



SPECIAL NEEDS PLANNING IN FAMILY LAW MATTERS

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When Does This Come Up?

Most Frequently:

- ▶ Couple with Marriage or RDP and a child with special needs (minor or adult), getting a dissolution.
- ▶ Couple with Marriage or RDP and one of spouses is disabled, getting a dissolution.
- ▶ Dissolution/separation where one of spouses is disabled, no kids.
- ▶ One individual of a couple questionable capacity and getting married or divorced.

Possibly:

Couple with child or one of spouses with special needs not getting divorced, but living apart.

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What Issues Can Be Impacted?

- ▶ A multitude of issues, including:
 - ▶ Public Benefits
 - ▶ Protection from Financial Fraud/Abuse
 - ▶ Healthcare and Insurance
 - ▶ Care Management/Supportive Services
 - ▶ Special Education Services

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Capacity to Marry

- ▶ Even if an individual is conserved, the conservatee still has the right to marry or enter into a domestic partnership unless the court determines that they lack the capacity to do so. Prob C §§1900–1901; *Estate of Gregorson* (1911) 160 C 21
 - ▶ In a General Conservatorship, item 1(e) of Petition;
 - ▶ In a Limited, items 1(h) and 1(j).
 - ▶ Lack of capacity to marry must be shown by evidence of a deficit in one or more of the person's mental functions which must be correlated to the decision to marry. Prob C §811.
 - ▶ Huge variations in willingness of Courts in different Counties to restrict this power.

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Capacity to Annul, Separate, Divorce, or Terminate RDP

- ▶ A Conservatee may initiate a divorce through a Conservator, provided
 - ▶ Spouse is "capable of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences and has done so." *Marriage of Higgason* (1973) 10 C3d 476, 483; *Marriage of Greenway* (2013) 217 CA4th 628; *Marriage of Straczynski* (2010) 189 CA4th 531
 - ▶ If Conservatee is capable of exercising a judgment and expressing a choice, Conservator may not initiate without Conservatee's express consent.

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Capacity to Annul, Separate, Divorce, or Terminate RDP (cont'd)

- ▶ Conservator may petition for annulment prior to death of either spouse in certain circumstances.
 - ▶ marriage occurred when the individual was of unsound mind; and
 - ▶ the conservatee did not, after "coming to reason," freely cohabit with spouse
- ▶ Conservator may petition for legal separation. *Schuck v Myers* (1965) 233 CA2d 151; *Pulos v Pulos* (1956) 140 CA2d 913.
- ▶ If the Spouse is the Conservator, must file notice with Conservatorship Court w/in 10 days and Court may issue OSC as to why Conservator should not be removed.

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Part 2: Financial Implications and Planning



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Common Concepts

- ▶ Deeming
- ▶ Couple Computation
- ▶ First Party \$\$ vs Third Party \$\$
- ▶ Pour-Back Wills
- ▶ Irrevocable Assignments

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Effect of Marriage on Public Benefits

- ▶ Assets in a valid special needs trust continue to be protected
 - ▶ If a first party special needs trust, remember can only be used for sole/primary benefit of beneficiary.
- ▶ If marriage is to another SSI recipient – couple computation is used for eligibility (a penalty):
 - ▶ In 2022 CA couple SSI is \$1,765.64 (vs \$1,040.21 for individual).
 - ▶ Resource limit for SSI is \$3,000 (vs. \$2,000 for individual).
 - ▶ Only one spouse's income exclusion can be used. (earned/unearned)

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Effect of Marriage on Public Benefits (cont'd)

- ▶ If only one spouse is SSI eligible, income and resources of other spouse are deemed to first spouse.
 - ▶ Deeming only applies when spouses live in the same household unless absent temporarily or because of military duty.
- ▶ Same exempt assets as individuals + retirement account of ineligible spouse is exempt
- ▶ Calculation of deemed income is complex. See
 - ▶ 20 CFR §416.1163
 - ▶ POMS at SI 01320.000–SI 01320.984
 - ▶ <http://www.disabilityrightsca.org/pubs/519801.pdf>

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Estate Planning During Marriage

- ▶ If one couple is/could be receiving public benefits, the only way for one spouse to leave them non-exempt assets on death while protecting benefits eligibility is via a special needs trust established through a pour-back Will.
 - ▶ Sample Included

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Divorce: Effect of Assets/Support Payments Received

- ▶ Both assets and spousal/child support payments received during a divorce can impact eligibility for public benefits.
 - ▶ Any non-exempt assets received are counted
 - ▶ Spousal support and child support are counted as unearned income for SSI

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How to Protect Eligibility

- ▶ Assets:
 - ▶ Plan to receive exempt assets vs non exempt assets
 - ▶ Establish First Party SNT to hold non exempt assets
- ▶ Income:
 - ▶ Irrevocable assignment of spousal or child support to First Party SNT
 - ▶ Sample Included

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Estate Planning During Divorce

- ▶ Automatic Temporary Restraining Orders in effect during divorce prevent changing a couple's estate plan.
 - ▶ What happens to a third party special needs trust established by the couple for the benefit of their child?
 - ▶ Trust team members put in place during marriage may no longer make sense.
 - ▶ Couple may decide to do new, separate, third party trusts or negotiate terms of existing trust.
 - ▶ What if trust is already funded with assets from, for example, grandparents.
 - ▶ Any new estate plans drawn up by former spouses need to be coordinated with SNT(s).

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Retirement Plans

- ▶ 401ks, 403bs, IRAs
 - ▶ Can name special needs trust – if new special needs trusts are drawn up, beneficiary designations need to be updated.
- ▶ CalPers
 - ▶ Survivor Continuance Benefits may be left to a First Party SNT
 - ▶ CalPers recommends sending a copy to them to ensure it will be honored.
- ▶ Military Survivor Benefit Plan Payments
 - ▶ May leave benefits for a disabled child to a special needs trust but has to be a First Party SNT.
 - ▶ Certain forms, elections, attorney certification required.
 - ▶ Will a military retirement plan honor a State Court Order?

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Part 3: Special Education Issues



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Involvement in Special Education Process

- ▶ IDEA gives parent full and equal partners with the school
 - ▶ Custody arrangements may change who is deemed to be the Parent.

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School District

- ▶ Custody arrangements may change what district child with special needs is deemed to reside in and therefore what schools/services he has access to.

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Part 4: Build Your Team



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Other professionals

- ▶ Care Needs Evaluators
 - ▶ National Care Advisors: <https://www.nationalcareadvisors.com/>
- ▶ Health and other Benefits Advisors
 - ▶ Jim Huyck: (916) 529-5300/jfhuyck@yahoo.com
- ▶ Financial Advisors Specializing in Special Needs
- ▶ Divorce Attorneys Specializing in Special Needs
- ▶ Special Education Advisors/Advocates/Attorneys

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Other Resources

- ▶ Centers for Independent Living: <https://cfilc.org/>
 - ▶ Assist with benefits applications
 - ▶ Assist in evaluating effect of marriage on benefits
- ▶ SSI POMS: <https://secure.ssa.gov/apps10/>

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Any Questions?

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