



POAs, Guardianships, Disability Benefits, and Special Needs Trusts

Matt Bellinger, Esq.

When Your Child Turns 18

Decision Making Rights - transfer from you to your child

- Legal presumption of capacity
- Medical decisions
- Educational decisions
 - Receive notice of and attend IEP meetings
 - Consent to reevaluation
 - Consent to change of placement

Eligibility for Disability Benefits

- SSI
- Medicaid

Countable Resource Limits – to maintain eligibility

Incapacitated Person - Definition

An adult - who is incapable of:

- Receiving and evaluating information effectively
or
- Responding to people, events, or environments

To such an extent that - he or she lacks the capacity to:

- Meet essential requirements for health, care, safety, or therapeutic needs
- Manage property or financial affairs without assistance

Poor judgment alone - shall not be considered sufficient evidence ¹

¹ Excerpts from Va. Code § 64.2-2000.

Alternatives to Guardianship

Durable Power of Attorney (finances and contracts)

- Adult-child with capacity to sign a power of attorney
 - Capacity here = understanding the power he or she is giving to his or her Agent
- Gives family member the authority to act as his or her Agent
- Takes away no rights from your adult-child

Advance Directive for Healthcare (medical decisions)

- Includes medical power of attorney and HIPAA release
- Not as certain as guardianship

Power of Attorney for Education (educational decisions)

- Agent can help make decisions at IEP meetings

Representative Payee

- For SSI / SSDI payments

Guardianship in Virginia

Guardianship – over the person

- Where to live & medical decisions
- Lose right to own firearm, marry, drive, vote
- May be limited
- Rights to drive and vote may be retained
- Rights can be restored
- Standby guardians can be appointed

Conservatorship – over finances

- Pay bills, open accounts
- Protect from bad influences
- Typically not needed – as Representative Payee, you will control income
- Annual/triennial accounts to Commissioner of Accounts

Both are court proceedings - can be combined

Guardian / Conservator - supervised by court

Recent Changes to the Virginia Code

Periodic Review Hearings: Courts are now required to set a schedule for periodic review hearings. The first review hearing has to be scheduled no later than 1 year after the initial guardianship hearing. Subsequent review hearings can be scheduled up to 3 years later. This requirement can be waived.

Restricting Visitation: Guardians may not restrict visitation with the incapacitated person unless it is necessary to prevent physical, mental, or emotional harm. If a Guardian decides to restrict someone's visitation, they must be provided with written notice and copies of the written notice must be provided to the local DSS and to the Circuit Court.

Required Visitation: If the incapacitated person does not live with the Guardian, then the Guardian must visit them as often as necessary to be able to make informed decisions for them, but in any case not less than 3 times a year, with at least 1 visit occurring every 120 days. Guardians must visit in person at least 1 time per year but the other visits may be done via virtual conference or video call.

Duties of a Guardian²

- A guardian must file an annual report with their local department of social services. There is a \$5 filing fee.
- A guardian is not liable for acts of the incapacitated person unless the guardian is personally negligent.
- A guardian shall not be required to expend personal funds on behalf of the incapacitated person.
- A guardian's duties and authority shall not extend to decisions addressed in a valid advance directive or durable power of attorney.
- A guardian shall be required to seek prior court authorization to:
 - Change the incapacitated person's residence to another state; and
 - To initiate a change in the person's marital status.
- A guardian shall, to the extent feasible, encourage the incapacitated person to act on his or her own behalf.
- When making decisions, a guardian shall consider the expressed desires and personal values of the incapacitated person to the extent known.

² Excerpts from Va. Code § 64.2-2019.

Questions?

Disability Benefits

Income:

1. Supplemental Security Income (SSI)
2. Social Security Disability Insurance (SSDI)
3. Childhood Disability Benefits (CDB)

Healthcare:

1. Medicare
2. Medicaid

Supplemental Security Income (SSI)

- Federal benefit for persons that are disabled, blind or age 65 +
- Income limit (SGA) = \$1,620 per month (2025)*
 - *work incentives allow someone to make more \$\$ and retain SSI eligibility (even if no payment), Medicaid and Medicaid waiver services
- Countable resource limit = \$2,000
- Parental “deeming” of income and assets ends at age 18
- Max benefit of \$967 per month (2025)
- Meant to pay for living arrangements
 - Charge fair share to avoid 1/3 SSI reduction
- Earned income reduces SSI but work incentives apply to reduce effect
 - ALWAYS make more money with SSI and work!
- Unearned income reduces SSI on a \$ for \$ basis

Note: Although SSI is administered by the Social Security Administration, it is **not** part of the Social Security Act. Funding for SSI comes from the annual federal budget.

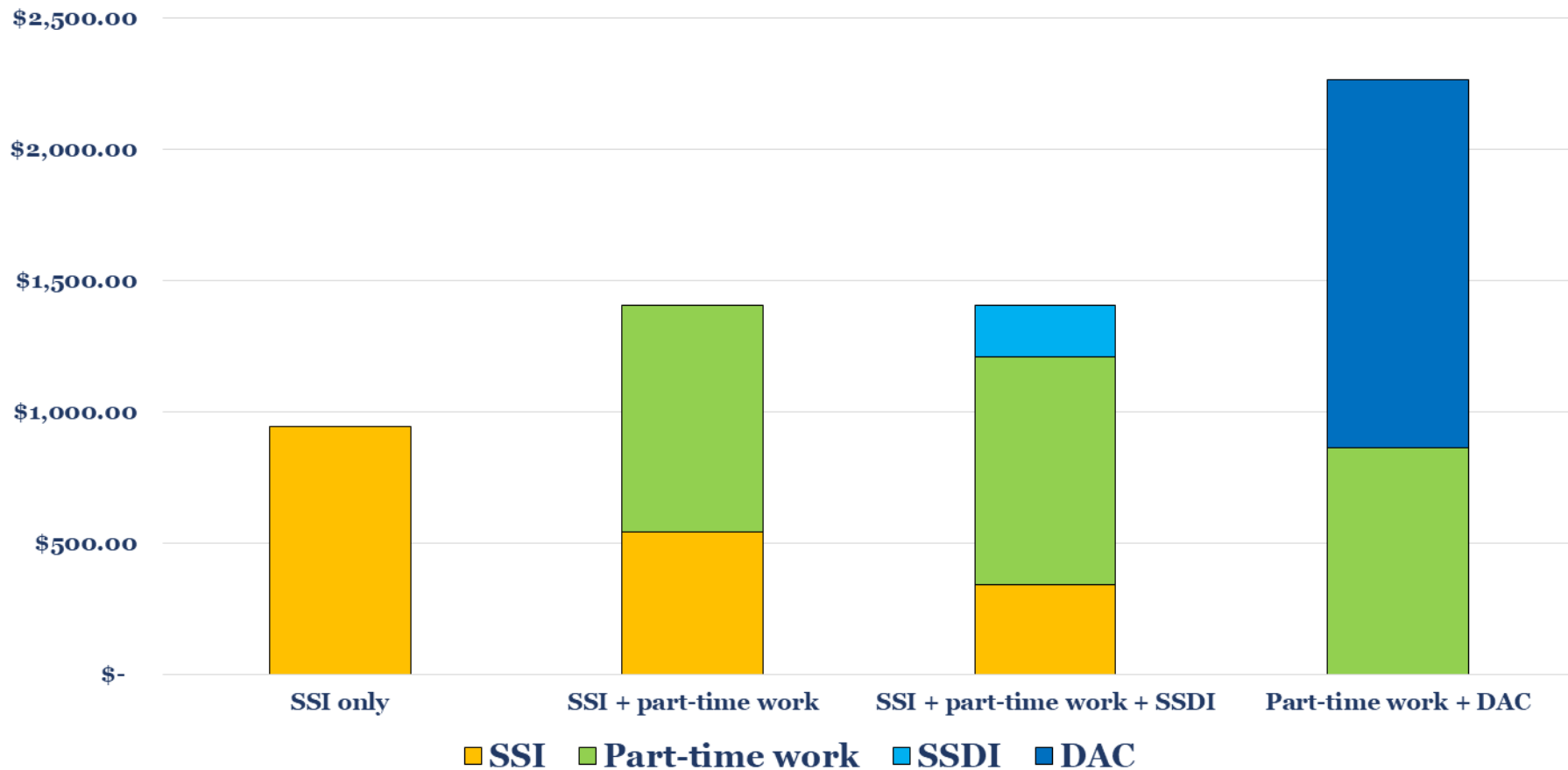
Social Security Disability Insurance (SSDI)

- Same disability requirements as SSI
- Have to be working and paying payroll taxes
- Eligibility based on work history and credits
 - Persons disabled before age 24 may qualify with 6 credits earned in a 3-year period
- Automatic enrollment but you may want to ask SSA caseworker after a couple years of part-time work
- Considered to be unearned income for SSI - reduces SSI on a \$ for \$ basis
 - So there is NO net increase in income
 - But SSDI has a more reliable funding stream
 - And it comes with Medicare (see slide 16)

Disabled Adult Child Benefit (DAC)

- Formerly known as the Childhood Disability Benefit (CDB)
 - Also know as “SSDI off of a parent’s work record”
- Adult-child can draw disability benefit off of a **parent’s** work record if he or she:
 - Was disabled before the age of 22; and
 - Is unmarried
- Eligibility starts when the parent:
 - Retires and draws social security;
 - Becomes disabled and draws SSDI; or
 - Passes away
- Considered to be unearned income for SSI – typically wipes out SSI
 - But total income increases

Income Sources Over Time (for adult children with disabilities)



Questions?

Medicaid

- Joint federal and state program that helps pay for medical care for persons that are disabled, blind or age 65+
- Administered by the states
- Income limits vary by state
- Countable resource limit of **\$2,000**
- 5 year look back period for transfers for less than full market value
- Considered disabled if receiving SSI or SSDI
- Always payor of last resort

Note: Medicaid pays for long-term nursing care; Medicare does not

Medicare

- Federal health insurance program for people age 65+ and younger persons with disabilities
- Disabled adult-child will become eligible after receiving SSDI for 2 years
 - Or when he or she becomes eligible for Disabled Adult Child Benefits off of your work record
- Medicare will likely be your adult-child's primary long-term medical insurance

Note: When your adult-child becomes eligible for Medicare, he or she ***must*** accept Part A (free) and Part B (monthly premium) coverage.

1. Private insurance → 2. Medicare → 3. Medicaid

Questions?

Third-Party Special Needs Trust (3P-SNT)

- Created by a family member and funded with ***family*** members' money
- Assets in a 3P-SNT do not count as resources for SSI, Medicaid and Medicaid waiver eligibility
- Typically empty until you pass away
 - Funded by your Wills and beneficiary designations on life insurance, IRAs, 401Ks, and brokerage accounts, etc.
- Successor Trustees manage assets and use them to supplement disability benefits and improve your son or daughter's quality of life
- 3P-SNTs can own any investment that a person can own
- 3P-SNTs can own real estate
- 3P-SNTs pay their own taxes, once funded, and have their own tax ID number
- NO payback clause
 - Assets left in the trust when the beneficiary passes go to family

First-Party Special Needs Trust (1P-SNT)

- Also known as a Medicaid qualifying trust
- Created by a family member, a Conservator, a Court, or the individual with a disability
- Funded with the *individual's* money
 - From a lifetime of earnings, a direct inheritance, or a law suit settlement
- Assets in a 1P-SNT do not count as resources for SSI, Medicaid, and Medicaid waiver eligibility
- Trustees manage assets and use them to supplement disability benefits
- Must include a Medicaid payback clause
 - Assets left in the trust when the beneficiary passes are repaid to DMAS to the extent of state Medicaid expenditures on the beneficiary's behalf
- 1P-SNTs are “Grantor Trusts” for IRS tax purposes
 - Income generated by the trust assets is reported on the beneficiary's tax return

Pooled Special Needs Trusts

- Commonwealth Community Trust and the Arc of Northern Virginia
 - Nonprofit organizations
 - Offer both Third-Party and First-Party Special Needs Pooled Trusts
- Assets in a Pooled Trust do not count as resources for SSI, Medicaid, and Medicaid waiver eligibility
- Trust assets are “pooled” together for investment purposes by a professional trustee
 - Subaccounts are maintained separately for each beneficiary though
- Same tax and payback considerations that we previously talked about it
- Typically less expensive to create than stand-alone trusts
- Useful options for small families with few candidates for successor trustees
- <https://thearcofnovatrust.org/>
- <https://commonwealthcommunitytrust.org/>

ABLE Accounts (529a)

- Assets in an ABLE account do not count as resources for SSI, Medicaid, and Medicaid waiver eligibility
- \$19,000 annual contribution limit from all sources
 - Money in a 529b college savings fund may be transferred into an ABLE account
- Assets in an ABLE account can be invested and they grow tax free so long as they are used for a qualified disability expense
- ABLE accounts include a Medicaid payback clause
 - Virginia passed a law that says no payback to the extent Federal law allows – Federal law still requires it
- Great place for the beneficiary's money – super savings account
 - Any time the representative payee account gets close to \$2,000, you can transfer money into the ABLE account
 - Or if they get a direct inheritance <\$19,000 from a family member
- <https://www.ablenow.com/>



Matt Bellinger, Esq.

(804) 729-6707

matt@benecounsel.com