

Estate Planning for Individuals with Special Needs

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by

Brian Wyatt

Special Needs Planning Attorney

for

The Sacramento County Public Law Library

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Your Speaker

- **Brian Wyatt** is an experienced special needs planning attorney with the Law Office of Brian D. Wyatt, P.C.
- **More than half** of our clients are persons with disabilities or their families.
- We belong to the Academy of Special Needs Planners, the National Academy of Elder Law Attorneys, WealthCounsel, ElderCounsel, and the probate sections of the California Bar and the Sacramento Bar Association.
- Brian serves on the board of UCP of Sacramento and Northern California.



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Disclaimer

The following presentation is meant for education only and not meant as a substitute for legal or financial counseling. Each person's situation is unique and deserves careful attention.

The information in these slides could become out of date, as the laws relating to special needs planning are constantly developing.

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The Agenda for This Presentation

We plan to cover these topics:

- Understanding Public Benefits
- Making Decisions about the Future
- Creating an Effective Plan using Special Needs Trusts, Conservatorships, and ABLE Accounts
- The Consequences of Procrastination

We will have a Q&A time at the end.

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Understanding Public Benefits



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Public Benefits at a Glance

Financial Benefits

Supplemental Security Income (SSI)	Social Security & Social Security Disability Insurance (SSDI)
Means Tested:	Not Means Tested:
-Limited Income -Limited Assets	-Income Irrelevant -Assets Irrelevant

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Public Benefits at a Glance

Medical Benefits

Medi-Cal	Medicare
Automatic with SSI	Comes after two years of Social Security Disability Insurance
Can be “share of cost” if there’s no SSI	This is why it’s so important to apply for SSDI as soon as possible.

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Supplemental Security Income (SSI)

SSI provides income for food and shelter.

- Typically, \$1,133.73/month. (\$1,492.82/month for a disabled person living independently.)
- Gateway to Medi-Cal and/or In-Home Support Services (IHSS).
- To qualify, person must (1) meet the Social Security Administration’s definition of “disabled” and (2) have limited assets and income.
- SSI is a “needs based” or “asset sensitive” program.

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Defining Disability

Disability for an adult is defined as the inability to engage in any “substantial gainful activity” (SGA) due to any medically determinable physical or mental impairment, or combination of impairments, that has lasted or can be expected to last for a continuous period of at least 12 months, or result in death.

Disability for a minor is defined as a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than 12 months

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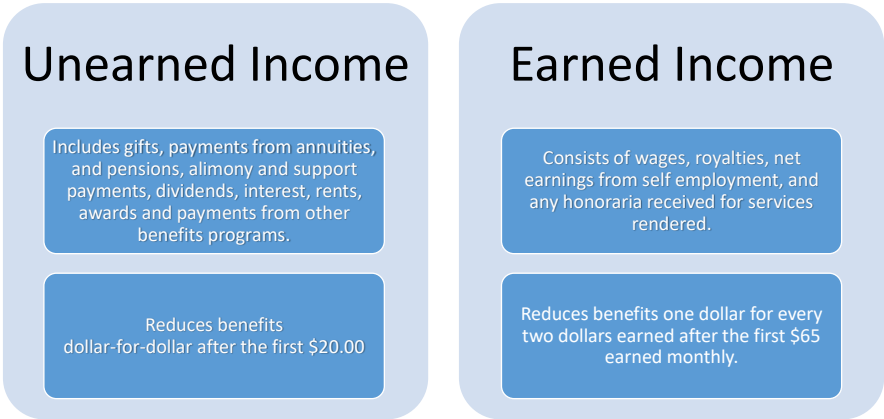
How Is SSI Needs-Based?

- A person cannot exceed certain “countable resources.”
 - \$2,000 for an eligible individual
 - \$3,000 for an eligible couple
- But not all resources are counted! Some are *exempt*:
 - Home of any value
 - Automobile of any value
 - Furniture, clothing, and personal care items
 - Burial plots, certain life insurance contracts, and miscellaneous other assets

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How is SSI Needs-Based?

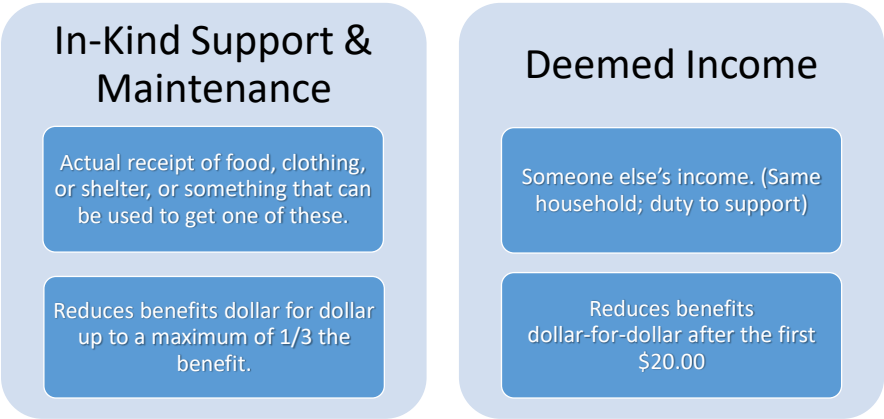
- A person cannot have too much “income” either...



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How is SSI Needs-Based?

- A person cannot have too much “income” either...



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Other Financial Benefits: Social Security & SSDI

- Childhood Disability Beneficiary (f/k/a “Disabled Adult Child”) is Social Security for individuals who:
 - are legally “disabled” before age 22; and
 - have parents who (1) are eligible for the program based on the parents’ work record and (2) are retired, disabled, or deceased (50 or 75% of Parent’s RSDI)
- SSDI is for individuals with a work record.
- *Social Security benefits, including SSDI, may reduce or eliminate SSI.*
- No resource test.
- Medicare after 24 months of SSDI.

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Medical Assistance and Support

- Medi-Cal
 - SSI recipients receive Medi-Cal automatically.
 - Also, as of July 1, 2022, an aged, blind, or disabled person can have up to **\$130,000** (for an individual) or \$195,000 (for a couple) in countable assets and qualify.
 - By January 1, 2024, there will likely be no asset cap at all.
 - BUT we cannot rely on these generous limits to continue forever. Plus, a person can have too much “countable income” and a share of cost will apply.
 - Medi-Cal covers “medically necessary” services, equipment, and hospitalization.
 - Medi-Cal also provides *long-term skilled nursing home care*; physical/occupational therapies; and prescriptions.
 - In-Home Support Services (IHSS) is a Medi-Cal program that allows persons with disabilities to live in their home. It covers (1) housekeeping, (2) cooking, and (3) transportation to doctors. If Personal Care Services are exhausted, **WPCS** may apply.
- Medicare
 - Medicare covers doctor visits, hospital stays, and short-term skilled nursing care.

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How Do These Benefits Work Together?



- Watch out for “dual-eligible” individuals, who may receive both Medi-Cal and Medicare.
- <https://ca.db101.org>

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What is At Stake with Special Needs Planning?

- Legal planning is necessary to empower the right people to step in when someone becomes incapacitated or dies.
- An inheritance can be protected from third parties and from being squandered by an unprepared beneficiary.
- This planning is the only way (currently) that a person with disabilities can inherit and still receive *all* needs-based benefits.
- What’s really at stake? Peace of mind!

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Making Decisions about the Future



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Nathan's Story

Nathan

- 18 years old
- Lives with his mother
- Diagnosed with autism
- Earns income from part-time job
- Receives SSI & Social Security (through deceased father)
- Has few personal assets (clothing, TV, knick-knacks)
- Qualifies for Medi-Cal



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Nathan's Future

- Nathan's mother is concerned about many "unknowns" in his future:
 - Who will make his health care decisions?
 - Who will make his financial decisions?
 - Where will he live?
 - How will his medical expenses be paid?

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What Can Nathan's Mother Do?

- Nothing
- Leave money directly to Nathan in a will or her living trust
- Disinherit Nathan
- Leave money to a person who promises to care for Nathan after she passes away
- Create an effective plan, including a Special Needs Trust

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Creating an *Effective* Plan



Two Key Steps



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Step One: Use a “Third-Party” SNT

- A “third-party” Special Needs Trust (SNT) protects an estate when it passes to a loved one with a disability (safe from outsiders).
- A “safe harbor” that allows a loved one to inherit and benefit from SSI/Medi-Cal/IHSS.
 - It’s the **only way** they can receive an inheritance and still qualify for all benefits!
 - Even if a disabled person can afford private health coverage, remember Medi-Cal also covers long-term skilled nursing home care and IHSS.
- Parents/Settlors can establish an SNT in two ways:
 - through their living trust; or
 - as a trust that stands separately from the living trust.

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Step One: Use a “Third-Party” SNT

- Why use a separate SNT instead of including an SNT in a living trust?
 - A separate SNT allows other family members to contribute.
 - It can be helpful to have a separate trust to receive retirement accounts.
 - The planning can be much more comprehensive than what can be shoehorned into a living trust.
 - BUT the settlor will need to manage the separate trust while still alive.
- Whichever approach is taken, a trustee must be carefully chosen, because the trustee will have discretion over how to use the funds.

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What are the Trustee’s Responsibilities?

The trustee of a Special Needs Trust must be able to accomplish these five tasks:

1. Invest/manage assets as required by law.
2. Exercise discretion to distribute the funds in a way that doesn’t jeopardize asset-sensitive benefits like SSI, Medi-Cal, and IHSS or harm the beneficiary.
3. Keep records that can withstand court and government scrutiny.
4. File tax returns.
5. Hire advocates, care managers, etc., as needed by the beneficiary.

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What are the Trustee's Legal Duties?



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Who Should Be Trustee?

- There are three main choices:
 - Nonprofessional (family member or friend) *with* professional advisors
 - A corporate trustee (i.e., a bank's trust department)
 - A California Licensed Professional Fiduciary
- What if a successor trustee resigns, gets sick, or doesn't work out?
 - Consider using a "Trust Protector" who can request/direct the trustee's resignation or appoint a vacancy.
 - Best approach is to think through all these issues ahead of time.

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What Can a Special Needs Trust Buy?

- ***If*** the trustee understands how the benefits programs work, and ***if*** they know what their legal duties require in the short and long term, they can meet just about any need the beneficiary has.
- We draft our special needs trusts to be ***discretionary***, meaning that the trustee can opt in and out of benefits (subject to their legal duties to the beneficiary).
- We also draft our trusts to work with ABLE Accounts, which allows even more flexibility.

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Step Two: Create a Letter of Intent

- The Letter of Intent is likely the most important “non-legal” document in a special needs plan.
- It lays out the settlors’ goals and expectations for their loved one.
 - Details preferences for meeting the beneficiary’s unique requirements.
 - Lists the key people who should be involved in the person’s life.
- It helps guide the key players, including family members, trustees, and caregivers.
- It may even be used to interpret intent, which is why **it should be reviewed by the planning attorney**.

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Moving Forward: What Can Be Done?

- Establish a plan, including a Special Needs Trust.
- Create a Letter of Intent.
- Prepare “to fund” the SNT with assets that meet the grantor’s objectives (e.g., life insurance).
- Determine whether the person with disabilities can execute legal documents.

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If the Person Can Sign Documents...

- The key question is whether the person with disabilities has capacity.
- If an adult with a disability has legal capacity, they should sign a power of attorney and an Advance Health Care Directive.
 - These steps will prevent the need for a conservatorship.
 - A good lawyer can help ensure the documents withstand scrutiny.
 - You can’t do this planning in an emergency.
 - It sure helps to have a cooperative primary care physician.
- If an adult with a disability does not have capacity, then consider a conservatorship.

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Conservatorships



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Conservatorship: If the Person Can't Sign Documents

- A conservatorship is essentially a court-established guardianship of an adult. It can cover their **estate** and/or their **person**.
- Conservatorships can be **general** or **limited**.
 - General conservatorships give the conservator with control over the life, financial, and health decisions of a person with a disability.
 - Limited conservatorships are only available for persons with developmental disabilities and give the conservator only so much control as is absolutely necessary to promote independence; regional center assessment is required; conservatee must have own lawyer (court-appointed).
 - As of this year (2023), a person with developmental disabilities can only have a limited conservatorship, unless they also have dementia.

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Conservatorship: If the Person Can't Sign Documents

You might be able to establish only a conservatorship of the person if there is a “representative payee” for benefits, the person does not have an estate, *and* you use a Special Needs Trust to cover inheritance.

If there is a conservatorship of the estate established, the conservator must account to the court after a year and then every two years after that.

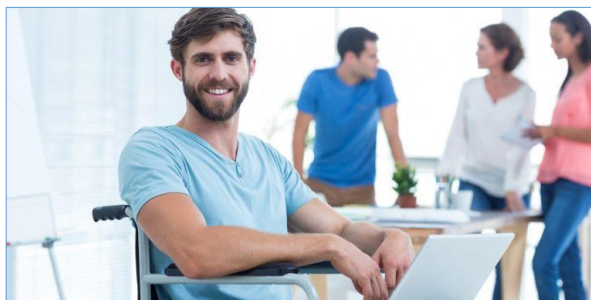
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If the Person Already Has Assets

- If the person with disabilities has assets other than personal property, they have an “estate” and planning is important.
- A “first-party” SNT might be necessary.
 - It will (1) provide funds for expenses not covered by other income sources and (2) allow the person access to all needs-based public benefits.
 - In most cases, the “first-party” SNT must be established by a parent, grandparent, or a court. But people with capacity can now do it themselves!
 - Unlike the “third-party” SNT included in an estate plan, the “first-party” SNT must provide that the state will be reimbursed for all Medi-Cal expenses.
 - A first-party SNT does not protect assets from creditors.
- The person with disabilities could potentially fund an ABLE account.

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ABLE Accounts



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ABLE Accounts

Achieving a Better Life Experience (ABLE) accounts:

- Enacted on December 18, 2014, modified by Tax Cuts and Jobs Act of 2018.
- Allows tax-advantaged savings accounts for people w/ disabilities.
- A person can fund his/her own ABLE account.
- California has implemented (calable.ca.gov); other states, too (ablenrc.org).
- Similar to a 529 Educational Plan, in that some states allow out-of-state residents to establish an account. (Rollovers from 529 to 529A allowed.)
- A person may retain Medi-Cal as long as disbursements are for “qualified disability expenses” and the ABLE balance is ≤ \$475,000 (in California).
- A person may retain SSI as long as disbursements are for “qualified disability expenses” and the ABLE balance is ≤ \$100,000 (nationwide).

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ABLE Account FAQs

1. Who can use? A person disabled before 26.
2. Who can fund? Anyone, including designated beneficiary (or a trust).
3. Who many can a person have? Only one ABLE account/person
4. Who can control? Person with disability or their parent, guardian, conservator, or agent.
5. Who inherits on death? Named beneficiaries or... Medi-Cal?
6. How much may be funded? \$17,000/year (annual gift exclusion), plus beneficiary may contribute from earnings up to the annual federal poverty level for a one-person household (\$14,580 in 2023).
7. Is funding gift-tax free? Yes.

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ABLE Account FAQs (cont'd)

8. Is income generated by the account taxable? Not if used for QDEs.
9. What constitutes a "qualified disability expense?" QDEs must relate to the beneficiary's disability. They include, w/o limitation: education; housing;* transportation; employment training and support; assistive technology and related services; personal support services; health; prevention and wellness; financial management and administrative services; legal fees; expenses for ABLE account oversight and monitoring; funeral and burial; and basic living expenses. **Funds from the ABLE account used to pay for housing for an SSI recipient must be spent within the same calendar month that funds are withdrawn. (See POMS SI 01130.740.)*
10. Can real-estate or non-cash assets fund an ABLE account? No.

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ABLE Accounts Conclusion

- Contributions to an ABLE account may be made by an SNT. This produces some interesting results. For example, an SNT cannot give cash to an SSI recipient w/o affecting the SSI, but an ABLE account owner can have a debit card. If an SNT contributes cash to an ABLE account, this “legally launders” that cash to the SSI beneficiary!
- If someone pays \$1,000 rent for an SSI recipient, that counts as in-kind support (ISM) and, generally, reduces the SSI by ~\$300 for that month. But if the same person contributes the cash to an ABLE account, and if that amount is used for rent, there is no ISM.
- ABLE accounts don’t replace third-party SNTs, e.g., due to funding limits.
- Some beneficiaries will not have capacity to manage their ABLE accounts.

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The Consequences of Procrastination



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Consequences of Procrastination

- The government has a plan if we do nothing:
 - A judge will decide.
 - This is a plan most people probably wouldn't like.
- Thanks to changes in D.C., we have a fairer and more predictable estate-tax system than in the recent past.
 - But things can change. Failing to plan means failing to prepare.
 - Anyone with an estate over \$12.92* million will need extra planning.

*This number will drop in 2026. (Don't forget life insurance.)

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Consequences of Procrastination

- Regardless of what happens with the estate tax, everybody in California must worry about probate.
 - Probate is "a lawsuit you file against yourself, using your money, for the benefit of your creditors."
 - It's expensive, costing roughly 5% of a person's gross estate.
 - It's slow, taking 12 to 16 months on average in California.
 - It's public, meaning anyone can find out what a person leaves and to whom – especially unfortunate when there is a vulnerable beneficiary.

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Consequences of Procrastination

- The consequences become even more pronounced when there is a beneficiary with special needs.
 - Even a small inheritance will require expensive planning to preserve access to critical benefits.
 - When the person with disabilities passes away, what's left will be used to "pay back" the state for Medi-Cal coverage.
 - The opportunity to maximize assets is missed.
 - Other consequences: family frustration, fighting, unnecessary burden on non-disabled beneficiaries, estate taxes.
 - ***Who will be there for the family if the grantor can't be?*** This planning isn't just about documents, it's about getting help when it's needed.

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Your Next Steps

- Form your planning team.
- Feel free to call us at (916) 273-9040 or visit www.wyattlegal.com.
- Email teri@wyattlegal.com to request a copy of these slides and/or to sign up for our Special Needs Planning e-newsletter.

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Questions and Answers

