

# Special Needs Trusts and ABLE Accounts for Persons with Special Needs

Downs Syndrome Network

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# Disclaimer

- This presentation is for general information only and is not intended to be legal advice.
- Consult a competent legal advisor for guidance concerning your situation.

# Road Map

- Part I- Paying for Care
- Part II – Special Needs Trusts and ABLE

# Part I - Paying for Care

- Public Options
  - SSI
  - SSDI
  - Medicaid

# SSI (Supplemental Security Income)

- Cannot have more than \$2,000 in savings
- Must be disabled (cannot engage in substantial gainful employment)
- Automatically qualify for Medicaid

# SSDI

## (Social Security Disability Income)

- Not means tested
- Must be disabled
- Eligibility based on
  - Your own work record
  - A parent's work record if you were disabled before age 22 and parent is retired or deceased
- Qualify for Medicare after 2 years
  - no wait for End Stage Kidney Disease or ALS

# Community Medicaid

- Community Medicaid Income Cap (net countable income \$350/month (individual) or \$392/month (couple))
- Assets cannot exceed \$2,000 (single) or \$3,000 (couple)
  - Exclusions:
    - Residence
    - Automobiles
    - Pre-Need Funeral Arrangements
- May Be A Waiting List
- Not All Providers Participate

# Part II

- Special Needs Trusts and ABLE
  - Third Party
  - Self-Settled
  - Pooled Trust
  - ABLE



# The Problem

- An adult child has a disability and is receiving Supplemental Security Income (SSI) and Medicaid.
- SSI pays the child \$794 a month and Medicaid provides health care.
- Medicaid also offers special group programs geared to the child's care needs which may be too costly, or perhaps even unavailable, without Medicaid eligibility.
- Receipt of income and assets are strictly limited when an individual is receiving public benefits (primarily Medicaid and SSI but also subsidized housing and food stamps)
- The parents want to make sure their child has sufficient funds for expenses that the public benefits programs do not cover.

# A Solution

- The parents can set aside funds in a special needs trust that would be available for the child's benefit without affecting his or her eligibility for public benefits.
  - Payments should not prevent SSI income.
  - Child support may be structured to take into account SSI income and Medicaid eligibility.

# Special Needs Trust Overview

- Established for a person who is disabled
- Allows trustee to manage funds.
- Under federal law insulates money from being counted for purposes of means-tested public benefit programs such as Medicaid and SSI.
  - SSI:
    - \$794/month benefit for shelter and food
    - Automatic eligibility for Medicaid
  - Medicaid
    - Pays for health care including special programs for disabled

# Options

- Three Special Needs Trusts and ABLE Account.
- The touchstone of all options:
  - Funds not counted for determining eligibility for public benefits.
  - Funds used to supplement public benefit payments and services.
  - Distributions are discretionary (not compelled to make distributions).

# Third-Party Special Needs Trust

(First Nat'l Bank of Md. v. DHMH, 399 A.2d 891 (1979))

- Anyone other than disabled person's money:
  - Examples of the disabled person's own money:
    - Inheritance
    - Personal injury award
    - Mandatory child support
- Anyone can be trustee except for beneficiary.
- Trustee must exercise discretion.
- Sole benefit not required.

# Third-Party Special Needs Trust

- Inter vivos or testamentary.
- Revocable or irrevocable.
- No Medicaid payback.
- No accountings to the state.
- Preferred option for “third party” money.

# Third-Party Special Needs Trust

(MD Discretionary Trust Act, E&T § 14-401)

- For one beneficiary.
- Must cite the Act.
- Form in statute.

# Self-Settled Trust

## 42 USC § 1396p(d)4A

- Can only be established by the beneficiary, a parent, grandparent, guardian or a court.
- Beneficiary must have capacity or legal authority to transfer his/her own funds.
  - better to “bypass” beneficiary and funds go directly to trust
- Beneficiary must be disabled.
- Trustee must exercise discretion.
- “Sole benefit.”
- Medicaid pay-back and accountings.
- Irrevocable.



# Self-Settled Trust

- Strict review:
  - by Maryland Dept. of Health for Medicaid issues.
    - Significant limitations...COMAR 10.09.24.08-2
  - by Social Security for SSI issues.
    - See, e.g., SSA POMS SI 01120.200
- Used only when source of funding is the beneficiary's own assets:
  - Inheritance.
  - Personal injury award.
  - Mandatory child support.

# Pooled Trust

## 42 USC § 1396p(d)4C

- Not-for-profit organization manages several self-settled accounts (e.g., analogous to the way a mutual fund account operates).
- Can only be established by the beneficiary, a parent, grandparent, guardian or a court.
- Beneficiary must be disabled.
- Organization serves as the Trustee.
- Trustee must exercise discretion.
- Lawyer not needed to draft trust, but administrative costs add up over time.

# Pooled Trust

- Pooled trust organizations serving Montgomery County include:
  - First Maryland Disability Trust.
  - Shared Horizons / Vinner Trust.
  - ARC of Northern Virginia.

# ABLE - Achieving a Better Life Experience IRC § 529A

Special account patterned after College Savings Plans:

- Grows tax-free.
- Assets not counted for public benefits.
- Distributions to benefit the person with disabilities not counted as income for public benefits.

# ABLE Eligibility Rules

- The beneficiary must be disabled:
  - eligible for SSI or SSDI benefits or
  - certified by a doctor
- The onset of a qualifying disability must occur before the individual is 26 years old.
- Only one account per person.
- Not limited to state of residency.
- A state agency operates the ABLE account.

# ABLE Eligibility Rules

- The eligible individual's agent under a power of attorney or, if none, his or her parent or legal guardian may establish the ABLE account for that eligible individual but may not have a beneficial interest in the account.
- Does not necessarily eliminate need for special needs trusts.

# Certification of Eligibility

- Disability certification must state person with a disability
  - Is blind or has a medically determinable physical or mental impairment resulting in marked or severe functional limitations, and which
    - (i) can be expected to result in death or
    - (ii) has lasted or can be expected to last for a continuous period of not less than 12 months.
  - Such blindness or disability occurred before the person's 26<sup>th</sup> birthday.
- The certification must include a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments and signed under penalty of perjury by a licensed physician.

# Contribution Limits

- Total annual contributions may not exceed the federal gift tax annual limit (\$15,000 in 2021).
- SSI payments will be suspended when the account balance exceeds \$100,000.
- All account assets excluded for Medicaid eligibility.
- Maximum account balance is \$500,000 (DC & MD)



# Income Tax Issues

- Contributions are not tax-deductible.
- Earned interest is tax-free.
- Qualified distributions are tax-free.
- Non-qualified distributions subject to ordinary income tax and a 10% penalty.

# Rollovers / Changes in Beneficiary

- 60 days to roll over to another ABLE account
  - for the benefit of the same designated beneficiary or
  - to an individual with a disability who is a sibling of the beneficiary.

# Permitted Distributions

- Funds must be used for “disability-related” purposes, including “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.”

# Medicaid Payback

- Any sums remaining in an ABLE account when the beneficiary dies must first reimburse Medicaid for services performed since the account was established.
- Medicaid payback paid only after
  - the payment of all outstanding payments due for the qualified disability expenses of the designated beneficiary and
  - is to be reduced by the amount of all premiums paid by or on behalf of the designated beneficiary to a Medicaid Buy-In program under that State's Medicaid plan.
- No payback in Maryland in many circumstances.

# ABLE - Loss of Eligibility

- If beneficiary is no longer eligible
  - For remainder of tax year
    - The ABLE account remains an ABLE account.
    - Distributions continue tax free for rest of tax year.
  - Beginning on the first day of the next tax year
    - No contributions to the ABLE account may be accepted.
    - The account otherwise remains an ABLE account.
    - If the individual subsequently again becomes an eligible individual, then additional contributions may be accepted.

# When ABLE May Help

- Accumulate earnings if SSI beneficiary.
- Person with disabilities wants to establish or control.
- Pay housing expenses to avoid ISM.
- Transfer UTMA funds so can qualify for SSI.
- Beneficiary not concerned about Medicaid payback.
- Pooled trust not available or not liked.
- “Park” funds for a short period until spent down.
- ABLE and special needs trusts are not mutually exclusive – both may be used.

# Comparison of Options

- 1. Whose assets**
- 2. Limitations**
- 3. Who sets up**
- 4. Who controls**
- 5. Who benefits**
- 6. Written agreement**
- 7. When to use**
- 8. Medicaid payback**

# Third Party SNT

1. Not beneficiary's assets
2. No age or dollar limitations
3. Anyone but the beneficiary can set up
4. Anyone but the beneficiary can control
5. Others beside the beneficiary can benefit
6. Need formal written document
7. Can be inter vivos gift or testamentary
8. No Medicaid payback



# Self-settled SNT

1. Not beneficiary's assets
2. Beneficiary must be < 65; no dollar limitations
3. Only the beneficiary, a parent, grandparent, guardian or court can establish
4. Anyone but the beneficiary can control
5. Must be for beneficiary's sole benefit
6. Need formal written document
7. Use when beneficiary has resources above eligibility limits
8. Medicaid payback

# Pooled SNT

1. Not beneficiary's assets
2. Beneficiary must be < 65 if on SSI; no dollar limitations
3. Only the beneficiary, a parent, grandparent, guardian or court can establish
4. Pooled Trust controls
5. Must be for beneficiary's sole benefit
6. Need master trust and joinder agreement
7. Use when beneficiary has resources above eligibility limits
8. Medicaid payback or pooled trust

# ABLE

1. Third party or beneficiary's assets
2. Beneficiary must be disabled < 26; federal annual gift exclusion (\$15,000 in 2021)
3. Only the beneficiary, a parent or guardian can establish
4. Beneficiary controls
5. Must be for beneficiary's benefit
6. Need agreement with ABLE state administrator
7. Use when beneficiary has resources above eligibility limits
8. Medicaid payback after ABLE started except in MD

# Questions?

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