

The ABLE Case Summary Series

ABLE Accounts Compared to Special Needs Trusts

When Is One or the Other Preferred? When Do Both Work Well Together?

This is the third in a six-part Case Summary Series to explore ways to benefit from an ABLE account that complements continued eligibility for selected public benefits and programs and/or use of special needs trusts. The purpose of the series is to help current or future ABLE account owners and beneficiaries understand better the possibilities of an ABLE account complementing other strategies to improve health, independence and quality of life.

Introduction

The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act is found in section 529A of the Internal Revenue Code and became law in December 2014.¹ Proposed ABLE regulations were published by the Department of the Treasury on June 22, 2015 and have not been issued as final.² As this is written, more than 30 states have established ABLE programs, allowing eligible individuals with disabilities to open ABLE accounts. ABLE accounts offer qualified individuals with disabilities an opportunity to save funds, in a dedicated account, to meet “qualified disability expenses” that will allow them to improve health, independence and quality of life.

Both ABLE accounts and Special Needs Trusts (SNTs) are a form of protected asset accounts. Each allows for the accumulation of money, for the benefit of an individual with a disability, without jeopardizing key federally-based benefits like Supplemental Security Income (SSI) and Medicaid. Also, when distributions are made from an ABLE or SNT account, for the benefit of an individual with a disability, there is no impact on SSI or Medicaid eligibility so

¹ 26 USC 529A.

² 80 Federal Register 35602-01.

long as the distributions are carefully limited to pay for certain classes of items.

This article compares ABLE accounts with two types of SNTs: First and Third Party Non-Pooled SNTs. We describe key advantages and limitations of ABLE accounts and the Non-Pooled SNTs, focusing on when either an SNT or an ABLE account might be the preferred vehicle for savings/asset accumulation to benefit an individual with a disability. We also use a case scenario to illustrate the use of both to benefit a particular individual.

ABLE Accounts: Advantages and Limitations

The earliest ABLE accounts were started in 2016 and their advantages and limitations are still emerging.

ABLE Account - Key Advantages:

- **Ease of Start-Up:** The typical state ABLE account can be established online through a dedicated website, with total time to enroll often less than 30 minutes.
- **Small Initial Deposit:** Most ABLE accounts can be started with a modest initial deposit. Currently, initial deposits are \$50 or less.
- **No Need or Limited Need for an Attorney:** ABLE programs are set up so that program enrollment can be done by a designated beneficiary, without assistance. Even if the designated beneficiary consults an attorney with respect to an ABLE account set up, the cost to retain an attorney is expected to be much less than it would be to set up an SNT (the Non-Pooled SNT in particular).
- **Designated Beneficiary Is Account Owner:** This means deposits and distributions can be controlled by the individual with a disability who set up the account, with no need for third party intervention. In some cases, the account will be set up by a Legal Guardian for a minor child, a court-appointed Legal Guardian for an adult, or a person with a Power of Attorney chosen by the designated beneficiary, but the designated beneficiary is still the account owner.
- **Any Person Can Make Contributions:** Any person can contribute to an ABLE account. ("Person," as defined by the Internal Revenue Code, includes an *individual, trust, estate, partnership, association, company, or corporation.*)

- **Designated Beneficiary Decides When and How Money Will Be Used:** So long as no Legal Guardian exists, the beneficiary will have full control over distributions.
- **Distributions to Pay for Housing Costs Not Income in SSI Program:** When the distribution pays for rent, mortgage, taxes or utility payments, the SSI program will not count this as income to the designated beneficiary.³ ***This is a clear advantage that ABLE accounts have over any form of SNT.***

ABLE Account – Key Disadvantages

- **Requires Disability Onset Prior to Age 26:** This eliminates individuals whose disabilities did not occur until later in life.
- **\$15,000 Annual Limit on Combined Contributions:** If a larger amount is available (e.g., through an estate, a personal injury settlement or a retroactive Social Security or SSI award), an SNT is likely the preferred vehicle for protecting the money.
- **Medicaid Payback Provision:** If the designated beneficiary dies with assets remaining in the ABLE account, a Medicaid program in a state where the designated beneficiary received services can enforce a lien against the ABLE account. The lien would apply to services provided after the ABLE account was established.⁴ Some states have chosen, through legislation, to repeal this provision.

A Note of Caution Regarding SNTs:

Special needs trusts are complicated. Federal and state laws related to the treatment of trusts by Medicaid have been subject to periodic amendments, making this an even more challenging area to keep up with. An individual with a disability or family member who is considering an SNT trust option should seek out a professional, i.e., an attorney, financial planner or other person with trust expertise, to help them determine if a trust is appropriate, what kind of trust is best and the impact on things like tax liability and eligibility for government benefits (e.g., SSI and Medicaid).

The brief summaries below provide readers with a basic understanding of how the Non-Pooled SNTs work and identify issues that will impact the

³ Social Security Program Operations Manual Systems (POMS) SI 001130.740 C.4. Most third party payments for housing costs would be considered in-kind support and maintenance and reduce the SSI payment by up to \$250 in 2018.

⁴ 26 USC 529A(f).

decision to use an SNT.⁵ These summaries should not be viewed, however, as a substitute to seeking out a trust expert who is well-versed on the federal law, including Medicaid and SSI policies, and who is also well-versed on the laws and policies that are unique to your state. Our goal for readers is to use this article as a starting point for analysis as you think about the relative merits of using an ABLE account, an SNT or both.

Non-Pooled SNTs: Advantages and Limitations

For practical reasons we have focused only on the Non-Pooled SNTs. They have long been the vehicle of choice used by family members to plan for the needs of their loved ones with disabilities, well before pooled trusts became widely available in the 1990s. In the author's experience, Non-Pooled SNTs also tend to be used more than Pooled SNTs for depositing large sums of money. There is also the very practical need to limit the length of this article.⁶ The SNT discussion that follows assumes the trust was carefully drafted to take advantage of key SSI and Medicaid policies.

The First-Party, Non-Pooled SNT (the (d)(4)(A) trust⁷) – Key Advantages:

- **Can Be Established by Beneficiary or a Range of Third Parties:** The relevant law allows the "grantor" (entity establishing the trust) to be the beneficiary, a parent, grandparent, court or legal guardian.
- **No Disability Onset Requirement:** The beneficiary need only be disabled when the SNT is established. That makes this SNT the clear choice over an ABLE account for a post-age 26 onset of disability.
- **No Limitation on Deposits:** When more than \$15,000 is available for deposit, the SNT is the preferred asset protection vehicle – either instead of or in addition to the ABLE account.
- **There Can Be More than One SNT Account for a Beneficiary:** For example, a beneficiary can have both a first-party and third-party Non-Pooled SNT. ABLE policy allows for only one account per designated beneficiary.

⁵ Key SSI policies governing SNTs are found at POMS SI 01120.200 A through M.

⁶ Many of the advantages and limitations discussed for Non-Pooled SNTs will apply to the Pooled SNT. However, readers and their attorneys will want to carefully look at the specifics of any pooled trust before deciding whether to use it as a vehicle to protect assets.

⁷ 42 USC 1396p(d)(4)(A).

The First-Party, Non-Pooled SNT – Key Limitations:

- **An Attorney Is Needed or Strongly Recommended to Draft Documents:** Attorney's fees will vary greatly for this service, but are likely to be considerable.
- **Not a Great Alternative for Small Amounts of Money:** This is because attorney's fees needed for set-up, combined with potential trustee costs for ongoing administration, could be close to or exceed the funds that would otherwise be protected in the trust.
- **Deposits Limited to Beneficiary's Funds.**
- **All Distributions Must Be Approved by the Trustee:** The beneficiary will never have an absolute right to have the trust pay for X or Y. The author is aware of many disputes beneficiaries have with trustees who are unwilling to release money for expenses the beneficiary believes are reasonable.
- **Medicaid Payback Required Upon the Death of Beneficiary.⁸**

The Third-Party, Non-Pooled SNT – Key Advantages:

Unlike the First-Party, Non-Pooled SNT, this must be established solely with third-party money. Many of the advantages listed for the First-Party apply here as well: no age of disability onset requirement; no limitation on deposits; and ability to have more than one SNT. There are additional advantages:

- **Any Third Party (But Not the Beneficiary) Can Contribute.**
- **Beneficiary Not Required to Meet Strict SSI Disability Test:** In fact, many parents or family members may establish these SNTs for children they believe will become eligible for SSI in the future.
- **No Medicaid Payback Required:** Because these accounts are not funded with the assets of the beneficiary, they are not (d)(4)(A) trusts and do not include a federally-mandated Medicaid payback provision. ***This makes this form of SNT superior to the ABL account for large sums of third-party money.***

The Third-Party, Non-Pooled SNT – Key Limitations:

⁸ 42 USC 1396p(d)(4)(A).

Many of the key limitations listed for the First-Party, Non-Pooled SNT will apply here: e.g., need for an attorney; not an alternative for small sums of money; and all distributions subject to trustee approval.

As the case summary below illustrates, there can be a great benefit to using the Third-Party, Non-Pooled SNT and the ABLE account together to maximize benefits to the beneficiary of both accounts.

Using the ABLE Account and a Third Party Non-Pooled SNT Together – The Case of Eva

Eva, age 21, is spinal cord injured and is a full-time power wheelchair user. She currently receives \$750 in monthly SSI and is Medicaid eligible, as she resides in one of 41 states in which SSI beneficiaries automatically qualify for Medicaid. She is also the beneficiary of a Third-Party, Non-Pooled SNT, established by her grandparents. Currently, there is \$185,000 in this SNT.

Eva is a college student and expects to graduate in 2020 with a degree that will allow her to become a math teacher. Her state vocational rehabilitation (VR) agency has paid for many of her college expenses and is prepared to pay about \$40,000 for modifications to a van if Eva can obtain funds to purchase the van.

Eva’s ABLE Account, Trust Deposits to Account: During 2017, Eva and her parents learned about ABLE accounts. Eva established an account in February 2018 using \$2,500 the parents received as an income tax refund. In May 2018, the SNT’s trustee deposited \$12,500 from the trust into Eva’s ABLE account, maximizing ABLE account contributions at the 2018 limit of \$15,000.⁹**ABLE Account Distributions for Eva’s Rent:** In July 2018, Eva moves into an accessible apartment very close to her college campus. Rent will be \$950 per month, including all utilities. During the last six months of 2018, Eva uses her monthly SSI and ABLE account to make monthly rent payments of \$950, drawing down \$1,400 from her ABLE account.

ABLE Account Rent Payments Have No Impact on SSI Payment Amount: Since housing expenses are a Qualified Disability Expense (QDE),¹⁰ rent payments from the ABLE account are clearly appropriate. Also, pursuant to SSI’s policy related to ABLE accounts, the account distributions

⁹ Trust experts have suggested to the author that there could be some question about whether a trustee of an SNT has authority to make deposits into an ABLE account, depending on language used in the trust document. To eliminate this as a potential, future drafting of SNTs for ABLE-eligible beneficiaries could include language authorizing trustee distributions into a beneficiary’s ABLE account.

¹⁰ 26 USC 529A(e)(5).

for rent or other housing costs will not be considered income to the designated beneficiary.¹¹ This means that Eva's SSI payment will remain at \$750 per month.

Readers should note that the SSI program's general rule would treat any third-party payments for rent/housing costs, including SNT payments for rent/housing costs, as in-kind income and reduce the monthly SSI payment by up to \$250 per month during 2018. After the trustee legally moves income from the SNT into the ABLE account,¹² Eva is able to pay her monthly rent from the ABLE account without any impact on her monthly SSI payment amount.

As 2019 approaches, Eva speaks to the SNT trustee who agrees to deposit \$15,000 into the ABLE account in early 2019, allowing for sufficient assets to pay rent and to build up a reserve to cover other expenses related to completing her college studies that are not picked up through her state VR agency.

Eva's Plan to Purchase a Van as She Approaches Graduation: Eva anticipates graduating from her college program in eight months. Eva meets with the SNT trustee and the trustee agrees to use trust assets to purchase a van (for approximately \$27,000) that will later be modified, at the state VR agency's expense, to allow her to drive to a student teaching placement, to drive to employment interviews and, ultimately, to travel to work. Eva finds a suitable van in late 2018, the SNT pays for the purchase in January 2019, pays for sales taxes and other fees, and pays for her first six months of car insurance.

The van is immediately sent to a VR agency-approved vendor to make appropriate modifications to the vehicle to allow Eva to access the vehicle from her wheelchair. The cost of the modifications, \$40,000, is paid by the VR agency as part of its sponsorship of Eva's work goal. Although Eva continues to have more than \$100,000 in her SNT and a significant balance in her ABLE account, because SSI considers both the SNT and ABLE account to be exempt assets, full SSI payments continue. Eva, as an SSI beneficiary, continues to be exempt from her VR agency's economic needs test for any of their more expensive services.¹³

Eva Starts First Job as Teacher, Retains Medicaid Through 1619(b) Work Incentives, and Contributes Wages to ABLE Account: This entry level teaching job will pay \$33,000 to start. Eva will travel to her first job

¹¹ POMS SI 01130.740 C.4.

¹² A Trust can make deposits into the ABLE account under IRS law. See 26 USC 529A(b)(1)(A) (allowing any "person" to contribute) and 7701(a)(1) (including trust in definition of person).

¹³ 34 CFR 361.54(b)(3)(ii).

with the van, purchased through the SNT and fully modified through her state VR agency. Although Eva will now be covered by her employer's insurance plan, she retains Medicaid through the section 1619(b) work incentive (after losing her SSI cash payment).¹⁴ She expects to use Medicaid for things that private insurance will not cover. She can continue to use her ABLÉ account, without third-party approval, for items not covered by Medicaid or the private insurance plan. Since Eva now works, she can increase her annual ABLÉ contributions by an extra \$12,060 from her earnings. This bill amends the Internal Revenue Code, with respect to ABLÉ accounts (tax-exempt savings accounts for persons with a disability), to allow: (1) an ABLÉ account beneficiary to make additional contributions to an ABLÉ account equal to the lesser of such beneficiary's compensation or an amount equal to the federal poverty line for a one-person household, and (2) a retirement savings tax credit for contributions to an ABLÉ account. ¹⁴

Since 1619(b) Medicaid is a form of SSI benefit, Eva must continue to keep countable resources under the SSI program's \$2,000 limit. For this reason, Eva decides to save some of her wages each month in her ABLÉ account. As noted above, Eva cannot deposit her own money into the Third-Party, Non-Pooled SNT that her grandparents set up for her.

Conclusion

Eva has been able to successfully benefit from both an SNT and an ABLÉ account, using both to help her complete her college education, pay for a suitable apartment near college and purchase a van to drive from her wheelchair while maintaining continued eligibility for the VR agency's services.

Eva has successfully transitioned to employment and financial stability. She hopes to accumulate enough funds in her ABLÉ account so that, combined with the SNT, she can make a sizable down payment on a fully-accessible ranch home within three to five years.

Dated: May 2018

¹⁴ See ABLÉ To Work bill, <https://www.congress.gov/bill/115th-congress/senate-bill/818>

¹⁵ See Social Security's "Spotlight on Continued Medicaid Eligibility for People Who Work: Section 1619(b)," <https://www.ssa.gov/ssi/spotlights/spot-medicaid.htm>. Every state has a unique annual income limit for 1619(b) eligibility. At \$33,000 in annual wages, Eva would meet those criteria in about half the states. She could also have an individualized eligibility determination if she exceeds the state threshold amount and has: Medicaid-funded expenses which are higher than the average per capita Medicaid expenditure in her state; impairment related work expenses; blind work expenses; or publicly funded personal attendant care services.

