When People with Disabilities Divorce

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Studies indicate that divorce rates increase with the onset of a disability. While any divorce is likely to be disruptive, when one or both partners have special needs, there are additional complications. Marital laws differ by state, but here are issues to consider.

Question of Capacity

Given longer lifespans, the issue of cognitive capacity is likely to become increasingly prevalent in divorce cases, raising issues regarding the ability to participate in proceedings. State laws vary greatly with regard to the right to initiate proceedings. While some jurisdictions will not allow an individual lacking capacity to file for divorce, others will permit it if a guardian/conservator can demonstrate that it's in the person's best interests. Certain states allow a guardian/ conservator, with court approval, to file on behalf of a ward, while others do not.

Additional Supports

In the case of an amicable divorce, it's not unusual for an ex-spouse to continue playing a supportive role in the life of an individual with disabilities, especially if there are minor children from the marriage. Still, a person with special needs may require an array of new services, depending on the ex-spouse's previous level of involvement. Other family members may be able to provide assistance but professional services, paid for with private funds or through Medicaid waiver programs, may need to be considered. While custody of minor children will be determined by the court, based on their best interests, individuals with disabilities retain their parental rights, even if interacting with their kids requires supportive services.

If the former spouse had been named health care proxy or granted power of attorney over finances and property, such advance directives must be updated.

Special Needs Trusts (SNTs)

Given the changing economic status of an individual with disabilities who undertakes a divorce, eligibility for needs-based government benefits may become more important than ever. If a first party SNT does not already exist, a court-ordered SNT should be created to hold that individual's share of divided marital assets and to receive any required alimony payments. In order to comply with federal regulations requiring that a first party SNT be

created by someone other than the beneficiary, establishing the SNT should not be part of the divorce agreement itself, but rather part of the divorce judgment and created at the request of the other party or the individual's guardian ad litem, if one has been appointed. The option of sheltering assets from a property settlement in a SNT may not be available if the ex-spouse needing government benefits is over the age of 64. Some state Medicaid programs will permit assets to be sheltered in a pooled SNT.

While it would be nearly impossible for one spouse to make successful claims against the other's third party SNT, a first party SNT may be another matter, depending upon state law. Some funding sources are protected, while others are not. When established to hold a personal injury settlement (with the possible exception of compensation for lost wages), funds in a first party SNT are not subject to division between divorcing parties. The same goes for funds resulting from inheritances or gifts to the recipient party. In contrast, if a first party SNT was partially funded from "unprotected" sources that were deposited to such a trust during the marriage, this property might be subject to division. The same would be true if marital funds were deposited to a pooled trust.

In any case, when the court decides overall distribution of property, the court may consider the existence of an SNT, its size, and the sources of its funding.

Divorced Disabled Spouse Benefits

Divorce can be difficult, especially when it comes to finances. For a divorced spouse who is disabled, navigating the complex system of benefits can be overwhelming. However, there is good news. If you were married for at least 10 years to your former spouse, you may be eligible for monthly benefits based on their earnings record, even if they have remarried. In order to receive these benefits, you must be at least 62 years old and have a disability that prevents you from working. When applying for these benefits, make sure to have a copy of your birth certificate and your former spouse's earnings record on hand. These benefits can be a vital source of income, helping to ease the financial burden of being disabled and divorced.

Effect on Government Benefits

There are often questions about the effect of divorce on one's government benefits and whether funds received through public programs must be shared with an ex-spouse. Here's an overview:

Supplemental Security Income (SSI)

Since SSI is a needs-based program, an individual's benefits may actually increase upon divorce,depending upon the division of property and alimony payments. SSI payments cannot be garnished for the purpose of alimony or child support.

Social Security Disability Insurance (SSDI)

Based on Own Work Record

Although benefits won't change, a portion could be garnished if an individual is ordered to pay alimony or child support. Some individuals are surprised to learn that they are not eligible for SSDI on their own work record because their prior employment is not recent enough. Not only must workers with disabilities have a certain number of quarters of employment based upon their age, but 20 quarters must be earned within the prior 10 years if the individual is over the age of 30.

Based on Deceased Ex-Spouse's Work Record

If an ex-spouse dies fully insured, a surviving ex-spouse with disabilities may be eligible for SSDI benefits on the deceased ex-spouse's work record if higher than the record of the surviving ex-spouse with disabilities. The surviving ex-spouse must be at least 50 and married at least 10 years to the deceased ex-spouse. Remarriage after the age of 50 or termination of an earlier marriage will not affect eligibility for this benefit.

Social Security Retirement

Unless an individual's own Social Security record entitles him or her to a larger benefit, the individual will remain eligible for benefits based on an ex-spouse's record if the couple was married for at least 10 years, the individual remains single and is at least 62. If the former spouse has yet to apply for Social Security, an individual may still be eligible for benefits based on the ex-spouse's work record if the parties have been divorced for at least two years and are both at least 62. The ex-spouse does not need to give permission or even know that the other spouse is receiving benefits based on the ex-spouse's work record. The benefits awarded to a divorced spouse do not reduce the benefits to which the primary worker and other dependents are entitled.

If an ex-spouse dies fully insured, the surviving ex-spouse may be eligible for retirement benefits on the deceased ex-spouse's work record if higher than the surviving ex-spouse's record. The ex-spouse must be at least 60 and married at least 10 years to the deceased ex-spouse. Remarriage after the age of 60 or termination of an earlier marriage will not affect eligibility for this benefit.

Medicare

Medicare is important health insurance for individuals receiving SSDI or individuals and their spouses who are at least 65 and receiving Social Security retirement income, including divorced spouses. Based on their work history, most individuals never pay premiums for Medicare Part A, which covers hospital expenses and limited skilled nursing home care. Part B covers doctor visits and durable medical equipment with a very affordable premium. If individuals are 65 and not eligible for social security retirement income, they may be eligible to purchase Medicare insurance, and there is a Medicaid program that can help with the cost of premiums for low income individuals.

Must Benefits Be Divided?

States differ in their approach to dividing marital property. Some states allocate property on a 50:50 basis, while others follow the principle of "equitable division," through which the court determines a "fair" distribution.

Although SSDI benefits generally aren't considered marital property, depositing such funds into a joint account might result in a 50:50 division in a state with an equal property division divorce statute. Accounts established to hold only SSI or other disability benefits would be exempt from property division. Such accumulated sums would, however, be considered by courts in equitable division states when determining overall property distributions.

When calculating alimony, SSDI payments are considered income, while SSI is not.

VA disability benefits may not be considered when dividing marital property. They may be garnished for pay spousal or child support, however, if the veteran waived a portion of retirement pay in order to receive nontaxable disability benefits. In any case, VA benefits are considered income when determining support obligations.

Estate Recovery

If eligibility for Medicaid was established through "spousal refusal" (an individual refuses to use his/her assets to support an institutionalized partner), upon the death of the person receiving services, the state may seek remuneration from an ex-spouse for expenses incurred during the marriage.

Individuals with disabilities who are considering divorce should educate themselves about the potentially significant economic implications of dissolving a marriage. Because specifics vary so dramatically from state to state, they should consult a local family law attorney who is experienced in, or who will retain co-counsel for, the complex nuances affecting individuals with special needs.

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