

**Guardianship
& Alternatives**

**Special Needs Trusts
& ABLE Accounts**



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Alison focuses her practice on special needs planning, including trust and estate work, government benefits, guardianship, alternatives to guardianship, and general probate work.

She is the mother of a 29-year-old daughter with significant special needs.

The combination of Alison's personal and professional experience allow her to better understand and serve her clients who worry about their loved ones with disabilities.

Legal Disclaimer



No attorney-client relationship created by use of this presentation.

This presentation should not be construed as legal advice for any particular set of circumstances.

Please visit with a licensed attorney to discuss your personal situation.

Adulthood for Individuals with Disabilities

Age 18: Parent no longer has authority to make decisions for child (medical, education, residence)



OPTIONS:

1. Adult child represents himself/herself;
2. Guardian is appointed;
3. Less-restrictive alternative is arranged.

GUARDIANSHIP

Court determination of incapacity and
need for appointment of guardian

Incapacitated person: *an adult who, because of a physical or mental condition, is substantially unable to provide food, clothing or shelter for himself or herself or care for the person's own physical health.*

Health Care Provider's Certificate of Medical Examination

Revision September 2023

In the Matter of the Guardianship of _____,
an Alleged Incapacitated Person

For Court Use Only
Court Assigned: _____

To the Physician, Psychologist, or Advanced Practice Registered Nurse

This form is to enable the Court to determine whether the individual identified above is incapacitated according to the legal definition (on page 3), and whether that person should have a guardian appointed.

1. General Information

Examining Health Care Provider's Name _____ Phone: (_____) _____

Office Address _____

- Select one: I am a physician currently licensed to practice in the State of Texas;
 I am a psychologist currently licensed in the State of Texas or certified by HHSC; or
 I am an advanced practice registered nurse acting under a physician's delegation authority and supervision in accordance with Chapter 157, Occupations Code.
 YES NO I have experience examining individuals with the physical or mental condition resulting in the Proposed Ward's incapacity; or
 YES NO I have an established patient-provider relationship with the Proposed Ward

Proposed Ward's Name _____

Date of Birth _____ Age _____ Gender M F

Proposed Ward's Current Residence: _____

I last examined the Proposed Ward on _____, 20____ at:

- a Medical facility the Proposed Ward's residence Other: _____

5. Ability to Make Responsible Decisions

Is the Proposed Ward able to initiate and make responsible decisions concerning himself or herself regarding the following:

- Yes No --- Make complex business, managerial, and financial decisions
- Yes No --- Manage a personal bank account
If "YES," should amount deposited in any such bank account be limited?
- Yes No --- Safely operate a motor vehicle
- Yes No --- Vote in a public election
- Yes No --- Make decisions regarding marriage
- Yes No --- Determine the Proposed Ward's own residence
- Yes No --- Administer own medications on a daily basis
- Yes No --- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) without supports and services
- Yes No --- Attend to basic activities of daily living (ADLs) (e.g., bathing, grooming, dressing, walking, toileting) with supports and services
- Yes No --- Attend to instrumental activities of daily living (e.g., shopping, cooking, traveling, cleaning)
- Yes No --- Consent to medical and dental treatment at this point going forward
- Yes No --- Consent to psychological and psychiatric treatment at this point going forward

YES NO ---- Based upon my last examination and observations of the Proposed Ward, it is my opinion that the Proposed Ward is incapacitated **according to the legal definition in section 1002.017 of the Texas Estates Code, set out in the box above.**

If you indicated that the Proposed Ward is incapacitated, indicate the level of incapacity:

Total ----- The Proposed Ward is totally without capacity (1) to care for himself or herself and (2) to manage his or her property.

Partial ----- The Proposed Ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.

Evaluation of Capacity (continued)

If you indicated the Proposed Ward's incapacity is partial, what specific powers or duties of the guardian should be limited if the Proposed Ward receives supports and services?

Full Guardianship Removes Rights

- Vote
- Marry
- Make personal decisions regarding own residence
- Consent to or object to medical, dental, psychological or psychiatric treatment
- Drive (obtain or hold driver's license)
- Manage financial, business and managerial matters
- Own and operate a firearm and ammunition

vs. PARTIAL “limited authority” guardianship
(some rights retained)

Alternatives to guardianship and supports and services must be considered before court can authorize guardianship

Guardianship of Person

Guardianship of Estate





GUARDIANSHIP OF PERSON



LESS-RESTRICTIVE ALTERNATIVES:

- *Guardianship with Limited Authority*
- *Medical Power of Attorney*
- *Durable Power of Attorney*
- *Supported Decision-making Agreement*
- *Declaration for Mental Health Treatment*

Medical Power of Attorney

- Agent appointed to make medical decisions for incapacitated person.
- Doctor determines incapacity.
- Individual signing POA must have capacity to understand legal document.
- Revocable.



Durable Power of Attorney

Legal document giving one person the power to act for another

- make residential and educational decisions, vocational training and employment, sign contracts, etc.

Can be effective IMMEDIATELY
or UPON INCAPACITY

*Must understand legal document



Powers of Attorney for Everyone!



Supported Decision-Making Agreement

- Disabled individual (“Principal”) selects **“Supporter”** to help make decisions.
- Does not require going to court. Attorney doesn’t need to draft agreement.
- Principal must have capacity to understand process and purpose of agreement.
- Supporter **CANNOT** make decisions for Principal - only assist in decision-making.

Decision-making requires practice.

Decision-making is a learned skill – people with disabilities need opportunity, experience and support to learn to make good decisions.

SDMA language

Appointment of Supporter:

I (Name of Adult with Disability), _____ am entering into this agreement voluntarily.

I choose (Name of Supporter) _____ to be my Supporter.

Supporter's Address: _____

Phone Number: _____

E-mail Address: _____

My Supporter may help me with life decisions about:

Yes ___ No___ obtaining food, clothing and a place to live

Yes ___ No___ my physical health

Yes ___ No___ my mental health

Yes ___ No___ managing my money or property

Yes ___ No___ getting an education or other training

Yes ___ No___ choosing and maintaining my services and supports

Yes ___ No___ finding a job

Yes ___ No___ Other: _____

My Supporter does not make decisions for me. To help me make decisions, my Supporter may:

1. Help me get the information I need to make medical, psychological, financial, or educational decisions;
2. Help me understand my choices so I can make the best decision for me;
or
3. Help me communicate my decision to the right people.

Yes _____ No _____ My Supporter may see my private health information under the Health Insurance Portability and Accountability Act of 1996. I will provide a signed release.

Yes _____ No _____ My Supporter may see my educational records under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g). I will provide a signed release.

Who can enter into SDMA?

- Any individual over age 18 who has physical or mental impairment that substantially limits one or more major life activity.
- Required level of capacity is not well-defined.
Must understand nature and consequence of signing SDMA (different from POA requirement of understanding legal aspects).

Guardianship of Estate

LESS-RESTRICTIVE ALTERNATIVES:

- *Supported Decision-making Agreement*
- *Statutory Durable Power of Attorney*
- *Social Security Representative Payee*
- *Trustee managing assets in a Trust*



SDMA language

Appointment of Supporter:

I (Name of Adult with Disability), _____ am entering into this agreement voluntarily.

I choose (Name of Supporter) _____ to be my Supporter.

Supporter's Address: _____

Phone Number: _____

E-mail Address: _____

My Supporter may help me with life decisions about:

Yes ___ No___ obtaining food, clothing and a place to live

Yes ___ No___ my physical health

Yes ___ No___ my mental health

Yes ___ No___ managing my money or property

Yes ___ No___ getting an education or other training

Yes ___ No___ choosing and maintaining my services and supports

Yes ___ No___ finding a job

Yes ___ No___ Other: _____

Durable



- Authorizes agent to handle financial matters on behalf of principal



Representative Payee

- Social Security Administration Only
- SSA does not accept POA

Appoint individual or approved organization:

- Online using your personal my Social Security account.
- By telephone at 1-800-772-1213 (TTY 1-800-325-0778).
- In person by going to your local field office.
- By mail using Form SSA-4547 – Advance Designation of Representative Payee.

Special Needs Estate Planning Tools

to provide assistance managing assets and preserve needs-based government benefits

Special Needs Trust is a trust for the benefit of an individual with disabilities

ABLE Account is a tax-advantaged savings account for an individual who was disabled before age 26 (age 46 after 2026)

How is a Special Needs Trust different from another trust?

- Beneficiary is **disabled** (physically or mentally).
- **Beneficiary control is restricted.**
- **Stated purpose to “supplement and not supplant” government benefits – NOT a support trust.**
- Trust is not a countable resource for needs-based government benefits. No transfer penalty.

**TRUSTEE of
Special Needs Trust
is NOT a GUARDIAN**

But can avoid Guardianship of Estate

Guardianship

1. Court determination of incapacity
2. No less restrictive alternatives to guardianship
3. **Appointment of Qualified Guardian**

Who can QUALIFY to serve as Guardian?

1. Spouse
2. Nearest of kin (children, parents, siblings, grandparents)
3. Eligible person who is best qualified to serve as guardian

Co-guardians (joint appointment) if married or joint managing conservators

**JBCC guardianship training & background check*

Who is DISQUALIFIED from serving as Guardian?

- Minor/other incapacitated person
- History of notoriously bad conduct (sexual offense, aggravated assault, injury to child, abandoning or endangering child, continuous family violence)
- Indebted to Ward
- Party to lawsuit affecting Ward
- Asserting claim adverse to Ward or Ward's property
- Found by Court to be unsuitable
- Non-resident with no resident agent

Successor Guardian

- Guardian should specify in Will or other legal document who should become successor guardian upon death or incapacity of guardian.
- If there is someone you DO NOT WANT to serve as guardian, you can (and should) specify this.
- Otherwise, guardianship opportunity will be offered according to “degree of kinship.”

Rights and Duties of Guardian of Person

- Right to have physical possession of Ward and establish Ward's legal domicile;
- Ensuring that Ward is cared for, supervised and protected;
- Providing clothing, food, medical care and shelter for Ward;
- Power to sign documents so that Ward can be employed;
- Power to consent to medical, psychiatric and surgical treatment except for the psychiatric commitment of Ward which requires court approval.



How long does the guardianship process take?

When should I start?

Guardianship Application

- Within 120 days of date that doctor examined Proposed Ward
- Up to 6 months before 18th birthday

Guardianship in county:

- where the potential ward resides
- where the potential ward is located when the application is filed
- where the principal estate of the potential Ward is located

10 Texas counties have **statutory probate courts**

- Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Hidalgo, Tarrant, Travis

Temporary Guardianship

Court can appoint temporary guardian (less than 60 days unless extended) if there is probable cause to believe that **person requires immediate appointment of guardian** for emergency medical procedures, imminent threat of abuse, time-sensitive issues, etc.

A red, rectangular stamp with a distressed, ink-like texture. The word "EMERGENCY" is written in bold, uppercase, sans-serif letters across the center of the stamp.

Guardianship Steps

- 1) Physician's CME completed
- 2) Guardianship application filed within 120 days of CME
- 3) Personal service of proposed ward
- 4) Service or notice to family members
- 5) JBCC registration and online training
- 6) Criminal background checks
- 7) Attorney Ad Litem appointed and makes visit
- 8) Court investigator files report (statutory probate courts)
- 9) Court hearing after 18th birthday
- 10) Bond and Oath signed = Qualification

Additional Steps for Guardianship of Estate

- Inventory, Appraisal and List of Claims
- Application for monthly or annual allowances
- Notice to secured creditors
- Investment plan

- **Court authorization required to sell property, pay creditors, distribute funds, etc.**

How do I renew my guardianship letters?

- annual report (GOP)
- annual account (GOE)
- current bond
- visit from court monitor in some counties



Can Guardianship Be Modified or Terminated?

Restoration of Rights (partial or total)

What happens to
the guardianship if
the ward moves?



Why is the guardianship process so expensive?



Guardianship Expenses

- 1) Attorney's fees
- 2) Attorney Ad Litem fees
- 3) Court costs - *filing fees, personal service, guardianship letters, annual reports*
- 4) Bond
- 5) Potential additional costs:
Certified mail, private investigation, fingerprinting, annual accountings

(Some costs may be waived for individuals with limited income.)

Tough Decision in Some Cases

Guardianship?



No Guardianship?

SPECIAL NEEDS TRUSTS

How is a SPECIAL NEEDS TRUST different from other trusts?

- Beneficiary is **disabled** (physically or mentally).
- **Beneficiary control is restricted.**
- Stated purpose is to **supplement and not supplant (replace) government benefits** – NOT a support trust.
- Trust is **not a countable resource** for SSI, Medicaid, etc.

SSI Financial Eligibility

“Needs-based”
program to provide
basic food and
shelter benefits

**Limited income and
assets to qualify**
 (“Means-tested”)

Resource Exclusions

- First \$2,000 (\$3,000 if married couple)
- Home of any value
- Car of any value
- Household goods and personal effects
- Life insurance with face value less than \$1,500
- Pre-paid Funeral or Burial Plot
- Burial fund worth up to \$1,500
- Retroactive SSI or SSDI payments for 9 months
- **Special Needs Trust**
- **ABLE Account**

Two Types of SNTs

First-Party SNT:

Funded with assets that belong to beneficiary

(Medicaid payback)

Third-Party SNT:

Funded with assets belonging to anyone other than the beneficiary

(No Medicaid payback)

First-party SNTs

Funded with beneficiary's own money (inheritance, personal injury award, gift), SBP annuity payments, child support for adult disabled child, etc.

Eligibility:

- Disabled beneficiary under age 65

Created by:

parent, grandparent, guardian, court, or beneficiary with sufficient capacity

**MEDICAID
PAYBACK**
upon
beneficiary's
death

Child Support

Lifetime child support (allowed in some states) can be **irrevocably assigned** to first-party SNT.

- SSA: This must be done by court order. An agreement to this effect will not work.
- **Do NOT assign child support payments to an ABLE account.**



Military Survivor Benefits

Disabled Military Child Protection Act

(December 2014)

- *SBP can be assigned to a first-party special needs trust*



Military Survivor Benefit Plan Annuity “SBP”

Retiree selects recipient of SBP:

“Spouse only”

“Spouse and Child”

“Child Only” (with spouse’s consent)

Eligibility for dependent child:

- Unmarried
- Under 18 years old (22 if full-time student)
- Incapacitated or disabled child who is incapable of self-support because of physical or mental disability which existed before 18th birthday (or before age 22 for full-time student)

SBP Premiums

Premium for "Spouse Only" coverage is 6.5% of gross retired pay.

Premium for "Spouse and Child" is not much larger.

Premium for "Child Only" is based on age of youngest child using actuarial tables.

➤ SBP pays monthly amount (rather than lump sum) which increases annually with inflation.

SBP Procedure



Attorney drafts first-party SNT and provides Attorney Certification Form



Military member obtains trust tax ID number



Military member submits written statement electing that annuity payment be paid to SNT for his or her child.

Income Not Assignable to Special Needs Trust

SSA POMS SI 01120.200.G.1.c – Payments not assignable by law:

- **Social Security Title II and SSI payments**
- Temporary Assistance to Needy Families (TANF)/Aid to Families with Dependent Children (AFDC);
- Railroad Retirement Board-administered pensions;
- Veterans' pensions and assistance;
- Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management; and
- Private pensions under the Employee Retirement Income Security Act (ERISA) 29 U.S.C.A., Section 1056(d).

Third-party SNTs

Created & funded
by any third party

Eligibility:

- Disabled beneficiary

Trust Assets:

- Cash, stock, real estate, etc. (anything that does not belong to the beneficiary)
- **No funding limits**

**SNT Grantor
decides where
assets go upon
beneficiary's death**

Third-Party SNT Options



Stand-alone
trust



Within another
living trust



Testamentary
Trust

Advantages of Stand-alone SNT

1. More detailed trust provisions
2. Immediately available to receive donations from third-parties
3. Can establish bank account, transfer titles, begin investing funds and “practice” trust management
4. Quick payment to trust as designated beneficiary (no waiting for probate)

POOLED SPECIAL NEEDS TRUST

42 U.S.C. § 1396p(d)(4)(C)

First-party or third-party SNT that is managed by not-for-profit organization

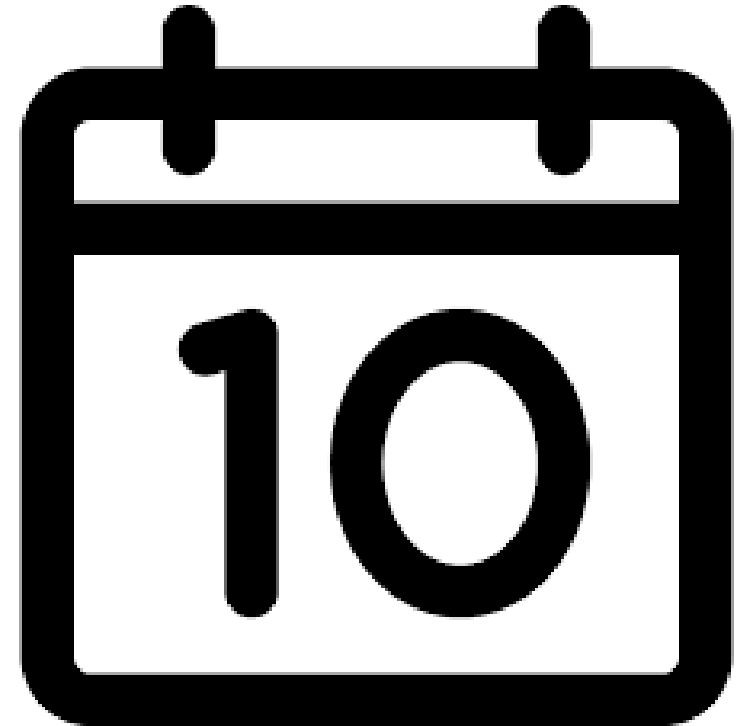
Sub-Account: Separate accounts for each beneficiary but the funds may be pooled for investment purposes

Minimal funding allowed

Only cash assets accepted for most pooled trusts

Reporting Trust to SSA

- **Report changes to SSA** by 10th day of month following change.
- Trust will be reviewed by Special Needs Trust Review Team.
- Use SSA appeal process as needed.



CHOOSING TRUSTEE OF SPECIAL NEEDS TRUST

- Parents
- Sibling
- Close friend
- Corporate Trustee (Bank)
- Pooled Trust

NOT SNT BENEFICIARY!



CORPORATE TRUSTEE vs. FAMILY MEMBER

Corporate trustee charges fees and only accepts substantial trusts

Family member arguably knows beneficiary best, but...

- Family member may have conflict of interest.
- Family member may not have time or want to serve as trustee.
- Family member must be willing to learn about government benefits and deal with agencies.
- Siblings are worst offenders for messing up SNT administration

Consider naming a TRUST PROTECTOR/ADVISOR to keep family members involved.

**TRUSTEE of
Special Needs Trust
is NOT a GUARDIAN**

Trustee manages property in the trust.
Trustee does not have authority to make
medical decisions or decide where
beneficiary lives.

Getting Trust Account Established

Specialized attorney can draft trust agreement.

Simple testamentary special needs trusts may be available through military.

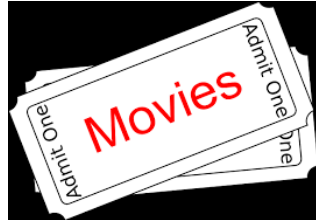
Trustee uses trust documents to set up trust account when ready to fund trust (could be immediately or when both parents have died).

Trustee administers trust according to needs of beneficiary.

Arrangements NOT Recommended

- Disinheritance – no money available for loved one with special needs
- Leaving assets to brothers or sisters with request to take care of sibling
 - Money is subject to creditors
 - Funds become part of estate upon death
 - Assets could be lost in divorce
 - May not want to take care of sibling if have own family

SNT Disbursements



Trust Distribution Methods

- Pay vendor directly for goods or services.
- Reimburse third parties for purchases made for beneficiary if all other guidelines are followed.
- Use True Link card in accordance with the terms and conditions of SSA POMS SI 01120.201.i.e Administrator-managed prepaid cards.
- Pay beneficiary's credit card bills if Trustee exercises appropriate discretion and can verify appropriate charges on statement.
- DO NOT distribute cash directly to beneficiary or reimburse him or her directly for purchases made.

Can a special needs trust pay for **FOOD** and **SHELTER**?



Usually YES,
but may affect certain government benefits.

**TRUSTEE of
Special Needs Trust
is NOT a GUARDIAN**

But can avoid Guardianship of Estate

Special Needs Trust
is a trust for the
benefit of an individual
with disabilities

ABLE Account is a
tax-advantaged
savings account for an
individual who was
disabled before age 26

Non-countable assets when determining
eligibility for government benefits

ABLE ACT

The Stephen J. Beck, Jr.
Achieving a Better Life Experience
Act signed in 2014

Provides for tax-advantaged **ONLINE** savings accounts for individuals disabled before age 26

Eligibility for ABLE Account

- Blind or disabled prior to the age of 26.
(Can be over age 26 when opening account, as long as disability occurred prior to turning 26.)

After January 1, 2026:

- Blind or disabled prior to the age of 46.
- If age criteria is met AND individual is already receiving SSI and/or SSDI benefits = automatically eligible
- If individual is NOT receiving SSI or SSDI benefits:
 - Meet SSA's definition of disability; and
 - Receive physician's disability certification

ABLE Account Owner & Manager

Beneficiary is account owner.

Beneficiary or Authorized Legal Representative manages account.

Authorized Legal Representative:

- Parent
- Legal Guardian
- Power of attorney agent
- Representative Payee in some states

ABLE Account Contribution Limits (2023)

\$17,000 annual contribution limit

(tied to IRS annual gift tax exclusion amount)

+ additional \$13,500 in wages earned by the individual with disabilities

ONLY ONE ABLE ACCOUNT PER BENEFICIARY

Contributions can be made by anyone (beneficiary, family members, friends, trustee of special needs trust, etc.)

and **must be made in cash.**

ABLE Account Balance Limits (2023)

\$100,000 balance limit for SSI recipients

If SSI recipient's ABLE account goes over \$100K, SSI benefit is suspended until the account is spent down below \$100K. Does not affect Medicaid.

Higher limit for Medicaid-only recipients

\$235,000 - \$550,000 in most states

Medicaid Payback

- ABLER account requires a Medicaid payback (reimbursement) in many states.
- Medicaid payback only affects Medicaid benefits received after the ABLER account is established.

Rollovers from 529 College Savings Accounts into ABLE Accounts

- Families that have a 529 College Savings Plan (529C) can transfer the monies to an ABLE Account (529A) without incurring a penalty.
- The rollover can be in amounts up to the annual ABLE contribution limit.
- Both accounts must have the same beneficiary or be a qualified member of the beneficiary's family.



ABLE Account funds used for Qualified Disability Expenses (QDE's)

“that relate to the individual’s disability and are for the benefit of maintaining or improving health, independence or quality of life.”



This includes food and shelter.

Withdrawals from ABLE Account



Online withdrawal process



Request paper check
(7-10 days)

Electronic withdrawals
(3-5 days)



Transfer to personal checking or savings accounts and use debit card



Pay bills directly from online account

A close-up, slightly blurred photograph of a white calculator resting on a document. The calculator's display screen is dark, and its keypad with various function and numeric keys is visible. The background shows the texture of a printed document.

Non-Qualified Fund Withdrawal

- Non-qualified funds withdrawn are considered an asset when determining eligibility for means-tested government benefits.
- Withdrawals for housing expenses must be spent in the month the withdrawal is received or it will be considered an asset.
- Tax Consequences



Prepaid Debit Card

- In most states, prepaid debit cards can be requested at time of enrollment or later.
- Funds can be transferred to the card via online account and can typically be used everywhere Visa debit cards are accepted.

Closing an ABLE Account

- When an account owner passes away, the funds in the account can be used for qualified disability expenses such as funeral and burial (before Medicaid payback).
- Remaining funds (after the Medicaid payback if applicable) can go to a named successor beneficiary.

ABLE Accounts Used to Eliminate ISM Penalty for SSI Beneficiaries

In-kind Support and Maintenance (“ISM”) is food or shelter that somebody else provides for you.

General Rule:

If you live in another person’s household for free, your SSI benefits will be reduced by **one-third** of the SSI maximum benefit.

Fair Share Exception:



SSA will not apply the ISM reduction if SSI recipient pays **fair share** of household expenses.

10 SSA “POMS” ISM Expense Items

1. Food
2. Mortgage
3. Real property taxes
4. Rent
5. Heating fuel
6. Gas
7. Electricity
8. Water
9. Sewer
10. Garbage removal

“Fair Share” = total cost of these 10 items divided by the number of people living in the home.

What if SSI recipient doesn't get enough money to pay "fair share?"

Lease Agreement or **ABLE Account**

Funds contributed to ABLE account (from any source) belong to the beneficiary.

Designated Beneficiary=Owner

ABLE account funds used to pay for QDEs including food & shelter

ABLE Account & ISM Example

David lives with parents. “Fair share” = \$900 per month.

- \$500 SSI payment to parents each month
- \$400 paid to parents from ABLE account

Result:

David avoids ISM charge and receives maximum SSI.

Administration tip: Trustee can transfer funds from special needs trust to ABLE account to avoid ISM penalty.

Benefits of SNT & ABLE Account

- Eligibility for needs-based government programs
- Allows for supplemental funds to enhance quality of life
- Assistance with money management
- Protection against financial abuse

Estate planning is critical for special needs families.

Summary

Eligibility

- SNT - disabled beneficiary of any age
- ABLE - disabled before 26

Cost

- SNT - costs \$\$\$ to set up and maintain (attorney needed)
- ABLE – minimal costs

Taxes

- Tax-free growth with ABLE

Assets

- SNT - no limits on type & amount of asset (as long as trustee agrees)
- ABLE - yearly and total limits (can only use cash)

Medicaid Payback

- No payback with third-party SNT

Use both together!

Third-party SNT
& ABLE Account

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