Overview of
Special Needs Planning and
Update on Recent Changes
for
Frederick County Estate Planning Council

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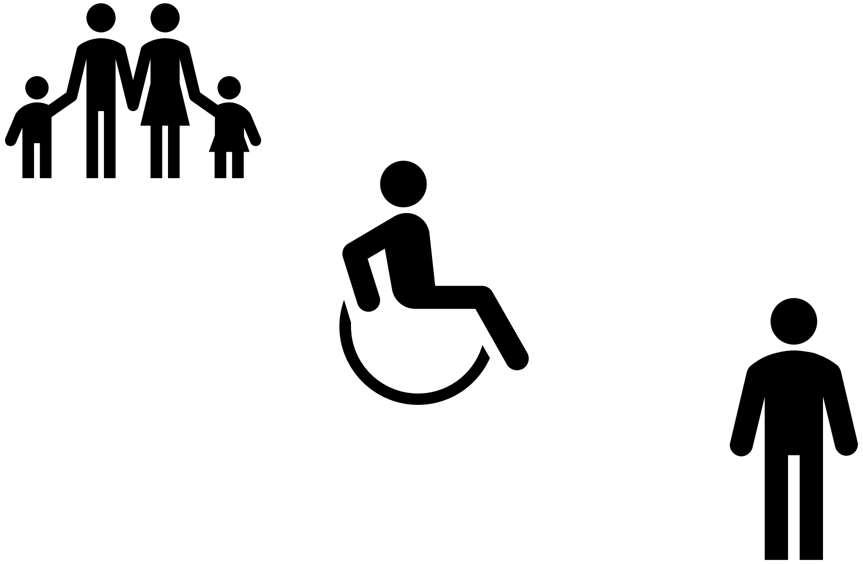
Thank you, Marty Snyder

Overview

- **Context for special needs planning**
- **Government benefits**
- **Special needs trusts**
- **ABLE Accounts**
- **Qualified Disability Trusts**
- **New Social Security Administration rules on trusts and Representatives Fees**
- **Maryland Child/Dependent Tax Credit**
- **Retirement Accounts into trusts**
- **UTMA Custodian and Guardian Authority to Establish Trusts**
- **Disabled Military Child Protection Act**
- **Maryland Regulations re: First Party Special Needs Trusts**
- **Kiddie Tax changes under TCJA of 2017**
- **Low Income Property Tax benefit**
- **Spotlight on By Their Side: advocates for people with disabilities**

Is there someone in the picture with a disability?



Chances are good ….

- 27.2% of U.S. population residing in households or 85.3 million people reported having a disability in 2014.
- 17.6% or 55.2 million people reported having a severe disability.
- https://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf
- 8.3 million people received SSI in 2015; of this 1.3 million were under 18
- https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2016/fast_facts16.html
- 8.9 million workers with disabilities received SSDI in 2015; with 1.9 million dependents also receiving.
- https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2016/fast_facts16.html

What Are We Planning For?

- Meeting basic needs, but what else?
- Enjoyment of a personally and emotionally fulfilling life.
- Comfort and quality of life.
- A safe and secure home.
- A meaningful job.
- Realization of one’s full potential.
- Being an active part of a community.
- And much more.

Government Benefits

- *Supplemental Security Income (SSI)*
- Adult disability criteria: Unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to last at least 12 months.
- Child disability criteria: medically determinable physical or mental impairment that results in marked and severe functional limitations.
- Income per month: $771 (individual), $1,157 (couple) in 2019
- Resource limit: $2,000 (individual) $3,000 (couple)

Government Benefits (con’t)

- SSI eligibility makes one eligible for Medicaid.
- *Social Security Disability Insurance (SSDI)*
- Same disability criteria as for SSI.
- Entitlement based on work history – one’s own or a parent’s
- Not means-tested – no income*or asset limit
  - * unless earnings from *working* are over a certain amount
- SSDI eligibility makes one eligible for Medicare after 25 months.

Yet More Government Benefits

- **Waiver programs** such as Community Pathways Waiver, Autism Waiver and Model Waiver for Medically Fragile Individuals that provide services to targeted populations, often including long term supports such as attendant care and residential programs.
- Shared Living (f/k/a Project Home).
- Food Stamps (a/k/a SNAP).
- Housing subsidies/vouchers.
- Qualified Medicare Beneficiary (QMB) /Special Low Income Medicare Beneficiary (SLMB)
- Medicaid Expansion Program under the Affordable Care Act
- *All have their own eligibility criteria AND count income and resources differently*

How best to achieve our clients' planning goals when they are faced with limited resources and when many important public benefits have strict financial tests?

Practice tip: Research and documentation

- Get written confirmation of what benefits the individual receives.
- Think about what benefits may be available in the future.
- Consider which are and are not means-tested.
- Consider the planning options and how they may interact.
- Plan for flexibility, as client and external circumstances may change.
- Help in selection of fiduciaries.

Will a Special Needs Trust help?

Special needs trusts provide a way to manage assets (e.g, income, investments, real property, insurance proceeds) for the benefit of an individual with disabilities in a manner which will exclude trust assets from being counted towards eligibility for means-tested benefits and allow use of these assets for the beneficiary’s quality of life.

Special Needs Trusts
a/k/a Supplemental Needs Trusts

- Intended to provide for the special or supplemental needs (those not met by public or private benefits) of a person with disabilities.
- May be funded with the assets belonging to the person with disabilities ("first party funded") or someone else's ("third party funded").
- May be created during lifetime ("inter vivos") or at death ("testamentary").
- May be revocable or irrevocable.
- May be through non-profit organizations.

Examples of Special Needs Trusts

- Parents include a special needs trust under a Last Will and Testament (‘testamentary trust”).
- Grandparents set up a trust now into which they and others may transfer funds during their lifetime or by the terms of their Wills; the trust cannot be changed later (“irrevocable inter vivos trust”.)
- Parents create a trust that can be changed over time to respond to evolving abilities/circumstances of the beneficiary and plan to fund the trust with life insurance policy (“revocable living trust”.)
- Individual over 18 and on SSI receives an inheritance outright and puts it into a first party funded SNT that meets SSI and Medicaid rules (“first party special needs trust”.)
- Non-profit entity offers a pooled trust for either first party or third party funded accounts.

Hallmarks of Special Needs Trusts

- Complete discretion in the trustee to make distributions.
- No power in the beneficiary to compel distributions, amend or terminate the trust.
- No mandatory distributions to beneficiary.
- No Crummey withdrawal rights.

ABLE Accounts

- A tax favored account for people with disabilities, with some similarities to 529 College Savings Accounts.
- Permits certain individuals with disabilities to accumulate financial assets in excess of $2,000 resource limit for SSI and Medical Assistance (Medicaid).
- Individual must have a severe physical or intellectual disability or blindness, with onset of disability before age 26.
- Maximum contributions to an ABLE account in any one year are capped at the federal gift tax exclusion, currently $15,000. 26 U.S.C. 529A(b)(2)(B). Limits are set PER ACCOUNT, not per donor.
- Lifetime contributions are capped at the state's College Savings Plan maximum, for Maryland this is now $500,000. 26 U.S.C. 529A(b)(6).
- Individual may only have one account.

ABLE Accounts Cont'd

- The account is owned by the individual who is disabled and is referred to as the "designated beneficiary."
- Contributions must be cash (check, money order, or credit card).
- The designated beneficiary or any 3rd party may contribute.
  - 3rd party contributions are considered a completed gift for tax purposes
- Income earned on the account is not taxable so long as spent for Qualified Disability Expenses (QDEs)
- After the designated beneficiary's death, the State *may* request reimbursement for medical assistance benefits provided to the beneficiary after the establishment of the ABLE account, subject to any outstanding bills for QDEs and funeral and burial expenses. *But, Maryland law now limits the State's reimbursement to long term care services provided after the age of 55.*
- May be established and managed by individual, parent (if under 18), agent under POA or guardian.

Qualified Disability Expenses

- Generally, expenses for the benefit of the designated beneficiary and related to his/her disability, including: *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,* and other expenses, which are approved by the Secretary of the Treasury under regulations. 26 U.S.C 529A(e)(5).
- If funds are spent on non-QDEs the designated beneficiary pays tax on the earnings withdrawn, plus a 10% penalty.

TCJA 2017 Enhancements:
Contribution of Earnings to ABLE Accounts

- Section 11024 incorporated the ABLE To Work Act which permits certain designated beneficiaries who are capable of earning their own income to contribute additional funds equal to the lesser of their annual income or the federal poverty level of the prior year ($12,060 in 2017, $12,140 in 2018).
- Beneficiaries must be employees who have had no employer contributions to a qualified compensation plan, annuity, or deferred compensation plan during the tax year to qualify.

TCJA 2017 Enhancements:
Tax Credit May Be Available for Certain ABLE Account owners

- The same section also permits designated beneficiaries to utilize the Retirement Savings Contributions Savers Credit to deduct their contributions to an ABLE account so long as they meet certain requirements.
  - The Saver's Credit is capped at the lesser of $2,000 for single filers, or a percentage of your contribution determined by your income.

Percentage of Contribution Included	Income
50%	≤ $19,000
20%	$19,001 – $20,500
10%	$20,501 – $31,500
0%	≥ $31,501

TCJA 2017 Enhancements: Rollover from 529 to ABLE

- Section 11025 incorporated the ABLE Financial Planning Act, permitting the rollover of funds from a 529 College Savings Account to an ABLE account without incurring a tax or penalty.
- Rollover contributions are subject to the contribution cap set at the federal gift tax annual exclusion amount, currently $15,000. So must be counted together with any other contributions in the same tax year.

Maryland ABLE Program

- Administered by Sumday Administration, through BNY Mellon.
- Maryland ABLE permits a state tax deduction for Maryland residents of up to $2,500 for single filers and up to $5,000 for joint filers, for contributions to an account under the Maryland state ABLE program, with a carry over for up to 10 years.
- For more information see https://www.marylandable.org.
- **Debit card option temporarily suspended in Maryland ABLE program; expected to resume by year end.**
- An account may be opened in the beneficiary's home state or any other state whose ABLE program accepts out of state enrollees.
  - Another state may provide more aggressive investment options or more favorable terms.
  - Contributions to an ABLE account managed under another state's program do not qualify for the Maryland state tax deduction.

Advantages of ABLE Accounts

- Easier, faster and less expensive to set up than a trust.
- More accessible to the beneficiary than trust funds.
- Allows the beneficiary an active role in using and managing her own money.
- **Payments from an ABLE Account to pay for owner's housing expenses avoid reduction in SSI benefit for receipt of in-kind support and maintenance (ISM).**
- Limits on annual and lifetime contribution, and type of assets that can be contributed make ABLE a useful planning tool, but does not displace special needs trusts.

Qualified Disability Trusts

- Qualified Disability Trusts have historically received special income tax treatment and have been permitted under section 642(b)(2)(C) of the IRC to take the personal exemption.

- This provision applies only to third party trusts.

- The TCJA 2017 temporarily suspends the personal exemption for tax years 2018 through 2025, by amending section 151 of the IRC such that the “exemption amount” means zero. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11041(a), 131 Stat 2054.

Qualified Disability Trusts

- Section 11041(b) continues the special income tax treatment for Qualified Disability Trusts by amending section 642(b)(2)(C) of the IRC such that, in any year where the exemption amount is zero, the words "the exemption amount under section 151(d)" are replaced by "$4,150." Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11041(b), 131 Stat 2054.

- This carve out for Qualified Disability Trusts also requires that this amount be adjusted for inflation pursuant to section 6334(d)(4)(C) of the IRC. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11041(b), 131 Stat 2054.

Qualified Disability Trusts

- A Qualified Disability Trust is a third party/non-grantor trust in which the current beneficiary(ies) of the trust have been determined to be disabled by the SSA for some portion of the year. IRC 642(b)(2)(C)(ii)(II).

- Remainder beneficiaries do not have to be disabled.

Disabled Military Child Protection Act

- Enacted 12/19/2014
- Allows military members and retirees to irrevocably direct payment of a Survivor Benefit Plan (SBP) annuity to a first party special needs trust for the benefit of a disabled child.
- Requires the trust to be established at the time the beneficiary is named.
- Attorney certification of trust required to initiate beneficiary designation.
- If retiree is deceased, DOD will allow court ordered assignment of a benefit already in pay status to a first party special needs trust.
- https://www.specialneedsalliance.org/the-voice/disabled-military-child-protection-act-policy-issued/

Special Needs Fairness Act 12/13/2016

- 21st Century Cures Act. Section 5007, now allows an individual to create his/her own stand alone self-settled (d4A) special needs trust
- Social Security Administration Emergency Message EM-16053

NEW SSA Rules on First Party Special Needs Trusts

- Released 4/30/2018
- Expands ability to pay for third party travel expenses.
- Allows 90 day amendment period for trusts that have been previously accepted by SSA but due to change in policy or interpretation no longer meet requirements.
- More explanation of sole benefit: that purpose of expenditures must be for the primary benefit of the beneficiary, and reasonable collateral benefit is acceptable.
- Reflects legislative changes: Disabled Military Survivor benefit can be paid into first party trust; an individual may now establish his/her own first party stand alone trust.
- Helpful explanations and direction for field office staff regarding treatment of trust expenditures, eg. no medical training or certification needed, more than one person can travel with beneficiary if circumstances call for this.
- https://secure.ssa.gov/apps10/poms.nsf/Home?readform POMS Sections SI 01120.199-203

SSA Representatives Fees – Updated Rules 6/25/2019

- POMS GN 03920 TN 26 adding new section to POMS GN 03920.007

  "Legal and Specialized Services Not Subject to Fee Authorization"
- In general, SSA asserts that attorney's fees for services performed in connection with a claim, are representational services and as such must be approved by SSA, including:
- Applying for Social Security monthly benefits, SSI or a lump sum death payment.
- Requests to modify benefit amount or reinstatement, waive an overpayment or appeal denial of waiver request.

Searching for Bright Lines in the land of "Sortakinda"

- Services performed prior to an application being made for SSI benefits (before a claim is initiated) appear not to require approval.
- Services performed once the application is filed that relate to the open claim/matter, such as advice to clients, drafting, communications with SSA, attending appointments, filing of and representation in appeals process, appear to require approval.
- For services requiring approval, attorney needs to have a signed representation agreement (Form 1696) with client; file a fee petition with SSA, and cannot bill for fees, or must hold fees in escrow, until SSA approves, or communicates that approval is not required.

SSA Representatives Fees – Updated Rules 6/25/2019

- https://secure.ssa.gov/apps10/reference.nsf/links/06252019080535PM

For this new "guidance"

- https://secure.ssa.gov/apps10/poms.nsf/lnx/0203910020

Generally about Representation, including process for fee petitions.

- https://www.ssa.gov/forms/ssa-1696.html

Representative Form for client's signature

National organizations (NAELA, Special Needs Alliance, Academy of Special Needs Planners, ABA, AAJ) are actively reviewing this situation and considering options.

Here’s what I’m doing:

- If I am working with a client:
  - Who is on SSI or in has initiated an application for SSI
  - And my work relates to the client’s eligibility, the amount of the benefit, or an overpayment
    - E.g, challenging SSA treatment of or counseling the client about a trust, reduction in benefit, or overpayment
  - Then, I inform the client I cannot be paid for these services until my fees have been approved by SSA, have client sign SSA Form 1696, and submit my fee request to the SSA Field Office.
- DISCLAIMER – I’m not sure this is comprehensively correct and am actively trying to figure this out.
- Stay tuned to list servs and other communications channels.

Expansion of MD Child/Dependent Care Tax Credit

- Increases the annual income limit for state income tax credit for child or dependent care
  - from $50,000, whether filing as individual or married couple,
  - to $92,000, for single parents and $143,000 for married couples filing jointly
- Tied to companion federal tax credit 26 U.S.C §21
- State tax credit is lesser of 32% of the federal child and dependent care credit; or the State income tax for the taxable year.
- Reduced for individual with income over $30,000/ couple with income over $50,000
- Refundable if credit is more than state income tax due for individual with income under $50,000/couples under $75,000
- Applies to care for children, adults with disabilities and elderly dependents 26 U.S.C §21(b)
- Senate Bill 870 (Signed into law): http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&tab=subject3&id=sb0870&stab=01&ys=2019RS

Retirement Accounts and SNTs

- When leaving a retirement account to an SNT it is important to maximize the stretch out of the required minimum distributions.
- An SNT trustee will want to accumulate RMDs, not pass them out to the beneficiary.
- The goal is for the trust to be disregarded, and allow a look through to the beneficiaries of the trust for purposes of determining life expectancy for RMDs.
- A trust must have the following four attributes to be disregarded:
  - Trust is valid under state law;
  - Trust is irrevocable or becomes irrevocable by the Participant’s date of death;
  - There are beneficiaries that are identifiable under the terms of the trust;
  - A copy of the trust document is provided to the plan administration or retirement plan custodian by no later than October 31 of the calendar year after the death of the participant.

Retirement Accounts and SNTs

- If a retirement account is left to a trust that does not meet these requirements, the IRS has strict rules about Required Minimum Distributions (RMD).
- If the trust has beneficiaries who are not “qualified beneficiaries” (such as the estate, a charity, a non-qualified trust), even if they are far downstream, who would take in the event no intended beneficiary survives, the IRS considers it a failure of designated beneficiary(ies) for purposes of determining RMDs.
- If there is no designated beneficiary, the beneficiary’s life expectancy cannot be factored into the RMDs.
- If all beneficiaries are people, IRS looks to the oldest beneficiary (current or future) to determine life expectancy for RMDs.

Retirement Accounts and SNTs

- If the participant dies before their Required Beginning Date (RBD):
  - W/ designated beneficiary, stretch is over the beneficiary's life expectancy.
  - W/O designated beneficiary, stretch is over five years.
- If the participant dies after their Required Beginning Date:
  - W/ designated beneficiary, stretch is over the greater of the participant's or beneficiary's life expectancy.
  - W/O designated beneficiary, stretch is over five years.

Proposed SECURE Act of 2019 May End Stretch Out

- SECURE Act would limit post-mortem stretch out to 10 years.
- Passed by House; tied up in Senate.
- Stay tuned.

Uniform Transfer to Minors Act

SSI treatment of Uniform Transfer to Minors Act accounts (UTMA Accounts) is based on the source of the funds:

- UTMA property contributed by a third party, including any additions or earnings, is neither income nor a resource to the minor until age of attainment (in Maryland, 21).
- UTMA property that was not gifted by a third party, is considered available at the age of 18.

Custodians' and Guardians' authority expanded for protection of individuals with disabilities.

- When the minor or ward is disabled as defined under 42 U.S.C. § 1382c(a)(3), a guardian of the minor or disabled person,
- The custodian or guardian may:
- Pay or apply income or principal from the guardianship estate or the UTMA account to establish or fund, for the benefit of the minor or disabled person:
- (1) A special needs trust, provided that the trustee is subject to the jurisdiction of a court, bonded, and required to file annual accountings of the trust;
- (2) A pooled asset special needs trust account, provided that the trust has been approved by the attorney general of the state where the minor or disabled person resides; or
- (3) An ABLE account.
- Md. Code Ann. Ests. & Trusts §§ 13-214(c), 13-314(d)

New Maryland Regs re: first party SNTs

- COMAR 10.09.24.08-2(C) updated in December 2016
- Eliminated rule that annuities in trusts must pay out by age 65; adds language of irrevocable assignment of right to receive periodic payments to trustee before age 65.
- Clarified requirement that state payback language must expressly provide that *all* states in which medical assistance received are entitled to payback. *(Critical for SSI approval.)*
- Eliminated prohibition on paying family members.
- Office of Eligibility Services now does reviews, not AG's Office.
- http://www.marylandattorneygeneral.gov/Pages/Complaints/Forms/Attorney_Review_checklist.pdf

Kiddie Tax Changes Under TCJA of 2017

- “Simplified” calculation of the Kiddie Tax.   Not.
- Changes take parents’ tax situation out of the picture.
- Changes the applicable tax rates to estate/trust income tax rates.
- Introduces concept of “earned taxable income” (ETI) which applies in calculating tax even when a child has only unearned income because ETI is computed as difference between child’s taxable income and net unearned income (NUI).
- https://www.journalofaccountancy.com/issues/2018/nov/irs-new-kiddie-tax.html

2018 rates for preferential income	2018 single tax brackets for preferential income: Sec. 1(j)(5)(B)	2018 modified single tax bracket amounts for kiddie tax — preferential income: Sec. 1(j)(4)(C)
0%	First $38,600	ETI + $2,600
15%	Next $387,200	ETI + $12,700 – income taxed at 0%
20%	Remaining income	Remaining income – income taxed at 0% and 15%

https://www.journalofaccountancy.com/issues/2018/nov/irs-new-kiddie-tax.html
"Understanding the new kiddie tax", Journal of Accountancy, November 2018; Kate Mantzke, CPA, Ph.D; Brad Cripe, CPA Ph.D; Suzanne Youngberg, CPA

Property tax benefit

- Homeowners’ tax credit is available for home that is in a first party special needs trust under 42 U.S.C. Sec. 1396p(d)(4) or a third party trust established for an individual who is disabled.
- Provided the beneficiary actually resides in the home and meets the income limitations.
- Md. Code Ann., Tax – Property Sec. 9-104(9)(ii).

Spotlight on: By Their Side Advocates for people with disabilities

- By Their Side is a Maryland non-profit that works with individuals with intellectual/developmental disabilities and their families to make sure the individual's wishes are addressed.
- Provide advocacy for health, safety, rights, and happiness, even when parents can no longer be there.
- Very knowledgeable about benefits and advocating for services.

http://www.bytheirside.org/

Resources, Law & Regulations

- Maryland ABLE ACT http://mgaleg.Maryland.gov/webmga/frmMain.aspx?stab=01*pid=billpage&tab=subject3&ys=2016rs&id=HB0431
- Maryland ABLE Webpage www.marylandable.org
- Maryland Department of Disabilities ABLE Webpage http://mdod.Maryland.gov/about/Pages/Able-Act-Taskforce.aspx
- National ABLE Resource Center http://www.ablenrc.org
- Division Q, Title III Sec. 303, Consolidated Appropriations Act 2016 (P.L. 114-113, December 18, 2015) amending IRC Sec. 529A http://uscode.house.gov/view.xhtml?req=(title;26%20section:529A%20edition:prelim)

- “Program Operations Manual System” used by Social Security field and regional office staff.
  - Contains definitions, rules and procedures for all steps in Social Security eligibility and application process.
  - Access via www.ssa.gov
- Special Needs Alliance www.specialneedsalliance.org
- NAELA National Academy of Elder Law Attorneys www.naela.org
- Md. Developmental Disabilities Council www.md-council.org
- Tax Cuts and Jobs Act https://www.congress.gov/bill/115th-congress/house-bill/1