A GENERAL PRACTITIONER'S GUIDE TO SPECIAL NEEDS PLANNING

Sponsor: Elder Law Section
CLE Credit: 1.0
Thursday, May 12, 2016
10:50 a.m. - 11:50 a.m.
Cascade Ballroom A
Kentucky International Convention Center
Louisville, Kentucky
A NOTE CONCERNING THE PROGRAM MATERIALS

The materials included in this Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefore. Attorneys using these materials, or information otherwise conveyed during the program, in dealing with a specific legal matter have a duty to research original and current sources of authority.

Printed by: Evolution Creative Solutions
7107 Shona Drive
Cincinnati, Ohio  45237

Kentucky Bar Association
# TABLE OF CONTENTS

The Presenters........................................................................................................................................................................i

A Guide to Special Needs Planning, Part One:  
What the Practitioner Has to Know......................................................................................................................................1


Special Needs: Trust and Government Benefits Presentation ..............................................................31

The Able Act: Is It a Significant Development in Special Needs Planning?..........................37
ROBERT L. MCCLELLAND is the managing member of ElderLaw Lexington, the firm of McClelland & Associates, PLLC. He was the first elected chair of the Kentucky Bar Association's Elder Law Section and is one of two board-certified elder law attorneys in the state of Kentucky. Mr. McClelland received his B.S. from Morris Harvey College, his J.D. from Salmon P. Chase College of Law, and his L.L.M. from Stetson University College of Law. He is a member of the Kentucky and West Virginia Bar Associations, National Academy of Elder Law Attorneys, Inc., ElderCounsel LLC, Special Needs Alliance LLC, Bluegrass Estate Planning Council, and the Mid-South Estate Planning Forum. Mr. McClelland serves as president of the Kentucky Guardianship Association and as an appointed member of the Lexington-Fayette County Senior Services Commission.

PETER H. WAYNE IV serves as wealth advisor with Stock Yards Bank and Trust Company in Louisville and is responsible for the administration of trust accounts and estates and is also the resident expert on special needs planning issues. Prior to joining Stock Yards Bank & Trust, Mr. Wayne practiced law at Wyatt Tarrant & Combs, LLP concentrating on special needs planning, litigation settlement planning, estate planning and estate administration. He received his bachelor's degree from Miami University and his J.D. from Salmon P. Chase College of Law. Mr. Wayne is a member of the Louisville and Kentucky Bar Associations and serves on the boards of Louisville Public Media, Louisville Asset Building Coalition, and Louisville Preservation Fund. He is also an advisory board member to Life Plan of Kentucky.
I. INTRODUCTION

**Important!** At least understand that, essentially, there are two (2) kinds of "Special Needs Trusts" (often referred to as "SNTs"):

"First Party" Trusts that have to pay Medicaid back

And

"Third Party" Trusts that do not have to pay Medicaid back.

The difference is defined by whose money went into trust and is critical to the beneficiary's government "needs based" benefits eligibility. In a "First Party" trust, the money belonged to the beneficiary and is transferred to a trustee, held by the trustee for the "sole benefit" of the beneficiary to "supplement" the life needs of the beneficiary which are not covered by any government benefit. In a "Third Party" trust, there may be multiple beneficiaries with one (or more) being a "special needs individual" or it can have only the "special needs individual" as beneficiary. However, because the corpus was created with another person's funds, to be used for supplementing the special needs person's quality of life, there is no requirement that the "third party's" money be used to refund Medicaid paid on behalf of the special needs person.

---

1 Medicaid is government funded medical insurance for low-income, aged, blind or disabled people. Kentucky is considered a "§1634" or "Social Security" state, which means that Medicaid eligibility mirrors the SSI rules. There are eleven states called "209b states" that have more restrictive eligibility rules. These numbers refer to specific provisions of the Social Security Law. Missouri, Ohio and Virginia are 209b states that border Kentucky. With the advent of the Affordable Care Act and "expanded" Medicaid eligibility in Kentucky, attorneys must be familiar with the importance of preserving this benefit for an eligible client. Medicaid statutes can be found in Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq.; 42 C.F.R. Parts 430, 431,435; See also [http://www.hhs.gov/](http://www.hhs.gov/).

2 "Sole benefit" is an important concept in SSI and Medicaid trust policy because in First Party trusts, only the person who put the money into trust can use the distributions from the trust. Because the Medicaid beneficiary would otherwise need to spend their own money on themselves before Medicaid pays their medical bills, distributions for the benefit of other parties would void the trust. When a third party's money funds the trust, there is no connection between the fund and Medicaid. See 42 U.S.C. §1396p(d).

3 First Party trusts are created pursuant to 42 U.S.C. §1396p(d)(4)(A) to conform to the exemptions in Social Security rules that allow resources of an SSI or Medicaid recipient to be held in trust without being considered an available resource against the $2,000 resource limit for eligibility. There is no limit on the value of the trust if properly drafted with Medicaid payback provisions.
An off-shoot of the First Party Trust concept is the "Pooled Trust." These are trust funds which have multiple beneficiaries sharing the investment benefit but having separate accounts within the "pool" of accounts. These trusts are created and managed through tax exempt organizations such as the Kentucky Guardianship Association, Inc. and monitored or managed by a board of directors. Investment decisions may be made by professional managers, but the responsibility for the accounts is on the Trustee.

II. WHO IS THE "CLIENT?"

The first question we practitioners need to ask is, "Who is my client?" Often a parent is the "front-man" in special needs planning. It may be a spouse or child who first makes the appointment. However, the real question is who will be most affected by the representation or more likely … whose money is it? If the parent interviews the attorney seeking to set up an estate plan which will hold the parent's legacy to a special needs child (minor or adult), the parent will most likely be my client. But if the parent comes to the attorney as a result of settling a medical misadventure case where the child was the recipient of an insurance payment, the money is actually the child's fund and thus, the child would likely be the client.

The importance of this question cannot be discounted because of the potential impact of the right of the beneficiary to access the corpus.

III. "DISABILITY"

The term "Disability" is generic in most contexts. However, for purposes of "self-settled" trusts, the importance of definition cannot be overstated. Diminished capacity referenced in ethics Rule 1.14 is not solely a province of "mental" capacity. It may imply that the client may be a minor [legal disability] or an individual who does not understand the complexity of their benefits structure. Regardless, the lawyer must fill the gap for the client. This may involve court

---

4 See 42 U.S.C. §1396p(d)(4)(C). This provision is one of three specific references to exempt trusts for SSI and Medicaid purposes. The first is §1396p(d)(4)(A), a First Party sole benefit trust, the second is §1396p(d)(4)(B), a "Qualifying Income Trust" which holds excess income for nursing home Medicaid beneficiaries and third is the (d)(4)(C) pooled trust fund. Attorneys refer to them as "d4As;" "QITs" (or "Miller Trusts"); and "Pooled Funds."

5 See SCR 3.130(1.2) (stating that the client determines the approach of the representation to the degree possible); But see SCR 3.130(1.14) (explaining what may influence how we represent clients with "diminished capacity").

6 See Population and Prevelance, Annual Disability Statistics Compendium, available at http://disabilitycompendium.org/archives/2014-compendium-statistics/population-and-prevalence (demonstrating that based on data from the American Community Survey (ACS), in 2013, there were 314,746,745 individuals living in the community, 39,892,960 of which were individuals with disabilities).

7 42 U.S.C. §§1382c(a)(2), (3) (demonstrating The provisions of the Social Security rules that discuss Special Needs Trusts reference a disability as one who would be disabled under the definition of the Act).
assistance, including having a determination of “disability.” When an individual is receiving SSI or SSDI benefits, the question of “disability” eligibility for planning is not an issue. Those eligible for SSI in Kentucky are automatically eligible for Medicaid. But Kentucky Medicaid has interpreted “disability” eligibility to be any eligibility for a needs based government benefit, such as SSI, SSDI or Workers’ Compensation.

Recent frustrations have arisen from an interpretation by Social Security Regional Offices that “court created” trusts must be “ordered” and not “approved.” Effectively, the interpretation implies that a trust should not be drafted and presented to the court, but a petition presented, and an “Order” issued by the judge that a trust be drafted and executed on behalf of the beneficiary. It remains unresolved whether the client's attorney, or agent under power of attorney, or GAL or some other "interested party" should execute the document. Some judges are reluctant to execute the document itself.

IV. UNDERSTANDING "BENEFITS"

I do not do personal injury litigation … or brain surgery. Ethics Rule 1.1 requires the attorney to be "competent" in his/her representation. Here are questions you need to be able to answer:

1. What is the difference between Medicaid and Medicare?
2. What is the difference between Social Security, SSI and SSDI?
3. Who do I refer this matter to if I cannot answer the first two questions?

Medicaid is government paid medical insurance for low income aged, blind or disabled people. The funds for Medicaid are from general fund budgets, partly from Federal and partly from state funds.

---

8 See 42 U.S.C. §1396p(d)(4)(A) (stating a self-settled, Medicaid exempt trust may be created by a “parent, grandparent, guardian or court.” ); See KRS 387.855,.910( permitting guardians and conservators or other persons who may serve in fiduciary positions, such as agents under power of attorney, [see KRS 387.865] to petition the District Court for an order establishing a Special Needs Trust).

9 See KRS Chapter 387. SCR 1.14 (cautioning about whether an attorney may bring guardianship proceedings against his own client. In Kentucky, the issue of "disability" is the province of a jury, not the family or physician.

10 Supplemental Security Income.

11 Social Security Disability Insurance.

12 Supra note 1.

13 These are the very basic benefits that a practitioner must ask about. The question is not limited to the beneficiary but may be related to the parent or the beneficiary's children/dependents or others in the household.
Medicare is Medical insurance paid from the Social Security Trust Fund and is payable for Social Security beneficiaries at age sixty-five (or earlier for qualified disabled Social Security beneficiaries.)

SSI is a "needs based" [low income and resources] benefit which limits the recipient's resource eligibility to $2,000 and income to a very low level depending on family income, other income sources and an inability to perform substantial gainful employment due to a disability which will last at least twelve months or is "permanent."

SSDI is early Social Security benefits [not needs based] payable to someone who is already qualified to receive Social Security but is not yet "age" eligible. These benefits are typically paid to someone who has recorded forty quarters of employment, but as in SSI, has an inability to perform substantial gainful employment due to a disability which will last at least twelve months or is "permanent." Most SSDI beneficiaries are covered by Medicare and typically on Medicaid so an SNT may not be appropriate.

Other Benefits

1. Supplemental Nutrition Assistance Program (SNAP).
2. Temporary Assistance for Needy Families (TANF).
3. Veterans Benefits for Dependents.15
5. Children's Health Insurance Program (CHIP AND CHIPRA).
6. Federally Assisted Housing.16

V. COUNSELING THE CLIENT

It is not enough for the practitioner to simply understand what the important benefits are; the counselor must be able to explain the interaction of these government benefits and the applicable tax issues and other strategies available to maximize eligibility and independence.

---

14 A "quarter" is an income amount, not a period of time. In 2015, the worker would receive "one quarter" for every $1,220 earned. Only four (4) quarters can be earned in any given year but all four can be earned in one month (i.e. if I had worked in January of 2015 and earned $4,880, I have earned my four quarters). Effectively, the worker is entitled to full benefit if they worked full time for ten (10) years. If a worker is too young to have worked ten years, it is still possible to qualify if fully employed when disability occurs.

15 Recent federal legislation has permitted Army parents to designate an SNT as beneficiary of their retirement benefits.

A. Interaction

Because SSI and Medicaid are joined by regulation in Kentucky, it is critical to retain SSI eligibility in order to maintain Medicaid eligibility. The SSI benefit for 2016 is $733 for an individual and $1,100 for married couples.\(^\text{17}\) Kentucky supplements some SSI beneficiaries' monthly payment if receiving caregiving services.\(^\text{18}\) When a client receives a settlement from a lawsuit, it likely will push their resources beyond the $2,000 limit.\(^\text{19}\) Because Medicaid eligibility follows the SSI rules, this is when an SNT becomes valuable. The individual's award/settlement can be held "in trust" by an independent trustee and if properly drafted, will be considered an exempt resource when eligibility is considered by Social Security and Medicaid.

Typically, the Medicaid benefit is the important benefit for the client. Medicaid pays medical expenses, but the "waiver programs" are invaluable to those who qualify. Waiver programs are alternatives to the original Federal program design and can pay for room and board in personal care and family care residential homes and home bound caregivers. In waiver cases, Medicaid is a lifeline for the client and cannot be lost without severe consequences.

There are some clients who are "double dippers" and receive both SSDI and SSI. These clients may only be entitled to one dollar ($1.00) of SSI but still are entitled to Medicaid. Many older clients who did not pay substantial reserves into Social Security may receive less than the $733 SSI payment. This would entitle the beneficiary to an SSI payment to make up the difference.


\(^{18}\) "Kentucky adds money to the federal SSI disability payment in some cases. (For disabled individuals who qualify for disability benefits based on income and not work history, they receive their benefit from Supplemental Security Income (SSI).) SSI is a federal program and therefore monthly payments to individuals are made by the federal government, but individual states may choose to pay residents additional monthly income. In Kentucky, the state contributes additional monthly payments when an SSI recipient is living in a personal care facility or a family care home or has a caretaker in the home. Below are the monthly payments for those individuals in Kentucky.

Personal Care Facility: $520 for an individual; $1,040 for a couple
Family Care Home: $172 for an individual; $344 for a couple
Caretaker in Home: $62 for an individual; $115 for a couple"


\(^{19}\) The SSI limits for resources that we do count are:

- Individual/Child — $2,000
- Couple — $3,000
Long Term Care (nursing home) Medicaid beneficiaries can exempt their resources with an SNT as well. But there is an age sixty-five limitation.\textsuperscript{20}

Third Party trusts are not considered available resources. However, any deposit of a beneficiary's resources into a third party trust will be a disqualifying transfer.

Another benefit is the FHA "Housing Voucher Program" formerly referred to as "Section 8." Currently, litigation is affecting housing benefits when SNTs are established. These issues are in flux and attention to the current status may save your client substantial reservation about having created the trust.

B. Taxation

A First Party Trust is taxed to the beneficiary as a "Grantor" and their Social Security number may be used as a Tax Identification Number.

A Third Party Trust may be a revocable trust and a Grantor Trust to the Third Party but it can be taxed independently. The strategy is draft a corresponding First Party Trust, then to require the distribution of the income into a First Party Trust for Grantor Trust status.\textsuperscript{21}

VI. DRAFTING THE TRUST(S)

A First Party Trust must be irrevocable. It must have the primary beneficiary as the state Medicaid agency "up to an amount paid on behalf of the beneficiary."\textsuperscript{22}

It is important to acknowledge the specific qualifications of a qualifying trust early in the document. Document who the beneficiary and Trustee are; that the beneficiary is disabled according to the statute; that the trust is irrevocable; and what article requires that Medicaid be reimbursed. These provisions can be all on one page, but many more provisions make the trust work. Some of those address what special needs\textsuperscript{23} are and that they are examples but not exclusive; it is proper to create an advisory committee to assist the administration of the trust; a provision should be included to allow the Trustee or advisory committee to

\begin{itemize}
\item \textsuperscript{20} A d4A trust can be created with funds belonging to a beneficiary who has not reached age sixty-five before the trust is created and once sixty-five years of age, no additional deposits can be made into the trust without a benefits disqualification period being assessed. In a d4C trust, some state Medicaid agencies do not have the disqualification because there is no such provision in the SSI regulations, SSI will assess a disqualification period.
\item \textsuperscript{21} See the provision on the ABLE Act below. The IRS has issued new regulations for ABLE accounts but has not specifically defined distributions from SNTs into ABLE accounts to be qualified.
\item \textsuperscript{22} See Kentucky Cabinet for Health and Family Services, Department for Medicaid Services, http://chfs.ky.gov/dms/.
\item \textsuperscript{23} "Special Needs Trusts" are often referred to as "Supplemental Needs Trusts" but there is no formal/technical difference.
\end{itemize}
make distributions that might reduce benefit eligibility if "in the best interests" of
the beneficiary, regardless of SSI or Medicaid.24

A Third Party Trust may be *inter vivos* or testamentary. It may be revocable and
have multiple beneficiaries, *i.e.* not a sole benefit trust. The SNT provisions may
be included in a sophisticated living trust or in a will. The SNT may be an ILIT
(irrevocable life insurance trust).

A Pooled Trust may require an attorney to draft or review the joinder agreement,
a separate instrument which defines the participation of a specific beneficiary to
the underlying base trust agreement.

Finally, a spouse may include SNT provisions in their will that exempt their
probate estate, in a discretionary trust for their spouse, from Medicaid eligibility
resource consideration should the spouse need Long Term Care Medicaid
benefits for nursing home coverage.25

VII. THE "ABLE" ACT

On December 17, 2014, Congress gifted to SSI and Medicaid beneficiaries an
opportunity to have personal accounts in excess of the historical $2,000 resource
limit.26 The Achieving a Better Life Experience Act ("ABLE Act")27 authorizes SSI
and Medicaid recipients to open their own "bank" accounts which can receive
deposits and hold up to $10,000 total each year, exempt from resource
consideration.28 Kentucky must first pass enabling legislation and publish
regulations in order to participate in this effort but the legislation has been
proposed and will be pending in the 2016 session. Unlike special needs trusts,
these accounts will allow those with disabilities to manage their own money
without the use of a discretionary trustee, for purposes of "qualified expense."29
There is a Medicaid reimbursement requirement which makes the use of Third
Party SNTs remain valuable.

---

24 A recent example of the use of such a provision is the implementation of the Affordable Care
Act and its prohibition against denying Medical insurance coverage to former Medicaid
beneficiaries whose trusts can afford the premiums because of "pre-existing conditions."

25 42 U.S.C. §1396p(c)(2)(B) (explaining such trusts are considered "c2B" spousal support trusts).

26 These accounts are "529" accounts similar to the 529 educational accounts and the
appreciation is tax exempt but contributions are not deductible for the donor. The maximum value
mirrors the state 529 limit, currently $350,000, but once the account reaches $100,000, SSI
payments will suspend until the account is below the $100,000 again.

27 Achieving a Better Life Experience, Public Law 113-295, Division B.

28 Unlike Medicaid and SSI, administration and oversight of this program is entrusted to the IRS
rather than the Social Security Administration or Medicaid.

29 The list of qualified expenses basically mirrors the SSI POMS limitations.
VIII. CONCLUSION

A practitioner can provide assistance to a special needs client by understanding the public benefit structure applicable to the client and her/his family. However, be very careful in drafting the trust to assure that it is current with the Social Security POMS\textsuperscript{30} and Medicaid Policy.\textsuperscript{31} Social Security is reviewing all trusts, even retroactively for years. A periodic review is in order for any trust drafted previously.


Process of Proper Planning

• Analyze the Client’s Assets
• Examine the Client’s Family Situation
• Discuss the Client’s Financial Goals
• Evaluate the Client’s Estate Planning Objectives
• Consider the Impact of Long-Term Care

Government Benefits

Entitlement:
• Social Security Disability Income ("SSDI")
• Medicare
• Veteran’s Administration ("VA") – Aid and Attendant Care

Needs-Based:
• Supplemental Security Income ("SSI")
• Medicaid
• Temporary Assistance for Needy Families/Food Stamps
• Section 8 Housing

Medicaid

• Medicaid is a joint federal and state medical benefit, which began in 1965, that assists states in furnishing medical assistance to those in need.

• Each state:
  • Establishes its own eligibility standards (i.e., 1634(a), SSI-criteria, or 209(b))
  • Determines the type, amount, duration and scope of services
  • Sets the rate of payment for services
  • Administers its own program
The Kentucky and Indiana Medicaid programs are based upon § 634 of the Social Security Act, which means if a person is found eligible for Supplemental Security Income ("SSI"), he or she is automatically enrolled in Medicaid.

Supplemental Security Income ("SSI")

- SSI is a Federal program administered by the Social Security Administration (SSA), and is sometimes called Title XVI benefits.
  - Provides cash assistance to individuals who have limited income and resources and are either age 65 or older, blind, or disabled, including children.
  - Eligibility is made available to disabled individuals with monthly income below $733 (as of January 1, 2016) and $2,000 in countable resources.

Eligibility for SSI and Medicaid

- Generally speaking, one is found eligible for Medicaid upon:
  - The receipt of SSI benefits; or
  - Having limited resources ($2,000 or less) and limited monthly income (less than $733 per month).
Eligibility for SSI and Medicaid

• What counts as a resource (asset) for eligibility?
  • Bank accounts
  • CDs
  • U.S. savings bonds
  • Cash surrender value of life insurance policies
  • Revocable living trusts
  • Some irrevocable trusts

Eligibility for SSI and Medicaid, Cont.

• Real Estate
  • Home (sometimes)
  • Rental property
  • Vacation property
  • Inheritances
  • Stocks and Bonds

What are Exempt Resources?

• Some examples of exempt resources are:
  • A house
  • Household goods
  • One vehicle of any value
  • Prepaid irrevocable funeral contracts
  • Burial Plot
  • Principal value of an IRA or 401K
Special Needs Planning Options

• There are three primary ways to help a disabled person become eligible for SSI and Medicaid. These strategies are:

  ▪ Spend Down Planning
  ▪ ABLE Account
  ▪ Special Needs Trusts

What is an ABLE Account?

• On December 19, 2014, President Obama signed into law the Achieving a Better Life Experience Act establishing ABLE accounts (the ABLE Act).

• An ABLE account is a 529 savings account for disabled individuals. Individual states (specifically each state’s legislative body) are required to establish regulations for these accounts before they are used.

• As of September 2015, 31 of 50 states signed ABLE legislation. Unfortunately, however, Kentucky is not one of these states.

What are the benefits of an ABLE account?

• There are three main benefits to ABLE accounts.

  ▪ Money held in an ABLE account cannot be counted for purposes of determining an individual’s eligibility for Supplemental Security Income (SSI) or Medicaid.
What are the benefits of an ABLE account? (Cont.)

- An ABLE account can be used for qualified disability expenses which include the following: 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, and funeral and burial expenses.

- Earnings on and distributions from an ABLE account for disability expenses cannot be considered the taxable income of the contributor to the account or the beneficiary of it.

Housing Related Expenses

- Qualified distributions now include distributions for housing related expenses.

- Said expenses will not be considered in-kind support and maintenance ("ISM") and thus will not impact a beneficiary’s eligibility for SSI.

- This is a recent policy position change by the Social Security Administration ("SSA") and was confirmed at the 2015 Stetson University special needs trust conference during a session with the SSA on October 16, 2015.

Are there any Limitations on ABLE Account?

- ABLE accounts are only available to individuals who become disabled before the age of 26.

- The annual amount that can be contributed to an ABLE account is limited to the annual gift tax exemption, currently $14,000, and each individual can only have one ABLE account.

- The total amount of money an ABLE account can currently receive from all sources is $14,000 per year.
Are there any Limitations on ABLE Account?

• The total value of an ABLE account cannot exceed $100,000.

• NOTE: This $100,000 limitation is specific to those who receive SSI benefits because the SSA considers any amount over this threshold to be "available" to the beneficiary, which in turn can negatively affect the individual's eligibility for SSI payments.

Are there any Limitations on ABLE Account? (Cont.)

• If, however, the beneficiary of the ABLE account is not concerned about remaining eligible for SSI benefits, the account may accumulate aggregate contributions up to the state's limit on qualified 529 accounts, which in Kentucky is $350,000.

IRS Regulations – ABLE Account

• The IRS issued Notice 2015-81 on November 20, 2015. This notice made three changes to the proposed rules for ABLE Accounts. These changes will make it easier for states to offer and administer ABLE programs.

• Administration: Those responsible for administering ABLE Accounts are not required to implement safeguards to determine which distributions are for qualified disability expenses, nor are they required to specifically identify those used for housing expenses.
However, beneficiaries will need to categorize distributions when determining their federal income tax obligations.

**Tax ID:** ABLE Account administrators are not required to request the taxpayer identification numbers (TINs) of contributors to an ABLE account when a contribution is made. If, however, an excess contribution is made, the administrator will need to request the contributor’s TIN.

**Disability Diagnosis:** Account beneficiaries can open an ABLE account by certifying, under penalties of perjury, that they meet the qualification standards, including their receipt of a signed physician’s diagnosis if necessary, and that they will retain that diagnosis and provide it to the program or the IRS upon request.

Termination of an ABLE account

- When the account beneficiary dies, any remaining assets in an account must first be used to reimburse Medicaid for any and all care provided to the beneficiary after the creation of the account, but shall exclude the amount paid by the beneficiary as premiums to a Medicaid buy-in program.
- Note, third parties, such as family members and friends, are wise to continue making gifts or planned bequests to third party special needs trusts to avoid the Medicaid-payback obligation required of ABLE accounts.
Why Consider a Special Needs Trust?

- Unplanned Inheritance
- Personal Injury Settlements
- Matrimonial Action
- Failure to do so may cause loved one to lose:
  - Supplemental Security Income ("SSI")
  - Medicaid
  - Other Government Assistance or Grants

Special Needs Trusts

- A Special Needs Trust is a form of discretionary, spendthrift trust designed to preserve government benefits for a disabled or aged beneficiary. Distributions from the trust are intended to supplement public benefits, not supplant them.
- The benefits at issue are typically needs-based benefits – those that have limitations on the amount of resources and income the recipient may own and/or receive.

Pooled and Private Special Needs Trusts

Private Special Needs Trust:
- 42 USC § 1396p(d)(4)(A)
- Separate Trusts
- State Specific
  - Must be under 65
  - No additional funds after 65
  - Only parent, grandparent, guardian or a court can establish
  - Mandatory Medicaid Payback
  - Need knowledgeable administrator to protect government benefits
  - Cost varies and time consuming
  - Need government agency approval

Pooled Special Needs Trust:
- 42 USC § 1396p(d)(4)(C)
- Master Trust
  - Nationwide
  - Any Age
  - Funds can be added anytime
  - Individual may establish
  - Medicaid payback may be avoided
  - Need knowledgeable administrator to protect government benefits
  - Low cost and quick setup
  - Need government agency approval
Example Uses of SNT Funds

- Out-of-pocket medical and dental expenses
- Medical equipment not provided by Medicaid
- Eyeglasses
- Exercise equipment
- Annual independent checkups
- Transportation
- Motor vehicles
- Vehicle maintenance
- Vehicle insurance premiums
- Life insurance premiums
- Physical rehabilitation services

Example Uses of SNT Funds, Cont.

- Essential dietary needs
- Materials for hobbies
- Tickets for recreational and cultural events
- Musical instruments
- Costs related to attending meetings
- Memberships in book or health clubs
- Home improvements
- Computers, etc.
- Cable TV

Example Uses of SNT Funds, Cont.

- Telephones, TVs, radios
- Cameras
- Trips and vacations
- Visits to friends
- Entertainment
- Newspapers and magazines
- Athletic training and competition
- Personal care attendants
- Vocational rehabilitation
Example Uses of SNT Funds, Cont.

- Professional services
- Tuition and related expenses
- Cosmetics
- Conferences and seminar

New Kentucky Statutes

- Effective July 12, 2012
- The laws can be found here: KRS 387.855 - 387.910
- Established a process for requesting the "Court" to establish a special needs trust for disabled person.

Third Party Special Needs Trust

- No payback requirement
- Can direct corpus at death of beneficiary to any individual
- No age limit
- Should serve as the primary vehicle for family and friends to make gifts or bequests in order to provide support to a disabled daughter, son, brother, sister, grandson, granddaughter or friend.
Third Party Special Needs Trust

• The purpose of a third party special needs trust is to preserve public benefits for an individual or family member with physical or mental disabilities.

• Money is provided to a disabled individual via gift or inheritance to provide for their supplemental needs.

• Individuals with disabilities often experience difficulty with managing their own financial affairs, so by establishing a third party special needs trust, the funds are administered and managed by a qualified trustee.

Third Party Special Needs Trust

• The trust must be a discretionary spendthrift trust that limits the discretion of the trustee so that he or she is prohibited to distribute principal or income to the beneficiary if such a distribution would reduce or eliminate the beneficiary’s eligibility for public benefits.

• These can be testamentary or inter vivos trusts and can be revocable or irrevocable.

• Medicaid is not the primary beneficiary upon termination of the trust.

Third Party Trust Trustee’s Discretion

• Sole, absolute and unfettered discretion

• Income and principal

• No support standard

• Beneficiary – no right to compel

• Express intent

• Emergency clause
Funding Third Party SNT

- Life Care Plan
- Life Insurance
  - Irrevocable Life Insurance Trust
  - Crummey Powers
  - Beneficiary Designations

Special Needs Trust Administration

- The Sole Benefit Rule - the primary rule of administration. It means that the trust is to be administered for the sole benefit of the disabled person.
- All distributions are to benefit the disabled person and not anyone else.
  - There are times, however, where family members, guardians and friends may receive incidental benefits as a result of their relationship to the disabled beneficiary. For example, a caretaker may receive a free flight to a vacation destination due to the disabled beneficiary’s inability to travel on his or her own.
Special Needs Trust Administration

- The Trustee must always ask whether or not the disbursement in question is for the sole benefit of the disabled beneficiary.

Special Needs Trust Administration

- In Kind Support and Maintenance (ISM)
  - The impact of ISM is an important rule for all trustees to understand. This is especially true when it comes to paying for rent or helping offset other food and shelter related expenses.
  - Any assistance provided to an SSI beneficiary in the form of food and shelter will be treated as countable income. However, so long as the benefit provided is not cash, but rather the payment of rent or purchase of food, then Social Security is only permitted to reduce the SSI benefit by 1/3.

In Kind Support and Maintenance (ISM)

- The ISM Reduction
  - The maximum amount of SSI that a disabled person may receive each month is $733. Therefore, the maximum amount that can be withheld from Social Security due to ISM is $264.33.
  - Where cash assistance reduces an SSI benefit on a dollar for dollar basis, ISM reduces an SSI benefit either for the value of the goods/rent provided or is calculated by dividing the maximum SSI benefit by three (less a $20 disregard).
In Kind Support and Maintenance (ISM)

• Example:
  - Sarah receives $733 per month in SSI benefits.
  - Sarah is the beneficiary of a first party special needs trust and the trust pays her $1,200 rent each month.
  - Because the trust is paying Sarah’s rent, her SSI benefit will be reduced by $264.33 due to the receipt of ISM.
  - Because Sarah still receives $468.67 in SSI benefits, the trust is able to provide her a nice place to live and still get SSI benefits, and in most states, Medicaid benefits as well.

• Social Security Considers the following items as ISM:
  - Food
  - Mortgage
  - Real property taxes
  - Rent
  - Heating
  - Gas
  - Electricity
  - Water
  - Sewer
  - Garbage removal

Clothing Purchases

• Clothing was originally considered to be ISM, but as of March 7, 2005, such purchases are permissible.
• The clothing purchases can be special garments for the trust beneficiary’s care or simply just ordinary clothes and shoes.
• There is no limit to the amount of clothes that can be purchased.
Generally Permissible Expenditures

- Cable, telephone, internet, and newspapers
- Tuition, books and education
- Household furnishings and furniture
- Televisions, computers and electronics
- Medical care, prescription medication, respite care and rehabilitative services

Purchase of a Vehicle

- The purchase of a vehicle can often be tricky, especially due to the difficulty in securing insurance when a trust owns the vehicle.

- Most insurance companies require a commercial insurance policy to be issued whenever a vehicle is owned by a special needs trust.

- If a trust owns a vehicle, it can expose itself to liability for injuries incurred as a result of an accident involving the vehicle.

THE SOLUTION

- In order to avoid unnecessarily exposing the trust to liability and helping reduce the cost of insurance for the vehicle, it is often best to adhere to the following purchase strategy:

- The trust makes a loan to beneficiary or a family member or friend of the trust beneficiary in order to purchase the vehicle in his or her name. This person should be the primary driver of the vehicle.
Purchase of a Vehicle, Cont.

• The trust then places a lien against the title of the vehicle in order to secure its interest, avoid violating the sole benefit rule applicable to special needs trusts, and ensure the purchaser does not immediately turn around and sell the vehicle for cash.

• The trustee then depreciates the value of the vehicle (against which it has a lien) over a period of 5-10 years. There is no set depreciation schedule established by Social Security that trustees must follow.

Pre-Paid Burial Plot/Funeral

• Prepaid Burial Plot and Funeral Arrangements

• One of the first items all trustees should purchase for a trust beneficiary is a prepaid burial plot and funeral.

• Most states prohibit a trustee from paying for these items following the beneficiary's death as part of wrapping up the trust.

Pre-Paid Burial Plot/Funeral, Cont.

• Therefore, it is vital to always make sure these items are in place as soon as possible after establishing a special needs trust.

• Most states place restrictions on the cost associated with a burial plot and funeral. Therefore, be sure to check the applicable state's Medicaid rules and regulations before completing a purchase.
Travel and Entertainment

Travel

• Most travel and entertainment expenses are 100% permissible. However, the important thing to always remember is for the purchase to not violate the sole benefit doctrine.

• Therefore, whenever making travel purchases, remember to only purchase airfare and hotel accommodations for the trust beneficiary and, if necessary, their travel companion/caretaker.

Travel and Entertainment, Cont.

• Practice tip: in order to try and maximize the trust and make the most of the trip, it is beneficial to try and purchase all inclusive packages. While there is no guarantee that Social Security will not try and argue that the expenditure was “food or shelter” related, experience has shown this to be a viable administrative strategy.

Entertainment

• The same rules listed above apply to entertainment purchases. Strictly limit all expenditures to the trust beneficiary, and if necessary, their travel companion/caretaker.

Purchase of a Home

• Because a home is considered to be an exempt resource by Medicaid and Social Security, the primary issue involved with the purchase of a home is determining whether or not the trust or the trust beneficiary should own the home.

• Beneficiary Ownership:

✓ The home will avoid being subjected to a forced sale due to the Medicaid reimbursement obligation that is triggered upon the beneficiary’s death.
The home is considered an exempt resource for the beneficiary and others can reside in the home without paying rent.

The beneficiary is responsible for the taxes, insurance and maintenance, upkeep and yard work since the property is not owned by the trust.

Purchase of a Home

Trust Ownership:

Upon the beneficiary’s death, the home will be subject to a forced sale, if necessary, to satisfy the reimbursement obligation required of all first party special needs trusts.

The trust can pay for the maintenance, upkeep and yard work since the property is owned by the trust. Since the property is now an asset of the trust, the Trustee has a duty to make sure the asset is maintained properly.

Anyone other than the beneficiary residing in the home will need to pay rent in order to avoid violating the sole benefit rule.

Generally a market analysis should be completed in order to determine the fair market value for the rent.
Practice Tip: If possible, consider having the trust purchase a life estate interest in the property with the remainder interest purchased by a family member.

Because life estate interests terminate as a matter of law upon the death of the owner, the trust will no longer own anything upon the beneficiary's death.

As a result, the home should not be subject to any Medicaid reimbursement obligation upon the beneficiary's death as the home is now owned by the individual who owned the remainder interest.

While Medicaid may argue that this is an impermissible arrangement, the law is on your side.

Caregivers

While there is no federal guidance on how caregiving arrangements must be established, many states will attempt to regulate paying family members for care management services whenever there is an obligation of support (for example, parents of minor children).

CAUTION:

If a trust hires individuals directly to provide care services to the beneficiary, the trust may be responsible for employment/payroll taxes and insurance.
Caregivers, Cont.

• The trust could also expose itself to liability for a caregiver’s injuries sustained while performing services.

• It is important to either work with attorneys and insurance professionals in order to make sure the proper legal documents are in place, taxes are paid, and insurance coverage is purchased or to work with third party (such as Risk Management Strategies) who will perform all of the employment/payroll services for the trust.

Medicare Set Asides

• What is a Medicare Set Aside (“MSA”)?

• Money allocated from a personal injury settlement to protect Medicare’s interest in an injured plaintiff’s future cost of injury related care. The intent is to prevent the burden shift of responsibility for this care from the insurance company to Medicare.

Medicare Set Asides

• A trust beneficiary can be dually eligible for both Medicaid and Medicare benefits. Should this be true and the money funding the special needs trust come from a personal injury settlement, then it is important for the trustee to verify whether or not an MSA is involved in the settlement. If so, then the Trustee should:
Medicare Set Asides (cont’d)

• Because an MSA held outside of a special needs trust is considered available to the beneficiary, it is important for the Trustee to create a sub-trust that is strictly limited to the MSA funds. Do not comingle the MSA money with the remainder of the trust’s assets.

• Engage an MSA administration company to ensure the MSA dollars are administered properly.

• Pay for MSA administration fees with money held in the special needs trust, but not in the MSA sub-trust.

Structured Settlement Annuities

• A Structured Settlement Annuity is a financial settlement tool that provides compensation to personal injury victims in which part or all of the settlement is paid over time, rather than in one lump sum at the time of settlement.

• In settling with a defendant, the plaintiff agrees to accept a series of future periodic payments to be made over time in lieu of a lump sum cash payment.

• A periodic payment is a mechanism that allows plaintiffs a means of taking part of the settlement as immediate cash and to receive a portion of the personal injury or wrongful death settlement in the form of guaranteed, income tax-free payments that can be customized to meet future needs.

Structured Settlement Annuities

• CAUTION!

• Whenever a special needs trust involves a structured settlement annuity, it is vitally important that the annuity payments are made directly to the trust and not to the beneficiary.

  ✓ Payments made to the beneficiary directly will be considered income and could negate the beneficiary’s eligibility for benefits.

  ✓ Fortunately annuity payments made to a trust are exempt and this includes any payments made to the trust after the beneficiary is 65 years old, the time upon which additional contributions to a trust are prohibited.
Trust Modification

The rules and regulations applicable to government benefit programs are constantly in a state of flux. Therefore, it is important for all special needs trust agreements to allow the trustee the following discretion even though the trust itself is irrevocable:

- Permit the Trustee to petition the court having jurisdiction over such matters at any time it is deemed necessary to ensure that the trust complies with the laws dealing with qualification for means-tested benefits.

- Permit the trustee to petition the probate or disability court to add flexibility to the trust in order to accomplish the purpose of providing for the beneficiary’s complete care, without sacrificing governmental benefits.

Trust Termination

- Upon the trust’s termination, most likely upon the beneficiary’s death, the Trustee should adhere to the following:

  - Any money and property left in the trust must be used to pay back Medicaid for all expenses paid for on behalf of the Medicaid beneficiary during the time the trust was in existence.

  - Note: Some states take the position that Medicaid’s right of recovery extends to all benefits provided during the trust beneficiary’s lifetime. It is important to speak with the state Medicaid office before advising a client about establishing a special needs trust.

Trust Termination

- Generally speaking, any and all remaining money, assets and property in the trust after reimbursing Medicaid in full passes to the beneficiary’s heirs at law.

- IMPORTANT REMINDER: Social Security takes the position that Medicaid must be reimbursed and certain tax liabilities must be resolved before the trustee may pay for the beneficiary’s funeral and burial plot or cremation.
Q. What is an ABLE account?
A. An ABLE account is a new 529 savings account, 529A to be more precise, for disabled individuals. The disability, however, must have occurred prior to the individual’s 26th birthday in order for said person to establish such an account. This type of account came to be due to the Achieving a Better Life Experience (ABLE) Act that was signed into law by President Obama on December 19, 2014.

Q. Can I open an ABLE account today?
A. Unfortunately you cannot open an ABLE account today because individual states (specifically, each state’s legislative body) are required to establish regulations for these accounts before they can be utilized by individuals. These accounts are unlikely to be available in Kentucky until the middle or end of 2016.

Q. What are the benefits of an ABLE account?
A. There are three main benefits to ABLE accounts. First, money held in an ABLE account cannot be counted for purposes of determining an individual’s eligibility for Supplemental Security Income (“SSI”) or Medicaid. Second, an ABLE account can be used for qualified disability expenses which include the following: 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, and funeral and burial expenses. Third, earnings on and distributions from an ABLE account for disability expenses cannot be considered the taxable income of the contributor to the account or the beneficiary of it.

Q. Are there any limitations on ABLE account?
A. Yes, there are limitations to ABLE accounts. ABLE accounts are only available to individuals who become disabled before the age of 26. In addition, the annual amount that can be contributed to an ABLE account is limited to the annual gift tax exemption, currently $14,000, and each individual can only have one ABLE account. As a result, the total amount of money an ABLE account can currently receive from all sources is $14,000 per year. In addition, the total value of an ABLE account cannot exceed $100,000. This $100,000 limitation, however, is specific to those who receive SSI benefits because the Social Security Administration (“SSA”) considers any amount over this threshold to be “available” to the beneficiary, which in turn can negatively affect the individual’s eligibility for SSI payments. If, nonetheless, the beneficiary of the ABLE account is not concerned about remaining eligible for SSI benefits, the account may accumulate aggregate contributions up to the state’s limit on qualified 529 accounts, which in Kentucky is $350,000.

In addition to the above, when the account beneficiary dies, any remaining assets in an account must first be used to reimburse Medicaid for any and all care provided to the beneficiary after the creation of the account, but shall exclude the amount paid by the beneficiary as premiums to a Medicaid buy-in program. Therefore, due to these limitations, ABLE accounts are unlikely to provide much relief for disabled individuals who receive substantial personal injury settlements or inheritances. Further, third parties, such as family members and friends, are wise to continue making gifts or planned bequests to third party special needs trusts to avoid the Medicaid-payback obligation that is required of ABLE accounts.

Q. What is a special needs trust?
A. A special needs trust is a form of a pure discretionary, spendthrift trust designed to preserve a disabled person’s eligibility for government benefits. These public benefits may include means-tested programs where eligibility is based on financial need, such as Medicaid, SSI or Food Stamps, or insurance programs where eligibility is based on criteria other than financial need, such as Medicare or Social Security Disability Income. For a description of the most common government benefits, see page 4.
Q. Are there different types of special needs trusts?
A. Yes, there are different types of special needs trusts, which include both private and pooled first party special needs trusts and third party trusts.

Q. What is a first party private special needs trust?
A. The characteristics of a private special needs trust are:
   • The Law is 42 USC §1396p(d)(4)(A)
   • Individual trusts drafted by an attorney
   • State specific
   • Designed for beneficiaries under the age of 65
   • No additional funds may be added to the trust after a beneficiary is 65 years old, unless through a previously established structured settlement annuity
   • Only parent, grandparent, guardian or a court may establish such a trust
   • The trust agreement must grant Medicaid a first right of recovery against the trust assets upon the beneficiary’s death
   • The trustee must be knowledgeable enough about government benefits to protect the beneficiary’s eligibility for them
   • The costs associated with drafting and establishing a private first party special needs trusts can vary depending on the facts of the case
   • Approval of the trust from Medicaid must be secured in order for the trust to be deemed a non-countable resource

Q. What is a pooled special needs trust?
A. The characteristics of pooled special needs trusts are:
   • The law is 42 USC §1396p(d)(4)(C)
   • Trust is administered in accordance with one master trust agreement
   • The trust is administered for the benefit of individuals nationwide
   • Anyone can join a pooled trust, but Medicaid often considers joining a pooled trust after the age of 65 to be an improper transfer
   • Unlike with private special needs trusts, a disabled individual may join the trust himself/herself
   • Medicaid payback may be avoided by permitting the trust to keep the assets upon the death of the beneficiary
   • The trustee must be knowledgeable about government benefits to properly administer the trust
   • The costs associated with joining a pooled trust are generally lower than those associated with establishing a private special needs trust
   • An individual can join and establish an account with a pooled trust in a very short period of time
   • The pooled trust trustee will secure the necessary government approval of an account’s establishment

Q. What is a third party special needs trust?
A. The purpose of a third party special needs trust is to preserve government benefits for an individual with physical or mental disabilities. Money is provided to a trust for the benefit of a disabled individual via gift or inheritance. The trust is established to provide for the disabled person’s supplemental needs. The trust must be a pure discretionary spendthrift trust that grants the trustee the authority to determine if and when a distribution is appropriate and to deny a requested distribution if such a distribution could negatively impact the beneficiary’s eligibility for benefits and/or overall well-being. Third party special needs trusts can be testamentary or intervivos trusts and can be revocable or irrevocable. Also, of great importance, Medicaid is not the primary beneficiary upon termination of the trust, rather the grantor can determine how the remaining trust assets are to be disbursed at the death of the beneficiary.

Q. What are the questions to ask when establishing a special needs trust?
A. The following questions should be asked:
   • Does the client want to determine the trustee, financial manager, and the terms of trust

(continues on pg. 3)
administration?
• Does the trustee require a minimum deposit for trust services?
• Does the trustee have experience with special needs trust administration?
• What are the fees for trustee services?
• Will the trustee travel to meet with the beneficiary?
• How are disbursements requested and processed?

Q. What are some additional special needs trust considerations?
A. The primary goal of a special needs trust is to preserve an individual’s means-tested government benefits. Therefore, it is important to learn if the individual has a parent, grandparent or legal guardian who can establish the trust on his or her behalf. If not, a court order must be obtained in order to establish the trust properly.

Q. What happens upon termination of the special needs trust or death of the beneficiary?
A. Any money and property left in the trust must be used to pay back Medicaid for all of the expenses paid for on behalf of the Medicaid beneficiary during the time the trust was in existence. Some states, however, take the position that Medicaid’s right of recovery extends to all benefits provided during the trust beneficiary’s lifetime. As a result, it is always important to speak with the state Medicaid office before advising a client about establishing a special needs trust. Generally speaking, any and all remaining money, assets and property in the trust after reimbursing Medicaid passes to the beneficiary’s heirs at law.

Q. Should I establish a Special Needs Trust or ABLE account?
A. While the overall use and effectiveness of ABLE accounts will remain unknown until they are available to the public, they will certainly be valuable to the disabled community. That said, however, it is highly likely that ABLE accounts will be used in conjunction with special needs trusts. While ABLE accounts will provide account owners greater ability to control their funds and will be far less expensive than special needs trusts, the substantial limitations on the accounts will likely result in people needing both an ABLE account and a special needs trust. This is especially true when family and friends want to leave money to a disabled person in excess of the annual gift tax exemption (currently $14,000) and for the money to be available for purposes other than qualified disability expenses.

Q. What are government benefits?
A. Government benefits are forms of healthcare benefits and financial assistance made available to citizens of the United States. While eligibility for certain government benefits is based upon an individual’s monthly income and the value of the resources he/she owns, eligibility for other programs is based upon the number of quarters of employment during which an individual paid taxes into the Social Security system. Examples of means-tested benefits are Medicaid, Supplemental Security Income, Food Stamps and Section 8 Housing Vouchers. Examples of entitlement-based benefits are Medicare, Social Security Disability Income and Disabled Adult Children’s benefits.

Q. What is Medicare?
A. Medicare is a health insurance program that pays for an eligible individual’s medical costs. Similar to Social Security Disability Income (“SSDI”), Medicare is an insurance program and not a program that is provided to people based on financial need. In simplest terms, Medicare pays for acute care, hospitalization, limited skilled-nursing care, physician’s visits, medications administered in hospitals, and prescription drugs under Part D.

Q. What is Medicaid?
A. Like Medicare, Medicaid provides health insurance coverage for basic medical and hospital care, as well as prescription drugs and long-term care services. In addition, and most often of critical importance to those with disabilities, Medic-
aid will pay for rehabilitative services, therapy (occupational and physical), and for care in either an individual’s home, a group home or nursing facility. Many states also provide services through waiver programs to support individuals with disabilities out in the community. Generally speaking, one is found eligible for Medicaid upon the receipt of SSI benefits or by having limited countable resources ($2,000 or less) and limited monthly income (less than $733 per month).

Q. What is the Medicaid Waiver Program?
A. The primary objective of Medicaid Waiver Programs is to provide those with disabilities the opportunity to secure the healthcare they need out in the community rather than being forced to obtain such care in an institutional facility. The majority of waiver programs allow the states to disregard certain Medicaid eligibility provisions in order to deliver long-term care services in the community. For example, a waiver program may disregard the amount of income received or the assets owned by a disabled person and the disabled person’s family members.

Q. What is Supplemental Security Income (otherwise known as “SSI”)?
A. SSI is a means-tested Social Security federal benefits program that provides income to certain aged, blind and disabled people. The purpose of the SSI program is to provide certain individuals with income to be used for food and shelter. Currently in 2015, the maximum amount of SSI for an individual is $733 a month.

Q. What is Social Security Disability Income?
A. SSDI is a benefit for people who cannot work because they have a medical condition that is expected to last at least one year or result in death. Federal law requires this very strict definition of disability. In general, to get SSDI benefits, you must meet two different earnings tests: (1) a “recent work” test based on your age at the time you became disabled; and (2) a “duration of work” test to show that you worked long enough (paid enough in social security taxes). Certain blind workers need only satisfy the “duration of work” test.

Q. What is Social Security’s definition of disability?
A. Social Security’s definition of disability is the inability to do any substantial gainful activity by reason of medically-determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. In other words, the injury must prohibit the person from performing his or her previous job or any other substantial gainful activity in the national economy.

Q. Can I become eligible for Medicare coverage after being determined to be disabled?
A. Yes you can because an SSDI beneficiary is entitled to receive health insurance coverage under the Medicare program after receiving SSDI benefits for a period of two years.

Q. What are Child Disability benefits?
A. Child disability benefits (“CDB”) are SSDI benefits that are made available to a child (minor or adult) when his/her parent(s) reach retirement age, become disabled or die. The benefit is based upon the parent’s earnings record with Social Security and is paid out as part of the parent’s Social Security benefit. In order for an adult child to access this benefit, he/she must have been determined to be disabled prior to the age of 22.

Q. Will an individual lose Medicaid coverage if the CDB benefit is greater than the SSI benefit?
A. No. Generally speaking, whenever an individual loses his/her eligibility for Medicaid due to the receipt of CDB benefits or an increase in a Social Security benefit, federal law ensures that the individual’s eligibility for Medicaid will remain in place.

(continues on pg. 5)
Q. What is the amount of income an individual can receive per month and the total amount of resources that someone can own and still maintain his/her eligibility for SSI?
A. A person can receive up to $733 per month in income and can own $2,000 in countable resources and still maintain his/her eligibility for SSI.

Q. What are resources?
A. Resources are typically defined as those assets an individual or couple own and can apply, either directly or by sale or conversion, to meet basic needs of food, clothing and shelter.

Q. What are some examples of non-countable resources?
A. Non-countable resources include household goods and personal effects which include an automobile, life insurance with a cash value not exceeding $1,500, a prepaid burial plot or a burial fund up to $1,500, and pre-paid funeral contracts.

On December 19, 2014, President Obama signed into law the Achieving a Better Life Experience Act establishing ABLE accounts (the ABLE Act), which are new 529 savings accounts for individuals who are disabled. While the enactment of this law was the culmination of years of hard work by individuals and families who support and advocate on behalf of individuals who are disabled, its impact on special needs planning, and more specifically, its role in an overall special needs financial and estate plan is yet to be determined. This is particularly true in Kentucky where no law currently exists for individuals to establish such accounts.

An ABLE account, once again, is a 529 savings account for individuals who are disabled. Individual states (specifically each state’s legislative body) are required to establish regulations for these accounts before they are used. As of September 2015, thirty-one of fifty states signed ABLE legislation. Unfortunately, however, Kentucky is not one of these states. That said, many citizens and legislators are working hard to ensure Kentucky joins the other thirty-one states during the 2016 legislative session. Assuming ABLE accounts are available within the next twelve months, the remainder of this article highlights their benefits as well as their limitations.

What are the benefits of an ABLE account?

There are three main benefits to ABLE accounts. First, money held in an ABLE account cannot be counted for purposes of determining an individual’s eligibility for Supplemental Security Income (SSI) or Medicaid. Second, an ABLE account can be used for qualified disability expenses which include the following: 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, and funeral and burial expenses. Third, earnings on and distributions from an ABLE account for disability expenses cannot be considered the taxable income of the contributor to the account or the beneficiary of it.

* Before joining Stock Yards Bank & Trust, Peter Wayne practiced law at Wyatt, Tarrant & Combs, LLP where he focused on special needs planning, litigation settlement planning, estate planning and estate administration. He is currently responsible for the administration of trust accounts and estates.

Matthew Smith is licensed to practice in the state of Kentucky. Before going to law school, Matthew worked as a financial advisor with Waddell and Reed where he focused on asset protection using special needs trusts. He is an active board member with the Kentucky Behavioral Health Planning and Advisory Council. His firm, Campbell & Smith Law, focuses on small business and elder law, which includes Special Needs Trusts.

1 See 26 U.S.C. 529A.

Will disbursements for housing assistance be considered in-kind support and maintenance for SSI beneficiaries?

Fortunately, the answer to this question is no. Qualified distributions now include distributions for housing related expenses. Said expenses will not be considered in-kind support and maintenance ("ISM") and thus will not impact a beneficiary’s eligibility for SSI. This is a recent policy position change by the Social Security Administration ("SSA") and was confirmed at the 2015 Stetson University special needs trust conference during a session with the SSA on October 16, 2015. The impact of this change cannot be understated as it immediately provides SSI beneficiaries with another resource to help offset their monthly expenses, and in turn, frees up other resources to improve the quality of their lives.

Are there any limitations on ABLE accounts?

Yes, there are limitations on ABLE accounts. ABLE accounts are only available to individuals who become disabled before the age of twenty-six. In addition, the annual amount that can be contributed to an ABLE account is limited to the annual gift tax exemption, currently $14,000, and each individual can only have one ABLE account. As a result, the total amount of money an ABLE account can currently receive from all sources is $14,000 per year. In addition, the total value of an ABLE account cannot exceed $100,000. This $100,000 limitation, however, is specific to those who receive SSI benefits because the SSA considers any amount over this threshold to be "available" to the beneficiary, which in turn can negatively affect the individual's eligibility for SSI payments. If, however, the beneficiary of the ABLE account is not concerned about remaining eligible for SSI benefits, the account may accumulate aggregate contributions up to the state's limit on qualified 529 accounts, which in Kentucky is $350,000.3

In addition to the above, when the account beneficiary dies, any remaining assets in an account must first be used to reimburse Medicaid for any and all care provided to the beneficiary after the account is created, but shall exclude the amount paid by the beneficiary as premiums to a Medicaid buy-in program. Therefore, due to these limitations, ABLE accounts are unlikely to provide much relief for disabled individuals who receive substantial personal injury settlements or inheritances. Further, third parties, such as family members and friends, are wise to continue making gifts or planned bequests to third party special needs trusts to avoid the Medicaid-payback obligation required of ABLE accounts.

Is an ABLE account as valuable as the special needs community hoped it would be?

The answer is a qualified yes. While these accounts certainly provide attorneys and financial planners with another resource when establishing a special needs plan for their clients, these accounts will not replace first or third party special needs trusts – the foundation of most, if not all, special needs plans. As a result, ABLE accounts will likely be used in conjunction with first and third party special needs trusts.

**What is a special needs trust?**

A special needs trust is a form of a pure discretionary, spendthrift trust designed to preserve a disabled person’s eligibility for government benefits. These public benefits may include means-tested programs where eligibility is based on financial need, such as Medicaid, SSI or Food Stamps, or insurance programs where eligibility is based on criteria other than financial need, such as Medicare or Social Security Disability Income.

**Are there different types of special needs trusts?**

Yes, there are both private and pooled first party special needs trusts. In addition, there are third party trusts.

The characteristics of a private special needs trust are:

- Statutory law is here: 42 U.S.C. §1396p(d)(4)(A)
- Individual trusts are drafted by an attorney
- State specific
- Designed for beneficiaries under the age of sixty-five
- No additional funds may be added to the trust after a beneficiary is sixty-five years old, unless through a previously established structured settlement annuity
- Only a parent, grandparent, guardian or a court may establish such a trust
- Trust agreement must grant Medicaid a first right of recovery against the trust assets upon the beneficiary’s death
- Trustee must be knowledgeable enough about government benefits to protect the beneficiary’s eligibility for them
- Costs associated with drafting and establishing a private first party special needs trust can vary depending on the facts of the case
- Approval of the trust from Medicaid must be secured in order for the trust to be deemed a non-countable resource

The characteristics of a pooled special needs trust are:

- Statutory law: 42 U.S.C. §1396p(d)(4)(C)
- Trust is administered in accordance with one master trust agreement
- Trust is administered for the benefit of individuals nationwide
- Anyone can join a pooled trust, but Medicaid often considers joining a pooled trust after the age of sixty-five to be an improper transfer
Unlike private special needs trusts, a disabled individual may join the trust himself/herself

Medicaid payback may be avoided by permitting the trust to keep the assets upon the death of the beneficiary

Trustee must be knowledgeable about government benefits to properly administer the trust

Costs associated with joining a pooled trust are generally lower than those associated with establishing a private special needs trust

Individuals can join and establish an account with a pooled trust in a very short period of time

Pooled trust's trustee secures the necessary government approval of an account's establishment

What is a Third Party Special Needs Trust?

The purpose of a third party special needs trust is to preserve government benefits for an individual with physical or mental disabilities. Generally speaking, money is provided to a trust for the benefit of an individual who is disabled via gift or inheritance. The trust provides for the supplemental needs of the person who is disabled. The trust also must be a pure discretionary spendthrift trust that grants the trustee the authority to determine if and when a distribution is appropriate and to deny a requested distribution if such a distribution could negatively impact the beneficiary's eligibility for benefits and/or overall well-being. Third party special needs trusts can be testamentary or inter vivos trusts and can be revocable or irrevocable. Lastly, and of great importance, Medicaid is not the primary beneficiary upon termination of the trust, rather the grantor can determine how the remaining trust assets are disbursed at the death of the beneficiary.4

While the passage of the ABLE Act was a tremendous victory for the special needs community, the substantial limitations placed upon ABLE accounts does limit their overall benefit and wide-spread use. However, while these limitations are unfortunate, their very existence is helpful as they provide planners and disabled Individuals alike with another planning tool. For example, these accounts are helpful when individuals receive small personal injury settlements (net settlements under $14,000) or inheritances and want to avoid having the money negatively impact their eligibility for means-tested benefits. In addition, ABLE accounts can be a great resource for disabled individuals who work, as they will permit such individuals to accumulate and retain more of their monthly income without the fear of losing their eligibility for means-tested benefits due to having "excessive countable resources." Finally, while it is unclear just yet how these accounts can and will work in conjunction with third and first party special needs trusts (i.e., how distributions from special needs trusts to ABLE accounts will be

---

4 Information presented herein was gathered from multiple sources, including from Thomas D. Begley, Jr. and Angela E. Canellos, The Special Needs Trust Handbook, New York, NY (2013) and Peter Wayne's previously published material currently found on the American Bar Association's Real Property and Trust & Estate Law's special needs trusts frequently asked questions webpage.
treated), the SSA’s recent policy change with respect to distributions from ABLE accounts for housing related expenses is a positive sign for the future – there’s definitely more to come.