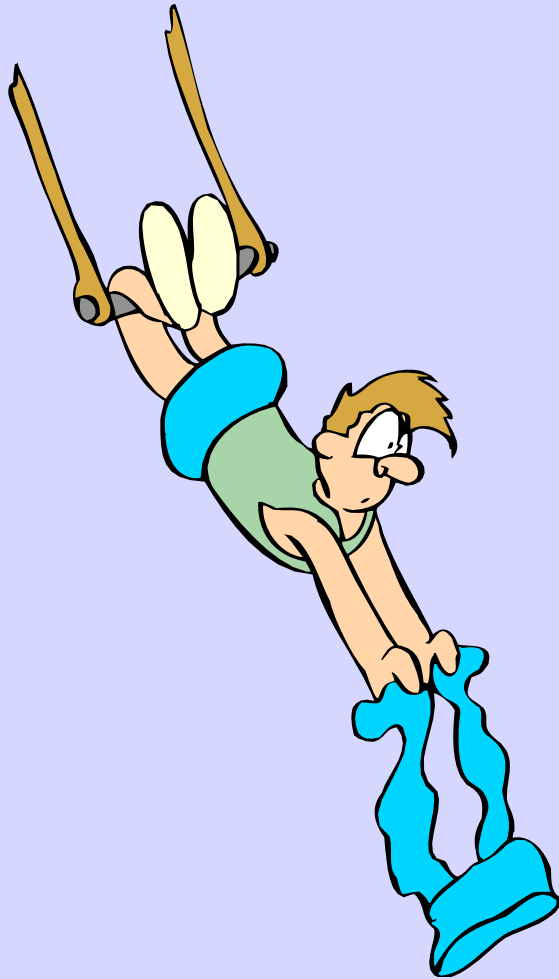


Issues in Special Needs Trust Planning



Presented By:

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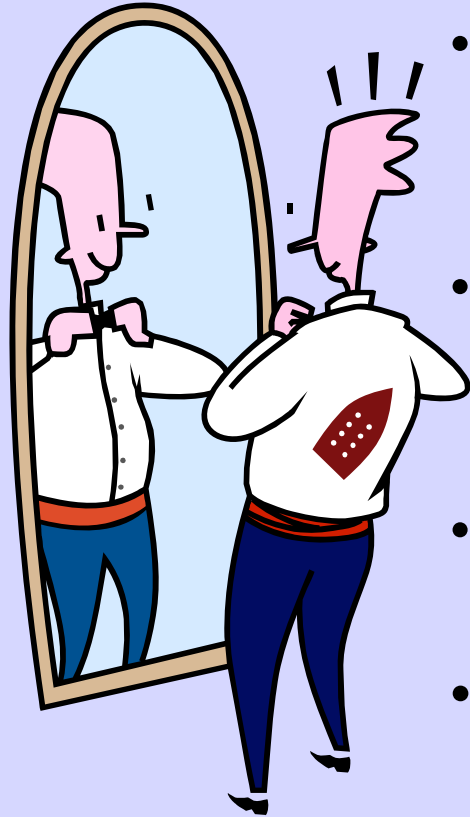
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Facts of Life

- Persons with disabilities are living longer and public benefits are often necessary
- There is no guarantee that public benefits will provide adequate resources over their lifetimes
- There is no guarantee that public agencies will be there to provide acceptable services and advocacy over a disabled person's lifetime

Issues in Special Needs Trust Planning



- **Preserve the right benefits**
 - Is the benefit an entitlement or “needs based”?
 - What is the “value” of the benefits?
- **Consider all alternatives**
 - Is the beneficiary willing to pay the price
 - Is the trust cost effective?
- **Draft the correct trust**
 - 3rd Party SNT, Self-Settled SNT, or Marital
- **Apply the correct law**
 - Overly restrictive distribution standard
- **Choose the right trustee**
- **Deal with all assets**
 - Special Issues with qualified plans
 - Assignment of Structured Annuities

Preserve the Right Benefits



- Is the benefit an entitlement or “needs based”?
- What is the “value” of the benefits?

Public Benefits Basics

Benefits not based on financial need

- Social Security
- Medicare
- Special Education
- Most Regional Center Benefits (for now)

Benefits based on financial need

- Supplemental Security Income (SSI)
- Medi-Cal (Medicaid)
- Food stamps, legal aid, and utility payment assistance
- Housing subsidies (H.U.D. or Section 8)
- In Home Support Services (IHSS)

Benefit Basics

Needs Based Benefits

Benefits based on
Entitlement

Cash
Assistance

Supplemental
Security Income



Social Security

Medical
Assistance

Medi-Cal



Medicare



Supplemental Security Income

Supplemental
Security Income




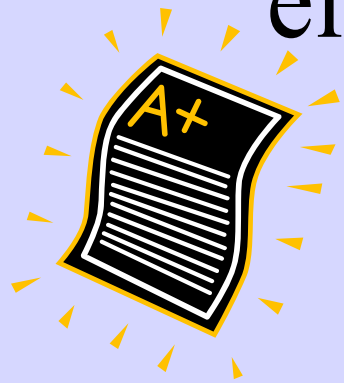
SSI is intended to pay for the beneficiary's food, clothing, and shelter and nothing more.



Two tests determine eligibility for SSI

 –Income test determines how much is received.

 –Resource test determines eligibility





Types of SSI Income



Unearned Income	Earned Income	In-Kind Support & Maintenance
Includes gifts, payments from annuities and pensions, alimony & support payments, dividends, interest, rents, awards and payment from other benefit programs.	Consists of wages, royalties, net earnings from self-employment, and any honoraria received for services rendered.	Actual receipt of food, clothing, or shelter, or something that can be used to get one of these.
Reduces benefits dollar for dollar after the first \$20	Reduces benefits one dollar for every two dollars after the first \$65 earned monthly	Reduces benefits dollar for dollar up to a maximum of \$208 in 2004

Basics Of SSI Eligibility

Resources



- Anything that can be converted to cash for support is a resource.
- If resources exceed \$2,000 on the first day of a calendar month, the beneficiary's public benefits will be lost until resources are reduced.
- Assets that the beneficiary does not have the legal right to demand are not counted for SSI purposes.



BASICS OF SSI ELIGIBILITY

Exempt Resources

- A home, if the beneficiary has an ownership interest and it serves as his/her principal residence.

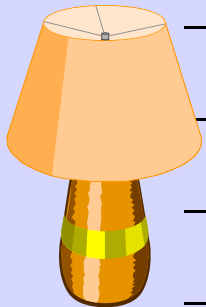


BASICS OF SSI ELIGIBILITY



Exempt Resources

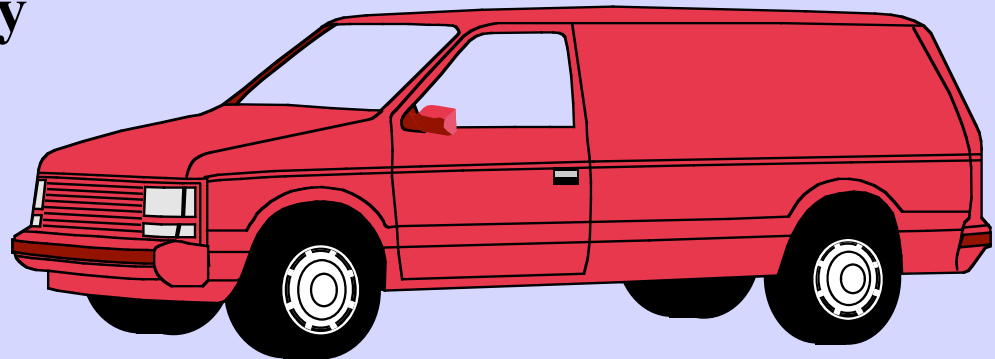
- Household goods all together worth no more than \$2,000 market value
 - furniture,
 - furnishings,
 - household equipment,
 - personal effects such as clothing,
 - jewelry,
 - items of personal care and education,
 - musical instruments



BASICS OF SSI ELIGIBILITY

Exempt Resources

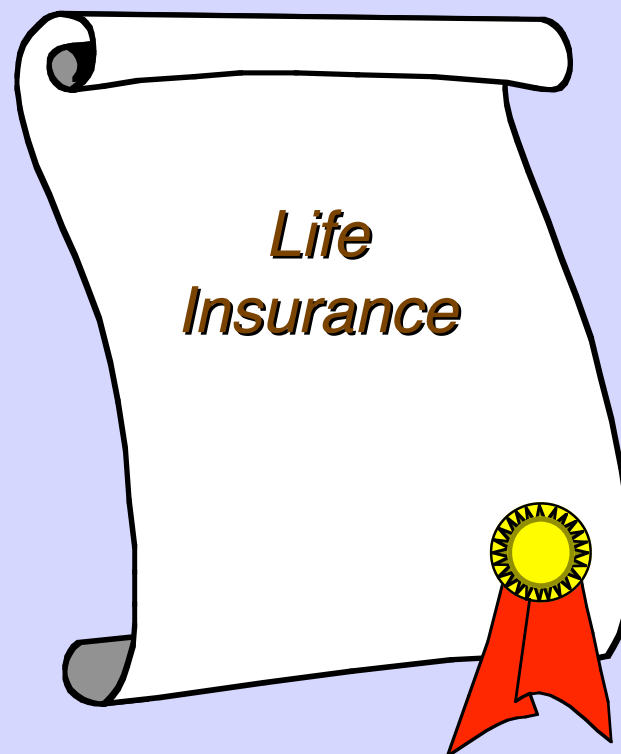
- **One automobile is totally excluded regardless of value if, necessary for employment, medical treatment, modified for operation by or transportation of a handicapped person; or is necessary to perform essential daily activities.**
- **If no exclusion applies automobile is excluded to the extent current market value does not exceed \$4,500 and**
- **Any other automobiles are treated as nonliquid resources and counted against the resource limit to the extent of the individual's equity interest in the vehicle.**



BASICS OF SSI ELIGIBILITY

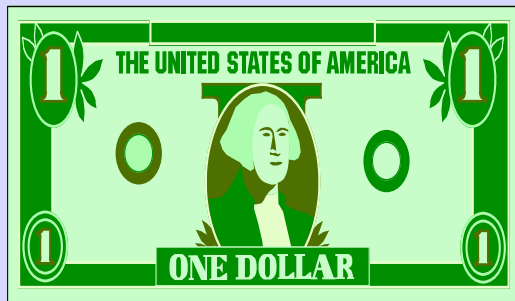
Exempt Resources

- Life insurance policies with cash surrender value, if their total face values amount to less than \$1,500, and
- All term life insurance.
- A burial plot, or other burial space, worth any amount.



BASICS OF MEDI-CAL ELIGIBILITY

- If an SSI beneficiary receives at least \$1 of SSI, the beneficiary then receives full scope free Medi-Cal automatically.



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Benefit Basics

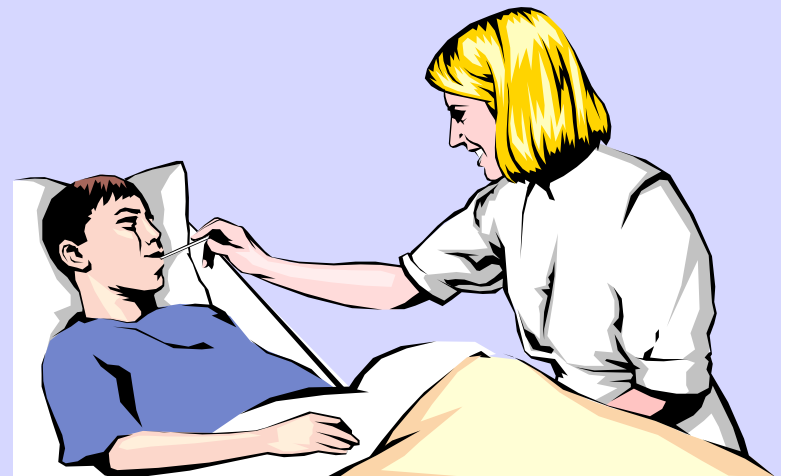
☛ Covered health services include:
“medically necessary” durable medical equipment, medical services and treatments, hospitalization including nursing care and dental care, and many regional center



benefits including residential programs.

In-Home Support Services

- Services in the home to assist persons who receive SSI and/or Medi-Cal who require services in order to remain safely in their own homes.
- Includes personal care services, domestic services, related services (meal preparation, laundry services, shopping, etc.) and accompaniment services to medical appointments or programs.
- An include paramedical services and protective supervision, when necessary.



Benefit Basics

☞ A disabled child may be eligible for Social Security if a parent is eligible and the child's disability began before age 22.

Social Security



Benefit Basics

Social Security



☞ Benefits do not become payable until the eligible parent dies, retires, or becomes disabled.

Benefit Basics

Social Security



☞ Social Security is not affected by the child's assets, but the child's income may result in an ineligibility determination.

Social Security



- Upon the disability or retirement of the parent, an eligible disabled child will receive an amount equal to $1/2$ of the parent's benefit
- Upon the death of the parent, an eligible disabled child will receive an amount equal to $3/4$ what the parent's SSA benefit.

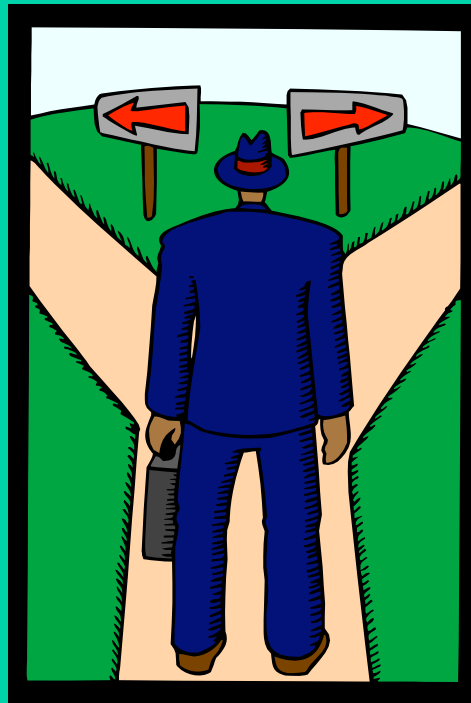
Benefit Basics

- Medicare is a federal health insurance program for people over 65 and people under 65 who have been receiving Social Security based on disability for two or more years.
- Persons can be eligible for both Medicare and Medi-Cal.
- Medi-Cal is payor of last resort and covers long term care costs.



Consider All of The Alternatives

- A Special Needs Trust is not always the right answer

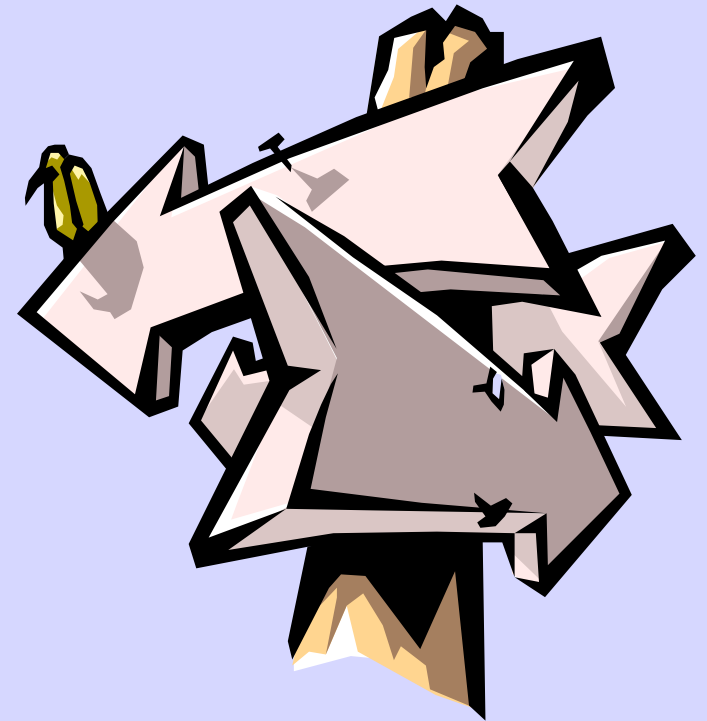


Alternatives leading to uncertainty about the beneficiary's future

- Disinheritance
- Leaving Residence or other exempt assets directly to the beneficiary
- Guardianship of the Estate
- Forgo public benefits
 - Beware of fraud – hiding of assets inherited by persons with disabilities is common

Alternatives that May Work Temporarily

- Purchase Exempt Resources
- Pay off Debt
- Prepay Bills



Drafting the Right Trust

- Not all Special Needs Trusts are the same
- The practitioner needs to determine which trust form is appropriate
- Trust needs to have the right distribution standards
- Also – the practitioner needs to determine whether they have capacity to transfer the assets into the Special Needs Trust



Types of Special Needs Trusts

Source of Funds Who Establishes Trust Distribution Upon Death Third Party A1

Special Needs Trusts can be:

- Testamentary trusts as part of the parent's living trust or will
- Stand alone Special Needs Trust with a pour over provision in the parent's living trust:
 - Allows other family members or loved ones to contribute to the trust
 - The management issues in a Special Needs Trust are different than most living trusts and require more detail
 - Allows greater privacy

Special Needs Trusts can be divided into Two Categories

- If the source of the funds are from someone other than the benefits recipient, the trust is categorized as a Third Party Special Needs Trust
- If the source of the funds of the Special Needs Trust are from the benefit's recipient, then the trust is categorized as a self settled or MediCal Payback Trust

Choose the Right Distribution Standard

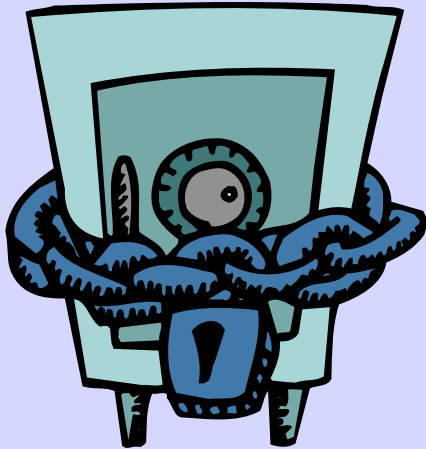
- Many trusts are still drafted with overly restrictive distribution clauses



Setting Objectives

- Proper planning will focus on achieving as much independence as possible for the disabled beneficiary
- Benefits alone should not be the sole planning objective

Elements of a Special Needs Trust



- A Trust is a contract to control property for the benefit of a beneficiary to meet some objective
- A special needs trust is drafted specifically so trust assets are considered not to be "available resources" in calculating the disabled person's resources.

Elements of a Special Needs Trust

- The Social Security Administration describes a discretionary trust as “a trust in which the trustee has full discretion as to the time, purpose and amount of all distributions.”
- If the beneficiary has no discretion over the distributions, the trust is not counted for SSI eligibility.



Supplemental and Discretionary Special Needs Trusts

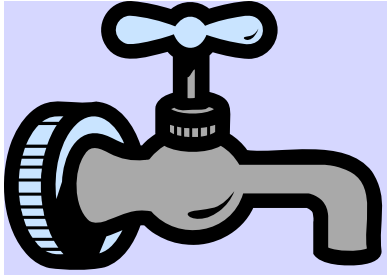
- A Supplemental Special Needs Trust only allows distributions that do not in any way reduce needs based benefits
- A Discretionary Special Needs Trust allows greater flexibility but requires greater skill in administration.



Supplemental and Discretionary Special Needs Trusts

- THEREFORE TRUST ASSETS FROM A SUPPLEMENTAL SPECIAL NEEDS TRUST CAN NOT BE USED FOR FOOD, CLOTHING OR SHELTER FOR SSI RECIPIENTS





Example – Water water everywhere but not a drop to drink

- Man injured in auto accident agrees to a settlement in excess of \$1,000,000
- He requires 12 hours attendant care a day as well as large expenditures for medication – opts to have a Special Needs Trust drafted.
- Special Needs Trust is a supplemental trust that forbids distributions for food, clothing and shelter.
- Man must pay for his basic needs from SSI (currently \$757 a month). He is living in a slum while trust is building in value

Examples: Discretionary Trusts

In making any distribution, the Trustee:

- Shall consider any other known income or resources of the beneficiary and reasonably available
- Shall take into consideration all benefits available from any government agency, such as Social Security disability payments, Medicare, Medi Cal, SSI, In Home Support Service, and any other special purpose benefits of which the beneficiary is eligible
- Shall consider resource and income limitations of any such assistance program
- Shall make expenditures so that the beneficiary's standard of living will be comfortable and enjoyable
- Shall not be obligated to or compelled to make specific payments
- Shall not pay or reimburse any amounts to any government agency or department, unless proper demand is made by such government agency and reimbursement is required by the State
- Shall not be liable for any loss of benefits

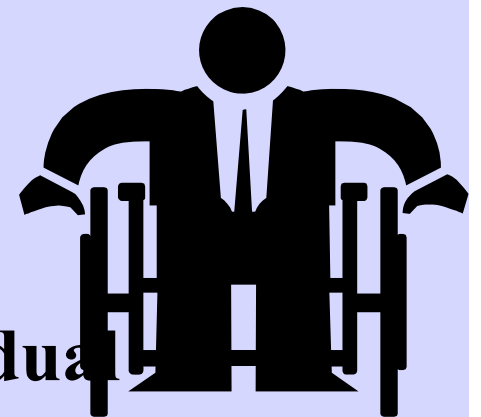
Apply the Correct Law

- Self Settled Trusts follow **federal law** but may be subject to **California law** if money or other property is to be paid for the benefit of a minor or incompetent person under a **compromise, covenant, order or judgment**



MediCal payback trusts under 42 U.S.C. 1396 p (D)(4)(A) continue MediCal Eligibility of

- (A) A trust containing the **assets of an individual** under age 65 **who is disabled**
- and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court
- ...if the State will receive all amounts **remaining** in the trust upon the death of such individual **up to the total medical assistance paid on behalf of the individual** under a State plan under this subchapter.



California Probate Code §3610.

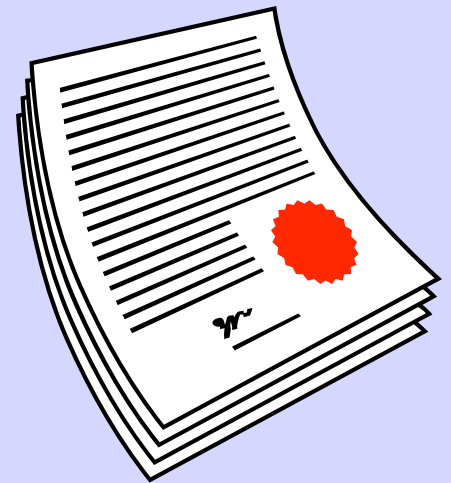
Court-Ordered Payment



- When money or other property is to be paid for the benefit of a minor or incompetent person under a compromise, **covenant, order or judgment**, and there is no guardianship of the estate of the minor or conservatorship of the estate of the incompetent person, the remaining balance of the money shall be paid, delivered, deposited, or invested as **provided in this article**.

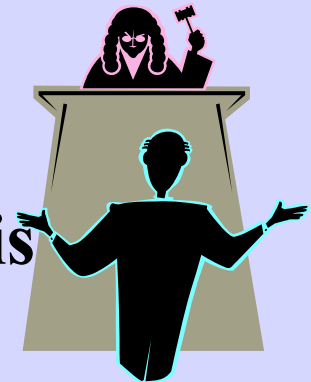
Probate Code §3611 Order Disposition of Funds

- (c) the remaining balance of any money be paid to a **special needs trust established under Section 3604**



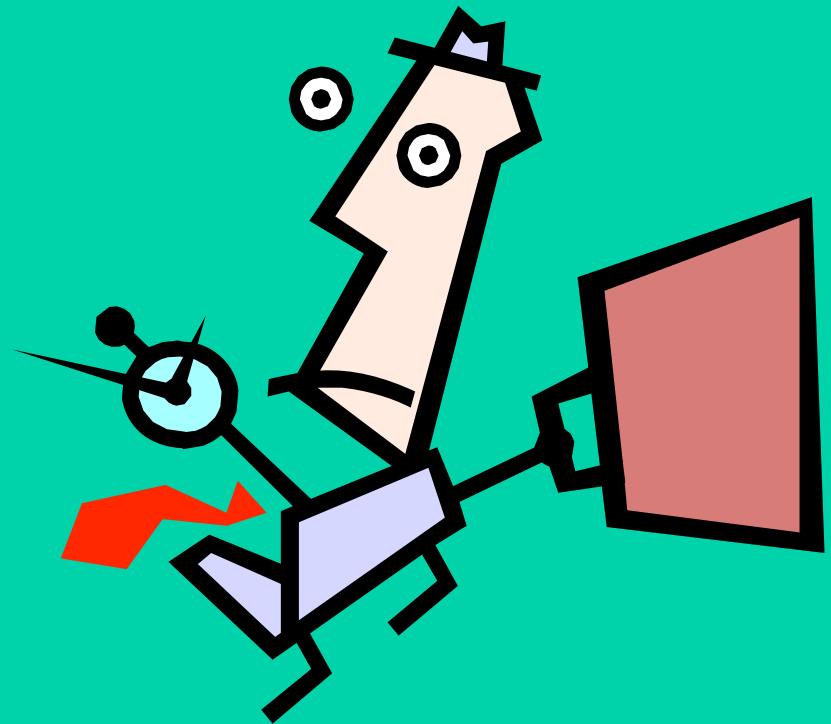
A Special Needs Trust Under Probate Code 3604 Can Only Be Established If the Court Determines all of the Following

- (d) A court order under Section 3602 or 3611 for payment of money to a **special needs trust shall include a provision that all statutory liens in favor of the State Department of Health Services, the State Department of Mental Health, the State Department of Developmental Services, and any county or city and county in this state shall first be satisfied.**



Select the Correct Trustee

- The majority of problems come from inappropriate trustees being named in Special Needs Trusts



THE IDEAL TRUSTEE

- Must understand public benefits
- Will use discretion in the best interest of the disabled beneficiary
- Can wisely invest and conform to all statutory fiduciary requirements
- Understands taxes
- Keeps perfect books
- Carries insurance, is bondable or has deep pockets
- Can identify second rate services or abuse
- Is immortal

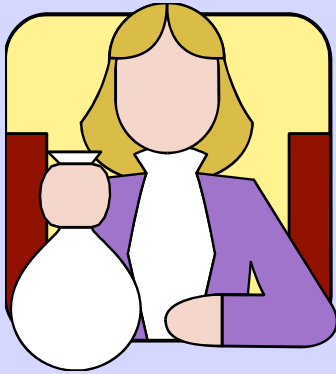


Choose a management system and team to carry out your intent

- Many Special Needs Trusts fail because of ill equipped Trustees
- We have found that a system of checks and balances works best in trust administration.
- Divide the duties into three categories
 - Financial
 - Personal including advocacy, care management, benefits
 - Accountability



Model 1 – the Trustee directed by a Trust Advisory Committee.



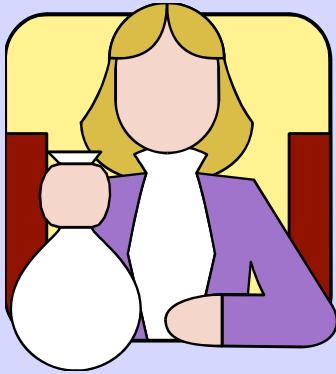
Trustee

- The Trustee can be directed by a Trust Advisory Committee which can direct distributions or replace the Trustee



Advisory Committee

Model 2 – the Trustee directed by a Care Manager.



Trustee

- The Trustee can be directed by a Care Manager.
- The Trustee manages the funds
- The Care Manager interacts with the beneficiary
- The Trust Protector oversees the Trustee and Care Manager from a distance and can replace either for any reason



**Care
Manager**

**Trust
Protector**



Model 2 –Don't Name the Same Person as Trustee and Care Manager

The Care Manager has many of the same responsibilities as a “skilled” parent :

- Choose from among residential choices
- Determine & implement a therapeutic &/or vocational &/or social plan for the beneficiary
- Supervise medical professionals and caregivers
- Advocate for the beneficiary at School & Regional Center
- Maintain involvement of family and friends
- Ensure the beneficiary's quality of life

Model 2 –Don't Name the Same Person as Trustee and Care Manager

The Trustee has all of the same duties as any other Trustee with additional duties to:

- Consider the impact on benefits of every distribution
- Assess the beneficiary's ability to be self supporting &/or manage money if the circumstances change
- Manage the assets to last a lifetime
- Respond to SSI/Medi-Cal audits
- Consult with Advocates or a Trust Advisory Board
- Approve distributions that are highly medical-technical

Model 3 – Co-Trustees

- For smaller trusts, or trusts where the beneficiary can advocate for themselves Co Trustees with the power to seek assistance from benefit, tax and financial advisors may adequate.



Co Trustees

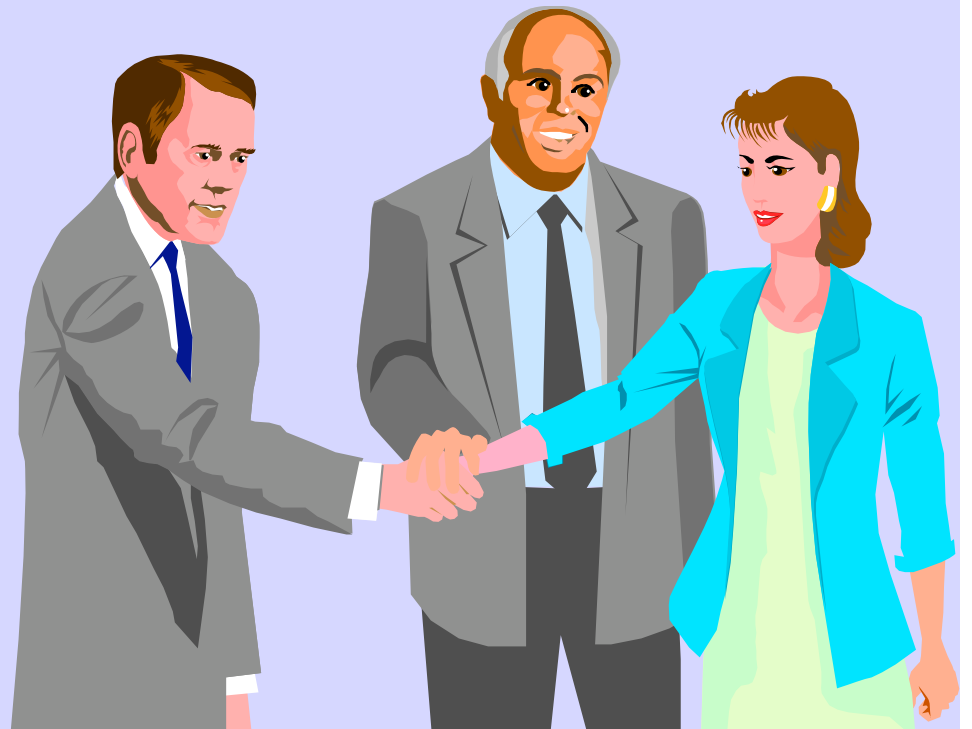
Which Model Should you Choose?

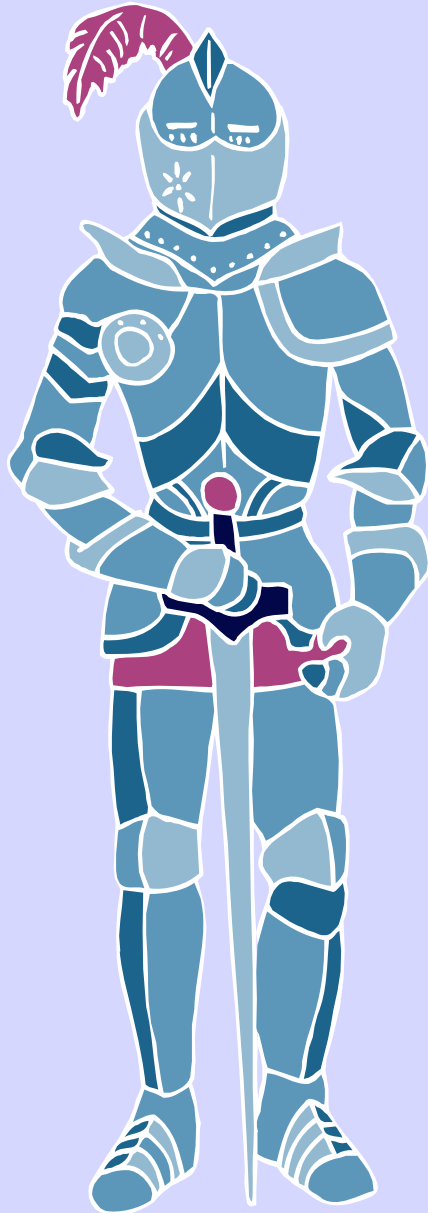
- The choice of which model is right for your situation will depend upon
 - The beneficiary's disability and unique needs
 - The amount of funds in the trust
 - The need for advocacy and care managers
 - The proximity of the Trustees or advisory committee members



SELECTION OF MANAGEMENT TEAM MEMEBERS

- Family or friends,
- Professional fiduciary,
- Trust Company,
- C.P.A.,
- Private Socialworker or Case Manager,
- Or a combination of the above.



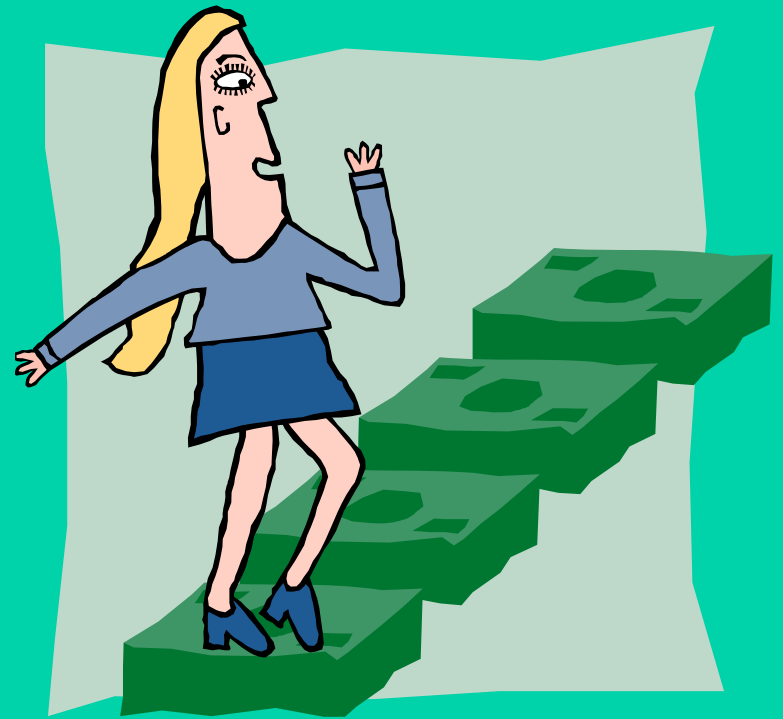


Trust Protector

- A Trust Protector oversees how the trust is managed, without day to day involvement
- The Trust Protector reviews accountings and assessments from the care manager
- The Trust Protector may hire and fire the trustee or care manager without cause
- A Trust Protector can be a professional, family or friends.

Deal With All of the Assets

- Retirement Plan Beneficiary Designations
- Structured Annuities
- Probate Issues



Retirement Plans

- Naming the trust as beneficiary
- Make sure that trust qualifies as beneficiary of a qualified plan
- Deal with qualified plans before death

Qualified Annuities

- It is very common for large settlements to have all or a portion of the settlement placed in a structured annuity
 - Annuity must be irrevocably assigned to the trust
- Major problems arise when too much is placed in the Special Needs Trust without considering other needs
 - Trustee issues
 - Housing
 - Estate Taxes