

Funding the Future: The ABLE Act and Special Needs Planning



PRESENTED BY




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Elder Law • Special Needs Planning • Estate Planning

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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 guardianship/conservatorship count
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SUPPLEMENTAL SECURITY INCOME

Supplemental Security Income (SSI)

- Monthly payment for food & shelter
 - \$733 single, \$1,100 couple max. payment (2015)
- 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

SSI Income Rules

- “Countable” income (must be $< \$733/\text{mo.}$):
 - All unearned income - \$20
 - Earned income - \$85 – IRWE - $1/2$ remaining earned income
- Only $2/3$ child support counted if child under age 18

MEDICAID

Medicaid – Coverage groups:

- **Home & Community Based Waivers**
 - Countable Income < \$2,199, 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 5,500)

LONG-TERM CARE MEDICAID

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

SPECIAL NEEDS TRUSTS

A mechanism to:

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



- 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

QUALIFIED DISABILITY TRUST



- Irrevocable
- Third-party funded
- Bene SSI or SSDI recipient under age 65 at creation
- May have multiple beneficiaries

- Can claim personal exemption (\$3,950 in 2014)
- Income distributed to bene gets \$3,950 exemption
 - Up to \$7,900 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)




- “(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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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

- Still pending:
 - Regulations (from IRS and SSA)
 - State establishment of ABLE accounts

What is a 529 Plan?



- 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

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 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

“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

“Payback”

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

ABLE ACT ACCOUNTS

- Only one ABLE account per beneficiary (§529A(b)(1)(B))
 - Multiple accounts? Only first qualifies
- Must be in state of bene's residence
 - 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 (\$14,000 in 2015) (§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)

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))

WHAT COULD POSSIBLY GO WRONG?

- 3rd-party money exposed to payback
 - Loss of special treatment by inappropriate withdrawals?
 - Multiple accounts
 - Mobile beneficiaries
 - Possible exposure to creditors
 - Effect of distribution on SSI (e.g., ISM)
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WHEN IS ABLE ATTRACTIVE?

- 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



- *“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/
- Steve Dale’s informative YouTube piece: www.youtube.com/watch?v=Oi8i-N7BQwM
- Collection of materials at Steve Dale’s site: <http://achievingindependence.com/able/>

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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