ISSUE EDITOR'S COLUMN:

Our Aging Divorce Clients – What We Need to Know

By Megann S. Hendrix

When dealing with a "boomer divorce," one issue an attorney may face is dealing with public benefits. As an attorney who practices both family law and elder law, I am often asked to consult on cases that involve long-term care or disability benefits. Whenever an attorney is dealing with an elderly or disabled client, one important question to consider is: "Does my client receive public benefits or is my client likely to need public benefits?" If so, the attorney will need to consider the financial implications to a client receiving or applying for public benefits throughout the divorce.

Public Benefits

Elderly and disabled individuals may be receiving or eligible for public benefits that have income and asset tests for eligibility. Two common types of public benefits are Supplemental Security Income (SSI)[1] and long-term care under Medicaid.[2] Both of these benefits are impacted by the income and assets of the individual receiving benefits.

A support or property division order that does not properly account for these benefits could be detrimental to the recipient spouse by reducing benefits or resulting in a complete loss of benefits. However, by structuring the orders properly, the recipient spouse may enjoy the benefit of support and property orders, in addition to public benefits.

Support: Maximize Spendable Income

For individuals receiving SSI, a typical support order paid directly to the recipient spouse is considered available income and reduces the monthly SSI benefit. Instead of sacrificing the SSI benefits, consider structuring spousal support payments

directly to a Special Needs Trust[3] or a Pooled Trust[4] for the recipient spouse's benefit.[5]

If properly set up, the recipient spouse will enjoy the use of this income stream through the Trust while still receiving the monthly SSI benefit. (Note: certain distributions from the Trust may affect the monthly benefit, so it is important to consult with a public benefits attorney.)

For individuals receiving Medicaid benefits for long-term care, a typical support order paid directly to the recipient spouse would increase the amount of income the recipient spouse must contribute toward his or her Medicaid benefits and the recipient spouse would receive none of the benefits of this extra income. Instead of losing the benefit of this money, the support order can direct support payments to a Special Needs Trust or Pooled Trust as described above. The recipient spouse will have the benefit of this support order, while still receiving Medicaid benefits.

Example

In some instances, it may even make sense for the recipient spouse to pay support to the non-recipient spouse. Consider this real-life example:

Husband has physical disabilities and resides in a nursing home. Wife resides at home with their college-age son. Husband is receiving Medicaid benefits to pay for his nursing home bill, and he is required to contribute all but $45 of his income toward his monthly care costs. Wife is trying to support the household on just her income alone, and has gone into debt trying to make ends meet.

Husband's only source of income is Social Security Disability Insurance (an entitlement benefit, not a public benefit) in the amount of $1,500. Before the divorce, he was paying $1,455 toward his care costs. The divorce judgment ordered the husband to pay the wife $1,455 per month in support, which eliminated the husband's required care contribution. In return, the wife transferred $727.50 per month into a WisPACT Trust for his benefit. Now, instead of the couple losing $1,455 per month, the wife has $727.50 extra each month to help with household bills, and the husband has $727.50 per month to use for a private room, a new wheelchair, etc. The husband agreed to pay the support amount, because otherwise his income would keep going toward his care costs. The wife agreed to transfer half of his income to a Trust for him, because otherwise she would not have any support.

This is just one example of how thinking creatively can help maximize the income available to each spouse. In a typical divorce situation, the low-income spouse would not pay spousal support to the higher income spouse. When it comes to dealing with public benefits, the attorneys involved need to work creatively and think outside-the-box to achieve maximum results for their clients.

Property Division: Protecting Assets

Most public benefits have asset limits that the individual or couple must meet to qualify for the benefit. Often, a married couple is allowed to keep more assets than a single person. For both SSI and Medicaid benefits, a single person may only have $2,000 of countable assets to qualify for those programs. Attorneys dealing with property division in a case involving public benefits need to familiarize themselves with the asset rules for that particular benefit to make sure the property division does not adversely affect the recipient spouse's benefits.

In addition to considering the eligibility rules for public benefits, attorneys in these cases also need to keep in mind Wis. Stat. section 767.34(2)(b), which prohibits a court from approving a stipulation that awards "substantially all" of the property to one spouse when the other spouse is applying for Medicaid benefits or is likely to apply for Medicaid benefits within the next 30 months. Because of this statute, it is important to award some of the assets to the recipient spouse, which should be done in a way that maintains the recipient's public benefits.

Special Needs Trusts and Pooled Trusts are a great option when it comes to dividing assets in a divorce involving public benefits. Because these types of Trusts, when properly created, are exempt (not counted) assets, the recipient spouse can receive assets in the property division and place those assets into his or her exempt Trust to remain eligible for public benefits. Again, SSI has special rules on the disbursements from these Trusts, so it is important to consult with a public benefit attorney when dealing with SSI.

Using other exempt assets can also be helpful when dividing the couple's assets. Some typical exempt assets are: the house, a vehicle, irrevocable burial plans, and personal property. However, giving the house to the recipient spouse can be problematic for a number of reasons, including estate recovery,[6] SSI rules, and having income available to pay for its upkeep. If this is an option the couple is considering, they should speak to a public benefit attorney about the implications of the recipient spouse keeping the house.

Example

Consider another real life example: husband and wife owned a house, two rental properties, a few vehicles, and the husband's 401(k) retirement account. The wife received in-home care paid for by Medicaid benefits. The couple incurred debt trying to make ends meet, including two 401(k) loans and an equity line of credit.

Through the property division, the wife received her handicapped-accessible van and a portion of the husband's 401(k), which she liquidated and transferred to a WisPACT Trust for her benefit. The husband received all other assets and debts.

The husband wanted to eliminate some of his debts to ease his cash flow. To pay down debt, the husband gave more of his 401(k) to the wife, who in turn agreed to liquidate in full to pay down some of the marital debt. Although under this plan the wife incurred additional income taxes, which she paid off the top before paying the debts, the husband got the benefit of the wife's low tax bracket on this tax liability and eliminated some monthly debt payments he would otherwise have to ease his cash flow.

Conclusion

Divorces involving elderly or disabled clients create unique challenges for family law attorneys, but also provide great opportunities to reach creative solutions that maximize the resources available. By being able to spot the issues and seek the appropriate help when needed, the attorney can help ensure that the elderly or disabled client is not adversely affected by the financial implications of a divorce.

Endnotes

1. SSI is a means-tested benefit, whereas retirement, disability (SSDI), and survivor benefits through the Social Security Administration are entitlement benefits based on historical earnings. The entitlement benefits do not have income or asset tests.
2. Also known as Title 19 or Medical Assistance benefits.
3. As defined by 42 U.S.C. § 1396p(d)(4)(A).
4. As defined by 42 U.S.C. § 1396p(d)(4)(C).
5. In Wisconsin, WisPACT Inc. and Life Navigators administer Pooled and Community Trusts for the benefit of individuals with disabilities.
6. Estate Recovery is the ability for the state to make a claim in the recipient's estate to recover certain benefits the state has paid on the recipient's behalf. Note that recent changes to the law impact the state's power to recover Medicaid costs from a Medicaid recipient's estate. This subject is covered elsewhere in this issue.