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CHAPTER 11

SPECIAL CONSIDERATIONS FOR DISABLED DEPENDENT ADULT CHILDREN

INTRODUCTION

Families with disabled dependents face special considerations which are discussed in this chapter.

A. Government Benefits: SSI, SSDI and MassHealth Benefits

1. Suplemental Security Income (SSI)

Supplemental Security Income (SSI) is a means-tested benefits program that pays monthly benefits to low-income elders (ages 65 or older), disabled adults, and to disabled or blind children. Disability is defined as being unable to work ("to engage in substantial gainful activity" in Social Security parlance) due to a medical condition or conditions that is expected to last at least one year or result in death. The program bases financial eligibility on income and assets. An individual cannot have more than $2,000 in countable resources in order to be eligible for the benefit. SSI benefits are funded by the federal government and provide monthly cash assistance. Some states, including Massachusetts, supplement the amount of the SSI stipend. The living situation of the SSI recipient initially determines the amount the recipient will receive from SSI but this amount can be reduced based on other factors, principally what other income, earned or unearned, the recipient receives. As a general rule, the more income an individual has, the lower the SSI monthly payment. An individual eligible for SSI in most states, including Massachusetts, is also automatically eligible for Medicaid benefits (MassHealth in Massachusetts) other than nursing home Medicaid and certain MassHealth Home and Community Based Waiver Services. If an individual receiving SSI or Medicaid benefits inherits a large sum of money directly rather than in a properly drafted trust, that person may be disqualified from the program.

2. Social Security Disability Insurance (SSDI)

Social Security Disability Insurance (SSDI) is an earned benefit available to individuals over the age of 18 who are unable to work because of a medical condition that is expected to last at least one year or result in death. This is the same disability standard as in the SSI program described above. The benefit is based on the person's work record and how much he or she has contributed to Social Security rather than on assets or income. SSDI benefits are administered by the Social Security Administration and the program is funded through taxpayer dollars. Since SSDI benefits are based on an individual's work record and not on his or her assets, an inheritance will not disqualify a recipient from benefits.

SSDI also provides cash benefits for eligible family members. For example, a disabled adult child may also be eligible for SSDI on a parent's record if the disability began before the age of 22, has been continuous, and if the parent is drawing Social Security benefits himself or herself, or is deceased, and paid into the Social Security system. These benefits are sometimes referred to as DAC (Disabled Adult Child) benefits. A child may also start receiving a monthly pension or other income upon a parent's death.

One of the consequences of SSDI or a pension, however, may be the loss of MassHealth benefits or a need to pay a premium for those benefits. (Note that what is income for public benefits programs differs from taxable income, and what is considered income varies from program to program. Also, income limits for MassHealth Standard is lower than the income limits for MassHealth Home and Community Based Waiver Services.) If a disabled adult child receives a higher SSDI payment than the monthly SSI payment, then the adult child may lose automatic MassHealth eligibility. This loss of SSI may require a separate MassHealth application and special planning for continued MassHealth eligibility. Many times this can be fixed by seeking a court order assigning pension payments or other income to a d4A Trust; however, Social Security payments are non-assignable. An elder with a dependent adult child who receives SSI benefits must be mindful of the eligibility requirements and should structure his or her estate plan to protect those benefits while still providing for the child.

3. Differences Between SSI and SSDI

There are many significant differences between the SSI and SSDI programs. Among them are how work income is treated, how distributions from trusts are treated and the impact of supported housing. These differences go beyond the scope of this chapter. Suffice it to say that one needs to have a thorough knowledge of these programs and their differences.

B. Special Needs Trusts

A special needs trust (or supplemental needs trust) is a planning technique an attorney can utilize as part of an estate plan in order to offer an elderly parent flexibility and control, as well as protection of government benefits for a dependent child. The assets held in the special needs trust are for the benefit of the child, but are generally used to supplement his or her needs that government benefits are not paying for. A trustee uses his or her discretion to distribute funds and manage assets on behalf of the child.

1. Types of Special Needs Trusts

There are two basic types of special needs trusts: third-party settled trusts and self-settled trusts.

Third-party settled trusts are trusts funded by another person's assets. For example, as part of an elder's estate plan, he or she can leave an inheritance to a special needs trust established for the benefit of his or her child (the beneficiary). The assets did not originate from the beneficiary. These types of trusts can be established under the will of the elder or it can be a separate trust established during the lifetime of the elder. The provisions can include the ultimate disposition of the assets held in the special needs trust once the beneficiary child passes away (for example, the remaining assets can go to other family members).

Self-settled trusts hold the assets of the beneficiary. If properly established, the assets in a self-settled trust do not disqualify the beneficiary from SSI or Medicaid benefits. For example, if the beneficiary is injured and receives a settlement or award those proceeds can be deposited into the special needs trust and not be seen as a countable resource. In order to be properly established, the special needs trust must: 1) be established by the disabled individual, a parent, grandparent, legal guardian (conservator in Massachusetts) or the court; and 2) provide a payback provision that states the commonwealth will receive payment to the extent the beneficiary received Medicaid benefits during his or her entire lifetime (not just since the funding of the trust) upon the beneficiary's death. These types of trusts are usually referred to as "d4A trusts" in reference to its statutory title.

These trusts must be reported to both Social Security and MassHealth when created or upon application for certain benefits by the disabled individual. Both agencies will review how the trusts were established, the trusts' terms and how the trusts are administered to determine whether the trust assets are countable, or whether a penalty period will apply.

2. Special Needs Trusts and Long-term Care Planning

Special needs trusts can also be used during the legal spend-down process for a parent to qualify for long-term MassHealth benefits. The transfer of assets to a special needs trust established for the sole benefit of a totally and permanent disabled person does not create an ineligibility period for an elder in a nursing home. Under the terms of the trust, the trustee must use the funds in a manner that is actuarially sound based upon the beneficiary's life expectancy or the trust must contain the same payback provision as a self-settled trust (as discussed in section 1).

3. ABLE Accounts

ABLE Accounts can be a useful addition to special needs trusts. These accounts are owned by the disabled person and can be managed by the disabled person or someone else on his or her behalf. Contributions from all sources per year cannot exceed $15,000, except that some working disabled may be able to contribute more. There are also account balance limits, most importantly a $100,000 limit. Like a d4A trust, there is a Medicaid payback at the death of the account owner. The uses, restrictions, and differences between ABLE Accounts and d4A trusts are complex and beyond the scope of this brief chapter.

In addition to d4A trusts, there are also pooled trusts ("d4C trusts"). They have all of the same requirements as d4A trusts but differ in that they are run by a nonprofit organization and not an individual trustee. This makes it possible for the pooled trust to take on much smaller trust deposits and still be economical with the fees. It also allows for individuals who cannot identify a known trustee to manage his or her funds. Currently pooled trusts are available to persons of any age. However, MassHealth has proposed regulations that would eliminate this option for individuals over 65. Therefore, consult with a professional before considering this option.

CHAPTER 12

WHAT YOU NEED TO KNOW ABOUT SOCIAL SECURITY

INTRODUCTION

As the workforce is aging, older adults should carefully contemplate when they will receive their Social Security benefits. Workers can receive Social Security at early retirement age, full retirement age or late retirement age. It is important for retirees to know their options and to understand how each option will affect their overall retirement strategy.

A. Retirement Training

The earlier a worker takes Social Security retirement benefits before age 70, the lower the monthly payment will be, because it will be paid over a longer period. Full retirement age is a set age upon which the base benefit amount is calculated, and benefits also increase between full retirement age and age 70 by delaying retirement benefits. The chart below outlines the ages when workers reach full retirement age.

Year of Birth	Full Retirement Age
1943–1954	66
1955	66 + 2 months
1956	66 + 4 months
1957	66 + 6 months
1958	66 + 8 months
1959	66 + 10 months
1960 and later	67

*If you were born on Jan. 1 of any year, you should refer to the previous year. If you were born on the first of the month, your full retirement age will be determined as of the immediate previous month.[1]

Retirees do not have to wait for full retirement age before they can take Social Security retirement benefits. Retirees can elect to take Social Security as early as age 62, but benefits will be permanently reduced unless the retiree later stops receiving the benefits and returns to work prior to full retirement age. Conversely, retirees can wait to take retirement benefits as late as age 70. By delaying until age 70, the monthly payments will be substantially increased above the full retirement benefit amount. Retirees can delay taking payments as long as they choose, but there is no advantage to delaying payments past age 70 because there is no retirement increase after that age.

In summary, there are three different windows for beginning retirement benefits:

- **Early Retirement:** Before full retirement age, and as early as age 62, benefits are permanently reduced by up to 25 percent; in addition, early retirees do not receive a cost of living adjustment (COLA). Your earnings may reduce benefits until you reach full retirement age.
- **Full Retirement:** Currently at age 66, 100 percent of calculated benefits and no reduction due to work earnings.
- **Delayed Retirement:** Between full retirement age and age 70, benefits will be permanently increased by 8 percent per year.

CAUTION: It is imperative to start your benefits precisely on your desired date. If you choose to start at full retirement age but sign up three months earlier, you are not at full retirement age. Your benefits are reduced by a percentage for every month under full retirement age. Any early retiree does not receive an annual cost of living increase.

B. The Calculations

The actual equation is more complex, but the breakdown may be understood through an illustration. A retiree born in 1954 reaches full retirement age the month that he or she reaches age 66. If the retiree elects to take payments at age 66, Social Security will distribute 100 percent of the monthly benefits. If the retiree elects to take payments early at age 62, then the monthly payments will be reduced by 25 percent. If the retiree waits until age 70 or later to take benefits for the first time, then the monthly payments will be 132 percent of what he or she would have received at full retirement age. If everyone lived to his or her average life expectancy, then everyone would receive around the same amount of total money, regardless of when they elected to receive their monthly payments. Since no one is guaranteed to live an average life expectancy, the election flexibility allows retirees greater control over the benefit to which they have contributed throughout their working lives.

C. Various Factors to Consider

Some financial planners will recommend retirees taking payments immediately at age 62 because financial planners may forecast greater earnings through private investments. This strategy would require a large return on investment to match or exceed the increase in payments the government guarantees by delaying.

Another factor to consider is immediate financial need. For example, if retirees are forced into early retirement and do not have the savings on which to survive without Social Security, then receiving the payments at age 62 may be necessary regardless of the reduction. Conversely, if retirees have saved well for retirement, or if they are still earning sufficient income, then delaying Social Security might provide a larger payoff in the end.

If a retiree is in poor health or foresees poor health in the future and does not believe he or she will reach average life expectancy, then it may make more economic sense to begin payments early. If a retiree expects to live past his or her life expectancy, then the overall payout may be much larger if a retirees delays taking Social Security.

Retirees should also weigh how Social Security will affect their income tax liability. If an individual retiree is earning $25,000 or more, then he or she may have to pay income taxes on Social Security benefits. The Social Security Administration offers a website that calculates the payouts the recipient will receive depending on income and when the recipient expects to take the benefits. *See www.ssa.gov/benefits/retirement/estimator.html.*

D. How Work Affects Your Benefits

Work earnings can also affect Social Security benefits. Individuals can still work and receive Social Security benefits, but the benefits might be reduced. Social Security calculates countable earnings during certain ages in a formula called the "retirement test." If an individual is working between the ages of 62 and the year before full retirement age, and he or she elects to take early Social Security benefits, $1 will be deducted for every $2 in gross earnings over the annual limit until the year in which full retirement age is reached. The annual limit in 2018 is $17,040.[2] In the year in which an individual attains full retirement age, Social Security will deduct $1 for every $3 that an individual earns above $45,360 until he or she reaches full retirement age.[3]

Regardless of the age of retirement, an individual will also receive benefit increases based on increases in average lifetime earnings if his or her current annual wages are higher than the prior average upon which benefits were calculated. Once a worker reaches full retirement age, the retirement test ends and Social Security will no longer deduct anything from the monthly payments due to work earnings. Social Security does not count pensions, annuities, investment income, interest, or government or military retirement benefits as work earnings. If an individual is still working after full retirement age and earning a significant amount of income, that can result in an increase both in the average annual income upon which the base benefit rate is calculated, and a "delayed retirement" increase of 8 percent per year until age 70.

Families of retirees may also be entitled to Social Security benefits. If a retiree is married or has minor or adult disabled children, then that retiree's spouse or children may be entitled to benefits on the retiree's record. A retiree's qualified dependents can each receive 50 percent of the retiree's benefits and the retiree's surviving spouse can receive 75 percent. Dependents and survivors may have their retirement benefits reduced if received prior to full retirement age. Total benefits payable under any worker's record, however, are usually capped at 150 percent to 175 percent of what the worker would otherwise receive.

E. Possible Benefit Enhancement Strategies

Recent changes in the Social Security laws have limited the benefit enhancement strategies available to workers and their spouses. Some benefit enhancements remain available based on eligibility and timely application. Strategies to discuss with an elder law attorney are:

1) **Filing a Restricted Application:** Only available to married clients who reached age 62 prior to Jan. 2, 2016.
2) **Timing of Multiple Benefits (also called "Deemed Filing")**: Applies to anyone who turned age 62 on or after Jan. 2, 2016.

A formerly popular "file and suspend" strategy ceased to be available after April 30, 2016.

F. Coordinating Social Security Benefits with Employer's Retirement Funds

When considering at what point to take Social Security benefits, it is important to consider all benefits earned over an individual working career and when they become due. Many employees earn qualified retirement benefits through their work — for example, under 401(k), or defined benefit pension plans. An individual may also have his or her own individual retirement accounts (IRAs), with balances sheltered from tax until distributed. The payment of retirement benefits from these sources should be considered in overall retirement planning.

Employers usually pay employees their retirement benefits when they leave employment or retire. By law, employers must generally begin paying an employee's qualified retirement benefits in the calendar year in which the employee reaches age 70½, or when the employee retires, if later. Owners of IRAs must begin taking minimum distribution when they reach age 70½, whether or not they are still working.

Once tax-sheltered retirement distributions begin, an individual is required to take certain minimum amounts each year or be subject to tax penalties. Required minimum distributions are generally spread over the life expectancy of the individual (or the individual and a beneficiary) and are taxed to the individual recipient at ordinary rates.

Individuals who got married or divorced before receiving retirement payments from an employer should be particularly careful to verify that all beneficiary designations for retirement benefits are properly updated. Employees who have been divorced should also take into account any requirements of a qualified domestic relations order (QDRO) to pay some portion of retirement benefits to an ex-spouse.

G. Social Security Benefits and Government Pensions

If you are entitled to receive a government pension from working in the public sector, your Social Security benefits may be reduced by the Windfall Elimination Provision (WEP), the Government Pension Offset (GPO), or both.

If you are receiving a pension from your work as a municipal, state or federal employee and you also have contributed to the Social Security system, you are entitled to receive both benefits, but your Social Security benefits may be reduced by the WEP. Your benefit will never be eliminated, and generally not reduced more than 50 percent. For example, if you worked under Social Security for 21 years, and retire at age 62 in 2018, your monthly Social Security benefit will be reduced by about $403 due to the WEP. If you have at least 30 years of creditable earnings on which you paid FICA taxes, you are entitled to receive both the government pension and the full Social Security benefit. See below for the GPO offset if you are also entitled to receive Social Security benefits from your spouse's record.

If you are receiving a government pension from your employment in the public sector, your Social Security benefit received from a spouse will be reduced by two-thirds of your government pension. If you get a monthly civil service pension of $1,200, two-thirds of that, or $800, will be deducted from your Social Security benefit. For example, if you are eligible for a $1,600 spouses, widows, or widowers benefit from Social Security, you'll get $800 a month from Social Security ($1,600 – $800 = $800). If two-thirds of your government pension is more than your Social Security benefit, your benefit could be reduced to zero. The WEP offset above applies to any Social Security benefit that you get on your own earnings record.

There are some exceptions to both the WEP and the GPO. Since many individuals are entitled to a government pension and Social Security benefits from their own earnings record and Social Security benefits from a spouse's record, trying to determine the actual Social Security benefit can be very complicated. Please refer to the publications listed below. You can also go to the Social Security website, www.socialsecurity.gov, or call the SSA, (800) 772-1213, for specific information about your own benefit calculation.

Social Security Administration
Publication No. 05-10007 | ICN 451453
February 2017
Government Pension Offset

Publication No. 05-10045 | ICN 460275
January 2018
Windfall Elimination Provision