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**ESTATE PLANNING STRATEGIES FOR
DISABLED BENEFICIARIES
USING SUPPLEMENTAL/SPECIAL NEEDS TRUSTS
AND ABLE ACCOUNTS**

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ESTATE PLANNING STRATEGIES FOR DISABLED BENEFICIARIES USING SPECIAL NEEDS TRUSTS

A PRIMER

I. Introduction

Leaving an inheritance to benefit persons with disabilities, whether minors or adults, has been a difficult challenge for parents and other benefactors for several decades. When parents or grandparents have created standard support trusts for the purpose of providing financial assistance to disabled individuals, oftentimes the creation of a support trust will interfere with public benefits, such as Medicaid and/or SSI (Supplemental Security Income), which would otherwise be available to the disabled beneficiary. For more well-to-do parents, such concerns may be irrelevant. However, due to the massive cost (typically), of providing housing, supportive living arrangements, health aides or other caregivers, transportation, medical care, prescriptions, and other assistance, significant sums of money will be required, resulting in a trust of, sometimes, seven figures in size if the beneficiary lives to his or her normal life expectancy. Although certainly some families are able to provide such benefits and are not concerned in the least about integrating trust provisions with public benefits, most families, including the majority of middle-class Americans, find it difficult to accumulate sufficient assets with which to leave a trust or inheritance of sufficient size to provide the ongoing lifetime care for their disabled loved one. Even if it is assumed that the disabled beneficiary will reside with other family members, such plans sometimes may work for a period of time, but eventually the needs and care of the disabled person may be so overwhelming or even destructive to the life of a care-giving sibling that the family may find it necessary to locate other housing and living

arrangements for the disabled person. Accordingly, individuals may seek other alternatives to the standard, traditional support trust in order to assist and enhance the quality of life of their disabled family member.

II. Writing the "Wrong" Prescription—The “Standard” Support Trust

If a parent or other benefactor creates a standard “support” trust for the benefit of a disabled person, often the Trustee merely determines the needs of the disabled person and makes distribution from the trust, either pursuant to compulsory provisions or, if discretion is permitted, in accordance with the Trustee's discretion after determining the level and degree of the beneficiary's on-going needs. If the trust required compulsory distribution of income and/or principal on a periodic basis, then distributions from the trust will most likely be considered as part of the income or assets of the beneficiary when received, which may well affect the right to public benefits when the beneficiary's financial status is reviewed by the State. Thus, the mere existence of the trust will trigger suspicion on the part of the State resulting in a request to review the trust document and an inquiry as to the nature of any distributions made by the Trustee [see *Trust Company of Oklahoma vs. State, ex rel. Department of Human Services*, 825 P.2d 1295 (1991)]. The State will typically view distributions as income of the beneficiary and the trust assets may be deemed “resources” available to him/her and it may result in a cessation of future benefits otherwise payable by the State. If the individual were living in a group home or other facility paid for substantially through Medicaid, the beneficiary may suddenly find himself or herself without support by the State and, thus, thereafter thrown upon the trust for full support until the trust is consumed (assuming the trustee was willing and authorized to make such distributions). This most likely would defeat the grantor's or testator's intentions, since most grantors or testators would not intend to supplant public benefits with the trust they created.

Prior to the passage of OBRA by Congress in August of 1993, a “third party” trust created by another person (*e.g.*, parent or grandparent, etc.) for the benefit of a disabled person was required to be a special needs trust by its terms in order to avoid the trust assets being deemed available for support of the beneficiary. After the passage of OBRA, third party trusts created thereafter will not be treated as automatically available as a resource to the disabled person. However, the Trustee should still avoid making disqualifying distributions that are for food, clothing, or shelter. In addition, compulsory distribution provisions, even post-OBRA, could be fatal to the continued receipt by the beneficiary of certain public benefits, such as Medicaid and SSI.

III. The Not-So-Great Alternatives

- **Disinheritance**. Due to the inability of many families to create full support trusts of sufficient size to pay for the massive costs for care, medical services, food, clothing, shelter, etc., of a disabled child, some have selected the very emotionally painful option of disinheritance. This approach has been the common choice in past years for many families of modest means (and even some families with substantial wealth). Disinheritance will indeed preserve any public benefits to which the beneficiary might otherwise be entitled, since the parent or other benefactor has declined to leave any specific assets or income to the disabled person. Although this approach is workable, it is the author's experience that most families find this option incredibly distasteful and emotionally traumatic, almost feeling that they have abandoned their disabled child, a child in which there is often a tremendous emotional investment, notwithstanding the financial drain and emotional and marital strain often suffered by families with disabled

children. In spite of the emotional trauma, however, some parents still opt for this “solution.”

- **Leave Property/Money to Other Heirs.** Another option sometimes desired by clients, is that of leaving an inheritance to another child or other family members with the "understanding" that the recipient will use the funds or assets in some form or manner to benefit the disabled person without disqualifying that person from receiving public benefits. Sometimes the benefactors of the gift anticipate that the person receiving the property in this more or less "secret" trust arrangement, will actually provide personal, in-home care for the disabled person. Sometimes the recipient may promise or assure the parent that, indeed, that will be the case (*i.e.*, provide care). However, sometimes no matter how well intentioned the family member who is the recipient of the property may be, the actual provision of the ongoing care may be simply impossible to do. This is a more or less "secret" arrangement, with no written document creating an enforceable trust. There are, of course, tremendous risks with this approach, since the recipient of the assets will most likely be considered the legal owner thereof, and could expend the funds, or they could be exposed to creditors, or risk of loss in a divorce proceeding, or other hazards. Furthermore, it may be difficult for the disabled “beneficiary” or his/her legal representative to legally enforce the informal “trust” arrangement against the recipient of the assets. Thus, the client cannot be assured that leaving the additional property to another family member will result in actual use of the bequest for the benefit of the disabled child.

IV. Supplemental or Special Needs Trusts—What Are They and When Should They Be Used?

The term “Supplemental Needs Trust” (“SNT”) is sometimes interchangeably used with the term “Special Needs Trust.” Although these terms have gradually come to mean slightly different types of SNTs, they basically are the result of creative, innovative estate planners who have, over the years, attempted to assist families in providing benefits to disabled beneficiaries without interfering with public benefits otherwise distributable or available to that person. A “third party **supplemental needs trust**” is typically created by a parent, grandparent, or other person using their own assets to benefit a disabled child or other person, without interfering with public benefits otherwise being received by that disabled person. A “**special needs trust**” is a creature of statute, although the term is not actually used in the statute. The statutory special needs trust, along with other trust types, was created as a part of OBRA (“Omnibus Budget Reconciliation Act”) of 1993 by Congress to assist persons entitled to disability benefits who otherwise would be disqualified by an inheritance, a personal injury award, or receipt of assets from other sources.

- **Why Should a Supplemental Needs Trust Be Considered?**

Under current law, a person receiving certain types of public benefits, such as Supplemental Security Income (SSI), “Waivered Services” (typically, Medicaid payments from the State due to a disabling condition of a child or adult), or other forms of public benefits, requires that the recipient have very limited income and assets in order to receive or maintain qualification for public benefits. Both SSI and Medicaid programs are basically “poverty programs” and qualifying for such benefits requires the recipient to be more or less financially impoverished. Thus, if a disabled individual were to inherit property outright, or

were to be the beneficiary of a full nondiscretionary support trust which required by its terms distribution of income and/or principal on a periodic basis, such status as beneficiary of such support trust or as direct beneficiary of an inheritance or other property (including, for example, by means of a gift such as via the Uniform Transfer to Minors Act or similar statutory authority), will normally disqualify the disabled individual from receiving or continuing to receive public benefits. It is not uncommon that grandparents unwittingly leave an inheritance to a disabled grandchild (sometimes unknown to the parent of the disabled grandchild) which (depending on the size of the gift), will upon receipt by the grandchild of the grandparents' gift, immediately disqualify that grandchild from receiving or continuing to receive public benefits. Thus, adequate knowledge and understanding of public benefits law is essential for estate planners to be able to counsel clients who may be disabled or where there are members of the client's family for whom the client wishes to provide some lifetime gifts or post-death benefits through their testamentary documents.

The States have wrestled with the issue of the legitimacy of parents or other family members creating so-called "supplemental needs trusts" while attempting to preserve public benefits for the disabled beneficiary. Without some detailed understanding of this area of law, the otherwise competent estate planner may unwittingly create a hazardous condition for the disabled person, resulting in the trust, inheritance, or other gift disqualifying that person from receiving public benefits. This could result in the inheritance or trust assets being prematurely consumed before the disabled individual can reapply for public benefits. However, as discussed hereafter, there are ways to preserve benefits if statutory "pay back" trusts are able to be implemented.

V. Supplemental Needs Trust—Is It the "Right" Prescription?

Many families with disabled children who wish to feel that they are dealing responsibly with their special needs child or grandchild, will often desire to create a normal or standard support trust for that person. However, due to the tremendous cost associated with providing support for a disabled child which, of course, depends on the degree of disability, many ordinary families simply cannot accumulate sufficient assets in their lifetime or purchase sufficient insurance (of a whole-life nature), to adequately fund a trust for a disabled child needing full support. Sometimes a parent or parents of a disabled child, arrive at an age where they are simply no longer able to provide home care for their disabled loved one. In such a case, residential placement is often desired or necessary to provide ongoing care for the disabled child. In doing so, the parent will find that it is essential that the child have minimal assets in order to qualify for state supported benefits in a group home or other living facility. It then begins to dawn on the parents that leaving the disabled child an inheritance will disqualify the arrangement that has been created for the child's current and long-term care needs. Once the parents discover the massive amount of funds/assets required to provide that ongoing support, they are faced with the dilemma of creating a full-support trust for the child, or facing one of the other options, such as disinheritance or leaving money to other heirs in a "secret" trust, as mentioned above. If the parent has accumulated sufficient assets, or sufficient assets will arise as a result of the parent's death (*i.e.*, via life insurance), then a standard support trust may be the preferential choice of the client, who has basically abandoned the pursuit of public benefits for the child or other family member, or who wishes to discontinue such benefits upon the death of the parent as a result of the full-support trust

coming into place. This is more or less a "Y" in the road analysis, conducted as part of the client interview process in order for the client to understand the tremendous assets required to fully support a disabled child.

- **Benefits of the Supplemental Needs Trust.** Mentioned previously, the SNT is designed to provide certain benefits to a disabled person without disqualifying that person from receiving public benefits. The SNT comes along side, so to speak, the public benefits and disburses funds in a way that will not trigger disqualification by the State. Such things as more sophisticated medical care, special equipment, sporting equipment or activities, entertainment items, (e.g. Disney World) travel and recreational experiences, hiring of assistant or additional therapists, caregivers, companions, and other types of arrangements, can provide a remarkable blessing to the disabled person. Thus, the SNT can enhance the quality and enjoyment of life for the disabled person without interfering with the "food, clothing and shelter" provided by the State.

Another use of the SNT is to engage advocates, legal or otherwise, to investigate the care of the disabled beneficiary and insure that adequate health care, social activities, financial watch care, and other arrangements are being satisfactorily provided to the beneficiary. Some individuals who are disabled do not require a guardian of their finances (since they actually have or possess very little), and others, for whatever reason, have no guardian of their person even though one would be beneficial. In such cases, the trustee can perhaps engage a third party to provide that source of oversight to insure that the beneficiary is receiving maximum services from the state, and those services that are provided through agencies or other caregivers are

done so in a satisfactory manner. Advocacy is an extremely important need of disabled persons, particularly those who are not able to advocate for themselves in a satisfactory manner. Thus, the SNT would be a very useful source of funding for special advocates of one form or another to insure that all available benefits from the state are being received and the quality of them are at an acceptable level.

Notwithstanding the tremendous potential benefit to disabled persons of a SNT, its use and assistance to the disabled beneficiary is often limited by the quality of the services of the Trustee. Due to the fact that many disabled persons are not able to adequately advocate for themselves, demand upon the Trustee for disbursement, or oversight of the needs of the disabled person is often lacking, thus, the trust could simply vegetate in an investment mode without serious inquiry by the Trustee as to the needs of the beneficiary. Sometimes it is important for the benefactor and creator of the trust to notify another family member or other interested person as to the existence of the trust so that a third party (perhaps a guardian, if one exists, or “Trust Advisor” or “Trust Protector”) can be sure and oversee the Trustee to insist that the Trustee becomes involved in some form or manner in the beneficiary's life to insure the actual use of the trust for the disabled person’s benefit, so that it doesn't become simply an investment for the benefit of the trustee, or remainder persons. The issue, therefore, of the selection of a Trustee for the SNT is very critical, and the individual or corporate Trustee assuming that role must be prepared to undertake the sometimes heavy responsibility associated with it.

VI. Options of Utilization of an SNT

A SNT is a type of trust that can be added to a Will as a recipient of a certain portion of the estate; or it can be placed inside a Revocable Living Trust, or it can be an independent, "stand-alone" trust, whether revocable or irrevocable, or part of a life insurance trust, etc. Each of these approaches has certain pros and cons.

- **SNT Placed in a Will.** The simplest implementation of a SNT is simply to "drop" Supplemental Needs Trust provisions into a Last Will. The SNT is designed to receive either a specific dollar amount from the estate or perhaps a percentage of the residue as determined by the testator. The probate estate will be eventually closed, but the trust will thereafter continue, typically for the lifetime of the disabled person, and terminate upon the death of the beneficiary. Thereafter, provisions would typically be made for alternate distributions to other family members then living, or a combination of family members and/or charities, etc. The disadvantage of the SNT in a Will is that it is available for public viewing, as a matter of public record in the probate case and, therefore, available to the State at any time along with exposure of the client's other relevant Will provisions, which some clients prefer to remain confidential.
- **Supplemental Needs Trust Inside a Revocable Living Trust.** Since revocable living trusts or grantor trusts have become wide-spread in their use, many clients who may wish to create a Supplemental Needs Trust will simply want to add it to their revocable trust in a manner similar to that of it being placed in a Last Will. This is a relatively common approach and provides the "privacy" typically desired by clients of

revocable trusts, although the State, if it learns of the existence of the trust, will normally require a full copy of the trust be provided to it. Accordingly, clients may opt for the third choice noted below, since they may not wish to expose their entire revocable trust contents to the State.

- **Independent "Stand-Alone" Supplemental Needs Trust.** In recent years, due to the desire for financial privacy by clients, and the desire to create a trust capable of receiving gifts from other individuals, some attorneys recommend using a stand-alone Supplemental Needs Trust, either revocable or irrevocable. Typically, the trust will be a form of grantor trust funded with perhaps a minor sum and retaining the power by the grantor to revoke or amend it at any time. The trust can be the recipient of assets from other sources, such as grandparents, thus, relieving the grandparents from having to create a Supplemental Needs Trust in their own documents. Gifts could be made to the SNT during the lifetime of the donor or upon his/her death. Depending upon the size of the gift from a grandparent, gift tax issues may arise, if the gifts are *inter vivos* gifts. If examination of the document were required by the State, they would be reviewing only the stand-alone trust and not the rest of the client's estate planning documentation.
- **Funding of the Supplemental Needs Trust.**
 - **Size of Trust Needed.** Since Supplemental Needs Trusts are not providing primary support for a disabled individual, the amount of disbursement and, therefore, size of the trust is not as large as might be envisioned for a full support trust. Such trust, if managed by an individual trustee, may be well less than \$100,000.00, since the earnings alone may be sufficient to provide

the special benefits appropriate for the beneficiary. If more recreational activities or other services are desired by the creator of the trust, then of course there is no limit to the actual size the trust could be. However, most families do not wish to create a larger trust than is actually necessary to benefit the disabled child unless that child is their only child. There would be nothing wrong with consuming the trust and, if one was able to artfully calculate the life expectancy of the beneficiary then, ideally, upon the death of the beneficiary, the trust would have been fully consumed. As a practical matter, such calculations are unrealistic since some disabled individuals may live close to a full or normal life expectancy, and others may suffer a rather untimely death unanticipated by all involved in the planning process.

- As an additional practical matter, if a corporate trustee is preferred then the client's ability, or lack thereof, to provide a Supplemental Needs Trust of at least \$250,000.00 may determine whether or not a corporate trustee can be selected. This raises the whole issue of the safety of selecting natural persons as trustees versus corporate trustees, and the accompanying risk of embezzlement, foolish investments, etc. Greater protection for the beneficiary, often desired by the parents, may encourage the creation of a trust of adequate size to attract the interest of a corporate trustee. There are some non-profit charitable organizations that will serve as trustees of much smaller trusts, however, and using one may be a viable option for the client. Younger parents often have been unsuccessful in accumulating sufficient assets with which to fund the SNT and often rely upon life insurance to provide the cash

(upon the death of a parent) to fund the SNT, either in their Will or in a revocable trust. However, the life insurance policy will only be of use if it is maintained throughout the lifetime of the insured parent and it remains in force at death. This may mean the client is required to purchase whole life insurance of some form, and have sufficient income/assets with which to maintain the premiums.

The SNT can be funded from the general assets of the estate or the living trust, as a percentage of the residuary. Again, this requires that the client (parents, etc.) will have accumulated sufficient assets with which to fund the SNT, and will not have consumed those assets for long-term care expenses caring for themselves. One of the greatest threats to adequately funding the Supplemental Needs Trust is the consumption of the estate of the parents/benefactors prior to their deaths, thus leaving no significant assets with which to fund the Supplemental Needs Trust.

- **Coordination of Supplemental Needs Trust with Charitable Remainder Trust.** A charitable remainder unitrust or annuity trust is permitted to make payments of its unitrust income to a Supplemental Needs Trust for the benefit of a disabled individual. Thus, this arrangement will allow the creator of the trust to have certain income tax benefits or estate tax benefits through this technique and still provide benefits for a special needs child. At his death the trust would pass to some charity or charities selected by the parents/benefactors.

- **Pourover From a Revocable Trust or Other Sources.** As stated previously, a stand-alone Special Needs Trust could receive assets from other sources, such as life insurance, an IRA or other qualified plan, another benefactor such as a grandparent or other sibling, or, as a transfer from the grantor's other revocable trust or estate via a last will. Thus, the parent/benefactor could provide in their revocable trust that a portion of the remaining assets in the trust after grantor's and/or grantor's spouse's death pass to the stand-alone trust and be added to it to fund the SNT further. Sometimes, formulas can be included in the revocable trust of the parent, so that the stand-alone trust ends up with a sum not to exceed, or not-to-be-less-than, a predesignated amount determined by the parent, after the stand-alone trust has acquired assets from multiple sources.

VII. Self-Settled Special Needs Trust (or Medicaid “Pay-Back Trusts”)

Prior to 1993, whenever a person receiving public benefits based upon the person's disability (having also qualified due to limited income and/or assets), found themselves a recipient of an inheritance, a personal injury award, or recipient of a trust requiring compulsory distribution of income and/or principal, they would often find themselves shocked to experience the loss of public benefits until the inheritance or assets were consumed or the trust spent down adequately to requalify them for public benefits. However, in 1993, as part of the Omnibus Budget Reconciliation Act, Congress amended Title 42 of the United States Code (Social Security provisions), creating a more or less "safe harbor" for individuals finding themselves suddenly disqualified due to their "unfortunate" status as a beneficiary or the recipient of inherited property. In the OBRA provisions, Congress set forth certain types of special needs

trusts which someone on behalf of and acting for the individual, could create, thus preserving public benefits which otherwise would be lost. This has become a remarkable tool to protect disabled clients who have found themselves the recipient of property from parents or other persons who are unaware of the relationship between inheritance and access to public benefits.

These trusts are sometimes called "disability trusts," or "Medicaid Pay-Back Trusts," and are found in Section 42, United States Code, §1396(p)(d)(4)(A) and (C). For lack of a creative title, these types of "self-settled" or "first party" trusts are established using the beneficiary's own assets and are often called by the section of the statute under which they are described, *i.e.*, a "d(4)(A)" trust. In this circumstance, a trust is created on behalf of the individual, and the language thereof is typically often associated with the language in a supplemental needs trust created by a parent using the parent's resources. However, the "fly in the ointment" is that upon the death of the disabled person, the balance in the trust must be paid to the state or states that provided public benefits, up to the amount expended on his or her behalf. Thus, the term "Medicaid Pay-Back Trust." Thereafter, any remaining balance may be paid to other beneficiaries designated in the trust document.

The essential requirements for the (d)(4)(A) trust are as follows:

- The trust must be created by the disabled individual, a parent, grandparent, guardian, or the Court;
- The disabled beneficiary must be less than 65 years of age;
- The assets utilized in the trust must belong to the disabled person;
- Upon the death of the disabled person, the balance remaining in the trust must be paid back to the state or states that rendered public benefits to the extent that each respective state provided such services.

There is no limit on the amount of assets the trust could contain; however, the beneficiary or creator of the trust must be under the age of 65.

Another form of disability trust set forth in the OBRA provisions, is what is called a "pooled-account" trust, set forth in §1396(P)(d)(4)(C). This statute provides that:

- The trust is established and managed by a nonprofit association;
- A separate account is maintained by the nonprofit organization for each beneficiary of the trust, but the trust assets may be pooled for investment and management purposes;
- The accounts in the trust are created solely for the benefit of individuals who are disabled, by the disabled individual, a parent, grandparent, or legal guardian of such individuals, or by a court; and
- To the extent amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust for charitable purposes, the trust pays to the state from such remaining amounts in the account in an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the state plan.
- Beneficiary must be under age 65 (via rule of OKDHS, but this “rule” is not contained in the federal statute).

VIII. Special Needs Trust Fairness Act

In November, 2016, the U. S. Senate passed H.R. 34, which included a much needed but simple addition to the existing OBRA 1993 (d)(4)(A) statute, which established Medicaid pay-back trusts for the benefit of persons with disabilities. As mentioned previously, a Medicaid “Pay-Back” Trust allows a disabled person who is receiving public benefits, such as SSI and/or Medicaid benefits, to place excess funds in a Medicaid Pay-Back Trust without those funds or assets being treated as “excess resources” resulting in a loss of SSI and/or Medicaid.

The original “(d)(4)(A)” statute [a recitation of a part of the Congressional Act authorizing such trusts, e.g., 42 U.S.C. 1396p(d)(4)(A)], allowed the establishment of such a trust only by a “parent, grandparent, guardian, or the court” and did not authorize the disabled individual him or herself to establish such a trust even if competent to do so.

Apparently there was a naïve assumption that all disabled persons lacked the capacity to establish a trust on their own, or there simply was a drafting oversight by Congress in the original statute.

The new “Fairness in Medicaid Supplemental Needs Trusts” Act only adds two substantive words to the existing statute; it adds “the individual” to the list of persons authorized to establish a (d)(4)(A) Medicaid Pay-Back Supplemental Needs Trust, in addition to a parent, grandparent, guardian, or the Court.

This simple change will eliminate the burden and expense associated with having to go through court proceedings if there was no parent, grandparent, or guardian available or willing to establish a (d)(4)(A) trust for the benefit of a disabled adult.

The new Act reads as follows:

- (a) In General.—Section 1917(d)(4)(A) of the Social Security Act (42 U.S.C. 1396p(d)(4)(A) is amended by inserting “the individual,” after “for the benefit of such individual by”.
- (b) Effective Date.—The amendment made by subsection (a) shall apply to trusts established on or after the date of the enactment of this Act.

The House of Representatives previously passed this statute and now, with Senate approval and the President having signed the bill in December 2016, a hurdle has been removed allowing competent disabled persons to establish, by themselves, a Medicaid Pay-Back Supplemental Needs Trust to promote their welfare and protect their resources, enabling them to retain public benefits, thus enhancing their lives.

IX. Achieving a Better Life Experience (ABLE) Act—Another Tool in the Special Needs Planners’ Toolbox

In February, 2013 a bipartisan set of congressional leaders initiated and proposed a new tool to assist disabled persons with setting aside funds which had been earned, inherited, or awarded, into a special type of account similar to a 529 account whereby the assets held in such “ABLE” account would not be deemed a resource to the disabled person and thus not disqualifying the disabled person from receipt of SSI and or Medicaid. An ABLE account, is one that is permitted to be established by a disabled person (or other legal representative) residing in a state that has adopted ABLE statutory provisions as authorized by the Congressional statute. An ABLE account, does not necessarily eliminate the need for creation of a Medicaid pay back trust as discussed earlier in these materials, but may serve the purpose of avoiding the necessity of creating a Medicaid payback trust which otherwise might have to be funded with very small sums.

Oklahoma passed and the governor signed into law our ABLE state act in May of 2016, effective on January 1, 2017. The Oklahoma state treasurer is entrusted with providing implementation and policies, and forms to explain and promote the Oklahoma version of the ABLE act.

There are certain features of an ABLE account containing specific requirements that must be satisfied and adhered to on an ongoing basis in order to avoid disqualification of either the ABLE account itself, or to avoid disqualifying withdrawals or disbursements made from the account. An ABLE account has certain tax advantages for qualified individuals with disabilities. Earnings on investments in a qualified ABLE account will not be taxed by the IRS. (State income tax rules may apply, however.) Any person may make contributions to an ABLE account

including the disabled beneficiary, his or her family and friends. The purpose of the ABLE account is to provide some additional method of saving funds to create for the disabled beneficiary a source of non-disqualifying resources to empower the disabled individual to purchase future medical, recreational, housing or other needs that previously were out of reach of acquisition by the disabled person due to the standard prohibition of accumulating assets or resources *in excess of \$2000* pursuant to the SSI and Medicaid rules. A person who is disabled who is seeking to establish an ABLE account must have significant disabilities with an age of onset of those disabilities occurring before the person turns 26 years of age. A person over that age *may* possibly still qualify as long as he or she was able to prove by documentation that the disability existed prior to the person reaching age 26. The disabled individual, or a parent or guardian of the individual, must submit a “disability certification.”

“Disability certification” means with respect to an individual, a certification by the individual or the parent or guardian of the individual that:

- a. 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 twelve (12) months, or is blind within the meaning of Section 1614(a)(2) of the Social Security Act, and
- b. a copy of the individual’s diagnosis related to the individual’s relevant impairment or impairments, signed by a physician meeting the criteria of Section 1861(r)(1) of the Social Security Act, can be provided[.]

The total contributions from all sources including the individual, as well as family and friends is \$14,000 per year. *This is the maximum from all sources of donors.* The total limit over time that could be held in an ABLE account in a particular state is limited to the education related code section 529 savings accounts. Some states (like Oklahoma) have set that limit at no more than \$300,000 per that state’s 529 plan. However for persons who are receiving SSI as well

as Medicaid, the ABLE act exempts the first \$100,000 in an ABLE account from being considered as a resource for SSI purposes. However if the ABLE account exceeds 100,000 the disabled beneficiary will be suspended from eligibility for SSI benefits and can no longer receive any SSI monthly income. However that same beneficiary will continue to be eligible for Medicaid. The state will likely be able to recoup some Medicaid expenses expended on behalf of the disabled individual after the death of the disabled beneficiary. This is similar to the Medicaid payback trust discussed earlier.

The ABLE account is designed to hold funds and allow those funds to be disbursed for “**qualified disability expenses**”. These expenses include, but are not limited to, such things as: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative expenses, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses approved under Section 529A of the Internal Revenue Code. The Treasury Department which has been entrusted by the Congressional act with establishing and oversight of the ABLE account regulations requires that the state maintain documentation to prove that the expenses are qualified. In 2016 numerous states have not only authorized the establishment of ABLE accounts but are also creating procedures by which a disabled individual could established such an account. The ABLE act limits an individual to establishing only one ABLE account. To help those living in states which do not yet offer ABLE accounts, some states have added language permitted by the Congressional act to offer ABLE accounts to nonresidents.

Like state 529 college savings plans, it is likely that the individual states will authorize several investment options for ABLE accounts established in their state.

An ABLE account is different from a special needs Medicaid payback trust in certain ways but quite similar in others. With an ABLE account, the account owner [e.g. the disabled individual] will have the ability to control their own funds (if competent to do so), and establish the account on their own. It is anticipated that the cost of establishing and ABL E account will be significantly less than the cost of creating, or having created for a disabled person, a Medicaid pay back trust due to the fact that the state will provide forms, guidance and procedural steps that the disabled person may take to establish an ABL E account.

Due to the current annual limitation of \$14,000 per year from all sources which can be contributed to the ABL E account, an ABL E account will not solve the problem of a person who is receiving SSI and or Medicaid, from continuing to qualify for those benefits if they inherit significant sums of money in excess of \$14,000 per year. However, the ABL E account is a very convenient option for families where parents, grandparents or other donors wish to make smaller gifts for the benefit of a disabled person either outright while living, or by means of a testamentary gift, without destroying the disabled person's public benefits such as SSI and or Medicaid. This is a very simple and handy option available to disabled persons that did not exist before passage of the ABL E Act.

Even with the passage of the Special Needs Trust Fairness Act, which allowed disabled individuals themselves to establish a Medicaid pay back trust, the ABL E account may be of equal or even greater value than the Medicaid payback trust because of the greater control the disabled individual will have over qualifying distributions from an ABL E account versus distributions by a trustee from a Medicaid pay back trust. Again however the ABL E account will not displace all circumstances where a Medicaid payback trust may be advisable, due to the limitation in the maximum amount that can be held by an ABL E account, or the slow funding

process limited to \$14,000 per year [as may be adjusted from time to time] or, finally, where the disabled person lacks the mental capacity to be able to create an ABLE account on his or her own.

Thus, an ABLE account is another tool in the planners' toolbox to assist disabled individuals in setting aside funds for purposes related to an individual's disability thus continuing to have an opportunity to enrich the lives of disabled persons without destroying public benefits.

X. Conclusion

Although SNT drafting is not overly complex, an understanding of the factors that affect the selection or use of a Supplemental or Special Needs Trust and the choice of wording requires a delicate walk through a legal minefield. The estate planner using this arrangement must obtain adequate understanding of the public benefits law that may affect a choice of estate planning tools normally available to a client. In addition, other family factors and goals of the client, often associated with normal or routine estate planning, are of particular concern when planning for a disabled child or other person, since a special needs person may not be able to adequately advocate on their own behalf or compensate by means of their own earnings for an otherwise poorly planned arrangement.

Aggressive inquiry must be pursued by the estate planner of the client, extended family members and third parties as to whether or not the disabled individual is currently qualified for or receiving public benefits, and if so what type (*i.e.*, SSI, SSDI, etc.), and whether or not any other family member anticipates leaving to the disabled person an outright gift, trust, or anticipated inheritance. Knowledge of this information early on will assist the estate planner in more thorough planning. Sometimes extended family members must be educated substantially

as to the danger of their "benevolence" and what harm it will cause to the receipt of public benefits for the disabled person. Thus, an unusually broad picture of the client and his extended family is very important to insure that an unanticipated inheritance does not cause serious planning problems for the disabled person, or that such an inheritance can be channeled into a Special Needs Trust or other protective device which preserves public benefits while enhancing the quality of life of the beneficiary.

WELFARE

SSI

- Supplemental Security Income
- Provides cash only for food, clothing, and shelter expenses
- Requires a showing of disability or medical eligibility

MEDICAID

- a/k/a “Soonercare”
- Purpose: pays doctors, hospital, and other medical providers directly
- Eligibility: requires a separate application with DHS and a determination of disability/medical need
- Has strict financial limitations as to both income and resources

INSURANCE

SSDI

- a/k/a: Social Security Disability, or disability insurance benefits
- Pays a monthly benefit based on FICA contributions of disabled person (or parent’s record, in some cases).
- Must have sufficient quarters (“fully insured”)

MEDICARE

- Purpose is to pay doctors, hospitals, prescriptions, etc.
- Must have received SSDI for at least two (2) years before coverage begins (except for special circumstances)

DUAL ELIGIBILITY

Some individuals get welfare and insurance based benefits