

# Public Benefits and ABLE Act Update



PRESENTED BY



Courtney Elder Law Associates

*Elder Law • Special Needs Planning • Estate Planning*

FRASCOGNA COURTNEY, PLLC

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# PUBLIC BENEFITS ARE IMPORTANT

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## MEDICARE

- Pays 74% of medical care for 40.3M over age 65
- Paid 20% of post-acute care in 2010 (KFF)

## MEDICAID

- Primary source of health and LTC assistance for over 60M people
- Paid 41% of post-acute care in 2010 (KFF)


# PUPPIES ARE INTERESTED



# SUPPLEMENTAL SECURITY INCOME

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## SSI Resource Rules

- “Countable” resource limit: \$2,000 single, \$3,000 couple
  - Exempt resources: home, auto, household contents, disability equipment, assets needed for self-support, burial spaces, \$1,500 life insurance, assets in “special needs trust”
  - Assets in guardianship/conservatorship count
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# SUPPLEMENTAL SECURITY INCOME

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## Supplemental Security Income (SSI)

- Monthly payment for food & shelter
  - \$733 single, \$1,100 couple max. payment (2016)
- Disabled, blind or 65+; low-income, low resources
- “Deeming Rules” may affect eligibility and amount of payment for spouse or child
- Automatically get Medicaid with SSI in MS

# SSI RULES - INCOME

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## SSI Income Rules

- “Countable” income (must be  $< \$733/\text{mo.}$ ):
  - All unearned income - \$20
  - Earned income - \$65 – IRWE -  $1/2$  remaining earned income
- Only  $2/3$  child support counted if child under age 18

# MEDICAID-ONLY MEDICAID

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Countable income = anything that can be used to buy food, clothing, shelter, medical care

- “Income-cap” State
  - Income limit for LTC program, HCBS Waivers
  - \$2,199 (\$733 SSI x 3)
- Federal Poverty Level Programs
  - CHIP, Pregnant Women, Children under 19, TANF
  - FPL = \$1,040 individual (\$1,385 couple)
    - includes additional \$50 “income disregard”



# MAO MEDICAID (cont'd)

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## Countable Resources < \$4,000

- Must have: Ownership interest + Legal right to access asset + Legal ability to use for personal support or maintenance
- Not counted: Home (up to \$552K value); cars; household contents; \$5,000 personal property; income-producing property (if 6% rate of return); burial spaces; burial funds up to \$6,000 (or greater irrevocable burial fund); term life insurance; \$10,000 cash value insurance; retirement account in payout

# MEDICAID COVERAGE GROUPS

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## Qualified Medicare Beneficiary (QMB)

- Eligible for Medicare Part A
- Income < \$1,040 (\$1,385 for couple)
- No resource limit
- Pays Medicare Part B premium (\$121.80 in 2016), deductibles and co-payments

## Specified Low-Income Medicare Beneficiary (SLMB)

- Same as above, but \$1,238 income limit (\$1,652 couple)
  - Only pays Part B premium
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# MEDICAID HCBS WAIVER GROUPS

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- Elderly and Disabled (respite, adult day care, meals, homemaker)
- Independent Living (personal care attendant)
- Intellectually Disabled/Developmental Disability (respite, attendant care, day-habilitation, speech/PT/OT)
- Assisted Living (homemaker, attendant care, Rx supervision, transportation)
- TBI/SCI (attendant care, nursing care, respite)
  - Same financial eligibility as LTC group

# HCBS PUPPIES

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# LONG-TERM CARE MEDICAID

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## Nursing Home Care

### **Single Person** eligible if:

- Countable income < \$2,199 (but more if use income trust)
- **Countable resources < \$4,000**

### **Married Person** eligible if:

- Applicant spouse eligible as single person
- Community spouse countable resources < \$119,220
- CS keeps IS income to reach \$2,981 income
  - “Spousal Impoverishment” rules

# MEDICAID TRANSFER PENALTY

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- Deficit Reduction Act of 2005 changed the rules
- Now 5 year “look-back” period from date of application
- Transfer penalty = Total of gifts during look-back period ÷ \$5,700 monthly divisor
  - Example: \$57,000 gift 8/1/12 – apply for Mcaid 8/1/2016 =
  - **10** months not eligible for Mcaid payment to NH
- No Transfer Penalty for Disabled Child at Home, Poverty-level programs, DHS programs

# MEDICAID TRANSFER EXCEPTIONS

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- No Penalty for transfer of **residence** to:
  - Spouse; child under 21; blind or disabled child of any age; sibling with equity interest who lived there 1 year prior to NH entry; child who lived there and provided care at least 2 years prior to NH entry
- No Penalty for transfer of **other assets** to:
  - Spouse; child under 21; blind or disabled child; third party for sole benefit of spouse or self; trust for sole benefit of a minor, blind or disabled child; trust for benefit of a disabled person under 65; “payback” trusts established per 42 USC § 1396p(d)(4)

# RETROACTIVE BENEFITS

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Medicaid benefits will be paid for up to 3 months prior to month of application if the applicant was eligible in those months

- In a nursing home or disabled at home
- Income within limit
- Countable resources within limits

Medicaid will allow up to 90 days to re-allocate resources between spouses





# MEDICAID ESTATE RECOVERY

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Per MCA § 43-13-317 Medicaid must seek recovery from “estate” of deceased recipient of LTC or HCBS services after age 55

- “Estate” means the probate estate (non-probate assets not subject to claim)
- Medicaid must be noticed as creditor of estate
- Claim waived if surviving spouse, minor, blind or disabled child
- MS Medicaid waives if caregiver family member lived in home 1 year, or family income source
- No claim against homestead valued <\$75k, will pass to surviving spouse/child/grandchild(ren) (*Darby* case)


# PUPPIES ENJOYED MEDICAID!



# SPECIAL NEEDS TRUSTS

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A mechanism to:

- **shelter and manage** resources
  - **benefit** person with disabilities
  - **preserve public assistance** benefits
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# REQUIREMENTS OF SPECIAL NEEDS TRUSTS

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- Written
- Distributions discretionary by the trustee
- Beneficiary not entitled to receive income or principal
- “Sole Benefit” of disabled individual (self-funded only)
- Irrevocable (or Revocable for third-party)

# THIRD PARTY SPECIAL NEEDS TRUSTS

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- Either Inter Vivos or Testamentary
  - Revocable or Irrevocable
  - Should be approved before or upon funding
  - Name remainder beneficiaries at death of disabled beneficiary (**no Medicaid payback**)
  - Not described in federal statute
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# QUALIFIED DISABILITY TRUST

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- Irrevocable
- Third-party funded
- Bene SSI or SSDI recipient under age 65 at creation
- May have multiple beneficiaries
  
- Can claim personal exemption (\$4,050 in 2016)
- Income distributed to bene gets \$4,050 exemption
  - Up to \$8,100 income tax free
- Trustee fees, etc. may also be deductions

# SELF-FUNDED “PAY-BACK” TRUST

42 U.S.C. § 1396P(D)(4)(A)



- “(d)(4)(A)” or “payback” trusts (called “special needs trusts” by Mississippi Medicaid)
- Inter vivos, irrevocable
- Only permissible Creators: parent, grandparent, legal guardian/conservator, or court
- Disabled beneficiary younger than 65
- Medicaid must be reimbursed at death of beneficiary

# SELF-FUNDED “POOLED” TRUST

42 U.S.C. § 1396P(D)(4)(C)

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- “(d)(4)(C)” trust or “pooled” trust for many beneficiaries
- Established by non-profit 501(c)(3) organization
- Irrevocable
- Created by the beneficiary as well as by a parent, grandparent, court or guardian
- Beneficiary younger than 65
- At death of beneficiary, the non-profit organization may retain a portion or all of the trust fund




# FUNDING SPECIAL NEEDS TRUSTS

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## **THIRD PARTY TRUST**

- Gifts from family, others
- Fund-raisers
- Bequests in wills and living trusts
- Life insurance
- Retirement accounts (as beneficiary)

## **SELF-SETTLED TRUST**

- Litigation settlement (lump sum, structured annuities)
  - Inheritance
  - Life insurance benefit
  - Personal assets
  - Guardianship/conservatorship assets
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# MEDICARE

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## Who Gets It?

- Over 65 on SS Retirement or RRR
- Over 65 and pay premium (not on SS/RRR)
- Under 65 on SSDI > 24 months
- End Stage Renal Disease beginning 3d mo. of dialysis
- ALS on SSDI (no 24-month wait)

# Medicare

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## How to Get It – Enrollment

- Automatic – with SS/RRR @ age 65
- Application – if don't take SS/RRR @ 65
  - Initial Enrollment: 3 mos prior – 3 mos after 65
  - General Enrollment: Jan – Mar each year (starts July)
- Late Enrollment – if covered by EGHP past age 65
  - 3 mos prior – 8 mos after group plan coverage stops
- Annual Election Period – Oct 15 – Dec 7 (to elect Medicare or Medicare Advantage)

# MEDICARE COSTS

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## Part A Costs

Deductible - \$1,288 / spell of illness (SOI)

Co-pay for Days: 0-60: \$0

61-90: \$322/day

91-150: \$644/day

Premium (buy-in): \$226/mo (30-39 qtrs SS)

\$411/mo (<30 qtrs SS)

# MEDICARE COSTS

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## Part B Costs

Deductible: \$166/year

Premium: \$104.90/mo (\$85k single/\$170k couple)  
(\$121.80 1<sup>st</sup> time enrollees, dual eligibles)

\$170.50/mo (\$85k-107k single/\$170k-214k couple)

\$243.60/mo (\$107k-160k single/\$214k-320k couple)

\$316.70/mo (\$160k-214k single/\$320k-48k couple)

\$389.80/mo (>\$214k single/>\$428k couple)

# TRYING TO UNDERSTAND MEDICARE

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# MEDICARE

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## What Does It Pay For?

- Part A – Hospital costs
- Part B – Physicians, home health, DME, out-patient PT/OT, diagnostic tests
  
- Not Covered:
  - Custodial care, personal comfort items, routine exams, eye exams/glasses/contact lenses, hearing aids/exams, cosmetic surgery

# MEDICARE

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## Special Coverages

- Ambulance – from home to hospital or NH if (i) only safe way and (ii) provided by MC-certified provider and (iii) EMS ambulance (w life support)
- Diabetes Management – out-patient with new-onset diabetes, ER or hospitalization, acute foot, eye or kidney problems; IF under a doctor's plan of care
- Medical Nutrition Therapy – for diabetes, renal disease



# MEDICARE

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## Durable Medical Equipment (DME)

Wheelchairs, hospital beds, etc. if

- Prescribed by physician
- Durable (last 5 years)
- For medical purpose
- Not useful without illness or injury
- Appropriate for home use, and
- Purchased from MC-certified provider

# MEDICARE

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## Out-Patient Therapy

- Physical, Speech, Occupational Therapy if
  - Ordered by physician
  - Medically necessary
  - Requires a qualified therapist
  - NOTE: “Improvement potential” is not required for continuation; have doctor document need to maintain function (*Jimmo v. Sebelius*, 2013 settlement)

# MEDICARE

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## Long Term Care (Nursing Home)

- Will pay first 20 days NH in full if
  - Admitted within 30 days following
  - Three (3) day hospital stay
  - Note: “Observation days” do not count toward 3 day stay
- Days 21 – 100
  - Resident must pay daily co-payment (\$161.00 in 2016)

May start new “spell of illness” after 60 days without Medicare-covered treatment



# “MEDICARE PART P”



# What is ABLE?

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- The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014:
  - Passed Congress in December
  - Signed by President Obama on 12/19/14
  - Adds § 529A to the Internal Revenue Code
- Still pending:
  - Regulations (from IRS and SSA)
  - State establishment of ABLE accounts

# State Laws

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- HB 1019 and SB 2607
  - died in committee
  
- State Legislation
  - 46 have enacted law
  - Pending in 2 states
  - Failed to pass in 2 states (including MS)
  - No legislation filed in 1 state (Idaho)

# What is a 529 Plan?

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- States permitted to create college savings plans
  - 48 states and DC participate (not WA or WY, though WY contracts with CO)
  - Some states have multiple plans
  - States set maximum account size (\$235K in MS)
- Multiple accounts for same beneficiary OK
- No federal requirement of residency
- Industry: [www.savingforcollege.com](http://www.savingforcollege.com)

# 529 PLANS

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- Contributions subject to gift tax – but up to 5X gift tax exclusion permitted in one year
- 529 account treated as out of donor's estate
- Donor can retain control, and even change beneficiaries
- No income tax benefit at contribution, but
  - No tax on accumulation
  - No tax on withdrawals, provided they are for “qualified higher education expenses”



# ABLE ACT ACCOUNTS

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## “Eligible Beneficiary”

- “entitled to benefits based on blindness or disability under **title II** or **XVI** of the Social Security Act...”
- ...occurring “before the date on which the individual attained age 26 ( § 529A(e)(1)(A))
- **OR** certification by beneficiary, parent or guardian to the same effect, under IRS regulations ( § 529A(e)(2))

# ABLE ACT ACCOUNTS

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## “Payback”

- “Upon death of designated beneficiary, state Medicaid plan may file a claim against the account (529A(f))
  - State is a **creditor**, not a beneficiary
  - Payback may be state-optional, since states may not be required to file claims
- Unlike Medicaid “estate recovery” – mandated by law

# ABLE ACT ACCOUNTS

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## “Payback”

- Payback is “subject to any outstanding payments due for qualified disability expenses
- Payback includes 3<sup>rd</sup>-party contributions
- Mechanics: does statute contemplate state simply debiting account?

# ABLE ACT ACCOUNTS

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- Only one ABLE account per beneficiary ( § 529A(b)(1)(B))
  - Multiple accounts? Only first qualifies
- Can enroll in account in another state
- State may contract w/ other state
- Contributor cannot direct investment, use as collateral

# ABLE ACCOUNT DOLLAR LIMITS

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- Total **contributions** in a year limited to gift tax exclusion amount (\$14,000 in 2016) ( § 529A(b)(2)(B))
- Total **contributions** over time limited to state's 529 maximum ( § 529A(b)(6))
  - \$235,000 in GA, KY, MS & TN
- \$100,000 limit for SSI benefits, but not for Medicaid ( § 103(a)(2) of the Act)
- Contribution not tax deductible, but account earnings not taxed

# ABLE ACCOUNTS – INCOME TAXES

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- Withdrawals tax-free if for “qualified disability expenses” (529A(e)(5)):
  - “education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses” and others approved by IRS regulations

# MISCELLANEOUS ABLE RULES

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- Contributions must be “cash” (presumably meant to exclude in-kind stock transfers, not checks) ( § 529A(b)(2))
- Rollovers permitted to family member who is also disabled ( § 529A(c)(1)(C))
  - IRC § 152(d)(2)(B) defines “family member”

# MISCELLANEOUS ABLE RULES

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- “Qualified disability expenses” may be reimbursed – including to beneficiary ( § 529A(c)(B))
- 10% surtax on distributions other than for qualified disability expenses (plus inclusion in beneficiary’s taxable income) ( § 529A(c)(3)(A))



# PENALTIES FOR NON-QUALIFIED EXPENSES

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- \$100,000 ABLE account (\$50,000 consists of contributions) distributes \$10,000 to beneficiary who has \$6,000 qualified disability expenses.
- IRC Section 72: one-half of distribution (\$5,000) included in gross income.
- Under the bill, the \$5,000 includible in gross income is reduced by \$3,000 ( $\$6,000 / \$10,000$  multiplied by \$5,000) to \$2,000.
- An additional tax of \$200 (ten percent of \$2,000) is imposed on the distribution.


# MISCELLANEOUS ABLE RULES

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- Limited ability to direct investment decisions (2X/yr max) ( § 529A(b)(4))
- Gift tax effect to donor: completed gift of present interest ( § 529A(c)(2)(A)(i))
- Bankruptcy exclusion if contributions made a year in advance by parent, stepparent, grandparent or step-grandparent (new 11 USC § 541(b)(10))

# WHAT COULD POSSIBLY GO WRONG?

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- 3<sup>rd</sup>-party money exposed to payback
  - Penalty on inappropriate withdrawals
  - Multiple accounts
  - Possible exposure to creditors
  - Effect of distribution on SSI (e.g., ISM)
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# WHEN IS ABLE ATTRACTIVE?

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- Small \$ amounts, value in autonomy
- Periodic payments under gift tax exclusion amount (e.g.: small annual structured settlement or mandatory trust distribution)
- Saving for specific expenditures (e.g.: vehicle, trip, etc.)
- Over-65 beneficiary with lifetime disability
- Bene w small \$ cannot follow SNT rules

# MORE RESOURCES

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- *“ABLE Act Passes – We’ll Tell You What It Means”* and *“The ABLE Act – How Will You Be Able to Use It?”*, both available at [www.issues.flemingandcurti.com/tag/able-act/](http://www.issues.flemingandcurti.com/tag/able-act/)
- Steve Dale’s informative YouTube piece: [www.youtube.com/watch?v=Oi8i-N7BQwM](http://www.youtube.com/watch?v=Oi8i-N7BQwM)
- Collection of materials at Steve Dale’s site: <http://achievingindependence.com/able/>

# CONCLUSION

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A properly funded and administered **ABLE Account** may be a useful **tool** in planning for financial security for a person with disabilities.

A well-managed **Special Needs Trust** and a qualified Trustee can maximize government benefits while allowing for additional family support to enhance the comfort and enjoyment of life for the disabled beneficiary.

# THANK YOU

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