

# Legal and Financial Planning for Disability: Trusts, ABLE & More



PRESENTED BY



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*Elder Law • Special Needs Planning • Estate Planning*

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# PERSONS WITH DISABILITIES

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- Need basics: food, clothing, shelter, transportation, medical care
- Need care and assistance with ADLs
- Need fun and enjoyment of life –  
Recreation, travel, entertainment

# FUNDING PROBLEMS



- Limited household income
- Shortage of financial assets
- Fractured families – single parent homes
- Insufficient public benefits (SSI, Medicaid cuts)

# HOW TO PAY - OPTIONS



- Private Pay – family, disabled person's income
  - but reduction of SSI if others pay food/shelter
- Gifts, bequests, death benefits to disabled person
  - may terminate SSI, Medicaid until spent
- Special Needs Trust can fund needs, protect public benefits

# SOCIAL SECURITY DISABILITY BENEFITS



- Social Security Disability Benefits – SSDI  
Benefits for the insured worker (2021)  
“SGA” = \$1,310/mo. earned income (\$2,190 blind)
- Childhood Disability Benefit – CDB  
Benefits for child disabled before age 22 if parent entitled to Social Security and retired, disabled or deceased
- Disabled Widow(er) Benefit – DWB  
Benefits for spouse or former spouse of insured deceased worker. Must be 50+

# DEFINITION OF “DISABLED”



## Social Security Administration Definition

- Over age 65
- Blind; or
- Unable to do any “substantial gainful activity” due to severe physical or mental impairments that will result in death or will continue for not less than one year (or, if child, results in “marked and severe limitations”).

# SUPPLEMENTAL SECURITY INCOME



## SSI Resource Rules

- “Countable” resource limit: \$2,000 single, \$3,000 couple
- Exempt resources: home, auto, household contents, disability equipment, assets needed for self-support, burial spaces, \$1,500 life insurance, assets in “special needs trust”
- **Assets in conservatorships count**

# SUPPLEMENTAL SECURITY INCOME



## Supplemental Security Income (SSI)

- Monthly payment for food & shelter
  - \$794 single, \$1,191 couple max. payment (2021)
- Disabled, blind or 65+; low-income, low resources
- “Deeming Rules” may affect eligibility and amount of payment for spouse or child
- Automatically get Medicaid with SSI in MS



# SSI RULES - INCOME

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## SSI Income Rules

- “Countable” income:
  - All unearned income - \$20
  - Earned income - \$65 – Impairment Related Work Expenses - 1/2 remaining earned income
- Only 2/3 child support counted if child under age 18 (POMS SI 00830.420(B)(1))

# MEDICAID

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## Medicaid – Coverage groups:

- **SSI-eligible**
- **Disabled Child Living at Home:**
  - Income < \$2,382/mo.
  - Countable resources < \$2,000
    - Parent(s)' income, resources not counted
- **Low-Income Programs (no assets limit)**
  - Children's Health Insurance Program (CHIP) (209% FPL)
  - Other children age 1-6 or 6-19 (144% / 133% FPL)

# MEDICAID



## Medicaid – Coverage groups:

- **Home & Community Based Waivers**
  - Countable Income < \$2,382, resources < \$4,000;
  - Require help with 2+ ADLs
- **Elderly & Disabled:** respite, meals, adult day care
- **Independent Living:** care attendant
- **Intellectually/Developmentally Disabled (ID/DD):** day-care, attendant care, PT/OT
- **TBI/SCI:** attendant for TBI or spinal cord injury
- **Healthier MS:** no Medicare, income < 135% FPL, assets < \$4,000 single/\$6,000 couple (limit 6,500)

# What is ABLE?



*Mississippi*  
**ABLE**



# What is ABLE?

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- The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014:
  - Signed by President Obama on 12/19/14
  - Adds **§ 529A to the Internal Revenue Code**
  
- Mississippi ABLE Act:
  - Miss. Code Ann. § 43-28-1
  - **[www.MississippiAble.com](http://www.MississippiAble.com)**
  - **Phone: 1-888-609-3469**

# What is a 529 Plan?



- States create college savings plans
  - States set maximum account size
  - \$235,000 maximum in MS
- Multiple accounts for same beneficiary OK
- Donor can retain control, and even change beneficiaries

# 529 PLANS




- 529 account treated as out of donor's estate
- No income tax benefit at contribution, but
  - No tax on accumulation
  - No tax on withdrawals, provided they are for “qualified higher education expenses”

# ABLE ACT ACCOUNTS

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## “Eligible Beneficiary”

- “entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act...”
  - ...occurring before age 26 ( § 529A(e)(1)(A))
  - **or** certification by beneficiary, parent or guardian to the same effect, under IRS regulations ( § 529A(e)(2))
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# ABLE ACT ACCOUNTS

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- Only one ABLE account per beneficiary  
( § 529A(b)(1)(B))
  - Multiple accounts? Only first qualifies
- May be in any state
- State may contract w/ other state
- Contributor cannot direct investment, use as collateral

# ABLE ACCOUNT DOLLAR LIMITS

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- Contributions limited to \$15,000/yr ( § 529A(b)(2)(B))
- \$100,000 limit for SSI benefits, but not for Medicaid ( § 103(a)(2) of the Act)
- State's 529 maximum limit for Medicaid ( § 529A(b)(6)) -- \$235,000 in GA, KY, MS & TN
- Disabled worker can contribute additional \$12,760 (FedPovertyLevel) each year

# ABLE ACT “PAYBACK”

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- Upon death of beneficiary, state may file for Medicaid payments after account opened (529A(f))
  - State is a **creditor**, not a beneficiary
  - Some states do not require payback
  - Mississippi does claim payback
- Unlike Medicaid “estate recovery” – mandated by law

# ABLE ACT “PAYBACK”



- Payback only for post-establishment Medicaid expenses
- Payback is subject to any outstanding payments due for qualified disability expenses
- Payback includes 3<sup>rd</sup>-party contributions

# ABLE ACCOUNTS – INCOME TAXES

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- Mississippi contributor gets state income tax deduction
- Growth in ABLE account untaxed
- At 5% return, Qualified Disability Trust could have \$158,000 assets before taxed

# ABLE ACCOUNTS – INCOME TAXES

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- Withdrawals tax-free if for “qualified disability expenses” (529A(e)(5)):
  - “education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses” and others approved by IRS regulations

# MISCELLANEOUS ABLE RULES

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- Contributions must be “cash” (meant to exclude in-kind stock transfers, not checks) ( § 529A(b)(2))
- Rollovers permitted to family member who is also disabled ( § 529A(c)(1)(C))
  - IRC § 152(d)(2)(B) defines “family member”

# MISCELLANEOUS ABLE RULES

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- “Qualified disability expenses” may be reimbursed – including to beneficiary ( § 529A(c)(B))
- 10% surtax on distributions other than for qualified disability expenses (plus inclusion in beneficiary’s taxable income) ( § 529A(c)(3)(A))



# MISCELLANEOUS ABLE RULES

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- Limited ability to direct investment decisions (2X/yr max) ( § 529A(b)(4))
- Gift tax effect to donor: completed gift of present interest ( § 529A(c)(2)(A)(i))
- Bankruptcy exclusion if contributions made a year in advance by parent, stepparent, grandparent or step-grandparent (new 11 USC § 541(b)(10))

# WHEN IS ABLE ATTRACTIVE?

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- Small gift, inheritance, insurance payments
  - Give beneficiary autonomy, financial independence
  - Periodic payments under allowed amount (e.g.: small annuity, trust payments)
  - Saving for specific expenditures (such as vehicle, trip, etc.)
  - Over-65 beneficiary with lifetime disability
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# SPECIAL NEEDS TRUSTS



# REQUIREMENTS OF SPECIAL NEEDS TRUSTS

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- Written
- Distributions discretionary by the trustee
- Beneficiary not entitled to receive income or principal
- “Sole Benefit” of disabled individual (self-funded only)
- Irrevocable (or Revocable for third-party)

# THIRD PARTY-FUNDED SPECIAL NEEDS TRUSTS



- Either Inter Vivos or Testamentary
- Anyone can establish; can have more than one
- Name a capable trustee
- Revocable or Irrevocable
- No Medicaid payback - name remainder beneficiaries at death of disabled beneficiary

# SELF-FUNDED “PAY-BACK” TRUST

42 U.S.C. § 1396P(D)(4)(A)



- “(d)(4)(A)” or “payback” trusts (called “special needs trusts” by Mississippi Medicaid)
- Inter vivos, irrevocable
- Can be created by: capable adult, parent, grandparent, legal guardian/conservator, or court
- Disabled beneficiary younger than 65
- Medicaid payback at death of beneficiary or trust termination for **lifetime** Medicaid payments

# SELF-FUNDED “POOLED” TRUST

42 U.S.C. § 1396P(D)(4)(C)



- “(d)(4)(C)” trust or “pooled” trust for many beneficiaries
- Established by non-profit 501(c)(3) organization
- Irrevocable
- Account opened by the beneficiary, bene’s parent, grandparent, guardian or a court
- Beneficiary younger than 65
- At death of beneficiary, the non-profit organization may retain a portion or all of the trust fund, with payback to Medicaid

# FUNDING SPECIAL NEEDS TRUSTS


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## **THIRD PARTY TRUST**

- Gifts from family, others
- Fund-raisers
- Bequests in wills and living trusts
- Life insurance
- Retirement accounts (as beneficiary)

## **SELF-SETTLED TRUST**

- Litigation settlement (lump sum, structured annuities)
  - Inheritance
  - Life insurance benefit
  - Personal assets
  - Guardianship/conservatorship assets
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# TRUSTEES OF SPECIAL NEEDS TRUSTS



- Loyal to beneficiary (no “self-dealing”)
- Able to follow trust law (separate accounts, best judgment)
- Understands effects of payments on public benefits
- Can prepare accountings to SSA/Medicaid when asked
- Respond promptly to any SSA/Medicaid notices received
- Immortal
- Consider having co-trustees or “trust advisors”

# ABLE OR SNT - CONSIDERATIONS

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- 3<sup>rd</sup>-party funds exposed to payback
  - No payback from 3d party SNT
- Possible inappropriate withdrawals
  - SNT Trustee controls withdrawals
- No multiple accounts
  - No limit on SNTs for disabled person
- Possible exposure to creditors
  - Creditor protection w 3d party SNT

# CONCLUSION

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A properly funded and administered **ABLE Account** may be a useful **tool** in planning for financial security for a person with disabilities.

A well-managed **Special Needs Trust** and a qualified Trustee can maximize government benefits while allowing for additional family support to enhance the comfort and enjoyment of life for the disabled beneficiary.

# THANK YOU



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