

Guardianship, Special Needs Planning, and DDD: Legalities and Practicalities

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Topics to be Covered

- Guardianship and the court process.
- Special Needs Planning/Trusts
- The application process for the Division of Developmental Disabilities.

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Guardianship

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Guardianship

- At 18 all individuals, including those with developmental disabilities, reach the legal age of majority. This means that parents can no longer make decisions legally on behalf of an adult child, regardless of the nature of the individual's disability and regardless of whether or not the individual still lives with the family.

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Guardianship

- GUARDIANSHIP is an important legal protection for individuals with special needs and should be considered by:
 - Parents of children with disabilities as their children approach the age of majority or in the state of New Jersey, 18 years old.
 - Family members of individuals with ongoing/permanent disabilities

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Who can be a Guardian

- A guardian can be a family member or another interested person. A co-guardian can also be named.

Co-guardians:

- Are more than one person appointed as guardian and each have equal decision-making authority
- Must be involved together in all decisions or consents needed for the individual
- Once a guardian or co-guardians have been appointed by the Superior Court, only the court can modify or change the guardianship order.

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Types of Guardianship

- **General Guardianship**
 - sometimes referred to as 'plenary' guardianship
 - appropriate for people who have been found incapable of making or expressing any decisions
- **Limited/Partial Guardianship**
 - covers decision-making around residential, educational, medical, legal, vocational, and financial issues
 - appropriate for people who have been found capable of making and expressing some, but not all, decisions

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The Process

- Two different discussions
 - Procedural
 - Documents needed
 - Timing
 - Court Rules
 - Substantive
 - Individuals Disability

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Guardianship in New Jersey

- Any interested person can apply to the Surrogate court for *guardianship of the person and/or property*
- Court will appoint an attorney for the proposed ward
- An independent evaluation will be conducted
- Court will look to any advanced guardianship designations
 - The Court makes the determination as to who is suitable
 - The guardianship designation is only a suggestion for the Court, it is not binding

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How Do I Designate a Guardian?

- Guardianship Designation or by Will for minor children.
- Only an expression of your desire
- Court is the only entity that can appoint a Guardian over someone else.
- Natural and adoptive parents are presumptive Guardians over minor children, even in event of divorce unless other court order specifies different

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Special Needs Trusts and The ABLE Account

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What is an Estate Plan?

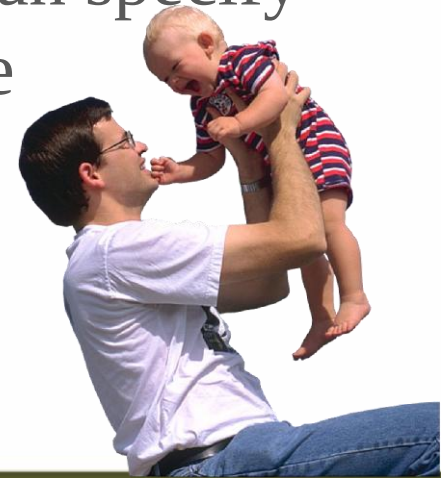
- Will/Pour-Over Will
- Revocable Living Trust
- Special Needs Trust
- Durable Power of Attorney
- Durable Healthcare Power of Attorney
- Living Will



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What is a Trust?

- A trust is a fiduciary arrangement that allows a third party, or trustee, to hold assets on behalf of a beneficiary or beneficiaries.
- Trusts can be arranged in many ways and can specify exactly how and when the assets pass to the beneficiaries.



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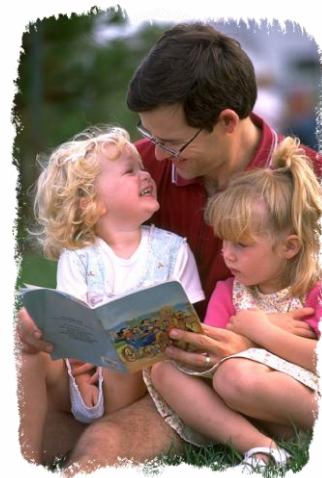
Trust Terminology

- Beneficiary – The person who will benefit from the trust assets
- Grantor – The person who transfers the assets into the trust
- Trustee – The person (or entity) that has the fiduciary responsibility over the trust
- Trust Protector – The person who monitors the trustee and advocates for disabled individual
- Irrevocable – Cannot be revoked, MAY be amended depending on language
- Remainder – Any funds that are left when the beneficiary passes away

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Trusts

- A Trust:
 - Control of wealth
 - Protection of your legacy
 - Against creditors and divorce
 - Can dictate successor trustees
 - Provide for an incapacitated or disabled heir
 - In New Jersey preserves inheritance tax exemption for the children of married couples (Only for a couple of years)



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What is a Special Needs Trust

- Technically a Supplemental Needs Trust
 - Designed to “Supplement,” not replace public benefits
- Maintain eligibility for governmental benefits and programs

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Why Have a Special Needs Trust?

- Protects eligibility for government benefits
- Provides for a higher quality of life
- Provides framework for care and management of assets
- Allows the parent to express their desires
- Protects assets from creditors and predators
- Extends life of assets

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Who Qualifies?

- Defined by 42 U.S. Code § 1382c
- 3(A) ...an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.
- 3(C)(i) An individual under the age of 18 shall be considered disabled for the purposes of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

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Pitfalls of Not Doing Special Needs Planning

- Losing Government Benefits
- Disinheriting the child
- Relying on your other children to provide for the child with special needs
- Choosing the wrong professionals



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Disinheriting the Child

- Some recommend to parents to disinherit the child with special needs in order to protect their public benefit.
 - Can have serious emotional consequences
 - Relying on the State to make certain decisions
 - May not accomplish the intended goal

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Reliance on Siblings

- While this may be a workable temporary solution, for the long term there are serious drawbacks
 - Siblings may not have the financial resources
 - Siblings may not have emotional resources
 - What if sibling gets divorced, or has other creditor problems? The assets you intended for your child may go to a creditor or ex-spouse.
 - What if sibling dies or becomes incapacitated?
 - What if the sibling moves far away?

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Choosing the Wrong Professionals

- Attorneys who are not experienced in this area can do more harm than good
- Financial Advisors with experience can help maximize your resources to benefit your child
- CPA's will help maximize your tax savings
- Insurance Agents will help get the proper policies in place

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Special Needs Trust

- Two kinds of SNTs
 - Self settled SNT
 - (Sometimes called 1st party SNT, OBRA '93 Trust, D4A trust or D4C)
 - Third Party SNT
 - (Sometimes called Supplemental needs trust)



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Third Party SNT

- May be established by Will or during life
 - If established by Will: Testamentary
 - Time consuming delay
 - Additional probate expenses
 - If established inter vivos:
 - In effect immediately
 - Trustees, and successors get training and experience
 - Can be beneficiary of life insurance
 - Grandparents can leave an inheritance to the trust
- If laws change, trust can be amended

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Third Party SNT

- The trust should reflect your child's uniqueness
 - Generic trusts can leave the trustee with little guidance on how to provide life enhancing benefits for your child
 - The trust should reflect your knowledge and insight into your child



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Third Party SNT

- The trustee should get experience managing the trust
 - Teach others, how to manage the trust
 - Work out kinks in the plan
 - Put a team in place to meet your child's unique needs
 - The plan is in place if you become incapacitated



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How do I Choose a Trustee?

- Initially, choose yourself and/or your spouse – depending on assets size may choose a professional trustee
- Next, choose who you think will
 - Care for your child
 - Is willing and able to devote the time and energy
 - Has the ability to manage the assets properly
 - Is willing to learn
 - Is willing to seek advice
 - Is someone you trust

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How do I choose a Trustee?

- Professional Trustees
 - **Are not as attached to your child**
 - **May be less responsive**
 - Are bonded or insured
 - Are more likely to properly manage the trust
 - Provide excellent record keeping
 - Charge for their services

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How do I choose a Trustee

- Consider selecting an individual and a professional to serve as co-trustees
- Trust Protector
- Together, they balance each other



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Self-Settled (First Party SNT)

- Set up by parent, grandparent, legal guardian or a Court (or now by the individual)
 - Special Needs Trust Fairness Act
- To or for the sole benefit of a person who is disabled and under age 65
- Established with the disabled person's own money
 - Usually the result of a personal injury settlement, or an inheritance
- **Payback Provision – State receives money left in the Trust at death**
- Protects disabled person's Medicaid or SSI benefits

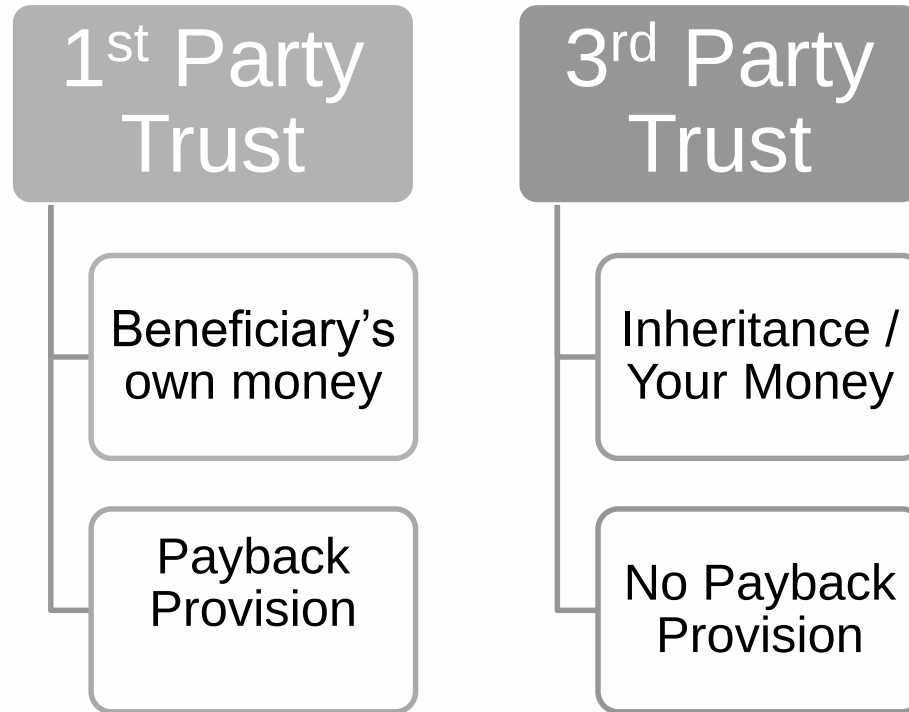
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Special Needs Trust Fairness Act

- President Obama just signed a new law that allows First Party Special Needs Trusts to be established by mentally competent individuals for their own benefit.
- This is a “fix” to the current law which only allows First Party Special Needs Trusts to be set up by a parent, grandparent, guardian or a court.
- For those individuals who have no living parent or grandparent and do not have or need a legal guardian, this law will avoid the time and money spent to have a court create such a Trust.

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Simply Put



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Understanding The ABLE Act

- The Achieving a Better Life Experience Act commonly called the ABLE Act has Passed
- Tax advantaged account that can be used to save funds for the disability related expenses of the account's designated beneficiary, who must be blind or disabled by a condition that began prior to the individual's 26th birthday.
 - SI 01130.740
- On 1/11/2016 - the New Jersey Legislature and Governor Christie signed into law a statute that implements the federal ABLE Act in New Jersey. Starting in October 2016, disabled individuals will be able to open ABLE Act accounts.

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How it Works

- The beneficiary and their family can contribute up to the amount of the annual gift tax exclusion to an ABLE account (currently \$14,000 per year).
- The ABLE account holds that money, and is managed and invested by the state. Any growth on the money in the ABLE account is tax-free, provided it is spent on “qualified disability expenses” for the beneficiary.
- The maximum amount that the account can contain is \$100,000 if the disabled person is receiving Supplemental Security Income. If the account holds more than \$100,000, then the person is disqualified from SSI.
- If the beneficiary is not receiving SSI, then the maximum amount that the account can contain is limited to the State’s 529(b) college savings plan limit, which in New Jersey is currently \$305,000.

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Qualified Disability Expenses

QDEs are expenses related to the blindness or disability of the designated beneficiary and that are for the benefit of the designated beneficiary. Can include:

- Education
- Housing
- Transportation
- Employment training and support
- Assistive Technology and related services
- Health
- Prevention and Wellness
- Financial Management and Administrative Services
- Legal Fees
- Expenses for ABLE account oversight and monitoring
- Funeral and Burial
- Basic Living Expenses

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Client Pitfalls

- **Payback, payback, payback**
 - Any money remaining in the account at the time of the beneficiary's death is subject to estate recovery from the State for the total amount of Medicaid benefits paid to the disabled person during his lifetime.
- An ABLE account can only be opened for an individual who was classified as disabled before age twenty-six.
- The individual with disabilities can only have one ABLE account, so multiple family members cannot open their own ABLE accounts for the individual.
- Overfunding, If one dollar more than \$15,000 per year is placed into the account, then the entire account is disqualified as an ABLE account.
- Failing to ensure paying qualified disability expense
- If the account holds more than \$100,000, then the person is disqualified from SSI.

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Planning: Where ABLE Might Fit

- Mix and Match – assume \$ within range:
- Small amounts of 1st party monies
- Control for competent beneficiaries
- Accumulation of wages over time
- **Transfer of UTMA accounts at 18 to qualify for SSI/Medicaid**
- Save for purchase of home or car or wedding expenses..
- Disability has potential to resolve
- Not quite ready to spend down – waiting for new van to be custom made
- Low income beneficiary savings plan
- In conjunction with larger SNT or pending litigation result
- When rules are promulgated, fleshed out, tried out and the ABLE account option fits the facts

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Topics to be Covered

- What is DDD?
- Who is eligible?
- How do I apply?
- How do I receive services?
- What services/supports are available?

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What is DDD?

- DDD is an arm of the New Jersey Department of Human Services. Funded by Medicaid.
- “DDD funds services and supports for eligible individuals with developmental disabilities. These services are offered in the community by more than 200 agencies or by more than 600 individuals and in five residential developmental centers administered by the division.”
<http://www.nj.gov/humanservices/ddd/home/about/>
- “The Division of Developmental Disabilities provides public funding for services and supports that assist New Jersey adults with intellectual and developmental disabilities age 21 and older to live as independently as possible. Services and supports are available in the community from independent providers, and in five state-run developmental centers.”
- Nearly 25,000 consumers of DDD Services.

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Who is Eligible for DDD Services?

- Must be a resident of New Jersey
- Must be an individual with intellectual and developmental disabilities.
 - The disability must have occurred before age 22 expected to be lifelong.
 - Must meet DDD criteria.
 - Must be eligible for Medicaid.

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Eligibility (cont.)

- DDD Definition of Developmental Disability under N.J.A.C. 10:46-1.3
 - Mental, physical, or combination of mental and physical impairments.
 - Manifested before age 22.
 - Likely to be indefinite
 - Resulting in substantial functional limitations in at least 3 major activities of daily living:
 - Self-care, Receptive and Expressive Language, Learning, Mobility, Self-Direction, Capacity for Independent Living, Economic Self-Sufficiency

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Medicaid Eligibility

- IMPORTANT- In order to be considered for and receive DDD services, the individual must be Medicaid eligible and maintain Medicaid eligibility.
- Can apply for Medicaid at age 18. Individual can apply for Supplemental Security Income (SSI) at 18.
 - SSI Eligibility = Automatic Medicaid Eligibility

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When do I approach DDD?

- Who is responsible for providing services to the individual?
 - Age 0-3: Early Intervention Services through the Department of Health
 - Age 3-21: The School System through IDEA, Section 504, etc.
 - Additional services may be provided to the Department of Children and Families (DCF), i.e. Performcare.
 - Age 16-21 (concurrent with School System): Transition; DDD funds Planning for Adult Life through ARC. Meets with parents to plan transition.
- Adult Services:
- DDD eligibility determination age 18 and up, services cannot begin until age 21*.

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How do I apply for DDD Services?

- Establish contact with your Community Services Office for your county.
- Receive DDD Intake Application from county office or download intake application.
- <https://www.state.nj.us/humanservices/ddd/documents/application-for-eligibility-english.pdf>
- Continue receiving services from the school system and DCF.

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DDD Application Process Cont.:

New Jersey Comprehensive Assessment Tool (NJCAT)

- The NJCAT is a mandatory assessment to determine an individual's eligibility for DDD services.
- Measures the individual's need in three areas: Self-care, behavioral, medical.
- Completed by the individual or primary caregiver.
- Can be completed online or via telephone.

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NJCAT Cont.

- The NJCAT determines the tier of support the individual will qualify for, and the annual budget the individual will receive.
- What is the most effective way to answer the NJCAT questions?
 - Sample NJCAT:
 - https://www.nj.gov/humanservices/ddd/documents/njcat_sample_assessment.pdf

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Determination Process: N.J.A.C. 10:46-4.1

- Intake team may interview applicant.
- Intake team shall notify applicant in writing of decision within 60 days of completion of application. If determined will take longer than 60 days, update on application every 30 days.
- Applicant notified within 10 days of eligibility decision with information regarding services deemed most suitable by intake team.
- Right to appeal under N.J.A.C. 10:46-5.1
 - Individual bears burden of proof.

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Person Centered Planning Tool (PCPT)

- A discovery tool used to further identify outcomes, service providers, strengths, weaknesses.
 - <http://www.nj.gov/humanservices/ddd/documents/Documents%20for%20Web/PCPT.pdf>
- Designed to give the individual greater participation in planning for the future.

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Support Coordination Agencies

- List of approved Medicaid and DDD-Approved SCAs in New Jersey.
 - http://www.nj.gov/humanservices/ddd/services/support_coordination.htm
- Support Coordinator (SC) provides care management for the individual, family, and caregivers.
- Directs completion of the Person-Centered Planning Process.
- Develops the Individualized Service Plan (ISP).
- Links individual with service providers.
- Monthly check-ins. Annual house visit.
- Individuals can change SCAs by request.
- Can attend transition meetings and exit IEP meeting at individual's school.

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SCAs Cont.

- Assists the individual in advocating for themselves and provides links to family advocacy organizations/resources.
- Other Agencies
 - Provider Agencies: Provide direct services to the individual and family. SCA cannot also be the provider agency, conflict of interest.
 - Fiscal Intermediary: Keeps track of provider services for Medicaid Reimbursement.
 - State Agencies to work with families and Support Coordinators.

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Individualized Service Plan (ISP)

- Should be completed by Support Coordinator and approved prior to exiting school system. Services can then be available at graduation.
- ISP lists goals, service providers, services, accommodations, etc., with advice and guidance from planning team.
- ISP is needed to commence services.

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How do I receive DDD Services?

- DDD services are funded largely by Medicaid. Maintain Medicaid eligibility at all times.
- NEW:
- There are two main Medicaid waivers (programs) that DDD-eligible individuals.
 - 1. Supports Program
 - 2. Community Care Program

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Supports Program

- The New DDD Medicaid waiver, started in 2015. The default program for the majority of entering individuals.
- Just need to meet the DDD functional criteria.
- No anticipated waiting list.
- Can live in own/family home, or unlicensed setting.
- Capped annual individual budget.
- New Fee-for-Service System.

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Supports Program Cont.

- Goal of Supports Program is to assist individuals in increasing independence.
- Supports Program offers life skills, home based supports, employment assistance.

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DDD Supports Program Budgets

Supports Program

Tier	Original Ceiling	New Ceiling	Difference
A	\$19,000	\$19,546	\$546
Aa	\$25,000	\$25,719	\$719
B	\$28,000	\$28,805	\$805
Ba	\$36,000	\$37,035	\$1,035
C	\$32,000	\$32,920	\$920
Ca	\$42,000	\$43,207	\$1,207
D	\$48,000	\$49,380	\$1,380
Da	\$62,000	\$63,782	\$1,782
E	\$58,000	\$59,667	\$1,667
Ea	\$78,000	\$80,242	\$2,242

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Community Care Program

- Started in 1982.
- Individual requires Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/ID) level of care.
- Can be on a waiting list while on the Supports Program. Updated annually on status. Can also be placed on CCP if deemed emergency.
- Larger budget than Supports Program.
- Shifting from contract to fee-for-service providers.

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DDD Community Care Program Budgets

Community Care Program

Tier	Original Ceiling	New Ceiling	Difference
A	\$44,740	\$46,026	\$ 1,286
Aa	\$79,692	\$81,982	\$ 2,290
B	\$79,480	\$81,764	\$ 2,284
Ba	\$145,383	\$149,562	\$ 4,179
C	\$117,801	\$121,186	\$ 3,385
Ca	\$224,303	\$230,750	\$ 6,447
D	\$168,122	\$172,954	\$ 4,832
Da	\$317,226	\$326,344	\$ 9,118
E	\$212,442	\$218,549	\$ 6,107
Ea	\$406,150	\$417,823	\$ 11,673

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Waiver Services

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- Assistive Technology
- Behavioral Supports
- Career Planning
- Cognitive Rehabilitation (SP only)
- Community Based Supports (SP only)
- Community Inclusion Services (SP only)
- Community Transition Services (CCW only)
- Day Habilitation
- Environmental Modifications
- Goods & Services (SP only)
- Individual Supports (CCW only)

- Interpreter Services (SP only)
- Natural Supports Training (SP only)
- Occupational Therapy
- Personal Emergency Response System (PERS)
- Physical Therapy
- Prevocational Training
- Respite
- Speech, Language, and Hearing Therapy
- Supported Employment
- Supports Brokerage (SP only)
- Transportation
- Vehicle Modifications



Employment

- New Jersey is an “Employment First” state. Meaning employment is the preferred postsecondary outcome for all, including individuals with disabilities.
- Supported Employment Services.
- Individuals can mix and match day program and employment activities. Goal is to work toward employment outcome.
- Medicaid buy in program.

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Residential Options

- Accessed through DDD service providers
- Group Homes
- Supervised Apartments
- Supported Housing
- Community Care Home
- DDD/DHS Housing Vouchers.

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Family Support Services

- Assistance to caregivers of DDD-eligible individuals who are not compensated.
- Cannot be guaranteed. Based on the needs/budget of the individual.
- Respite care in and out of the home.
- Assistive Technology
- Vehicle Modifications.

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QUESTIONS?

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