Special Needs Trusts, Pooled Trusts & ABLE Tax Savings Accounts for Individuals with Disabilities: Where do we begin?

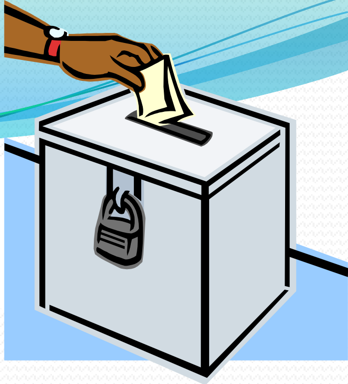
Scott Nixon, Executive Director Life's Plan Inc.

What is a Special Needs Trust?

Also named:

- Supplemental Needs Trusts
- Third party special needs trusts
- SNTs (Acronym for “Special Needs Trusts
- OBRA Self-Settled “Payback” Trusts
- Pooled Trusts
- Medicaid Qualified Trusts
- Disability trusts.

What is a Special Needs Trust?



A contract between a settlor (Grantor, donor, creator) of a trust and a trustee to administer property for the benefit of a <u>disabled third party(the beneficiary)</u>, to be utilized to protect the beneficiary's <u>quality of care </u>by way of supplemental use & support while not disrupting key public benefits and services.

What a Special Needs Trust Can Do?

1. Enhances services with use of family/individual private assets

2. Helps secure a quality of care through a reserve fund that families and the individual desire;

3. Helps maintain an improved quality of life through supplemental use of a Special Needs Trust.

Two Basic Kinds of Special Needs Trusts

Third Party Trust

(Special Needs Trust Supplemental/SNT)

Self-Settled Trusts

(OBRA '93)

1st Party Trusts

Individual Special Needs Trusts

Third party "Pooled" trust

OBRA '93 D(4)A (Individual)

OBRA D(4)C Pooled Trust

Key Differences*

Third Party Trust
(Special Needs Trust Supplemental/SNT)

- Funded from a source(s)other than disabled beneficiary
- Not subject to OBRA "93 interpretation of rules
- "Sole" benefit **not required**
- No **"Age"** limitation
- **No "Payback"** to the state

Self-Settled D4A/D4C Trusts (1st Party Trusts)

- Contains assets of disabled beneficiary
- Codified under OBRA 1993, interpreted by SSA POMS
- Must be for **"Sole"** benefit, required
- D4A- Under 65/ D4C any age **(X-IL, subject to transfer penalty)**
- Subject to **"payback"** to state(s) for medical assistance (Medicaid)

What's the "Magic" in these specialized trusts?

Must be **irrevocable** to beneficiary, yet give the trustee some revocability power to terminate for protection of beneficiary

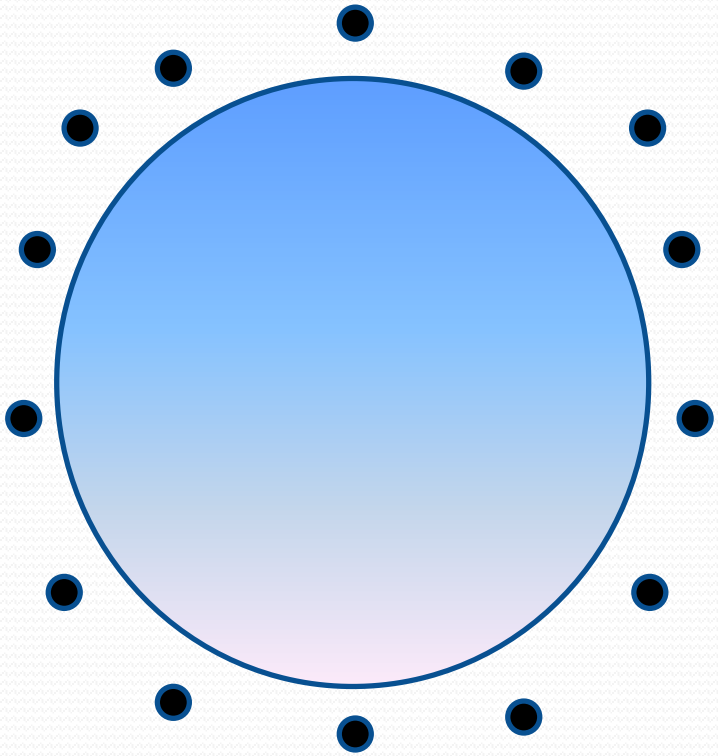
Who owns the assets going in to SNT matters (third party vs self-settled?) "mixing" these 2 types of trust assets together is dangerous.

The trust should specify that its purpose is to **"Supplement and not Supplant"** municipal, county, state and federal benefits.

Specifically designed to benefit beneficiary with disabilities under the **"Sole"** benefit rule. (Required for OBRA "93 trusts/Not required for third party trusts)

Must be drafted in accordance to SSA (POMS) and Medicaid regulations (ILCS) (**Third party trusts excluded Medicaid control or access)**

The Pooled Trust



History of the Pooled Trust

•Many people believe Pooled Trusts developed out of the "OBRA 93" federal law, allowed for creation of a self settled Pooled Trust, the (d4c) exception, as a "non-countable" resource for SSI and Medicaid eligibility purposes.

•There were pooled trusts in operation before OBRA 1993 E.G. Self Sufficiency Trust of Illinois (1987), The ARC of Indiana Master Trust (1988), and other ARC based organizations establishing pooled trusts.

•The ARC of Indiana Master Trust was founded by the ARC of Indiana, The Self Sufficiency Trust was founded by the Ray Graham Association here in Illinois. (originally 3rd party pooled trusts)

•Prior to "OBRA 93", **NO** provisions requiring "Payback" to state for Medicaid costs

What is a Pooled Special Needs Trust?

- A Pooled Special Needs Trust is a cross between a 401K and a traditional Special Needs Trust- pooled trusts most commonly known as an OBRA self settled trust.

- Beneficiaries do not use their own Trust docs, they use the pooled trust's legal documents called a "joinder" or "transfer" agreement to join an existing pooled account.

- The distributions are handled very much in the same way as a traditional Special Needs Trust with a few exceptions

- A Pooled Trust can be a quick, economical way to set up a Special needs trust account

Other Aspects of Pooled Trusts

- OBRA Pooled trusts are funded with the beneficiary's own assets, *self-settled* funds, these can include an inheritance, personal savings, an IRA or personal injury settlement
- A Pooled Trust can offer attorneys the ability to set up a smaller trust accounts, some as small as $10,000 or less
- Pooled Trusts are legal financial mechanisms ready to work with attorneys and families, some more than others.
- Pooled trust program are knowledgeable resources as it pertains to the field of Special Needs planning
- Some programs can offer a 3rd party pooled trust as another special needs planning option for testamentary trusts or small estates, last minute inheritances.

•Disability

•SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00

Under the pooled trust exception, the individual whose assets are used to establish the trust account, must meet the definition of disabled for purposes of the SSI program.

Nuts and Bolts of a Pooled Trust

•Who can establish a D(4)C pooled trust?

•Under the OBRA '93 pooled trust exception, <u>a parent(s), grandparent(s), legal guardian or a court</u> can establish. **(POMS SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00)**

•Under the pooled trust exception, <u>a legally competent, disabled adult</u> can establish their own trust subaccount with his/her own funds.

•A third party agent under durable <u>**POA-Property**</u> can establish a pooled trust account on behalf of disabled beneficiary

Nuts and Bolts of a Pooled Trust

REQUIREMENTS for OBRA POOLED TRUST EXCEPTION

- Must be established and maintained by **Non-Profit Association**

- Trust must contain assets of a **disabled individual** (section 1614(a)(3) of the SSA act)

- Assets must be ***"pooled"*** for investment, management purposes

- Must have **separate accounts** maintained on each beneficiary for reporting purposes

- Trust must be for the **"Sole" benefit** of the disabled person

- An OBRA pooled trust must include a **"Payback"** provision in the trust document upon death of beneficiary to reimburse any and all state(s), for medical assistance

Nuts and Bolts of a Pooled Trust

The over 65 Thing & other new rules

- New rules under DRA 2005, IL SMART Act of July 1, 2012, no longer allow a transfer of assets for disabled person 65 and over to go into a pooled trust account without incurring a penalty. The **ONE EXCEPTION: Public Guardian or Office of State Guardian** can establish a OBRA pooled trust for 65 and over beneficiary.

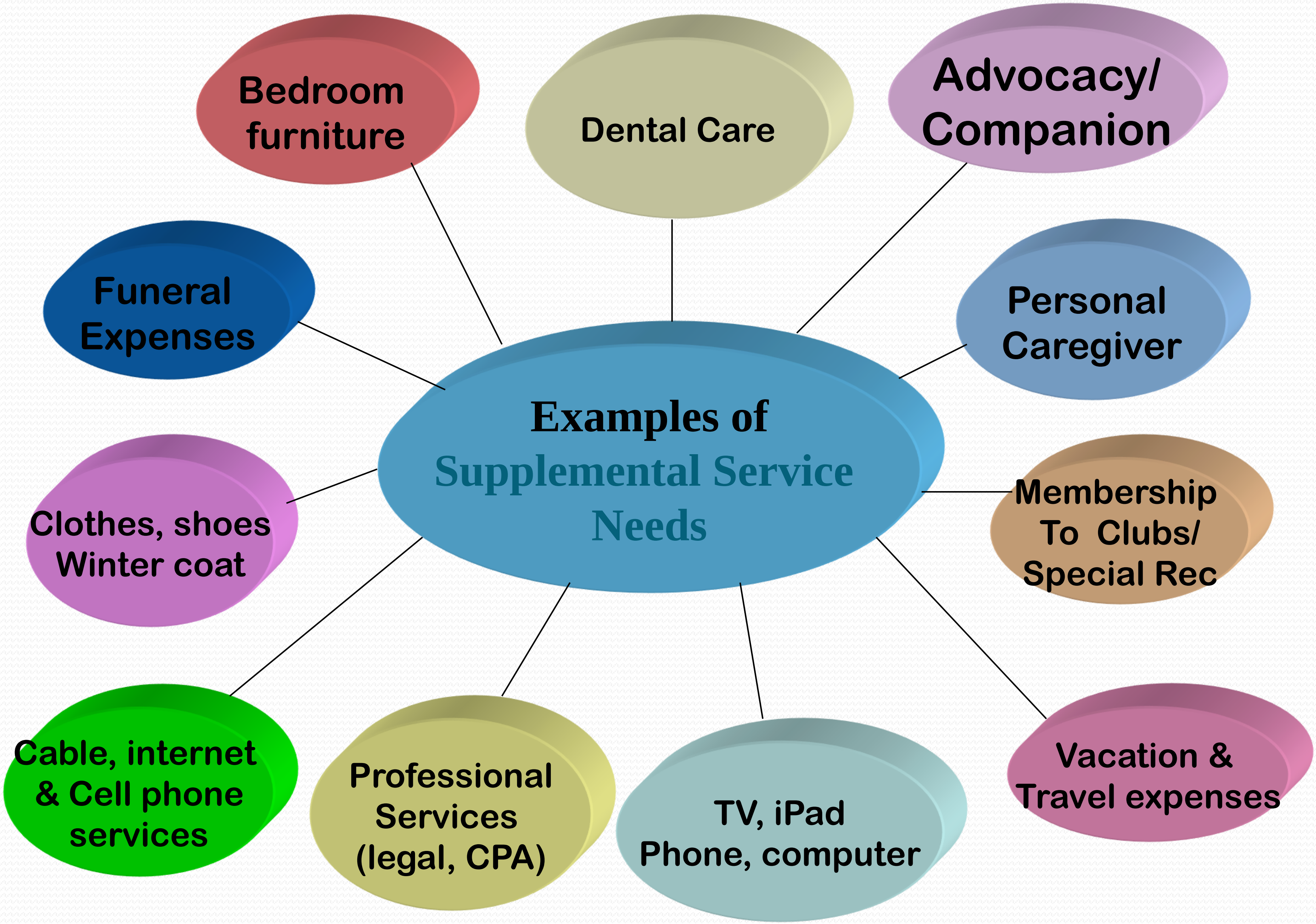
- New SSA/Medicaid rules are more restrictive on pooled trusts on establishment and paying out for things such as **travel for a guardian/companion**, or family caregiver expenses or ability of non-profit to retain any funds on death of beneficiary

- Funeral expenses cannot be paid out of a self settled SNT after the death of a beneficiary, but a prepaid burial plan is an advisable solution to set up for a beneficiary before they are deceased, “SNT can pay”.

How to administer a Special Needs Trusts 101?

- Like a spendthrift trust, money from the trust is not to be directly distributed to the beneficiary, in cash or by reimbursement, but payments can be made out to **third parties** such as vendors, the guardian or personal agent for supplemental goods and services.
- Money from a SNT typically **cannot pay for primary support** needs such as food, rent or utilities (Specific to SSI claimants)
- Beneficiary or grantor is re-titling assets over to trustee in **releasing ownership** and authority to control their assets for public benefits eligibility.
- OBRA '93 Trusts must be intended to be disbursed for the **"sole" benefit** of beneficiary

Administering the "I wants…." from a Special Needs Trust


Examples of Supplemental Service Needs
Bedroom furniture
Dental Care
Advocacy/ Companion
Funeral Expenses
Personal Caregiver
Clothes, shoes Winter coat
Membership To Clubs/ Special Rec
Cable, internet & Cell phone services
Professional Services (legal, CPA)
TV, iPad Phone, computer
Vacation & Travel expenses

Other Types of Supplemental Disbursements

“I Wants”

- Personal items, hygiene products, shampoo, deodorant, toothbrush, cleaning supplies, paper supplies
- Goods and Services, home décor or furnishings
- A condo or home purchase
- A Car or transportation costs
- Vehicle Insurance, Maintenance, and Gas
- Wheelchair
- Eyeglasses and exam
- Care Management (Professional/ Family Member)
- Lawn care/snow removal
- Educational costs

Why use the Pooled Trust?

•Parents may <u>not</u> have a qualified Trustee (no siblings/family available to serve?)

•A competent, family Trustee could pre-decease beneficiary, may live far away, “Capacity” issues could arise in their ability to serve as Trustee

•Pooled Trust Documents are drafted in accordance to government regulations, while reviewed with a high frequency by SSA and Medicaid for approval

•Trusts can be set up with small amounts of $$ (Banks/Corporate Trustees usually have larger minimums (>$500K)

Why use a Pooled Trust?

•Expertise on establishing a Special Needs Trust account & handling trust management for a person with a disability.

•OBRA pooled trust subaccount have advantage--a legally, competent beneficiary or their POA can set up, without a guardianship or court oversight

•Pooled Trust can be invaluable to protecting a beneficiary's public benefits in receipt of a small lump sum or settlement proceeds

•Pooled Trusts can be community based organization, that can benefit attorneys in finding a trustee in serving families/individuals in crisis

Steven Beck Jr. Achievement for a Better Life Experience (529 ABLE ACT Tax Savings Accounts)

What is ABLE?

- Established under new section 529A of the IRS code
- Passed Congress in December 2014
- Signed into law by President Obama on 12/29/14
- Governor Rauner signed Senate bill 1383 into law July 27, 2015 (Illinois ABLE Act)
- Allows a person with a disability with the onset of a severe disability before age 26 to establish their own tax exempt savings plan without losing their public benefits.
- Enables eligible individuals save to pay for disability related expenses that goes above and beyond the $2000 asset limit.

What is ABLE?

- Contributions in and distributions out for Qualified Disability Expenses (QDEs) will be given special treatment in determining eligibility for most federal means-tested benefits.

- Allows a person with a disability under age 26 to create their own tax exempt savings plan without loss of public benefits.

- 1st draft of ABLE regulations released June 19, 2015 by IRS in conjunction with the Dept. of Treasury.

  (Final IRS regs not yet released as of 8/22/2016)

- The first ABLE programs are now launched and open for enrollment across the country (Ohio STABLE, ABLE Tennessee, ENABLE Nebraska, and ABLE United Florida)

What are some of the important requirements?

- Each individual may have only ***"ONE"*** *ABLE* account.
- "Designated beneficiary" is account owner
- There is no longer a residency requirement related to establishing an ABLE acct in your state or another, but will be operated and administered by a state ABLE program
- Another person such as a Parent or legal guardian is allowed signature authority over the account
- Multiple individuals can contribute including ABLE account owner

Who is eligible?

To be eligible, individuals must meet two requirements:

1. Must be blind or disabled before age 26

2. Severity of Disability:

   - Have been determined to meet the disability requirements for Supplemental Security Income (SSI) or Social Security Disability benefits (SSDI) (Title XVI or Title II of the Social Security Act) and are receiving those benefits.

   - Submit a "disability" certification assuring that the individual holds documentation of a physician's diagnosis and signature, and confirming that the individual meets the functional disability criteria in the ABLE Act (related to the severity of disability described in Title XVI or Title II of the Social Security Act)

What are Qualified Disability Expenses?

- Education
- Housing
- Transportation
- Employment training and support
- Assistive Technology
- Personal Support Services
- Financial management and administrative services
- Legal Fees
- Funeral and burial expenses

https://secure.ssa.gov/apps10/poms.nsf/lnx/0501130740

ABLE Act…Not all Great News

- Contributions in to an ABLE acct limited to $14,000 per year
- When an ABLE beneficiary dies, remaining assets in an ABLE Account go as a “Payback” back to state for Medicaid costs. Third party monies at risk?
- Penalty surtax cost & income tax hit, if expenditure from ABLE account does not meet standard as “Qualified Disability Expense”
- ABLE account can only pay for “Disability Related Expenses” Trips to “gambling debts in Vegas or Disney with friends”????
- An eligible individual must have become disabled <u>before age 26</u> and <u>receives SSI or SSDI</u> and/or files a <u>disability certification</u> under rules IRS drafts, may be annual or semi annual event??

ABLE Act Advantages

- If No Guardian, beneficiary is able to make their own financial decisions (e.g. Cerebral Palsy, Aspberger's or physical disability).
- Small lump sum amounts of $, will allow beneficiary autonomy versus the legal costs of setting up a trust, with ability to set up a savings (>$2K allowed for by means tested public benefits).
- Periodic payments under gift tax exclusion amount, small structured settlement will work to utilize an ABLE account
- Saving for specific expenditures, (e.g. vehicle, computer, wheelchair)
- Over 65 beneficiary, as long as they were disabled before age 26

ABLE Act Other Highlights

- Allows an individuals and families to use private funds for purposes of supporting people with disabilities to maintain health, and independence for disability related expenses
- Maximum amount in ABLE acct without loss of SSI is $100K
- States 529 limit will be maximum amount allowed in an ABLE acct before loss of Medicaid benefits. (Illinois: $350,000)
- One ABLE account per customer, state run program for people with disabilities, portable to other states
- Earnings and interest in ABLE acct will be tax free.
- ABLE Acct will not count as an “asset” & Qualified Disability Expenses (QDEs) will not count as Income for SSI/Medicaid

ABLE Act New Federal Regulations

- Notice of Published Rule Making (NPRM) issued June 19, 2015
- Public hearing was held 10/14/15 in Washington, D.C.
- Final IRS regulations not published yet? As of 8/22/2016
- New changes includes- portability, self reporting ABLE account activity falls on responsibility of Account owner or their legal guardian
- Eligibility and <u>re-certification</u> records & maintenance will fall on account owner's responsibility with limited program assistance
- 529 college plan rollovers- not so beneficial—Rollovers-X ABLE acct can rollover but only to siblings, stepsiblings or half bloods with disabilities

When can ABLE accounts be attractive?

Small amounts of asset$ can be used

No costly trustee/legal fees

Small structured annuities or periodic payments

Savings for particular expenditure (e.g. vehicle, computer)

Available to Over 65 beneficiary with lifetime disability

Investment options available on new ABLE programs

What can possibly Go Wrong?

3rd party monies exposed to “Payback” provisions

ABLE acct owner cannot retain funds in personal checking acct beyond a month for housing QDEs, or will be charged as countable resource in 2nd month

Re-certification for disability approval process, not clear?

Surtax charge on non-qualified disability expenses (non-QDEs)?

Tax implications on earned income & distribution on a non-qualified disability expenses (non-QDEs)

Exposure to Creditors (IL ABLE Protected)

THE BEYOND

Heath Benefits for Worker with disabilities (HBWD)

Medicaid Spend Down, under $20K

Exempt purchased assets: car, prepaid funeral plan or home

On SSDI & Medicare—may not need a spend-down

Affordable Care Act (ACA) age 18-64 , not for LTC

Few discretionary, income only trusts, Medicaid annuity—possible, but with limited use?

Addendums

Comparison ABLE vs. Pooled Trust

	ABLE Accounts	Pooled Trust
Medicaid Payback	**Yes required under ABLE Act all assets in account on death of account owner must paid back to state for Medicaid costs**	**1^{st} party- all funds not retained by pooled trust (NO-under IL SMART Act) must have “payback ”provisions** 3rd party monies- **<u>not required</u>** to payback state for Medicaid expenses
Disbursements	Qualified Disability Expenses: education, housing, transportation, employment training and support, assistive technology, personal support services, health care expenses, financial management and administrative services	All things allowed under ABLE: plus broader range of expenses including: entertainment, electronics & vacation with a broader latitude in disbursements especially for third party trusts
Costs	Lower admin costs .30% of ABLE Acct value	Higher trustee costs, but lower than corporate trustee services
Eligibility	Disability must have occurred before age 26	1^{st} Party under 65 unless Public Guardian 3^{rd} party- no age limit

Comparison ABLE vs. Pooled Trust

	ABLE Accounts	Pooled Trust
Funding	**Limited to $14,000 per year Asset cap $100K before loss of SSI/Asset cap of $418K Before loss of IL Medicaid**	**No asset$ cap for any type of Special Needs Trust including 1st and 3rd party trusts, pooled or individual accounts in losing SSI/Medicaid**
Control	Account owner controls acct	Trustee controls account
# of Accts	Limited to one ABLE acct	Unlimited
Rollovers	Allowed for another eligible ABLE acct owner, who is a related brother, stepbrother, half-blood sibling.	1st party- irrevocable not allowed to rollover or close 3rd party- assets can be assigned to anyone or charity on death of beneficiary
Housing expenses	Allowed as QDE without penalty as long as $$ not retained in acct owner's bank acct for a 2nd month	Not allowed to pay for housing expenses without a 1/3 deduction of SSI benefits under In-kind support & maintenance rules

Comparison ABLE vs. Pooled Trust

	ABLE Accounts	Pooled Trust
Disability	**Re-certification annually on disability qualification for ABLE account owner. SSI/Medicaid re-determination every 1, 3, 5 years**	**One time certification by pooled trust for establishing an OBRA pooled trust for disabled beneficiary. SSI/Medicaid re-determination every 1, 3, 5 years**
Taxes	Interest & Income earned within ABLE account is tax-free as long as qualified disability withdrawals are made by account owner	Special needs trust earnings & income are not tax free, but often written off against legal/trustee costs to manage tax costs. IRS has Special tax exemptions for qualified disability trusts.
Investment Options	ABLE accounts may have several investment options to choose from for owner	Pooled trusts are limited to one investment strategy/Individual SNTS have broader range of investment options
Established	Parent, guardian, POA-Property and disabled person if of capacity	Parent, guardian, POA-Property and disabled person can establish own 1st party pooled trust account

Brian is 30 years old. He was born with cerebral palsy and lives with his parents. His grandmother has died and left him a small inheritance of $10,000. Brian has the mental capacity to sign a receipt for his own inheritance. What is Brian's best planning option with this scenario?

Brian makes for an excellent candidate of an ABLE savings account.

Does he have other planning options with the inheritance?

He does, using an OBRA pooled trust would be the next best option, but would be more costly using trustee services for this one-time small inheritance.

Jacqueline is 56 years old, has inherited $67,000 from an unexpected inheritance from her uncle. She receives SSI and Medicaid.
She can ill-afford to lose her Medicaid benefits. It would cause undue hardship for her housing and medical needs. She has no parent or grandparent or other family members alive to establish a Special Needs Trust.

What are Jacqueline's best options with the settlement money?

A self-settled D(4)A special needs trust is a consideration, but will likely cost $5000 or more to set up and take months to seek approval from the court. A corporate trustee will also need to be found for annual oversight. Jacqueline could instead, since she has capacity to sign legal docs, join a self-settled pooled special needs trust on her own, using the nonprofit's trust documents to establish an account at a fraction of the costs with the professional administration of the nonprofit that will avoid court supervision.

Knowing what a great concept this ABLE account looks like for Brian with his small inheritance. Should Brian's mom set up funding from her estate to his ABLE Account?

ABSOLUTELY NOT! With "payback" provisions attached to an ABLE account, she is better served to seek a qualified special needs planner to set up a 3^{rd} Party Special Needs Trust for her son or possibly if she has a small estate, consider using a 3^{rd} party pooled trust.

Brian's mother is 72 and not wealthy, but she decides for her only son Brian that she can afford put away $5K a year for Brian over the next 10 years. What is her best planning option with this money?

She should seek an estate planner to set up a will and either a 3rd Party Stand Alone Supplemental needs trust or contact a pooled trust organization to consider pouring all her final estate assets by will in to a 3rd party pooled trust account.

What if Brian's mom needs nursing care?

Brian's mom, under ILCS Treatment of transfers, can leave her entire estate as a direct inheritance to a special needs child/grandchild or to their Special needs Trust and seek Medicaid eligibility for long term care. Caveat is the SNT must include "sole" benefit language in the trust including third party trust agreements.

John is 28 years old and has become severely disabled due to a work related accident. He is receiving the maximum SSI benefit of $733 per month and Medicaid. John is about to receive an award of $54,000. John is receiving medically needed Medicaid and has no other health insurance. He has a home health care aide, paid for by Medicaid as well. He would have to enter a nursing home if he did not receive Medicaid paid home healthcare service.

What are John's best options with the settlement money?

A self-settled D(4)A special needs trust is a consideration, but the assets may be too small with legal set up costs to consider as best option. The next best choice for John would be to set up a the self-settled D(4)C pooled Special needs Trust using the nonprofits trust documents to establish an account for him. The pooled trust can also pay for additional home health care not covered by Medicaid.

Jose's grandfather is planning to leave his grandson Jose. a ¼ of his estate when he dies. His estate is worth approximately $500K.

Could he utilize an ABLE account?

Absolutely Not! Why Not?

Because the inheritance will exceed the maximum annual contribution level for an ABLE account and there will be a "payback" provision on an ABLE acct. A third party trust should be established for Jose by an attorney before his grandfather passes to protect Jose's inheritance and insure the trust has no "payback" lien on death.

Cami has a very similar situation to Brian's earlier scenario. Her grandma has left her a $16K inheritance. Cami has Down Syndrome and is unable to legally sign a receipt for her inheritance. Her mother is her plenary Guardian.

Can Cami set up an ABLE Account?

She herself cannot as she does not have capacity to sign in to a legal contract or agreement to establish an ABLE account, but her mother as her Plenary Guardian can sign up on her behalf to create an ABLE account as her registered agent, but mom will have to go to court to get approval on an ABLE account which will include legal fees to set up.

Deidre has been in the nursing home for a year. She is 64 and has $60K left in her bank accounts remaining before she will apply for Medicaid.

What are Deidre’s best legal options right now?

Likely to set up a OBRA pooled trust account

What if Deidre has already turned 65 in the nursing home, does she have any planning options?

Sadly, not in Illinois under the SMART Act, Deidre cannot use the Pooled trust nor an ABLE account, only option is likely a Medicaid spend-down plan or private pay until she runs out of $$.

Remember Brian who received his grandmother’s inheritance and was a perfect candidate to set up an ABLE account in which he did. Well Tragically, Brian was in a serious van accident, Brian who was born with Cerebral Palsy was offered by the insurance company a $48,000 settlement.

Can Brian use his ABLE Account?

Maybe Yes and Maybe No, he can only deposit over the course of one year $14,000, so the entire $60K cannot be deposited, but if the lawyers and court agree, a structured settlement could be set up to pay annually $14,000 in to Brian’s ABLE account. A self settled pooled trust may be a close second to consider if lump sum $$$ is only way to distribute or an individual self-settled D(4)A

Brian’s sister Lisa who was driving the van at the time of the accident was horribly injured and became disabled as result. She is 28 and has a work history and now receives $600 a month for SSDI and $133 for SSI. She also gets Medicaid coverage and will be receiving a $110,000 settlement as a result.

Can Lisa set up and ABLE account like Brian?

Absolutely not, Lisa’s disability onset was after age 26. Her only options are the OBRA ‘93 self-settled D(4)A or D(4)C trusts. The D(4)A drafted correctly drafted trust makes most sense for Lisa here.

Life's Plan, Inc.

www.lifesplaninc.org

Executive Director
Scott Nixon
snixon@lifesplaninc.org
630-628-7189