

How special needs planning can enhance the quality of life of a spouse or child with disabilities in a divorce

By Shirley B. Whitenack, Esq.

Robert, a 70 year old retired engineer, and Cora, his 63 year old wife, have been married for eleven years. Each have children from previous marriages but they have no children together. They signed a prenuptial agreement before they married. The agreement provides that each spouse is to receive what they brought into the marriage in the event of a divorce. Robert's assets were valued at twice the amount of Cora's when they signed the agreement. Cora was diagnosed with early onset dementia and needs 24/7 supervision. She does not have long-term care insurance. Robert is concerned that his assets will quickly be depleted by the cost of Cora's long-term care. The couple lives in New Jersey.

When a married couple is faced with the prospect of substantial costs of long-term care for a chronically ill spouse, long-term care planning through a divorce may be the only solution that will prevent the healthy spouse from becoming impoverished while ensuring the availability of assets to enhance the quality of life of the ill spouse.

Florida, New York and Connecticut permit a spouse to refuse to pay for his or her spouse's long-term care. In other states, however, all assets owned by either spouse will be considered available for the ill spouse's long-term care unless the asset is exempt, such as the healthy spouse's principal place of residence and his or her car. If the couple applies for Medicaid benefits to pay for Cora's long-term care, Robert will be able to

retain one-half of the couple's countable assets up to a maximum amount of \$126,420 in 2019 and Cora will be able to retain up to \$2,000. The excess over that amount will need to be spent down before Cora can qualify for Medicaid. To make matters worse, Medicaid will disregard the couple's prenuptial agreement.

Robert and Cora live in an equitable distribution state. Equitable distribution means that the assets acquired during the marriage will be divided in a fair, but not necessarily equal, way. Cora is under 65 years old so the assets she receives through a divorce can be placed in a special needs trust for her benefit. This way, she can qualify for public benefits such as Medicaid, and still have assets available to pay for that which Medicaid does not cover. Robert can keep the assets he received through the divorce without having to pay for Cora's care.

Robert began receiving Social Security retirement benefits when he reached the age of 70. Although Cora will be divorced, she may still be able to receive Social Security retirement benefits based upon Robert's work record. This is because an ex-spouse can receive benefits on an ex-spouse's record if the marriage lasted 10 years or longer, the claiming spouse is unmarried, at least 62 years old, the ex-spouse is entitled to receive Social Security retirement benefits, and the benefit the claiming ex-spouse is entitled

to receive on their own work record is less than the benefit the claiming ex-spouse would receive on his or her ex-spouse's work record. If Cora receives benefits based on Robert's work record she would continue to receive those benefits even if Robert remarried in the future.

Special needs trusts may also be useful when divorcing parents have a child with special needs. Many divorce attorneys and their clients do not realize that child support payments can cause a reduction or elimination of the child's eligibility for means-tested benefits such as Medicaid and Supplemental Security Income ("SSI"), a monthly cash benefit program administered by the Social Security Administration. When a child under the age of 18 receives SSI payments, two thirds of the child support payments are considered income to the child, which results in a dollar-for-dollar reduction of the SSI payment. If the child is 18 or older, the entire child support payment minus \$20.00 counts as income to the child, even if the payments are made to the custodial parent. Depending on the amount of the child support payments, the child's access to Medicaid benefits may also be adversely impacted. These benefits can be preserved, however, if child support payments are directed by a divorce decree to a special needs trust for the benefit of that child. Depending on the circumstances, payments can be made by one or both parents to an ABLE account in addition to or as an alternative to a special needs trust.

Susan and David are the parents of Lewis, who is 23 years old. Lewis has Down Syndrome and attends a day program. Lewis receives an SSI benefit of \$500 per

month. He also receives Medicaid benefits. David filed for divorce. Susan wants David to pay child support in the amount of \$600 per month. That child support payment will cause Lewis to lose his SSI benefit and potentially, Medicaid as well. This is because there will be a dollar-for-dollar reduction of the SSI payment even though the child support payment is made to Susan.

Susan and David's divorce settlement can be structured in such a way that Lewis receives financial support from David without adversely impacting Lewis' SSI benefits. The divorce decree could direct David to pay \$500 per month to a special needs trust for Lewis's benefit or deposit \$500 per month into an ABLE account. Such payments will allow Lewis to retain his SSI and Medicaid benefits.

Divorce settlements often contain provisions requiring ex-spouses to maintain life insurance for the benefit of the divorced couple's children. If life insurance is paid out to the child with disabilities, however, the child will be ineligible to receive SSI and Medicaid. Consequently, the divorce settlement can provide that life insurance proceeds will be deposited into a special needs trust for the benefit of the child, thereby maintaining the child's eligibility for those benefits.

Couples who are contemplating divorce should not assume that their divorce attorneys are cognizant of the laws governing the receipt of Social Security retirement benefits or means-tested benefits such as SSI and Medicaid. For assistance in this regard, such couples should consult with attorneys who have expertise in government benefits planning.

SpecialCare is a program developed by Massachusetts Mutual Life Insurance Company (MassMutual) that provides access to information and resources to families with dependents, of any age, who have a special needs. The Special Care Planner is a title used by MassMutual financial professionals who have received advanced training and information in estate and tax planning concepts, special needs trusts, government programs, and the emotional dynamics of working with people with special needs and their families.



Shirley Whitenack is not affiliated or associated with MassMutual.

The information provided is not written or intended as specific tax or legal advice. MassMutual, its employees and representatives are not authorized to give tax or legal advice. Individuals are encouraged to seek advice from their own tax or legal counsel. Individuals involved in the estate planning process should work with an estate planning team, including their own personal legal or tax counsel.

© 2019 Massachusetts Mutual Life Insurance Company (MassMutual), Springfield, MA 01111-0001.
All rights reserved. www.massmutual.com.