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Protecting Resources for Medicaid & SSI Beneficiaries with Special Needs Trusts and ABLE Accounts

The countable resource limit for Supplemental Security Income (SSI) recipients and many Medicaid recipients is only $2,000. However, some of these recipients can protect additional resources in a Special Needs Trust or an ABLE account. This bulletin will explain these options and who can benefit from them.

Benefits of special needs trusts and ABLE accounts

“Special needs trusts” and ABLE accounts hold assets for the benefit of persons who would be disqualified from Medicaid or Supplemental Security Income (SSI) if they personally held the assets. Assets in a special needs trust or ABLE account can be used to supplement the governmental benefits received by the trust beneficiary. For instance, a special needs trust or an ABLE account can pay for education, transportation or housing.

ABLE accounts

ABLE Accounts were authorized by 2014 federal legislation. For disabled persons whose disability started before they attained age 26, an ABLE account can be funded by the disabled person and others at the rate of up to $15,000 per year, plus an additional amount equal to the beneficiary’s annual earned income up to $12,140 . An ABLE account can be directly accessed and used by the disabled person for certain qualified expenses: education, housing, transportation, health and wellness, employment training and support, personal support, and financial management and administrative support.

Withdrawals from ABLE accounts for qualified expenses are not treated as income to the beneficiary by SSI or Medicaid, even if the withdrawals are used for food or shelter. Generally, the withdrawals should be spent for the qualified expense in the month of withdrawal.

It the total amount in an ABLE account exceeds $100,000, SSI eligibility will be lost although Medicaid eligibility is not affected. Upon the death of the ABLE account holder, any remaining balance must first be used to repay Medicaid for all Medicaid expenditures made on behalf of the account holder.

Information about the Washington state ABLE program can be found here: https://www.washingtonstateable.com. Other state's programs can also be utilized by Washington residents, although each resident can have only one ABLE account. An excellent resource explaining the program and the various state options is the ABLE National Resource Center, whose website is: www.ablenrc.org.

Special Needs Trusts

Special Needs Trusts are managed by a "Trustee," who cannot be the disabled person. There is no limit on the amount of resources that can be held in a Special Needs Trust. Usually distributions from special needs trusts are made in the form of direct payments to vendors who provide goods or services to the beneficiary. (If cash were given to the beneficiary it would normally be considered income to the beneficiary.)

Generally, the goods and services purchased from vendors paid by the trust are not treated as income and do not reduce the governmental benefits the trust beneficiary is receiving. However, if the goods or services purchased by the trust consist of food or shelter for an SSI recipient, this will result in a reduction in the amount of SSI received of up to one-third of the SSI benefit amount. To avoid this reduction, a special needs trust can fund an ABLE account to be used for food or shelter.

Creating and funding special needs trusts

If the assets in a special needs trust come from a source other than the trust beneficiary, there are very few requirements. As long as the trust beneficiary cannot directly access the trust assets and the trustee is not required to make distributions to the beneficiary, the assets in the trust will not affect the beneficiary's eligibility for SSI or Medicaid. This applies to most trusts for a disabled child established by the Will of a Parent.

But, if a trust holds assets that were contributed by the beneficiary, including assets the beneficiary would have otherwise received directly (e.g., from a lawsuit settlement), many requirements apply.

The most common approach to creating a special needs trust is authorized by 42 U.S.C. § 1396p(d)(4)(A) (which is why these are often referred to as "D4A" trusts) and WAC 182-516-0120. It is available only for beneficiaries who are disabled and under age 65 when the trust is created and funded. This approach long required that the trust could only be established by a parent, grandparent, guardian or court. But since December 13, 2016, the disabled beneficiary, or an agent of the beneficiary designated by a power of attorney, can also establish this kind of trust, although there must still be an independent trustee. This kind of trust also must provide that the state will be paid back upon the death of the beneficiary for everything Medicaid covered for the beneficiary during the beneficiary's life, but only to the extent of any funds remaining in the trust when the beneficiary dies.

Once a D4A trust is established, funds of the beneficiary can be transferred to the trust until the beneficiary attains age 65 without the imposition of an SSI or a Medicaid transfer-of-asset penalty. (Uncompensated transfers typically cause the imposition of a period of ineligibility for SSI and Medicaid long-term care coverage.)

A friend or relative of the beneficiary may serve as the trustee of a D4A trust, and the document creating the trust may authorize the trustee to charge a reasonable fee for this service.

Because a separate trust document must be drafted for each D4A trust and a court proceeding may be required, it can be an expensive, complex and time consuming process to establish this kind of trust.

The pooled-asset trust alternative

A different kind of special needs trust is authorized by 42 U.S.C. § 1396p(d)(4)(C) (and often referred to as a "D4C" trust) and WAC 182-516-0125. This kind of trust must be administered by a nonprofit organization that holds the assets of multiple beneficiaries. While the account of each beneficiary is separately accounted for, i.e., only the beneficiary who created an account can receive a distribution from the funds attributable to the account, usually the funds from multiple accounts are invested as a common fund. (Thus, the investments are made from the "pool" of all of the funds.)

Upon the death of an account holder, there are two possible dispositions of any funds remaining in an account. One is repayment to Medicaid for funds it expended. Alternatively, if explicit authorization has been given by the beneficiary, the nonprofit organization may hold the remaining funds for its charitable purposes including assisting other disabled persons.

The assets of persons 65 and older can be placed in a pooled- asset trust and will not be deemed available for SSI or Medicaid eligibility purposes. However, the **transfer** of the assets to the trust by persons over 64 **will** be subject to the transfer penalties imposed for SSI and Medicaid long-term care coverage.

Pooled-asset trusts are typically governed by a single trust document (called a "master" trust) developed by the nonprofit organization that administers the trust. Individual account holders sign a "subscription agreement" to have their contribution governed by the terms of the master trust. Thus, beneficiaries do not have to pay for the drafting of a trust document. The nonprofit organization that set up the pooled trust must be used as the trustee for each account, and fees are charged for the ongoing administration of each account.

Examples of pooled-asset trusts

The two largest pooled asset trusts in Washington are the Developmental Disabilities Life Opportunities Trust, discussed below, and the pooled trust administered by Lifetime Advocacy Plus, a nonprofit organization based in Lynnwood (contact: Kayce Taylor, Lifetime Advocacy Plus, 19203 36th Ave. West, Suite 101, Lynnwood WA 98036, 206-367-8055, www.laplus.org).

Other such trusts have been set up by Exceptional Foresters which limits its services to adults with intellectual disabilities (2009 W. Railroad Avenue, Shelton, WA 98584, 360-426-0077) , the Brain Injury Alliance of Washington (316 Broadway, Suite 305, Seattle, WA 98122, www.biawa.org) and Beagle & Associates (500 W. 8th St. Suite 230, Vancouver, WA 98660360-694-5177, www.intrustmentnw.com).

The Developmental Disabilities Endowment Trust Fund is available only to individuals who, at the time of enrollment, are Washington residents under 65 and meet the state definition of developmental disability (confirmed by the Division of Developmental Disability). State funds are available to match part or all of the fees charged by the DDETF. The match is earned by maintaining an account for three years and depositing the equivalent of $25 a month (which could be, for example, one initial deposit of $900). An explanatory booklet can be downloaded from the DDETL web site: http://ddetf.wa.gov. The DDETF is administered by The Arc of Washington State (2638 State Ave NE, Olympia, WA 98506, 888-754-8798).

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