Planning for People With Special Needs

Southern Arizona Estate Planning Council

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When someone asks about giving assets to a person who has a disability, or if a person who has a disability asks for assistance because they believe they have too many assets and may be disqualified from public benefit programs, there are certain items that must be known in order to properly advise the person. These materials summarize these items and the possible options available. For ease of reference, the person who has a disability will often be referred to as the "beneficiary" throughout these materials.

I. Is There A Need To Be Concerned?

First of all, giving the person with a disability (the "beneficiary") assets is not a problem unless the beneficiary is "sufficiently disabled" and receiving, or possibly eligible sometime in the future for, "needs-based" public assistance.

1. Beneficiary Must Be Sufficiently Disabled:

Just because a person has a disability does not mean the person is disabled enough to qualify for public assistance. If a person is not sufficiently disabled, and for many public assistance programs - also sufficiently impoverished, then there is

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no need to consider doing special planning or establishing an ABLE account or a special needs trust for the benefit of the person.

The most common threshold of disability that is used to determine eligibility for public assistance programs is the definition of "permanent and total disability" utilized by the Social Security Administration. In order to be sufficiently disabled for Supplemental Security Income (SSI) purposes and Medicaid in many states, the beneficiary must be "permanently and totally disabled". This definition is found in 42 U.S.C. 1382c(a)(3)[3].

> "(3)(A) Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this subchapter if he is <u>unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months</u>. (Emphasis added)
>
> (B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the

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[3] Title XVI of the Social Security Act (SSI) is administered by the Social Security Administration. Title XVI appears in the United States Code as 42 U.S.C. §§1381 - 1385; 4 U.S.C. Chapter 7, Subchapter XVI.

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> preceding sentence (with respect to any individual), “work which exists in the national economy” means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.
>
> (C)(i) An individual under the age of 18 shall be considered disabled for the purposes of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.
>
> (ii) Notwithstanding clause (i), no individual under the age of 18 who engages in substantial gainful activity (determined in accordance with regulations prescribed pursuant to subparagraph (E)) may be considered to be disabled.”

The definition of permanent and total disability used for Social Security Disability purposes is substantially the same as the SSI definition, and is found at 42 U.S.C.§423(d)(1)(A), Section 216(d)(1)(A) of the Social Security Act.

If the beneficiary is not sufficiently disabled to satisfy this definition, then the beneficiary does not need special planning to reduce or protect assets, an ABLE account, or a special needs trust.

On the other hand, if the beneficiary is sufficiently disabled to qualify as permanently and totally disabled under the SSI definition, then the beneficiary will be receiving, or should in the future be eligible to receive, public assistance. If so,

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for purposes of deciding what advice is appropriate for the beneficiary, the next requirement is ...

2. Beneficiary Must Be Receiving Needs-Based Public Assistance:

Once it is determined that a beneficiary who has a disability is sufficiently disabled to satisfy the SSI definition of disability, it must next be determined whether the beneficiary is receiving or eligible for assistance from any public assistance program. If so, it is critical to determine exactly which programs are providing assistance to the beneficiary. Concern about the beneficiary having too many assets is only necessary if the beneficiary is receiving assistance from certain needs-based public assistance programs, or will be eligible for such assistance in the future.

A. Two Categories of Public Assistance Programs: Public assistance programs can be divided into two basic categories: those that are "needs-based" and those that are not "needs-based". The distinction between these two categories is found in the financial situation of the beneficiary. Some public assistance programs require that a beneficiary have low income and few assets (usually referred to as "resources") in addition to being sufficiently disabled. These are referred to as "needs-based" programs. Other public assistance programs only require that the participant be sufficiently disabled and have a connection to the program. For those programs, it does not matter whether the beneficiary has low assets or income. Although there is no formal title for such programs, these materials will refer to them as "non-needs-based".

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B. A Brief Description of the Most Common Public Assistance Programs: Although there are many government programs that provide assistance to people, the six primary ones are briefly described below.

1) Programs Not Based on Financial Needs ("Non-Needs-Based"): Participation in these programs is not based on whether a person has minimal assets or income, but only on whether the person meets certain non-financial criteria established by the public benefit program.

a. Social Security: There are three types of Social Security benefits: old-age assistance (retirement benefits), survivor's benefits, and disability benefits. This program is officially known as Old Age, Survivors, and Disability Insurance (OASDI). The law is found at Title II of the Social Security Act, 42 U.S.C. §401, *et seq.*, and 20 C.F.R. §404, *et seq.*

A person can draw Social Security benefits from the person's own Social Security earnings record or someone else's. In certain circumstances, it is possible for a person to receive Social Security benefits based on the Social Security earnings record of the person's spouse, parent, or child. Social Security pays money to a recipient on a monthly basis.

Receipt of Social Security benefits does not require that a person have minimal assets or low income. Since qualification for Social Security benefits is not based on the amount of resources or unearned income a person has, it does not matter if a Social Security recipient is the beneficiary of a trust or has

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other assets. For all Social Security benefits other than early retirement and Social Security Disability, income from any source will not reduce the benefits received, although it may make some of the Social Security benefits taxable. Persons who started drawing Social Security retirement benefits before reaching their full retirement age, and those receiving Social Security Disability, however, will find their benefits reduced or terminated if they are paid too much income from their employment.

b. **Medicare:** Medicare is a health insurance program that provides for hospitalization, most doctor's charges, limited skilled nursing home care, and some home care. The law is found at Title XVIII of the Social Security Act, 42 U.S.C. §1395, and 42 C.F.R. §405-421. It is administered by the Centers for Medicare and Medicaid Services (CMS, formerly known as the Health Care Financing Administration (HCFA)).

In order to become eligible for Medicare a person must be: (i) age sixty-five or older, and (ii) fully insured under the Social Security or Railroad Retirement system, and entitled to Social Security retirement benefits or certified as a qualified Railroad Retirement beneficiary, or (iii) have been a recipient of Social Security Disability (SSD) benefits for at least twenty-four months (this is waived for a person who has ALS), or (iv) have end-stage renal disease requiring renal dialysis or a kidney transplant. Participation in Medicare is not based on a person having minimal assets or income.

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c. Veterans Benefits: The Veterans Administration and various branches of the United States military provide benefits to veterans of the United States armed forces. Eligibility to receive these benefits is often not dependent on the person's financial condition, especially if the benefit is based on years of service or a service connected disability. However, there are exceptions. Whenever a beneficiary is receiving veterans benefits it is important to determine exactly what is being received and the criteria for the veteran to qualify for such assistance.

2) Programs That Are Needs-Based: Although participation in the above-described programs is not adversely impacted by a person having too many assets or too much income, there are other public assistance programs that are "needs-based," sometimes referred to as "means-tested." In other words, even if a person is sufficiently old or disabled, the person does not qualify for these other programs unless the person meets certain criteria, two of which are having low income and minimal assets that are "available" (some programs use the word "countable") to the person. Three of these programs are Supplemental Security Income (SSI), Medicaid, and Federal assisted housing programs. In addition, some Veterans benefits are needs-based.

a. Supplemental Security Income (SSI): SSI is a federal program administered by the Social Security Administration. The law is found at Title XVI of the Social Security Act, 42 U.S.C. §1381, *et seq.*, and 20 C.F.R. §416. The Social Security Administration also has an operations manual to

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guide its caseworkers. It is called the Program Operations Manual System (POMS). It can be found at https://secure.ssa.gov/apps10/ .

SSI is designed to pay a minimum amount of income to qualified individuals to provide for all of their food and shelter. This payment is equal to seventy-five percent (75%) of the federal poverty level, and is adjusted annually. In 2018, this is $750 per month. Some states provide a small supplement to the federal benefit, but many do not.

In order to be eligible for SSI a person must meet the categorical requirements of being at least age sixty-five, blind, or permanently and totally disabled.[4] In addition, the person's monthly income must be below the then-current SSI benefit amount.[5] Another requirement is that the person's "countable resources" at the end of a calendar month must be $2,000 or less (or $3,000 if married and living together).[6] Similar to the Medicaid program, certain resources are deemed to be exempt.[7]

b. Medicaid: Medicaid is a welfare program that is a partnership between the United States government and the

[4] 42 U.S.C. §1382c(a)(1)(A).

[5] 42 U.S.C. §1382, and 20 C.F.R. §416. There are some exceptions to this limitation. The primary exceptions are the general income exclusion, which exempts the first $20 received from any source from income in the month it is received (POMS SI 00810.420), and the earned income exclusion (POMS SI 00820.500). Refer generally to 42 U.S.C. § 1382a(b) and POMS SI 00820 for all exceptions.

[6] 20 C.F.R. §417.1205(c).

[7] 42 U.S.C. §1382b(a); 20 C.F.R. §416.1210.

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states. The federal law is found at Title XIX of the Social Security Act, 42 U.S.C. §1396 and 42 C.F.R. §430, §431 and §435. Each state will also have its own statutes and regulations dealing with its Medicaid program. In Arizona, the Medicaid law can be found at Arizona Revised Statutes (A.R.S.) Title 36, Chapters 29 and 34; the Arizona Administrative Code, Chapters 21, 22, 28, 29, 30, 31, and 34; and the Arizona Eligibility and Policy Manual for Medical, Nutrition, and Cash Assistance. This can be found online at https://azahcccs.gov/resources/guidesmanualspolicies/eligibilitypolicy/eligibilitypolicymanual/index.html.

The federal agency administering the Medicaid program is the Centers for Medicare and Medicaid Services (CMS, formerly known as the Health Care Financing Administration (HCFA)). Each state will have a department that administers the Medicaid program in that state. In Arizona this agency is known as the "Arizona Health Care Cost Containment System (AHCCCS) .

In Arizona, the Medicaid program is called "Arizona Health Care Cost Containment System" (AHCCCS) and Medicaid is referred to as "AHCCCS Medical Assistance". A separate program was established for Arizona residents who have disabilities, serious mental illness, and those who are institutionalized in a nursing home. This is referred to as the "Arizona Long-Term Care System" (ALTCS). However, the AHCCCS agency administers the ALTCS program.

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Many states base their Medicaid eligibility on SSI qualification. In other words, a person will qualify for Medicaid if they qualify for SSI. These are referred to as "1634 states" (where the state, under authority granted in Section 1634 of the Social Security Act, contracts with the Social Security Administration to determine eligibility for Medicaid at the same time eligibility for SSI is determined) or "SSI states" (which is similar to a 1634 state, but a separate application for Medicaid is filed with the state). Arizona is a 1634 state. A few states, however, use eligibility criteria different from SSI. These are referred to as "209(b) states."[8] These states may have different rules pertaining to the impact of trusts on eligibility for Medicaid. However, all states require that a person be sufficiently old or disabled in addition to having low income and minimal assets.

c. Federal Assisted Housing Programs: A person who is sufficiently disabled or old and has low income and assets may be eligible to participate in any one of a number of assisted housing programs. Most of these are federal programs administered by the Department of Housing and Urban Development (HUD). The two primary programs are HUD Housing Choice Vouchers (more commonly known as Section 8 vouchers)[9] and the Section 202 Program.[10] Other federal assisted housing programs are Section 504 Rural

[8] The current 209(b) states are Connecticut, Hawaii, Illinois, Minnesota, Missouri, New Hampshire, North Dakota, Oklahoma, and Virginia. See POMS SI 01715.020 for the Social Security Administration's list of each state and whether it is a SSI, 1634, or 209(b) state.

[9] 42 U.S.C. § 1437f and § 3535(d); 24 C.F.R. Part 982.

[10] 12 U.S.C. §1701.

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Housing Assistance, Section 502 Rural Mortgage Assistance, and Section 235 Mortgage Assistance.[11]

In addition, a person may be eligible to live in a group home program or an Independent Supported Living (ISL) program. State agencies or nonprofit organizations normally administer these. Often, qualification for Medicaid or SSI is a prerequisite for participation in these arrangements.

d. Veterans Benefits: It is possible for a veteran of the United States military to qualify for assistance from the Veterans Administration or a branch of the military if the veteran meets certain financial criteria. Whenever a beneficiary is a veteran of the United States armed forces and is receiving benefits because of being a veteran, it is important to determine exactly what those benefits are and the criteria for the veteran to be receiving them. It is possible that the veteran is receiving needs-based assistance, which is referred to as "pension" benefits. There are three categories of VA pension benefits. These are known as Basic Pension, Housebound Benefits, and Aid & Attendance Benefits. In addition, a qualifying spouse of an eligible veteran may also be eligible for benefits.

C. Only Needs-Based Public Assistance Requires Planning to Reduce Assets: Planning to reduce a person's "available resources" is only needed if the person is receiving needs-based public assistance, or is

[11] 42 U.S.C. §9817.

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sufficiently disabled that he or she should, or will in the future, be eligible for such assistance.

If the person who has a disability (the "beneficiary") is not receiving or potentially eligible for needs-based public assistance, then there is no need to try to reduce the beneficiary's "available resources." However, if it is likely that the beneficiary may in the future qualify for needs-based public assistance, then this type of planning should be considered. The main reasons a beneficiary who is sufficiently disabled to satisfy the SSI definition of permanent and total disability would not be eligible for needs-based public assistance is because the beneficiary either has too much income or too many "available resources", or both. If this is the case, then a determination should be made whether it is possible, and advisable, to try to reduce the beneficiary's income and/or available resources in order for the beneficiary to attempt to qualify for needs-based public assistance.

II. Three Ways This Comes Up

Once it is determined that the person with the disability is receiving, or may become eligible for, needs-based public assistance, then the possible solutions to help the person retain eligibility for those programs depend on which of the following three situations applies:

1. **Estate Planning by a Third Party:** Someone other than the person with a disability (for ease of reference, this person will be referred to as a "third party" in these materials) wants to plan their estate and leave money upon their death for the benefit of the person with a disability.

2. **Gift from a Third Party:** A third party wants to use his or her money or assets to help a person who has a disability now, while the third party is living.

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3. Person With a Disability Has Too Much Money: The person who has a disability has, or will be receiving, assets that exceed the maximum allowed to maintain eligibility for needs-based public assistance and will be disqualified from those benefit programs unless the excess assets disappear in a manner that will not disqualify the person from those programs.

III. Estate Planning by a Third Party

1. Third Party-Settled Trust: For purposes of these materials, a "third party" is someone other than the person who will receive assets from the third party upon the third party's death. For example, a parent leaving the parent's assets to the parent's child upon the parent's death. When this occurs and the assets are held in trust for the benefit of the child/beneficiary, the trust is referred to as a "third party-settled trust".

The "settlor" of a trust is not just the person who signs the trust to establish it and is referred to in the trust document as the settlor (or grantor, trustor, or some similar title). According to well-established law, a person is considered a settlor of a trust if the person's assets are used to fund the trust.[12]

Technically, it is also a third party-settled trust when a person establishes a trust with the person's separate assets for the benefit of his or her spouse. However, this is not the case when the other spouse is eligible for Medicaid or SSI assistance. Since spouses have a legal duty to support each other, both the Medicaid and SSI programs deem all assets owned by either spouse to be "available" to the other

[12] Restatement (Second) of Trusts, §3 and §17; 42 U.S.C. §1396p(d)(2)(A); POMS § SI 01120.200.B.2; *Masterson v. Department of Social Services, Division of Family Services*, 969 S.W.2d 746 (Mo. banc 1998); *Guaranty Trust Co. of New York v. New York Trust Co.*, 297 N.Y. 45, 50-51, 74 N.E.2d 232 (1947); *Forsyth v. Rowe*, 266 Conn. 818, 629 A.2d 379,(Conn.,1993); *Cohen v. Commissioner of Div. of Medical Assistance*, 423 Mass. 399, 668 N.E.2d 769, (Mass.1996); *Striegel v. South Dakota Dept. of Social Services*, 515 N.W.2d 245 (S.D.,1994); *Strand v. Rasmussen*, 648 N.W.2d 95 (Iowa 2002); *In re Hertsberg Inter Vivos Trust*, 457 Mich. 430, 578 N.W.2d 289 (Mich. 1998).

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spouse for eligibility purposes.[13] As a result, these programs treat the other spouse/beneficiary as the settlor of the trust that is established for his or her benefit and require the "self-settled trust" provisions to apply (this is discussed later in these materials). The only exception to this is when the trust for a spouse is established upon the death of the first spouse by his or her Last Will and Testament.[14]

2. Special Needs Distribution Clause: If the beneficiary of the trust established by the third party upon the third party's death is sufficiently disabled and receiving, or may become eligible for, needs-based public assistance, such as Medicaid and SSI, then the distribution section of the trust should contain a "special needs" distribution clause.

The "distribution section" is the section found in every written trust agreement that describes when and how the trustee is to distribute from the trust for the benefit of the beneficiary. Simply stated, there are four basic distribution clauses that can be found in the distribution section of a trust. These are: (i) mandatory support), (ii) discretionary support, (iii) pure discretion, and (iv) special needs, which can be further broken down into "strict" or "discretionary". Which one is utilized depends on what the trust settlor intended.

Generally, a special needs distribution clause gives the trustee broad discretion to distribute trust income and/or principal for the "special needs" of the beneficiary. Special needs are usually defined as anything the beneficiary needs, or anything that would be useful or in any way helpful to the beneficiary, if it is not paid for or provided to the beneficiary from a public assistance benefit program or some other source. The trustee is directed to distribute from the trust in a manner that "supplements but does not supplant" any public assistance the beneficiary is

[13] 42 U.S.C. §1396c(f)(1); 42 C.F.R. §435.602(a)(1). *McKenzie v. State of Missouri, Department of Social Services, Division of Family Services*, 983 S.W. 2d 196 (Mo. App. E.D. 1998).

[14] 42 U.S.C. §1396r-5; 42 C.F.R. §435.121(a)(3)(i).

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receiving. Trusts that contain a special needs distribution clause (a "special needs trust") are also sometimes referred to as "supplemental needs trusts," "supplemental care trusts," and similar titles.

When the settlor is establishing a trust for the benefit of a beneficiary who has a disability or is elderly and is receiving (or may someday qualify for) needs-based public assistance, then a “special needs” distribution clause is most often used as the distribution clause of the trust. Depending on the laws of the state where the beneficiary resides, this special needs distribution clause will be either strict (prohibiting the trustee from making a distribution from the trust that will in any way reduce or negatively impact any public assistance the beneficiary may be eligible to receive) or discretionary (discouraging a distribution that causes a reduction in the beneficiary’s public assistance, but granting the trustee discretion to make such a distribution if the trustee determines that it is in the beneficiary’s best interest even though it causes a reduction in the beneficiary’s public benefits).

3. Summary: If someone (a “third party”) wants to leave assets upon their death for the benefit of another person who has a disability and is receiving, or may someday become eligible for SSI or Medicaid (the “beneficiary”), then a third party settled special needs trust should be utilized. If the beneficiary is not the spouse of the third party establishing this trust, then the trust can be in the form of a living trust or a testamentary trust established by the third party’s Will. However, if the beneficiary is the third party’s spouse, then the third party must establish the special needs trust via his or her Will.

In addition to holding assets for the benefit of the beneficiary in a manner that will not cause the trust assets to be countable as “available resources” for the beneficiary’s eligibility for needs-based public assistance programs, a third party-settled special needs trust does not need to repay Medicaid upon the beneficiary’s

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death. That is only necessary when a self-settled special needs trust is used. These are discussed later in these materials.

IV. Current Gift From A Third Party

If the third party wants to spend money immediately, while the third party is living, to assist another person (other than the third party's spouse) who is sufficiently disabled and is receiving, or may in the future be eligible for, Medicaid or SSI, then it is first necessary to determine exactly what the third party is attempting to accomplish.

Is there a particular need the person with a disability (the "beneficiary") has that the third party is trying to fulfill? If so, what is it? If not, does the third party merely want to financially assist the beneficiary? Common options available to the third party to spend money in a manner that does not cause the beneficiary to be disqualified from SSI or Medicaid are described below.

1. **Do Not Give Money:** First of all, money should never be given to the beneficiary. Both SSI and Medicaid treat a gift of money as "income" and penalize the beneficiary by reducing or eliminating benefits for the month the income is received.

2. **Purchase Exempt Asset and Give to Beneficiary:** If the beneficiary needs or wants something that is treated as an exempt asset by the SSI and Medicaid programs, then the asset can be purchased and given to the beneficiary. A gift of an "exempt" asset will not cause a reduction in the assistance the beneficiary is receiving.

   For SSI eligibility purposes, an exempt asset is anything other than food or "shelter" (which is defined later in these materials). Medicaid is not concerned about gifts of

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food or shelter, so if the beneficiary is only receiving Medicaid assistance and will never qualify for SSI,[15] then paying for the beneficiary's food or shelter will not cause a reduction in benefits.

Examples of assets that are exempt and can be purchased and given to the beneficiary are: (i) a motor vehicle that will be used to transport the beneficiary; (ii) household items, such as furniture, appliances, televisions, stereos, computers, video game systems, telephones, etc.; (iii) personal items, such as clothing, personal care products, books, videos, video games, music cd's, musical instruments, etc.; (iv) a prepaid burial plan, as long as the beneficiary cannot cash it in or sell it for cash; and (v) a house or condominium, as long as it will be the beneficiary's primary residence and is not worth more than $572,000 (in 2018). However, if the beneficiary is receiving SSI there will be a loss of SSI for the month the beneficiary receives the residential property.

3. **Pay for a Service the Person Uses or Needs:** If the beneficiary needs or wants something that is a service or is consumed, then the cost of this can be paid directly and the beneficiary allowed to consume what is purchased.

A. **Examples**: Classic examples are paying for the beneficiary's cable TV, internet connection, cellular telephone, household cleaning services, gas and maintenance for a motor vehicle, travel expenses - including transportation (air, train, or bus tickets), hotel, and entrance fees for theme parks or other tourist attractions.

B. **Concerns if Beneficiary Receiving SSI:** However, if the beneficiary is receiving SSI, then paying for the beneficiary's food or "shelter" expenses will cause a reduction in the beneficiary's monthly SSI benefit. "**Shelter**" for

[15] This can occur when the beneficiary's income from Social Security or pension exceeds the maximum SSI amount, which in 2018 is $750 per month.

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SSI purposes is defined as providing or paying for the beneficiary's (i) mortgage (including property insurance required by the mortgage holder), (ii) real property taxes, (iii) rent, (iv) heating fuel, (v) gas, (vi) electricity, (vii) water, (viii) sewer, and (ix) garbage removal. Other household services, such as those described in the preceding paragraph, do not cause a reduction in benefits.

The beneficiary's SSI is reduced whether someone else pays for the beneficiary's food or shelter expenses, or directly provides food to the beneficiary or allows the beneficiary to live rent free (these are referred to as "in-kind support and maintenance"). However, if the beneficiary does not qualify for SSI (typically because the beneficiary is receiving Social Security or pension payments that exceed the maximum monthly SSI benefit), then paying for or providing food and shelter does not cause the beneficiary to lose Medicaid benefits.

4. Give Money to an ABLE Account: If the beneficiary qualifies, then it may be possible to make a gift of money to an ABLE account established for the beneficiary. Although a full description of ABLE accounts are beyond the scope of these materials, they are summarized below.

A. What is an ABLE Account? An ABLE account is a relatively new type of financial account that can be owned by a person who is sufficiently disabled and satisfies a few additional requirements. Although there are some restrictions and drawbacks, the primary advantage of an ABLE account is that a person with a disability can hold and control money in excess of the resource limits (typically $2,000) placed on "available resources" for needs-based public assistance programs, such as SSI and Medicaid, without disqualifying the person from those programs.

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ABLE accounts are authorized by the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the "ABLE Act"), enacted on December 19, 2014 as part of The Tax Increase Prevention Act of 2014, Pub. L. No. 113-295. The ABLE Act allows a state, or state agency or instrumentality, to establish and maintain a tax-advantaged savings program (an "ABLE program") that benefits certain individuals who have a disability. In Arizona, HB 2388 was signed into law on May 12, 2016. Section 5 contained the Arizona ABLE Program by adding a new Chapter 8 to Title 46 of the Arizona Revised Statutes, now located in A.R.S. § 46-901, *et seq.* This law outlined the parameters of the ABLE program and established an oversight committee that was directed to, among other things, "Make recommendations and provide guidance for the establishment, implementation and improvement of the program, including statutory and rule changes."[16] As of the date these materials are prepared Arizona has not established an ABLE program, but the oversight committee has been meeting and there should be a program established soon.

Qualified individuals can establish and own an account (an "ABLE account") managed under an ABLE program. It is not necessary that the individual enroll in an ABLE program established by the State where the individual resides. There are many states that offer ABLE accounts to qualified people who are not a resident of the state. For a description of each state's ABLE program visit http://www.ablenrc.org/state-review.

With some restrictions, contributions can be made to an ABLE account, and distributions can be made from an ABLE account, without adverse tax consequences or causing the beneficiary to be disqualified from public

[16] A.R.S. § 46-907.D.1.

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benefit programs. In addition, the money in an ABLE account compounds income tax free.[17]

B. Summary of Relevant Requirements for a Person to Use an ABLE Account: Not everyone qualifies to have an ABLE account, and even if a person qualifies, there are limits on what can be transferred to an ABLE account and restrictions on how the money in an ABLE account can be spent without adverse consequences.

1) The person must be sufficiently disabled prior to age 26: "Sufficiently disabled" for the ABLE act means (i) the person is receiving SSI, Social Security Disability Insurance benefits (SSDI, also referred to as "DIB"), Childhood Disability Benefits (CDB), or disabled widow's or widower's benefits (DWB) because of blindness or disability that began before age 26,[18] or (ii) the person provides a "disability certification" prepared by the person or the person's parent or guardian, and the disability certification is accompanied by a doctor's written statement that the person was sufficiently disabled prior to age 26.[19] The ABLE Act refers to a person who meets these requirements as an "**eligible individual.**"[20]

2) There can be only one ABLE account per eligible individual: If a person qualifies to have an ABLE account (i.e., is an "eligible individual") and does not already have one, then an ABLE account can be established by the eligible individual or the eligible

[17] 26 U.S.C. § 529A(a).

[18] 26 U.S.C. § 529A(e)(1); POMS SI 01130.740.B.1.

[19] 26 U.S.C. § 529A(e)(2); POMS SI 01130.740.B.1.

[20] 26 U.S.C. § 529A(e)(1).

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individual's parent, legal guardian, or agent acting for the eligible individual under a power of attorney.[21] After that, money can be transferred into the ABLE account. The eligible individual or anyone else can contribute money to an ABLE account.[22] If the eligible individual already has an ABLE account, then, subject to the below-described limitations, it may be possible to contribute more money to the existing ABLE account. It is not possible for an eligible individual to have more than one qualifying ABLE account.[23]

3) The ABLE account can only receive cash: Only cash can be contributed to an ABLE account.[24] Anything other than cash must be sold or otherwise converted to cash, and the cash can then be contributed to the ABLE account.

4) There is a limit on the amount that can be contributed to the ABLE account: With one exception, the amount of money that can be contributed to an ABLE account in any calendar year is limited to the then-current per donee annual exclusion authorized by 26

[21] POMS SI 01130.740.B.4.

[22] Contributions to an ABLE account can be made by any "person". The preamble to the proposed regulations for 26 U.S.C. § 529A says, "The term *person* is defined in section 7701(a)(1) to include an individual, trust, estate, partnership, association, company, or corporation. Therefore, for purposes of section 529A(b)(1)(A), a person would include an individual and each of the entities described in section 7701(a)(1)." (emphasis in original) 80 Fed. Reg. 35602, published June 22, 2015, at 35606.

The preamble to the proposed regulations goes on to say, "The legislative history of section 529A suggests that a ''person'' described in section 529A(b)(1)(A) includes the designated beneficiary of an ABLE account. *See* 160 Cong. Rec. H7051, H8317, H8318, H8321, H8322 (2014).", 80 Fed. Reg 35602 at 35607.

[23] 26 U.S.C. § 529A(b)(1)(B); 26 U.S.C. § 529A(c)(4); POMS SI 01130.740.A.

[24] 26 U.S.C. § 529A(b)(2)(A); POMS SI 01130.740.B.2.

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U.S.C. §2503(b),[25] or in other words, the amount that can be given away as a present interest gift without being classified as a taxable gift. This is $15,000 in 2018. Money can be contributed to an able account by the Designated Beneficiary of the ABLE account, any other person, or a rollover of a 529 qualified tuition savings account that was established for the same beneficiary or a member of the 529 account beneficiary's family.[26] The family members who qualify for this rollover are the spouse, child or other descendant, sibling or step-sibling, parent or other ancestor, stepparent, blood-related nephew or niece, blood-related uncle or aunt, spouse of a sibling or step-sibling, son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, sister-in-law, or a first cousin.[27]

If it is near the end of a calendar year, then it is possible to contribute up to $15,000 in the current year and another $15,000 in early January of the following year.

In addition, if a Designated Beneficiary is employed and does not contribute to an employer sponsored retirement plan, the Designated Beneficiary can make contributions to the Designated Beneficiary's ABLE account above the $15,000 annual cap until December 31, 2025. This additional contribution is limited to an amount that is the lesser of: (i) the Designated Beneficiary's compensation included in the beneficiary's gross income for the year the contribution is made to the ABLE account, or (ii) the amount equal to the poverty line for a

[25] 26 U.S.C. § 529A(b)(2)(B); POMS SI 01130.740.B.2.

[26] The rollover from a 529 tuition savings plan was added by Section 11025 of the Tax Cuts and Jobs Act of 2017, Pub. L. 115-97. It is allowed until December 31, 2025. This can be found at 26 U.S.C. § 529(c)(3)(C)(i)(III).

[27] 28 U.S.C. § 529(e)(2).

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one-person household, as determined for the preceding calendar year. For contributions in 2018, this amount is $12,060 (which was the 2017 Poverty Guideline for a single person household).[28]

5) The eligible individual's SSI will be suspended if there is more than $100,000 in the ABLE account: Although this will not be a problem for a few years (because contributions to an ABLE account are currently limited to $15,000/year), even though there are no limits on how much money can be held in an ABLE account, if the eligible individual's ABLE account exceeds $100,000, the excess will be deemed to be an available (countable) resource for SSI purposes and the eligible individual's SSI will be suspended.[29]

This is not a problem if the eligible individual is not receiving SSI. Nor does this cause the eligible individual to be disqualified from Medicaid.[30] This is one of the reasons the eligible individual's SSI is suspended instead of terminated. If the eligible individual lives in a §1634 state (states that entered into an agreement that requests the Social Security Administration to make Medicaid eligibility determinations on behalf of the state), then losing SSI would cause a loss of Medicaid. However, merely suspending SSI does not have this effect.

[28] This was added by Section 11024 of the Tax Cuts and Jobs Act of 2017, Pub. L. 115.97, and can be found at 26 U.S.C. § 529A(b)(2)(B)(ii).

[29] Pub. L. 113–295, div. B, title I, §103(a)(2) and §103(b), Dec. 19, 2014, 128 Stat. 4063; POMS SI 01130.740.C.3; POMS SI 01130.740.D.1.

[30] Pub. L. 113–295, div. B, title I, §103(b)(2), Dec. 19, 2014, 128 Stat. 4063; POMS SI 01130.740.D.1.a.

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6) The eligible individual's Medicaid will not be affected if the ABLE account accumulates too much money, but further contributions may be prohibited: Money in an ABLE account will not be deemed to be an available resource for Medicaid eligibility purposes, no matter how large the ABLE account becomes.[31] However, additional contributions to an ABLE account may be prohibited if the value of the ABLE account exceeds the limit a state has imposed on a qualified tuition program that authorizes the establishment of a "529 plan".[32] Currently, in Arizona this limit is $431,000.[33]

7) An ABLE account cannot be pledged as security: Neither the entire ABLE account, nor any portion of an ABLE account, can be used to provide security for any loan.

8) An ABLE account can be rolled over into another ABLE account: An ABLE account can be rolled over from one ABLE account to another ABLE account for the same designated beneficiary, but not more frequently than once every twelve months.[34]

9) The designated beneficiary of an ABLE account can be changed: Although it is possible to change the designated beneficiary of an ABLE account, it can only be changed to another "eligible individual" who is a "member of the family" of the former designated

[31] Pub. L. 113–295, div. B, title I, §103(a), Dec. 19, 2014, 128 Stat. 4063.

[32] 26 U.S.C. §529A(b)(6).

[33] This figure is drawn from the Arizona Commission for Postsecondary Education website, http://az529.gov/FAQ.html. However, the Fidelity Arizona College Savings Plan website says this amount is $453,000. See https://www.fidelity.com/go/529-arizona/overview.

[34] 26 U.S.C. §529A(c)(1)(C)(i) and §529A(c)(1)(C)(iii).

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beneficiary.[35] A "member of the family" is defined as the designated beneficiary's brother, sister, stepbrother, or stepsister, including those who are adopted

C. How Money Contributed to an ABLE Account is Treated and Can be Used: Money in an ABLE account is supposed to be used to pay for the "qualified disability expenses" of the "designated beneficiary." The "**designated beneficiary**" of an ABLE account is the "eligible individual" who established and is the owner of the ABLE account.[36]

1) Contributions to, earnings, and distributions from an ABLE account for qualified disability expenses are not taxable: Contributions to an ABLE account qualify as a non-taxable present interest gift for gift tax purposes[37] and earnings on funds invested in an ABLE account are not treated as taxable income.[38] In addition, distributions to or for the benefit of the designated beneficiary of the ABLE account that are used for "qualified disability expenses" are not included in the designated beneficiary's gross taxable income[39] and are not deemed to be taxable gifts.[40]

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[35] 26 U.S.C. §529A(c)(1)(C)(ii).

[36] 26 U.S.C. § 529A(e)(3). An "eligible individual" is described in Section 1.C.1)b of these materials, above. See *Supra* footnote 20.

[37] 26 U.S.C. § 529A(c)(2)(A).

[38] 26 U.S.C. § 529A(a). An exception is if the income is unrelated business taxable income as described in 26 U.S.C. § 511.

[39] 26 U.S.C. § 529A(c)(1)(B).

[40] 26 U.S.C. § 529A(c)(2)(B).

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2) Contributions to an ABLE account and earnings on ABLE account assets are not "income" for SSI and Medicaid: Similarly, for needs-based public assistance programs such as SSI and Medicaid, contributions to an ABLE account and earnings on ABLE account investments are not "income" for eligibility purposes.[41]

3) Distributions from an ABLE account for QDEs are not "income" for SSI and Medicaid, but not so for non-QDE expenditures: Distributions from an ABLE account that are used for a qualified disability expense (QDE) within the taxable year the money is distributed from the ABLE account are not treated as income for SSI and Medicaid eligibility purposes.[42] Or, said another way, as long as the designated beneficiary's expenditures for QDEs in a taxable year equal or exceed the distributions from the beneficiary's ABLE account, the ABLE account distributions will not be treated as "income" for SSI and Medicaid eligibility purposes. According to the CMS letter to "Dear State Medicaid Director" dated September 7, 2017,[43] this is true whether the state uses Modified Adjusted Gross Income (MAGI)[44]-based or non-MAGI (sometimes referred to as "SSI-based") eligibility categories when determining eligibility for Medicaid.

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[41] Pub. L. 113–295, div. B, title I, §103(a), Dec. 19, 2014, 128 Stat. 4063; POMS SI 01130.740.C.1 and SI 01130.740.C.2.

[42] Pub. L. 113–295, div. B, title I, §103(a), Dec. 19, 2014, 128 Stat. 4063; CMS letter SMD# 17-002 dated September 7, 2017 to State Medicaid Director.

[43] On September 7, 2017, the Center for Medicare and Medicaid Services ("CMS") issued a letter to State Medicaid Directors addressing the implications of the ABLE Act on state Medicaid programs. See SMD# 17-002 RE: Implications of the ABLE Act for State Medicaid Programs. Here is a link to this letter: https://www.medicaid.gov/federal-policy-guidance/downloads/smd17002.pdf.

[44] Simply stated, MAGI refers to the methodology that the Affordable Care Act imposed on states starting in January 2014 for determination of eligibility for many Children's Health Insurance Program (CHIP) and Medicaid programs. However, it does not apply to persons receiving Medicaid because of eligibility for SSI or other federal or state aid, or who are age 65 and older. 42 U.S.C. § 1396a(e)(14)(D)(i).

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However, if distributions from an ABLE account exceed the expenditures for QDE's in a taxable year, the excess ABLE account distributions may be countable as income for Medicaid eligibility purposes. According to the CMS letter to "Dear State Medicaid Director" dated September 7, 2017, the exact treatment of the excess distributions depends on whether the state uses a MAGI-based or non-MAGI-based methodology for determining Medicaid eligibility.

For states that utilize non-MAGI (SSI-based) criteria (which are the states that do not require a determination of income by the state agency administering the Medicaid program, but, instead, base eligibility for Medicaid on a person being eligible for SSI or other federal or state aid), any excess ABLE account distributions will be deemed to be an available resource in December of the year the distribution was made from the ABLE account. The CMS letter includes this example:

> "For example, if an SSI-based individual receives an ABLE account distribution in August, but does not spend the distribution until December (and uses the distribution for a QDE in that month), the amount of the distribution is not counted in any month. If the individual uses the distribution in December for a non-QDE, the distribution would be counted as a resource in the month of December."

This is because, for SSI purposes, all distributions from an ABLE account are deemed to be a conversion of a resource from one form

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to another.[45] Thus, even if the distribution from the ABLE account is used for something that is not a qualified disability expense, the amount distributed will not be deemed to be "income" for SSI purposes, so there will not be a dollar-for-dollar reduction against future SSI payments. Instead, the amount will be deemed to be a "resource" that is countable towards the $2,000 maximum the beneficiary can have and maintain eligibility for SSI. According to the above-quoted CMS letter, this also applies for Medicaid eligibility purposes for states that use the non-MAGI eligibility criteria.

However, for states that use MAGI-based criteria when determining eligibility for Medicaid eligibility purposes, the above-cited CMS letter opines that the amount of the ABLE distribution that is taxable because it was not used for QDE expenses will be added to the designated beneficiary's income for Medicaid eligibility purposes. This will require the beneficiary to spend this amount of money towards the cost of the beneficiary's long-term services and supports before being eligible for federal assistance.

4) "Qualified Disability Expense" definition: "**Qualified disability expenses**" are defined as "any expenses related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary, including the following expenses:"[46] education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees,

[45] POMS SI 01130.740.C.4.

[46] 26 U.S.C. § 529A(e)(5).

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expenses for oversight and monitoring, funeral and burial expenses, other expenses, which are approved by the Secretary under regulations and consistent with the purposes of 26 U.S.C. § 529A, and basic living expenses.[47]

5) **"Housing Expense" definition:** "**Housing expenses**" that qualify as "qualified disability expenses" are defined as the same "shelter" expenses that are used for SSI in-kind support and maintenance purposes.[48] These include: mortgage (including property insurance required by the mortgage holder); real property taxes; rent; heating fuel; gas; electricity; water; sewer; or garbage removal.

D. Tax Consequences for ABLE Account Distributions that are Not "Qualified Disability Expenses": Section 529A imposes two adverse tax consequences if there are distributions from an ABLE account for items that are not a "qualified disability expense". These are:

1) The amount of the distribution will be included in the taxable income of the designated beneficiary of the account, but only "in the manner as provided under Section 72" of the tax code.[49]

a. 26 U.S.C. §72 contains the provisions for taxation of annuities. Essentially, this Section breaks each distribution into two parts: principal and income. The

[47] "Basic living expenses" is added to the above list by POMS SI 01130.740.B.5.

[48] POMS SI 01130.740.B.8.

[49] 26 U.S.C. § 529A(c)(1)(A) and (B).

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principal portion is not taxable and the income portion is taxable.

b. In the context of an ABLE account, this means that only the portion of the non-qualified disability expense distribution that is attributable to earnings on the ABLE account will be included in the designated beneficiary's gross taxable income.

c. For example, if there was $15,000 in an ABLE account and it was invested and earned 2%, there would be $300 of earnings in the ABLE account after a year. If the entire $15,300 was distributed for something that was not a qualified disability expense, there would only be $300 (the earnings portion) added to the designated beneficiary's gross income. The $15,000 (principal portion) would not be taxable.

2) In addition to the inclusion of the earnings-portion of the non-qualified disability expense distribution in the gross taxable income of the designated beneficiary, there will also be a 10% additional tax imposed unless the distribution was made on or after the designated beneficiary's death.[50]

a. However, this additional tax is only 10% of the amount of the ABLE account distribution that was included in the taxable income of the designated beneficiary.

[50] 26 U.S.C. § 529A(c)(3).

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b. Continuing the above example, since only $300 of taxable income is included in the designated beneficiary's gross taxable income, the additional tax imposed would be 10% of $300, or $30.

c. Thus, the total negative impact of a $15,300 distribution from the designated beneficiary's ABLE account for items that do not qualify as a "qualified disability expense" would be $300 added to the designated beneficiary's gross income (which will only result in an income tax if the designated beneficiary's income is high enough to be taxable) and a $30 tax that is in addition to any other income tax the designated beneficiary would have to pay.

E. Medicaid Must Be Repaid Upon Death of the Designated Beneficiary: When the designated beneficiary dies, the money remaining in the ABLE account must be used to repay any state(s) that provided Medicaid assistance to the designated beneficiary, if the state makes a claim. However, the repayment is subject to the following rules:[51]

1) Only Medicaid received since the ABLE account was established: Unlike a self-settled special needs trust established under the authority of 42 U.S.C. §1396p(d)(4)(A) or (C), a state is only entitled to be reimbursed from an ABLE account for Medicaid expenditures made for the benefit of the designated beneficiary after the ABLE account was established. With a d4A or d4C trust, the state can recover for all Medicaid expenditures made for the benefit

[51] 26 U.S.C. §529A(f).

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of the trust beneficiary, even those made prior to the establishment of the trust.

2) “Qualified disability expenses” can be paid before the State: The money remaining in a deceased designated beneficiary’s ABLE account can be used to pay any “outstanding payments due for qualified disability expenses” before the state is reimbursed for Medicaid expenditures. This includes, among other items, the payment of funeral and burial expenses. These usually cannot be paid from a d4A or d4C trust after the beneficiary’s death.

Also, any Medicaid Buy-In premiums paid to the State are to be deducted from the payback.

5. Give to a Pooled Special Needs Trust: Another option to consider is to give money to a pooled special needs trust. This may be appropriate if a non-exempt asset is to be given to the beneficiary, or the beneficiary does not qualify to have an ABLE account, or the gift is larger than what an ABLE account can receive. This type of trust is explained later in these materials.

6. Give to an Irrevocable Third Party-Settled Special Needs Trust: It is also possible to transfer assets to an irrevocable third party-settled special needs trust established for the benefit of the beneficiary. However, this gift will be deemed to be a taxable gift for gift tax purposes and will use up some of the donor’s gift and estate tax exemption unless Crummey withdrawal powers are granted to beneficiaries other than the beneficiary who has the disability. The details of this type of trust are complex and beyond the scope of these materials.

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V. Person With Disability Has Too Much Money

Instead of money or assets coming from a third person, it is possible that the person who has a disability has, or will be receiving, assets that exceed the maximum allowed to maintain eligibility for needs-based public assistance and will be disqualified from those benefit programs unless the excess assets disappear in a manner that will not disqualify the person from those programs. If this is the situation, then the following should be considered

1. **First $2,000 Not an Issue:** Both SSI and Medicaid in Arizona allow a person participating in those programs to have no more than $2,000 in their name as "available." Some states have a different limit for their Medicaid program.[52]

2. **Get Rid of the Excess:** Although giving the money away will usually cause disqualification from Medicaid and SSI for a period of time, it may be possible that the money the beneficiary has or is receiving can be consumed by spending it on services or items that benefit the beneficiary or the beneficiary's spouse. The quicker this is done, the less impact on the beneficiary's needs-based public assistance.

   Obviously, the smaller the amount of money the beneficiary is receiving, the easier this is to accomplish. Also, it is helpful to plan out how the money is going to be spent in advance of its receipt, so it can be spent quickly once it is received.

   A. **Consume the Excess:** Some examples of how this money can be consumed in a manner that helps the beneficiary and/or the beneficiary's spouse are: (i) pay off debts currently owed; (ii) pay for dental or medical

[52] For example, in Missouri the MO HealthNet (Missouri Medicaid) maximum is currently $2,000. This will increase by $1,000.00 for each fiscal year until it reaches $5,000.00 on July 1, 2020, and then will increase by an inflation factor. Missouri H.B. 1565, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (modifying MO. REV. STAT. §208.010.7).

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care or procedures not covered by Medicaid or other insurance; (iii) pay for travel expenses for the for the beneficiary and spouse, or other people required to care for the beneficiary; (iv) pay for food and other consumables - since this in the beneficiary's money, paying for food will not cause a reduction in the beneficiary's SSI; and (v) prepay for services the beneficiary will be using in the future, such as hair care, body care (such as massages, facials, manicures, etc.), house cleaning, legal services, and other items. Be careful to not prepay too far in the future, and be sure the prepaid amount cannot be refunded upon request. If a refund is possible, then the needs-based public assistance program may take the position that the prepaid amount is an available or countable resource for eligibility purposes.

B. Spend the Excess on Exempt Resources: The excess assets the beneficiary has or the money the beneficiary is receiving can also be used to purchase assets for use by the beneficiary and/or the beneficiary's spouse that will qualify as exempt resources for Medicaid and SSI. Examples are: (i) purchase irrevocable prepaid burial plan and Burial Plot; (ii) spend money on the beneficiary's residence, such as paying down a mortgage, improving the residence, or purchasing a new residence. Keep in mind that for Medicaid purposes the maximum fair market value of the residence in 2018 cannot exceed $572,000;[53] (iii) purchase a motor vehicle that will be used to transport the beneficiary; and (iv) purchase exempt household, personal, or other property such as described earlier in these materials.

C. Give The Excess Away: While it is possible for the beneficiary to merely give the excess away, most such gifts will result in the beneficiary being disqualified from SSI and Medicaid for a period of time. The details of this are beyond the scope of these materials.

[53] 42 U.S.C. § 1396p(f)(1); 42 U.S.C. § 1396p(f).

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3. **Transfer to an ABLE Account:** If the beneficiary qualifies and it is excess money that is causing the beneficiary to be disqualified from SSI or Medicaid, then the beneficiary can transfer the excess to an ABLE account. These are discussed earlier in these materials.

4. **Transfer to a Self-Settled Special Needs Trust:** If the amount of the excess assets are too large to be disposed by the foregoing methods, then transferring them to a self-settled special needs trust is an option that should be considered. Since this type of trust is based on statutory law and is an exception to general trust rules, there are restrictions on who can utilize them and criteria regarding their provisions that must be strictly followed.

However, if the beneficiary qualifies, then a self-settled special needs trust can receive an unlimited amount of money or assets that can be utilized to enhance the services and benefits the beneficiary receives without causing a reduction or loss of SSI or Medicaid benefits. These trusts are summarized below.

A. **Definition:** A self-settled trust is a trust that holds any assets formerly owned by the beneficiary of the trust. This is true even if the beneficiary (or the beneficiary's spouse) did not sign the trust as the person establishing it. In other words, in a self-settled trust the settlor and beneficiary are the same person. In addition, for Medicaid and SSI purposes a trust is deemed to be self-settled if any assets of the beneficiary's spouse are transferred to the trust.[54] The only exception to this is if the spouse establishes the trust by his or her Last Will and Testament.[55]

[54] 42 U.S.C. §1396p(d)(2); POMS § SI 01150.110.E.

[55] 42 U.S.C. §1396p(d)(2)(A); *Skindzier v. Comm. of Social Services*, 258 Conn. 642, 784 A.2d 323 (Conn. 2001).

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B. Impact of Self-Settled Trusts on Eligibility for Public Assistance:

Self-settled trusts are "countable resources" for Medicaid and SSI eligibility purposes unless they qualify for one of the OBRA 93 exceptions.

The trust assets held in a self-settled trust will be deemed to be a countable resource for Medicaid and SSI eligibility purposes unless the trust fits into one of the exceptions found in 42 U.S.C. §1396p(d)(4)(A) or 42 U.S.C. §1396p(d)(4)(C).[56] The first is commonly referred to as a self-settled special needs trust (and for ease of reference will be referred to as a "d4A trust" in these materials) and the second is commonly referred to as a "pooled" special needs trust. Assets held in a self-settled special needs trust that satisfies the requirements of either of these statutes are exempt for Medicaid and SSI purposes.

C. Description of Qualified Self-Settled Special Needs Trusts:

1) Requirements to Qualify a Trust as a d4A Special Needs Trust: As a result of OBRA 93 and subsequent administrative rulings and legislation, the current requirements to establish a trust that qualifies under 42 U.S.C. §1396p(d)(4)(A) are:

a. The beneficiary must be disabled sufficiently to qualify for SSI (as defined in 42 U.S.C. §1382c(a)(3)); and

b. The beneficiary must be under the age of 65 years at the time the trust is established and funded; and

[56] These exceptions were established by the Omnibus Budget and Reconciliation Act of 1993 (OBRA 93), Pub. L. No. 99-262.

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c. The trust must be established for the benefit of the beneficiary (this was later expanded administratively to "sole benefit"); and

d. The trust must be established by the beneficiary, the beneficiary's parent, grandparent, legal guardian or a court.

OBRA 93 did not allow the person who had the disability and would become the beneficiary of the trust to establish a self-settled special needs trust that qualified under Section d4A. However, on December 13, 2016, President Obama signed H.R.34 - the 21st Century Cures Act, Pub. L. 114-255, that, in Section 5007, enacted the Special Needs Trust Fairness Act that amended 42 U.S.C. §1396p(d)(4)(A) to allow the individual who has the disability to also establish a d4A special needs trust; and

e. At the death of the beneficiary, any assets remaining in the trust must first be used to repay the state (or states) up to the total of what it spent on the beneficiary for Medicaid assistance during the beneficiary's lifetime. Any excess after Medicaid is repaid can be distributed however stated in the trust document. (Although not part of the actual statute, this has been administratively expanded to also apply if the trust terminates during the beneficiary's lifetime).[57]

If these requirements are met, then:

[57] POMS SI 01120.199.

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f. Transfer of the beneficiary's assets to the trust will not create a transfer penalty for Medicaid or SSI eligibility purposes; and

g. The trust assets will not be deemed to be an available resource for Medicaid or SSI eligibility purposes; and

h. The beneficiary will qualify for Medicaid and SSI (assuming he or she otherwise qualifies); and

i. The trust may distribute for the benefit of the beneficiary to supplement the beneficiary's Medicaid and SSI without disqualifying the beneficiary from receiving Medicaid or SSI.

j. Although the trust can continue to provide supplemental assistance to the beneficiary after he or she attains the age of 65 years (assuming it was established prior to that time), no additional contributions can be made to the trust after the beneficiary is 65 years old.

k. NOTE: This description is based on not only 42 U.S.C. §1396p(d)(4)(A), but also §3259.7(a) of Transmittal 64 promulgated by The Health Care Financing Administration (HCFA, now known as the Centers for Medicare and Medicaid Services (CMS)) in November of 1994, and H.R.34 - the 21st Century Cures Act., Pub. L. 114-255.

2) Requirements to Qualify a Trust as a d4C Pooled Special Needs Trust: A trust established under 42 U.S.C. §1396p(d)(4)(C)

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is referred to as a “pooled trust” or “pooled special needs trust” and the requirements are slightly different than for a d4A trust. In order for a self-settled trust to qualify as a “pooled special needs trust”, the following criteria must be met:

a. The beneficiary must be disabled sufficiently to qualify for SSI (as defined in 42 U.S.C. §1382c(a)(3)); and

b. A non-profit association must establish and maintain a trust (usually referred to as a “master trust”);

c. The master trust allows a separate account (or sub-trust) within the master trust to be established for the benefit of the beneficiary by either the beneficiary, the beneficiary's parent, grandparent, or legal guardian, or by a court (this is typically accomplished by a Joinder Agreement being signed whereby the beneficiary is “joining” the master trust); and

d. The master trust accounts separately for each beneficiary’s separate account (sub-trust) of the master trust, but the principal contributed by all beneficiaries of the master trust is pooled for investment purposes and net income is allocated proportionately among the beneficiaries’ separate accounts (sub-trusts); and

e. Each beneficiary’s separate account (sub-trust) is solely for the benefit of the beneficiary for whom the account was established.

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If these requirements are met, then:

f. Transfer of the beneficiary's assets to the pooled trust account will not create a transfer penalty for Medicaid or SSI eligibility purposes; and

g. The assets held in the beneficiary's separate account (sub-trust) of the pooled trust will not be deemed to be an available resource for the beneficiary's Medicaid or SSI eligibility purposes; and

h. The beneficiary will qualify for Medicaid and SSI (assuming he or she otherwise qualifies); and

i. The trust may distribute for the benefit of the beneficiary to supplement the beneficiary's Medicaid and SSI without disqualifying the beneficiary from receiving Medicaid or SSI; and

j. Although the trust can continue to provide supplemental assistance to the beneficiary after he or she attains the age of 65 years, any additional contributions made to the trust after the beneficiary is 65 years old, or if the pooled trust account is established for the benefit of the beneficiary after he or she is 65 years old, may trigger a transfer penalty for Medicaid and SSI eligibility purposes; and

k. When the beneficiary dies, the non-profit association that established the pooled trust and serves as the trustee may keep in the pooled trust some or all of the assets remaining in

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the beneficiary's separate account. This is to be used to assist other beneficiaries who have accounts with the pooled trust. Whatever is not kept in the trust must be used to repay the Medicaid program for all amounts it spent on behalf of the beneficiary.[58]

3) The Primary Differences Between a d4A Trust and a d4C Pooled Special Needs Trust:

a. A d4A trust cannot be established for a person who is age 65 years or older. Nor can assets be transferred into an existing d4A trust after the beneficiary is 65 or older. There is no age 65 restriction for a d4C pooled trust. Whether this means a person age 65 or older can transfer assets into a pooled trust without incurring a transfer penalty is currently being litigated in various courts around the country.[59]

b. The trustee of a d4C pooled trust cannot be changed; it will be the non-profit association that established the pooled trust. The trustee of a d4A trust is chosen when the trust is established and can be a person, a group of people, a corporate trustee, a non-profit organization, or a combination serving as co-trustees. Authority can be reserved in the d4A trust document to give someone the power to remove and replace a trustee. This authority can be held by the beneficiary, a personal agent acting on behalf of the beneficiary, a trust protector or advisor, or a court.

[58] What actually happens to the remainder of the beneficiary's separate account upon the beneficiary's death depends on what the master trust document says. Many states have imposed different or additional requirements than the enabling statute, 42 U.S.C. §1396p(d)(4)(C).

[59] See for example, *Lewis v. Alexander*, 685 F.3d 325 (3rd Cir. 2012), *Cert Denied* 133 S.Ct. 933 (2013); *Center for Special Needs Trust Administration, Inc. v. Olson*, 676 F.3d 688 (8th Cir. 2012); *In re Pooled Advocate Trust*, 813 N.W.2d 130 (S.D. 2012); and *Hutson v. Mosier*, — P3d —, Kan. Ct. App. No. 117020 (9-8-2017), 2017 WL 3942586..

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c. A d4A trust is custom document that is designed and drafted for the beneficiary. As such, it can contain provisions that are not available in a d4C pooled trust. Examples are: (i) appointing a trust protector or trust advisor and granting them powers ranging from merely being able to advise the trustee about distributions, to reviewing the trustee's accountings, to overseeing all of the trustee's actions, to terminating and replacing the trustee, to amending the trust document; (ii) naming a succession of trustees, and (iii) distributing any trust assets remaining after Medicaid is repaid to the beneficiary (if the trust is terminated during the beneficiary's lifetime) or people or institutions chosen by the settlor of the trust (if the trust is terminated upon the beneficiary's death).

d. It normally costs more to establish and administer a d4A trust than it does to join a d4C pooled trust. This is a result of the d4A trust being a custom document established solely for the beneficiary, while the pooled trust is a master trust that applies to all beneficiaries who join the trust. The attorney's fees to draft a d4A trust are usually much higher than the joinder fee imposed to join a d4C pooled trust. Also, a d4A trust must file a separate income tax return each year that is paid for from trust assets.

e. The trustee of a d4C pooled trust is a non-profit association that has experience administering special needs trusts. With a d4A trust, the trustee may be a family member or friend who, although well meaning, may have little or no experience administering a special needs trust. Failure to

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properly administer the trust may cause the beneficiary to be disqualified from needs-based public assistance programs.

f. If the amount to be held in trust is small, it may be more appropriate to use a d4C pooled trust than a d4A trust. This is especially true if the trustee of the d4A trust is going to be a corporate trustee. Typically, a corporate trustee will require the trust to have assets of at least a few hundred thousand dollars before it is cost efficient for the corporate trustee to serve. A d4C pooled trust does not have this requirement because the assets of all beneficiaries who join the trust are "pooled" for investment purposes.

VI. Chart Comparing ABLE Account and Special Needs Trusts

The following chart summarizes the characteristics and differences of an ABLE account, a third party-settled special needs trust, a d4A self-settled special needs trust, and a d4C pooled special needs trust.

	ABLE Account	**Third Party-Settled Special Needs Trust**	**Self-Settled Special Needs Trust**	
			d4A	**d4C (Pooled)**
Whose Assets in Account or Trust	Third party's or beneficiary's	Not the beneficiary's	Normally only the beneficiary's	Normally only the beneficiary's
Limitations	Disability must begin before 26; Only $15,000 per year can be contributed	None, other than beneficiary's assets cannot be added	Beneficiary must be under age 65	May have transfer penalty if beneficiary puts assets in after 65
Who Establishes	Beneficiary, or beneficiary's guardian, parent, or DPA agent	Not the beneficiary	Beneficiary, parent, grandparent, guardian, or court	Beneficiary, parent, grandparent, guardian, or court

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Who Controls or is Trustee	Beneficiary or someone acting on beneficiary's behalf	Any person (other than beneficiary) or corporation	Any person (other than beneficiary) or corporation	Only non-profit organization that established the master trust
Who can benefit	Only the beneficiary	Beneficiary and others chosen by Settlor	Only the beneficiary ("sole benefit")	Only the beneficiary ("sole benefit")
Is there a separate written agreement	Not custom drafted. Must enroll with ABLE program offered by a State	Yes, custom drafted trust agreement	Yes, custom drafted trust agreement	Not custom drafted. Instead, join a Master Trust established by the non-profit organization that is the Trustee
When to use	When someone wants to gift to beneficiary, or beneficiary has too much money	When someone wants to give (or leave at death) assets to benefit someone else	When beneficiary receives lawsuit settlement, gift or inheritance, or has accumulated assets prior to disability or when turning age 18	When beneficiary receives lawsuit settlement, gift or inheritance, or has accumulated assets prior to disability or when turning age 18
Repay Medicaid upon death?	Yes, but only Medicaid received after ABLE account starts	No	Yes, all Medicaid beneficiary received during life	Depends on what pooled trust negotiated with State, but usually all remaining assets will be paid to Medicaid or retained by the trust

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