

Special Needs Trusts

vs.

ABLE Accounts

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## Introduction

Special Needs Trusts (“SNT”), also known as Supplemental Needs Trusts, were established for the purpose of allowing the beneficiary of a SNT to continue to receive public benefits. This can be accomplished because a SNT is drafted to supplement, and not replace, the public benefits that the beneficiary of the SNT may receive. The Omnibus Budget Reconsideration Act of 1993 (OBAA ’93) codified several different forms of SNTs.<sup>1</sup> The type of SNT used is solely dependent upon the facts and circumstances involved. In order to determine the type of SNT that must be used and the requirements that must be satisfied, an initial determination must be made of ownership of the assets being funded into the SNT and who will be creating the SNT.

ABLE accounts, on the other hand, are tax-free savings accounts that can be set up for individuals with disabilities to assist such individuals with expenses that are not covered by government benefits. Congress passed the Stephen Beck, Jr. Achieving a Better Life Experience Act (“ABLE Act”). The ABLE Act was designed to allow those with disabilities to have a supplemental source of assets/income beyond those provided by government benefits without losing their eligibility for those benefits. The establishment of the ABLE Act is a significant event for people with disabilities. Known as ABLE accounts, their use has proven to be very popular. Over 14,000 ABLE accounts, totaling more than \$48.5 million have been established in the first two years.<sup>2</sup>

These materials discuss the requirements for drafting a SNT, as well as the administrative issues involved in administration of a SNT. The materials also discuss the requirements and administration of an ABLE Account and the advantages and disadvantages of each option.

## Special Needs Trusts

The three main types of SNTs<sup>3</sup> used for public benefits planning are the d(4)(A) disability trust, the d(4)(C) pooled trust and the third party SNT.<sup>4</sup>

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<sup>1</sup> 42 U.S.C. §1396p(d)(4)(A), (B), and (C) (2000)

<sup>2</sup> Michelle Diament, ABLE Accounts Grow in Popularity, December 5, 2017; <http://www.disabilitycoop.com/2017/12/05/able-accounts-growing/24492/>

<sup>3</sup> The d(4)(B) trust, or Qualified Income Trust, is not considered for this article because (d)(4)(B) trusts are generally used in income-cap states, such as Florida, to allow a Medicaid applicant’s income to be trusted and paid to the nursing home, thereby not disqualifying them from Medicaid. The d4B trust is relatively simple in application and because of its unique and narrow nature, this trust is not included under the umbrella of the three basic types of SNTs mentioned above. The d(4)(B) is rarely used in Missouri because Missouri is not an income-cap state. The only known use of (d)(4)(B) trusts is for Home and Community Based Waiver Services and Programs (HCB Waiver).

<sup>4</sup> The d(4)(A) trust is defined at 42 U.S.C. §1396p(d)(4)(A) and the d(4)(C), or pooled trust is defined at 42 U.S.C. § 1396p(d)(4)(C). There is no statutory authority for a third-party SNT, but are excluded by definition under 42 U.S.C. §1396p(d)(1)-(2).

The following is an illustrative comparison and characteristic table concerning the three main types of SNTs:

<b>Trust Type</b>	<b>d(4)(A), Self-settled</b>	<b>d(4)(C), Pooled</b>	<b>Third-party SNT</b>
<b>Established by</b>	Parent, Grandparent, Legal Guardian, Court, Individual <sup>5</sup>	Parent, Grandparent, Legal Guardian, Court, Individual	Third Party (not disabled individual)
<b>Funded by Assets Belonging to:</b>	Disabled Person	Disabled Person	Third Party
<b>Beneficiary</b>	Disabled Person only	Disabled Person	Disabled Person & nondisabled person
<b>Grantor Trustee allowed</b>	No	No	Yes
<b>Distributions</b>	Payments to Third Parties	Payments to Third Parties	Payments to Third Parties
<b>Payback provision</b>	Yes	Yes	No
<b>Disability</b>	SSA Definition	SSA Definition	SSA Definition
<b>Gift tax annual exclusion</b>	Cannot use	Cannot use	Can Use
<b>Testamentary</b>	No	No	Yes
<b>Age Limit</b>	Funded by 65	No, but some states have transfer penalty for over 65	None
<b>Frequently Used For</b>	Personal injury settlement or inheritance	Smaller amounts or personal injury settlements or inheritance	Parent planning for child; testamentary gift to disabled individual; coordinate testamentary gifts; Medicaid planning

### **Drafting Considerations—It’s Not A Form**

The biggest misconception among some attorneys and the public is that a SNT is just a form or that language from one SNT can apply to all SNTs. This approach causes significant problems, which can result in a beneficiary losing their eligibility for public benefits, or unnecessary payment to the State or Federal government in a third-party SNT situation. Often, drafting mistakes prove time consuming and expensive to correct.

As a practical matter, virtually all SNTs (self-settled and third party) will be treated as “grantor trusts” for income tax purposes.<sup>6</sup> Thus, one or more of the grantor trust provisions should be spelled out in the SNT. For an SNT that is a grantor trust, all net income of the trust will be

<sup>5</sup> Originally in the passage of 42 USC §1396p(d)(4)(A), an individual could not establish a self-settled special needs trust, which apparently was an oversight in the original legislation. In 2014, the Special Needs Fairness Act, Pub. L. No. 114-225 §5007, corrected this problem, which was acknowledged by the Social Security Administration in an emergency change to the POMS. SSA EM 16053.

<sup>6</sup> I.R.C. §§671-679

treated as taxable income to the beneficiary of the trust. The income, deductions, and credits of the trust are reported on the beneficiary's individual tax return each year, and not on the fiduciary income tax return (IRS Form 1041). The result is the payment of the beneficiary's income taxes by the trust does not constitute additional income to the beneficiary.

Understanding that an SNT is a complex instrument does not stop at recognizing the different types of SNTs. Equally as important, is a thorough understanding of the underlying reason for the SNT—public benefits.

### **Know the Public Benefits**

Besides understanding the most difference between self-settled SNTs, pooled trusts, and third-party SNTs, the second most important distinction is to understand the difference and availability of government benefits to a disabled beneficiary. A cursory review of the most relevant public benefits—SSI/Medicaid and SSDI/Medicare—is discussed below.

Most SNT beneficiaries are eligible or actively seek eligibility for Supplemental Security Income (“SSI”), which is needs-based (limited income and assets). The SSI eligibility rules are the most important rules to grasp because the concepts are central to understanding other eligibility rules.

SSI rules have a simple way of distinguishing between income and assets: Money received in a given month is income in that month, and any portion of that income remaining on the first day of the next month becomes an asset. In Missouri, an SSI beneficiary who receives Medicaid<sup>7</sup> is limited to no more than \$2,000<sup>8</sup> in assets. Some types of assets are not counted in this calculation (called “non-countable”) and include: beneficiary's home, one car, household furnishings, prepaid burial contracts (need to be irrevocable), life insurance with no more than \$1,500 cash value, tools of the beneficiary's trade, and personal items.

In many states, receipt of SSI payments automatically qualifies the beneficiary for Medicaid eligibility.<sup>9</sup> Unfortunately, Missouri is not one of those states. Missouri is known as a “209(b)”<sup>10</sup> state, which means that it uses at least one eligibility component that is more restrictive than the Medicaid eligibility standard in place on January 1, 1972.

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<sup>7</sup> In Missouri, the Medicaid program is now known as “MO HealthNet”. For purposes of this article, the more general and widely-known term “Medicaid” will be used.

<sup>8</sup> 20 CFR §416.1205(c)

<sup>9</sup> There are currently 41 states that are referred to as §1634 states. A §1634 agreement specifies the state's and SSA's responsibilities and requires the state to provide Medicaid coverage to SSI recipients. 42 U.S.C. §1383c (2000)

<sup>10</sup> 42 U.S.C. §1396a(f) (2000)

Social Security Disability Insurance (“SSDI”) and Medicare benefits are not “means-tested.” Thus, there are no financial eligibility requirements. After receiving SSDI for 24 months, the beneficiary will qualify for Medicare benefits. During the two-year wait for Medicare, however, a beneficiary may rely on Medicaid benefits, if eligible.

Because SSI/Medicaid are the usual benefits considered with SNTs, the special-needs language and distribution standards are critically important because the wrong language could result in either income or assets being “available” to that beneficiary for SSI/Medicaid purposes.

### **Critical Use of Distribution Standards—Discretionary vs. Support**

The common law and Restatement of Trusts (Second) treat discretionary trusts and support trusts differently.<sup>11</sup> In essence, discretionary trusts provide no standards for the exercise of trustee discretion and support trusts require the trustee to use income and principal for the beneficiary’s support. The Restatement (Third) of Trusts and the Uniform Trust Code (“UTC”) eliminate the distinction between discretionary and support trusts, treating support trusts as discretionary trusts with a support standard. Missouri adopted the Uniform Trust Code,<sup>12</sup> effective January 1, 2005, which many critics believed would jeopardize the use of SNTs.<sup>13</sup> A recent article analyzed and dismissed the concerns that critics had about the UTC’s affect on SNTs.<sup>14</sup> The most important distinction in applicable SNT trust language will be the rights of the beneficiary to distributions according to the extent of the trustee’s discretion and the trust’s distribution standards.

For all purposes, an SNT should only contain pure discretionary distribution standards. The reason behind this is while the UTC is silent concerning a beneficiary’s right to compel distributions, at common law,<sup>15</sup> a beneficiary of a purely discretionary trust has no ability to compel a distribution if the trustee has “sole,” “uncontrolled,” or “absolute” discretion.<sup>16</sup> Conversely, if a trust contains support language, i.e., “support and maintenance,” a beneficiary generally has the right to compel the trustee to make distributions under the support distribution standard.

In addition to avoiding such toxic support language as, “support and maintenance” in an SNT, language that spells out the settlor’s intent to supplement and not supplant public benefits is

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<sup>11</sup> See Sections 154 and 155 of the Restatement of Trusts. (Second)

<sup>12</sup> Mo. Rev. Stat. §§456.1-101 through 456.11-1106 (2009)

<sup>13</sup> Mark Merric and Douglas W. Stein, *A Threat to All SNTs*, Trusts and Estates, Nov. 2004

<sup>14</sup> Richard E. Davis, *Uniform Trust Code and SNTs: Should UTC be Feared, Embraced or Ignored?*, NAELA Journal, Vol. 5, 2009, No. 1

<sup>15</sup> The common law of the controlling jurisdiction would guide the analysis concerning a beneficiary’s right to compel a distribution. See Mo. Rev. Stat. §456.1-106 (2009) and accompanying UTC comment.

<sup>16</sup> Restatement (Third) of Trusts, §50 cmt. b., Reporter’s Notes to cmt. a and b (2001)

highly recommended.<sup>17</sup> The Comment to the UTC § 103 also highlights that the settlor’s intent is controlling, and courts place great emphasis on the settlor’s intent in questions of construction.<sup>18</sup> This is important because inevitably, unwary practitioners will continue to draft SNTs with hybrid distribution language of a “discretionary support trust,” (i.e., “trustee has discretion to make distributions to beneficiary for health, education, maintenance, and support”). A clause reflecting the settlor’s intent could provide evidence to support a finding that despite support language, a trust is discretionary.<sup>19</sup> Some attorneys that draft SNTs mistakenly believe that the ascertainable standards of, “health, education, maintenance, and support” are necessary,<sup>20</sup> or that the standards should be inserted for good measure. This is an incorrect assumption, and usually, a costly mistake that can harm a beneficiary on public benefits.

### **Choice of Trustee**

The choice of trustee for a SNT is important and often overlooked. With some exceptions, the biggest challenge for a lay-person trustee or professional trustee alike, concern proper distributions from the trust to the beneficiary.

Frequently, a family member (parent, sibling, etc.) is appointed as trustee or co-trustee of a SNT, and comes to the role with little fiduciary experience. Frequently, it makes sense to involve a family member who usually has extensive personal knowledge about the disabled beneficiary and the beneficiary’s needs and wants. The challenge is to properly educate and inform the lay-person trustee about public benefits, the distribution rules, and the importance of maintaining public benefits. This is why it is a good idea to develop an informational instructional guide concerning the person’s duties and responsibilities as a trustee and arm them with as much information as possible from the outset of the fiduciary relationship. A corporate or professional trustee or co-trustee may be a preferred choice for a number of reasons: public-benefits knowledge, compliance with fiduciary laws, has investment expertise, understands taxes, has insurance, and has experience concerning trust administration.

Generally, a court approving a d(4)(A) SNT is likely more reassured if a professional fiduciary is a co-trustee with a family member of the beneficiary because of the professional’s expertise and experience.

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<sup>17</sup> See *Tidrow v Director, Missouri Div. of Family Serv.*, 688 S.W.2d 9 (Mo. App. E.D. 1985)

<sup>18</sup> *Webb v St. Louis County National Bank*, 551 S.W.2d 869, 875 (Mo. App. 1977)

<sup>19</sup> See *Pohlmann v Nebraska Dept. of Human Resources*, 710 N.W.2d 639 (Neb. 2006)

<sup>20</sup> Generally, “HEMS” distribution standards in trusts usually concern estate-tax and gift-tax planning, which is beyond the scope of this article. See I.R.C. §§2041, 2511, 2514

## What Can the Trust Pay For?

The most vexing issues concerning SNTs usually involve administration questions due to the complicated SSI income and asset rules.

SSI has a concept of “in-kind support and maintenance” (“ISM”) that is central to understanding SNT administration. Any payment from a third party—trust included—for necessities of life like food or shelter, will be treated as countable income to the beneficiary. SSI rules distinguish between “earned” and “unearned” income. Earned income means that work is performed in exchanged for the income. Unearned income is passively received, such as bank account interest or SSDI payments. An SSI recipient can receive \$20 per month in any type of income, which is called the “disregard” amount. The classification of income (earned vs. unearned) has an important effect for SSI purposes. Any unearned income reduces the SSI benefit by the amount of the income, so investment income or gifted money will reduce SSI dollar-for-dollar, minus the \$20 disregard. Earned income is treated more favorably, because it only reduces SSI benefits by approximately one-half. The result is that the effect of a beneficiary receiving ISM is that the SSI benefit is reduced by the lesser of the presumed maximum value of the items provided or an amount calculated by dividing the maximum SSI benefit by three and adding the \$20 disregard amount. For 2018, the maximum federal SSI benefit for a single person is \$750/month. A one-third amount reduction is \$241.00, which means that is the maximum amount SSI can be reduced regardless of the value of the ISM.

The Social Security Administration (“SSA”) treats the following items as “food and shelter” which means that payment of these expenses is ISM to the beneficiary: food, mortgage (including property insurance), real property taxes, rent, heating fuel, gas, electricity, water, sewer, and garbage removal. Usually, an SNT should avoid making ISM payments that would reduce the monthly SSI benefit. But in some cases, it makes sense to take the one-third reduction in SSI benefits and have a trust make ISM payments. The analysis should always hinge on what the numbers indicate is the maximum benefit to the beneficiary.

Conversely, some expenses that an SNT can pay for in Missouri include: clothing,<sup>21</sup> phone, cable, internet service, newspaper, vehicle,<sup>22</sup> insurance, maintenance, gas,<sup>23</sup> pre-paid burial/funeral

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<sup>21</sup> After March 7, 2005, clothing purchases for a beneficiary were no longer considered ISM.

<sup>22</sup> Some states restrict value, type and title ownership of vehicles.

<sup>23</sup> The beneficiary should have a gas-company credit card because the card cannot be used to purchase food or shelter, or converted into cash.

arrangements,<sup>24</sup> tuition, books, tutoring, travel<sup>25</sup> and entertainment, household furnishings and furniture, TV, computers and electronics, durable medical equipment, care management,<sup>26</sup> therapy, medications, taxes,<sup>27</sup> and legal and trustee fees.

### **Social Security Administration POMS**

There are no federal regulations concerning trusts as countable “resources” for purposes of a means-based testing analysis for public benefits (SSI, Medicaid, etc). As a result, the Social Security Administration's Program Operations Manual System (“POMS”),<sup>28</sup> the publicly available operating instructions for processing Social Security claims contain the underlying operating instructions for SNTs. The United States Supreme Court has applied the Skidmore Doctrine<sup>29</sup> and elevated the POMS to the force of law in the absence of federal regulations.

In January 2009, which have been subsequently updated on several occasions, including an update in May, 2018, the Social Security Administration made changes to the POMS relating to both first party and third party special-needs trusts.<sup>30</sup> These changes included revisions and clarifications to drafting requirements and trust administration.

### **Significant POMS Changes Affecting Drafting of Special-Needs Trusts**

(1) **Spendthrift Clause.**<sup>31</sup> The POMS require that every trust that seeks to be a non-countable resource must contain a spendthrift clause which means that the trust must prohibit both voluntary and involuntary transfers of the beneficiary’s interest in the trust income or principal. However, Missouri Case Law holds that for Mo HealthNet eligibility, a Spendthrift Clause in a SNT is not required.<sup>32</sup>

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<sup>24</sup> Some states may limit the amount of the burial contract. The contract or plan must be irrevocable.

<sup>25</sup> There may be concern about payment for hotels and restaurants meeting the “food and shelter” definition. Further, some states may impose limitations on companion travel not found in federal law. Airline tickets must be “non-refundable” and must not be able to be converted to cash.

<sup>26</sup> There is no federal limitation, but many states attempt to limit payments for care if made to a family member or other relative, especially if there is an obligation of support (e.g. parents of a minor child).

<sup>27</sup> States may attempt to direct trust language on what taxes can be paid for, such as taxes incurred as a result of trust assets or at the death of the beneficiary.

<sup>28</sup> The SSA POMS can be found online at: <http://secure.ssa.gov/apps10/poms.nsf/partlist!OpenView>

<sup>29</sup> See *Skidmore v Swift & Co.*, 323 U.S. 134, 139-140 (1944); Also See *United States v Mead Corp.*, 533 U.S. 218, 228, 234-235 (2001).

<sup>30</sup> The identifying resource section concerning trusts begins online at <http://secure.ssa.gov/apps10/poms.nsf.Inx/0501120200>. The 3 application trust sections are: SI 01120.200; SI 01120.201; and SI 01120.203.

<sup>31</sup> POMS SI 01120.200 B16; POMS SI 01120.200 D1a; POMS SI 01120.200 D1b.

<sup>32</sup> *Missouri Division of Family Services v Wilson*, 849 S.W. 2d 104 (Mo. App. W.D. 1993)



(2) **Revocation and Termination.**<sup>33</sup> In a third-party trust, the focus is on whether the individual can terminate the trust and obtain the assets. If a beneficiary had the right to revoke the trust, the assets in the trust would be an available resource to the beneficiary. In addition, if the beneficiary has the right to terminate a trust, then the assets are considered a countable asset. At the early termination of a first party special needs trust, the trust document must provide that the state or states, if more than one state has provided medical assistance, shall be reimbursed for all medical services received by the trust beneficiary, to the extent to which funds are in the trust. Upon such early termination, the remaining funds in the trust must be paid to the trust beneficiary. The decision to terminate trust cannot be made by the trust beneficiary.<sup>34</sup>

(3) **Revocability of Grantor Trust.**<sup>35</sup> This POMS provides that when “heirs-at-law” are named as a class of individuals that would receive the residuary of a self-settled trust rather than specific named individuals, that in most states, the trust would be considered to be irrevocable and as a result, not a countable resource. Missouri follows this provision.<sup>36</sup>

(4) **Child support and maintenance.**<sup>37</sup> Child support or maintenance properly assigned and paid directly into a Special Needs Trust as a result of a court order are not income, as long as the assignment is irrevocable.

(5) **Payback.**<sup>38</sup> A Medicaid payback provision cannot be limited to a particular period of time. A Medicaid payback provision includes any funds paid on behalf of the disabled person since birth. The payback is not limited to Medicaid expenditures made after the trust was established. In addition, the trust must state that Medicaid payback will be made to all states that provided medical assistance.<sup>39</sup>

The POMS also clarifies that taxes, other than death taxes, are prohibited distributions prior to the Medicaid payback.<sup>40</sup> Also, although State law usually provides as such, a trust should clearly reflect that the State is considered a creditor rather than a residual or contingent beneficiary.<sup>41</sup>

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<sup>33</sup> POMS SI 01120.200 B19; POMS SI 01120.200 B20; POMS SI 01120.200 D1b

<sup>34</sup> POMS SI 01120.199, Early Termination Provisions and Trusts

<sup>35</sup> POMS SI 01120.200 D3

<sup>36</sup> POMS SI KC01120.200; Revocability of Grantor Trusts (RTN 8-07/2009)

<sup>37</sup> POMS SI 01120.200 G1d

<sup>38</sup> POMS SI 01120.203 B1h

<sup>39</sup> POMS SI 01120.203 B1h; POMS SI 01120.203 B2g

<sup>40</sup> POMS SI 01120.203 B3b

<sup>41</sup> POMS SI 01120.200 H1b

(6) **Sole Benefit.**<sup>42</sup> The d(4)(A) or d(4)(C) trust must be established for the sole benefit of the disabled individual. Thus, a trust will be disqualified if it contains provisions that provide benefits to other persons during the lifetime of the beneficiary or allow for termination of the trust prior to the individual's death and payment of the corpus to another individual or entity.<sup>43</sup> This rule is clarified in the most recent POMS to provide that the term "sole benefit" does not mean that this prevents any collateral benefit to anyone than the trust beneficiary. As noted in the POMS, "[t]he key to evaluating this provision is that, when the trust makes a payment to a third party for goods or services, the goods or services must be for the primary benefit of the trust beneficiary."<sup>44</sup>

(7) **Legal Authority to Establish Trust.**<sup>45</sup> A party must have "legal authority" to create a trust or else the trust will be a countable resource to the beneficiary. A legally competent disabled adult may transfer her/his own assets into a trust or another party acting under a valid power of attorney may establish the trust or transfer of assets.<sup>46</sup> A trust can also be established by a court, but note that approval of a trust created by an ineligible party by a court is not sufficient.

(8) **Seed Trust.** Some states require that a self-settled trust must be funded with an asset by the party that established the trust. The SSA allows the establishing party to "seed" the trust with a nominal amount of their own funds. Missouri acknowledges that some property interest must be contributed to the trust for proper creation.<sup>47</sup> Under the MUTC definition of property, this could include a nominal amount of money, i.e., \$10.

### **Changes Affecting Administration and Management of Trust Assets**

Even if a trust is drafted properly to qualify for d(4)(A) or d(4)(C) treatment and does not disqualify an SSI recipient on application of the SSI resource rules, the trustee could violate the monthly SSI income rules when making a distribution for the benefit of the elderly or disabled beneficiary. The new POMS provide clarification concerning allowable trust distributions.

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<sup>42</sup> POMS SI 01120.203 B3e

<sup>43</sup> POMS SI 01120.201 I1e

<sup>44</sup> POMS SI 01120.201 F3a; ...the key to evaluating this provision is that, when the trust makes a payment to a third party for goods or services, the goods or services must be for the primary benefit of the trust beneficiary. You should not read this so strictly as to prevent any collateral benefit to anyone else. For example, if the trust buys a house for the beneficiary to live in, that does not mean that no one else can live there, or if the trust purchases a television, that no one else can watch it. On the other hand, it would violate the sole benefit rule if the trust purchased a car for the beneficiary's grandson to take her to her doctor's appointments twice a month, but he was also driving it to work every day.

<sup>45</sup> POMS SI 01120.203 B1g

<sup>46</sup> POMS SI 01120.203 B1f

<sup>47</sup> Mo. Rev. Stat. §§456.4-401, 456.1-103 (11) (2009)

(1) **Distributions that are Income.** Distributions from the trust to third parties that result in the beneficiary receiving non-cash items are countable as income the month of receipt if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt.<sup>48</sup> This means that payments to third parties for in-kind goods and services which are not food or shelter are not countable income to the beneficiary.

(2) **Distributions that are Not Income.** Distributions made from the trust to a third party that result in the beneficiary receiving non-cash items (other than food or shelter) are not income if those items would become a totally or partially excluded non-liquid resource if retained into the month after the month of receipt.<sup>49</sup>

(3) **Distribution not for Benefit of Beneficiary.** If a trust is established with assets of the individual or his or her spouse, any disbursement from the trust that is not made to or for the benefit of the individual is considered a transfer of resources as of the date of payment and is not considered income to the individual.<sup>50</sup>

(4) **Disbursement for Credit Card Bills.** If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on what was on the bill. If the trust pays for food or shelter items on the bill, the individual will generally be charged with in-kind support and maintenance up to the PMV. If the bill includes non-food, non-shelter items, the individual usually does not receive income as the result of the payment unless the item received would not be a totally or partially excluded non-liquid resource the following month.<sup>51</sup> For example, if the credit card bill includes restaurant charges, payment of those charges results in ISM. If the bill also includes purchase of clothing, payment for the clothing is not income.

(5) **Disbursement for Gift Cards and Gift Certificates.** Gift cards and gift certificates are considered cash equivalents. If a gift card/certificate can be used to buy food or shelter (e.g. restaurant, grocery store or VISA gift card), it is unearned income in the month of receipt. Any unspent balance on the gift card/certificate is a resource beginning the month after the month of receipt. If the store does not sell food or shelter items (e.g. bookstore or electronics store), but the card does not have a legally enforceable prohibition on the individual selling the card for cash, then it is still unearned income.<sup>52</sup> The value of the gift card/certificate is not income in the month

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<sup>48</sup> POMS SI 01120.200 E1a; POMS SI 01120.201 I1a

<sup>49</sup> POMS SI 01120.200 E1c

<sup>50</sup> POMS SI 01120.200 E2; POMS SI 01120.201 I1c

<sup>51</sup> POMS SI 01120.201 I1d

<sup>52</sup> POMS SI 01120.201 I1e

received if the gift card/certificate cannot be used to purchase food or shelter and cannot be resold.<sup>53</sup> Some trustees are providing gift cards to the beneficiary or the beneficiary's family in \$20 monthly increments since \$20 is the allowable monthly disregard. A credit card issued in the name of the beneficiary, however, is not a cash equivalent because any use of the credit card becomes a debt legally owed by the beneficiary, which is allowed under the POMS.<sup>54</sup> This problem has been remedied by the new company, True Link, which provides magnetic cards for purchases, if the funds loaded on the magnetic cards are from a third party. The Social Security Administration has blessed the use of the True Link card for SSI recipients.<sup>55</sup>

### **Pooled Trusts (42 U.S.C. § 1396p(d)(4)(C))**

(1) **Transfers to Pooled Trusts.** A transfer of resourced to a pooled trust for an individual age 65 or over may result in a transfer penalty.<sup>56</sup> In Missouri, as of this writing, there is a transfer penalty for an individual over age 65 funding a pooled trust.

(2) **Sole Benefit Of.** The individual trust account of a pooled trust must be established for the sole benefit of the disabled individual. This exception does not apply if the account provides a benefit to any other individual or entity; or allows for termination of the trust account prior to the individual's death and payment of the corpus to another individual or entity.<sup>57</sup>

(3) **Who Established Trust Account.** A legally competent disabled individual who establishes or adds to a pooled trust account with his or her own funds has the legal authority to act on his or her own behalf. A third party establishing a trust account on behalf of another individual with that individual's assets must have legal authority to act with regard to the assets of the individual.<sup>58</sup> An attempt to establish a trust account by a third party with the assets of an individual without the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust. In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient.

(4) **Payback.** The trust must provide payback for any State(s) that may have provided medical assistance under any State Medicaid Plan and not be limited to any particular State.

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<sup>53</sup> POMS SI 00830.522

<sup>54</sup> POMS SI 01140.300

<sup>55</sup> POMS SI 01120.201 I1e; <https://www.truelinkfinancial.com/card/true-link-card>

<sup>56</sup> POMS SI 01120.203 B2a

<sup>57</sup> POMS SI 01120.203 B2e

<sup>58</sup> POMS SI 01120.203 B2f

Medicaid payback also cannot be limited to any particular period of time, i.e., payback is applicable from Medicaid recipient's birth.<sup>59</sup>

### **The ABLE Act**

ABLE accounts, established under the ABLE Act, are designed to be substantially similar to 529 plans which are the education savings plans to help families prepare financially for college. ABLE accounts, which are now referred to as 529A plans, provide people with disabilities a savings mechanism, just like other Americans. Income earned by the new 529A accounts, just like 529 plans, will not be taxed and contributions to the account are not deductible for Federal Income Tax. The ABLE Act allows distributions from the ABLE accounts for qualified disability expenses, such as "medical care, education, employment, training, housing, transportation and other expenses."<sup>60</sup>

The establishment of ABLE accounts is a significant additional vehicle for people with disabilities to attempt to live life not mired in poverty. Persons with disabilities have very high and significant costs of living over and above those who do not have disabilities. In order to live, most people with disabilities must rely on government benefit program such as Supplemental Security Income ("SSI") and Medicaid. The ABLE Account recognizes that people need more than \$2000 in available resources to be able to sustain their lives. This limitation leaves very little safety net for a person with disabilities. The ABLE Account recognizes this and permits eligible individuals and families to establish savings accounts which will not affect their eligibility for SSI, Medicaid and other public benefits. The legislation explains that ABLE accounts will with private savings "secure funding for disability related expenses on behalf of designated beneficiaries with disabilities that will supplement, not supplant benefits provided through private insurance, Medicaid, SSI, the beneficiary's employment and other sources."<sup>61</sup>

ABLE accounts are designed to be a less complicated and less expensive alternative to a special needs trust ("SNT").<sup>62</sup> In fact, the disability community is touting that people can establish

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<sup>59</sup> POMS SI 01120.203 B1h; POMS SI 01120.203 B2g

<sup>60</sup> Note: This is the full text of the Section in the ABLE Act: (5) Qualified disability expenses: The term "qualified disability expenses" means any expenses related to the eligibility individual's blindness or disability which are made for the benefit of an eligible individual who is a designated beneficiary, including the following expenses: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary under regulations and consistent with the purposes of this section. 26 USC §529A(e)(5)(2018)

<sup>61</sup> Achieving a Better Life Experience Act of 2014, Pub. L. 113-295, §101, 128 Stat. 4056 (2014)

<sup>62</sup> "The ABLE Act vs. The Special Needs Trust: Which financial tool is right for your family?"

<http://specialneedsplanning.net/2015/01/the-able-act-vs-the-special-needs-trust-which-financial-tool-is-right-for-your-family/>, January 15, 2015.

ABLE accounts without any attorney involvement.<sup>63</sup> At present, the Internal Revenue Service (“IRS”) has yet to implement regulations about ABLE accounts, but the Social Security Administration and many state agencies have issued their rules about ABLE accounts and their state government benefits.<sup>64</sup>

### **Who is Eligible for an ABLE Account?**

The ABLE Act states that the eligibility will be limited to those individuals with significant disabilities who are disabled before turning 26 years of age. If an individual meets that criteria and is also receiving benefits under SSI and/or SSDI, they are automatically eligible to establish an ABLE Account. If a person with a disability is not already receiving disability benefits through the Social Security Administration they would still be eligible, through a certification process, to open an ABLE Account. This certification requires that the SSI criteria regarding significant functional limitations be documented. This certification cannot be used to qualify for Social Security benefits such as SSI or SSDI, rather it is a certification that is peculiar to ABLE accounts.<sup>65</sup>

### **ABLE Accounts Requirements under the Federal Statute**

The new ABLE accounts will be similar to 529 Plans in a number of ways, but very different in others. Here are some of the highlights:

- A person with a disability can only have only one ABLE Account if they were disabled by age 26.<sup>66</sup> During the congressional discussions leading to the passage of the ABLE Act, the age of disability was reduced to age 26 to make the law palatable to the budget conscious members of Congress. If every person with a disability, regardless of age, could open an ABLE Account, the projected cost of the program would explode.<sup>67</sup> By limiting the qualifying age to 26, the Congressional Budget Office found the cost of ABLE accounts would be greatly lessened. What does it mean to have a disability before age 26? The easy answer is that someone who is receiving Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI, or SSD) benefits by that age qualifies. Others might qualify, but it will be harder to establish eligibility.

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<sup>63</sup> *Id.*

<sup>64</sup> <http://www.irs.gov/government-entities/federal-state-local-governments/tax-benefit-for-disability-irc-section-529a>. June 2015 IRS Proposed ABLE Regulations: <http://www.gpo.gov/fdsys/pkg/FR-2015-06-22/pdf/2015-15280.pdf>. November, 2015 IRS updated guidance: <http://www.irs.gov/pub/irs-drop/n-15-81.pdf>.

<sup>65</sup> 26 USC §529A(e)(2)(A)(2018)

<sup>66</sup> This is an issue for divorced parents. There is concern, to this author, that the establishment of an ABLE Account for a child with disabilities will become an additional source of conflict for divorced parents.

<sup>67</sup> Congressional Budget Office. H.R. 647 *Achieving a Better Life Experience Act of 2014*. August 27, 2014. <http://cbo.gov/sites/default/files/113th-congress-2013-2014/costestimate/hr6470.pdf>

- Each person with a disability can have just one ABLE Account. Originally, the legislation required that it be established in the ABLE Account owner’s state of residency. The residency requirement has been eliminated in subsequent legislation<sup>68</sup>.
- Maximum contributions to an ABLE Account may not exceed the present interest gift tax exclusion in a given year. The 2018 maximum contribution to an ABLE Account is \$15,000.<sup>69</sup> This figure will increase as the gift tax exclusion amount increases.
- The maximum size of an ABLE Account will be set by each state limit for total contributions to 529 Plans, which in Missouri is \$325,000<sup>70</sup>. If the account grows to more than \$100,000, the beneficiary’s Supplemental Security Income (SSI) benefits will be suspended, but not MO HealthNet benefits.<sup>71</sup>
- When the ABLE Account beneficiary dies, remaining assets in the account will be paid to the state Medicaid program which provided benefits after the establishment of the ABLE Account.<sup>72</sup> There is some controversy about the failure to advise people of the Medicaid payback provision in the promotion of ABLE accounts.<sup>73</sup>
- If ABLE Account funds are used to pay for “qualified disability expenses,” there will be no income taxation on the interest or gain in value of the ABLE assets, and the expenditure will not be counted as income for government benefits to the beneficiary.<sup>74</sup>
- ABLE accounts cannot be used as security for a loan.<sup>75</sup> Rollovers from one ABLE Account to another are permitted, however the rollover must be done within 60 days of the closing of the original ABLE Account for the same designated beneficiary or other disabled family member.<sup>76</sup> Rollovers are permitted only once every 6 months and ABLE accounts use calendar months.<sup>77</sup>

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<sup>68</sup> Pub.L.No. 114-113, Div Q, Title III, Subtitle A, Section 303; enacted December 18, 2015.

<sup>69</sup> <http://www.irs.gov/newsroom/in-2018-some-tax-benefits-increase-slightly-due-to-inflation-adjustments-others-unchanged>

<sup>70</sup> Per 26 IRC §529A, the state amount of the ABLE Account value cannot be greater than the 529 plan limit, but the state can lower the limit. The Missouri limit for a 529 plan is \$325,000. The Income Maintenance Manual (IM 96, Issued 10/26/2015) states that for MO HealthNet benefits, the ABLE Account limit is \$325,000.

<sup>71</sup> IM #96, 10/26/2015. [http://dss.mo.gov/fsd/iman/memos/memos\\_15/im096\\_15.html](http://dss.mo.gov/fsd/iman/memos/memos_15/im096_15.html); Public L. No. 114-113, DWQ, Title III, Subtitle A, Sec. 303 – December 18, 2015.

<sup>72</sup> 26 USC §529A(f)(2018)

<sup>73</sup> See ARC website and UCP website. National Association of State Treasurers, “ABLE accounts Slow to Catch On but Hold Promise”, (January 12, 2018). <http://nast.org/able-accounts-slow-catch-hold-promise/>

<sup>74</sup> 26 USC §529A(a)(2018)

<sup>75</sup> 26 USC §529A(b)(5)(2018)

<sup>76</sup> 26 USC §529A(c)(1)(C)(2018)

<sup>77</sup> *Id.*

- Notice of the establishment of the ABLE Account and regular reporting of distributions for ABLE accounts are required under 26 IRC §529A. The Secretary of the IRS is directed by the statute to create reporting mechanisms for these reporting requirements.<sup>78</sup> These regulations have yet to be written. Federal ABLE Act requires each ABLE program must provide a separate accounting for each designated beneficiary.
- Should the ABLE Account holder no longer be disabled, the continuation of the ABLE Account is permitted; however any distributions from the account are taxable and no more contributions can be made to the ABLE Account. Should the ABLE Account subsequently become disabled, the account can be reinstated as an ABLE Account.<sup>79</sup>
- Contributions can be made only in cash; contributions in-kind are not permitted.<sup>80</sup>

### **The Federal ABLE Act**

The Federal ABLE Act specifically states that if the ABLE Account balance becomes greater than \$100,000, SSI benefits are not terminated, but rather suspended until the ABLE Account balance is lower than \$100,000.<sup>81</sup> In some states, which couple Medicaid eligibility with SSI eligibility, the suspension is critical. Missouri does not. For this reason, the suspension rules are not of importance to practitioners in Missouri at present. There are exceptions to the ABLE Act's permitted suspension of SSI benefits for an ABLE Account with a balance of more than \$100,000. Those exceptions include the SSI recipient has other resources exceeding the SSI resource limits, distributions from the ABLE Account, which are not qualified disability expenses, and any ABLE Account distribution, for anything other than housing, which is saved for a short period of time rather than immediately spent.<sup>82</sup>

### **Social Security Administration Treatment of ABLE Accounts**

Social Security Administration ("Social Security") issued its directives on ABLE accounts on October 19, 2016, which were further refined in May, 2018.<sup>83</sup> Supplemental Security Income ("SSI") is the Social Security Disability benefit program that is means tested.<sup>84</sup> The Social Security requirements for ABLE accounts only pertain to SSI recipients. For SSI recipients who establish an

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<sup>78</sup> 26 USC §529A(g)(2018)

<sup>79</sup> Guidance Under Section 529A: Qualified ABLE Programs, 80 Fed. Reg. 35603, 35605 (June 22, 2005)

<sup>80</sup> 26 USC §529A(a)(2)(A)(2018)

<sup>81</sup> Achieving a Better Life Experience Act of 2014, Pub. L. 113-295, §103(b), 128 Stat. 4056 (2014)

<sup>82</sup> POMS SI 01130.740 C.5 – Outlines the criteria to saving unspent distributions. It is imperative that the rules be followed carefully.

<sup>83</sup> POMS SI 01130.740

<sup>84</sup> Social Security Disability (SSDI) recipients have no limitations on resources they own. Therefore the Social Security restrictions for ABLE Account owners who receive SSDI are not relevant.



ABLE Account, the Social Security Administration will not consider the account an available resource for eligibility if the ABLE Account:

- Is established in a state authorized ABLE Program.<sup>85</sup>
- The ABLE Account is owned by the individual with a disability, regardless of the person with signatory powers.<sup>86</sup>
- Contributions and income earned from ABLE accounts are not considered income or assets for SSI eligibility.<sup>87</sup> Nor does a distribution for an ABLE Account count as income for SSI eligibility. Rather the Social Security Administration considers a distribution from an ABLE Account to be a conversion of a resource from one form to another.<sup>88</sup>
- Social Security does not have many requirements for evidence of the disability certification; all SSI recipients have been declared, previously, disabled. Social Security does acknowledge that there must be a certification of disability that states that the ABLE Account owner is blind or has a “medically determinable impairment or blindness and that disability occurred prior to the age of 26.”<sup>89</sup> Social Security does not require any certification of disability by a medical professional.
- Social Security permits control of an ABLE Account be held by the account beneficiary, a parent or guardian of an account beneficiary or by an agent of the account holder serving under a Power of Attorney. No one else can have control of the account.<sup>90</sup> Regardless of control or signatory authority, the ABLE Account remains the asset of the account beneficiary for Social Security purposes.<sup>91</sup>
- Social Security has used the same definitions and explanations of “qualified disability expenses” that were issued by the IRS in their proposed regulations of ABLE accounts. The expenses are not limited to medical expenses, but rather are more broad. The laundry list in POMS SI 01130.740.B.5 mirrors the list in proposed IRC 26 IRC 529A: administrative expenses, including legal fees, and accounting fees, education, transportation, employment supports, health, including prevention and

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<sup>85</sup> POMS SI 01130.740.A

<sup>86</sup> POMS SI 01130.740.B.4

<sup>87</sup> POMS SI 01130.740.C.1

<sup>88</sup> POMS SI 01130.740.C.4, SI 01110.600.B.4

<sup>89</sup> POMS SI 01130.740.B.1

<sup>90</sup> POMS SI 01130.740.B.4

<sup>91</sup> *Id.*

wellness, and funeral and burial expenses.<sup>92</sup> Interestingly, Social Security includes housing expenses as permissible distributions from ABLE accounts without any reduction of SSI benefits. This is contrary to standard Social Security rules which reduce the monthly SSI benefit if a third party pays any part of the recipient's housing or food costs.<sup>93</sup> Social Security has made this determination because of the underlying principle adopted by Social Security that a distribution from an ABLE Account is merely a conversion of an asset rather than a distribution of income.<sup>94</sup> Unlike ABLE accounts, any distribution from a Special Needs Trust for the payment of food or housing costs is a payment of in-kind maintenance and support which triggers an automatic reduction in SSI benefits. For this reason, ABLE accounts are beneficial to an SSI recipient to have their housing and food paid as an ABLE Account distribution.

- Unlike ABLE accounts, first party special needs trusts have no authority to pay any expenses post death, including creditors, administrative fees and expenses, funerals, etc.
- Social Security, unlike their analysis of special needs trusts, has not required that all distributions must be for the “sole benefit” of the ABLE Account owner.<sup>95</sup> Some ABLE account beneficiaries may also be a beneficiary of a special needs trust or pooled trust, as described in section 1917(d)(4) of the Act. Distributions from such trusts made on behalf of the trust beneficiary to the beneficiary's ABLE account should be treated the same as contributions to ABLE accounts from any other third party. Thus, while distributions from an SNT or pooled trust can be considered in some circumstances income to the trust beneficiary, disbursements from an SNT or pooled trust to the ABLE account of the trust beneficiary are not counted as income. Therefore, states should disregard as income a distribution from an SNT or pooled trust that is deposited into the ALBE account of the SNT or pooled trust.<sup>96</sup>

## **MO HealthNet Treatment of ABLE Accounts**

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<sup>92</sup> POMS SI 01130.740.B.5

<sup>93</sup> POMS SI 00835.001, POMS SI 00835.200, POMS SI 00835.300

<sup>94</sup> POMS SI 01130.740.C.4

<sup>95</sup> Compare POMS SI 01120.201F, POMS SI 01130.740

<sup>96</sup> POMS SI 01120.200 and SI 01130.740

MO HealthNet revised its Income Maintenance Manual to advise its eligibility workers as to the effect of ABLE accounts on MO HealthNet eligibility. Memorandum, IM #96, was issued on October 26, 2015.<sup>97</sup> IM #96 directs eligibility workers of the Family Support Division, Missouri Department of Social Services to disregard ABLE accounts as resources for eligibility of MO HealthNet, Food Stamps, Temporary Assistance and the Child Care Subsidy Program.<sup>98</sup> As with Social Security, the Family Support Division defined “qualified disability expenses” using the same definition and list of expenses that was issued by the IRS in 26 IRC 529A. However, Missouri, in IM #96, determined that medical expenses paid from an ABLE Account cannot be used in the spenddown calculation for MO HealthNet.<sup>99</sup>

MO HealthNet after the death of the ABLE Account owner, must be reimbursed for medical services expenditures made after the establishment of the ABLE Account. This is unlike special needs trusts created by 42 USC §1396p(d)(4)(A)(B)+(C), known as a first party special needs trusts, which require reimbursement for all Medicaid services during the lifetime of the trust beneficiary. Reimbursement to MO HealthNet shall be pro rata between all states that provided medical services. However, unlike 42 USC §1396p(d)(4)(A)(B)+(C), final expenses, including administrative expenses and final qualified disability expenses can be paid prior to the reimbursement to the state. Also, ABLE accounts can make a distribution for funeral expenses after the death of the ABLE Account owner, which is not permitted for first party special needs trusts.<sup>100</sup>

### **MO HealthNet Payback on ABLE Accounts**

ABLE accounts, under Federal and State law, including Missouri, must require reimbursement to the State for all medical services provided subsequent to the establishment of the ABLE account.<sup>101</sup> Reimbursement provisions can be problematic for ABLE accounts established with funds from another party, rather than the ABLE Account owner. Should that third party create a special needs trust for the person with disability, which is known as a third party special needs trust, such SNT will not have a Medicaid payback provision. Thus, if the third party elects to

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<sup>97</sup> IM #96, 10/26/2015. [http://dss.mo.gov/fsd/iman/memos/memos\\_15/im096\\_15.html](http://dss.mo.gov/fsd/iman/memos/memos_15/im096_15.html). On September 7, 2017, which clarified a previous letter dated August 2, 2017, CMS (Center for Medicare and Medicaid Service), issued its directives to the State Medicaid Directors on ABLE accounts. Among other directives, CMS, on Page 4, “some ABLE beneficiaries may also be a beneficiary of a special needs trust...distributions from such trusts made on behalf of the trust beneficiary to the beneficiary’s ABLE Account should be treated the same as contributions to ABLE accounts from any other third party.” Missouri has not made any changes to its IM #96 since the letter was issued.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 26 USC §529A(e)(5)(2018)

<sup>101</sup> 26 USC §529A(f)(2018); IM #96, 10/26/2015. [http://dss.mo.gov/fsd/iman/memos/memos\\_15/im096.html](http://dss.mo.gov/fsd/iman/memos/memos_15/im096.html)

use an ABLE Account to assist the person with a disability, rather than a third party special needs trust, then funds in the ABLE Account must be paid to reimburse the State for medical services, whereas if the money is deposited into a third party special needs trust, then the residuary is not paid to the State for reimbursement. At present there is no provision in the Federal Act, nor in the Missouri statutes about early termination of ABLE Account and the MO HealthNet payback provision. Unlike ABLE accounts, should special needs trusts created by 42 USC §1396p(d)(4)(A)(B)+(C), terminate prior to the death of the trust beneficiary, the Trustee must reimburse Medicaid.<sup>102</sup>

Because of the payback provision on ABLE accounts, attorneys must analyze special needs trusts and ABLE accounts to determine the appropriate vehicles for the government benefit recipient. Central to the analysis, is the determination if or when MO HealthNet benefits will be needed. Also, the attorney should determine if there will be any funds left in the ABLE Account at the death of the account owner. If most of the ABLE Account is used each year, then there is little likelihood that MO HealthNet would receive any funds at death. That would make the use of an ABLE Account more attractive to a third party donor.

### **Tax Implications of ABLE Accounts**

The contribution limits to an ABLE account are the same as the Annual Federal Gift Tax Exclusion Amount.<sup>103</sup> Therefore, as the annual exclusion amount increases, the contribution limit to ABLE accounts will increase as well. Because the contribution limit to ABLE accounts is the same as the Annual Federal Gift Tax Exclusion amount, there would be no need to file a gift tax return for the ABLE Account contribution, provided it is the total amount of gifts to the ABLE Account owner that year from the gifting individual. All contributions to ABLE accounts are completed gifts.<sup>104</sup> The ABLE Act does not permit the 5-year upfront funding, in contrast to the 529 IRC section.<sup>105</sup> There is no Federal Income tax deduction for contributions to ABLE accounts; however; Missouri ABLE Act has a state income tax deduction for ABLE Account contributions up to \$8,000 for a single filer and \$16,000 for married adults filing jointly.

As stated before, provided distributions from the ABLE Account are qualified disability expenses, all growth in the ABLE Account is tax-free and account distribution are not income and

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<sup>102</sup> POMS SI 01120.199F

<sup>103</sup> 26 USC §529A(b)(2)(B)(i)(2018)

<sup>104</sup> 26 USC §529A(c)(2)(A)(2018)

<sup>105</sup> Compare 26 USC §529(c)(2)(B)(2018); 26 USC §529A(b)(2)(2018)

therefore, not taxable.<sup>106</sup> ABLE accounts, unlike third party special needs trusts, are not Qualified Disability Trusts.<sup>107</sup> The Federal ABLE Act sets forth the penalties for distributions for unqualified disability expenses. The distribution of unqualified disability expenses is taxable income to the ABLE Account owner, plus a 10% increased tax penalty on those expenses, which are includible on the Federal Income Tax return.<sup>108</sup> This penalty is waived if the distribution is made after the death of the ABLE Account owner.<sup>109</sup> Each state's ABLE program must provide adequate safeguards to prevent excess contributions.<sup>110</sup>

### **All ABLE Programs are Not Created Equal**

Each state's ABLE program has different rules, requirements and administration. Some states, like Missouri, limit their program to their state residents only. Other states have ABLE accounts open to anyone. Missouri's ABLE program was established in April, 2017, and is part of the STABLE program, which originated in Ohio.<sup>111</sup> STABLE just announced that their program is the first in the nation to accept direct employer contributions, which will allow employed people with disabilities to put employer contributions into an ABLE Account.<sup>112</sup> Thus, they would no longer be in danger of losing a government benefit because of a 401(K) mandatory employer contribution. All ABLE programs use an outside investment firm to provide its investment platform. Missouri/STABLE program uses Vanguard.<sup>113</sup>

### **New Federal Changes to the Federal ABLE Act**

Congress recently passed two bills, the ABLE Financial Planning Act and the ABLE To Work Act, which increases ABLE accounts and their effectiveness for ABLE Account owners. For tax years 2018 until 2026, the ABLE Account owner will be permitted to make additional contributions to an ABLE Account up to the lesser of the ABLE Account owner's compensation for the year or the federal poverty limit for a one person household, which is \$12,140 for 2018.<sup>114</sup> To be able to make this additional contribution the ABLE Account owner cannot make a

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<sup>106</sup> 26 USC §529A(a)(2018)

<sup>107</sup> See 26 USC §642(b)(2)(C)(ii)(2018)

<sup>108</sup> 26 USC §529A(c)(3)(A)(2018)

<sup>109</sup> 26 USC §529A(c)(3)(B)(2018)

<sup>110</sup> 26 USC §529A(b)(6)(2018)

<sup>111</sup> The STABLE program, originating in Ohio, is the oldest and most experienced program in the United States. Other states that use STABLE include, Kentucky, Missouri, Vermont, Georgia, New Mexico, South Carolina and New Hampshire.

<sup>112</sup> See [stableaccount.com](http://stableaccount.com)

<sup>113</sup> For update information on the different ABLE Account programs in the various states, see ABLE Resource Center, [www.ablerc.org](http://www.ablerc.org).

<sup>114</sup> The Act expires on December 31, 2025.

contribution to a defined contribution plan for the same taxable year.<sup>115</sup> Nor can the account owner make a contribution to an annuity contract under IRC 403 (b), or an eligible deferred compensation plan in IRC 457(b).<sup>116</sup> The ABLE Account deposit will be an alternative choice to contributing to an employer based savings program. The new Act permits the ABLE Account owner to claim savers credit for any contributions to the ABLE Account, which is a non-refundable tax credit which is subject to a \$2,000 annual cap.<sup>117</sup>

The ABLE Financial Planning Act now permits rollovers from 529 accounts. Like the ABLE To Work Act, this law will be in effect from 2017 until 2026. Any rollover from a 529 account to a 529A account will be remitted to the annual limit on contributions to ABLE accounts. Any excess rolled over will be includible in the income of the distributee but no penalty will be assessed.<sup>118</sup> Because of the low income of people on government benefits, the rollover may be a low taxable event, thus creating planning opportunities. The 529 account must be owned by the ABLE Account owner or a member of the owner's family. The definition of family includes step family members, aunts, uncles, in-laws and cousins.<sup>119</sup>

### **The Benefits and Challenges of ABLE Accounts**

ABLE accounts, however, do present new challenges for attorneys giving counsel to people with disabilities. The Medicaid payback may not be avoided in certain circumstances, thus necessitating the creation of a special needs trust. This will be helpful for people who have some amounts over money or wages which will make them lose government benefits if the resource levels are excluded. Wages can also be deposited into ABLE accounts. The age restriction of 26 years before the onset of the disability limits the use of ABLE accounts to only those who are disabled while young. Should the person with a disability not have a parent or agent under a Power of Attorney to establish the ABLE Account, court involvement may be necessary.<sup>120</sup> Clients must report ABLE accounts regardless of its non-accountability for benefit eligibility. Child support cannot be paid to an ABLE Account unlike with a special needs trust.<sup>121</sup> All of these are challenges for advising a client to use an ABLE Account.

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<sup>115</sup> 26 USC §529A(b)(7)(A)(2018)

<sup>116</sup> *Id.*

<sup>117</sup> 26 USC §25B(d)(1)(2018)

<sup>118</sup> 26 USC §529(c)(3)(C)(2018)

<sup>119</sup> 26 USC §529(c)(3)(C)(2018), 26 USC §152(d)(2)

<sup>120</sup> §475.092

<sup>121</sup> Neal Winston, an Elder Law Attorney in Somerville, MA, participates in an "Advocates Group" that regularly meets with the Social Security Policy Division. He advises that Social Security has determined that child support or alimony

ABLE accounts have many benefits. Social Security imposes less restrictive rules on distributions from ABLE accounts than special needs trusts. The MO HealthNet payback is more limited in an ABLE account than first party special needs trusts. Employers will be able to put tax qualified monies into ABLE accounts in 401(K) and 403(b) accounts. Thus, ABLE accounts for recipients of government benefits will give people with disabilities another vehicle to provide them with a higher quality of life.

### **Conclusion**

The ABLE Act, and resulting use of ABLE Accounts, is one of many options available when planning for persons with disabilities. For those attorneys familiar with special needs planning, using special needs trusts is still essential. For example, third party special needs trusts, unlike ABLE Accounts, provide advantageous planning opportunities because there are fewer restrictions than ABLE Accounts. There is no limit to the amount that can be contributed, no payback to the state, and no age limitations. Since there are more restrictions, including payback requirements, with a first party special needs trust, then the ABLE account may be a more attractive option in the case where the funds contributed to the ABLE account are likely to be used each year and thus NOT available for payback at death. Although the use of ABLE Accounts comes with restrictions and may not be available for all persons with disabilities, it provides a new and additional resource to help provide for those persons who qualify. Perhaps the best option is to consider the use of both a SNT and an ABLE account and to ensure that the SNT contains language allowing for the payment of funds to an ABLE account established for the beneficiary.

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payments paid to ABLE accounts unlike first party special needs trusts, will be counted as income for SSI eligibility purposes.

## Comparison Chart of Special Needs Trusts and ABLE Accounts

	<b>ABLE Accounts</b>	<b>Third Party SNT</b>	<b>Self-Settled d4A</b>	<b>Pooled SNT d4c</b>
<b>Whose assets in account or trust?</b>	Third Party's or Beneficiary's	Not the Beneficiary's	Beneficiary's	Beneficiary's
<b>Limitations</b>	Disability must begin before age 26; only \$15,000 per year can be distributed	None, other than beneficiary's assets cannot be added	Beneficiary must be under the age 65	Must have transfer penalty if beneficiary puts assets in after 65
<b>Who Establishes?</b>	Beneficiary; or Beneficiary's Guardian, parent or DPOA agent	Not the Beneficiary	Beneficiary; parent, grandparent, guardian or court	Beneficiary, parent, grandparent, guardian or court
<b>Who controls the account or trust?</b>	Beneficiary or someone acting on beneficiary's behalf	Any person (other than the beneficiary) or corporation	Any person (other than the beneficiary) or corporation	Only non-profit organization that established the master trust
<b>Who can benefit?</b>	Only the beneficiary	Beneficiary and other chosen by Settlor	Only the beneficiary	Only the beneficiary
<b>Is there a separate Written agreement?</b>	No custom drafted, must enroll with ABLE program offered by the state	Yes, custom drafted trust agreement	Yes, custom drafted trust agreement	No custom drafted; join a master trust created by a non-profit organization as trustee
<b>When to use?</b>	When someone wants to gift a beneficiary or beneficiary has too many assets	When someone wants to give (or leave at death) assets to benefit someone else	When beneficiary receives settlement, gift or inheritance or has accumulated assets prior to disability or when turning 18	When beneficiary receives settlement, gift or inheritance or has accumulated assets prior to disability or when turning 18
<b>Repay Medicaid upon death?</b>	Yes, but only Medicaid received after ABLE account starts	No	Yes, all Medicaid beneficiary received during life	Depends on what pooled trust negotiated with state, but usually all remaining assets paid to either Medicaid or retained by trustee
<b>No. of Accounts or trusts</b>	1 per beneficiary	Unlimited	Unlimited	Unlimited
<b>Fees</b>	Financial Institution Fees	Attorney and Trustee Fees	Attorney and Trustee Fees	Attorney and Trustee Fees
<b>Investment Options</b>	Investment strategies may be changed twice annually	No restrictions	No restrictions	No restrictions
<b>Valid Distributions</b>	Broadly defined "disability expenses" including basis living expenses	Any expense for sole benefit of beneficiary with certain implications for distributions for food and/or shelter	Any expense for sole benefit of beneficiary with certain implications for distributions for food and/or shelter	Any expense for sole benefit of beneficiary with certain implications for distributions for food and/or shelter