

EMPOWERMENT THROUGH PLANNING: ESTATE AND SPECIAL NEEDS PLANNING FOR THE CHRONICALLY ILL

Presented by:

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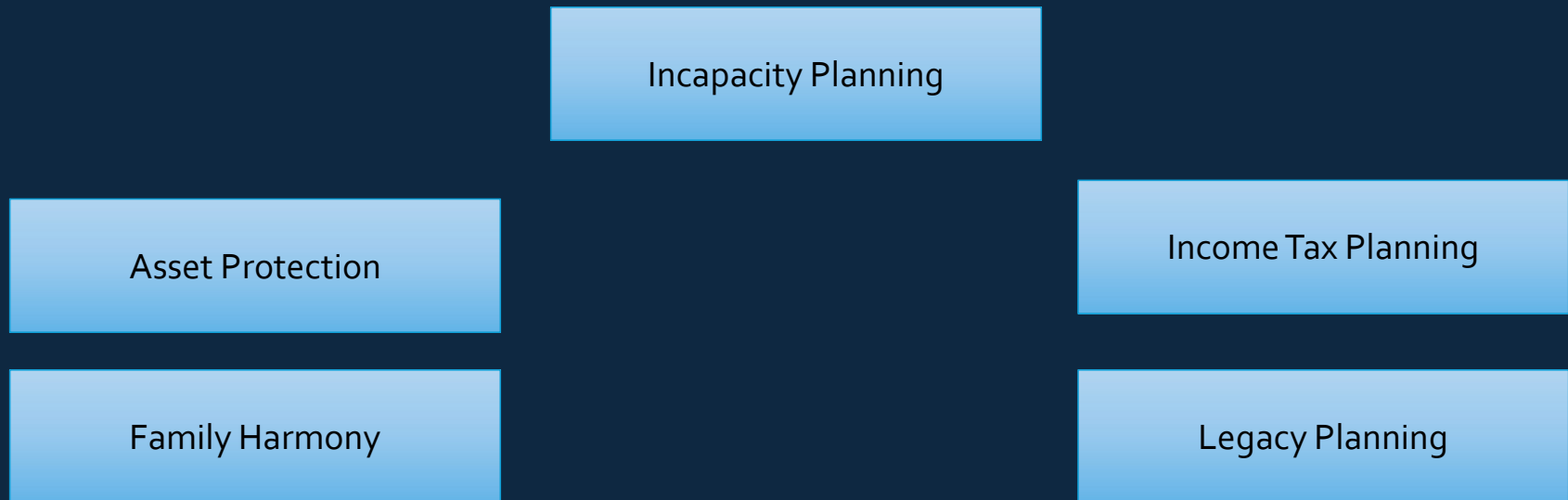
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WHO HERE HAS A WILL?

Raise your hand

WHAT IS ESTATE PLANNING?



WHAT IF I DON'T HAVE AN ESTATE PLAN?

- Court-appointed guardian/conservator will be required to manage your financial affairs in the event of incapacity
- Court-appointed guardian of the person will likely be required for health care decisions
- Court-appointed guardian/conservator will be required for your minor children, if both natural parents/guardians are not available
- Court-supervised probate will be required to transfer title for all assets in your individual name that do not otherwise pass by right of survivorship or beneficiary designation
 - Assets will generally be “frozen” at death until an Executor or Administrator is appointed
- Estate will pass in accordance with intestacy law vs. to intended beneficiaries
- Assets will pass outright to spendthrift or special needs beneficiaries

ASSETS THAT GENERALLY AVOID PROBATE

Assets owned jointly with right of survivorship

Probate still required in the event of simultaneous death

CAUTION: Avoid the common probate workaround of adding one or more of your children or other family members as joint owners on your property

Exposes the property to their creditors and they can withdraw the entire balance, if they wish

Requires their consent and potential partition action in order to sell real property

Assets that pass by beneficiary designation (unless estate is named as the beneficiary or no beneficiary is named)

Retirement accounts and pensions

Life insurance and annuities

Accounts payable or transferable on death (POD or TOD)

Automobiles and boats – title can generally be transferred at the DMV without probate

Assets owned by a revocable trust (to be discussed later)

THE FIRST DECISION

To Will or to Trust?

WHAT OTHER DOCUMENTS
COMPRISE AN ESTATE PLAN?

ADVANCE MEDICAL DIRECTIVE “LIVING WILL”

This is a document that sets forth your wishes in regard to your health care and end of life treatment.

Authorizes anatomical gifts, organ donation, participation in medical studies, and autopsies.

DURABLE GENERAL POWER OF ATTORNEY “FINANCIAL POWER”

Appoints an “Agent” of your choice to handle financial matters on your behalf. This document’s power terminates at the time of your death. This allows another person to seamlessly fit in to help you in case of incapacity.

SPECIAL NEEDS TRUSTS

WHAT IS A SPECIAL NEEDS TRUST?

Purpose

- Allows beneficiary to maintain qualification for Medicaid and Social Security's Supplemental Security Income (SSI) benefits

Types

- Third party
- First party
- Pooled Trusts

Restrictions

- Must be approved by Social Security and Medicaid
- Designed to supplement the beneficiary's needs – not provide broad support

THIRD PARTY TRUSTS VS. FIRST PARTY TRUSTS

Third Party SNTs

- No law specifically on Third-Party SNTs. Review the Program Operations Manual System (POMS) SI 01120.200 on Trusts.
- Can be revocable or irrevocable.
- These trusts can be *inter vivos* or testamentary.
- In general, the terms may be less restrictive as those in 1st-party Special Needs Trusts.

First Party SNTs

- The law regarding 1st party Special Needs Trusts is found at 42 USC §1396p(d)(4)(A) and 1st party pooled Special Needs Trusts are at (d)(4)(C).
- These trusts are established with the assets of an individual with disabilities. The individual must be under the age of 65 at the time the trust is established and funded. The individual must be disabled as defined in the Social Security Act.
- The 1st party Special Needs Trust may be established by a parent, grandparent, legal guardian, the court, and now, the competent individual with disabilities.
- With respect to Social Security reviewing these trusts, in this area, the trusts must be “seeded” by the \$10.00 language we put into the trust.
- Review of the POMS SI 01120.200 on Trusts is essential.

POOLED SPECIAL NEEDS TRUSTS

The law for pooled trusts is under 42 U.S.C. §1396p(d)(4)(C). A non-profit association must administer pooled trusts. These trusts can be first-party or third-party. The trust assets are pooled for investment purposes (similar to a bank). Each beneficiary has his or her own separate account, but the non-profit administers the trust for multiple beneficiaries. Lower set-up costs and administration costs. Oftentimes, the pooled trusts receive better investment returns from a relatively low-valued stand-alone SNT. Useful option for limited assets.

POOLED VS. STANDALONE TRUSTS

Pros of a Pooled Trust

A more affordable and economical option than establishing a separate standalone trust
It removes concerns on finding a qualified and appropriate trustee
Managed by a nonprofit organization
The staff of the pooled trusts are experts in the area of public benefits
In most cases, the pooled trust may have better investment returns because all the assets are pooled for purposes of investments

Pros of a Standalone Trust

May give the beneficiary more financial independence (if warranted)
Can hold real estate*
Can provide for any specific nuances particular to the individual beneficiary (more flexibility)
*Be sure to check with the pooled trust before setting it up to see if it accepts real estate.

POOLED VS. STANDALONE TRUSTS

Cons of Pooled Trusts

Not all pooled trusts allow for tailored investment strategies

The pooled trust will advocate for the family to leave any money remaining (after payback to Medicaid on first-party SNTs and after administrative costs in terms of the third-party trusts)

Funds for large disbursements may not be readily available to the beneficiary. Payments to providers must be requested and justified as reasonable and necessary. For things like routine medical expenses, the pooled trust company will arrange for these to be automatic

Some pooled trusts will not accept real property or accept real property with a minimum of cash

Cons of Standalone Trusts

Difficulty or inability to identify an appropriate trustee

Costs to set-up the trust and the annual/administrative fees tend to be much higher than the pooled trusts

WHAT ARE ABLE ACCOUNTS?

ABLE accounts, or Achieving a Better Life Experience accounts, are tax-advantaged savings accounts created to assist individuals with disabilities and their families in saving and investing funds for disability-related expenses. Established through the Stephen Beck Jr. Achieving a Better Life Experience Act in 2014,

ABLE accounts aim to safeguard eligibility for means-tested government benefits like Medicaid and Supplemental Security Income (SSI). Modeled after Section 529-C college savings accounts, ABLE accounts are governed by rules outlined in Social Security's Program Operations Manual Services (POMS) at SI 01130.740. Here are the key features of ABLE accounts:

TAX ADVANTAGES OF ABLE ACCOUNTS

The tax advantages of ABLE accounts are akin to Roth IRAs: contributions are made with after-tax dollars, and earnings grow tax-free within the account. Additionally, withdrawals are tax-free if **used** for *qualified disability expenses*. However, using funds for non-qualified expenses incurs penalties, much like withdrawing from a Roth IRA before retirement age. For instance, if a disabled individual accumulates \$50,000 over a decade with \$10,000 in earnings, totaling \$60,000 in his ABLE account, he incurs no taxes if he uses it for a home down payment. However, if he spends \$5,000 on a non-qualified expense, like gambling in Atlantic City, he faces taxation plus a 10% penalty.

ELIGIBILITY REQUIREMENTS FOR ABLE ACCOUNTS

To be eligible for an ABLE account, the individual must have become disabled before turning 26 and meet Social Security Administration's criteria for disability, including SSI or SSDI eligibility or blindness. An eligible individual can qualify for an ABLE account through the following means:

- i) Disability can be established by meeting the criteria for SSI or SSDI benefits, or
- ii) By obtaining a doctor's certification equivalent to the Social Security's definition of disability.
- iii) The individual must be diagnosed with a disability before turning 26.
- iv) This requirement will change in 2026, shifting to a disability onset before the age of 46.

Note: Remember that you cannot use a doctor's certification to secure Medicaid or Social Security benefits – the doctor's certification is not a shortcut to public benefits! It is only an option to obtain eligibility for an ABLE account (if you don't receive SSD or SSI but meet Social Security's disability definition).

LIMITS AND OPTIONS

Contribution Limits:

- i) Each state offering ABLE accounts sets its contribution limit, typically linked to the federal gift tax exclusion (\$18,000 as of 2024).
- ii) Some states impose an overall maximum account balance limit. Virginia has a \$550,000.00 maximum account balance limit.
- iii) Contributions into an ABLE account may be made by any person, including a trust like a Special Needs Trust.
- iv) Contributions to the ABLE account are not tax-deductible, but income earned within the account is tax-free if used for Qualified Disability Expenses.
- v) Contributions must be made in cash; real property, retirement accounts, stocks, and bonds are not permitted.

Additional Contribution Option:

- Employed individuals with disabilities may make additional contributions, capped at either their annual compensation or the poverty line for a one-person household (\$15,060 in 2024), whichever is less.

Savers Credit Eligibility:

- i) ABLE account holders may be eligible for the Savers Credit, a non-refundable tax credit of up to \$1,000.
- ii) Eligibility criteria include being at least 18 years old, not being a dependent or full-time student, and meeting income requirements.

HOW DO ABLE ACCOUNTS IMPACT BENEFITS?

SSI ELIGIBILITY & MEDICAID ELIGIBILITY

The first \$100,000 in the ABLE account is typically excluded from being counted as a resource for SSI.

Most account withdrawals for Qualified Disability Expenses are also excluded. SSI payments may be suspended if the account balance exceeds \$100,000.

ABLE account balances and withdrawals are completely excluded assets for Medicaid purposes up to the state's limit for Section 529-C accounts.

IMPACT ON BENEFITS

Exceeding \$100,000 in ABLE account funds for SSI leads to the suspension of benefits, but the individual's Medicaid could remain until it reaches the state's limit.

Upon the beneficiary's passing, remaining ABLE account assets can be used to settle outstanding Qualified Disability Expenses and funeral/burial expenses before any funds are reimbursed to Medicaid.

STATE SPECIFIC PROGRAMS

ABLE accounts are managed at the state level, and each state may offer its own program with unique features, investment options, and fee structures. Individuals can open an ABLE account in any state that provides them, regardless of their state of residence. **Virginia no longer requires a Medicaid payback at the owner's death.**

IN-KIND SUPPORT & MAINTENANCE ISSUE FOR RECIPIENTS OF SSI

1) SSI covers basic shelter needs. If someone else, such as a parent or a Special Needs Trust (SNT), pays the rent directly for an SSI recipient, it's considered In-Kind Support and Maintenance (ISM). This usually results in reduced SSI payment, typically by one-third (Value of One-Third or VTR).

2) Specifically, if a family member or an SNT pays rent for an SSI recipient, the recipient's monthly SSI payment is reduced dollar for dollar, capped at the Presumed Maximum Value (PMV), which is one-third and \$20.

3) The Social Security Administration recently clarified that distributions from an ABLE account, whether for housing or non-housing Qualified Disability Expenses (QDEs), are not counted as income.

4) Consequently, distributions from an ABLE account for housing-related QDEs do not reduce the SSI payment.

5) With an ABLE Account, a parent or an SNT can deposit rent funds into the account, and the ABLE account can then distribute the payment for rent without affecting the SSI payment.

6) Normal SSI resource counting rules and exclusions apply to any assets purchased with funds from an ABLE Account.

COMMON CONCERNS & PITFALLS

FUNDING & CONTRIBUTIONS LIMITS

SNTs

Pitfall: SNTs do not have contribution limits, which can be advantageous for significant financial resources.

Concern: However, establishing and managing an SNT can be costly and complex, especially if it requires court involvement or a professional trustee.

ABLE Accounts

Pitfall: ABLE accounts have annual contribution limits, currently capped at \$18,000 (as of 2024). This limit can restrict the amount of money that can be sheltered in the account in any given year.

Conflict: If the individual receives substantial gifts or inheritances, an ABLE account alone may be insufficient.

USE OF FUNDS

SNTs

Concern: The rules governing the use of SNT funds can be restrictive, particularly for first-party SNTs, which must be used for the sole benefit of the disabled individual.

Conflict: There can be disagreements or misunderstandings about what constitutes an allowable expense, leading to conflicts between trustees and beneficiaries.

ABLE Accounts

Pitfall: ABLE accounts have more flexibility regarding what the funds can be used for (Qualified Disability Expenses, or QDEs), but misuse of funds could result in tax penalties and loss of benefits. The debit card associated with the ABLE account could be stolen.

Concern: Some expenses may not qualify as QDEs, creating potential tax liabilities or even disqualification of the account.

MEDICAID PAYBACK

SEE POMS SI 01120.203.

SNTs

Concern: First-party SNTs are subject to Medicaid payback upon the beneficiary's death, meaning that any remaining funds must be used to reimburse Medicaid for services provided during the beneficiary's lifetime.

Conflict: Families may be concerned about losing assets to Medicaid rather than passing them to other heirs.

ABLE Accounts

Concern: ABLE accounts are also subject to Medicaid payback upon the beneficiary's death, which may surprise some families who incorrectly believe the account is exempt from such claims. Although less of a concern these days as many states have followed Virginia's lead into removing the payback requirement.

Pitfall: This can result in a significant reduction in the amount left to heirs.

IMPACT ON BENEFITS

SNTs

Concern: Properly structured SNTs do not affect eligibility for means-tested benefits like Supplemental Security Income (SSI) or Medicaid.

Pitfall: Poorly drafted or managed trusts may inadvertently disqualify a beneficiary from these benefits.

ABLE Accounts

Concern: Funds in an ABLE account up to \$100,000 are exempt from SSI asset limits, but exceeding this threshold could result in a temporary suspension of SSI benefits.

Conflict: Managing the balance in an ABLE account requires careful planning to avoid negative impacts on SSI.

MANAGEMENT & CONTROL

SNTs

Concern: SNTs often require a trustee to manage the funds, which can create a power imbalance and potential conflicts between the trustee and the beneficiary.

Pitfall: Beneficiaries might feel a lack of control over their resources, leading to dissatisfaction or disputes.

ABLE Accounts

Concern: ABLE accounts are typically managed by the beneficiary (or an authorized representative), providing more control but also more responsibility.

Pitfall: Mismanagement by the beneficiary could lead to misuse of funds and potential disqualification from benefits.

COSTS & COMPLEXITY

SNTs

Concern: Establishing and maintaining an SNT can be expensive, especially if it involves legal fees, trustee fees, and annual reporting requirements.

Pitfall: Complexity in trust management can lead to mistakes or oversights that may have legal or financial consequences.

ABLE Accounts

Concern: ABLE accounts are generally less expensive and simpler to set up and maintain, but they offer fewer protections and less flexibility than SNTs.

Pitfall: The simplicity of ABLE accounts may lead families to overlook more comprehensive planning needs that an SNT could address.

STATE SPECIFIC CONSIDERATIONS

SNTs

Concern: SNTs are governed by state-specific trust laws, which can vary widely, potentially complicating interstate issues or moves.

ABLE Accounts

Concern: ABLE accounts are also state-specific, with some states offering better programs than others. Not all states offer ABLE accounts, though residents can use another state's program.

Conflict: Beneficiaries may need to navigate differences in state laws if they relocate.

THANK YOU

