

# Incapacity Planning with ABLE Accounts v. Other Supports

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# ABLE Account

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The ABLE Act amended Section 529 of the Internal Revenue Service Code of 1986 to create a tax-favored savings vehicle for individuals with disabilities to cover the costs of qualified expenses while maintaining eligibility for vital needs-based public benefit programs such as Medicaid and Supplemental Security Income (SSI).

# Overview

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Basics of SSI\* & Medicaid—Means Tested Benefits

ABLE Accounts Explained

Practical Applications

Comparisons of ABLE Account v. Other Supports

\*SSI for adults is the principle area of discussion for this presentations purpose unless otherwise specified.

# SSI: What is it?

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Supplemental Security Income (hereinafter “SSI”) is a state administered federal supplement program designed to help aged, blind, and disabled people, who have little or no income.

With that supplemental income, the program expects that the recipient or their representative payee use this cash to meet basic needs for food, clothing, and shelter.

# Current SSI Benefit Amounts

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Because there was no Cost of Living Adjustment (also “COLA) that applied to Social Security Benefits, the Federal monthly maximum amounts for 2016 are \$733 for an eligible individual and \$1,100 for an individual with an eligible spouse.

# SSI Benefits can be reduced by “Countable Income”

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Countable income is the amount left over after eliminating from consideration all items that are not income; and applying all appropriate exclusions to the items that are income.

It may be in cash or in kind. In-kind income is not cash; it is food or shelter, or something you can use to get food or shelter.

- For example, a recipient or couple lives throughout a month in another person's household and receives **both** food and shelter from others living in the household, SSA will reduce their benefit the applicable federal benefit rate (FBR) by one-third. SI 00835.200 The One-Third Reduction Provision.

\*Again, note that for SSI for Children, deeming rules apply that dramatically affect the amount of benefits.

# SSI Categories

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For adults, individuals who are aged blind, or disabled, **and** who have limited income and resources may be eligible to receive SSI.

Aged--anyone is 65 years and older.

Blind—

- Someone who has a central visual acuity of 20/200 or less in your better eye with use of a correcting lens; or
- Someone who has a visual field limitation in your better eye, such that the widest diameter of the visual field subtends an angle no greater than 20 degrees.

# SSI Categories

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**Disabled**—for individuals who have a medically determinable physical or mental impairment (including an emotional or learning problem) which:

- results in the inability to do any substantial gainful activity; and
- can be expected to result in death; or
- has lasted or can be expected to last for a continuous period of not less than 12 months.
- Substantial gainful activity is SSA's measure of work that is both "substantial and gainful." For disabilities other than blindness, earnings averaging over \$1,130 for 2016 generally demonstrate SGA.

# Five-Step Process to Determine Disability

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1. has the individual achieved substantial gainful activity (“SGA”) in the past 12 months,
2. does the individual have a severe impairment,
3. does the individual have an impairment that meets or equals a listing in the listing of impairments,
4. is the individual able to do his or her past work, and
5. can the individual do other kind of work.

# 3-Step Process for Children

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- If under 18, whether or not married or head of household, the child has a medically determinable physical or mental impairment or impairments which result in marked and severe functional limitations; and
- The impairment(s) has lasted or can be expected to last for a continuous period of at least 12 months or be expected to result in death; or
- If the child is blind, he or she meets the same definition of “blind” as applies for adults.

# Disqualifying Events

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Failure to recertify as disabled

Income ineligibility

Resource ineligibility

# Income Ineligibility

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An individual has the duty to report changes in earned or unearned income as soon as possible but no later than 10 days after the end of the month in which the change occurred.

SSA will disregard certain income like:

- the first \$20 of most income received in a month;
- the first \$65 of earnings and one-half of earnings over \$65 received in a month;
- money someone else spends to pay your expenses for items other than food or shelter (for example, someone pays your telephone or medical bills)

Countable income, being the amount left over after eliminating from consideration all items that are not income; and applying all appropriate exclusions to the items that are income, will reduce SSI benefits dollar for dollar until an individual may no longer be eligible to receive SSI benefits.

# Resource Ineligibility

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The current resource limit is \$2,000 for an individual and \$3,000 for a couple. Generally, resources are items like:

- cash;
- bank accounts, stocks, U.S. savings bonds;
- land;
- life insurance;
- personal property;
- vehicles;
- anything else you own which could be changed to cash and used for food or shelter; and
- deemed resources.

# Resource Exclusions

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the home you live in and the land it is on;

household goods and personal effects (e.g., your wedding and engagement rings);

burial spaces for you or your immediate family;

burial funds for you and your spouse, each valued at \$1,500 or less (see the SSI Spotlight on Burial Funds);

life insurance policies with a combined face value of \$1,500 or less;

one vehicle, regardless of value, if it is used for transportation for you or a member of your household;

retroactive SSI or Social Security benefits for up to nine months after you receive them (including payments received in installments);

grants, scholarships, fellowships, or gifts set aside to pay educational expenses for 9 months after receipt

# Planning Strategies during Disqualification

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Spending down resources until resource limit is met

Creation of Special Needs Trusts (SNTs)

Sell of countable resources and possible reimbursement of overpayments.

SSI and Medicaid are linked such that if someone qualifies for SSI, then they automatically qualify for Medicaid. Like Medicaid, being over the SSI resource and income limits, leads to periods of ineligibility.

# Medicaid: What is it?

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Medicaid is a state-administered federal program funded by both federal and state dollars that provides health coverage to eligible disabled and low-income participants.

In Texas, Medicaid provides coverage to 4 million low-income Texans, and covers half of all children in the state of Texas and two-thirds of people in nursing homes.

There are many programs under Medicaid but, for the purpose of this presentation, will take a brief look at traditional Medicaid eligibility for the disabled and elderly.

# What does Medicaid cover?

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Inpatient hospital services

Outpatient hospital services

EPSDT: Early and Periodic Screening, Diagnostic, and Treatment Services

Nursing Facility Services

Home health services

Physician services

Rural health clinic services

Laboratory and X-ray services

Certified Pediatric and Family Nurse Practitioner services

Freestanding Birth Center services (when licensed or otherwise recognized by the state)

Transportation to medical care

# What kind of services do Medicaid waiver programs cover?

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Adaptive Aids & Medical Supplies

Adult Foster Care

Assisted Living

Behavioral Support

Dietary/Nutrition

Companion Care

# Income & Resource Eligibility for Medicaid

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The Texas Health and Human Services Commission (HHSC) follows §1612 of the Social Security Act (42 U.S.C. §1382a) and 20 CFR §§416.1101 - 416.1104 regarding the definition and general treatment of income for the purpose of determining financial eligibility and calculating a co-payment. Section E-1100 of MEPD Handbook

As to the relationship between income and resources, in general, anything received in a month, from any source, is income to a person, if it meets the person's needs for food and shelter.

Anything the person owned prior to the month under consideration is subject to the resource counting rules, except for periodic payments that are not purposefully interrupted.

# Disqualifying Events

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Failure to meet definition of disability

Income Ineligibility

Resource Ineligibility

# Planning Techniques During Periods of Possible Disqualification

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Special Needs Trusts

Qualified Income Trusts (formerly, known as Miller's Trust)

Spend Down

Resource Conversion

# Examples of Common Eligibility Issues

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George inherits between \$5,000-10,000 from his parent's estate. He is now over the resource limits for SSI and Medicaid. He is forced to spend down those resources and then, become eligible upon spend down.

Katy was diagnosed with Rett Syndrome. She experiences a loss of muscle tone. Soon, she loses any purposeful use of her hands. She stops talking and develops extreme social anxiety and withdrawal or disinterest in other people. Now, that she turns 18, her mother seeks continuing support from her father. However, her support payments of \$430 per month reduce her SSI benefits.

Peter receives a royalty check each year of \$1,500 and is a co-owner in his parents' home along with his sister. He struggle coming up with the property tax payments because sis won't help. He isn't able to save the little cash he makes from his work program and the annual royalty check because he would go over the resource limit.

# ABLE Enabling Legislation and Regulations

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The Achieving a Better Life Experience (ABLE) Act of 2013 (S 313/HR 647) was introduced in the 113th Congress on February 13, 2013 and signed into law by President Barack Obama in tax package legislation on December 19, 2014.

Texas adopted the ABLE program in June of 2015. See Appendix A.

The IRS has proposed regulations.

SSA has adopted POMS provisions concerning ABLE accounts.

# Purpose of the ABLE Program

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To encourage and assist individuals and families in saving funds for the purpose of supporting individuals with disabilities to maintain health, independence and quality of life; and to provide secure funding for qualified disability expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program under Title XIX of the Social Security Act, the supplemental security income program under Title XVI of the Social Security Act, the beneficiary's employment, and other sources Section 54.901 of the Texas Education Code.

# Impact of ABLER Accounts on Financial Determinations for Means Tested Benefits Programs

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In Texas, in making an eligibility determination, an agency, notwithstanding other provisions of state law, “may not consider the amount in the applicant's ABLER account, including earnings on that amount, and any distribution for qualified disability expenses in determining the applicant's eligibility to receive and the amount of the assistance or benefit with respect to the period during which the individual maintains the ABLER account.”

- Section 54.9065(1) of the Texas Education Code.

# Qualifying ABLE Program

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*(A) under which a person may make contributions for a taxable year, for the benefit of an individual who is an eligible individual for such taxable year, to an ABLE account which is established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account,*

*(B) which limits a designated beneficiary to 1 ABLE account for purposes of this section, and*

*(C) which meets the other requirements of this section.*

- 26 U.S.C. § 529A(b)(1)

# Important Terms

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**Able Account**—The term ‘ABLE account’ means an account established by an eligible individual, owned by such eligible individual, and maintained under a qualified ABLE program.

**Person (who can contribute to an account)**—the term person is defined in section 7701(a)(1) of the Internal Revenue Code to include an individual, trust, estate, partnership, association, company, or corporation.

**Designated Beneficiary**—the term ‘designated beneficiary’ in connection with an ABLE account established under a qualified ABLE program means the eligible individual who established an ABLE account and is the owner of such account.

**Qualified Disability Expenses**—The term ‘qualified disability expenses’ means any expenses related to the eligible individual’s blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary.

# Other Important Terms

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Member of the family—the term ‘member of the family’ means, with respect to any designated beneficiary, an individual who bears a relationship to such beneficiary which is described in subparagraph section 152(d)(2)(B). For purposes of the preceding sentence, a rule similar to the rule of section 152(f)(1)(B) shall apply.

This means brother, sister, stepbrother, or stepsister.

# “Eligible Individual”: Who can get an ABLE Account?

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*(A) the individual is entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act, and such blindness or disability occurred before the date on which the individual attained age 26, or*

*(B) a disability certification with respect to such individual is filed with the Secretary for such taxable year.*

*i.e., the individual has been found disabled by SSA or HHSC before 26 years old and receiving SSI/Medicaid, or is 26 years old and has a disability certification.*

# Disability Certification (Does not = SSA/MA Benefits Eligibility)

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*The term "disability certification" means, with respect to an individual, a certification to the satisfaction of the Secretary by the individual or the parent or guardian of the individual that-*

*(i) certifies that-*

*(I) 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 12 months, or is blind (within the meaning of section 1614(a)(2) of the Social Security Act), and*

*(II) such blindness or disability occurred before the date on which the individual attained age 26, and*

*(ii) includes a copy of the individual's diagnosis relating 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.*

# One Account per Eligible Individual

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Any one qualified disabled individual is limited to one ABLÉ account, which has tax-free growth.

Nevertheless, this limit of one ABLÉ account per qualified disabled individual does not affect rollover from ABLÉ accounts

- 26 U.S.C. § 529A(b)(1)(B)

# Annual Contribution Limit

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Contributions to any one ABLE account must be in cash or a rollover in any given year that cannot exceed the annual exclusion amount for gift tax under section 2503(b) for the calendar year in which the taxable year begins.

For 2016, the annual exclusion limit is \$14,000.00.

# Example

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Peter has an ABLE account created by his mom. The family is excited to exercise this planning opportunity. They fund it with a lump sum payment of \$13,000.00 from insurance proceeds he received from his uncle's passing. Peter's sister, having had a great year in paint business, contributed \$8,000.00 to her brother's Able account in that same year.

What happens?

- The state will return the Peter's sister's contribution less \$1,000.00.

# Aggregate Contribution Limit

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Aggregate contributions to an ABLE account cannot exceed the limit established by the State under section 529(b)(6).

As a 529 plan in Texas, aggregate total of contributions can be no more than \$370,000.

# Limit of Investment Direction

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The designated beneficiary is limited to no more than two opportunities in any calendar year to provide investment direction, whether directly or indirectly, for the ABLÉ account.

# Limit on Financial Institutions

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An ABLE program must be established by and maintained by a State or agency or instrumentality of a State.

Therefore, an individual may only establish an account with which his or her or state or contractating state has contractual relationships.

- I.e., one cannot go to Chase and create an “ABLE Account,” if Chase is not contracted through the state to offer ABLE accounts.

# ABLE Account Exclusions for Financial Determinations of Means Tested Benefits Programs

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An ABLE account is excluded from program financial considerations up and until \$100,000, and thereafter, the value of the account that exceeds \$100,000 will be considered a resource. 26 U.S.C. § 103(a)(2)

**For SSI program purposes**, benefits of an individual will be suspended due to excess resources attributable to an ABLE account not disregarded under subsection (a) of Section 103.

**For Medicaid program purposes**, however, resources in ABLE account that exceed \$100,000 will be treated as if an individual is still continuing to receive SSI benefits.

- Therefore, there will be no impact on Medicaid benefits due to resources up to the aggregate contribution limit of \$370,000. 26 U.S.C. § 103(b)(2)

# Qualified Disability Expenses: On what can we expend accounts funds?

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Any expenses related to the eligible individual's blindness or disability that are made for the benefit of an eligible individual who is the designated beneficiary, and includes expenses for:

Education,  
Housing,  
Transportation,  
Employment training and support,  
Assistive technology and personal support services,  
Health

Prevention and wellness,  
Financial management and administrative services,  
Legal fees,  
Oversight and monitoring,  
A funeral and burial, and  
Other expenses approved under federal regulations adopted under Section 529A, Internal Revenue Code.

# Rollover From ABLE Accounts

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*(i) ROLLOVERS FROM ABLE ACCOUNTS.—Subparagraph (A) shall not apply to any amount paid or distributed from an ABLE account to the extent that the amount received is paid, not later than the 60th day after the date of such payment or distribution, into another ABLE account for the benefit of the same designated beneficiary or an eligible individual who is a family member of the designated beneficiary.*

# Change of Designated Beneficiary (i.e., Owner)

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*(ii) CHANGE IN DESIGNATED BENEFICIARIES.—Any change in the designated beneficiary of an interest in a qualified ABLE program during a taxable year shall not be treated as a distribution for purposes of subparagraph (A) if the new beneficiary is an eligible individual for such taxable year and a member of the family of the former beneficiary.*

# Gift Tax Rules

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*“(A) CONTRIBUTIONS.—Any contribution to a qualified ABLE program on behalf of any designated beneficiary—*

- “(i) shall be treated as a completed gift to such designated beneficiary which is not a future interest in property, and*
- “(ii) shall not be treated as a qualified transfer under section 2503(e).*

# Medicaid Payback Provision

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Except for outstanding payments due for qualified disability expenses, ABLE accounts are subject to paying back to the State for costs in expended in the care of the disabled individual, including:

- All amounts remaining in the qualified ABLE account not in excess of the amount equal to the total medical assistance paid for the designated beneficiary after the establishment of the account, and
- Net of any premiums paid from the account or paid by or on behalf of the beneficiary to a Medicaid Buy-In program under any State Medicaid plan established under title XIX of the Social Security Act

# Practical Applications

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Inheritance

Property sale proceeds

Child support payments

Gifts from family

# Loss of Eligible Individual Status

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Though someone may no longer be an eligible individual, as in being disabled per the statute, an individual's account does not lose its protected tax status.

Nonetheless, further contributions or expenditures would be suspended by the first day of next taxable year.

Where an individual becomes a qualifying eligible individual again, the ability to make contributions is suspended.

For any distributions made when the designated beneficiary is not disabled per the statute, the distributions will not count as qualified disability expenditures and will be included in his or her gross income at a 10% penalty.

# Example

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Jessie's MS goes into remission. She is able to go back to her work and she exceeds SGA for that year. SSA finds that she is no longer disabled. That same year Karen's dad contributes \$3,000 to her ABLER account, which had only \$4,000 contributed for the year. Next year, Karen takes a distribution from her ABLER account for a trip to Seattle in the amount of \$1000.00.

What happens?

- Karen's dad's contribution is permitted because it was before the next taxable year.
- Karen's gross includible income is increased by \$1000 plus a 10% penalty because she was not under a qualifying disability in the year of the expenditure.

# How to start an account?

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An individual or his or her agent must open an account in the state in which he or she resides or with a contracting state.

As referenced above, an individual cannot go to any bank or investment institution to open account—either the State or its licensed or contracted vendors may be used to create a qualifying ABLE account.

To find when ABLE accounts will become available for application, join the listserv at [texasable.org](https://texasable.org) for announcements and updates.

# Supports Used to Manage Incapacitated Funds

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Money Management Program (Does not create benefit eligibility)

Statutory Durable Power of Attorney (May be used to create tools that will allow for benefit eligibility)

Self-Settled Special Needs Trusts (D4A & D4C Pooled Trusts)

Third Party Special Needs Trusts

# Non-Eligibility Creating Supports

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## Money Management Program

- Agency becomes payee of eligible payee benefits
  - Ex. Harris County Payee Program

## Statutory Durable Power of Attorney

- Directive in which an individual designates another to manage his or her finances
- Mechanism that can be used to create an eligibility and use an eligibility tool

## Appointment of Guardian

- Court appointed individual who manages a ward's estate.
- Ability to create eligibility tools.

# Eligibility Tools: D(4)(a) Self-Settled SNT

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*A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.*

# Eligibility Tools: (D)(4)(c) Pooled Trust

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*(i) The trust is established and managed by a non-profit association.*

*(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.*

*(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.*

*(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.*

# Eligibility Tools: 3<sup>rd</sup> Party SNT

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- A third party special needs trust uses the assets and resources of an individual who is not the beneficiary of the trust.
- A properly drafted third party special needs trust does not require the repayment or payback to Medicaid.
- Further, this kind of special needs trust may be an inter vivos trust or testamentary trust, allowing the testator or grantor the ability to craft trust terms, including distribution language, succession of management, and designation of remainder beneficiaries.

# ABLE Account v. D4A & D4C Trusts

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## ABLE Account

- Limit of contributions to cash or rollovers
- ROI: Limited
- Limited Investment Direction
- Direct beneficiary control
- Tax free growth and income tax free distributions for qualified disability
- Succession of control depends on beneficiary preference or appointed agents
- Medicaid Payback Provisions
- Funds maybe rolled over to qualified family member

## D4A & D4C

- No limit on kinds of contributions
- ROI: Subject to investment plan
- Continuing investment direction
- Control by trustee who is not beneficiary
- Succession management per trust document (may require court intervention but contains controlling language on trustee duties)
- Medicaid Payback Provisions
- Funds must be used for sole benefit of beneficiary

# ABLE Account v. 3<sup>rd</sup> Party SNT

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## ABLE Account

- Limit of contributions to cash or rollovers
- ROI: Limited
- Limited Investment Direction
- Direct beneficiary control
- Tax free growth and income tax free distributions for qualified disability
- Succession of control depends on beneficiary preference or appointed agents
- Medicaid Payback Provisions
- Funds maybe rolled over to qualified family member

## 3<sup>rd</sup> Party SNT

- No limit on kinds of contributions
- ROI: Subject to investment plan
- Continuing investment direction
- Control by trustee who is not beneficiary
- Succession management per trust document (may require court intervention but contains controlling language on trustee duties)
- **NO Required Medicaid Payback Provision**
- Funds must be used for sole benefit of beneficiary