



When People with Disabilities Divorce

This article is an updated version of one originally published in August 2014 by SNA member [Ed Wilcenski](#) of [Wilcenski & Pleat, PLLC](#) in Clifton Park, NY, and now-retired SNA member Barbara Hughes.

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

Question of Capacity

In cases where a disability is cognitive, a spouse's decisional capacity may be at issue regarding how that spouse can participate in the divorce. State laws vary greatly regarding the right to initiate or participate in divorce proceedings when a party has impaired capacity. If a spouse's cognitive impairment is severe, a court may require the appointment of a guardian or conservator to represent that spouse. If the spouse with severe impairment is petitioning for divorce, the court may require a guardian to show why the divorce is in the individual's best interest. Similarly, some states may also require the responding spouse to have a guardian or conservator appointed if they are severely impaired.

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 a disability, especially if there are minor children from the marriage. On the other hand, if their ex-spouse does not continue to play a supportive role, a person with a disability may require an array of new services. Other family members may be able to assist, but professional services paid for with private funds or through Medicaid waiver programs may need to be considered. While the court will determine custody of minor children based on their best interests, it will also consider the best interests of the individuals involved. Individuals with disabilities retain their parental rights, even if interacting with their children requires supportive services.

If the former spouse had been named health care proxy or granted power of attorney over finances and property, such legal documents should be reviewed and updated, as necessary.

Special Needs Trusts (SNTs)

Given the changing economic status of an individual with a disability who is a party to a divorce, eligibility for needs-based governmental benefits may become more important than ever. If a first-party SNT does not already exist, an SNT can be created to hold that individual's share of divided marital assets and to receive any required alimony payments. This option may not be available if the ex-spouse needing governmental benefits is over the age of 64. Some state Medicaid programs will permit assets to be protected in a pooled first-party 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 the overall distribution of property, the court may consider the existence of an SNT, the type of SNT, its size, and the sources of its funding.

Effect on Governmental Benefits

Any divorce can be difficult, especially when it comes to finances, but for a divorced spouse with a disability, navigating the complex system of governmental benefits can be overwhelming. These benefits can be a vital source of income, helping to ease the financial challenges of disability, which may be compounded by divorce.

There are often questions about the effect of divorce on one's governmental 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 increase upon divorce, depending upon the division of property and alimony payments. SSI payments cannot be garnished for 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 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 a disability may be eligible for SSDI benefits on the deceased ex-spouse's work record if the deceased ex-spouse's benefit is higher than the record of the surviving ex-spouse. The surviving ex-spouse must be at least 50 years old and have been married to the deceased ex-spouse for at least 10 years. Remarriage after the age of 50 or termination of an earlier marriage will not affect eligibility for this benefit.

➤ Social Security Retirement

Unless the individual with a disability has their own Social Security record that entitles them to a larger benefit, the individual with a disability will remain eligible for benefits based on an ex-spouse's record if the couple was married for at least 10 years, the individual with a disability remains single, and is at least 62. If the former spouse has yet to apply for Social Security, the ex-spouse with a disability 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 years of age. 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 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 the benefit is 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 an important health insurance benefit for individuals receiving SSDI for more than two years, 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 short-term skilled nursing home care. Part B covers doctor visits and durable medical equipment with a minimal premium. If individuals are 65 but are not eligible for Social Security retirement income, they may be eligible to purchase Medicare insurance. Additionally, there is a Medicaid program that can help with the cost of premiums for low-income individuals with or without a disability. Medicare eligibility is not dependent upon being married or divorced.

Must Benefits Be Divided?

States differ in their approach to dividing marital property, including governmental benefits of a spouse with a disability. Some states allocate all property and assets 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 likely would be exempt from property division. However, such accumulated sums likely would 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. However, these benefits may be garnished to pay spousal or child support if the veteran waived a portion of retirement pay to receive nontaxable disability benefits. 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 their assets to support an institutionalized spouse), upon the death of the person receiving services, the state may seek reimbursement 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, such an individual should consult a local family law attorney or estate planning attorney who is experienced in, or who will retain co-counsel for, the complex nuances affecting individuals with disabilities.

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