Special Needs Trusts and ABLE Accounts with a Focus on Quality of Life

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Defining the Challenge

- When someone is asked to describe the purpose of a special needs trust, the typical answer given is to protect eligibility for public benefits.
- Focusing only on preservation of public benefits fails to address the big picture.
- The true objective should be to maximize the quality of life for the beneficiary with a disability.

Defining the Challenge

- The objective of most families we work with is to provide their loved one with the best quality of life possible; a life that promotes independence and is free from abuse and neglect.
- Maintaining benefits eligibility is merely one tool available for pursuing that broader goal.
- Special Needs Trusts and ABLE accounts are both financial tools one can use to maintain benefits and provide an enhanced quality of life

Imagine



- You have a daughter named Kathy who has a significant disability.
- Kathy is likely to need some level of assistance for the rest of her life.
- You come to the estate planning attorney to provide for her needs in the event of your incapacity or death.
- Kathy is otherwise healthy and is likely to live 70 years or longer.

The Challenge

- ▶ Benefit laws may will change
- Social service systems will change
- Her condition may change
- Her advocacy system may change
- Attitudes may change
- The amount of resources she needs may change
- Trustee options will change



The Special Needs Trust as an Advocacy Tool

- Focusing only on the preservation of public benefits also ignores what may be a greater issue
- Persons with disabilities are often subject of abuse and neglect and require a great amount of vigilance.
- It is often essential to be vigilant for signs that their loved one is not being abused or neglected.

Providing Advocacy upon the Incapacity of the Parent Advocate

 Ideally, the special needs trust should have as one of its focuses to continue the advocacy of the parents if both parents either pass away or become incapacitated themselves

A Primer on Public Benefits

Needs Based Benefits

- Supplemental Security Income (SSI)
- Medi-Cal
- Food stamps, legal aid, and utility payment assistance
- Housing subsidies (H.U.D. or Section 8)

Benefits Based on Entitlements

- Social Security Disability
 Insurance (SSDI) includes
 - Childhood Disability Benefits (CDB)
 - Disability Insurance Benefits (DIB)
- Medicare
- Special Education

Basics of Needs Based Eligibility Resources

- Anything that can be converted to cash for support is a resource.
- If resources exceed \$2,000 on the first day of a calendar month, the beneficiary's public benefits will be lost until resources are reduced.
- Both SNTs and ABLE accounts can be used to maintain eligibility

A General Overview of Trusts

- Before we can explore special needs trusts, we must first begin with a discussion of trusts in general.
- Trusts seem like mysterious and mystical documents, but, in fact, a trust is merely a contract to accomplish a specific objective.
- Some trusts are established for management purposes, some for tax planning, and still others to accomplish social objectives.

Special Needs Trust Basics



The Social Security Administration defines resources for SSI eligibility as cash and any other personal property that an individual owns or has the power to convert to cash, or not legally restricted from using for his or her support and maintenance.

If an SSI recipient does not own an asset outright and is legally restricted from direct access to the funds, those assets are not considered a resource for benefits eligibility.

Special Needs Trust Basics



- A special needs trust is a contract where the trustee has sole and absolute discretion over the assets in the trust and the beneficiary has none.
- In essence, a special needs trust is a form of a spendthrift trust
- By directing assets otherwise intended for the individual to a special needs trust, you are preventing those assets from counted as an available resource thus preserving his or her eligibility for benefits.

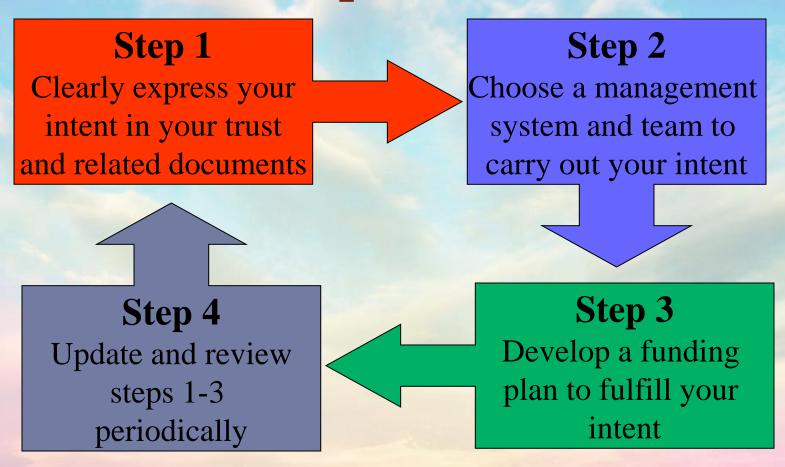
Third-Party Trust



- A third-party trust can have great latitude, and upon the death of the beneficiary can be left to anyone you wish except:
- You cannot leave it to the drafting attorney

THE PROCESS OF CREATING YOUR ESTATE PLAN WITH THE DALE LAW FIRM

The Achieving Independence 4 Step Process



Why is expressing intent so important?

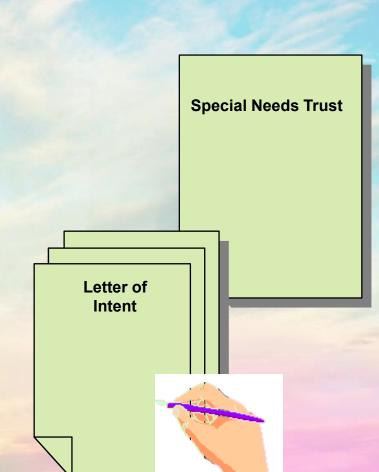


 Clearly state your intent so that in the event that a future Trustee who does not know you is administering the trust, it will be clear what is expected

A bare bones trust can only accomplish limited objectives

Why is expressing intent so important?

- The Special Needs Trust should have broad information for overall guidance to the trustee and advocate.
- The letter of intent should give more detailed information.
- Think of the letter if intent as a journal of ongoing documentation of the beneficiaries needs.



The Ideal Trustee

- Will use discretion in the best interest of the disabled beneficiary
- Must understand public benefits and keep up with changes in the law
- Can wisely invest and conform to all statutory fiduciary requirements
- Understands taxes
- Keeps perfect books
- Provides advocacy and prevents abuse
- Is immortal



Divide These Duties Into Three Categories

Advocacy

- Will use discretion in the best interest of the disabled beneficiary
- Must understand public benefits
- Provides advocacy and prevents abuse

Accountability

- Keeps perfect book
- Carries insurance, is bondable or has deep pockets
- Is immortal

Financial

- Can wisely invest and conform to all statutory fiduciary requirements
- Understands taxes

Model 1

The Trustee Directed by a Trust Advisory Committee



Trustee



The Trustee manages funds, makes distributions, does taxes, keeps records

The Trustee is directed by a Trust Advisory Committee which gives guidance on distributions, can amend the trust or replace the Trustee

Can include a care manager to access the needs of the beneficiary to guide the management team.



Advisory Committee

Model 2 The Trustee Directed by a Care Manager



Trustee



- The Trustee manages funds, makes distributions, does taxes, keeps records
 - The Care Manager interacts with the beneficiary and advises trustee on distributions

The Trust Protector oversees the trust performance and can make adjustments as laws change or replace the trustee if necessary.



Model 3 Limited Purpose Trust

For trusts for specific purposes, such as to provide only housing, can be more tightly defined and trustees can seek assistance from benefit, tax and financial advisors may be adequate.



Co-Trustees

Model 4 – Pooled Special Needs Trust directed by a Trust

Advisory Committee

Leaky Lagoon Pooled Trust Pooled special needs trust manages funds, makes distributions, does taxes, keeps records

 Pooled special needs trust shares resources between 100's of families

Can include care
 manager or advocates often at
 lower costs than the normal rate

 Ideally pooled special needs trust accountable to family or circle of support for the beneficiary. Care Manager



Advisory Committee

Funding the Special Needs Trust

Consider a Trust as a vehicle, the Trustee as the driver, and funding is the fuel to help the Special Needs Trust reach its goal



Funding the Special Needs Trust

One of the biggest mistakes we see in estate planning is not making sure that the trust is "funded properly"



Updating Your Special Needs Trust

- A question I often hear is, "How often should I have my child's special needs trust reviewed by my attorney?"
- Let me give you the typical lawyer's answer, "It depends."
- As unsatisfying as that response might be, the following information may provide you with some further guidance.

Two Levels of Review Begin with a Self-Check

- ✓ Begin with an annual review that you may undertake yourself or with the assistance of your financial or tax advisors who help with your overall financial planning.
- ✓ Once you have performed this selfcheck you will be able to determine if now really is the time to update your estate plan and special needs trust

Two Levels of Review Begin with a Self-Check

- It is important that your financial or tax advisor know about all of your assets including those that they may not manage.
- One advantage of involving your advisors is that in an emergency or upon your passing they will be able to better facilitate your successor trustee to gain access to your assets

A New Tool – ABLE Act of 2014

- Federal ABLE Act was signed by the President in 2014
 - Adds Section 529A Qualified ABLE Program to the Internal Revenue Code
 - Allows states to create tax-advantaged savings account programs for people with disabilities while protecting eligibility for public benefits such as SSI or Medi-Cal
 - Keeps ABLE monies safe from federal and state income taxes if spent on Qualified Disability Expenses
 - In the right situation gives a benefit and a level of freedom to beneficiaries of special needs trusts not previously available.

Who is Eligible?

- Must be disabled before age 26 AND
- Meets the eligibility criteria for disability benefits like SSI or SSDI - OR-
- Self-certification: Has been diagnosed by a qualified physician with a physical or mental disability resulting in marked and severe functional limitations that is expected to last no less than 12 months.

Some ABLE Basics

- Before the ABLE Act
- A person with a disability could not save more than \$2,000 without impacting their SSI
- Now
- You can save up to \$15,000 per year and up to \$100,000 in total before SSI or California means tested benefits (except for Medi-Cal) is impacted

\$529,000 total contribution cap for CalABLE (contribution only)

\$100,000 total cap for recipients of SSI & state means tested benefits (contribution + earnings)

\$15,000 annual contribution cap (contribution only)

ABLE and SSI Eligibility

- If the beneficiary is receiving Supplemental Security Income (SSI) benefits, when the assets in the account total \$100,000, any monthly SSI benefits will be placed in suspension.
- If the assets in the ABLE Account drop back below \$100,000, the SSI benefit suspension ceases and any SSI benefit resumes.
- The beneficiary will not have to reapply for SSI benefits once the account drops back below the \$100,000 threshold.



What can be Contributed to an ABLE Account

A program shall not be treated as a qualified ABLE program unless it provides that no contribution will be accepted other than cash



More ABLE Program Basics

- Eligible individuals may only have one ABLE account
- Accounts can function both like a savings and checking account, depending on how you want to use the account
- Account moneys are tax-exempt as long as they are spent on "Qualified Disability Expenses"

Exclude Contributions as Income

- A payment made into an ABLE account constitutes a contribution.
- Consider the contribution made by the person to whom the funds belong or are due.
- Exclude contributions to an ABLE account from the income of the designated beneficiary.
- Excluded contributions include rollovers from a member of the family's ABLE account to an SSI applicant, recipient, or deemor's ABLE account.

What is a Qualified Disability Expense (QDE)?

- Any expense related to the designated beneficiary as a result of living a life with disabilities
- Categories are intentionally broad, and include education, housing*, transportation, health care expenses and more
- If funds spent on a non-QDE, expense is subject to regular taxes, plus a 10% tax penalty – and benefits may be at risk

Qualified Disability Expenses

Qualified disability expenses (QDEs) are expenses related to the blindness or disability of the designated beneficiary and for the benefit of the designated beneficiary. In general, a QDE includes, but is not limited to, an expense for:

- Education;
- Housing;
- Transportation;
- Employment training and support;
- Assistive technology and related services;

- Personal support services;
- Health;
- Prevention and wellness;
- Financial management and administrative services;
- Legal fees;
- Expenses for ABLE account oversight and monitoring;
- Funeral and burial; and,
- Basic living expenses.

Who can Establish and Manage an ABLE Account

The only persons that can establish or have signature authority over an ABLE Account are

- the eligible individual,
- the eligible individual's agent under a valid power of attorney or if none,
- his or her parent or.
- · legal guardian or conservator.

Who can Establish and Manage an ABLE Account

 Unless the ABLE beneficiary lacks capacity, they have first priority to manage the account regardless of who established the account or if signature authority was delegated by a power of attorney.

Capacity and ABLE Accounts

Scenario:

- Fred and Wilma have a daughter named Pebbles who was born with a severe developmental disabilities.
- Fred and Wilma establish an ABLE Account under their authority as Pebbles' parents.
- Pebbles lacks capacity to manage her account or to execute a power of attorney.
- Fred and Wilma maintain signature authority over the account as parents.

Capacity and ABLE Accounts

Scenario:

- Fred and Wilma passed away in a tragic accident, and their neighbors and best friends Barney and Betty step in to take care of Pebbles.
- In order for Barney and Betty to assume signature authority over Pebbles' ABLE account they will need to become Pebbles' guardian or conservator.

Who can Establish and Manage an ABLE Account

- If the eligible individual under an ABLE
 Account has capacity it is best to have the
 individual sign a power of attorney
 immediately.
- If the eligible individual wants a to have a sibling have signature authority – then the power of attorney is the method to make this happen.

Who can Establish and Manage an ABLE Account

- In determining whether an ABLE Account is right for you or your loved one;
 - If the ABLE Beneficiary has capacity to manage his or her account, have the beneficiary establish a power of attorney in the event that the beneficiary loses capacity in the future,
 - If the designated beneficiary lacks capacity to manage the account and you have signature authority, think about how to have some way to have a successor take over in the event of your incapacity or death.

SNT to ABLE for Rent

- Belinda has been disabled from birth, and receives \$954.72 a month in SSI.
- She is a beneficiary of a self settled special needs trusts.
- She would like to move to a nicer apartment that would cost \$1,000 a month.
- She will need some assistance in order to make the move

SNT to ABLE for Rent

- If Bob her trustee were to give her \$1,000 a month directly it would be counted as unearned income and eliminate her SSI completely.
- If Bob were to pay the landlord directly

 the payments would count as ISM and her benefits would be reduced by
 \$270.
- If instead Bob were to contribute \$1,000 a month to her CalABLE Account, and in turn the funds from the account were to pay the landlord then there would be no reduction of SSI.

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