Planning for People With Special Needs

Southern Arizona Estate Planning Council

February 21, 2018

Presented by

Craig C. Reaves, CELA

What you need to know

What can you do if someone asks you:

A. How do I give assets to a person who has a disability without causing her to lose public assistance?, or
B. How can I maintain my public assistance when I have too much money?

In order to answer these questions, you must know whether the person is “sufficiently disabled” and receiving “needs-based” public benefits.

If not, the answer is easy.

If the answer is “Yes”, then the fun begins…

What is "Sufficiently Disabled"?

Usually SSI definition is used:

"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."

What is "Needs-Based" Public Assistance?

There are two basic categories of public assistance programs

1. Needs-Based (or "means-tested")
2. Non-Needs-Based

Non-Needs-Based Public Benefits

Non-Needs-based public benefits are:

1. Social Security
   - Retirement, Disability, Survivors
2. Medicare
3. Some VA benefits

To qualify for these, a person must be blind, sufficiently old, or have a permanent and total disability, AND be able to connect to the Social Security or Veteran's systems

Needs-Based Public Benefits

In addition to requiring a person to be blind, have a permanent and total disability, or be sufficiently old, a "needs-based" public assistance program bases eligibility on financial need, such as:

- Low income, and
- Low assets (available resources)

Needs-Based Public Benefits

Needs-based public benefit programs are:

1. SSI (Supplemental Security Income)
2. Medicaid
   - But distinguish between medical and long-term care benefits (institutional and HCBS)
3. Federal Assisted Housing Programs
   - Housing choice vouchers (Section 8)
   - Section 202 program
4. Some VA benefits

Needs-Based Public Benefits

For most needs-based public programs, the beneficiary must be:

1. Sufficiently blind, old, or disabled,
2. Have low income, and
3. Have no more than $2,000 of "available (or countable) resources"

Satisfying the last requirement is the reason to plan to reduce a person's assets

Three Ways This Comes Up

1. Estate planning by a third party,
2. Gift from a third party, or
3. Person with special needs has more than $2,000 of "available (or countable) resources"

Estate Planning By Third Party

1. Third party-settled trust

When someone other than the beneficiary is leaving assets in trust for the beneficiary's benefit. Use when someone is establishing a trust for the benefit of another person.

- Parent for Child
- Grandparent for Grandchild
- Child for Parent, Grandparent, or Sibling

Estate Planning By Third Party

2. Use special needs distribution clause

- Trust for person who is sufficiently disabled and receiving needs-based public assistance must supplement those public benefits
- Otherwise the trust assets are deemed to be 'available resources' and will disqualify the beneficiary from needs-based public assistance, such as Medicaid and SSI

Estate Planning By Third Party

Four Trust Distribution Clauses

1. Mandatory Support
2. Discretionary Support
3. Pure Discretionary
4. Special Needs
   A. Strict, or
   B. Discretionary

Estate Planning By Third Party

Special Needs Distribution Clause

- Discretion to Trustee to distribute for "special needs" of the beneficiary
- "Special needs" are anything not paid for by public benefits
- Sometimes called "supplemental care" trust

Estate Planning By Third Party

Special Needs Distribution Clause

- Strict – Prohibited from distributing for any food, shelter, or anything provided from public benefits
  - Old trusts include "clothing"; eliminated in 2005
- Discretionary – Trustee has discretion to distribute for food, shelter, or items provided by Medicaid if the trustee deems it in the beneficiary's best interest, even if causes reduction in public benefits

Estate Planning By Third Party

If Trust Has a Special Needs Distribution Clause

- Trust assets NOT deemed available resource
- Trust does NOT disqualify the beneficiary from needs-based public assistance

This is the Purpose of a Special Needs Trust

Current Gift From Third Party

1. Do not give money
   - Will cause issues with needs-based assistance
2. Purchase and give exempt assets
   - If on SSI, not food or "shelter"
   - Exempt asset are: motor vehicle, household items, personal items, irrevocable prepaid burial plan, house or condo

Current Gift From Third Party

3. Pay for Services
   - If on SSI, do not pay for "Shelter"
     - Mortgage (including required insurance), real property taxes, rent, heating fuel, gas, electricity, water, sewer, and garbage removal
   - OK to pay for: cable, internet, telephone, household cleaning, gas and maintenance for vehicle, travel, etc.

Current Gift From Third Party

4. Give to ABLE account – Will cover next
5. Give to pooled special needs trust
   - But assets remaining when beneficiary dies will probably repay Medicaid or stay with the non-profit trustee
   - Pooled trusts covered later
6. Give to irrevocable third party-settled special needs trust
   - But will be taxable gift, unless Crummey powers
   - Complicated (expensive) to draft

ABLE Accounts – What Are They?

Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the "ABLE Act")

An investment vehicle where a limited amount of money can be contributed and accumulated without disqualifying the beneficiary from needs-based public assistance.

Money in an ABLE account compounds income tax free and is not an available resource for needs-based public benefit programs.

But a person has to qualify to be able to use an ABLE account, and there are restrictions on how money in an ABLE account can be used without adverse consequences.

ABLE Account - Requirements

1. Must be "sufficiently disabled" prior to age 26
   - A. Receiving SSI, SSDI, Childhood Disability Benefits, or Disabled Widow's(er's) benefits
     1) As result of disability or blindness
     2) That began prior to age 26.
   - B. Or have a satisfactory "disability certification"
     1) Prepared by the individual, parent, or guardian
     2) Accompanied by doctors written statement
     3) That certifies disability or blindness prior to 26.
   - C. Satisfy this to become an "eligible individual"

ABLE Account - Requirements

2. Can be only **one** ABLE account per person
   - Established by the “eligible individual”, or
   - Parent, guardian, or DPA agent
3. Only cash can be given to an ABLE account
4. Maximum of $15,000/year contribution
   - One exception – Beneficiary employed and not participating in employer retirement plan can contribute additional amount equal to earnings up to federal poverty amount for single person
5. SSI suspended if > $100,000 in ABLE acct

ABLE Account - Requirements

6. Medicaid not affected; but future contributions may be prohibited if account too large
7. Cannot be pledged as security for a loan
8. Can be rolled over to another ABLE account
9. Designated Beneficiary can change to brother or sister, whether step or adopted
10. If already have guardianship, may require conservatorship & annual court accounting

ABLE Account – Contributions

Contributions to an ABLE Account -

- Not taxable as income to beneficiary
  - But not tax deduction for donor
- Not taxable as gift from donor
  - Qualifies as present interest gift
- Not “income” for SSI and Medicaid eligibility

ABLE Account – Earnings

Earnings on ABLE account assets -

- Not taxable as income
- Not “income” for SSI and Medicaid eligibility

ABLE Account - Distributions

How ABLE Account Money Should Be Used

To pay for

- "qualified disability expenses" (QDE)

  of the

- "designated beneficiary"

  (the "eligible individual" who established and is the owner of the ABLE account)

ABLE Account - Distributions

"Qualified Disability Expenses" (QDE)

"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 [of the ABLE account], including the following expenses:"

Education	Housing	Transportation	Employment training and support
Assistive technology and personal support services	Expenses for oversight and monitoring	Prevention and wellness	Financial management and administrative services
Legal fees	Health	Funeral and burial expenses	Other approved expenses
Basic living expense (added by POMS)			

ABLE Account - Distributions

“Housing Expenses”

“Housing expenses” are the same expenses used for SSI in-kind support and maintenance:

Mortgage (including property insurance required by lender)	Real property taxes	Rent
Heating fuel	Gas	Electricity
Water	Sewer	Garbage removal

ABLE Account - Distributions

Consequences of Distributions <u>for QDEs</u>

1. Distribution for the beneficiary’s “qualified disability expenses” is **<u>NOT</u>**:
   A. Included in beneficiary’s gross taxable income,
   B. Deemed to be a taxable gift, nor
   C. Deemed to be “income” for Medicaid and SSI.
      - Instead is a resource converted from one form to another.

ABLE Account - Distributions

Consequences of Distributions Not for QDEs

2. Distribution from ABLE account NOT spent on "qualified disability expense" is:
   - A. NOT disqualifying "income" for SSI
   - B. But IS disqualifying "income" for Medicaid because it is taxable
   - C. Effect on Medicaid depends on how the state determines eligibility for Medicaid
     - Either the excess is "resource" in December of distribution year, or
     - The taxable portion of excess is "income" and must be spent down before federal benefits will pay

ABLE Account - Distributions

Consequences of Distributions Not for QDEs

3. Distribution from ABLE account NOT spent on "qualified disability expense" is:
   - A. Taxable income to beneficiary
   - B. But taxed under Code § 72
     - Annuity tax section – only earnings are taxed
   - C. + 10% additional tax as a penalty
     - Only imposed on the tax

ABLE Account - Distributions

Consequences of Distributions

Code § 72 → taxation of annuities

- Only earnings taxed; not principal
- Example: $15,000 in ABLE account invested at 2% = $300 earnings.
  - $15,300 distributed for NON-QDE results in $300 included in designated beneficiary's taxable income

ABLE Account - Distributions

Consequences of Distributions

10% Additional Tax

- Only imposed on earnings included in beneficiary's taxable income
- Example continued: $15,300 distributed = $300 earnings included in taxable income.
  - 10% of $300 = $30
  - Additional tax is only $30

ABLE Account – Death of Beneficiary

Medicaid Must be Repaid, but…

1. Only repay Medicaid paid **after** ABLE account established
   - Unlike d4A and d4C trusts that must repay ALL Medicaid received during life
2. Qualified disability expenses can be paid first
   - Includes funeral and burial
3. Medicaid Buy-In premiums are deducted before repayment
4. Any remaining money in ABLE account becomes part of the beneficiary's probate estate

ABLE Account – Illustrations

1. Gifts from others to ABLE account

- Family and friends gift to beneficiary's ABLE account
  - Gets more money to beneficiary
  - Will not cause reduction in benefits
  - Downside – subject to Medicaid payback at death
- ABLE account then
  - Allows beneficiary to have more spending money
  - Pays for beneficiary's QDEs, especially housing if receiving SSI

ABLE Account – Illustrations

2. UTMA account to ABLE account

- If child with UTMA account turning age 18, account deemed available resource
- To avoid disqualification from SSI and Medicaid, money must disappear
  - Up to $15,000 can be put in ABLE account
  - Do not need to quickly spend or establish self-settled SNT

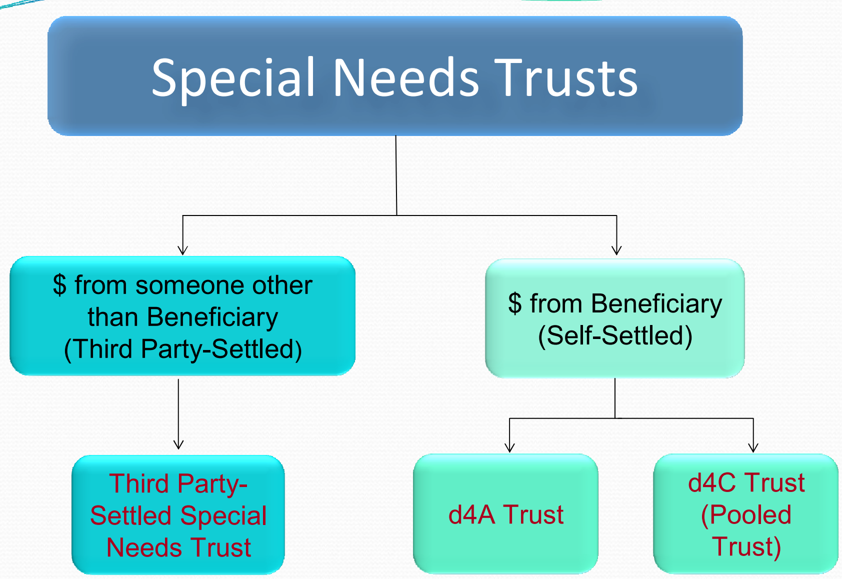
ABLE Account – Illustrations

3. Excess resources to ABLE account

- If beneficiary cannot spend income fast enough and will have >$2,000 at end of month
  - Can transfer excess to ABLE account
    - Will avoid eligibility penalty for public benefits
- If beneficiary wants to save up money to pay for something, can do so in an ABLE account
  - To take a trip, or purchase car, furniture, computer, games, phone, etc.

Person Has Too Much Money

1. First $2,000 is not a problem
2. Get rid of excess
   - A. Consume the excess
     - Pay off debts, pay for dental or non-covered medical care, travel, food, prepay services, etc.
   - B. Spend the excess on exempt resources
     - Irrevocable prepaid burial, residence, motor vehicle, household, personal or other exempt property, etc.
   - C. Give the excess away – may disqualify person from Medicaid and SSI for a period of time
3. Transfer to an ABLE account, if qualify
4. Transfer to a self-settled special needs trust



Self-Settled Special Needs Trust

- Settlor and Beneficiary are the Same Person
  - Settlor's assets are in the trust, or
  - Settlor's spouse's assets are in the trust
    - Unless established by the spouse's Will
  - Includes trusts established by the beneficiary's guardian and attorney-in-fact under DPA
- Must comply with OBRA-93 and FCIA-99

Self-Settled Special Needs Trusts

OBRA 93 – Summary

- Any asset or income in a self-settled trust that was "established" by the beneficiary
- that could be distributed to or used for benefit of the beneficiary or the beneficiary's spouse
- if the trustee (or anyone) exercised maximum discretion in favor of the beneficiary
- is deemed to be "available" to the beneficiary for Medicaid and SSI eligibility purposes
- and "countable" towards the maximum amount the beneficiary can have and be eligible for Medicaid and SSI

After effectively slamming the door shut on the ability of a Medicaid or SSI recipient to use a self-settled special needs trust

Congress opened it a crack for people who are sufficiently disabled and young enough by allowing two types of special needs trusts:

- d4A trust
- d4C “pooled” trust

42 U.S.C. § 1396p(d)(4)(A) and (d)(4)(C)

Self-Settled Special Needs Trust

d4A Trust

- ✓Beneficiary must be under age 65
- ✓Separate custom drafted trust
- ✓Chose own trustee; may not be experienced
- ✓Can have trust protector
- ✓Higher costs than d4C
- ✓Must repay Medicaid upon beneficiary’s death or early termination

d4C Pooled Trust

- ✓No age 65 limitation, but might have transfer penalty
- ✓Join Master trust established by non-profit association
- ✓Non-profit is trustee; has experience with SNTs
- ✓Cannot have trust protector
- ✓Lower costs than d4A trust
- ✓Either repays Medicaid or non-profit that is trustee keeps upon death

Comparison of ABLE Account and SNTs

	ABLE Acct	Third Party-Settled SNT	Self-Settled Special Needs Trust	
			d4A	d4C
Whose assets	Third party or beneficiary	Not beneficiary’s	Normally beneficiary’s	Normally beneficiary’s
Limitations	Disability before 26; $15,000/year	None	Beneficiary must be under 65	May be penalty if bene > 65
Who sets up	Bene, parent, guardian, or DPA	Not the beneficiary	Bene, parent, grandparent, guardian, or court	Bene, parent, grandparent, guardian, or court
Who controls	Bene or other	Not Beneficiary	Not Beneficiary	Charity
Who benefits	Only Beneficiary	Bene and others	Only Beneficiary	Only Beneficiary
Written Agreement	Join ABLE prog.	Yes, custom	Yes, custom	Join Master Trust
When to use	Gift, or too much money	Gift or leave at death	Bene has too much money	Bene has too much money
Repay Medicaid	Yes, only Medicaid received after ABLE started	No	Yes, All Medicaid received for life	Depends

Now you know

What can you do if someone asks you:

A. How do I give assets to a person who has a disability without causing her to lose public assistance?

1. Estate planning by a third party
   - ➢ Third party-settled special needs trust

Now you know

What can you do if someone asks you:

A. How do I give assets to a person who has a disability without causing her to lose public assistance?

2. Gift from a third party
    - Purchase exempt assets and give to bene.
    - Pay for services
    - Give money to an ABLE account
    - Give to third party pooled special needs trust
    - Give to irrevocable third party SNT

Now you know

What can you do if someone asks you:

B. How can I maintain my public assistance when I have too much money?

1. Get rid of excess
    - Consume, Spend on exempt resources, Give away
2. Transfer to an ABLE account, if qualify
3. Transfer to a self-settled special needs trust

Planning for People With Special Needs

Southern Arizona Estate Planning Council

February 21, 2018

Presented by

Craig C. Reaves, CELA