
VIII.

Estate Planning Issues: Special Needs

**B. Bailey Liipfert III
Liipfert Law Group PLLC
Winston-Salem, NC**

North Carolina Bar Association (NCBA) publications are intended to provide current and accurate information and are designed to assist in maintaining professional competence. Nonetheless, all original sources of authority presented in NCBA publications should be independently researched in dealing with any client's or your own specific legal matters.

Information provided in North Carolina Bar Association publications is for educational purposes only; nothing in this publication constitutes the provision of legal advice or services, or tax advice or services, and no attorney-client relationship is formed. Publications are distributed with the understanding that neither the North Carolina Bar Association nor any of its authors or employees render any legal, accounting or other professional services.

Copyright © 2019 North Carolina Bar Association.

ALL RIGHTS RESERVED. Permission is hereby granted for the limited copying of pages or portions of pages of this book by or under the direction of licensed attorneys for use in the practice of law. No other use is permitted without the express written consent of the North Carolina Bar Association.

Practical Life & Estate Planning Issues for Service Members with Children with Disabilities

Helping Your Clients Avoid the Minefields



Overview of Life & Estate Planning

- Life Planning
 - Durable Powers of Attorney/Rev Living Trusts
 - Advance Medical Directives
 - Do Not Resuscitate Orders (DNRs)
 - Medical Orders for Scope of Treatment (MOST)
- Life Planning for Parents and Adult Children

Overview of Life & Estate Planning

- Estate Planning
 - Wills/Revocable Living Trusts
 - Estate Planning Issues
 - Estate Tax Planning
 - Beneficiary Designation Issues
 - Planning for Families with Disabilities
 - Special Needs Trusts under Wills
 - Special Needs Trusts under Living Trusts (Rev or Irrev?)

Life Planning Options

- Durable Power of Attorney
 - Springing vs Immediately Effective
 - Naming Multiple Agents (Attorneys-in-Fact)
 - Gifting Powers
 - Planning for Children with Disabilities
 - Multi-state Issues (witness provisions)

Life Planning Options

- DPOA vs. DPOA + Revocable Living Trust
 - Avoidance of Courts in Multiple States
 - Guardianship/Conservatorship
 - DPOA may be revoked upon guardian appt
 - Avoidance of Delays in Asset Management & Support of Dependents with Disabilities
 - Privacy

Life Planning Options

- Advance Medical Directives
 - Living Will
 - Health Care Power of Attorney (HCPOA)
 - State Forms vs Custom Forms
 - When activated?
 - Conflicts btw Health Care Agent & AIF under DPOA

Estate Planning Issues

- Will vs Pour-Over Will + Rev Living Trusts
 - Will alone
 - Simpler, cheaper initially
 - Testamentary Special Needs Trust for Surviving Spouse
 - Downsides: Probate, Need to Update When Moving

Estate Planning Issues

- Will vs Pour-Over Will + Rev Living Trusts
 - Will + Rev Living Trust Positives
 - Avoids Probate & Ancillary Probate (other states)
 - No Delay in Administration if Co-Trustee
 - Privacy
 - Less updating (when moving to new state)

Estate Planning Issues

- Will vs Pour-Over Will + Rev Living Trusts
 - Will + Rev Living Trust Negatives
 - Must fund trust to avoid probate
 - Less understood by clients
 - Cashing checks at grocery store
 - Overhyped, sold as means to get financial info by fly-by-night “financial advisers”

Typical Trusts in Wills & RLTs

- Holdback Trusts
- Special Needs Trusts
 - Spousal (must be under Will, not RLT)
 - Special Needs Trust for Children
- Credit Shelter (A/B) Trusts Tax Planning
 - Rarer with \$5.49M exemption from Estate/Gift Tax
 - Portability

Typical Trusts in Wills & RLTs

- Spendthrift Trusts
- Planning with Retirement Benefits
 - Leaving IRA Outright
 - See Through Trusts
 - Conduit Trusts
 - Accumulation Trusts
 - Future: Special Treatment for SNTs?

Planning for Family Members with Disabilities

- When Should We Plan?
 - Spouse with Dementia or Disability
 - Child with Disability
- Generally, most critical where disability will require supports for daily living or long-term care, not covered by health insurance

Planning for Family Members with Disabilities

- Planning for the Disabled Child
 - SSI versus SSDI
 - Medicaid versus Medicare
 - Waiver Programs
 - CAP/C
 - CAP/DA
 - Innovations Waiver

Special Needs Trusts

- Third-Party Special Needs Trust
 - Testamentary (under Will)
 - SNT for spouse must be in Will
 - Living Trust
 - Irrevocable
 - Revocable (during Grantor's lifetime)
- First-Party (Payback) Special Needs Trusts

Payback Special Needs Trusts

- Under Age-65 Payback SNT
 - 42 U.S.C. §1396p(d)(4)(A)
- Pooled Charity-Managed SNT's
 - 42 U.S.C. §1396p(d)(4)(C)
 - Commonwealth Community Trust (one example)
- Income Cap or Miller Trusts (not an option in NC)

ABLE ACT: Achieving a Better Life Experience Accounts IRC §529A

- ABLE Account which does not count as a resource for SSI or Medicaid
 - SSI up to \$100K & Medicaid up to State's 529 Plan Limit
- WHO? Persons with a Disability Onset before Age 26
- HOW MUCH? Annual Exclusion per Year (\$14K)
 - **Can self fund or anyone can contribute**
 - **One ABLE Account per Person**
- Downside: Medicaid Payback

ABLE ACT: Achieving a Better Life Experience Accounts IRC §529A

- ABLE Account is Intended to Pay for Qualified Disability Expenses
 - education,
 - housing,
 - transportation,
 - employment training and support,
 - assistive technology and personal support
 - services, health,
 - prevention and wellness,
 - financial management and administrative services,
 - legal fees,
 - expenses for oversight, and
 - monitoring, funeral and burial expenses.

ABLE ACT: Achieving a Better Life Experience Accounts IRC §529A

- What Happens if Beneficiary Pays for a Really Expensive Night on the Town?
 - Regular Income Tax (on earnings, not initial amount invested)
 - 10% Penalty (but only on deferred income)
 - Medicaid/SSI Impact
 - Disallowed Expenses MAY be considered countable income
 - States MAY monitor distributions
 - States MAY impose transfer penalty

Developing Issues in NC Estate Planning and Fiduciary Law

QUESTIONS?

Finding an Elder Law or Special Needs Planning Attorney in NC

- NC Bar Elder Law & Estate Planning Sections
www.ncbar.org
Elder Law Attorneys
www.naela.com
- Bailey Liipfert, III
380 Knollwood Street, Suite 620
Winston-Salem, NC 27103
 - www.liipfertlaw.com
 - 1.336.283-4848

Finding a Special Needs Planning Resources

- Special Needs Alliance
 - Network of disability and public benefits planning attorneys
 - www.specialneedsalliance.org
 - 1.877.572.8472
- ABLE National Resource Center
 - www.ablenrc.org
- Disability Rights NC
 - www.disabilityrightsnc.org
- Bailey Liipfert, III
 - www.liipfertlaw.com
 - 1.336.283.4848

SPECIAL NEEDS EP FOR PERSONS WITH DISABILITIES BBL 2017 LAMP-.DOCX

One of the greatest fears that parents and other caregivers have is the possibility that they will die without having arranged for the care of a disabled son, daughter, relative or friend.¹ Most families only have to be concerned about this issue until a typical child reaches an age when he or she is self-supporting. However, many individuals with disabilities will never be fully capable of self-support, and their parents and caregivers will have to plan for the day when they will not be available to provide assistance and oversight. For these families, the failure to properly plan can cause tremendous hardship for the person with the disability at precisely the time when he or she most needs help: when the primary source of support, often a family member or close friend, is no longer available for companionship, assistance, and help. “Special Needs Planning” is the practice of ensuring that services and support will continue for the life of the person with the disability when the caregivers are no longer able to help. The tools of Special Needs Planning include wills, trusts, guardianship, durable powers of attorney and advance directives. A beautifully drawn special needs trust may protect eligibility for governmental benefits such as Medicaid or SSI, but helping a person with disabilities make a successful transition when parents or other caregivers die requires a more involved thought process on the part of the caregivers and the legal advisers. Special Needs Planning is often holistic in its approach, covering more than legal and medical issues. Often the team involved in the process will include financial advisers, accountants, private case managers and educational consultants.

The type and level of assistance that will be needed vary according to the nature of the disability, the disabled person’s age and family circumstances, and many other factors. For example, parents of a minor with a severe developmental disability are often most concerned with identifying a Guardian who is willing to undertake the task of caring for a special needs child in the event the parent passes away. Caregivers dealing with mental illness understand that the illness can bring loneliness and isolation, and they want to ensure that there will always be an advocate willing to step in and assist in a time of crisis. On the other hand,

¹ This manuscript was adapted from one written by Edward V. Wilcenski, a friend and colleague in the Special Needs Alliance. Any errors or omissions are my responsibility. Ed and attorneys in other states can be located at www.specialneedsalliance.org or by calling Liipfert Law Group, PLLC for a referral.

many people with disabilities live very independent lives, and need nothing more than some basic assistance in their day-to-day affairs.

Comprehensive Special Needs Planning ensures that the question, “Who will take care of my loved one when I am gone?” is answered in the most cost-effective and efficient manner possible, and in a fashion that considers not only the needs of the disabled individual, but also on the ongoing financial and health care needs of the caregivers themselves. Aspiring special needs planning attorneys with an elder law background will have an advantage, but planning for persons with disabilities goes beyond typical planning for elders. The attorney must understand new governmental benefits, be familiar with local non-profit resources and must also understand the basics of education law in order to competently advise clients. North Carolina’s ever changing and transforming mental health system poses a challenge but for persons with developmental or intellectual disabilities or persons with mental illness, understanding these “systems” is worthwhile and vital.

Begin With a Comprehensive and Honest Assessment

Special Needs Planning requires a working knowledge of a broad range of issues, including government benefits eligibility, trust and estate law, estate and income tax rules, guardianship, and others. In all cases, the planner must understand the nature of the particular disability and must have a sense of what the future care and oversight requirements will be. In turn, the care needs will determine the resources that will be required to support a comprehensive plan of care. This last consideration, identifying the level and cost of the services that will be required to provide support to a loved one, is often the most difficult. Indeed, families and caregivers seldom add up the costs of the various forms of support they give to an individual with a disability. Those who contend that a disabled individual’s financial needs are minimal often forget to add up the cash value of the many services they provide. These can include serving as advocate, social service coordinator, companion, guardian, chauffeur, money manager, and recreation director. These services enhance the quality of the disabled individual’s life. If a parent or caregiver dies without planning for the continuation of these services, the quality of life that the person with a disability previously enjoyed is likely to be reduced substantially.

Some of these “quality of life” services are available through government funded programs designed for individuals with disabilities. These programs are generally designed to provide only a basic level of support, and the items and activities that make our lives enjoyable, those that truly provide “quality of life,” are simply unavailable. Moreover, the eligibility thresholds for most of these programs are quite low, and living within these thresholds can be quite difficult. As a result, families and caregivers often seek to “supplement” the goods and services available through these public benefit programs with their own funds, but without jeopardizing benefit eligibility. This is where competent Special Needs Planning becomes critical.

Many times, an honest consideration of the abilities of the child with a disability or the potential abilities of the child may affect the child’s housing and employment options long before the parents other caregivers become unable to act for the child. It has been the author’s experience that promoting and advocating for greater independence and autonomy for a child greatly increases the odds for success. Special needs planning attorneys should become familiar with housing options available in their communities as well as vocational options and their potential impact on eligibility for Medicaid and other governmental benefits.

The Elements of a Comprehensive Special Needs Plan

Each Special Needs (Estate) Plan is unique, and it should maximize the formal and informal supports that the individual with the disability received from government funded programs, family caregivers, community supports, and others. However, all Special Needs Plans contain three basis components: a legal plan, a financial plan, and a life care plan.

Legal Planning

The legal planning component of a Special Needs Estate Plan will address many traditional Estate and Long Term Care Planning issues. Has the client considered how the estate will be divided among his or her intended heirs? What is the family’s current estate and income tax exposure? Is there a Will in place, and, if so, has it been updated since the onset of the son’s or daughter’s disability? Will the appointment of a Guardian be necessary, and, if so, who will be the

Guardian? Parents and caregivers who fail to make a plan in a Will or Revocable Trust accept the state's default estate plan called intestacy.

What if the *caregiver* needs assistance? Does he or she have a properly drafted Durable Power of Attorney, Living Will and Health Care Power of Attorney? The durable power of attorney will likely need to be customized to address the potential needs of the child with a disability.

If aging parents are serving as the primary caregivers for the person with the disability, have they considered how they will pay for *their own* long-term care needs without jeopardizing the inheritance of their children? Legal planning may include a trust under the Will to protect a surviving spouse as well as the child with a disability and a referral to an insurance agent to discuss long-term care insurance options.

Do the parents' respective estate plans include a properly drafted Third-Party Special Needs Trust (also called Supplemental Needs Trusts), which is a trust instrument designed especially for individuals with disabilities? Who will serve as Trustee of the Special Needs Trust? Does the Trustee understand how these types of trusts are to be administered? While parents or other caregivers typically set up the Special Needs Trust, other family and friends can contribute to these trusts by making reference to them in their own wills or other estate planning. Special needs planning attorneys should give consideration to drafting a third party special needs trust in the form of a living trust, revocable or irrevocable, in order to make contributions from family or friends easier.

What is the functional level of the individual with the disability? Is he or she capable of executing his or her own Durable Power of Attorney and Health Care Power of Attorney so as to preclude the need for a formal guardianship at some future time?

What are the federal and state benefit programs that support the person in the community, and have the eligibility requirements for those programs been factored into the Special Needs Plan?

A sound legal plan will address these and other issues, and as with any type of planning, it is best developed early and comprehensively, considering the needs and intentions of all members of the disabled individual's circle of support.

Financial Planning

A sound financial plan complements the legal component of a Special Needs Plan. Whereas legal planning primarily involves the preservation and transmission of wealth, financial planning is primarily concerned with the enhancement of wealth and the selection of assets to ensure growth, diversification, liquidity and availability to meet a client's goals and objectives. The two areas are closely intertwined, and a comprehensive Special Needs Estate Plan will contain components of both disciplines.

Consider, for example, a family whose primary asset is the family home. Many families hope that the value of the home will be available as an inheritance for a disabled son or daughter and other heirs. Indeed, many parents and other caregivers contemplate that the disabled son or daughter will be able to continue to reside in the home after they are gone. But have they considered what will happen if *they themselves* reach an age when they will no longer be able to reside in the home and need assistance with their own health care needs? If the caregivers have not considered how *their own* long term care costs will be met, there is a risk that the home would need to be sold to satisfy these obligations, and may never be available for the son or daughter. One solution may be to use other assets to generate the income that would be necessary to pay these costs. Another possibility may be the purchase of a long-term care insurance policy or an annuity or life insurance policy with a lifetime long-term care rider helping lower the risks facing the parents. In the end, the most appropriate planning route may be to restructure assets so that long-term care costs would be paid for through the Medicaid system. Legal and financial professionals participating in the development of a Special Needs Plan should expect to share their ideas on the pros and cons of each strategy, and arrive at the most appropriate solution for the family.

More traditional financial planning considerations include planning to ensure that a family will have sufficient funds for a comfortable retirement, investing in assets that will minimize income tax liability, and consolidating assets to minimize the

cost and effort of overseeing a diverse portfolio. These issues are best addressed with a competent and knowledgeable financial professional who understands the heightened importance of proper planning for individuals with disabilities and their families.

Caregiver's Plan (Letter of Intent)

The final step in developing a Special Needs Plan is often the most overlooked. At least in theory, people appreciate the need to address the legal and financial issues discussed above. But once the parents and caregivers are gone and the assets have been protected for the benefit of the individual with the disability, many questions still remain. "How should the funds that the family has worked so hard to protect be used to truly enhance the life of the person with the disability?" "To whom should I, as Trustee or Guardian, look to for advice and suggestion when the person with the disability cannot speak on his or her behalf?"

"Life Care" planning is the process of providing answers to these and similar questions for the family members, friends and advocates who will provide assistance and oversight after the primary caregivers are gone. The product of life care planning is a Caregiver's Plan, sometime referred to as a Letter of Intent. It begins with ensuring that as much personal, financial, and other pertinent information concerning the person with the disability is stored in a single place and accessible for future reference. Many advocates use workbooks designed specifically for this purpose. The workbooks usually request background medical information, financial information, family history, community contacts, and recreational preferences of the person with the disability. The workbooks also often request that the caregivers provide similar information about *their own* finances and family supports.

This information can prove to be especially crucial for those who must step in and assist when the caregiver is seriously injured or dies unexpectedly.

It is difficult to overemphasize the importance of this step in the Special Needs Planning process. Consider this: If your client were to get up and leave town today, right this minute, completely unexpectedly and without advance notice to *anyone*, including the disabled family member or friend, who would step in to

handle the disabled child's affairs? Does this person know where all of the pertinent financial information is stored? Has the provided him or her with the legal authority to access funds and act on the child's behalf? Who breaks the news to the child with the disability? Who will step in to do what *the caregivers* have been doing all these years? Who stays in contact with the service coordinator or social worker? Who double-checks to be sure that medication is being taken as prescribed? Who will make those calls when no one has heard from your son or daughter in days, and who will they call? And if you have someone in mind, have you provided this person with the information he or she needs to carry out your wishes? Does this person know what you know about your son's or daughter's needs, preferences and dislikes?

To those people who will step in and assist your disabled family member or friend when you are no longer able to do so, a well written Caregiver's Plan will be worth its weight in gold. And as uncomfortable as it is for many parents and other caregivers to face the subject, completing this piece of the Special Needs Estate Planning process often provides the most satisfaction and relief. Certainly the legal and financial components are also critical, but in most circumstances, competent counsel will be able to preserve some of the family's funds for the person with the disability, even if no planning whatsoever has been completed prior to the disability or death of the caregiver. The "crisis intervention planning" is always more expensive, time consuming, and will be conducted before a court as a matter of public record, but it can be done.

Once the parents or primary caregivers are gone, however, the ability to prepare a comprehensive and detailed Caregiver Plan becomes quite limited. There may be an Individualized Service Plan to use as a reference, a dedicated service coordinator or case manager who might have some additional personal information, or some other family member or friends who could assist in compiling pertinent information, but none of these fallback references will ever replace the Caregiver Plan prepared by the person who has taken care of the person with the disability all of his or her life.

Promoting Independence: Education, Employment, & Housing Issues

Most critical for persons with disabilities is having a chance to become as independent as possible. Many parents' greatest fear is that their child may become institutionalized when they have passed away or themselves become disabled, yet the most common living arrangement, to have the child continue living at home with the parents, comes with a risk that the transition to a new caregiver will fail to work. The author's experience, this risk is great no matter the pre-planning discussed above. Special needs planning attorneys should consider openly discussing whether a particular child with a disability may be a candidate for living independently and even being able to work. These discussions sometimes never take place because of a parent's or a child's fears of losing benefits.

Education

The best time to address education and vocational issues is years before a child leaves the school system. Beginning in the year in which a child turns 14-years-old, part of the Individualized Education Plan (IEP) in the child's school system is a vocational assessment. The special needs planning attorney should request a copy of the IEP for review in order to see the educators' opinion concerning the child's potential to live independently and to be able to work in the future. Parents with younger children with disabilities should be actively encouraged to participate in the IEP process. Some parents are unaware that the school system has an obligation to their child until graduation or age twenty-two and may leave years of potential services unused. In this age of budget cuts, sending students with disabilities out of the school system risks lessening the options for self-support available to the child.

Families with the financial ability to pay, or with the assistance of a non-profit advocacy group, should consider getting help with the IEP process through an educational consultant. The consultant on a one-time basis or regularly each year can help parents evaluate the job the school system is doing with their child and help the parents decide whether additional services should be requested. Helping parents uncover the potential in their child may be a priceless gift!

One helpful resource on education law is published and regularly updated by the North Carolina Department of Public Instruction, Exceptional Child Division, is the “Policies Governing Services Children with Disabilities, revised July 2014. It is available online at <http://ec.ncpublicschools.gov/policies/nc-policies-governing-services-for-children-with-disabilities/policies-children-disabilities.pdf>. The policies cross reference statutory and regulatory law, making one’s search for information somewhat easier.

Education for children with disabilities often ends with graduation or receipt of a certificate. Today children with intellectual or development disabilities have a chance to experience a post-secondary school program. North Carolina has several post-secondary school options available to students at universities, colleges and community colleges around the state. Afford such a program can greatly increase the odds that a child with a disability can live independently, but the cost of such a program can be even greater than the cost of college for a typical university of college student. One such program, Beyond Academics at the University of North Carolina at Greensboro has a success rate for graduates living independently of approximately 85%. To learn more about this program, go to beyondacademics.uncg.edu. For information on other programs around North Carolina and around the rest of the country, go to www.thinkcollege.net. Planning for a post-secondary education for a child with a developmental or intellectual disability is much like planning for a typical college student’s education with the additional complexity of needing to plan for continuing eligibility for public benefits

Employment

One of the greatest challenges for persons with disabilities is finding the right balance of employment. A great fear of many families is whether employment may lead to loss of vital Medicaid or Medicare benefits, and employment can cause the loss of such vital benefits. The trend over the last several decades has been to create incentives to work for people with disabilities. The special needs planning attorney should become familiar with the concept of earned income versus unearned income for Medicaid and SSI. Generally, earned income is counted 50 cents on the dollar and includes an exclusion of the first \$65 of earned income. Including the \$20 income exclusion, the first \$85 of income is excluded,

making the cost of smaller amounts of earned income manageable and is often beneficial to the person with a disability.

For example, an SSI recipient receiving a \$735 per month check would only lose \$200 were he or she to earn \$485 per month of earned income, assuming no other source of income, i.e., he or she would pocket an additional \$285 of income. In addition, his or her monthly income over a quarter would add up to enough to get credit a quarter for SSDI and Medicare eligibility.

Other incentives to work include plans of self-support, enabling SSI recipients with SSA's permission to set aside funds for employment and education, as well as rules permitting SSI recipients to stay eligible for SSI in the event an attempt at work should fail without going through the disability determination process again. SSDI recipients are likewise given access to Medicare and an expedited return to SSDI as well.

The Social Security Administration's Red Book is a handbook on all of the incentives under the law available to persons on SSI or on Social Security Disability who wish to attempt entering or returning to the workforce. The Red Book is available online and is updated each year at <http://www.socialsecurity.gov/redbook/>.

Housing Issues

Finding and retaining housing for family members with disabilities can be a challenge for families. Special needs planning attorneys should become familiar with housing options. Options include intermediate care facilities for persons with intellectual or developmental disabilities, residential care facilities (group homes at a lower level of care), subsidized housing options, such as Section 8 as well as other HUD programs, and the highly desired option of living in an unsubsidized apartment or home.

Families should be encouraged to be realistic in evaluating housing options and should be prepared to start considering options years before the need would typically arise.

One failure of many third party special needs trusts is that the dispositive

provisions of the trust are often drafted so restrictively as to restrict the Trustee from paying for needed housing. The mere reduction of the SSI benefit may be a small price to pay to assure the family member comfortable, accessible housing outside of subsidized housing. This is particularly true where the person with disabilities has a fighting chance to live independently with some assistance with housing and date-to-day management of his or her financial affairs.

For example, an SSI recipient receiving the full \$735 benefit in 2016 would lose \$265 of the SSI benefit if his or her trustee paid in rent \$900 for an apartment and \$400 for utilities monthly. The trustee's contribution of \$1,300 per month toward shelter expenses (known as In-kind Support & Maintenance (ISM)) can make the difference between living in an institution and living in a decent apartment or home.

ABLE Accounts

The latest tool in planning for children with disabilities is the ABLE account. The ABLE Account was created by Congress in the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014, popularly known as the ABLE Act and codified in Section 529A of the Internal Revenue Code. For a useful summary of the ABLE Act and the ABLE Account, please review the attached March 2017 Issue of The Voice, The Official Newsletter of the Special Needs Alliance which includes an article by member Stephen Dale on "Achieving a Better Life Experience (ABLE)—How to Open an ABLE Account." You can subscribe to this newsletter at www.specialneedsalliance.com. Please expect updates soon on ABLE Accounts as new options are appearing monthly.

The ABLE Account is a tax-favored option in planning for individuals with a disability onset prior to age 26. The disability can be shown by SSI or SSDI eligibility, a doctor certifying that the child would meet the Social Security definition of disability, having condition listed on Social Security's List of Compassionate Allowance Conditions:

<https://www.ssa.gov/compassionateallowances/conditions.htm>.

The ABLE account is also an option for individuals who meet Social Security's definition of blind by age 26 as well.

The ABLE Account can be funded with up to the annual exclusion amount from

any source, including the individual with a disability, family and friends, currently \$14,000. There can only be one account at any time, so, for a practical purposes, the total contribution is limited to the annual exclusion. The ABLE Account, due to the contribution limit will not be replacement for a third-party special needs trust as part of a family's planning for a child.

Having an ABLE Account will not interfere with SSI eligibility up to \$100,000 and will not terminate Medicaid eligibility even above this limit as long as the account has less than the State's 529 Plan size limit, sometimes in excess of \$400,000. Because the ABLE account will require Medicaid payback, families should avoid funding more than what will likely be needed to fund on-going expenses and possible future education expenses in most cases.

The ABLE Account is best used to pay Qualified Disability Expenses defined as education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, as well as funeral and burial expenses. So far, the Internal Revenue Service and the Social Security Administration have defined these broadly, making use of an account particularly beneficial. The ABLE Account appears a great option for paying shelter expenses as it does not cause a reduction in SSI benefits.

Estate planning for children with disabilities can greatly benefit from the use of an ABLE account, especially when the child can manage his or her own ABLE account. An ABLE account can grant to the child with a disability the dignity of managing enough money to deal with emergencies and plan for greater independence.

Special Considerations for Military Families

Special Needs Estate Planning for military families presents some unique obstacles and special challenges. Due to the nature of being a military family, moves across state lines are common and occur more often than for other families. The frequent moves make it harder for military families to learn about sources of support and care in a new state.

For example, children with severe developmental disabilities who live in a state

may qualify for a Medicaid home and community based waiver program. These programs often have waiting lists that can delay participation for months or years. In North Carolina we call these waiver programs the Community Alternatives Programs. Children who qualify for one of the CAP programs can qualify for attendant care and other services enabling them to live at home without the parents and other children having to live in poverty. For many military families in North Carolina, the wait on the waiting list practically excludes children from military families from participation. Military families should investigate home and community based waiver programs as soon as feasible when moving to a new state, preferably even before the move takes place. Options available in a given state may vary greatly from the previous state.

Military families with members on active duty have better insurance options than most families through TRI CARE, particularly if the family member with a disability can qualify for TRICARE Extended Care Health Option (TRICARE ECHO). ECHO requires enrollment in the service branch's exceptional family member program, medical/educational verification of the disability and approval of the TRICARE regional contractor. Unlike home and community based waiver programs, ECHO can be carried wherever the military family moves worldwide, so long as the service member remains on active duty.

While TRICARE ECHO offers greater services than most any employer-based health insurance, TRICARE in any form offers less limited coverage, even for military retirees. In some circumstances, military grandparents have opted to adopt grandchildren with disabilities to enable the grandchildren to have access to TRICARE services. In order to keep TRICARE, military families should consider the benefits of staying in military service long enough to retiring with benefits. TRICARE for Life is available to military retirees and veterans who were separated from service by medical retirement.

CHAMPVA is a medical program operated by the Veterans Administration for certain family members of veterans not eligible for TRICARE. CHAMPVA is available to spouses and dependent children of veterans who are rated totally and permanently disabled due to service related injuries or to surviving spouses and surviving dependent child of these veterans or veterans who actually died due to the disability for which they were rated. As with TRICARE, CHAMPVA maybe lifetime medical insurance for children with disabilities, provided that the

children are designated as incapacitated dependents.

For military families with children with disabilities, the decision of whether to choose the Survivor Benefit Plan retirement option (SBP) can be a trap. The service member may choose to protect up to 55% of his or her retirement pay for a spouse and/or a dependent child. In the past, picking the SBP for a child with a disability could have interfered with needed state Medicaid benefits and may cause the loss of a monthly SSI check. It may still be problematic unless you set it up correctly. Fortunately, there is now a way to assign the SBP check to a Special Needs Trust to avoid the loss of benefits. Attached is the August 2015 Issue of The Voice, The Official Newsletter of the Special Needs Alliance which includes an article by member Kelly Thompson on "The Military Child Protection Act." You can subscribe to this newsletter and locate local special needs planning attorneys at www.specialneedsalliance.com.

Conclusion

"Special Needs Estate Planning" is by necessity a dynamic process and even more so where planning is being done in a military family facing many moves over the years. It is common to hear financial professionals talk about the need to periodically "review a plan" to be sure that it still meets a family's needs. This admonition is equally as important, if not more so, in the context of planning for an individual with the disability, as many people with disabilities are unable to actively advocate on their own behalf once their primary caregivers are gone. Laws governing taxes, property rights, and government benefit programs that support a disabled individual in the community are changing constantly. And the resources, needs and preferences of the person with the disability as documented in the Life Care Plan will change with time.

The most important thing is to *begin the process*. Once you have built the foundation, small changes are easy to accommodate. Legal documents can be modified, assets can be restructured, and new information can be added to the Life Care Planning workbook with minimal effort. But if you wait too long to begin the process, you may never have the opportunity to answer the question, "Who will take care of my loved one when I am gone?"

At Liipfert Law Group, PLLC we have assisted many families and friends of persons with disabilities develop comprehensive estate and long term care plans that integrate traditional estate and long term care planning with the use of supplemental needs trusts. We have the experience and resources to aggressively advocate before the state and federal agencies that administer government benefit programs, and have developed a network of government, private, and non-profit professionals who provide advice and support when a comprehensive “Special Needs Estate Plan” is being developed. If you have a family member or friend with a disability and would like to discuss what you can do to help secure a stable future for that person’s benefit, please do not hesitate to contact us. If you are moving and need a referral to an attorney in your new location, we can help as well.

B. Bailey Liipfert, III, Attorney
Liipfert Law Group, PLLC
380 Knollwood Street, Suite 620
Winston-Salem, NC 27103
Telephone: 336-283-4848
bailey@liipfertlaw.com
www.liipfertlaw.com

The Voice® Newsletter

August 2015 - Vol. 9, Issue 7

The Voice is the e-mail newsletter of The Special Needs Alliance. This installment was written by Special Needs Alliance member Kelly A. Thompson. Kelly has been a lawyer for 36 years, practicing law in Arlington, Virginia for the last 20 years. Her clients include many military families, and her practice focuses on planning for individuals with disabilities and the elderly, special needs trusts, trust administration and estate planning.

Disabled Military Child Protection Act

On December 19, 2014, President Obama signed the Disabled Military Child Protection Act. This law allows a military parent to provide a survivor benefit for a disabled child and have it paid to a special needs trust for that child's benefit.

Until this law was passed, military parents of children with disabilities faced a serious dilemma at retirement — whether or not to choose the military Survivor Benefits Plan (SBP) retirement option for their children. The dilemma was that the benefit could not be assigned to a special needs trust and could potentially interfere with the child's eligibility for government benefit programs such as Supplemental Security Income (SSI) or Medicaid.

Survivor Benefits Plan

Members of the military can elect several options to provide for a spouse or dependent child at the military member's retirement or death. The SBP will pay up to 55% of the military member's retirement pay to a spouse and/or dependent child when the retiree dies. The member can also select a lesser benefit at a lesser cost. The military member can select between coverage for a spouse only, a spouse and children, or children only. The member takes a reduction of about 6.5% in retirement pay for SBP for a spouse and only about \$20/month for dependent children, including adult disabled children.

The existing law provided that the SBP could only be paid to a "person" and the Defense Department took the position that "person" did not include a trust for a child with disabilities.

Effect on SSI and Medicaid Eligibility

In addition to (or in place of) the survivor benefit, a military member can provide an array of benefits for a child with a disability. In most cases a disabled child over age 18 can be designated as an Incapacitated Dependent (DD Form 137-5) and be permanently eligible for military post privileges as well as TRICARE

health benefits. However, these military benefits do not include supportive living programs or vocational opportunities. SBP and TRICARE benefits are often not enough to pay for all the help that may be needed by an adult child with a disability so the military family may need to look to other programs to provide for a child's needs.

If the disabled child over age 18 has assets of less than \$2,000 and minimal income, the child will usually be eligible for SSI and Medicaid. Medicaid may duplicate TRICARE's health benefits but Medicaid "waiver" programs pay for a wide variety of services that TRICARE does not. Medicaid waiver benefits pay for supported living programs, in-home caregivers, mental health support services, day activity programs, job coaching and other services. TRICARE and Medicaid provide a complementary mix of health care benefits and support services needed by many adults with disabilities.

SSI pays a monthly cash benefit (\$733 per month in most states in 2015), and any unearned income over \$20 offsets SSI income dollar-for-dollar. In some states a person's income must be less than the SSI benefit amount to qualify for Medicaid waiver services. In other states a person's income must be less than three times the SSI benefit amount (\$2,199 in 2015) to qualify for Medicaid waiver services.

SBP income payments paid directly to a disabled child will offset the SSI benefit as unearned income. If the military member elected SBP for his or her disabled child, the child will receive as much as 55% of the parent's income. If the SBP payment exceeds the SSI benefit amount, the child with a disability will lose SSI and as a result may also lose Medicaid health care and community support benefits. In my home state of Virginia and in many states, if an individual's income exceeds \$2,199 per month, all supported living assistance, job coaching, respite care and other services provided under Medicaid waiver programs are lost.

A recent example from my practice is Tom, a 52 year old man with an intellectual disability who had lived in a group home for 18 years and attended a day program for individuals with disabilities. Tom's only income was SSI, and as a result he qualified for Medicaid to pay for his group home program and all related health services. When Tom's father, a retired Navy officer, died, Tom began to receive military SBP in an amount just above three times the SSI benefit amount. This SBP payment made him ineligible for Medicaid waiver services. The private pay cost of the programs and services Tom was receiving prior to his father's death was \$10,400 per month, almost five times his SBP payment. Tom lost his group home placement, as well as his day program, and was transferred to a board and care home that was little more than a homeless shelter.

Legislative Solution

If military parents could have the SBP benefit for their disabled child paid to a special needs trust instead of paid directly to the child, SSI and Medicaid benefits could be protected. To change the allowed beneficiary of the SBP seemed like a simple fix. The Special Needs Alliance began lobbying on this

issue in 2007, leading to legislation being introduced in 2009. Various members of Congress agreed with the SNA but the “fix” proved to be complicated. After many false starts, a military advocacy organization, the Military Coalition, made this a part of their legislative agenda. Various disability advocacy organizations, the American Bar Association and the National Academy of Elder Law Attorneys also publicly supported the measure.

The Disabled Military Child Act specifically authorizes military parents to elect that the SBP benefits for a disabled child be assigned to a supplemental or special needs trust. The trust must be a first party or self-settled special needs trust that includes provisions to reimburse the Medicaid program on the death of the disabled child for Medicaid benefits the child received during his or her lifetime. Families considering assigning the SBP to a special needs trust should consult an experienced special needs planning attorney to ensure that the correct type of special needs trust is utilized in their plan. (See previous issues of The Voice for more detailed explanations of special needs trusts.)

Regulations still need to be adopted to implement this new law. It is not clear whether parents who previously declined an SBP benefit for a disabled child can now revise their election given this new option to have the benefit paid to a trust. It is also not yet clear whether SBP benefits already being paid directly to disabled individuals can be assigned to a special needs trust.

Military families who have a family member with a disability face numerous challenges not faced by most families. Frequent transfers make meeting the educational needs of their child a moving target. Those same transfers mean that obtaining Medicaid and other benefits for their child is repeated often as they move from state to state. A military family may spend years on a waiting list for Medicaid waiver services in one state, finally receive benefits, only to be transferred to another state and start the waiting list process all over again. The inability to assign SBP payments to a special needs trust was one challenge facing military families that has at last been fixed!

About this Newsletter: We hope you find this newsletter useful and informative, but it is not the same as legal counsel. A free newsletter is ultimately worth everything it costs you; you rely on it at your own risk. Good legal advice includes a review of all of the facts of your situation, including many that may at first blush seem to you not to matter. The plan it generates is sensitive to your goals and wishes while taking into account a whole panoply of laws, rules and practices, many not published. That is what The Special Needs Alliance is all about. Contact information for a member in your state may be obtained by calling toll-free (877) 572-8472, or by visiting [the Special Needs Alliance online](https://www.specialneedsalliance.org/the-voice/disabled-military-child-protection-act/).

Requirements for Reprinting this Article: The above article may be reprinted only if it appears unmodified, including both the author description above the title and the "About this Newsletter"

paragraph immediately following the article, accompanied by the following statement: "Reprinted with permission of the Special Needs Alliance - www.specialneedsalliance.org."

©2016 Special Needs Alliance. All Rights Reserved.

The Voice® Newsletter

March 2017 - Vol. 11, Issue 2

The Voice is the e-mail newsletter of The Special Needs Alliance. This installment was written by Pacheco, California, Special Needs Alliance member Stephen W. Dale of The Dale Law Firm, PC. Steve is a disability rights advocate and attorney dedicated to providing quality estate planning. He is a frequent speaker on a variety of disability related topics across the country. Steve regularly teaches courses to the public, financial professionals, and other attorneys on special needs trusts and trust administration. Additionally, he serves as the trustee for the Golden State Pooled Trust. Steve offers numerous videos and handouts to the public and his colleagues at www.achievingindependence.com.

Achieving a Better Life Experience (ABLE) – How to Open an ABLE Account

The first ABLE programs have been launched in 18 states, as of March 1, 2017, and most of them welcome applicants from other states. Since ABLE accounts can be rolled over from one state to another, families throughout the U.S. can now begin exploring their options.

ABLE accounts, which grow tax-free, are one way to set aside funds for disability-related expenses without affecting the beneficiary's eligibility for means-tested government programs like Supplemental Security Income (SSI) and Medicaid. They are available to individuals who meet the government's definition of "disability" prior to attaining 26 years of age. At the beneficiary's death, any remaining funds (whether first-party or third-party) must first be used to reimburse the applicable state's Medicaid program for covered expenses incurred since the creation of the account.

There are broad similarities among the ABLE programs, but many details differ, as will undoubtedly continue to be the case as additional programs launch. Interested families should carefully research the specifics, bearing in mind that the least expensive alternative may not be the one that best meets their long-term needs. This article addresses the basics of how to establish an ABLE account.

Who Can Open an ABLE Account?

An ABLE account can be opened by an individual with a disability, a parent of such individual, a guardian/conservator of the individual, or an agent designated through the individual's power of attorney. Regardless of who is responsible for managing the account, it may be advisable to consult a special needs attorney about establishing a power of attorney to avoid interruptions in signature authority during the term of the ABLE account.

How to Sign Up

To date, all of the ABLE programs have an online application process, with additional help available by phone or e-mail. The Nebraska program also provides a hard copy application for mail-in. This form must be used by guardians, conservators or agents designated through a power of attorney, who must supply evidence of their legal authority. Parents of a minor beneficiary can apply online.

Certification

So far, Florida is the only state limiting eligibility for its ABLE program to state residents. Other requirements are federally mandated, and applicants are responsible for self-certifying that they meet them. In addition to having a disability with an onset date prior to the age of 26, the beneficiary must meet one of the following conditions:

- be receiving SSI or SSDI (Social Security Disability Insurance)
- have a letter from a licensed doctor certifying that the beneficiary meets Social Security's definition of disability
- have one of the Social Security Administration's [Compassionate Allowances Conditions](#)
- be blind.

Applicants are not required to forward the physician's certification to the state program but must be prepared to supply it if requested. Applicants will, however, need to provide the diagnosing doctor's name, address and date of diagnosis.

Florida offers an online [Eligibility Wizard](#), Ohio has an "[eligibility quiz](#)" and Tennessee has an [interactive guide](#) to help families determine whether or not a person qualifies to open an ABLE account.

Other Information Needed

The following information is also required concerning the beneficiary of an ABLE account:

- name
- address
- Social Security Number or taxpayer identification number
- birth date
- e-mail address.

If the account is being opened by someone other than the individual with a disability, the account opener's personal information will also be needed.

For those who wish to transfer funds electronically (if this option is available), bank account and routing numbers must also be supplied.

Contributions

Deposits to an ABLE account can be made by anyone, subject to federally determined limits.

Beneficiaries can have no more than one ABLE account, and total annual contributions from all sources cannot exceed \$14,000, a number that is keyed to the federal annual gift tax exclusion under § 2503(b) of the Internal Revenue Code. If a beneficiary receives SSI and has an ABLE account balance which grows to exceed \$100,000, the beneficiary's SSI will be suspended until the account balance falls below \$100,000. For beneficiaries who do not receive SSI, each state is able to set the account upper limit before the beneficiary's Medicaid eligibility will be affected. Here are some examples of state-specific differences:

- **Florida** accepts donations by check, money order, cashier's check, automatic contribution, or payroll deduction. There are no contribution minimums, and the maximum account balance is \$418,000.
- **Nebraska** accepts contributions by check, electronic funds transfer from a bank, or payroll deduction. Individuals other than the beneficiary may also use an Enable gift certificate. The state requires a \$50 minimum contribution in order to open an account (\$25 if funding is by electronic funds transfer from a bank account or payroll deduction). Subsequent contributions must be at least \$25 (waived for electronic funds transfers or payroll deductions). There must be at least \$50 in the account at all times. Contributions will no longer be accepted once the account balance reaches \$360,000.
- **Ohio** requires an initial contribution of at least \$50, and has an upper limit of \$426,000 for its accounts.
- **Tennessee** accepts contributions by check, electronic funds transfer, or recurring direct deposits from checking or savings accounts. The contribution limit is \$350,000.

Investment Options

All states offer a variety of investment choices, ranging from conservative to aggressive. For example:

- **Florida** offers seven professionally managed options, including both predefined portfolios and individual funds from which customized portfolios can be structured.
- **Nebraska** offers four investment options, including an FDIC-insured bank savings option. An additional checking account option is also available.
- **Ohio** offers five investment options, including an FDIC-insured option.
- **Tennessee** offers the most choices, with 14 funds from which to choose.

Fees

States set their own fees. For example:

- **Florida** waives maintenance fees until July 1, 2017, after which there will be a \$2.50 monthly fee if the beneficiary chooses electronic withdrawals. An extra \$10 will be charged annually for paper check disbursements. Depending upon investment choices, fees of up to 0.290% of account balances may be charged.
- **Nebraska** charges \$11.25 quarterly (\$45 annually), in addition to asset-based fees ranging from 0.50% to 0.56%, depending upon investment choices. A checking account option is also available, with additional fees.
- **Ohio** has a tiered fee structure. Residents pay \$2.50/month (\$30 annually) for account maintenance and asset-based fees of 0.19% to 0.34%, based on their investment choices. Out-of-state account holders pay \$5/month (\$60 annually) for maintenance and asset-based fees of 0.45% to 0.60%, depending on investments.
- **Tennessee** doesn't charge for account maintenance but has asset-based fees of 0% to 0.63%, depending on investments.

Account Management

Each state has specific rules regarding the management of ABLE accounts. The following are examples of state-specific rules regarding withdrawals from an ABLE account:

- **Florida** will make electronic transfers to a bank account or issue paper checks to pay expenses directly to third parties. Electronic transfers and up to two checks per month are free. Additional checks are \$5.00 each.
- **Nebraska** will make electronic transfers to a bank account or issue paper checks. Prescheduled withdrawals can be arranged. Withdrawals from the checking account option can be made by check or debit card.
- **Ohio** withdrawals can be made through electronic transfer to a bank account, by paper check, or to a STABLE debit card.
- **Tennessee** presently makes all disbursements in the form of a paper check to the beneficiary.

The launch of additional state ABLE plans in the coming months is anticipated. For up-to-date information, check out the ABLE National Resource Center at <http://www.ablenrc.org/about/what-are-able-accounts>, or a similar resource maintained by The Arc at <http://www.thearc.org/what-we-do/public-policy/issues/able-program-implementation>. States will undoubtedly learn from each other's experiences, and the best available option for a person with special needs is likely to be a moving target. As always, it is important to consult with a competent special needs attorney to help families understand the benefits and drawbacks of the various ABLE programs, as well as other tools that should be considered to help secure the future of the beneficiary.

About this Newsletter: We hope you find this newsletter useful and informative, but it is not the same as legal counsel. A free newsletter is ultimately worth everything it costs you; you rely on it at your own risk. Good legal advice includes a review of all of the facts of your situation, including many that may at first blush seem to you not to matter. The plan it generates is sensitive to your goals and wishes while

taking into account a whole panoply of laws, rules and practices, many not published. That is what The Special Needs Alliance is all about. Contact information for a member in your state may be obtained by calling toll-free (877) 572-8472, or by visiting [the Special Needs Alliance online](http://www.specialneedsalliance.org).

Requirements for Reprinting this Article: The above article may be reprinted only if it appears unmodified, including both the author description above the title and the "About this Newsletter" paragraph immediately following the article, accompanied by the following statement: "Reprinted with permission of the Special Needs Alliance - www.specialneedsalliance.org."

©2016 Special Needs Alliance. All Rights Reserved.

