

**Special Needs Trusts
and
ABLE Accounts
Maximizing Financial Security for
Persons with Disabilities**

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GIBSON LAW OFFICES, P.L.L.C.

Nancy Gibson has been practicing law in Missoula, Montana since 1985. She attained her undergraduate and law degrees at The University of Montana. She spent the first nine years after her admission to the Montana bar with a Missoula litigation firm specializing in settlement, defense and trial of civil cases.

In 1994, Ms. Gibson opened her solo law office in Missoula, focusing on elder and disability law. Since then, she has worked locally, state-wide, and nationally to address legal issues of the elderly and persons with disabilities.

Ms. Gibson is the only attorney in Montana who is a member of the Special Needs Alliance, an invitation-only national organization of disability law attorneys who specialize in special needs and settlement planning. Members of the Alliance assist injured persons receiving a settlement or award to preserve eligibility for government benefits, and also assist families in providing for loved ones with disabilities.

She served as chair of the Elderly Assistance Committee of the State Bar of Montana from 1998 to 2003. She is actively involved with the National Academy of Elder Law Attorneys (NAELA), an organization dedicated to improving the lives of the elderly and persons with special needs. She served four years on the NAELA board of directors, and also has served as a Director of the Special Needs Alliance.

Over the years Ms. Gibson has served Western Montana through board positions and steering committee involvement for a various non-profit organizations. She serves as a board member or legal consultant for non-profit agencies providing health care and aging services within Montana. She often speaks to professional groups and local communities on elder law, disability and settlement planning, and special needs trusts. She is a Past President of the Western Montana Estate Planning Council. She served as Chair of the Board of Partners in Home Care, a home health agency in Montana.

Ms. Gibson provides legal services to clients who live throughout Montana through her specialization in elder and disability law. Her practice includes preparation of wills and trusts; special needs trust planning; settlement planning; assisting clients with asset preservation and long term care issues, particularly Medicaid planning; public benefits eligibility; administration of estates and trusts; guardianship; conservatorship, and other protective arrangements. She has training and experience in elder law mediation and dispute resolution. She is accredited by the U.S. Department of Veterans Affairs to handle veteran's claims. She has served as Trustee and Trust Administrator in large asbestos settlement trusts.

SPECIAL NEEDS TRUSTS

I. INTRODUCTION

There are two categories of Special Needs Trusts: those created with the beneficiary's assets (self-settled) and those created with someone else's money (third-party). Third-party trusts are often called Supplemental Needs Trusts.

A. Self-Settled Trusts.

Federal and state law recognize that a trust may be established with assets of a person with disabilities under age 65. This is referred to as a "d4A trust" or a "Medicaid payback trust" or a self-settled special needs trust. It can be funded with assets that come from a personal injury settlement, a divorce settlement, an inheritance, or other assets already owned by or to be received by the individual. It must include a provision requiring that Medicaid (not Medicare or the Social Security Administration) be paid back upon the beneficiary's death for the Medicaid services provided to the beneficiary during his or her lifetime, to the extent that funds remain in the trust. There are other specific requirements under state and federal law and regulations, as well as Social Security written instructions that set forth such requirements. A special needs trust must be carefully drafted to satisfy these requirements, which are constantly evolving.

The most critical requirements of a self-settled trust are:

- (1) it must be established for a disabled person who is under the age of 65,
- (2) it must be established by a parent, grandparent, guardian and court,
- (3) it must be irrevocable, other than for certain provisions such as compliance with benefit eligibility, and
- (4) it must include the above-referenced Medicaid-payback requirement.

Generally, when an SSI recipient or a person on certain Medicaid programs transfers assets to another person, he is penalized and loses benefits. Properly drafted and created Special Needs Trusts are an exception to the transfer rules. A Special Needs Trust is a discretionary trust created for a beneficiary who is "disabled" by Social Security standards. It supplements but does not replace public benefits for which the beneficiary may be eligible. A Special Needs Trust must be carefully drafted and implemented to conform with statutory and

regulatory requirements to assure ongoing SSI and Medicaid eligibility. SSI and Medicaid rules regarding Special Needs Trusts are similar but not identical.

If the trust is properly drafted, the funds can be used for just about anything, as long as it is for and in the best interest of the beneficiary. Depending on the public benefits received by the beneficiary, use of the funds for food and shelter expenses may reduce the benefits being received. The trustee should be someone who can properly distribute funds to best benefit the beneficiary.

An alternative type of self-settled special needs trust is a pooled trust (also called a “d4C Trust”). Instead of holding the assets of a single disabled person, a pooled trust holds the resources of many disabled beneficiaries. The assets in the pooled trust are managed, administered and distributed by a non-profit association. Also, unlike individual (d)(4)(A) trusts that may be created only for those under age 65, the Montana Medicaid program recognizes that pooled trusts may be for beneficiaries of any age and may be created by the beneficiary herself.

B. Third Party Trusts (Supplemental Needs Trusts).

Every family with a special needs family member should strongly consider establishing a special needs trust for that individual. That is a document that provides specific directions that must be followed in managing the care and funds of the special needs individual.

A “third party special needs trust” is one in which another person, such as a parent, creates a trust for a person with disabilities, and uses assets which do not belong to that person to fund the trust. Often these trusts are referred to as supplemental needs trusts. Third party trusts provide wonderful opportunities in planning for a special needs family member, whether he or she is a child, an adult, or an infirm adult receiving long term care services. There is no need to repay Medicaid out of this type of trust, if it is properly set up. Any balance upon death can pass to other family members, or whomever one wishes.

II. CONSIDERATIONS IN CREATING A SPECIAL NEEDS TRUST

A determination of the type of benefits a person is receiving or will receive

is a starting point in deciding whether to create a special needs trust. One must consider all the needs and circumstances of the beneficiary, such as health and medical needs, prognosis, life expectancy, anticipated changes in health, housing arrangements, capacity to own assets responsibly, capacity to manage assets responsibly, financial needs, family members involved in providing care, whether there are alternative methods of using the funds or assets that would be placed in the Special Needs Trust, whether there are sufficient assets to utilize a professional trustee, and if not, whether there is a suitable individual to name as trustee. Also, one should consider the state in which the disabled trustee is likely to reside, particularly upon the death of the primary family caregiver, and the specific legal and governmental agency requirements for a special needs trust in that state.

If a person is or will be dependant on SSI or Medicaid, a special needs trust should be considered, but all possible means of maintaining eligibility should be examined to determine what is the best choice. Other possibilities include (1) spending the funds on exempt assets and to make payments that will not trigger ineligibility, (2) setting up an account within a pooled trust, or (3) opening an ABLÉ account. If a person's future needs for Medicaid or SSI are uncertain, then a determination should be made whether to create a Special Needs Trust anyway, but perhaps manage the trust assets in a flexible way. Every case must be evaluated based upon the particular facts. To advise on these issues, an attorney or other professional must have sufficient training and understanding of the interplay between governmental benefits laws and regulations with well-drafted special needs trust documents and proper trust administration.

ABLE ACCOUNTS

What is an ABLÉ account?

ABLE Accounts, which are tax-advantaged savings accounts for individuals with disabilities and their families, will be created as a result of the passage of the Stephen Beck Jr., Achieving a Better Life Experience Act of 2014 or better known as the ABLÉ Act. The beneficiary of the account is the account owner, and income earned by the accounts will not be taxed. Contributions to the account made by any person (the account beneficiary, family and friends) will be made using post-taxed dollars and will not be tax deductible, although some states may allow for state income tax deductions for contribution made to an ABLÉ account.

Why the need for ABLE accounts?

Millions of individuals with disabilities and their families depend on a wide variety of public benefits for income, health care and food and housing assistance.

Eligibility for these public benefits (SSI, SNAP, Medicaid) require meeting a means or resource test that limits eligibility to individuals to report more than \$2,000 in cash savings, retirement funds and other items of significant value. To remain eligible for these public benefits, an individual must remain poor. For the first time in public policy, the ABLE Act recognizes the extra and significant costs of living with a disability. These include costs, related to raising a child with significant disabilities or a working age adult with disabilities, for accessible housing and transportation, personal assistance services, assistive technology and health care not covered by insurance, Medicaid or Medicare.

For the first time, eligible individuals and their families will be allowed to establish ABLE savings accounts that will not affect their eligibility for SSI, Medicaid and other public benefits. The legislation explains further that an ABLE account will, with private savings, "secure funding for disability-related expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, Medicaid, SSI, the beneficiary's employment and other sources."

Am I eligible for an ABLE account?

The ABLE Act limits eligibility to individuals with significant disabilities with an age of onset of disability before turning 26 years of age. If you meet this age criteria and are also receiving benefits already under SSI and/or SSDI, you are automatically eligible to establish an ABLE account. If you are not a recipient of SSI and/or SSDI, but still meet the age of onset disability requirement, you could still be eligible to open an ABLE account if you meet Social Security's definition and criteria regarding significant functional limitations and receive a letter of certification from a licensed physician. You need not be under the age of 26 to be eligible for an ABLE account. You could be over the age of 26, but must have had an age of onset before the individual's 26 birthday.

Are there limits to how much money can be put in an ABLE account?

The total annual contributions by all participating individuals, including family and friends, for a single tax year is \$14,000. The amount may be adjusted periodically

to account for inflation. Under current tax law, \$14,000 is the maximum amount that individuals can make as a gift to someone else and not report the gift to the IRS (gift tax exclusion). The total limit over time that could be made to an ABLE account will be subject to the individual state and their limit for education-related 529 savings accounts. Many states have set this limit at more than \$300,000 per plan. However, for individuals with disabilities who are recipients of SSI, the ABLE Act sets some further limitations. The first \$100,000 in ABLE accounts would be exempted from the SSI \$2,000 individual resource limit. If and when an ABLE account exceeds \$100,000, the beneficiary's SSI cash benefit would be suspended until such time as the account falls back below \$100,000. It is important to note that while the beneficiary's eligibility for the SSI cash benefit is suspended, this has no effect on their ability to receive or be eligible to receive medical assistance through Medicaid.

Additionally, the state in which the beneficiary lived may file a claim to all or a portion of the funds in the account equal to the amount in which the state spent on the person with disabilities. This is known as a "Medicaid Pay-Back" provision and the claim could recoup Medicaid related expenses. If \$100,000 is held in an ABLE account at death, and the account holder has received a considerable amount of services paid by Medicaid, the balance could be unnecessarily depleted and not available for the use of children, spouse, or other loved ones. Thus, while ABLE accounts are very useful, they are not the best way for family members and others to place accumulating funds that could be left for the use of the person with disabilities, if it is desired that others receive the balance at the person's death. A third party special needs trust would be preferred for this planning.

Which expenses are allowed by ABLE accounts?

A "qualified disability expense" means any expense related to the designated beneficiary as a result of living a life with disabilities. These may include education, housing, transportation, employment training and support, assistive technology, personal support services, health care expenses, financial management and administrative services and other expenses which help improve health, independence, and/or quality of life?

Can I have more than one ABLE account?

No. The ABLE Act limits the opportunity to one ABLE account per eligible individual.

Do I have to wait for my state to establish a program before opening an account?

No. While the original law passed in 2014 did stipulate that an individual had to open an account in their state of residency, this provision was eliminated by Congress in 2015. This means that regardless of where you might live and whether or not your state has decided to establish an ABLE program, you are free to enroll in any state's program once they are accepting enrollees.

Will states offer options to invest the savings contributed to an ABLE account?

Like state 529 college savings plans, states are likely to offer qualified individuals and families multiple options to establish ABLE accounts with varied investment strategies. Each individual and family will need to project possible future needs and costs over time, and to assess their risk tolerance for possible future investment strategies to grow their savings. Account contributors or designated beneficiaries are limited, by the ABLE Act, to change the way their money is invested in the account up to two times per year.

How is an ABLE account different than a special needs or pooled trust?

An ABLE Account will provide more choice and control for the beneficiary and family. Cost of establishing an account will likely be considerably less than either a Special Needs Trust (SNT) or Pooled Income Trust. With an ABLE account, account owners will have the ability to control their funds and, if circumstances change, still have other options available to them. Determining which option is the most appropriate will depend upon individual circumstances. For many families, the ABLE account will be a significant and viable option in addition to, rather than instead of, a Trust program. For more information, the webinar on ABLE Accounts, Trusts, Financial and Benefits Planning is archived on our website along with its slides and transcript.

How Will I know Which State ABLE Program is Right for Me?

By the Summer of 2016, we expect that several states will have opened ABLE programs and be inviting eligible individuals nationwide to open an ABLE account regardless of their state of residence. Ohio has a program in the testing phase,

and is now close to the point of opening accounts. When comparing State ABLE programs you may want to consider the following questions in order to find a program that best meets your needs:

Opening an Account

What proof will the ABLE program require for you to document in order to open an account or show that your disbursements are qualified expenses?

Is there a minimum contribution to open an ABLE account?

Is there a fee to open an account and, if so, how much is that fee?

Maintaining the Account and Fees

Is there a required minimum contribution to your account? If so, what is the amount? Are the fees front end loaded or are they reduced if you leave your funds invested for several years? Are there restrictions on how often you can withdraw funds from your account?

Investment Opportunities

What are the investment options the state ABLE program offers?

Are the options likely to meet your needs for limiting risk with the growth of your contributed dollars to the ABLE account?

Does the program offer any unique or value added program elements to help you save, contribute to your account, grow the account, and manage your invested dollars?

Does the state program offer any unique or value added program elements (such as a match or rewards program, financial literacy info or program for beneficiaries) to help you save, contribute to your account, grow the account, and manage your invested dollars? If so, what is it?

Is there a “debit card/purchasing card” available with the program? Are there added costs to this?

SUMMARY

With good planning, one can greatly enhance the financial security of a person who has a disability. Family members should become educated and seek advice for the specific situation they wish to address, to maximize the assistance they can provide, during their lifetimes and through estate planning.