

Special Needs and ABLE Planning

Southern Arizona Estate Planning Council

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Let's Start with "Special Needs"

Sometimes you might read about "special needs trusts" or "supplemental benefits trusts" and wonder why one phrase is used rather than the other. You might, in fact, have bumped into "supplemental needs" or other terms. Perhaps you have seen trusts that don't use any of those names, but which other practitioners insist on calling special needs trusts. What's the difference, and what do the various terms really mean?

Since the inception of the modern era of special needs planning,¹ most commentators have used that term. Some, though, preferred to use the phrase "supplemental needs trust" to describe the early versions of trusts for individuals with disabilities. And a few states codified one term or the other.²

Some practitioners began referring to self-settled trusts as "supplemental needs trusts," reserving "special needs trusts" for third-party entities created by someone with their own resources but for the benefit of an individual with a disability. Just to keep the confusion level high, other practitioners began using the two formulations with exactly the opposite meaning(s). And what should we call a trust created with one person's assets for the benefit of a different person (with a disability), but for the purpose of making the donor eligible for public benefits?

For our purposes, we're going to use the more common term: special needs trust. We don't begrudge anyone else using supplemental needs, or special (or

¹ Arguably, that would be August 10, 1993, when then-President Bill Clinton signed the Omnibus Budget Reconciliation Act of 1993 (OBRA 93). That Act included what became 42 USC §1396p(d)(4), and especially subsection (A), which specifically recognized self-settled trusts for the benefit of an individual with a disability. The Act did not use the term "special needs trust" but it quickly became the primary formulation to describe the concept.

² Never constrained by conventional considerations, Arizona adopted the term "special treatment trust" to describe what are elsewhere usually referred to as self-settled special needs trusts. See Arizona Medicaid Eligibility Manual §§MA801 and MA803.

supplemental) benefit, or any other term that they may or may not have copyrighted.

Now that we know what we're going to call them, what the heck are special needs, anyway? Well, they primarily focus on individuals with a disability, and their ability to either have resources or manage them. Those are two separate considerations, and we'll deal with them momentarily.

Definition(s) of Disability

Most special needs planning is undertaken for the benefit of individuals who have been determined to have a disability³ for the purpose of one or more public benefits programs. So who are those individuals with disabilities?

First, it is critical to understand and appreciate that the mere existence of a disability (or a disabling condition, if you will) is usually not enough.⁴ In addition, the individual with a disability must have specific limitations in their ability to function as a result of that disability.⁵

The most important of those definitions is in the Social Security law. It starts with the Disability Insurance element of Social Security (usually referred to as SSD or SSDI), which establishes that an adult individual may receive benefits if they are covered by Disability Insurance⁶ and they are unable to perform substantial gainful activity because of their disabling condition. In a milieu that prizes acronyms, that is usually referred to as SGA, and thus there is a shorthand way of describing that disability.

An individual who is unable able to earn \$1,690⁷ or more per month as a result of their disabling condition may be “disabled” by Social Security standards. Note

³ And this brings up the whole topic of “people-first” terminology. For decades disability rights activists have insisted that we (the larger community) should put the subjects of disability planning first – including by referring to them as “a person with a disability” rather than “a disabled person”. In recent years other activists have begun to insist that the awkward construction calls unnecessary attention to the disability, distracting from the person. Whatever your preference, we generally adhere to the language of the statutes and regulations, which never got around to standardizing people-first language.

⁴ Though there are exceptions. Blindness, for instance, automatically creates eligibility for some government benefits, or improved eligibility treatment. As does end stage renal disease, for at least some benefits. But we're going to stay with the notion that disability starts with a disabling condition, but will usually require more.

⁵ This limitation requirement is different for minor children, and generally easier to meet. But spending much effort on that tends to confuse rather than enlighten. Just remember that a child might qualify somewhat more easily, though they may perversely not qualify for means-tested benefits because of their parents' assets and/or income.

⁶ And who is so covered? Anyone who is currently insured under the Social Security program, plus some survivors and dependents of those who are covered.

⁷ This is one of the places where certain conditions change the rules. Blind individuals are deemed to be disabled if their earning ability is less than \$2,830 per month. And, of course, both of these numbers are 2026 values; they increase each year with inflation, at the same rate as Social Security's Cost of Living Adjustment (COLA). That increase is usually released in mid-

that that does not mean that they can become disabled by simply reducing their hours, or agreeing to a lower rate of pay. The definition of disability requires that they be *unable* to earn the SGA amount per month.

Of course there are a lot of variables undescribed here. One-time income may not count. Nor does unearned income. And once eligibility is obtained, there are a number of ways in which a beneficiary can earn more for a period of time, encouraging them to seek a return to higher earning power. Plus there are some conditions (notably alcoholism or drug addiction) that do not qualify an individual for consideration – though they may also have another condition that is primary (mental illness, for instance) that allows them to become eligible. But all of those considerations, while important, do not change the general notions of planning for a person who is clearly disabled or who might become (or become considered as) disabled in a reasonable future circumstance.

The exact same definition of disability is employed in eligibility determinations for Supplemental Security Income (SSI), the other disability program administered by the Social Security Administration (SSA). The same \$1,690 (in 2026) limitation applies, though the maximum SSI benefit is lower -- \$994 in 2026. Just to clarify the distinction: an individual who is capable of earning \$1,000/month but not capable of earning \$1,690 would qualify as disabled, but would receive no SSI benefit because their income exceeds the \$994 limit.⁸

Not every government program requires a disability determination at all, and some use their own definitions (notably, Veterans benefits have much more complex disability calculations). But the Social Security definition of disability is by far the most important for most purposes.

Once we've established a disability, the next most important distinction is to divide public benefits programs into those that require a determination of financial resources and those that do not. So let's discuss the differences between means-tested benefits and those that are not means-tested.

Means-tested vs. Not Means-tested

Here's a listing of the primary public benefits for individuals with disabilities, grouped into those that are not means-tested and those that are. And note that this listing is for Arizona residents – some of the eligibility rules vary by state.

October but can normally be projected by now. In fact, the best estimate is that it will be 3.5 – 3.6% next year; one problem is that it is keyed each year to the figures released in October, and in October, 2025 the government was shut down by a deadlocked Congress, so the starting figure was never released.

⁸ This is incorrect, by the way. The rule is correctly stated, but there is a special additional rule to consider: the first \$20 per month is disregarded for SSI purposes, so a person (with a disability) who is capable of earning \$1,000/month would actually still receive \$14/month from SSI. And just to point out the mind-numbing complication of these rules, that is also a lie: the \$20/month disregard is actually expressed as \$60/calendar quarter. Confused? You're welcome.

Programs	Requirements
Not means-tested	
Social Security disability insurance (SSDI)	Disability, covered by Social Security
Medicare	Over-65 or SSDI for 2 years, eligible for Social Security
Veteran's disability benefit	Depending on degree of disability
Indian Health Services (ISH)	Categorical
Means-tested	
Supplemental Security Income (SSI)	Disability, asset and income eligibility
Medicaid	
Income AHCCCS	Income only, either Modified Adjusted Gross Income (MAGI) or Expanded Medicaid (Obamacare)
QMB, SLM, QI, "Extra Help"	Income only, supplements Medicare benefits
ALTCS (Arizona Long Term Care System)	Income and Assets (plus need for long-term care, etc)
Section 8/housing subsidies	Primarily assets; income affects amount of rent subsidy
TANF	Income and assets
SNAP (food stamps)	Income

Special Needs Planning – Two Kinds of Trusts

Armed with that definitional background, we can turn to planning for individuals who have (or might reasonably be expected to have) special needs. There are typically two kinds of problems to consider:

1. The individual may have eligibility limitations. That is, they may lose benefits if they have access to substantial assets.⁹
2. Their disabling condition may actually interfere with their ability to manage assets, income and life decisions generally.¹⁰

Now it becomes important to distinguish between the two kinds of special needs trusts. Some are created and funded by third parties, and are therefore usually described as third-party special needs trusts. Others are funded with assets that actually belong to, or are currently available to, the person with a disability.¹¹ Those trusts are usually referred to as self-settled, or first-party, special needs trusts.

So all special needs trusts can be described as one or the other: either self-settled or third-party. But there are actually a number of other categories of special needs trusts to consider. Each, however, can be seen as a subtype of the two major types of trusts:

Type of Trust	Categorization
Self-settled trust under 42 USC §1396p(d)(4)(A)	Self-settled (in fact, the classic self-settled trust – which are often referred to as “d4A” trusts)
Pooled trust (under 42 USC §1396p(d)(4)(C))	Self-settled, but with its own special treatment under the federal law
“Miller” Trust (under 42 USC §1396p(d)(4)(B))	Self-settled, but limited to handling <i>only</i> the income of the individual
Pooled trust (but NOT under 42 USC §1396p(d)(4)(C))	Third-party (Rare, but not unheard of)

⁹ And what do we mean by “substantial assets”? Well, that’s actually not our focus. But one of the most important limitations is the asset limit for SSI: \$2,000 in available resources. That \$2,000 limitation has a number of qualifications, and is not the same limitation as the ones in other programs. But we want to focus on how to address the problem, not the precise delineation of the problem itself.

¹⁰ And, of course, it may not. But in some circumstances, an individual with special needs may be at higher risk, or be perceived by family members as being at higher risk, leading to a desire to provide management for any gift or inheritance.

¹¹ This is an important point here. If the individual has access and control, or legally could assert access and control but for their disability, it doesn’t matter who creates, establishes, settles or funds the trust – they are treated as having done those things as the agent of the person with the disability. Third-party trusts are created and funded by third parties, with money that belongs to the third party. Everything else is a self-settled trust.

“Sole benefit” trust	Third-party as to the beneficiary, though effectively treated as self-settled. The primary purpose of this type of trust is to secure benefits eligibility for the settlor, not the beneficiary
Standalone estate planning trust established by parent or other interested person	Third-party
Special needs provisions governing sub-trust of settlor’s larger trust but benefitting remainder beneficiary with special needs	Third-party (and possibly also a Type II AMBT under federal tax law)

Estate Planning Considerations

So how does public benefits eligibility inform estate planning? To some extent, as suggested above, that is the wrong question. The better question: if there is a beneficiary (or potential beneficiary) with a disability, how should the estate plan address that individual? And, of course, we should keep in mind that the existence of a disability is tested at the time of estate plan maturation (e.g.: by the death of the individual) rather than at the time of execution of documents.

But not to worry. There are a handful of planning options that make it easy to prepare adequately for the beneficiary with a disability. Those include:

1. Savings language for possible future disability. Perhaps every trust and will (other than pourover wills) should include a provision that allows the fiduciary (trustee or personal representative) to segregate the share for any individual who is then receiving, or the fiduciary believes might soon qualify for, public benefits. Perhaps even give the fiduciary the ability to make that decision based on their own judgment.

Be cautious about too much discretion, however: consider the holding in the (unpublished) decision in *Boyd v. Boyd*, 2010 WL 5125513 (CalApp 2010), in which a beneficiary in a nursing home on Medicaid lost her effort to compel the trustee to exercise her discretion to amend the trust into a third-party special needs trust.

2. Level of trustee’s discretion. Whether testamentary or *inter vivos*, it is important for a third-party special needs trust to give the trustee discretion about distribution of principal and income. If there are mandatory distributions, they will be treated as available resources for the beneficiary

(even if not actually distributed). If the discretion is subject to a recognizable standard (e.g.: a HEMS distribution standard), the public benefits programs may take the position that a beneficiary could seek to compel distributions to satisfy those standards, and that even the beneficiary's failure to do so does not protect against the treatment of *at least* some portion of the trust's income or principal as available for public benefits purposes.

So far (happily), Arizona has not taken such a position, but it's probably best to avoid such an argument for future circumstances. It might, however, be advantageous to generically describe how the trustee might approach discretionary distributions (e.g.: "in exercising its discretion, the trustee should consider the effect of any distribution on the public benefits that might otherwise be available to the beneficiary, and exercise the discretion in a manner that the trustee reasonably calculates to maximize the beneficiary's comfort, autonomy and independence").

3. Avoid unnecessarily restrictive language. Don't include prohibitions on distributions for food or clothing (those limitations are no longer even meaningful in public benefits law, and have not been since 2024 and 2005, respectively). Don't even include prohibitions on distributions for shelter (which still can have an effect on the level of benefits, particularly Supplemental Security Income). Why not? For a variety of reasons. The rules may change (they already have, in material ways, twice in the past two decades). And such expenditures might allow for a net gain for the beneficiary, as when a \$1,000 housing expenditure could cause a \$300± reduction in benefits, which might make sense. On top of those two items, it is absolutely commonplace for the death of a settlor to change the program and amount of benefits payable to a trust beneficiary in ways that make the SSI eligibility rules no longer relevant. In fact, consider giving the trustee express authority to make the judgement that continued public benefits eligibility is not the most important consideration.
4. Include ABLE Act authority in every third-party special needs trust. It isn't required – unless it has been prohibited by the trust's language, it should ordinarily be available to the trustee. But make it explicit, both to alert (and give permission to) the trustee, and to protect against future changes in the law.
5. Consider including a Trust Protector (mandatory or within the discretion of the trustee), or giving the trustee the authority to make at least some modifications, or some other mechanism to give flexibility for future program eligibility and benefit changes. A LOT has changed in the past two decades, and SSI and Medicaid themselves are only 60-year-old

programs. If the trust is going to continue for, say, another 30 years, it's hard to predict what will change but easy to predict that there will be big changes.

6. It's all about trustee selection. Try to wean your clients away from just choosing their oldest child, or the child with an accounting or investment background, as trustee for the child with a disability. Make that child the Trust Protector, but choose a trustee with experience in public benefits and special needs trusts. And help any trustee learn more about their duties, limits, discretion and how to improve the beneficiary's quality of life.

Note that none of this addresses self-settled special needs trusts. They are both more problematic to set up and more frustrating to administer. Be very, very careful about preparing a self-settled special needs trust without experience or support. And note that you will need to cite ARS §36-2934.01(B), and identify AHCCCS (the state's Medicaid agency) as a beneficiary, not just a creditor, of the trust (ARS §36-2934.01(A)(1)). And Arizona language about the payback provision specifically referring to Arizona (and excluding any other state's payback rights), while the Social Security Administration mandates exactly the opposite (POMS §SI 01120.203(B)(8)). So every self-settled SNT requires a careful consideration of who will be reviewing and acting on the language of the document.

Special Needs Trust Administration

A variety of problems face the trustee of a SNT. And the problems for the trustee of a self-settled SNT (particularly in Arizona, with our odd legal provisions¹²) and the trustee of a third-party trust can be very different. But there also can be a lot of commonality and overlap. Here, we propose to touch on highlights and a handful of overlooked issues, rather than trying to be comprehensive in a very fact-dependent environment.

Know your beneficiary

As a general observation, a trustee should be familiar with the individual quirks and living arrangements of a trust beneficiary. But in the case of a SNT, it may be harder to extract the usual information, often because of the limited ability of the beneficiary to communicate. At the same time, the beneficiary might be surrounded (and supported by) individuals who have their own self-interest – even though caretakers and family members might have genuine concern for the beneficiary and their well-being.

There is simply no substitute for periodic home visits. What does “periodic” mean? Obviously it will vary by functional level, relationships and family

¹² ARS §36-2934.01

support, institutional or non-institutional care settings and a variety of other very fact-specific circumstances.

Family member or caretaker as trustee? Well, they might have a much easier time describing care needs, schedules and routines, goals and support systems. They also might be the worst at assessing real needs and communicating them appropriately.

Set and review goals

What is the purpose of the trust (and the guiding principle for the trustee)? Is it enhancing the beneficiary's quality of life? Or protecting public benefits eligibility? Or preserving principal (and even growing the trust corpus)? What would best benefit the beneficiary? Autonomy, independence, self-respect? Or medical care and supplies?

Whatever the analysis, revisit it at least once every few years. And, just for fun, re-read the trust document every year or so.¹³

Benefits programs – and interactions

If the beneficiary is receiving Supplemental Security Income (SSI), the trustee needs a basic understanding of the In-Kind Support and Maintenance (ISM) rules. Also, the need for a non-cash way to get benefits to the beneficiary.¹⁴ Gift cards don't work. Giving the beneficiary a debit card on the trust's bank account doesn't work. Why not? The trustee needs to not just know the list of permissible options, but actually understand why different good ideas don't work.

Meanwhile, a deeper understanding of the SSI rules will help the trustee use rules that are actually beneficial. Like prepaid (domestic) airline tickets, or restaurant meals and hotel rooms during vacations or other travel¹⁵.

And remember – a SNT beneficiary receiving SSI might well become an SSD recipient one day (particularly if a parent begins receiving Social Security benefits or dies – though not always¹⁶).

¹³ We're very interested in the ability of Artificial Intelligence to help with this. Not as a substitute for reading, but as a supplement to your review and digestion of the document. Let us know how that's working for you.

¹⁴ We use True Link cards extensively. They seem like a safe and convenient way to help provide some independence and to arrange for payment of daily expenses without distributing cash. Plus they have the advantage of being the only commercial product specifically called out in the Social Security POMS: POMS SI 01120.201(I)(1)(e) ("Administrator-managed prepaid cards")

¹⁵ All of these, and more, are covered in POMS SI 01120.201F.3. It's good to read that POMS section from time to time – both looking for changes and to remind yourself of the rules. And note that this list is a bit of a red herring – each item is a separate sub-category. Hotel rooms are not "housing" when the resident returns to their home within a month. Meals (and food more generally) are no longer a problem at all. And airplane tickets, even though refundable, are not considered available so long as the travel is domestic. And we've just gotten started.

¹⁶ And it's important to know when they will and when they won't qualify on a parent's work account. It helps planning and changes the benefits picture substantially.

As we described in the opening sections here, an SSI recipient will ordinarily also qualify for Medicaid (at least for general Medical care – what in Arizona we call AHCCCS). SSI beneficiaries usually also have an easier time qualifying for housing subsidies¹⁷, SNAP and other benefits.

If a trust beneficiary qualifies for SSD (Social Security Disability Insurance – also sometimes referred to as SSDI) benefits, the rest of the eligibility picture changes, as well. Two years after SSD qualification, most beneficiaries will begin to receive Medicare benefits. And, of course, a given beneficiary might receive both SSD and SSI, Medicare and Medicaid. It's hard to keep on top of the status, and eligibility changes are commonplace.¹⁸

Documentation

A competent trustee needs to keep excellent records. Document every exercise of discretion – less because of concerns about litigation (though that can be a motivating factor) than because memory is fragile. What options did the trustee consider? What level of involvement did the beneficiary (and family and caretakers) have? What information did the trustee wish they had but could not get, or rely on (for the next time the same problems arise)?

Administration is multidisciplinary

A leading figure in the SNT administration landscape regularly includes in his presentations a description of the perfect trustee. A SNT trustee, ideally, should be:

- An investment manager
- A social worker
- A lawyer
- A medical provider and diagnostician
- An accountant
- A benefits consultant
- A care manager
- A psychologist
- A counselor
- Immortal

To the extent that a given trustee has those attributes – great. Missing attributes need to be available from some other source.

¹⁷ Though waiting lists are famously long and prevent many individual from every receiving any benefit.

¹⁸ Not, to be clear, eligibility rules, so much as the eligibility status of the trust beneficiary, which is often variable.

Investment principles

For centuries, Anglo-American trust administration has focused primarily on preservation of principal. To the extent that it is possible, secondary goals of growth or income could be considered.

Quite often, SNTs upend that tradition. SNTs may be smaller than other trusts, with beneficiaries who have higher needs. Beneficiaries may have shortened life expectancies (though perhaps that's a hard thing to review with family members and caretakers). Paradoxically, the availability of a public safety net – even a patchy and flawed net – sometimes is appropriately added to the mix.

The bottom line: SNTs are often inherently spend-down trusts. Or the current benefits may be more important than future benefits. Or they may be completely ordinary, focused on preservation of principal and/or growth/income.

Reporting/accounting

SNTs are, after all, trusts. So the basic rules of trust accounting¹⁹ apply. But the most interesting issue unique to Arizona (or nearly so) is determination of the “Qualified Beneficiaries”²⁰ of a self-settled SNT. Because AHCCCS insists on being identified as a beneficiary, not just a creditor (or super-creditor, as in some states) of the trust, AHCCCS is entitled to accountings and (theoretically, at least) has standing to object to accountings. One piece of advice: capitalize on that status. Give them perfect notice, and get court approval of accountings in many (perhaps most) cases. Limit their ability to complain about trust administration years later, or on termination of the trust.

What does an accounting look like? It needs to be complete, but the Arizona Trust Code recognizes that it might not look like a court accounting²¹.

Does Social Security need an accounting? No. They are not a beneficiary, and they do not have any claim against the beneficiary or the trust.

Accountings are different from reporting the existence and expenditures of the trust. Reasonable minds may differ, but we have always taken the position that the trustee does not have a duty to report the existence of the trust to either Social Security or AHCCCS. Once AHCCCS knows of the trust's existence, the agency will require an annual budget²² and a certification that the trustee knows that mistakes may affect the beneficiary's eligibility.²³

¹⁹ See ARS §§14-10801 through 14-10817

²⁰ ARS §§14-10103(14)(b) and (c)

²¹ Except, of course, when it is a court accounting.

²² AHCCCS has a special form, which they number DE-312.

²³ Again, AHCCCS has a special form. This one is the DE-522.

Death or termination of the trust

Though federal law is not explicit, AHCCCS treats termination of a SNT as the functional equivalent of death of the beneficiary. And death of the beneficiary can trigger the payback provision of any self-settled SNT.

AHCCCS has an unwieldy administrative structure for dealing with its claim for payback from SNTs. They rely heavily on an outside contractor, HMS.²⁴ They have gotten better at communicating amongst themselves, but it can often take quite a long time to get a final figure for the amount paid for AHCCCS services during the beneficiary's life. And it can often take an even longer time to get a final figure on which you can rely. Nonetheless, it is important to start that process soon after the trust's termination.

Did the beneficiary of a self-settled SNT live anywhere other than Arizona? It may be necessary to get similar information from other state Medicaid agencies. And any apportionment among different states should ordinarily be proportional to their total claims, not the recency of services.

In third-party SNTs, the terms of the trust will presumably provide the identification of remainder beneficiaries. If there are funds remaining after the repayment of Medicaid claims in a self-settled SNT, the same should be true.

Federal law permits payment of taxes incurred as a result of the trust to be paid before any payback. And, of course, taxes would be payable before any distributions to other remainder beneficiaries. It may well take six months to a year to figure out the payback (if any), the tax liability and the identities and whereabouts of all of the remainder beneficiaries. Wrapping up a SNT – self-settled or third-party – is often more complicated than at least some other trusts.

Taxation Issues

There are a number of tax issues for SNTs. They are different for self-settled and third-party trusts. Let's start with the former.

Self-settled SNTs are grantor trusts

An absolute statement like that always invites argument. Let's pose one: if (for some reason) we wanted to create a self-settled SNT that was *not* a grantor trust, could we do it? Well, yes – but we'd have to grapple with IRC §673(a). That rule says that if a taxpayer puts their own assets into a trust – even an irrevocable trust – but retains a “reversionary interest” of over 5% of the value of the trust, then it is always a grantor trust. So we could avoid that rule by creating an irrevocable self-settled trust but limit all future distributions to no more than 5% of the trust principal. Absent that (clearly unacceptable) limitation, you can't make a self-settled trust that is *not* a grantor trust.

²⁴ Health Management Systems.

Why would you want to try to make a self-settled trust not a grantor trust? So that you could pay the higher, compressed income tax rates? Probably not. You might argue that you want to avoid filing a form 1040 with trust income included, because you don't want the SSA or Medicaid agencies thinking that the beneficiary has income. But "income" for tax purposes is not the same as "income" for eligibility purposes. And most (but not all) eligibility workers get that. The perceived problem of having reportable income for tax purposes is less than it was decades ago. But even if that were not true, you can't just decide to call your grantor trust not a grantor trust.

Related issue: do you have to get an EIN for the self-settled trust? You probably can, since the grantor is not the trustee. But you don't have to. And getting an EIN doesn't help obfuscate the income, since a grantor trust with an EIN may not file a substantive 1041. The trustee should — by which we mean "must" — file only an informational return, indicating that all income and deductions will be reported on the individual return and that the trustee has provided all the necessary tax information to the grantor.

Third-party trusts

Some third-party trusts can be grantor trusts. Just not to the beneficiary. But if you create a revocable SNT for your disabled child, you are its grantor (and you will pay the income taxes on earnings). Make it irrevocable but retain any of the powers listed in IRC §§673(a) (the same section that makes self-settled trusts grantor trusts), 674, 675 or 677. This may be a desirable result, but a donor might not want to keep paying taxes on income that is primarily for the benefit of their child with a disability, whose expenses may be large and income small. Different circumstances call for different planning.

Non-grantor trusts

Self-settled SNTs and some third-party SNTs will be grantor trusts, but at least some third-party SNTs will not (particularly, but not solely, after the death of the settlor/grantor). Those trusts will be taxed as separate entities, and will be burdened with the compressed tax rates problem.²⁵ One small savings: a third-party SNT probably will qualify as a Qualified Disability Trust (IRC §642(b)(2)(C)). That can give the trust a much-larger personal exemption.²⁶

²⁵ A trust reaches the highest marginal income tax rate (of 40.8%, including the Net Investment Income Tax) at a total taxable income of \$16,000. The highest tax rate for capital gains (20%) kicks in at \$16,250 of capital gains. For comparison, an individual taxpayer does not reach those high-tax rates until \$640,000 and \$545,000, respectively.

²⁶ Though the entire concept of a personal exemption has been written out of the Internal Revenue Code of individuals, the concept still exists — and the calculation is updated every year — just for these third-party SNTs. The 2026 exemption amount: \$5,300. Compare that to the \$300 figure for "simple" trusts, and \$100 for "complex" trusts.

IRAs and qualified retirement accounts

A lot has been written about the relationship between IRAs (and qualified retirement accounts) on the one hand, and SNTs as beneficiaries of such accounts on the other hand. Most of the discussion has focused on how to draft trusts and beneficiary designations to take maximum advantage of the opportunities. But here's the basic analysis: in the wake of the SECURE 2.0 Act, a third-party SNT may permit the RMDs for an inherited IRA to be withdrawn over the life expectancy of the disabled beneficiary. Since most other beneficiaries must withdraw all of the inherited IRA within 10 years of the owner's death, this can be a terrific benefit. Of course, if the beneficiary is going to need the funds sooner, or dies early in the administration of the SNT, then there might not be much tax benefit. But for a well-funded SNT named as beneficiary of an IRA or qualified retirement account, it may be possible to withdraw funds from the account over 50+ years, rather than 10.

ABLE Act Accounts

The Achieving a Better Life Experience Act (ABLE Act) was adopted by Congress in 2014. It was not self-executing, but required states to consider whether to create their own programs or sign on to programs in some other state. Arizona acted in 2016, but it took another two years before we had decided to adopt the Ohio program. Ohio's program is called STABLE; if an Arizonan signs up for STABLE then they are automatically transferred to the Arizona version of the account. Similarly, if an Arizona STABLE member moves to one of the other STABLE states (Georgia, Idaho, Kentucky, Missouri, New Mexico, Oklahoma, South Carolina, Utah, Vermont, West Virginia or Wyoming – or, of course, Ohio), then their account is transferred administratively to that new state.

ABLE Act accounts are relatively little-known and under-utilized. But (and this is important) even though the advocacy groups that envisioned and pushed for ABLE thought of them as alternatives to SNTs, they are not mini-SNTs. ABLE Act accounts solve different problems: autonomy, immediacy and friction reduction. And it turns out that they integrate particularly well with SNTs in many circumstances.

First, let's deal with the bad news right up front. Money in an ABLE Act account is paid to the state Medicaid agency (to the extent of lifetime benefits received) before being distributed to the beneficiary's estate or any named alternate beneficiaries (STABLE does not at present allow beneficiary designations, so anything left over after the payback goes to the beneficiary's estate). Some states – but not Arizona – have implemented exceptions to that general principle, but only to ABLE Act participants who live in that state and utilize that state's ABLE Act account. This is especially confusing because Ohio is one of the states providing for no payback, but that applies only to Ohio residents in the Ohio flavor of STABLE.

ABLE Act basics – age and disability

Let's start with some of the rules governing ABLE Act accounts. Almost all of them are federal rules with little or no state variations (with the notable exception of those states excusing the payback requirement), so we can generalize about the principles.

An ABLE Act account can be set up for any person who became disabled before age 46 (this limitation was for disabilities before age 26 until the beginning of this year). NB: that does not mean that the account must be set up before age 46, or that contributions cannot be made thereafter. It just means that the beneficiary must have been disabled before that age.

And how do we know that they were disabled in time? Well, if they received SSI or SSD (including on a parent's account) before the age of 46, they qualify. If they did not, but were factually disabled (by Social Security standards) then the STABLE enrollment process asks the person setting the account up to aver that they were disabled. The standard the applicant is supposed to apply: that they would have been disabled by SSA rules if they had applied, but did not qualify either because of finances, work history or simple failure to apply.

ABLE Act basics – contributions and financial limits

A beneficiary can only have one account. If a second or subsequent account is set up, the various ABLE Act administrators are expected to see the prior account and pull it into the new account.

Contributions to the ABLE Act account (from all sources, combined) cannot exceed an annual figure established in the same manner as the gift tax exclusion amount. But in 2026 Congress modified the calculation method for the ABLE Act maximum, with the result that it considers one "extra" year of calculation. Bottom line: in 2026 the contribution maximum is \$20,000, even as the gift tax exclusion amount stays at \$19,000. Presumably, next year both will be \$20,000, and the ABLE Act contribution amount will go up at least one year before the gift tax exclusion amount in years after that.

There are several circumstances in which the maximum annual contribution can be increased. The key one: if the beneficiary is employed but not covered by their employer's retirement account program, they may be able to make an additional contribution (but not more than earnings).

If the ABLE Act account grows to more than \$100,000, the beneficiary's SSI benefits will be suspended until the account drops back below \$100,000. This is supposed to be automatic, and not require a new SSI application. And the \$100,000 figure has no effect whatsoever on Medicaid or other benefits programs. Since ABLE Act accounts have only been around for about a decade, the \$100,000 limit is largely theoretical for most participants – but will become more of an issue in the next few years for at least some participants. And, of course, if the beneficiary isn't receiving SSI benefits (because they have other

assets, or have been deemed ineligible because of family assets or income, or because they receive SSD benefits of more than the SSI maximum), then they simply don't care about the \$100,000 limitation.

Note that the SSI limitation is based on the current balance in the ABLE Act account, not the amount of contributions. There is another limitation that is based on the total amount of contributions – and for which the current account balance is irrelevant. That is an analogue of the Section 529 (education) accounts: the maximum amount of contributions over the lifetime of the ABLE Act account is set at the same amount as the §529 limit for the state. Currently in Arizona that is \$609,000; in Ohio it is \$541,000. It is not clear (to me, at least) which limit applies to Arizona participants in STABLE – but the distinction is entirely theoretical until the accounts have been around for 40-50 years.

Conceptual treatment of ABLE Act accounts

The ABLE Act was a conscious attempt to provide a §529-like account for people who are never likely to go to college. In fact, the ABLE Act was codified as §529A of the Internal Revenue Code, and the accounts are sometimes referred to as 529A accounts to highlight that relationship. But the actual implementation differed in several important ways. One was the maximum total contribution limit (described above). Another is the very conception of ownership.

A §529 account is owned by the contributor unless/until they transfer ownership to another (by actual transfer or upon death). An ABLE Act account is owned by the beneficiary – even if a family member establishes it, contributes their own money, and continues to administer it. In fact, parents, grandparents, siblings, spouses and agents under a power of attorney can all open and manage the accounts. But they still belong to the beneficiary.

Qualified Disability Expenditures

ABLE Act accounts are intended to be used for particular kinds of expenditures. To that end, the ABLE Act itself provides a lengthy list of Qualified Disability Expenses (IRC §529(e)(5)). The list ends with “and other expenses, which are approved by the Secretary [of the Treasury] under regulations and consistent with the purposes of this section.” Regulations make it clear that pretty much any expenditure will qualify – and the actual statutory list is pretty broad to begin with.

But – and this is important – the entire notion of QDEs is a red herring. Why? Because the penalty for violating the QDE limitation is a tax penalty, not a benefits penalty. Did an SSI beneficiary spend ABLE Act funds on something that can not be shoehorned into the QDE list (plus regulations)? Oh, then they owe ordinary income taxes on the proportion of the non-QDE that can be calculated as income in the account. So (bear with us for the math here – it won't hurt) consider a \$10,000 ABLE Act account that earns \$200 in income, and is now worth \$10,200. And the beneficiary receives a non-QDE distribution of \$102.

That means that \$102/\$10,200 of the distribution (that's .1%, for the math-challenged) of the \$102 distribution (or \$.10) is taxable. That's a rounding error. Did the beneficiary actually receive \$1,020 in non-QDE distributions? Oh, then the taxable income just went up to \$1.02. You can imagine a circumstance where this taxability might make a difference, but it's pretty hard to get very exercised about it. So you're probably safe ignoring the whole QDE limitation.

Taxation of ABLE Act accounts

There are a number of hard-and-fast rules that make the ABLE Act accounts very attractive – even though the dollar amounts might be small. Contributions to an ABLE Act account are not taxable (to the beneficiary). Distributions are not taxable (unless they are non-QDE distributions).

In Arizona, contributions to an ABLE Act account are state income tax deductible, up to the generous amount of \$2,000 per donor/donee. A married couple can double that amount. So a married couple with two children with disabilities can make \$8,000 in ABLE Act contributions and get a state income tax deduction for the entire amount.

Public benefits effect of ABLE Act

This is where ABLE Act accounts really shine. Contributions (by the beneficiary or a third party – including a SNT) are not “income” for public benefits purposes – and this applies for *all* public benefits programs. The amount in the ABLE Act account is not an available resource, and income earned within the account is also not an available resource (or income). And distributions out of an ABLE Act account are not income – and the money sitting in non-ABLE account pending final use aren't even resources (with one tiny exception²⁷).

²⁷ We're tempted to not even explain it, but it's too much fun, so we will. Imagine that an ABLE Act beneficiary has \$20,000 in their account, and they intend to use it for rent. So they withdraw their rent of \$1,200 each month and pay the landlord. The deposit, the accumulated account and the withdrawal are all penalty-free for public benefits purposes – even though a payment for rent looks like In-Kind Support and Maintenance for SSI purposes. But here's the tiny exception: if the beneficiary pulls \$1,200 out on July 28 for the August rent, and still has the \$1,200 in their general bank account come August 1, it is an available resource. If their other available resources exceed \$800, then they are over the \$2,000 limit and would lose their SSI – and possibly also their AHCCCS eligibility – for August.

But this is easy to avoid. How? Withdraw the money on July 28 and then pay the rent by July 30. Or withdraw it on July 24, and take the whole week to get the rent paid. Or withdraw it not “for” rent, but for a Disneyland vacation – no resource problem, even if the beneficiary later decides to use the money for rent instead. Stupid? Yeah, sure. But rules, as Ellis Parker Butler told us, is rules (and pigs is pigs – but that doesn't really matter here).

So why use ABLE Act accounts?

There are a number of real benefits to ABLE Act accounts, despite their drawbacks.²⁸ Among those:

1. Enhancing autonomy and self-control. It's hard to overestimate the value of having one's own account under one's own control. And not having to justify every expenditure, or keep receipts for later review, can be very liberating for beneficiaries and their immediate family members.
2. Reducing administrative costs. A professional SNT trustee will likely charge for every transaction. That will include receiving the request, considering it, acting on it and actually writing and mailing a check. Can family members take over many of those duties through an ABLE Act account? Win/win!
3. Housing. The SSA's In-Kind Support and Maintenance rules effectively reduce many SSI beneficiary's monthly checks by a little more than \$300. A SNT – or a family member – can provide up to \$20,000/year of housing with no reduction in benefits whatsoever. SMH!
4. Encouraging basic money-management skills and even some modest savings. In individual circumstances, the ability for a person with a disability can not just achieve additional autonomy but also develop life skills that they might be able to use later.
5. Blowing through the \$2,000 limitation. Is an SSI beneficiary trying to save up for a new car? It can be impossible with a \$2,000 cash limitation. Enter the ABLE Act account! Huzzah!

Case Studies

I. The value of retirement accounts

Terry and Pat, both age 62 and married for 40 years, have three children. Their older children are both professionals, with substantial estates of their own and high incomes. Their youngest child, Chris, age 20, is developmentally disabled and lives at home with Terry and Pat. Their joint estate includes their \$700,000 home, IRAs and 401(k)s of a little more than \$2.5 million, and other investments of \$2 million. They have no wills or trusts in place, and will need a comprehensive estate plan. Some of their questions:

1. How should they divide their estate among their three children?
2. Might they simply disinherit Chris and have the other two children provide care and support?
3. How much should they expect Chris's continuing care to cost?

²⁸ Wait, drawbacks? I thought it sounded like it was all rainbows and unicorns. Well, there is the administrative problem (ABLE Act administration is pretty klunky, and providers are often slow and sloppy) as well as the payback problem. And though the rules are clear, relying on eligibility analysts to get it right every time is often wishful thinking.

4. Who should be beneficiary on their retirement accounts?

II. Can a charity be included?

Drew, 71, has a 40-year-old child, Jordan, who has cerebral palsy. Jordan has a part-time job and earns about \$500/month. When Drew began drawing Social Security benefits last year, Jordan's Social Security benefit jumped from about \$800/month to \$1500/month. Jordan is still covered by Medicaid, which Drew believes is very important. Drew already created a special needs trust for Jordan's benefit, and the trust is the primary beneficiary of Drew's estate. If medical costs can be taken care of, Drew expects that any assets remaining after Jordan's death can be used to fund a program for similar individuals through the local UCP chapter. Can UCP be the remainder beneficiary of Jordan's special needs trust? Can such a trust be named as beneficiary on Drew's ±\$500,000 IRA?

III. How to account?

You've been consulted by BigFriendly Bank, trustee of the Davy Jones Supplemental Benefits Trust. BigFriendly had a different lawyer/accountant team representing them, but they became unenamored of the advice they were getting. The DJ Trust started 30 years ago with just over a million dollars, and BigFriendly's careful management has increased the trust to over \$10 million. The trust officers are understandably proud.

When you ask about Davy's actual needs, the trust officer explains that she hasn't ever actually met Davy, who lives in an adjacent state in a care home. He receives public benefits which provide all of his care needs; the trust officer gets periodic updates from the care facility's nursing staff, and she checks quarterly to make sure that Davy is still alive. On Davy's death, the trust will go to his sister Diana; she has been getting accountings but BigFriendly hasn't really heard much from her. It's not clear to the trust officer whether Davy has any social, medical or psychological needs, but he did have a state-appointed guardian until that person retired 10 years ago (and died shortly thereafter, the trust officer learned when sending an accounting to him).

Do you have any ideas or concerns you'd like to share with BigFriendly? How might you suggest they proceed? Are you OK just preparing the current accounting and submitting it to the court that, it must be said, has routinely approved 30 consecutive accountings?

IV. ABLE and Truelink

You represent the trustee of a third-party special needs trust for the benefit of Sarah, age 40. She lives on her own in a rent-subsidized apartment, and receives SSI benefits of about \$640/month. The trust has been unable to give Sarah any cash distributions, but has paid for some utilities and a portion of her rent to

keep her in her apartment. Because of the trust's inability to spend very much money on Sarah, it has grown to a little over \$1,000,000 in assets.

The trustee has recently heard that payment of Sarah's portion of the rent has actually been a violation of the rent subsidy rules, and she might lose her subsidy. In any event, Sarah would really benefit from having more cash available, and the trustee is willing to spend more. What options might be available?