

BASICS OF ABLE ACCOUNTS & SPECIAL NEEDS TRUSTS UPDATE

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ABLE ACCOUNTS

1. What is an ABLE account? Can I have more than one? What are the contribution limitations? What happens when the beneficiary dies?

ABLE accounts were introduced by the “Achieving a Better Life Experience Act of 2014”. ABLE accounts are tax-deferred savings accounts modeled on Section 529 education savings plans. The beneficiary of the account is the account owner. Income earned by the account is not taxed. Contributions to the account can be made by any person, including the account beneficiary, family and friends. Contributions to the account must be made with after tax dollars and are not tax deductible for federal tax purposes.

Utah has adopted the ABLE Act (Utah Code 35A-12-101) but has not yet established its own ABLE program. If you want to start an ABLE account before Utah establishes its program, you can open an account in another state. Keep in mind, however, that the ABLE Act only permits a beneficiary to have a single account.

Total contributions from all sources, including the beneficiary, family members, friends and others are limited to \$15,000 per year (adjusted periodically for inflation). The Tax Cuts and Jobs Act allows the designated beneficiary (but no other person) to make additional contributions in excess of this limit. To be eligible to make additional contributions, the designated beneficiary must be employed or self-employed and must not be covered by an employer’s retirement savings plan. The additional contributions are limited to the lesser of (1) the previous year’s poverty line for a single person household or (2) the designated beneficiary’s taxable compensation for the current year. Many states have set a total contribution account limitation of \$300,000. For individuals who receive SSI, the first \$100,000 contributed to an ABLE account is exempted from the \$2,000 SSI resource limit. If the amount held in an ABLE account exceeds \$100,000, the beneficiary’s SSI eligibility is suspended until such time as the account balance drops below \$100,000. (This is an SSI limitation and not a Medicaid limitation.)

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Like a first party special needs trust, funds remaining in an ABLE account are subject to “pay back” to the state for medical assistance provided to the beneficiary under the Medicaid program after the account is established.

2. Why are ABLE accounts helpful?

The ABLE Act acknowledges the significant additional costs attendant to living with a disability. Absent an ABLE account, individuals dependent on Supplemental Security Income (“SSI”) and Medicaid face an eligibility limit of \$2,000 in cash savings, retirement funds and other non-exempt assets. Funds held in a qualifying ABLE account will not affect eligibility for SSI, Medicaid and other means tested public benefits.

3. Who is eligible to create an ABLE account?

Individuals who are born or become disabled prior to age 26 are eligible to create an ABLE account. Individuals receiving SSI or Social Security Disability Income (“SSDI”) are automatically eligible to establish an account. Individuals who are not receiving SSI or SSDI who became disabled prior to age 26 can create an account upon obtaining a letter regarding functional limitations from a licensed physician.

4. How can ABLE account funds be used?

Funds must be used for qualified disability expenses, including housing, education, transportation, employment training, health and wellness, financial management, legal fees, and more.

5. What are the benefits of an ABLE account? How do ABLE accounts compare to first party and third party special needs trusts?

Perhaps the single most important advantage of an ABLE account is that the beneficiary can retain control of their own money and retain a sense of autonomy. [Query whether the clarification of the rules regarding use of prepaid debit cards and payment of credit card expenses set forth below also expands autonomy.]

Like a first party special needs trust, an ABLE account can be funded with the beneficiary’s own funds, although the amount that can be contributed from all sources is restricted to \$15,000 per year. A first party special needs trust has no contribution limitation. An ABLE account can be managed by the beneficiary. A first party special needs trust is managed by a trustee. An ABLE account is limited to distributing funds for education, health and wellness, housing, transportation, personal support services, funeral and burial expenses, legal fees, and financial management fees. A first party special needs trust can distribute funds for the items listed above, and for a broad range of additional items like travel, recreation and entertainment. ABLE accounts have maximum contribution limitations while first party special needs trusts do not. ABLE accounts have an SSI limitation of \$100,000; first party special needs trusts do not. Both ABLE accounts and first party special needs trusts are subject to a “pay back” clause.

Third party special needs trusts are funded with funds from third parties, such as parents, relatives, and friends. There are no contribution limitations and the trust is managed by a trustee. Funds can be used for virtually any purpose, although distributions used for shelter and food will reduce a beneficiary's SSI benefits. A third party special needs trust is not subject to "pay back". Upon the death of a beneficiary, remaining funds may be distributed as the trustor(s) direct.

FIRST PARTY SPECIAL NEEDS TRUSTS

6. What's new with first party special needs trusts?

Administrative oversight! For many years, the Social Security Administration ("SSA") largely ignored first party special needs trusts. Then several years ago SSA undertook a rather exhaustive review of existing trusts and disqualified many of them for lack of compliance with various POMS provisions (see examples below). This caused great frustration for most every lawyer practicing in the field. It also caused great frustration to many SSI and Medicaid recipients, who often were asked to repay thousands and sometimes tens of thousands of dollars.

For example, in one case SSA disqualified a trust in 2014 and asked for the repayment of \$19,394 in SSI assistance where the individual's trust provided for payback to his state of residence (in 2012, when the trust was drafted), but did not provide for payback to any state that may render Medicaid assistance. The SSA also concluded that certain trust language erred in impermissibly permitting payment of fees related to "non-trust property" and "other matters relating to the Beneficiary's affairs" to be paid prior to the reimbursement of Medicaid upon the beneficiary's death.

In another case, SSA disqualified a trust contending that language in the trust provided for one state to take precedence over another, and that there was insufficient language in the trust describing what was to happen in the event of an early termination.

In another situation, also involving an early termination provision, SSA disqualified a trust contending that the trust provided for payment to a single state upon early termination of the trust (rather than all states that could provide assistance) and limited reimbursement for services rendered only during the time the trust was in existence.

Notwithstanding the foregoing, SSA has permitted hardship exceptions to repayment where it can be demonstrated that the beneficiary was not involved in and was unaware of any issue with the trust, for example, because an attorney drafted the trust. The SSA has also said it does not authorize repayments to be made by the trust.

SSA recently revised its Program Operation Manual System ("POMS"). While many of these changes are highly technical, several of them are worth mention. First, the revised POMS address the possibility of a transfer of resources penalty for the funding of a pooled trust by an individual over age 65 (long the rule in Utah). The new POMS also explain that trusts may pay a beneficiary's credit card bill so long as food and shelter are not included in the payment. If they are, those payments are handled using the presumed maximum value rule. Also, if gift cards can

be used to purchase food or shelter, the value of the gift card will be treated as unearned income in the month of receipt, and the balance will count as a resource in the month following receipt. The SSA has now approved the use of secured debit cards, like TrueLink© cards, to be used with special needs trusts.

If you have any experience with special needs trusts, you are familiar with the “sole benefit” rule – a first party trust must be created for the “sole benefit” of the disabled person. However, the SSA has softened the “sole benefit” rule with respect to distributions, now permitting distributions for the “primary benefit” of the named sole beneficiary. Trustees may now purchase products and services that partially benefit a third person. For example, a new television may be purchased for a trust beneficiary if they are the primary person using it, even if someone else in the home occasionally watches it.

With regard to companion services, and using a trip to Disneyland as an example, a Trustee may now pay for both parents of a minor to accompany the minor if the minor’s disability requires this level of care. The trust cannot pay for siblings in this example because they are not necessary companions.

THIRD PARTY SPECIAL NEEDS TRUSTS

7. What’s new with Third Party Special Needs Trusts?

Third party special needs trusts “work” (are not treated as countable assets of the trust beneficiary or beneficiaries) because of an important legal concept. A child, including an adult child, has no absolute right to an inheritance, and a parent has no legal duty to provide an inheritance to his or her children.

Accordingly, if a parent restricts or places conditions on a child’s inheritance, the child - and SSI and Medicaid – must respect the conditions. For example, instead of providing a child with an inheritance, a parent might say “a trustee may provide you with such income and principal as the trustee sees fit in his or her discretion”. In this situation, the beneficiary only has the right to receive what the trustee chooses to provide in his or her discretion. The beneficiary has no absolute right to anything, and neither SSI nor Medicaid can impute any amount to the beneficiary. For this concept to work, however, the trust must be discretionary, and should not refer to the “health, support or maintenance” of the beneficiary.

The Utah Medicaid Policy Manual has not discussed third party special needs trusts in detail. Now, however, in the new POMS, the SSA has reiterated that Medicaid has no right to recover funds placed into a valid third party special needs trust upon the death of the disabled beneficiary.