



ABLE Accounts and SNTs: How to Choose?

Distributed by Brian N. Rubin, President Elect, Special Needs Alliance*

*** Special Needs Alliance is the national not for profit association of experienced special needs planning attorneys, membership by invitation.**

The “ABLE” account is a relatively new planning tool that offers an individual with disabilities a tax-free savings option (similar to a 529 College Savings Plan) that does not interfere with the individual’s eligibility for means-tested government benefits, such as Supplemental Security Income (SSI) and Medicaid. Special needs trusts (SNTs) are well-established savings tools that also protect eligibility for public programs.

Since the regulations governing SNTs and ABLE accounts are quite different, individuals with disabilities and their families should consider their specific circumstances before establishing one or the other. In some instances, it may be beneficial to create both.

Eligibility

The ABLE Act limits eligibility to an individual whose disability onset occurred prior to the age of 26 and who satisfies Social Security’s criteria regarding significant functional limitations stemming from the disabling condition.

First party SNTs, which are funded with assets belonging to the beneficiary, must be established before an individual meeting Social Security’s disability criteria reaches the age of 65. There are no age limits for creating third party trusts, funded with assets belonging to anyone *other* than the beneficiary.

Establishment and Management

ABLE accounts can be created and managed by the beneficiary, subject to capacity. If they need assistance, the account can be established and/or managed by their parents, conservator/guardian or agent under a power of attorney.

A first party SNT may be established by the beneficiary, their parents, grandparents, conservator/guardian or the court. A third party SNT may be established by anyone *except* the beneficiary. Management of SNTs is handled by a designated trustee.

Contribution Limits

There are no limits to how many SNTs an individual may have or to how much each trust may hold. On the other hand, an individual may have only one ABLE account, and *total*

-1- **ABLE Accounts and SNTs: How to Choose?**

Distributed by Brian N. Rubin, President Elect, Special Needs Alliance

annual contributions are pegged to the annual federal annual gift tax exclusion (\$14,000 for 2017).

Any amount over \$100,000 in an ABLE account counts towards the individual's \$2,000 resource limit for SSI and Medicaid eligibility, and causes the individual's SSI payments to be suspended until the account balance decreases to less than \$100,000. If all other eligibility rules are followed, the individual's SSI payments will resume when the account balance drops below \$100,000 without the need to reapply for SSI. During the SSI suspension period, the individual's SSI-linked eligibility for Medicaid continues uninterrupted.

Total lifetime contributions to an ABLE account are tied to each provider state's limit on total contributions to its 529 College Savings Plan. State limits vary from approximately \$250,000 to \$450,000. In light of the annual contribution limit of \$14,000, these lifetime limits would not be reached for decades, even if no disbursements are made from the ABLE account during the accumulation period.

Investment Options

Each state's ABLE program designates investment options available to account holders. Changes may be made no more than twice annually.

SNT investments are made at the sole discretion of the appointed trustee, who has a fiduciary responsibility to act in the beneficiary's best interests.

Use of Funds

An SNT, at the trustee's discretion, may pay for anything that benefits the beneficiary alone—other than food and housing—without affecting government benefits. If the beneficiary is an SSI recipient, food and housing expenditures are considered *in-kind support (ISM)* and will reduce payments from that program.

An ABLE account may pay for the beneficiary's "qualified disability expenses" (QDEs) to maintain or improve the health, independence, or quality of life of the beneficiary. This includes basic living expenses, education, housing, transportation, employment training and support, assistive technology, personal support services, health care expenses, financial management and administrative services. The ability to pay for housing without affecting SSI is an attractive benefit of ABLE accounts. More categories may be added by further regulations.

If withdrawals are made for expenditures other than QDEs, the earnings portion of the withdrawal would be subject to regular income tax and a 10% penalty. In those states that have adopted special state income tax benefits, improper withdrawals might also incur additional state tax penalties.

Fees

ABLE account fees are nominal, generally limited to maintenance and charges by financial institutions. Attorney and trustee fees are incurred when creating and maintaining an SNT. A less expensive alternative—a pooled SNT—may be appropriate in some cases. Pooled SNTs are administered by nonprofit organizations and combine the resources of many sub-accounts for efficiency and investment effectiveness.

Taxes

Many believe that the most beneficial provision of an ABLE account is that it grows “income tax-free,” at least for federal income tax purposes. However, few individuals who receive public benefits actually pay any income tax. Even the ability to avoid all taxes on a \$100,000 investment within an ABLE account is unlikely to improve the tax picture for a person who is eligible for SSI or Medicaid.

Contributions to an ABLE account are not deductible under federal income tax rules (although some states do provide for a modest state income tax deduction). A transfer to an ABLE account by a third party does qualify as a present interest gift for purposes of the federal annual gift tax exclusion. The modest tax benefits associated with an ABLE account may merit a professional review of the beneficiary’s particular individual tax situation to determine whether those tax considerations could make an ABLE account a worthwhile option.

First party SNTs are generally treated as grantor trusts, with income taxable to the beneficiary. Often the income generated will be below taxable limits. With proper drafting, third party SNTs can use various planning strategies to minimize taxes.

Medicaid Payback

State Medicaid programs that provide medical assistance and/or “waiver” services for the benefit of the beneficiary of an ABLE account (including community-based residential services) may assert a “payback” claim for reimbursement upon the beneficiary’s death payable from funds then remaining in the account. *All funds contributed to an ABLE account, including donations from third parties, are subject to this Medicaid payback if a state elects to assert the reimbursement claim.*

Subject to the payment of any outstanding QDEs, a state must limit its payback claim to Medicaid expenditures for the benefit of the beneficiary which occurred *after* the creation of the ABLE account. Although unlikely, it is theoretically possible that a state may elect not to seek any payback recovery from ABLE accounts belonging to its own citizens (not to participants from other states), and this beneficial feature, if available, may certainly influence a beneficiary’s choice when considering which ABLE program to select.

Funds remaining in a first party SNT are subject to Medicaid payback for services performed *throughout the beneficiary's life*. There is no payback required from third party SNTs.

Which to Choose?

When pondering the establishment of an SNT and/or ABLE account, the beneficiary or their legal representative should consult a special needs planning attorney about the suitability of these savings tools for the beneficiary's needs.

An ABLE account is not an ideal vehicle to manage significant third party funds due to the likelihood of a Medicaid payback claim upon the death of the beneficiary, unless there is also the strong likelihood that all third party funds contributed will in fact be spent before the beneficiary dies. For most individuals with disabilities, an ABLE account is not a substitute for comprehensive SNT planning, but it may be a helpful secondary tool to help secure their financial futures.

There are several circumstances in which an ABLE account may be particularly useful. For example, an ABLE account would allow an individual with disabilities to save unspent work earnings or Social Security benefits for a future purchase without violating the general rule that the recipient of SSI and Medicaid cannot accumulate more than \$2,000.

An ABLE account might also be useful where a relative has misguidedly left a small inheritance (*i.e.* less than \$14,000) directly to a person who receives Medicaid and/or SSI (instead of designating the bequest to be paid to a third party SNT).

Another possible use for an ABLE account is to receive support or alimony payments ordered by a court in the context of a divorce, so as not to adversely impact the beneficiary's SSI or Medicaid eligibility.

As discussed above, an ABLE account may also be used to avoid an ISM reduction to the beneficiary's SSI payment if contributions are used to provide for the beneficiary's housing expenses.

Lastly, an ABLE account might be an excellent vehicle to hold a small litigation settlement or an unexpected windfall such as lottery winnings.

A special needs attorney can discuss in detail how these two techniques interact. A carefully drafted SNT might well authorize the trustee to transfer money into the beneficiary's ABLE account to maximize the benefits of both tools simultaneously. For help finding a special needs planning attorney, visit <http://www.specialneedsalliance.org/find-an-attorney>. (The Special Needs Alliance is a national not-for-profit association of experienced special needs planning attorneys.)