

# *Future Planning with Special Needs Trusts and ABLE Accounts*

**H. Amos Goodall, Jr., LL.M., CELA**  
[agoodall@paeldercounsel.com](mailto:agoodall@paeldercounsel.com)  
**Steinbacher, Goodall & Yurchak**  
**328 South Atherton Street**  
**State College, PA 16801**  
**(814) 237-4100**

**November 2018**

**Pennsylvania Bar Institute**  
**Elder Law Institute**

# DISABILITY IN THE U.S. AND PENNSYLVANIA

- Between 2005 and 2010, the number of non-institutionalized individuals with disabilities increased by 2.2 million people.
- Approximately 14 percent of Pennsylvania's 12+ million residents have a disability.
- Pennsylvania is ranked 18th out of 50 states in disability rates for all ages.

U.S. Census Bureau

# CHOICES IN PAYING FOR MEDICAL CARE FOR AN INDIVIDUAL WITH A DISABILITY

**Privately pay** or use private insurance for long-term services. This is rarely an option for an individual with a lifelong disability.

OR

**Utilize government programs** that provide life-long supports. This is the most realistic route for an individual with a long-term disability.

In-home care/ assisted living: **\$65,000-\$120,000/year**

*<https://www.care.com/c/stories/10266/special-needs-care-for-adult-children-cost-of-care/>*

# BENEFITS

- Means Tested – eligibility based on income and assets available to the individual with a disability
  - Examples include Supplemental Security Income (SSI), Medical Assistance/Medicaid (MA), Waiver
- Entitlement – eligibility based on contribution to program or a person's age; assets are not a factor
  - Examples include Social Security Disability, Social Security Retirement, Social Security Survivors Benefits, Adult Child Disability Benefits, Medicare

# SUPPLEMENTAL SECURITY INCOME (SSI)

- These means-tested benefits have strict asset and income guidelines.
- Assets are limited to \$2,000 per individual (set in 1989).
- The maximum benefit is \$771 for an individual (2019).
- In-kind Support and Maintenance (ISM): Food or shelter that somebody else provides.
- In PA, individuals who receive SSI (even \$1) are automatically eligible for MA.

# MEDICAL ASSISTANCE (MA)

- Medical Assistance (MA) is a means-tested benefit that many individuals with disabilities use. An individual cannot have more than \$2,000 in assets or he may lose his MA.
- Waiver services consist of funding to provide supports/services for an individual in the community rather than institution.
- Medical Assistance for Workers with Disabilities (MAWD):
  - Permits Pennsylvanians with disabilities to obtain employment without losing medical coverage or eligibility for home and community-based services
  - 2017 Monthly Income Limit to retain MAWD is \$2,513
  - 2017 Resource Limit to retain MAWD is \$10,000

# **SOCIAL SECURITY DISABILITY (SSD)**

An individual qualifies for SSD if:

1. He or she has worked and has paid into SSD.
2. He or she is an adult child diagnosed with a disability before age 22 and a parent who has paid into Social Security and who is either disabled, retired or deceased.
3. He or she is a spouse/former spouse of someone who has paid into Social Security and who has a disability, is retired or deceased.

# MEDICARE

- Social Security recipients who are over 65 or have a permanent disability are entitled.
- An individual who has railroad retirement benefits or end-stage renal disease is also eligible.
- An individual with a disability who is receiving SSD will receive Medicare after a 24-month waiting period.

*\*Note: An individual with a disability may be dual eligible for Medicare and Medical Assistance.*



# SPECIAL NEEDS TRUSTS (SNTs)

A special needs trust is a trust designed for beneficiaries who have a mental, intellectual, or physical disability.

- Is used to supplement the needs of a beneficiary, but not supplant government benefits
  - **SUPPLEMENT: Can be used for** items such as clothing, vacation, medical needs, transportation, recreation, entertainment
  - **SUPPLANT: Cannot be used for** housing, grocery food, utilities, cash access
- Is created for the sole benefit of the beneficiary
- Allows the beneficiary to keep his or her government benefits

Assets in a special needs trust will be considered “exempt” in terms of determining eligibility for benefits.

## 3 TYPES OF SNTs

1. **Third Party/Common Law/Supplemental Needs Trust:**  
Lang v. Commonwealth of PA, Dept. Of Public Welfare,  
515 Pa 428, 528 A.2d 1335 (1987).
2. **Pooled Trust:** 42 U.S.C. §1396p(d)(4)(C)
3. **Payback Trust:** 42 U.S.C. §1396p(d)(4)(A)

# THIRD PARTY TRUST

Grantor/Settlor: someone other than the individual with a disability

Beneficiary: person with a disability; no age limit for establishing a third party trust

Trustee: can be an individual, a corporate Trustee, or both

When advising your client on choosing an appropriate Trustee consider the following:

1. Trustee's relationship to the beneficiary
2. Time/organization required to administer trusts
3. Trustee must know how disbursements can affect the beneficiary's government benefits

# THIRD PARTY TRUST

## Trust Corpus/Funding the Trust:

- Must be funded with assets belonging to a third party
- **Practice Tip:** first-party funds *must not* be added to a third party trust; these funds will be considered available to the beneficiary and could result in an “overpayment” of government benefits. The grantor may fund during his lifetime (inter vivos) or upon his death (testamentary).

Remainder Funds: as noted previously, no pay back is required to the state(s), so Settlor/Grantor reserves the right to direct where remainder funds will go (to family, friends, charity, etc.).

# THIRD PARTY TRUST

## Drafting:

- The trust document must be drafted by an attorney and can either be written as part of a Last Will and Testament or can be a stand alone document.
- The Trust need not be approved by a Court or DHS, but should be disclosed to ensure it is not a countable asset.

## Distributions:

- It is not required that distributions are made for the sole benefit of the beneficiary.  
Note: Be aware that the Trustee may need to follow the sole benefit rule to protect certain government benefits.
- SSI rules apply with regard to shelter costs.
- Trustee has sole discretion over income and principal.

# THIRD PARTY TRUST

## Special Considerations:

### **1. Multiple trusts:** A beneficiary could have multiple trusts:

- Third Party Trust and First Party Trust
- Multiple third party trusts

### **2. Beneficiary Designations:**

- Remind clients to update beneficiary designations
- Beneficiary should be “John Smith Special Needs Trust” or “Special Needs Trust for the benefit of John Smith”

## **TAKE AWAYS...**

- Disinheritance is not necessary and is not a best practice with regard to future planning for individuals with special needs.
- Proper pre-planning via third party special needs trusts gives families the opportunity to leave a legacy for their loved one with a disability and the peace of mind of knowing their loved one will have financial security after the family member is gone.
- Third party trusts allow the beneficiary access to funds that will not jeopardize his eligibility for benefits, while the Settlor is able to choose a Trustee and remainder beneficiaries.
- While third party trusts are the most flexible and efficient way to leave or gift money to an individual with a disability, in the absence of a third party trust there are other options...

# POOLED TRUST

Grantor/Settlor: can be an individual or a parent, grandparent, guardian, agent under POA or the Court

Beneficiary Requirement:

- Must be disabled as defined by SSA
- Should be under the age of 65

Trustee:

- Must be administered by a non-profit
- No co-trustees permitted



# POOLED TRUST

## Trust Corpus/Funding the Trust:

- Generally funded by the monies belonging to the individual beneficiary

Examples: small settlements, small inheritances, SSD back pay

- Funds are pooled for investment purposes but each account is administered individually.
- Typically only small deposits are required to open

## Drafting:

- Standard form documents allow accounts to be created quickly and cost-effectively (available online)
- Governed by master trust document, so no separate trust document is required

# POOLED TRUST

## Distributions:

- Must be made for the sole benefit of the beneficiary
- SSI rules apply with regard to shelter costs.
- Trustee will consider amount in Trust, an individual's benefits, "burn rate," and budgets when making distribution decisions.
- Trustee has sole discretion.

## Remaining Funds:

- May stay with the pooled trust company, pay back to DHS, or a combination of both.
- In Lewis v. Alexander, 685 F.3d 325 (3rd Cir. 2012), the United States Court of Appeals for the Third Circuit overturned PA's attempting to limit the amount of funds a pooled trust can retain and ruled that pooled trusts can retain 100% in line with the federal statute.

# POOLED TRUST

## Special Consideration:

- Over 65 beneficiaries - **42 U.S.C. §1396(p)(c)(1)** codifies MA's general rule that transfers for less than fair market value will result in a penalty period of ineligibility for MA applicants or recipients. Thus, while the pooled account will not be considered a countable *resource* for the over 65 beneficiary in terms of SSI and MA, the transfer is considered for less than fair market value and will result in the individual's being deemed ineligible for MA services for the penalty period. Other states allow over-65 contributions.

# PAYBACK TRUST

Grantor/Settlor: can be an *individual*, a parent, grandparent, guardian, or the Court

Note: In 2016, President Obama signed The Special Needs Trust Fairness (P.L. 114-225 §5007) allowing an individual to establish her own (d)(4)(a) trust.

Note: Beware “court established/court approved problem

## Beneficiary Requirements:

- Must be disabled as defined by SSA
- Must be under the age of 65 to establish the trust

Trustee: can be an individual, a corporate trustee, or both

# PAYBACK TRUST

## Trust Corpus/Funding the Trust:

- Generally funded by the monies belonging to the individual beneficiary (Examples: larger settlements or inheritances)
- Funds cannot be placed into these trusts after the beneficiary turns 65 years old.
  - **Exception:** Annuities or structured settlements that begin before the beneficiary is 65

## Drafting:

- Trust document must be drafted by an attorney and DHS Office of General Counsel must review and approve.
- The Court must approve the trust if being created for a minor or incapacitated person.
- Payback Provision: the trust must provide a payback provision that upon the death of the beneficiary, the trust funds will first be used to “pay back” the state(s) for all MA services the beneficiary received during her lifetime.

# PAYBACK TRUST

## Distributions:

- Must be made for the sole benefit of the beneficiary
- SSI rules apply with regard to shelter costs.
- Trustee has sole discretion.
- Distributions do not supplant a third party's legal support obligations owed to a disabled beneficiary.
- Benefits can be no more than incidental to a third party.

Remaining Funds: After pay back to the state(s), the trust document will direct remaining funds to family, friends, charities, etc.

# PAYBACK TRUST

## Special Consideration: Payback v. Pooled

When choosing between whether a pooled trust or payback trust makes the most sense for your client, consider:

- The amount funding the trust
- The cost of drafting a payback trust document
- The age, overall health and needs of the beneficiary
- The likelihood that money will be left for remainder beneficiaries after pay back

# THE ABLE ACT

- The Achieving a Better Life Experience or ABLE Act was signed into law by President Obama on December 19, 2014.
- Creates a new provision under Section 529 of the IRS Code, establishing ABLE accounts, to allow individuals with a disability to save for qualified disability-related expenses, much like a traditional 529 plan allows for saving for education-related expenses.
- ABLE to Work Act signed into law December 22, 2017 (sunset 2025)



# THE ABLE ACT

Beneficiary: an individual deemed disabled before the age of 26

- An individual is disabled, if 1) he or she is receiving Social Security benefits, or 2) the individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, or is blind, and provides a copy of his/her diagnosis signed by a physician.

Funding: Anyone can fund the account, but keep in mind:

- There is an annual \$15k contribution limit from all sources (annual gift tax exclusion amount).—Note ABLE to Work supplement
- A SSI recipient will have benefits suspended once the account reaches \$100k (will be reinstated when amount is under \$100k and will not lose MA, even if MA is attached to SSI benefit).
- Maximum contribution is equal to 529 plan limits (\$511,758).

# THE ABLE TO WORK ACT

Additional Contribution: an employed may contribute above \$15,000 limit

Condition—does not participate in employer pension plan

Amount: can contribute up to lesser of:  
-- \$12,140 (estimated 2019) or  
-- compensation amount

Note: SSI treats compensation funded into ABLE Act account as earned income

Note: Saver's Credit applies to these payments (tax credit for lower income employees who pay into retirement accounts)

# THE ABLE ACT

Grantor/Owner: Anyone can set up the account, but the beneficiary owns the account; a beneficiary can only own one account.

- ❖ An individual other than the beneficiary can be made a signatory on the account, but the beneficiary still owns the account.

Remainder Funds: The federal statute allows the states to require a payback to DHS for any medical assistance payments the beneficiary has received, but PA has not enacted such a provision; PA allows an ABLE account to be transferred to a disabled sibling upon the death of the beneficiary or the contents will flow to the beneficiary's estate (it will be subject to estate recovery).

Disbursements: can only be for “qualified disability expenses...”

# QUALIFIED DISABILITY EXPENSES

Examples of QDEs:

- Education
- Housing\*\*\*
- Transportation
- Employment training and support
- Assistive technology and personal support services
- Health, prevention, and wellness
- Financial management, administrative services, legal fees
- Basic living expenses\*\*\*
- Funeral and burial expenses

Note: It is a good idea to keep receipts and accounting of these expenditures. Using ABLE funds for non-qualified disability expenses could result in tax consequences. Also, it is possible SSI recipients could be required to justify expenses.

# SNTs and ABLE

A couple of things to consider...

- Treatment of Housing Expenses
- Contribution Limits
- Age Restrictions
- Distributions Requirements

Note: both SNTs and ABLE accounts are “tools in the toolbox” for individuals with disabilities; you can have both

# SUMMARY

- Means-tested government benefits are essential to the welfare of individuals with disabilities, but carry with them strict income and asset limits.
- Third party special needs trusts create a way for individuals to receive/inherit money from third parties without jeopardizing their access to these essential government benefits. They allow the grantor to choose a trustee and remainder beneficiaries.
- In the absence of a third party trust--or where an individual with a disability has first party funds--ABLE accounts, payback trusts and pooled trusts exist to shelter those funds. However, be advised of the limitations and regulations placed on these options and note that where possible TPTs should be drafted as part of estate plans for individuals with disabilities and their families.

Questions?