

The ABLE Act and Special Needs Planning



PRESENTED BY



Courtney Elder Law Associates

Elder Law • Special Needs Planning • Estate Planning

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PERSONS WITH DISABILITIES

Persons over age 5 with disabilities

- Overall: 12.8% of population
- Age 5 – 17: 5.4%
- Age 18 – 64: 10.6%
- Age 65+: 35.4%

(2017 Disability Statistics Annual Report)

- Mississippi – 16.3% of civilian non-institutionalized population (476,044)

(2017 American Community Survey of the U.S. Census Bureau)



PERSONS WITH DISABILITIES



- Need basics: food, clothing, shelter, transportation, medical care
- Need care and assistance with ADLs
- Need fun and enjoyment of life –
Recreation, travel, entertainment

FUNDING PROBLEMS



- Limited household income
- Shortage of financial assets
- Fractured families – single parent homes
- Insufficient public benefits (SSI, Medicaid cuts)

HOW TO PAY - OPTIONS



- Private Pay – family, disabled person's income
 - but reduction of SSI if others pay food/shelter
- Gifts, bequests, death benefits to disabled person
 - may terminate SSI, Medicaid until spent
- Special Needs Trust can fund needs, protect public benefits


SOCIAL SECURITY DISABILITY BENEFITS

- Social Security Disability Benefits – SSDI
Benefits for the insured worker (2019)
“SGA” = \$1,220/mo. earned income (\$2,040 blind)
- Childhood Disability Benefit – CDB
Benefits for child disabled before age 22 if parent entitled to Social Security and retired, disabled or deceased
- Disabled Widow(er) Benefit – DWB
Benefits for spouse or former spouse of insured deceased worker. Must be 50+

DEFINITION OF “DISABLED”




Social Security Administration Definition

- Over age 65
 - Blind; or
 - Unable to do any “substantial gainful activity” due to severe physical or mental impairments that will result in death or will continue for not less than one year (or, if child, results in “marked and severe limitations”).
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SUPPLEMENTAL SECURITY INCOME

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 guardianships count**
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SUPPLEMENTAL SECURITY INCOME



Supplemental Security Income (SSI)

- **Monthly payment for food & shelter**
 - \$771 single, \$1,157 couple max. payment (2019)
- **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**

HOW SSI AMOUNT CALCULATED



The following amounts are deducted from the SSI benefit amount:

- Unearned income
- Deemed income
- In-kind support (food, shelter)
- “Countable” Earned income

SSI RULES - INCOME

SSI Income Rules

- “Countable” income:
 - 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

Medicaid – Coverage groups:

- **SSI-eligible**
- **Disabled Child at Home:** income < \$2,313/mo., countable resources < \$2,000
 - Parent(s)' income not counted
- **Low-Income Programs (no assets limit)**
 - Children's Health Insurance Program (CHIP)

MEDICAID

Medicaid – Coverage groups:

- **Home & Community Based Waivers**
 - Countable Income < \$2,313, resources <\$4,000;
 - Require help with 2+ ADLs
- **Elderly & Disabled:** respite, meals, adult day care
- **Independent Living:** care attendant
- **Intellectually/Developmentally Disabled (ID/DD):** day-care, attendant care, PT/OT
- **TBI/SCI:** attendant for TBI or spinal cord injury
- **Healthier MS:** no Medicare, income <135% FPL, assets <\$4,000 single/\$6,000 couple (limit 6,500)

What is ABLE?



- 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**
- Mississippi: 42nd State to enact
 - Miss. Code Ann. § 43-28-1
 - **www.mississippiable.com**
 - **Phone: 1-888-609-3469**

What is a 529 Plan?



- States permitted to create college savings plans
 - 48 states and DC participate
 - Some states have multiple plans
 - States set maximum account size (\$235K in MS)
- Multiple accounts for same beneficiary OK
- No federal requirement of residency

529 PLANS



- 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

“Eligible Beneficiary”

- “entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act...”
- ...occurring before 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 “PAYBACK”

- Upon death of beneficiary, state may file for post-establishment Medicaid payments (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 “PAYBACK”



- Payback is “subject to any outstanding payments due for qualified disability expenses
- Payback includes 3rd-party contributions
- Mechanics: Not clear how states will do this

ABLE ACT ACCOUNTS

- Only one ABLE account per beneficiary (§ 529A(b)(1)(B))
 - Multiple accounts? Only first qualifies
- May be in any state
 - What if the beneficiary moves?
- State may contract w/ other state
- Contributor cannot direct investment, use as collateral

ABLE ACCOUNT DOLLAR LIMITS



- Total contributions in a year limited to gift tax exclusion amount (\$15,000 in 2019) (§ 529A(b)(2)(B))
- Total **contributions** over time limited to state's 529 maximum (§ 529A(b)(6))
 - \$235,000 in GA, KY, MS & TN
 - \$400,000 in OH
- \$100,000 limit for SSI benefits, but not for Medicaid (§ 103(a)(2) of the Act)

ABLE ACCOUNTS – INCOME TAXES



- No income tax deduction for contribution, but growth in ABLE account untaxed
- At 7% return, a Qualified Disability Trust could have \$113,000 income before taxed
 - Assumes distribution to bene with no tax liability
- At 5% return, QDT could have \$158,000 assets before taxed

ABLE ACCOUNTS – INCOME TAXES



- **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

- 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

- “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


- \$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




- 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))

THINGS TO CONSIDER

- 3rd-party money exposed to payback
 - Possible inappropriate withdrawals
 - No multiple accounts
 - Possible exposure to creditors
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WHEN IS ABLE ATTRACTIVE?



- Small gift, inheritance amounts
 - Give beneficiary autonomy
 - Periodic payments under allowed amount (e.g.: small annuity, trust payments)
 - Saving for specific expenditures (e.g.: vehicle, trip, etc.)
 - Over-65 beneficiary with lifetime disability
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REQUIREMENTS OF SPECIAL NEEDS TRUSTS



- 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-FUNDED SPECIAL NEEDS TRUSTS



- Either Inter Vivos or Testamentary
- Anyone can establish; can have more than one
- Name a capable trustee
- Revocable or Irrevocable
- Name remainder beneficiaries at death of disabled beneficiary (no Medicaid payback)

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
- Can be created by: capable adult, parent, grandparent, legal guardian/conservator, or court
- Disabled beneficiary younger than 65
- Medicaid payback at death of beneficiary or termination of trust

SELF-FUNDED “POOLED” TRUST

42 U.S.C. § 1396P(D)(4)(C)




- “(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

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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TRUSTEES OF SPECIAL NEEDS TRUSTS




- Loyal to beneficiary (no “self-dealing”)
- Able to follow trust law (separate accounts, best judgment)
- Understands effects of payments on public benefits
- Can prepare accountings to SSA/Medicaid when asked
- Respond promptly to any SSA/Medicaid notices received
- Immortal
- Consider having co-trustees or “trust advisors”

CONCLUSION



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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