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## Using ABLE along with your Special Needs Trust

### Special Needs Trusts

#### I. Overview

**Special Needs Trust:** Primary purpose is to supplement the benefits an individual who has disabilities receives through government programs. = preserve eligibility for government sponsored benefits.

- Also create or maintain eligibility for valuable community programs and services.
- By utilizing a SNT, the disabled family member can continue receiving governmental benefits (Supplemental Security Income, Medicaid, and other services) even though the assets in trust are over the eligibility limit (currently in Pennsylvania, the disabled person's income and assets, earned or unearned, must remain below \$2,000).

#### II. 3 Types of Special Needs Trusts

##### 1. Special Needs Common Law Trust or Third-Party SNT

- The common law SNT or third-party SNT is created by case law and not statutorily. The trust can be created in a Will or separate trust document.
- The trust is funded by assets that belong to someone other than the disabled individual. If a parent sets up a SNT, assets left to the SNT for the benefit of the disabled person will not jeopardize governmental benefits.
- Also, any assets remaining in the trust at the disabled person's death can be passed on to third party beneficiaries without the government having the right to reimbursement for governmental benefits the disabled individual received during lifetime.

##### 2. Special Needs Payback Trust

- Must meet disability definition from SSI and MA purposes.  
The payback trust ensures the same protection of governmental benefits as the common law trust.
- However, it is funded by the disabled individual's own assets. After the disabled person dies the payback trust allows the government to be reimbursed for governmental benefits paid to the disabled person during lifetime.
- Although third party beneficiaries are named in the trust, it is most likely that there will be little or no assets left for them after the government's right to reimbursement.

- Basically, the trust acts as an emergency back-up trust that is funded solely by assets owned by the disabled individual. If assets are unexpectedly received by the disabled person from a lawsuit or inheritance, these assets belong to the disabled person and may cause the loss of governmental benefits. By placing these assets in a payback trust, the family can ensure that the disabled person will keep the governmental benefits.
- Examples- You have no Will - Grandparent leaves money - accident=personal injury settlement

### **3. Special Needs OBRA Pooled Trust**

- A Pooled Trust (like the ARC Community Trust of PA or Secured Futures Trust, Berks Community Trust) is a trust that is maintained by non-profit associations.
- They receive assets owned by or left to a disabled person and pool these assets with assets from other disabled persons. The money is "pooled" together for investment to create a better economical advantage for its beneficiaries. The beneficiaries of the Pooled Trust are the special needs individuals.
- Each beneficiary maintains a separate account within the Trust. At the disabled person's death, the remaining funds are retained by the trust for the other disabled participants in the trust.
- The Pooled Trust organization will provide fiduciary services by acting as trustee, or sometimes co-trustee with another trustee of the parents' choosing. Also, because funds are pooled together for investment there is some security that there will likely be funds available for a disabled individual who runs out of money.

### **III. Funding a SNT**

- How much money? How many kids in Family? Special Needs? Size of estate?
- How quickly will assets be needed- Cash vs. IRA (paid out overtime)
- Various-bank accounts, stock, bonds, mutual funds, real estate, annuities, life insurance, retirement accounts.

### **IV. What can SNT be used for:**

Assets in a SNT can be used for such supplemental purposes as funeral planning, medical and dental care not otherwise covered by public assistance or private insurance, psychiatric / psychological / recreational / occupational therapy, home care aides, education, transportation, furnishings, and quality of life enhancements such as t.v. or travel. However, funds cannot be directed to food or housing needs unless the governmental benefits are insufficient to meet these needs or possible reduction or termination.

## ABLE ACT

- I. What is it?
  - A. Achieving a Better Life Experience Act of 2014 signed by President Obama 2014
  - B. The ABLE Act amends Section 529 of the Internal Revenue Service Code of 1986 to create tax-advantaged savings accounts for individuals with disabilities that does not affect government benefits under a certain amount.
    - 1. GROWS TAX-FREE!
  - C. Based on the structure of 529 College Savings Accounts.
  - D. States must comply with Federal Regulations.
- II. Federal Regulations
  - A. Only ONE account per beneficiary
  - B. Can be established in any state (residence requirement eliminated in Dec. 2015)
  - C. Eligibility: Blindness or disability occurs before beneficiary turns 26 (529A(e)(1)(A))
    - 1. IRS determines whether you meet SSA definition of disability or under new Disability Certification criteria in 529A(e)(2).
  - D. YEARLY Contribution limit tied to federal gift tax exclusion: \$15,000
    - 1. Must be in cash/check. Gift directly to ABLE account.
  - E. Rollovers permitted to another disabled family member.
  - F. Account Value Limit- if over \$102,000 then beneficiary's SSI benefits are suspended (won't have to reapply) but MA retained. Any amount over \$100,000 is counted as a resource.
  - G. Withdrawals are tax-free if for a "qualified disability expense"
    - 1. "Any expenses related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary, including the following expenses: 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 any other expenses approved by IRS regulations (529A(e)(5)).
    - 2. Withdrawal should be used before end of month if it is an undesignated distribution or rent/housing/shelter distribution or will be counted as a resource.
    - 3. Unqualified withdrawal- earnings portion taxable for Federal and State and 10% Federal surtax plus possible State fees.
      - a) Unqualified distribution can be returned to ABLE Account before beneficiary's annual income tax return due then 10% surtax is waived.
  - H. At beneficiary's death, state may file claim against remaining funds in account.
    - 1. Payback required of medicaid benefits- State claim is optional
    - 2. Payback starts with date ABLE Account begins.
- III. State Specific Regulations
  - A. Pennsylvania ABLE (S.B.879) signed by Governor Wolf 4/18/16
  - B. Program Administrator-PA Treasury Department
  - C. \$25 minimum contribution and \$60 annual fee (or \$45 if electronic statements)
  - D. Investment Managers: BlackRock, Schwab and Vanguard

- E. Six Asset-allocation investment options (fees will vary).
  - F. Debit Card available-\$2.00 monthly fee but waived if over balance over \$250
  - G. Pennsylvania law also protects funds in your PA ABLE Account from creditors.
  - H. TOTAL Value Limit: \$511,758 in 2019 (tied to PA's 529 max)
    - 1. If account value rises above then SSI and MA suspended? Unclear.
  - I. Pennsylvania legislation states NO payback for PA medical assistance benefits from ABLE account.
  - J. PA residents can deduct contributions to PA ABLE for PA Income Tax purposes
  - K. Does not affect Student Aid.
  - L. Who can enter into ABLE account contract of minor or who lacks capacity?
    - 1. Parent or Guardian, Person or entity designated in writing by parent or guardian (POA), Trustee of Trust for beneficiary or Representative Payee.
- IV. Advantages over Payback Special Needs Trust
- A. Savings = earned income accumulates over time
  - B. Inheritance-the ABLE account becomes part of the Beneficiary's estate-no PA tax
  - C. More control
  - D. Disability has potential to resolve
  - E. Over 65 beneficiary with lifetime disability
  - F. Grows Tax Free
  - G. Less red tape
- V. How it relates to Third Party Special Needs Trusts
- A. Third party money is safe in SNT, in ABLE? Creator has more control.
  - B. Fiduciary Duty of Trustee of SNT.
  - C. No asset limits in Third Party SNT.
  - D. Conclusion: Can be used in conjunction with a Third Party Special Needs Trust.
- VI. Questions/Issues:
- A. How will it be handled administratively and be paid for? Implementation?
  - B. How are withdrawals monitored?
  - C. No fiduciary duty- Lack of protection for beneficiary
  - D. DHS may seek Payback from estate for services paid after 55 in PA.
  - E. Unknowingly create Multiple Accounts.
  - F. Different rules for different states.
- VII. Great Resources:
- A. <http://www.paable.gov/>
  - B. <http://ablenrc.org/>
  - C. POMS SI 01130.740 issued 12/18/15.

## “Qualified Disability Expenses”

### **Education**

Tuition for preschool through post-secondary education  
Books / Supplies and educational materials

### **Housing**

Expenses for a primary residence / Mortgage payments / Real property taxes / Utility charges  
Rent  
Purchase of a primary residence  
NOTE: SSI benefits can be affected if you use ABLE funds for any housing expenses.

### **Transportation**

Expenses for transportation / Use of mass transit  
Purchase or modification of vehicles  
Moving expenses

### **Employment Support**

Moving expenses  
Expenses related to obtaining and maintaining employment / Job-related training

### **Health Prevention and Wellness**

Expenses for health and wellness  
Premiums for health insurance  
Mental health, medical, vision, and dental expenses  
Habilitation and rehabilitation services  
Durable medical equipment  
Therapy  
Respite care  
Long term services and supports  
Nutritional management  
Communication services and devices  
Adaptive equipment  
Personal assistance

### **Assistive Technology and Personal Support**

Expenses for assistive technology and personal support (e.g., a smart phone for a child with autism)

### **Miscellaneous Expenses**

Financial management and administrative services / Legal fees  
Expenses for oversight  
Monitoring  
Home improvement, modifications, maintenance and repairs  
Funeral and burial expenses.

## Special Needs Trust vs. ABLE Account

1)No Contribution Limit-Cash or stock	1)Currently, \$15,000 cash limit
2)No Value Limit affecting benefits	2)Currently, \$100,000 limit for SSI suspension and at \$511,758 no additional contributions
3)Taxed within a Trust at Trust tax rates	3)Grows tax free (but usually owner doesn't pay income taxes). Owner will receive 1099-QA and 5498-QA each year and may have to include on their 1040. Tax deductible for PA residents to PA ABLE
4)Not considered a resource when applying for benefits	4)Not considered a resource when applying for benefits
5)No investment limitations except for Trustee's fiduciary responsibility	5)Limited investments (mutual funds labeled "Aggressive, Moderate, Conservative, etc.)
6)Trustee controls asset investment and distribution	6)Account owner controls asset investment and distribution. Authorized signatories can also manage account
7)Trustee has fiduciary responsibility and duty to beneficiary of Trust	7)No fiduciary duties
<p>8)Third Party Special Needs Trust has no payback to the government for benefits received by beneficiary and can go how the creator of the Trust would want the assets to go.</p> <p>Payback Trust has distribution limits, may have to go to Court to get approval for distributions, a lot of red tape, and pays back the state after beneficiary dies.</p> <ul style="list-style-type: none"> <li>ABLE Account will much easier (compared to a Payback Trust) to be able to deal with small inheritance or gift or work earnings or savings that could cause the individual to become ineligible for government benefits.</li> </ul>	<p>8)At owner's death the account becomes part of his/her estate (possibly PA will allow transfer to sibling who is also eligible for ABLE). Earnings will be taxable for income taxes but no penalty. No Pennsylvania Inheritance Tax as of now.</p> <p>Once the assets in the PA ABLE account have been transferred to the estate, DHS may seek repayment from the estate. DHS may seek repayment from a PA ABLE account proceeds in the estate of the deceased Account Owner only if the deceased was 55 or older and only for Medical Assistance (Medicaid) consisting of nursing facility services, home and community-based services, and related hospital and prescription drug services paid once the Account Owner turned 55. Repayment is postponed if the deceased has a surviving spouse, child under 21, or disabled child of any age.</p>

## Death Of Beneficiary

The PA ABLE account can be used to pay for any outstanding Qualified Disability Expenses, as well as funeral and burial expenses.

Under proposed Internal Revenue Service (IRS) regulations, if a Beneficiary dies, the ABLE account becomes part of the Beneficiary's estate. Those regulations are not yet final or in effect. States have asked the IRS to consider other options. Specifically, as allowable under Pennsylvania law, the other option would be to transfer the account to the Beneficiary's sibling, if any, who is also an Eligible Individual.

When the assets are transferred to the estate, any growth on the contributions will be subject to income tax but not the 10% additional tax applicable to Non-Qualified Withdrawals. For this reason, it usually will be best to pay any outstanding Qualified Disability Expenses, including funeral and burial expenses, from the ABLE account, which will be tax free, before the assets are transferred to the estate.

## PA Payback

Under federal law, if the Beneficiary received Medical Assistance (Medicaid), the state that provided the Medical Assistance (Medicaid) is permitted to file a claim seeking repayment from the ABLE account in an amount up to the amount of Medical Assistance (Medicaid) provided during the time the beneficiary had an ABLE account. However, under Pennsylvania law, the state agency responsible for administering Medical Assistance (Medicaid) (Department of Human Services-DHS) may not file a claim against a PA ABLE account. However, once the assets in the PA ABLE account have been transferred to the estate, DHS may seek repayment from the estate. But whose funds may be subject to repayment and the amount that must be repaid are different from claims against an ABLE account itself. In Pennsylvania, DHS may seek repayment from a PA ABLE account proceeds in the estate of the deceased Account Owner only if the deceased was 55 or older and only for Medical Assistance (Medicaid) consisting of nursing facility services, home and community-based services, and related hospital and prescription drug services paid once the Account Owner turned 55. Repayment is postponed if the deceased has a surviving spouse, child under 21, or disabled child of any age.

## Creditors

Pennsylvania law also protects funds in your PA ABLE Account from creditors. In Pennsylvania legal proceedings, your PA ABLE account cannot be subject to attachment, levy or execution by a creditor of a contributor or the Account Owner. There is also some limited protection in Federal Bankruptcy proceedings. Please see the [PA ABLE Savings Program Disclosure Statement](#) for more information.