who is granted, by a court, the care and custody of a minor or person declared disabled or incapacitated. A conservator, on the other hand, is an individual appointed by a court to have care and control over a minor or a disabled person's *property*. Although these phrases are sometimes used interchangeably, a guardian has care of an *individual* whereas a conservator has care of that *individual's property* – a distinction with great legal importance. Therefore, it is necessary to petition a court for both guardianship and conservatorship. A conservatorship is only necessary in the event that a minor or a person declared incapacitated by the court has assets in his or her own name.

Although a guardian and conservator are frequently the same person, it is still necessary to petition a court for both guardianship and conservatorship. The appointment of guardianship and conservatorship is governed by Missouri law and is a legal process by which a probate court designates a guardian and/or conservator upon issuance of letters of guardianship or conservatorship. Because of the close relationship between guardianship and conservatorship, it is common to petition a court for conservatorship and guardianship at the same time.

Parents will be the natural guardians of their minor children if one or both of the parents are still living unless the court finds them to be unfit as guardians. Individuals, non-profit organizations or social service agencies may be appointed guardian.

The court shall make its appointment of a guardian and/or conservator in accordance with the incapacitated or disabled person's most recent valid nomination of an eligible person qualified to serve as guardian. If there has been no such appointment, the court will appoint a family member or friend in order of statutory preference.

## St. Louis Area Organizations Supporting Persons with Disabilities and Their Families

### United Cerebral Palsy of Greater St. Louis

United Cerebral Palsy is a national organization serving more than 176,000 individuals with disabilities. The organization is facilitated by ambassadors who help to fulfill the organization's mission to advance the independence, productivity and full citizenship of people with disabilities.

UCP supports the My Child Without Limits Program, which offers resources and information for families who have special needs children. [Mychildwithoutlimits.org](http://Mychildwithoutlimits.org) offers information regarding the understanding of Cerebral Palsy, traveling tips for families, speech therapy for those children afflicted with Cerebral Palsy and news updates.

The United Cerebral Palsy of Greater St. Louis office is located at 8645 Old Bonhomme Road, St. Louis, MO 63132-3999. Their website is [http://www.ucp.org/ucp\\_local.cfm/95](http://www.ucp.org/ucp_local.cfm/95). They also may be reached by phone at (314) 994-1600.



### Gateway Chapter of the Autism Society of America

The Autism Society of America (ASA) is one of the nation's largest volunteer organizations dedicated to those afflicted with Autism. The ASA provides resources and information to individuals across the entire diagnostic Autism spectrum.

While the ASA is partnered with many corporate sponsors, a partnership with AMC Theaters offers families in the St. Louis area an opportunity to watch newly released movies in an environment comfortable for autistic individuals. The Sensory Friendly Films programs shows movies with the auditorium lights turned up and the volume of the movie lowered. No previews or advertisements will be shown before the movie. Families are able to bring in their own gluten-free, casein-free snacks. While the safety of the audience is of primary consideration, audience members may also move around, dance, walk, shout or sing. Families can attend these Sensory Friendly Films locally at AMC West Olive 16, 12657 Olive St, Creve Coeur, MO 63141.

### **Spotlight: Todd Gentry**



Todd Gentry, CFP, is a Met Life Met DESK specialist working out of Chesterfield, Missouri. Met DESK is Met Life's Division of Estate Planning for Special Kids. In his role as a Met DESK specialist, Mr. Gentry has an increased understanding of government benefits for special needs individuals, and what it takes to preserve those government benefits, including eligibility for SSI and Medicaid. He further understands the financial planning it takes to make sure those individuals with special needs will be financially protected for life.

Mr. Gentry's website, <http://www.jtgentry.metlife.com/>, boasts an abundance of resources for families who are caring for special needs individuals. Newsletters, scheduled workshops and online videos are all available online, as are numerous estate planning workbooks. If you wish to contact Mr. Gentry, his phone number is (636) 736-3319.

## **Supreme Court of the United States Decides Case in Favor of Special Needs Families**

***Forest Grove School District v. T.A.: a vital step towards ensuring all special needs children get the education they deserve***

In June 2009, the Supreme Court decided a pivotal case for those families with special needs children in a case entitled *Forest Grove School District v. T.A.* The case involved the Individuals with Disabilities Education Act (IDEA), which requires States that receive federal funding to provide a "free and appropriate public education" (FAPE) for all children with disabilities.

For those children who are diagnosed to have disabilities, this FAPE will often include an "individualized education program," (IEP) a program which brings together those individuals within the child's educational circle—teachers, parents, assistants—and specifically targets the disabilities the student may encounter. The IEP will offer alternatives to overcome any disabilities the child may have that are hindering her ability to excel in the classroom. Actions taken as part of the child's IEP can include extended test taking time, alternative test taking atmospheres and even a change in the test format.

In *Forest Grove*, the parents of T.A. sought reimbursement from the school district for tuition for the private school T.A. needed to attend so he could receive proper assistance with his disability at school. The district found T.A. to be without any disabilities, thereby claiming the IDEA was inapplicable. However, upon further examination by a private physician, T.A. was diagnosed with attention-deficit/hyperactivity disorder and other learning and memory disabilities. With this diagnosis, T.A.'s parents made the decision to place T.A. in a private school where his needs could be better met.

The school district argued that the 1997 amendments to IDEA did not require reimbursement for private school tuition when there had been no previous special-education services through the public school system. The school district claimed there were safe harbor provisions in the 1997 Amendments to IDEA which precluded the school district from being financially liable. However, the Court found that such a provision was only applicable to those schools who had correctly identified a disability and offered that child a FAPE—which the district had failed to do.

Ruling upon the case, the Supreme Court found in favor of T.A. stating that "having mandated that participating states provide a FAPE for every student, Congress could not have intended to require parents to either accept an inadequate public-school education pending adjudication of their claim or bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act."

This decision marks the continual trend in the courts towards providing individuals with disabilities the ability to thrive in their educational atmosphere.



## SETBACK FOR MEDICAID PAYBACK TRUSTS

A Medicaid Payback Trust is a Special Needs Trust that is setup whenever a person is considered disabled under the Medicaid or Social Security Act. (42 USC § 1382c(a)(1)). Often funds are received from a personal injury or other type of settlement and paid directly into the Medicaid Payback Trust. The federal government specifically allows for this type of Special Needs Trust (also known as a Supplemental Support Trust) under 42 USC 1396p(d)(4)(A), so long as all the requirements of the statute are met. The requirements include that upon the death of the beneficiary any funds remaining in the Medicaid Payback Trust are paid to reimburse Medicaid first. Any remaining funds are then paid to the beneficiaries. This Medicaid Payback Trust allows for a Medicaid recipient to have the necessary funds for purchase of necessities during the recipient's life and allows the state to receive payment for the services it renders upon the recipient's death.

A recent decision from the US District Court for the District of New Mexico, *Hobbs ex rel. Hobbs v. Zenderman*, 2009 WL 2750707 (C.A.10 (N.M. (C.A.10 (N.M.)),2009) is a severe setback for the Special Needs Community . Steffan Hobbs had sued for injuries obtained in an automobile accident when he was six years old. Hobbs and his parents settled the case and agreed that \$1.1 million dollars was to be put aside in "The Steffan Hobbs Medicaid Payback Trust". The Trust purchased a one-half interest in the family's home and paid Steffan Hobbs' mother a monthly stipend for her care of Steffan. The family then applied for Medicaid through the State of New Mexico which found the Supplemental Support Trust to be a countable resource. The State of New Mexico found that the use of the Special Needs Trust funds for purchase of land and a family home was specifically prohibited under the state's Medicaid policy. After exhausting his administrative appeals, Hobbs' parents filed suit in the US District Court for the District of New Mexico alleging that the Medicaid Payback Trust had complied with the requirements of the federal law (1396p(d)(4)) and therefore could not be counted as a resource. The District Court found in favor of the State and the Hobbs' family appealed.

The appellate court in *Hobbs* found that the "Medicaid statute exempting special needs trusts from requirement that state count certain trust assets as resources available to an individual when determining Medicaid eligibility did not unambiguously impose a binding obligation on the states to exempt such trusts when making eligibility determinations, but rather, left such a decision within the discretion of the states, and as such, statute could not support Medicaid claimant's § 1983 claim against New Mexico authorities for violation of that provision. Social Security Act, § 1917(d)(4), 42 U.S.C.A. § 1396p(d)(4); 42 U.S.C.A. § 1983."

This finding by the appellate court allows individual states to determine whether they will develop their own eligibility determinations for a Medicaid Payback Trust or even allow the Medicaid Payback Trust to be a countable resource for Medicaid purposes. The State of Missouri currently recognizes the elements set forth under the federal statute and allows for Medicaid Payback Trusts to be utilized and not count as a resource for the Medicaid Recipient. However, this could be changed by the legislature if the New Mexico decision stands.

To access the latest news and law regarding Special Needs Families please feel free to visit our blog at:  
[www.dannamckitrick.com/beyond-the-fine-print](http://www.dannamckitrick.com/beyond-the-fine-print)

## Planning Considerations for Children with Special Needs

Special Needs Families often need to convey more information to their other family members and friends about how to care for their child in the event that they would be unable to continue to do so. Next month, Danna McKitrick P.C. will be releasing checklists and other helpful forms that you can complete on our website and keep with your estate plan documents.

Information on the forms will include doctors, specialists, medications, daily routines, and other important information that someone would need to know about your child. This is especially helpful for non-verbal children who are unable to communicate their daily needs. The forms will be available for you to download and complete at your convenience. If you are a current client, I am happy to also keep this information in my file. You may fax, email, or mail me your completed forms.

I welcome your input on what information you would like to see included on the website. Also, if you have ideas for future topics, please do not hesitate to call or email me.

**Questions? Call 314.889.7155**

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*Misty A. Watson focuses her practice on estate planning and administration, including probate. She counsels individuals, families, and business owners in the creation of trusts, wills, financial and health care powers of attorney, guardianships, and conservatorships.*

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