

# Coordinating an ABLÉ Account and a Special Needs Trust

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## ABSTRACT

When leveraged properly as part of a coordinated long-term portfolio, an Achieving a Better Life Experience (ABLE or 529A) account and special needs trust (SNT) can allow an individual with disabilities to maximize savings above the government resource limit (currently \$2,000 for an individual) without losing eligibility for U.S. government benefits. This article analyzes recent literature, policies, statutes, and litigation concerning special needs planning matters to create strategic guidance for financial planners who are considering combining an ABLÉ account with an SNT. Financial planners should address eight key concerns to determine whether it is in a client's best interests to utilize an ABLÉ account in tandem with an SNT: (1) eligibility; (2) annual contribution limits; (3) cumulative balance limits; (4) total funds available after account setup fees; (5) total funds available after account administration and/or maintenance fees; (6) Medicaid Estate Recovery factors; (7) spending requirements/goals; and (8) state-based investment options.

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## Overview of ABLÉ Accounts and SNTs

Without adequate special needs planning (SNP), individuals with disabilities cannot save resources in excess of \$2,000 without losing their eligibility for government benefits.<sup>1</sup> For most people with disabilities, access to these programs like Medicare, Medicaid, Supplemental Security Income (SSI), and/or Social Security Disability Insurance (SSDI) is essential for their health and well-being. Likewise, without a special needs plan in place, people with disabilities who have gainful employment are often forced to choose between saving their money and thereby disqualifying themselves from public benefits, or working a low-wage or part-time position to maintain resources below means-test thresholds.<sup>2</sup> To help navigate this difficult choice, two SNP tools stand out as leaders in protecting savings without sacrificing eligibility for government programs: the Achieving a Better Life Experience (ABLE) savings account (also sometimes referred to as a 529A account) and the special needs trust (SNT).<sup>3</sup>

Combined with an SNT, an ABLÉ account offers a new standard of care for special needs planning. When leveraged through a coordinated portfolio, these tools have the potential to generate maximum earnings and tax advantages for clients without impacting their eligibility for government programs.<sup>4</sup> Planners will note that this article contains five reference tables in total. These tables are

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designed to assist financial planners with client financial literacy or as sales aids to build more robust financial portfolios. When viewed side by side, the tables herein may be especially useful to help planners illustrate the essential features of SNTs/ABLE accounts to clients, and how the tools might be structured to complement each other.

Generally, an SNT is a legal instrument established to hold money or property for the benefit of a person with disabilities.<sup>5</sup> There are three primary types of SNTs: (1) first-party trust (also sometimes referred to as self-settled trust); (2) pooled trust; and (3) third-party trust.<sup>6</sup>

See Tables 1 and 2. Depending on the nature of the SNT, this planning vehicle may require a higher initial investment than an ABLÉ account.<sup>7</sup> SNT costs commonly include attorney's fees for creation and trustee administration fees.<sup>8</sup> If a client's funds are relatively low, the SNT start-up and ongoing fees could exceed the amount of funds that would otherwise be protected in the trust.<sup>9</sup> In contrast, an ABLÉ is a tax-advantaged savings account for qualified individuals with disabilities.<sup>10</sup> Varying ABLÉ account options exist in each state and qualified individuals can enroll in any program across the country.<sup>11</sup>

**TABLE 1**  
Three Primary Types of SNTs<sup>42</sup>

Type	Summary	Occurrences after a Beneficiary's Death	Key Federal Statutes and Social Security Administration Regulations
Self-funded trust	SNT funded with the beneficiary's own assets. Funds may include but are not limited to the beneficiary's income from employment, inheritance, or a personal injury lawsuit settlement. <sup>43</sup> This SNT can only be established for beneficiaries under the age of 65.	Any remaining assets may be subject to Medicaid Estate Recovery (payment collection by the government).	42 U.S.C. § 1396p(d)(4)(A); Program Operations Manual System (POMS) SI 01120.200(B)(4)
Third-party trust	SNT established by a third-party and funded entirely with third-party assets. The beneficiary's own assets cannot be used to fund this trust.	Any remaining assets are freely transferable by the grantor (and not subject to Medicaid Estate Recovery).	42 U.S.C. § 1396p(d)(2)(A)(iii)–(iv); POMS SI 01120.200(B)(16)
Pooled trust	SNT created and administered by a nonprofit entity that creates individual trust for the beneficiary to use during their lifetime. A pooled trust contains the assets of several different individuals that are maintained in separate accounts for each beneficiary. Account funds are pooled together for investment purposes. This SNT can be established for an individual with disabilities at any age.	Depending on state law, some or all of the assets remaining in a pooled trust account may revert to the other remaining beneficiaries or be kept by the charity trustee. In cases of first-party pooled trusts, any remaining assets may be subject to Medicaid Estate Recovery. In cases of third-party pooled trusts, any remaining assets are freely transferable by the grantor.	42 U.S.C. § 1396p(d)(4)(C); POMS SI 01120.200(B)(9)

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ABLE accounts allow tax-advantaged earnings growth, while SNTs offer either limited or no significant tax advantages—trust tax rates are usually significantly higher than individual income rates. The tax results for an SNT depend on the type of trust, who creates it, the terms of the trust agreement, and how it is administered. As a general rule, ABLE account beneficiaries do not owe federal or state taxes on withdrawals used to pay for “qualified expenses.”<sup>12</sup> Compared to SNT rules, allowable expenses are decidedly broader under ABLE account definitions of a qualified disability expense.<sup>13</sup> Qualified distributions from an ABLE account include expenses for “education, housing, transportation, employment training and support, assistive technology, personal support services, health, prevention and wellness, financial management, administrative services, legal fees, expenses for oversight and monitoring, and funeral and burial expenses.”<sup>14</sup> Conversely, allowances from an SNT can only *help* a beneficiary to pay for costs that enhance their quality of life.<sup>15</sup> Generally, SNT funds can only be used for the “special and supplemental needs” of a person with disabilities, and not their

day-to-day living expenses, such as food and shelter.<sup>16</sup> Nonqualified withdrawals from an ABLE account or SNT can be subject to federal income tax, a penalty tax, and applicable state and local income taxes.<sup>17</sup> See Table 3. Because ABLE accounts and SNTs together can provide broader support for clients with disabilities than either vehicle on its own, financial planners can provide tremendous value for maximum client benefit in helping to coordinate these tools.

### Coordinating SNTs and ABLE Accounts

As Kelly and Hershey explain, ABLE accounts are usually most beneficial when combined with other SNP tools.<sup>18</sup> They state that, if possible, many accountholders should coordinate the spend-down of their ABLE account with an SNT and/or Roth IRA.<sup>19</sup> Together, an ABLE account and SNT are often most advantageous to a beneficiary as part of a comprehensive long- and short-term budget plan. For example, if an SNT beneficiary has an ABLE account, Hershey and Kelly recommend coordinating the use of relatively lower amounts in an ABLE account in tandem with greater savings in a third-party SNT.<sup>20</sup> With this

**TABLE 2**  
Common Terminology Differences among SNT Types<sup>44</sup>

Self-Funded Trust	Pooled Trust	Third-Party Trust
First-party trust	Pooled-income trust	Supplementary trust
Omnibus Budget Reconciliation Act (OBRA) trust, OBRA'93 trust, or OBRA-93 trust	OBRA-93 trust, OBRA'93 trust, or OBRA trust	Pooled supplemental needs trust
Charitable pooled (d4C) trust	d4C trust	Self-funded payback pooled trust
Grantor trust	First-party pooled trust	
Self-settled trust (d4A)	Third-party pooled trust	
Self-funded payback trust	Pooled supplemental needs trust	
Medicaid payback trust	Pooled Medicaid payback trust	

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strategy, the ABLÉ account should be spent down entirely before the beneficiary's death to avoid a loss of funds in the Medicaid Estate Recovery process.<sup>21</sup> Any funds that remain in the third-party SNT after the beneficiary's passing can be freely transferred to another person or a charity organization.<sup>22</sup>

An ABLÉ account is similar to an SNT in that both allow the client to accumulate assets and make expenditures for supplemental needs while maintaining means-tested social insurance eligibility.<sup>23</sup> Bjorklund states, "Compared to the SNT, the ABLÉ account is easy to start up, fund, and administer, but is limited

as to the ultimate size of its accumulated assets and related distributions for qualified expenses."<sup>24</sup> Like self-funded SNTs, ABLÉ account assets are subject to recovery by the state Medicaid agency after the beneficiary's death.<sup>25</sup>

Individuals with disabilities cannot receive benefits through Medicaid and other government programs if they own significant financial resources that are not sheltered in an SNT, ABLÉ account, or other SNP instrument.<sup>26</sup> As Kelly and Marsack explain, "Access to government benefits is often an essential resource for individuals with disabilities as many in this population have

**TABLE 3**  
Key ABLÉ Account Advantages in Comparison to an SNT, Generally<sup>45</sup>

Consideration	ABLE Account	SNT
Distributions to pay for housing costs	Distributions to pay for housing costs (rent, mortgage, taxes, or utility payments) are not considered income for Social Security Income evaluations. <sup>46</sup>	Typically, housing cost distributions are not qualified payments from SNTs.
Enrollment	A designated beneficiary can open an account online through dedicated state ABLÉ program websites. All state programs strongly recommend consulting an attorney before creating an ABLÉ account.	There are no state program websites for creating an SNT. Generally, an attorney is necessary (and strongly recommended) to create the necessary documents.
Initial deposit cost	Most accounts require a low initial deposit of \$50 or less.	SNTs are typically not a viable alternative for small funds because of attorney's fees for setup and potential trustee costs for ongoing administration.
Setup cost	There is little or no cost to establish an account.	SNT setup costs can vary depending on the type of trust and administrative structure. See above.
Designated beneficiary as account owner	With the exception of cases involving a full legal guardian or power of attorney, deposits and withdrawals are controlled by the individual with a disability who set up the account.	With the exception of first-party trusts as well as cases involving a full legal guardian or power of attorney, deposits and withdrawals are controlled by the trustee.
Investment options	ABLE programs offer federally insured savings accounts as well as investment options ranging from conservative to aggressive with varying degrees of risk.	SNT investments are made at the discretion of the trustee.

unique and multifaceted requirements for healthcare and activities of daily living—these benefits provide people with access to comprehensive support networks.<sup>27</sup> SNP planners are aware that if a client with disabilities receives large assets outright from an estate or as a result of a personal injury litigation award or settlement, an SNT can be particularly useful to house such funds without jeopardizing eligibility for government benefits.<sup>28</sup> Planners should also consider that ABLÉ accounts can also be utilized for such purposes if the overall funds do not exceed the federal limit threshold for receiving government benefits.<sup>29</sup> Guidance is scant regarding managing litigation funds subject to ABLÉ account annual contribution limits; however, new standards are slowly emerging. Some financial professionals recommend utilizing an ABLÉ account as part of a structured settlement portfolio—in this instance, the structured settlement annuity can be paid once each year to the SSI beneficiary to place in the ABLÉ account.<sup>30</sup>

When deciding whether to recommend that clients utilize an ABLÉ account in tandem with an SNT, financial planners should weigh eight key considerations: (1) eligibility; (2) annual contribution limits; (3) cumulative balance limits; (4) total funds available after account setup fees; (5) total funds available after account administration and/or maintenance fees; (6) Medicaid Estate Recovery factors; (7) spending requirements/goals; and (8) investment options.

These eight essential planning issues can help guide financial planners seeking to coordinate ABLÉ accounts with SNTs.<sup>31</sup> Summarized briefly, these considerations engender the following issues and related questions:

1. **Eligibility**—Does the client qualify for an ABLÉ account? If the client's qualifying disability occurred after age 26, the client is not eligible for an ABLÉ account.
2. **Annual contribution limits**—Will the client's funds exceed the yearly contribution limits for an ABLÉ account?
3. **Cumulative balance limits**—Will the client's total funds exceed the maximum balance limit

for an ABLÉ account under state ABLÉ program rules?<sup>32</sup>

4. **Total funds available after account administration and maintenance fees**—Can the client afford the necessary fees associated with this SNT account?
5. **Total funds available after account setup fees**—Which SNT account setup processes would best suit the client's needs? Can the client afford to pay for associated legal financial planning services? Do the client's total available funds exceed the fees associated with the account?
6. **Medicaid Estate Recovery factors**—Estate Recovery is at issue for any funds remaining in an ABLÉ account, self-funded trust, and certain pooled trusts upon the beneficiary's death.<sup>33</sup> Third-party trusts are not generally subject to Medicaid Estate Recovery. Therefore, is it feasible for the special needs plan to include provisions designed to spend down the ABLÉ account balances before the beneficiary's death to avoid losing the assets subject to government payback? If the answer to the above is negative and the client wishes for their assets to transfer to another individual or charity after their death, the special needs plan must include Medicaid Estate Recovery protections. See Table 1 regarding "Occurrences after a Beneficiary's Death."
7. **Spending requirements/goals**—What does the client hope to pay for with this account? Are those particular expenses allowed under SNT and/or ABLÉ account regulations?
8. **Investment options**—Which investment options would best suit the client's needs?

In Table 4, the authors have mapped specific ABLÉ and SNT account considerations to each of these questions.

### Creation, Use, and Maintenance Considerations for ABLÉ Accounts versus SNTs

For financial planners servicing clients with disabilities, the coordination among various programs and products presents unique challenges and oppor-

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**TABLE 4**

Eight Key Considerations When Analyzing the Need for a Tandem ABLÉ Account and SNT<sup>47</sup>

Item No.	Issue	ABLE Account Considerations	SNT Considerations (Generally)
1	Eligibility	If the client's qualifying disability occurred after age 26, the client is not eligible for an ABLÉ account.	There are no age requirements for a qualifying disability.
2	Annual contribution limits	Yearly deposits are subject to the federal gift tax limit and the beneficiary earnings limit.	No deposit limit.
3	Cumulative balance limits	The maximum holding amount varies between state programs and ranges from \$235,000 to \$529,000.	No maximum holding limit.
4	Total funds available after account setup fees	ABLE programs do not require attorney's fees or financial advising fees (though they are strongly recommended by all state ABLÉ programs in account agreements). In cases where the client's total available funds exceed the fees associated with the SNT, an ABLÉ account is preferable.	An SNT is not practical if it requires fees that exceed the client's total available funds. If the client cannot afford to pay for associated legal financial planning services, they assume the risk of creating a legally invalid trust that is subject to probate.
5	Total funds available after account administration and/or maintenance fees	Typically, ABLÉ programs do not charge administration fees because there is no account trustee. Maintenance fees vary with each state's ABLÉ program; however, costs are relatively nominal and average from \$0 to \$60.	SNT trustees may charge an administration fee. Fee amounts can vary widely depending on the trustee's activities. Trustee's fees and associated SNT costs are typically higher than those associated with ABLÉ accounts, often 1% to 2% of the total funds.
6	Medicaid Estate Recovery factors	With limited exceptions for qualifying siblings, ABLÉ account funds cannot be bequeathed to others. In most states, ABLÉ accounts are subject to Medicaid Estate Recovery (government payback) after the beneficiary's death. Remaining funds cannot be transferred to any third party.	Third-party SNTs are not subject to Medicaid Estate Recovery (government payback). In these cases, remaining funds can be distributed to named individuals or organizations.
7	Spending requirements/goals	ABLE account funds can be used for a broad range of costs that support the beneficiary. "Qualified disability expenses" are set forth in federal and state statutes/regulations.	Funds can be used as determined by trustees in accordance with the trust's spending provisions. Under federal and state statutes/regulations, some food or housing-related expenses can cause a reduction in government benefits.
8	Investment options	Apart from checking account options, each ABLÉ program offers pre-designed investment portfolios through vendor service providers (e.g., Black-Rock, Vanguard, Schwab, and Sallie Mae). Investment and management options offer varying degrees of risk.	Does not require the use of pre-designed options. Allows special needs planners greater flexibility to customize a plan with targeted risks.

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tunities.<sup>34</sup> Traditionally, the creation and implementation of an SNT provided a mechanism for protecting financial assets for beneficiaries with disabilities while still qualifying them for government programs. With the proliferation of state-based ABLÉ or 529A ac-

counts, qualified individuals with disabilities have additional options to help plan for their short- and long-term financial needs.<sup>35</sup>

The SNT offers many distinct advantages that are not available through an ABLÉ account. An SNT:

**TABLE 5**  
Creation, Use, and Maintenance of ABLÉ Accounts versus SNTs<sup>48</sup>

Issue	Self-Funded Trust (Nonpooled)	Third-Party Trust (Nonpooled)	Pooled Trust	ABLE Account
What does the creation process require?	Attorney writes the trust document.	Attorney writes the trust document.	Grantor typically uses the nonprofit organization's trust format; however, the language should also be reviewed by an SNP attorney.	Each state offers online enrollment for beneficiaries (or their legal guardians) to create an account. State ABLÉ account programs encourage users to set up their own accounts, but also warn of the need for legal advice from an attorney and financial planner/tax advisor.
Is an attorney and/or financial planner often used for the setup?	Yes, to ensure all trust terms are properly written and the grantor's wishes are satisfied.	Yes, to ensure all trust terms are properly written and the grantor's wishes are satisfied.	Yes, to ensure all trust terms are properly written and the grantor's wishes are satisfied.	Sometimes, but often not. Though state ABLÉ account programs encourage do-it-yourself setup, personalized guidance from an attorney and financial planner/tax advisor is strongly recommended.
Who can deposit into the account?	Deposits are limited to the beneficiary's funds.	Any third party can contribute funds except the beneficiary.	Any third party can contribute funds except the beneficiary.	Any individual or entity can fund the account, including the beneficiary (subject to contribution limitations).
Who can create the account?	The beneficiary can create the account. The grantor is the beneficiary because the law requires that the trust be funded with the beneficiary's funds.	The grantor can create the account. The grantor and the beneficiary are separate individuals/entities.	The grantor can create the account. The grantor and the beneficiary are separate individuals/entities.	Beneficiaries can create their own accounts.

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**TABLE 5** (cont'd)  
Creation, Use, and Maintenance of ABLÉ Accounts versus SNTs

Issue	Self-Funded Trust (Nonpooled)	Third-Party Trust (Nonpooled)	Pooled Trust	ABLE Account
Who controls contributions and distributions for the account?	Generally, though subject to legal exceptions, the trustee managing the trust is the beneficiary.	The appointed trustee manages the trust assets and administers the trust provisions on behalf of the beneficiary. All distributions must be approved by the trustee.	The appointed trustee manages the trust assets and administers the trust provisions on behalf of the beneficiary. All distributions must be approved by the trustee.	Generally, beneficiaries manage their own accounts.
If there is a balance remaining after beneficiary's death, are the assets subject to government payback (Medicaid Estate Recovery)?	Yes	No	Yes or no, depending on the structure of the trust and state law.	Yes
Yearly fees	Yes, typically trustee and/or investment advisor fees.	Yes, typically trustee and/or investment advisor fees.	Yes, typically trustee and/or investment advisor fees.	Yes, account maintenance fees (depending on the beneficiary's investment selections and the state ABLÉ program's administrative rules).
Yearly contribution limits	No	No	No	Yes, subject to the federal gift tax limit.
Maximum contribution limits (cumulative balance)	No maximum holding limit.	No maximum holding limit.	No maximum holding limit.	Yes (the total amount varies between state ABLÉ program jurisdictions). The maximum holding amount varies between state programs and ranges from \$235,000 to \$529,000.
How many accounts can an individual have?	There are no limits to how many SNTs an individual may have.	There are no limits to how many SNTs an individual may have.	There are no limits to how many SNTs an individual may have.	An individual can have only one ABLÉ account.

(1) has broader eligibility criteria (e.g., no age-related thresholds); (2) if a third-party SNT is used, it is not subject to Medicaid Estate Recovery (government payback) after the beneficiary's death; (3) has no deposit

limitations; (4) does not include penalty fees for maintaining a balance in excess of government resource limits (currently \$100,000 for an ABLÉ account); (5) allows funds to be spent on a broader array of expenses;



and (6) provides wider options for investment choices and client-customized management.<sup>36</sup> The ABLÉ account offers multiple distinct advantages that are not available through an SNT: (1) relative ease in account creation and maintenance; (2) nominal maintenance fees; (3) state tax qualified contributions in several states; (4) a wider range of categories of expenditures, including room and board.<sup>37</sup> See Table 5.

### Conclusion

Because of the unique financial and economic stresses facing people with disabilities as a population, clients have a pressing need for clearly worded strategic guidance from financial planners to help them navigate ABLÉ accounts and SNT options. Unique stresses include greater “gateway costs” to receive health care, assistance services, employment, transportation, housing, education, and technology.<sup>38</sup> A 2020 landmark study by the National Disability Institute (NDI) attempted to calculate these excess costs.<sup>39</sup> NDI researchers estimated that households with an adult with disability that limits their ability to work require an average of 28 percent more income to obtain the same standard of living as a comparable household without a member with a disability.<sup>40</sup> According to the NDI, this translates to an additional \$17,690 a year for a household at the median income level.<sup>41</sup> Financial planners are uniquely suited to help clients to address these additional costs and may be able to provide tremendous value to clients in carefully weighing how to coordinate SNT and ABLÉ account planning. ■

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(1) Financial planners should recognize that there are different schools of thought regarding the terms “special needs” and “disability.” Many people view the term special needs as empowering and inclusive, especially in cases where individuals with government-recognized disabilities consider their condition as unique, but not personally disabling or incapacitating. A minority of others, however, views the term special needs as an imprecise moniker for a serious disability that impacts an individual’s ability to conduct activities of daily living. For purposes of this article, the authors use the terms disability and special needs synonymously.

(2) D. W. Wick, “The Expensive, Protective Estate Planning Strategy: A New Paradigm for Estate Planning Design and Administration,” *Elder Law Journal* 27 (2019): 115.

(3) Except where specified, all references to special needs trusts in this article pertain to trusts as a broad, overarching term that includes third-party trusts (both traditional and pooled) and first-party trusts.

(4) Note: Depending on their short- and long-term goals, specific clients may not benefit from a coordinated ABLÉ account and SNT. For purposes of this article, recommendations for financial planners assume that if a trust beneficiary or ABLÉ accountholder is not able to manage the financial tools, the beneficiary has a court-appointed legal guardian or conservator (full or limited in scope) to provide support with the decision-making process. For an early review of the planning complexities facing people with disabilities before the advent of ABLÉ accounts, see, for example, P. Sullivan, “Wealth Matters: Exploring Trusts for the Disabled,” *The New York Times* (November 5, 2010); accessed at: <https://www.nytimes.com/2010/11/06/your-money/06wealth.html>.

(5) M. Lauderdale and S. J. Huston, “Financial Therapy and Planning for Families with Special Needs Children,” *Journal of Financial Therapy* 3, no. 1 (2012): 3 (examining the factors associated with the likelihood of having a plan that includes an SNT among families that have children with disabilities under age 18).

(6) 42 U.S.C. 1396p(d)(4)A (codifying self-settled trusts); 42 U.S.C. 1396p(d)(4)C (codifying pooled trusts). See also K. B. McCoy, “The Growing Need for Third-Party Special Needs Trust Reform,” *Case Western Reserve Law Review* 65 (2014): 461. Note: Other

combinations of SNTs exist, e.g., a third-party pooled trust. The scope of this article focuses on the three primary SNTs: first-party trust (nonpooled), third-party trust (nonpooled), and pooled trust.

(7) D. A. Rephan and J. Groshek, “ABLE Act Accounts: Achieving a Better Life Experience for Individuals with Disabilities with Tax-Preferred Savings (and the Old Reliable Special and Supplemental Needs Trust),” *Mitchell Hamline Law Review* 42, no. 3 (2016): 963; accessed at: <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article.1034&context.mh1r>.

(8) E. Wilcenski and T. Pleat, “Administration of Special Needs Trusts: Development of an Improved Approach (Part II),” *New York State Bar Association Journal* 91, no. 2 (March 2019): 12-20; accessed at: <https://nysba.org/app/uploads/2020/04/March-Journal-2019-WEB.pdf>. See also E. Wilcenski and T. Pleat, “Administration of Special Needs Trusts: Development of an Improved Approach (Part III),” *New York State Bar Association Journal* 92, no. 3 (April 2020): 40-44; accessed at: [https://nysba.org/app/uploads/2020/04/NYSBA-April-2020-Journal\\_FinalWEBLinks.pdf](https://nysba.org/app/uploads/2020/04/NYSBA-April-2020-Journal_FinalWEBLinks.pdf).

(9) E. Wilcenski and T. Pleat, “Supplemental Needs Trusts: The Basics,” *New York State Bar Association Elder Law Section Program* (2016); L. Murphey, “Special Needs Trust Basics,” *Michigan Probate & Estate Planning Journal* 31 (2011): 3; R. P. Lacey and H. D. Nadler, “Special Needs Trusts,” *Family Law Quarterly* 46 no. 2 (2012): 247-267; accessed at: <https://nysba.org/NYSBA/Meetings%20Department/Section%20Meetings/Trusts%20and%20Estates/TRUSFA16%20Materials/Combined%20Self%20Settled%20Materials.pdf>; ABLE National Resource Center, “The ABLE Case Summary Series: ABLE Accounts Compared to Special Needs Trusts” (2018); accessed at: <https://www.ablenrc.org/wp-content/uploads/2019/07/ABLE-Accounts-Versus-Trusts.pdf>.

(10) The Stephen Beck, Jr. Achieving a Better Life Experience (ABLE) Act of 2014, Pub. L. No. 113-295, 128 Stat. 4010, codified at 26 U.S.C. § 529A (2014); accessed at: <https://www.congress.gov/bill/113th-congress/house-bill/5771/text/enr?r=123>.

(11) U.S. Social Security Administration, “Spotlight on Achieving a Better Life Experience (ABLE) Accounts” (2020); accessed at: <https://www.ssa.gov/ssi/spotlights/spot-able.html>; U.S. Senate Committee on Finance, “Saving for an Uncertain Future: How the ABLE Act Can Help People with Disabilities and Their Families,” Hearing No. 113-598 (July 23, 2014); accessed at: <https://www.finance.senate.gov/imo/media/doc/937721.pdf>; M. Morris, C. Rodriguez, and P. Blanck, “ABLE Accounts: A Down Payment on Freedom,” *Inclusion* 4, no. 1 (2016): 21-29; accessed at: doi: 10.1352/2326-6988-4.1.21; C. McGee and G. Ferguson, “A Primer on ABLE Accounts,” *University of Richmond Law Review* 52 (2017): 149-180; accessed at: <http://lawreview.richmond.edu/files/2017/11/McGee-521A.pdf>. See also ABLE National Resource Center, “Get Started: Search by ABLE Program Features” (2020a); accessed at: <https://www.ablenrc.org/state-plan-search/>.

(12) Earnings on nonqualified withdrawals from an ABLE account are subject to federal income tax and a 10 percent federal penalty tax, as well as applicable state and local income taxes.

(13) W. Weikel, “Disabling the Funds of the Disabled: How the Sole Benefit Rule Frustrates the Administration and Purpose of Supplemental Needs Trusts,” *Quinnipiac Probate Law Journal* 32, no. 1 (2018): 60.

(14) ABLE Act (2014), endnote 10; L. Hershey, A. Kelly, and B. Abbey, “Enabling ABLE: Five Potential Positives for Implementing the ABLE Act,” *Journal of Financial Service Professionals* 71, no. 2 (2017): 60-68 (discussing the broad range of qualified disability expenses and the possible advantages of using an ABLE account in special needs planning).

(15) B. Jackins, R. S. Blank, and K. W. Shulman, *Managing a Special Needs Trust: A Guide for Trustees* (Exeter, NH: disAbilities Books Press, LLC, 2019).

(16) See, e.g., New York Consolidated Laws Estates, Powers, and Trusts Law § 7-1.12, “Supplemental Needs Trusts Established for Persons with Severe and Chronic or Persistent Disabilities,” 2020; accessed at: <https://www.nysenate.gov/legislation/laws/EPT/7-1.12>.

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(18) A. Kelly and L. Hershey, “A 50-State Review of ABLE Act 529A Accounts,” *Journal of Financial Service Professionals* 72, no. 2 (2018): 69-84.

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(20) *Ibid.*

(21) *Ibid.*

(22) L. Hershey et al., “When to Stretch and When Not to Stretch an Inherited IRA: The Special Case of the Special Needs Trust,” *Journal of Financial Service Professionals* 69, no. 2 (2015): 59-66.

(23) P. R. Bjorklund, “Special Needs Trusts: Applications to Personal Injury Damages,” *Journal of Legal Economics* 27, no. 1 (2021): 53-62.

(24) *Ibid.*

(25) *Ibid.*

(26) U.S. Social Security, “Understanding Supplemental Social Security Income SSI Resources” (2022); accessed at: <https://www.ssa.gov/ssi/text-resources-ussi.htm> (noting that the limit for countable resources is \$2,000 for an individual and \$3,000 for a couple).

## Coordinating an ABLÉ Account and a Special Needs Trust

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- (27) A. Kelly and C. Marsack-Topolewski, "Special Needs Trust," in F. Volkmar (Ed.), *Encyclopedia of Autism Spectrum Disorders* (New York: Springer, 2020); accessed at: [https://doi.org/10.1007/978-3-319-91280-6\\_102518](https://doi.org/10.1007/978-3-319-91280-6_102518).
- (28) R. Andersen and S. Gary, *Understanding Trusts and Estates*, 6th ed. (Durham, NC: Carolina Academic Press, 2018).
- (29) ABLÉ Act (2014), endnote 10; See also L. Hershey, A. Kelly, and B. Abbey, "Disabling ABLÉ: Five Possible Pitfalls When Implementing the ABLÉ Act," *Journal of Financial Service Professionals* 71, no. 2 (2017): 70-78 (noting that under federal law, ABLÉ accountholders cannot lose eligibility for government benefits because of ABLÉ account usage. In certain circumstances, ABLÉ accountholders can lose the ability to receive government benefits with no out-of-pocket costs or limited costs).
- (30) U.S. Social Security Administration, "Achieving a Better Life Experience (ABLE) Accounts." POMS SI 01130.740 (2022). See also P. Hindert, "ABLE Accounts + Structured Settlements, Now a Possibility?" *Independent Life* (August 17, 2020); accessed at: <https://www.independent.life/blog/able-accounts-structured-settlements-now-a-possibility/> (noting that under current laws and regulations, a structured settlement annuity placed in an ABLÉ account will count as SSI income in the month of January and create a one-month SSI overpayment).
- (31) Kelly and Marsack-Topolewski (2020), endnote 27.
- (32) Kelly and Hershey (2018), endnote 18 (discussing how ABLÉ account limit amounts vary widely among state ABLÉ programs).
- (33) ABLÉ Act (2014), endnote 10; 42 U.S.C. § 1396p(d)(4)(A) (2022); 42 U.S.C. § 1396p(d)(4)(C) (2022); and 42 U.S.C. § 1396p(d)(2)(A)(iii)–(iv) (2022). See also U.S. Centers for Medicare & Medicaid Services, "Medicaid: Eligibility: Estate Recovery" (2022); accessed at: <https://www.medicaid.gov/medicaid/eligibility/estate-recovery/index.html>.
- (34) In accordance with endnote 1 herein, some individuals with disabilities view the label of special needs as patronizing, diminutive, and/or "othering." From this perspective, client needs are not unique to them, but simply different from those without a disability. See, e.g., D. Oliver, "'I Am Not Ashamed': Disability Advocates, Experts Implore You to Stop Saying 'Special Needs,'" *USA Today*, June 11, 2021; accessed at: <https://www.usatoday.com/story/life/health-wellness/2021/06/11/disabled-not-special-needs-experts-explain-why-never-use-term/7591024002/>; E. Garcia, *We're Not Broken: Changing the Autism Conversation* (New York: Houghton, Mifflin, Harcourt Publishing Company, 2021).
- (35) ABLÉ Act (2014), endnote 10; A. Kelly and L. Hershey (2018), endnote 18.
- (36) U.S. Social Security Administration (2022), endnote 11; R. E. Webb Jr., "Special Needs Trust Planning," *GPSolo* 31 (2014): 35.
- (37) Kelly and Marsack-Topolewski (2020), endnote 27.
- (38) S. Mitra et al., "Extra Costs of Living with a Disability: A Review and Agenda for Research," *Disability and Health Journal* 10, no. 4 (2017): 475-484; accessed at: <https://doi.org/10.1016/j.dhjo.2017.04.007>; Z. A. Morris, et al., "The Extra Costs Associated with Living with a Disability in the United States," *Journal of Disability Policy Studies* (2021); accessed at: <https://doi.org/10.1177/10442073211043521>.
- (39) N. Goodman et al., "The Extra Costs of Living with a Disability in the U.S.: Resetting the Policy Table," National Disability Institute (2020); accessed at: <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2020/10/extra-costs-living-with-disability-brief.pdf>. See also A. Kelly et al., "Financial Health Assessments by People with Disabilities and Their Families during the COVID-19 Pandemic: Opportunities and Obstacles for Financial Planners," *Journal of Financial Service Professionals* 76, no. 5 (2022): 46-55 (analyzing the unique challenges of special needs planning during the COVID-19 pandemic).
- (40) *Ibid.*
- (41) *Ibid.*
- (42) Kelly and Marsack-Topolewski (2020), endnote 27. See also C. Hickman-Ladd, "Special Needs Planning: Some Things to Consider," *American Bar Association Voice of Experience* (October 30, 2019); accessed at: [https://www.americanbar.org/groups/senior\\_lawyers/publications/voice\\_of\\_experience/2019/october-2019/some-things-to-consider-in-special-needs-trust/](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2019/october-2019/some-things-to-consider-in-special-needs-trust/).
- (43) Bjorklund (2021), endnote 23.
- (44) Kelly and Marsack-Topolewski (2020), endnote 27 (noting that a pooled SNT may be either a first or third-party trust).
- (45) A. Kelly and C. Marsack-Topolewski, "Achieving a Better Life Experience Savings Account (ABLE Savings Account, ABLÉ Account, 529A Savings Plan, and 529A Account)," in F. Volkmar (Ed.), *Encyclopedia of Autism Spectrum Disorders* (New York: Springer, 2020); accessed at: [https://doi.org/10.1007/978-1-4614-6435-8\\_102513-1](https://doi.org/10.1007/978-1-4614-6435-8_102513-1). See also B. Abbey and L. Hershey, "Does the ABLÉ Act Enable the Wealthy and Disable the Poor?" *Journal of Financial Service Professionals* 70, no. 2 (2016): 46-52; L. M. Russell and A. Grant, *Planning for the Future: Give Your Child with a Disability the Gift of a Safe and Happy Life* (7th ed.) (Palatine, IL: Planning for The Future, Inc., 2010).
- (46) U.S. Social Security Administration (2022), endnote 30 (Section C.4 notes that most third-party payments for housing costs would be considered in-kind support and maintenance and reduce the SSI payment).
- (47) A. Kelly and C. Marsack-Topolewski (2020), endnote 45. See also U.S. Social Security Administration (2022), endnote 30; U.S. Social Security Administration, "Exceptions to Counting Trusts Established on or after January 1, 2000," POMS SI 01120.203 (2022); and U.S. Social Security Administration, "Information on Trusts, Including Trusts Established Prior to January 01, 2000, Trusts Established with the Assets of Third Parties, and Trusts Not Subject to Section 1613(e) of the Social Security Act," POMS SI 01120.200 (2022).
- (48) Kelly and Marsack-Topolewski (2020), endnote 27. See also Kelly and Marsack-Topolewski (2020), endnote 45.