

2015 Special Needs Trusts National Conference  
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Veterans Benefits and the Person With Special Needs

Issues for Military Children with Special Needs

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## Topics:

### Disabled Military Child Protection Act Access to Medicaid Waiver Services & ECHO Education Issues

#### DISABLED MILITARY CHILD PROTECTION ACT

On December 19, 2014 President Obama signed the Disabled Military Child Protection Act. This law (10 U.S. Code 1450 text at Appendix A) allows a military parent to provide a survivor benefit for a disabled child and to 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 irrevocably choose the military Survivor Benefits Plan (called "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.

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 many states a person's income must be less than three times the SSI benefit amount (\$2,199 per month 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 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 would be protected. To change the allowed beneficiary of the SBP seemed like a simple fix. The author, with the assistance of 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 advocates for this change 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.

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. The author has been told by Defense Department sources that there will likely be an “open season” to revise elections and make the assignment to a trust in the coming months, but it is unclear what revisions, elections and assignments will be permitted. It will also be important to make clear to SBP recipients that the benefit must be assigned to a first party special needs trust. This will be difficult, as it is anticipated that most families will not understand the difference and the cost of preparing a second special needs trust may be prohibitive for many families. JAG and legal services officers at military bases are not permitted to draft any type of special needs trust for service members or retirees.

There is another benefit available to dependents of service members - Dependency and Indemnification Compensation (DIC). This is paid to dependents of service members killed on active duty. It cannot be assigned to a trust, but it is typically a lower benefit and does not interfere with Medicaid waiver eligibility as the SBP does. In addition, this benefit is more along the lines of Social Security or similar benefits and, arguably, should not be excluded from countability as income.

### **ACCESS TO MEDICAID WAIVER SERVICES & ECHO**

A major issue confronting military families who have a child with special needs is their constant moves - in military parlance "PCS" or permanent change of station. A typical station lasts only 3 years and can be much shorter if the station is a training assignment. For military families trying to access Medicaid waiver services, this constant moving means either 1) never making it to the top of a waiting list before moving to the next station, or 2) if they are receiving Medicaid waiver services, facing the choice to leave the military or leave the child behind to continue to receive those services.

In November 2013 West Virginia University published the results of a comprehensive study on military families and access to Medicaid and Medicaid waiver services commissioned by the Office of Community Support for Military Families with Special Needs, Department of Defense. That study quotes multiple families interviewed who say that they need services but there is no point in applying as they will never receive services before moving to the next station. Texas, California and Virginia all have very large military populations and are also among the states with the longest waiting lists for services - often much longer than 3 years. In addition, there is the challenge of finally receiving Medicaid waiver services but then being moved and starting on another wait list.

The West Virginia University study suggests that there be some agreement or legislation providing that service members be granted the same services in the new duty station state or at least the same priority on the wait list. However, the study acknowledges that this is not very practical - a child receiving a developmental disability waiver in Virginia may move to Massachusetts where there is no comparable waiver program. Every state also runs their waiting list in different ways, categorizing with different levels of urgent needs or not categorizing by urgency at all. The study therefore suggests that the Department of Defense should consider expanding the Tricare ECHO program which provides expanded services for children with special needs.

Tricare, the health insurance program for service members, retirees, and their dependents, also has a program for active duty family members with special needs called ECHO (Extended Health Care Option). ECHO covers most categories of disability, including Autism Spectrum Disorder. However it covers the child only while a full time student with a maximum age of 23. It also does not cover a dependent child once the service member has retired. ECHO provides durable medical equipment, rehabilitative services, home health care up to 40 hours per week, transportation, and respite care of 16 hours per month. There is a cap of \$36,000 per year per recipient for services. There is also a monthly cost share for families, based on the service members pay grade, of \$25 to \$250 per month. See [www.tricare.mil/echo](http://www.tricare.mil/echo). In 2013 only 8,094 Tricare beneficiaries were enrolled in ECHO, or about 6% of all families enrolled in the Exceptional Family Member Program which is available to all service members with a special needs child. The great majority of the families using ECHO in 2013 used it for home health care or respite services, and ABA therapy. (See Military Times, March 3, 2015 "Panel: Improve Benefits for Severely Disabled Children")

Until recently ECHO also provided ABA (Applied Behavior Analysis) therapy for children with autism. ABA therapy is now provided exclusively under the Autism Care Demonstration (ACD) - a program that started in July 2014 and scheduled to be maintained as a demonstration program until the end of 2018. Eligibility is more liberal under ACD versus ECHO and retired service members may access these benefits for dependents. See [www.tricare.mil/acd](http://www.tricare.mil/acd).

So it appears that the military is working to provide “in house” benefits for children under age 22 to replace Medicaid waiver services. However, this does not address the plight of the service member who has a child over age 22 who is receiving or close to receiving Medicaid waiver services. I have had several client families in my practice who have chosen to retire or leave service short of retirement because a move would endanger an adult child’s benefits. In making that decision they have to weigh the lost Survivor Benefit Program versus a lost Medicaid waiver benefit. I also frequently encounter the military family who is in the Washington DC area as their last duty station prior to retirement but plan to retire to their home state. The retirement often coincides with a child reaching adulthood and accessing Medicaid waiver benefits. The heartbreaking decision is sometimes to leave the child in Virginia where they have a group home placement and benefits, rather than move with the family to the home state where there would be a long wait for equivalent placement and benefits.

Another remedy that has been introduced in Congress is the ACE (Advancing Care for Exceptional Kids) Act of 2015 (HR 546). This is not aimed at military families in particular, but includes provisions to simplify obtaining care across state lines.

## EDUCATION ISSUES



The same issues with frequent moves are present in education. Most children of service members attend school in their community and not on the military base. Children covered by IDEA (Individuals With Disabilities Education Improvement Act) will have an Individual Education Plan (IEP) and that must be transferred to the new station when a family moves. While both IDEA and the Interstate Compact on Educational Opportunities for Military Children mandate that a child with an IEP should receive comparable services at the new school, that can be a challenge to enforce. IEP's are often prepared at the end of the school year and not implemented until the following school year. Military family moves most often occur over the summer. So the most recent IEP is just a "plan" and not "services" that must be comparable, and the receiving school often tries to implement the one year old services rather than the updated plan.

The other challenge in education is just finding a school system or individual school that can meet a child's needs. I have many non-military clients who spend a great deal of time during their child's preschool years finding just the right school choice for them. Military families do not have this luxury. They typically have 60 days to do the entire move and often little choice as to schools. If they have on base housing then their school choice is made for them. If they are off base then affordability will be a major factor even with research time available.

## CONCLUSION

Families of service members face many challenges but if there is a special needs child those are compounded. Some policies of both the military and broader government are outright discriminatory and others simply put a major burden on families who are required to relocate on a regular basis.

## APPENDIX A

### **10 U.S. Code § 1450 - Payment of annuity: beneficiaries**

1           Current through Pub. L. [114-19](#)

(a) In General.— Effective as of the first day after the death of a person to whom section [1448](#) of this title applies (or on such other day as that person may provide under subsection (j)), a monthly annuity under section [1451](#) of this title shall be paid to the person's beneficiaries under the Plan, as follows:

- (1) Surviving spouse or former spouse.— The eligible surviving spouse or the eligible former spouse.
- (2) Surviving children.— The surviving dependent children in equal shares, if the eligible surviving spouse or the eligible former spouse is dead, dies, or otherwise becomes ineligible under this section.
- (3) Dependent children.— The dependent children in equal shares if the person to whom section [1448](#) of this title applies (with the concurrence of the person's spouse, if required under section [1448\(a\)\(3\)](#) of this title) elected to provide an annuity for dependent children but not for the spouse or former spouse.
- (4) Special needs trusts for sole benefit of certain dependent children.— Notwithstanding subsection (i), a supplemental or special needs trust established under subparagraph (A) or (C) of section 1917(d)(4) of the Social Security Act ([42](#)

U.S.C. [1396p\(d\)\(4\)](#)) for the sole benefit of a dependent child considered disabled under section 1614(a)(3) of that Act ([42 U.S.C. 1382c\(a\)\(3\)](#)) who is incapable of self-support because of mental or physical incapacity.

(5) Natural person designated under “insurable interest” coverage.— The natural person designated under section [1448\(b\)\(1\)](#) of this title, unless the election to provide an annuity to the natural person has been changed as provided in subsection (f).


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**Veterans Benefits and the Person with Special Needs**

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***Veterans' Benefits:  
 Why Should You Care?***

- A Word to the Wise: A Little Knowledge Can Be a Dangerous Thing. But . . .
- When advising clients, you could be leaving important benefits on the table:
  - Pensions, including aid and attendance
  - Disability Compensation
  - Priority access to VA Medical Care

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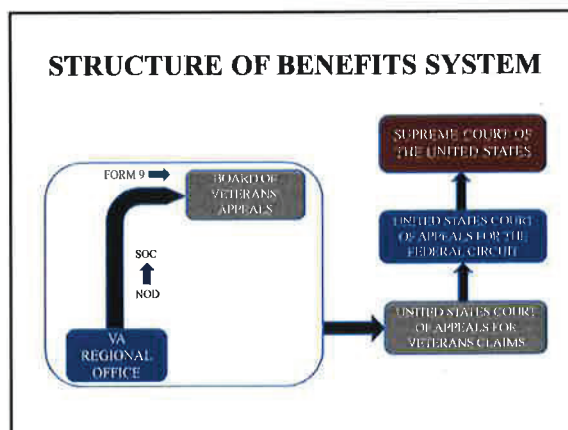
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## SYSTEM FEATURES

### Regional Offices

- ☐ 57 located in the U.S. & Philippines
- ☐ Part of the "Veterans Benefits Administration"
  - Distinct from health care (Veterans Health Administration)
- ☐ Non-lawyers

### Board of Veterans' Appeals

- ☐ Chairman; Vice-chairman; Approx. 65 Veterans Law Judges/Board Members
- ☐ Four Regional Decision Teams
- ☐ A separate entity within VA -Not part of Veterans Benefits Administration

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## SYSTEM FEATURES CONTINUED...

- ☐ Board and Regional Offices comprise the Administrative portion of the system.
- ☐ Administrative System is "non-adversarial" and pro-claimant.
  - Duty to Notify (38 U.S.C. § 5103)
  - Duty to Assist (38 U.S.C. § 5103A)
  - Benefit of Doubt Rule (38 U.S.C. § 5107)
  - May introduce new evidence at any point
- ☐ Problem: Delays & The "Hamster Wheel"

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## SYSTEM FEATURES CONTINUED...

### Judicial System

- ☐ The judicial process is adversarial. No pro-claimant features.

### CAVC

- ☐ Article I Court
  - Presidential Appointments
  - 15 Year Terms
- ☐ Appellate Body
  - Precluded from fact-finding
- ☐ En banc/Panel/Single-Judge Decision-making




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## SYSTEM FEATURES CONTINUED...

### Judicial System (Cont.)

#### Federal Circuit

- ☐ Article III Court
- ☐ Limited Jurisdiction

#### SCOTUS

- ☐ 4 cases in history from system

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## SYSTEM WORKLOAD

### Massive System

- ☐ Nearly 1/3 of U.S. population eligible for some benefit.
- ☐ Nearly \$25 billion spent annually in compensation & pension.
- ☐ Over 1,000,000 new claims filed each year for the past 5 years.
- ☐ FY 2014 set a record with 1.3 million disability claims alone.
- ☐ Approximately 200,000 claims in the "backlog."

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## BENEFITS

### ☐ Wide Array of Benefits, For Example:

- Burial
- Health Care
- Educational / Rehabilitation
- Home Loans
- Insurance
- Disability Compensation – Most Common
- Pensions
- Dependency and Indemnity Compensation




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## SERVICE-CONNECTED DISABILITY CLAIM

Various ways to have a disability deemed "Service-Connected"

- ☐ Direct Service Connection
- ☐ Secondary Service Connection
- ☐ 38 U.S.C. § 1151- VA Medical Malpractice
- ☐ Presumptions

- Specialized such as Agent Orange
- Presumption of soundness, 38 U.S.C. § 1132
- Presumption of aggravation, 38 U.S.C. § 1153




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## ELEMENTS OF SERVICE-CONNECTION CLAIMS

### 1. "Veteran" Status – 38 U.S.C. § 101(2)

"a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable"

### 2. Current Disability – 38 U.S.C. § § 1110, 1131

- ☐ Medical Evidence / VA Exams
- ☐ Lay Evidence

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## ELEMENTS OF SERVICE- CONNECTION CLAIM CONTINUED...

### 3. In-Service Event or Occurrence

- ☐ Evidentiary Issues
- ☐ Buddy Statements

### 4. NEXUS – Or connection between current disability & in service events.

- ☐ Medical Opinions
- ☐ Presumptions
- ☐ Critical Role of Lawyers

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## ELEMENTS OF SERVICE- CONNECTION CLAIM CONTINUED...

### 5. Rating

- ☐ Schedule – 0% - 100% in 10% increments
- ☐ Extra-schedular ratings
- ☐ TDIU (“Total Disability Based on Individual Unemployability”)

### 6. Effective Date




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## PENSIONS

- ☐ VA Pension benefits are distinct from service-connected disability compensation.
  - Defined by 38 U.S.C. § § 1501-1562
  - Keep in context: 3.3 million comp claims vs. 325,000 pension claims
- ☐ As distinct from compensation benefits, pensions are mean-tested
- ☐ A person may not receive both service-connected disability compensation and pension benefits.
- ☐ A pension's goal is to account for the lifetime loss of earning potential in the private sector due to “wartime” military service.
- ☐ **IMPORTANT: Proposed Regulations will likely change the way the law operates in this area in significant ways.**

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## PENSIONS CONTINUED...

Basics for Establishing Entitlement to a Pension:

- ☐ Veteran generally must have 24 months of continuous/active-duty service, 90 days of which generally must be during a period of congressionally defined “wartime.”
  - Veteran must also have been discharged under other than dishonorable conditions.
- ☐ Veteran must be permanently and totally disabled (and not service-connected) and the disability must not be the result of “willful misconduct.” OR
- ☐ Age 65 years or older.
- ☐ For both: Demonstrated Need – “MEANS TESTING”
- ☐ Currently, there is NO look back period. **IMPORTANTLY, this is likely to change under the proposed regulations.**

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## PENSIONS CONTINUED...

### More on Mean Testing

- ☐ Complicated & Technical
  - But remember: Means testing does not apply to the far more common benefit of disability compensation
- ☐ Considers both income and net worth of veterans, spouses, and dependent children
  - Case-by-case assessment. *This may change in pending regulations to have a set amount.*
  - Generally, VA will not deny a pension for a veteran with a net worth less than \$80,000, although age and life expectancy factor into the analysis. *This too may change*

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## PENSIONS CONTINUED...

- ☐ The means testing is based on projections of an annualized 12-month period from the date of the claim.
- ☐ Examples of things that are excluded or deductible from income (only examples):
  - Public and private "welfare"
  - Casualty insurance payments
  - Profit from sales of real or personal property
  - Money in jointly held accounts that are acquired as the result of the death of the other account holder
  - Medical expenses, which includes the cost of nursing home care
  - Accrued interest on retirement accounts
  - Some trust income dependent largely on control over trust




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## PENSIONS CONTINUED...

- ☐ A veteran without dependents who is receiving Medicaid-covered nursing home care will have pension benefits reduced to \$90/month for any period after the third full calendar month following admission.
  - 38 U.S.C. § 5503(a)(1)
- ☐ A Word About "Aid & Attendance"
  - Aid & Attendance allows for greater benefits as a result of a veteran being so impaired that he or she requires assistance from another person to perform the functions required by everyday living
    - 38 U.S.C. § 1502(b)
    - Greater than being "housebound," which also allows increased benefits
      - 38 U.S.C. § 1502(c)

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## QUESTIONS?

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