

# Special Needs Trusts Administration Challenges

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In this session we will review of the basics of Special Needs Trusts, as well as discuss new updates in this important area, including the use of ABLE accounts. We will also identify unique aspects to consider when settling a Special Needs Trust.

## The Basics

- The purpose of a Special Needs Trust is to preserve eligibility for means-tested government benefits while providing for the supplemental needs of the person with a disability.
- Primary public/government benefits to be preserved are:
  - Supplemental Security Income (SSI)
  - Medicaid (Services and Health Insurance)

### More Basics

- Social Security Income, whether Supplemental Security Income (SSI) or Social Security Disability Income (SSDI), is intended to provide **basic support** for food and shelter.
- Special Needs Trusts are intended to provide for the “extras” that go beyond basic support needs.
- Special Needs Trusts work to preserve eligibility for **Medicaid and SSI**, but are not needed to preserve eligibility for SSDI and Medicare.

### Types of Special Needs Trusts (SNT's)

- Third-party SNT's are funded with **other people's** money, such as a relative of a person with disabilities.
- Self-settled "Payback" SNT's are funded with a disabled person's **own** money. aka "OBRA" trusts
- "Pooled" Payback SNT's are funded with a disabled person's own money which is deposited along with other pooled funds by signing a "joinder" agreement.

Today's discussion will focus on Third-party SNT's and Self-Settled "Payback" SNT's.

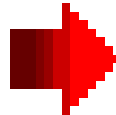
## Key Trust Provisions

- Third Party SNT's:
- Specifies its purpose is to **"Supplement and not Supplant"** municipal, county, state and federal benefits.
- Trustee has **broad discretionary** authority. May contain detailed lists of permitted expenditures, but estate planners differ on whether this is effective.
- Ability to **Amend** the trust to permit the beneficiary to qualify for benefits, and other purposes.
- Discretion to make **disqualifying distributions** as the circumstances may warrant.

- Self-Settled SNT's:
- Specifies its purpose is to **"Supplement and not Supplant"** municipal, county, state and federal benefits.
- **Irrevocable**
- Distributions are for the **sole benefit** of the beneficiary.
- Beneficiary must be **disabled** and under the age of 65 when the Trust is established and funded.
- **Payback:** Medicaid must be reimbursed for total assistance provided to beneficiary during lifetime.

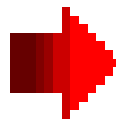
## Common Administration Challenges

- Failure to Identify a Special Needs Trust



- Employ staff with subject matter expertise

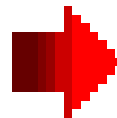
- Failure to Identify Available Benefits for the Disabled Beneficiary



- Employ an Advocate or Case Manager to assist staff in identifying a beneficiary's needs and available benefits

- Improper Distributions from a Special Needs Trust, such as:

- Payments made directly to a beneficiary
- Payments that are not for the sole benefit of the beneficiary
- Providing a beneficiary with gift card, or credit cards.



- Purchase goods or services using Trust funds and arrange for delivery to the beneficiary. Other techniques include reimbursing a third party on voucher
- Use a “True Link” card to manage distributions



## **Good -to-Know for all distributions :**



- Social Security Administration’s “POMS” (Program Operating Manual System) -a guide to what is permitted under Social Security rules. The Special Needs Trustee needs to be familiar with the POMS or employ advocates who have this knowledge.
- <https://secure.ssa.gov/poms.nsf/home!readform>

## Updates

### **Special Needs Trust Fairness Act of 2015**

This legislation corrected an oversight in the 1993 law which established Self Settled “Payback” Trusts, also known as “OBRA” Trusts.

To review: An OBRA trust permits a disabled individual’s own funds to be placed in a special needs trust. The 1993 law required that the Trust be established by a parent, grandparent, guardian or court. Unfortunately, the OBRA law failed to provide a way for individuals with disabilities who were otherwise competent to independently establish a self-settled SNT.

## Special Needs Trust Fairness Act of 2015

On Dec. 13, 2016, President Obama signed the 21<sup>st</sup> Century Cures Act (H.R. 34 – 114<sup>th</sup> Congress (2015-2016). Section 5007 of the Act, titled “Fairness in Medicaid Supplemental Needs Trusts” incorporates language from the Special Needs Trust Fairness Act of 2015 by simply adding the words “the individual” to the existing OBRA statute. By doing so, individuals with disabilities who have the capacity to create their own self-settled special needs trusts no longer need Court approval to do so.



## Updates

### **Achieving a Better Life Experience (ABLE) Act**

December 19, 2014: The Stephen Beck, Jr. Achieving a Better Life Experience (ABLE) Act (P.L. 113-295) added Section 529A to the federal tax code to enable eligible individuals with disabilities to save money in a tax-exempt account that may be used for qualified disability expenses while still keeping their eligibility for federal public benefits.

### **What is an ABLE account?**

An ABLE account is a type of tax-advantaged savings account that an eligible individual with disabilities can use to pay for qualified disability expenses.

The ABLE account is similar to a 529 account, although used for different purposes.

### **Who may establish an ABLE account?**

An individual must meet two requirements to be eligible for an ABLE account:

1. The onset of symptoms of the person's disability must have occurred before age 26.
2. The disabled individual must have “marked and severe functional limitations” (essentially, a Social Security definition of disability). An individual whose disability occurred prior to age 26 and is already receiving SSI and/or SSDI is automatically eligible to establish an ABLE account.

### Who may establish an ABLÉ account?

**Special Note:** An individual with disabilities who does not currently receive SSI and/or SSDI may still be eligible to open an ABLÉ account if they obtain a letter of certification from a licensed physician.



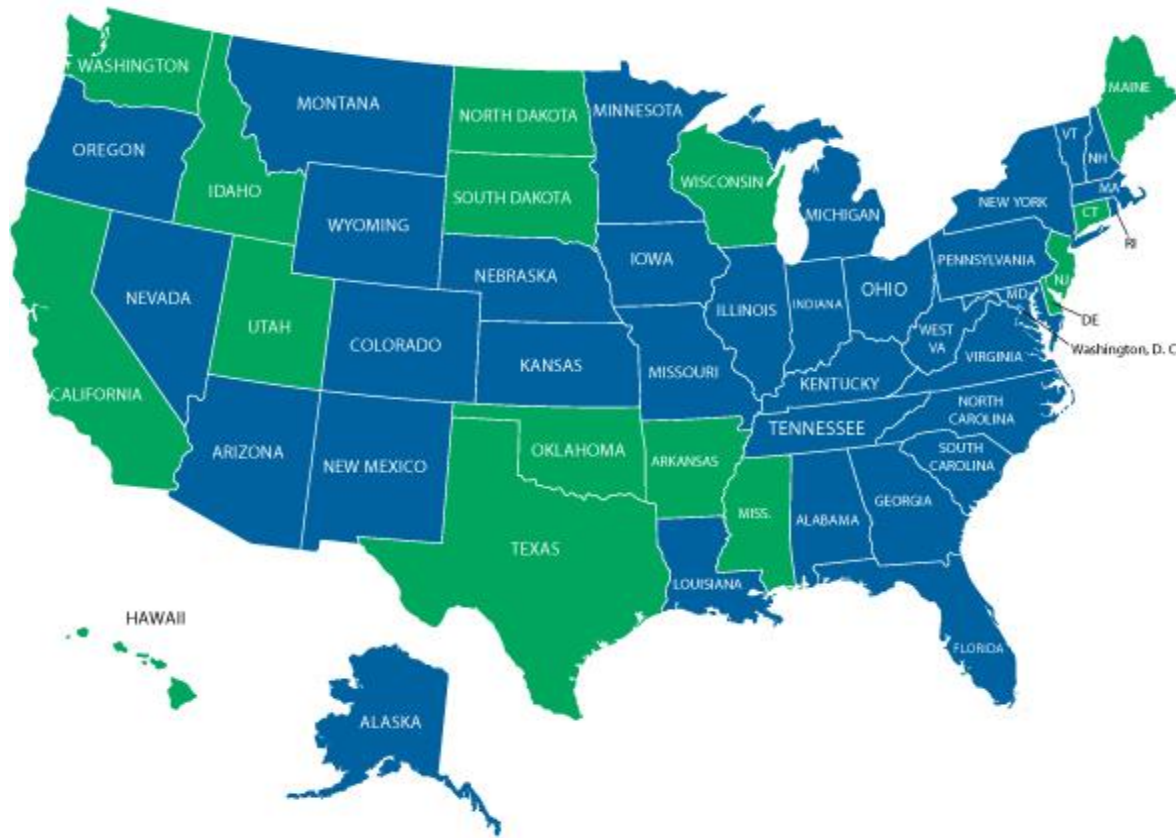
### **Key Elements of an ABLE account:**

**One Account :** A beneficiary is limited to one ABLE account, which is administered by a qualified ABLE program administrator.

Individual states will decide whether to offer a qualified ABLE program to its residents (and how it will be run) OR to contract with another state to allow its residents to use another state's program.

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As of January 2018, there are over 30 eligible ABLE programs nationwide.



### **Key Elements of an ABLE account:**

**Contributions :** Any individual, including the beneficiary, may contribute to an ABLE account. Annual contributions are limited to the annual gift tax exclusion (2018 = \$15,000.00).

The state must ensure that total contributions to an ABLE account do not exceed the state-based limits for 529 accounts. Amounts exceeding \$100,000.00 will be counted as an available resource for individuals who are seeking SSI. If the ABLE account is more than \$100,000.00, the beneficiary's eligibility for the SSI cash benefit is suspended until the balance falls below \$100,000.00. **NOTE:** This suspension has no effect on Medicaid eligibility.

### Key Elements of an ABLE account:

**Tax Treatment:** The ABLE account is owned by the eligible individual who established it. This person is known as the “designated beneficiary”.

Distributions from the account for qualified disability expenses do not count as taxable income.

Earnings on an ABLE account do not count as taxable income to the contributor or the beneficiary. \*

\*a beneficiary’s wages that are directly deposited into an ABLE as a contribution are still counted as income by SSA for eligibility purposes.

### **How can an ABLÉ account be used?**

For "qualified disability expenses". A qualified disability expense means any expense incurred by the beneficiary as a result of living with a disability.

These include education, housing, transportation, employment training and support, assistive technology, personal support services, health care expenses, financial management and administrative services, legal fees, funeral and burial costs, basic living expenses and other expenses to enhance the beneficiary's quality of life.

## **Advantages of an ABLE account**

1. More choice and control for the beneficiary and family
2. Reduced cost to establish when compared to a Special Needs Trust
3. Reduced administrative fees

In some circumstances, an ABLE account may be an effective complement to a Special Needs Trust.

### Medicaid Payback Provision

Any assets remaining in an ABLE account at the death of the qualified beneficiary must be used to reimburse the state for Medicaid payments it made on behalf of the beneficiary , subject to certain limits and upon the state's filing of a claim for payment.

The payback is calculated based on amounts paid by Medicaid *after* the creation of the ABLE account.

### Settlement of Special Needs Trusts

A Third Party Special Needs Trust is settled following the beneficiary's death in a similar manner as other trusts. Remember: there is no “payback” provision in a Third Party SNT.

Settling an “OBRA” or First Party Special Needs Trust has unique challenges. First and foremost, the OBRA Trust *is* a Medicaid Payback Trust.

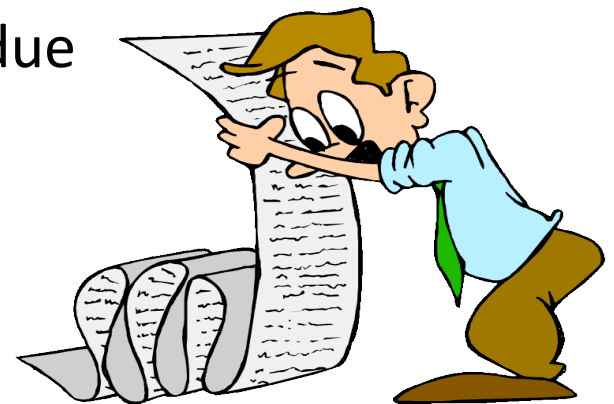
### **Settlement of Special Needs Trusts**

Important initial steps to follow after learning of a beneficiary's death:

1. Discontinue all scheduled disbursements from the Trust and hold the payment of any bills or other distributions, pending resolution of the Medicaid payback.
2. Notify Medicaid of the beneficiary's death and request a lien repayment letter.

**Scenario:** The beneficiary of a self-settled SNT dies after having received Medicaid benefits for many years. The State Medicaid agency furnishes a long ledger which details every expense paid for the beneficiary. The account officer lacks knowledge about the beneficiary's long history, and is not able to determine the validity of the ledger.

How can the account administer perform due diligence with regard to the payback?



**Resolution:** This is a common problem. Be advised that while the payback is not negotiable, errors do occur in the ledger.

These include: charges for services that pre-date the beneficiary's disability. Or previous lien payments that were made pursuant to a litigation resolution are not credited.

If the beneficiary's family is available, the best practice is to provide the family with the ledger and ask that they review it for accuracy and approval.



If the beneficiary was a resident of a nursing facility, one might check the facility's records for dates of hospitalizations and other procedures. Also, Medicaid rates for nursing homes are published for each facility, so these charges can be confirmed as well.

Consider hiring a medical insurance administrator to complete a comprehensive review, particularly in settlements that include a large payback amount that encompasses many years.

Note: Some jurisdictions provide annual statements of the Medicaid benefits paid for review during the administration of the trust.

**Statute of Limitations:** There is no statute of limitations for Medicaid payback. You may encounter delays in receiving a lien payback amount, but you cannot interpret a lack of response to mean that a payback is not due.

If you decide to settle the trust assets without receiving a release for the Medicaid payback, you do so at your own peril!

Caution should be exercised in accepting an Indemnification and/or a Refunding Agreement from trust beneficiaries who request distributions prior to the Medicaid payback.

Consider retaining attorneys with relevant expertise to assist the Trustee in providing the expertise necessary for proper settlement administration.

**Scenario:** Following the beneficiary's death, the Trustee cannot make any distributions until the payback is determined. This includes funeral and burial expenses. This limitation often comes as a surprise to the survivors, who may expect the Trust to provide this type of funding immediately following the death.

It is essential that the Trustee engage in **pre-need funeral planning** while the beneficiary is alive, or else risk being without funding to pay for these services when needed.

**Scenario:** The Medicaid payback exceeds the remaining balance in the Trust. The State's lien will not be able to be fully satisfied. Is this a problem? In many cases, this is not an issue because the OBRA trust worked as planned-it allowed the disabled beneficiary to receive benefits that would otherwise have been withheld.



### Administrative Points:

- Has the State received regular accountings or statements during the administration of the Trust?
- Has the State approved Trust distributions, especially in the case of large or uncertain distributions?

## Resources:

ABLE National Resource Center  
1667 K Street, NW Suite 480  
Washington, DC 20006  
(202) 683-6094  
[info@ablenrc.org](mailto:info@ablenrc.org)

**Nursing Home Rates can be searched by state:**

NY: [www.health.ny.gov/facilities/long\\_term\\_care/reimbursement/nhr/](http://www.health.ny.gov/facilities/long_term_care/reimbursement/nhr/)

FL: [http://ahca.myflorida.com/medicaid/cost\\_reim/nh\\_rates.shtml](http://ahca.myflorida.com/medicaid/cost_reim/nh_rates.shtml)

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\*Thanks to Illinois attorney Melissa LaPointe for her insights in discussing this topic and providing valuable input.