



## A Forum on Financial Planning December 15, 2020

### Q&A: Special Needs Trusts & ABLE Accounts

Please find responses to many of the questions posted in the chat about special needs trusts (SNTs) and ABLE accounts during The Arc Center for Future Planning's 12/15/20 webinar entitled "A Forum on Financial Planning." Questions may have been changed slightly to make them more clear. People asked several questions that will depend on the law in their state. For questions not answered in this document, **we encourage you to contact a [special needs planning attorney](#) in your state and visit the [ABLE National Resource Center](#)'s website.**

Many people wanted to know:

#### **How do I know if an ABLE account or special needs trust (SNT) is right for my family?**

The answer will depend on your individual situation and may include an ABLE account, one or more SNTs, both an ABLE account and a SNT, or neither. Learn more by reviewing a [comparison chart](#) created by the ABLE National Resource Center and Special Needs Alliance and by talking to a [special needs planning attorney](#) in your state. You can also review [Should I Use a Special Needs Trust or ABLE Account?](#) from The Arc's [Center for Future Planning](#).

#### **Questions About Special Needs Trusts (SNTs)**

##### **1. How does a SNT work? What is a "beneficiary" and what is a "trustee?"**

A SNT is a legal way to save money for a person with a disability who needs public benefits, like Supplemental Security Income (SSI) and Medicaid. Most public benefits require a person to have very little money (as little as \$2,000) or they can lose their benefits. People can put money and property, like a home or a car, into a trust. All of the items put into the trust are called "assets." The assets in a SNT must be used for the benefit of a person with a disability, but those assets do not belong to the person with a disability. They belong to the trust. Therefore, the person with a disability is called a "beneficiary" of the trust. A "trustee" is the person who controls the SNT and who decides how the trust will be spent. Because the

assets in a SNT belong to the trust and not directly to the beneficiary, the person can keep their public benefits even if the SNT is worth more than \$2,000.

## **2. What is the difference between a 1<sup>st</sup> party SNT and a 3<sup>rd</sup> party SNT?**

A 1<sup>st</sup> party SNT is created with assets that belong to the beneficiary. Examples are money from a job, inheritance, lawsuit, or child support. When the beneficiary dies, the assets in the 1<sup>st</sup> party trust usually must be used to pay back the state for any Medicaid-funded services the person received when they were alive. 1<sup>st</sup> party trusts are often used when a person gets money unexpectedly that will affect their SSI or Medicaid benefits. A 3<sup>rd</sup> party SNT is created with assets from anyone other than the beneficiary, such as their parent, grandparent, or other relatives or friends. When the beneficiary dies, the assets in the 3<sup>rd</sup> party trust go to the “remainder” beneficiaries identified in the trust document. A 3<sup>rd</sup> party trust is the best planning tool for family members who want to leave a person with a disability money or property when they die.

## **3. What is the difference between an individual trust and a pooled trust?**

An individual trust is managed by a private trustee chosen by the person or family. Private trustees are often family members, friends, or professional trustees with a law firm or financial company. The trustee makes decisions about how to invest the individual trust’s assets. Pooled trusts are managed by non-profit organizations. Pooled trusts create individual accounts for each beneficiary but pool the funds together for investment purposes. Pooled trusts may be better for smaller estates, for families that don’t have a family member who can serve as trustee, or for families who cannot afford a professional trustee.

## **4. How do you choose the type of SNT?**

There are many things to consider when deciding on a SNT. Some questions include where the assets are coming from, how much assets you have, what you want to use the assets for, whether there is a family member available to serve as trustee, and more. That’s why it’s important to talk to a [special needs planning attorney](#) in your state when considering a SNT.

## **5. How much money can be saved in a SNT?**

There is no limit on how much money and other assets can be saved in a SNT.

## **6. Can money be added to a SNT after it has been created? Who can add to it and how often can money be added?**

Yes. Assets can be added to a SNT at any time after it has been created, except that most states do not allow contributions to a 1<sup>st</sup> party trust after a beneficiary turns 65 years old. When deciding whether to add assets to a 1<sup>st</sup> or 3<sup>rd</sup> party trust, remember that it matters who the assets initially belonged to. If you want to add a beneficiary’s income or money that was given to or inherited directly by the beneficiary, then it must be placed in the beneficiary’s

1<sup>st</sup> party trust to protect their public benefits. If someone other than the beneficiary wants to give the beneficiary money or leave them something when they die, they should add it or leave it directly to the beneficiary's 3<sup>rd</sup> party trust.

#### **7. What can a SNT be used to buy?**

Trusts can be used to buy anything that makes the beneficiary's life more enjoyable. However, they are not supposed to be used to pay for basic living expenses like housing and food. If a trust is used to pay for basic living expenses, the beneficiary's public benefits may be reduced. In addition, trusts must be used for the primary benefit of the beneficiary. There are some exceptions for 3<sup>rd</sup> party trusts, but in general, trusts cannot be used to buy things for other people, like gifts or donations to charities. Examples of items that a trust might be able to pay for are travel, vacations, pets, hobbies, books, education, entertainment, computers, phones, a car, massages, and medical or other expenses not covered by public benefits.

#### **8. Can money in a SNT be used to rent a nicer apartment?**

Yes, but the person's SSI will be reduced, because SSI is supposed to pay for a person's living expenses. Beneficiaries can talk with their trustees about whether the reduced SSI benefits are worth it, so that the person can live in a nicer home or a safer or more convenient neighborhood. Beneficiaries can also talk with their trustees about using an ABLE account and transferring money to the ABLE account to pay for housing. A person will not usually have their SSI reduced if they use an ABLE account to pay for housing costs.

#### **9. Can a person have more than one SNT?**

Yes, there are no limits on the number of SNTs that a person can have. A person may have more than one trust if they need both a 1<sup>st</sup> and 3<sup>rd</sup> party trust.

#### **10. Can you create one SNT for two or more people, such as two children with disabilities?**

A 1<sup>st</sup> party SNT can only have one beneficiary. While a 3<sup>rd</sup> party SNT can have more than one beneficiary, it needs to be written very carefully to explain how each beneficiary will benefit from the funds and what will happen to the trust if one beneficiary dies. To create a 3<sup>rd</sup> party trust with more than one beneficiary, it is very important that you speak with a knowledgeable [special needs planning attorney](#) in your state.

#### **11. What are the fees to set up a SNT?**

Fees vary from one trustee to another and from one state to another. You may want to meet with more than one attorney and look at the fees for more than one trust so that you can compare costs.

## **12. When should you create and put funds into a SNT?**

Generally, as soon as possible. If a person with a disability receives unexpected funds, they should create a 1<sup>st</sup> party SNT as soon as possible to protect their public benefits as much as possible. Parents, family members, and friends should create a 3<sup>rd</sup> party SNT as soon as possible as well, because you never know when a parent or extended family member may die and leave money to the person with a disability. Most families leave 3<sup>rd</sup> party trusts empty until they die. Then, the 3<sup>rd</sup> party SNT is funded with money from a will, life insurance policy, retirement account, or other accounts. The money should be left directly to the SNT, not to the person with a disability.

## **13. How much money do you need to create a SNT?**

The answer depends on what you want the trust to do and how much money you have. You should talk to a [special needs planning attorney](#) about what makes sense for your family.

## **14. How can extended family contribute to a trust?**

Typically, family members will want to leave money directly to a 3<sup>rd</sup> party SNT in their will, life insurance policy, or other account. If a family member wants to make a one-time gift to the SNT while they are alive, they should speak with an accountant or attorney, because they may have to pay taxes on that gift.

## **15. How do SNTs affect taxes?**

Paying taxes on assets in a SNT is complicated. You should talk to an accountant or attorney for specific advice about what taxes need to be paid.

## **16. Who monitors SNTs?**

This depends on the state and the trust document. Most states require trustees to tell the beneficiary or the beneficiary's representative how they spent money in the trust each year. This is called an "annual accounting." The beneficiary or their representative should review the accounting and raise concerns directly with the trustee. Some trust documents may identify a person or process for removing a trustee if there are concerns about how the trust is being managed. Some courts, state Medicaid agencies, developmental disabilities agencies, and the Social Security Administration may also monitor SNTs.

## **17. What should you consider when choosing a trustee?**

Be sure to select someone who has the time and interest in understanding the rules about what trusts are allowed to pay for, which can be complicated. The person should be highly ethical, organized, and efficient to properly handle all the paperwork required of a trustee. There are several non-profit organizations, including [many chapters of The Arc](#), that serve as trustees for pooled trusts if there is no family member available to serve or if the family cannot afford or does not want a private, professional trustee.

### **18. What happens to money in a SNT when the beneficiary dies?**

This depends on whether it is a 1<sup>st</sup> or 3<sup>rd</sup> party trust. All trust documents must name “remainder” beneficiaries who will receive the money in the trust when the original beneficiary dies. These remainder beneficiaries are often other family members and charitable organizations. However, in most states, funds left in a 1<sup>st</sup> party trust must be paid to the state for any Medicaid-funded services the person received while they were alive. This is called Medicaid payback. Unless the state has rules that limit Medicaid payback, no money can be distributed to remainder beneficiaries before Medicaid payback. In addition, some states allow non-profit organizations that run pooled trusts to keep some or all of the money left in a 1<sup>st</sup> party trust before the Medicaid payback. There is often no money left in a 1<sup>st</sup> party trust for remainder beneficiaries after Medicaid payback. The state does not have the right to funds left in a 3<sup>rd</sup> party trust, so those funds go to the remainder beneficiaries identified in the trust document.

### **19. How does the government know about trusts that require payback?**

When a beneficiary receives Medicaid, SSI, or other public benefits, there is a legal duty to tell each public benefits program about both 1<sup>st</sup> and 3<sup>rd</sup> party trusts when they are funded. The government agency will typically review the trust documents and send a letter that indicates whether the trust has been properly created to protect the beneficiary’s public benefits. When the beneficiary of a 1<sup>st</sup> party trust dies, the trustee is required to report the death to the Social Security Administration, state Medicaid agency, and any other public benefits programs the beneficiary was receiving.

### **20. How often should a SNT be reviewed?**

It is recommended that you review the SNT at least every five years and whenever there is a major change in the life of the individuals named in the trust, including the beneficiary, the person named as trustee, and the remainder beneficiaries. You should make sure the trust complies with current laws and still reflects the wishes of the person who created the trust. For example, you should review that the people named as trustee, personal representative, remainder beneficiaries, and any other support role for the beneficiary are still the same people you want in those roles when the trust is funded. In addition, you should review the trust if the person you named as trustee has died, moved out of state, is no longer able to manage the trust for any reason, or you have lost confidence in the person.

### **21. Are there free services for creating a SNT?**

You do not need a lawyer to create a SNT. However, the rules for making sure the SNT is created properly to protect a person’s public benefits are complicated, so it is highly recommended that you talk to a [special needs planning attorney](#) in the state where you live when considering a SNT. While some law firms and non-profit organizations, including chapters of The Arc, offer free trainings on financial planning, most attorneys and trust

organizations charge a fee for help creating a SNT. You can ask your [local chapter of The Arc](#) if they offer free trainings on financial planning, and you can review the [Center for Future Planning's Tip Sheet](#) on choosing a lawyer when planning for a person with a disability's future.

## Questions About ABLE Accounts

### **1. What is an ABLE account?**

Like SNTs, ABLE accounts are another legal way to save money for a person with a disability who needs public benefits, like SSI and Medicaid. Money in an ABLE account up to \$100,000 does not affect a person's SSI benefits. Any money in an ABLE account does not affect a person's Medicaid and other public benefits. The money in an ABLE account is invested so that it can earn more money. The earnings are not taxed, so long as the money is used for a Qualified Disability Expense (QDE), which is explained more in Question 5.

### **2. Who is eligible for an ABLE account?**

People who became disabled before they turned 26 years old and who currently receive SSI or Social Security Disability Insurance (SSDI) are automatically eligible for an ABLE account. Even if you do not receive SSI or SSDI, you are eligible if you became disabled before you turned 26 years old and you obtain a letter of disability certification from a licensed doctor.

### **3. How do you open an ABLE account?**

Many states have created ABLE plans. They each have their own rules, but many ABLE programs allow people from other states to participate in their plan. Use the ABLE National Resource Center's [Search Tool](#) and [Comparison Tool](#) to select the state ABLE plan that best fits your situation.

ABLE plans often allow you to request a paper application, but most ABLE accounts are opened online through the website of the ABLE plan that you choose. It typically takes ten minutes or less to open an account online. However, it will take longer to read the disclosure document for the state ABLE plan you choose. You should read the disclosure document to make sure you understand the plan's rules. Most ABLE accounts can be opened for as little as \$25 to \$50.

A person with a disability can open their own ABLE account. If the person is unable to open their own account, their parent, grandparent, spouse, sibling, power of attorney, legal guardian, or Social Security Administration Representative Payee can open an account for them. Once an account is opened, the account owner can give other people permission to see the account and take certain actions related to the account, like contributing money to the account.

#### **4. Can a person have more than one ABLE account?**

No. A person with a disability can only have one ABLE account. However, they can also have one or more special needs trusts.

#### **5. What can an ABLE account be used for?**

ABLE accounts must be used for Qualified Disability Expenses (QDEs). QDEs are costs related to a person's disability that increase or maintain their health, independence, or quality of life. QDEs are meant to include a wide variety of things, including education, food, housing costs, transportation, employment, assistive technology, personal support services, health care expenses, legal fees and financial management, and funeral and burial expenses. Housing costs can include rent, purchase, modifications, taxes, and utilities.

Great examples of how ABLE accounts have been used are available from the [ABLE National Resource Center's Ambassadors](#), who are ABLE account owners and family members of ABLE account owners.

#### **6. Can money in an ABLE account be used to buy gifts, give to a church, or make a charitable donation?**

No. Like funds in a SNT, funds in an ABLE account must be used for the benefit of the person with a disability. A gift or donation benefits the person who receives the money, not the person who gives the money. Therefore, funds in an ABLE account should not be used for gifts or donations.

#### **7. How much money can I save in an ABLE account?**

Each state has its own rules for how much total money you can save in an ABLE account, ranging from \$235,000 to \$529,000. However, SSI benefits will be suspended once an ABLE account has more than \$100,000. SSI benefits can typically start again when the balance is below \$100,000. Medicaid benefits are not affected by any money in an ABLE account. Up to \$15,000 can be added to an ABLE account each year. More can be added if the person with a disability is working and not participating in their employer's retirement program.

#### **8. Are contributions to an ABLE account taxable or tax-deductible?**

The money that a person contributes to an ABLE account is not deductible on their federal tax returns. Money contributed to an ABLE account may be deductible on some state's tax returns. In addition, the earnings from the money invested in an ABLE account are not taxed so long as the money is used for QDEs.

#### **9. Who can put money into an ABLE account?**

Anyone can put money into an ABLE account, including the person with a disability, their family members, friends, legal guardian, SSA Representative Payee, and employer. Money

that an employer puts into an employee's ABLE account still counts as earned income. Earned income must be reported to the public benefits programs that the employee participates in and may affect the public benefits they receive. If the person has a special needs trust, the trustee can also put money into the person's ABLE account. For example, a trustee may put money in an ABLE account for the person to use for food or housing costs.

**10. Can money be transferred from a 529 College Savings account to an ABLE account?**

Yes. Total contributions up to \$15,000 can be made to an ABLE account each year, including funds rolled over from a 529 College Savings account. The 529 College Savings program and the ABLE plan must coordinate so that the transfer happens properly. However, recent rules passed by the federal government indicate that transfers from 529 College Savings accounts to ABLE accounts will not be allowed after 2026.

**11. What happens to the money in an ABLE account when the person with a disability dies?**

When an ABLE account owner dies, money remaining in the ABLE account is often used first to pay for funeral and burial expenses. ABLE account owners can identify the people they want to receive the money left in their account when they die. However, in most states, money left in an ABLE account must be paid to the state for any Medicaid-funded services the person received after the ABLE account was created. This is called Medicaid payback. There is not usually any money left in the ABLE account after Medicaid payback. Some states have passed rules that limit the amount of money that Medicaid can request from ABLE account owners who lived in their state. If the ABLE account owner did not receive Medicaid-funded services, or if there is money left after the Medicaid payback, the money will be distributed according to the ABLE account owner's wishes. If the ABLE account owner did not make their wishes known, the money will be distributed according to the laws in their state for what happens to someone's money when they die.