



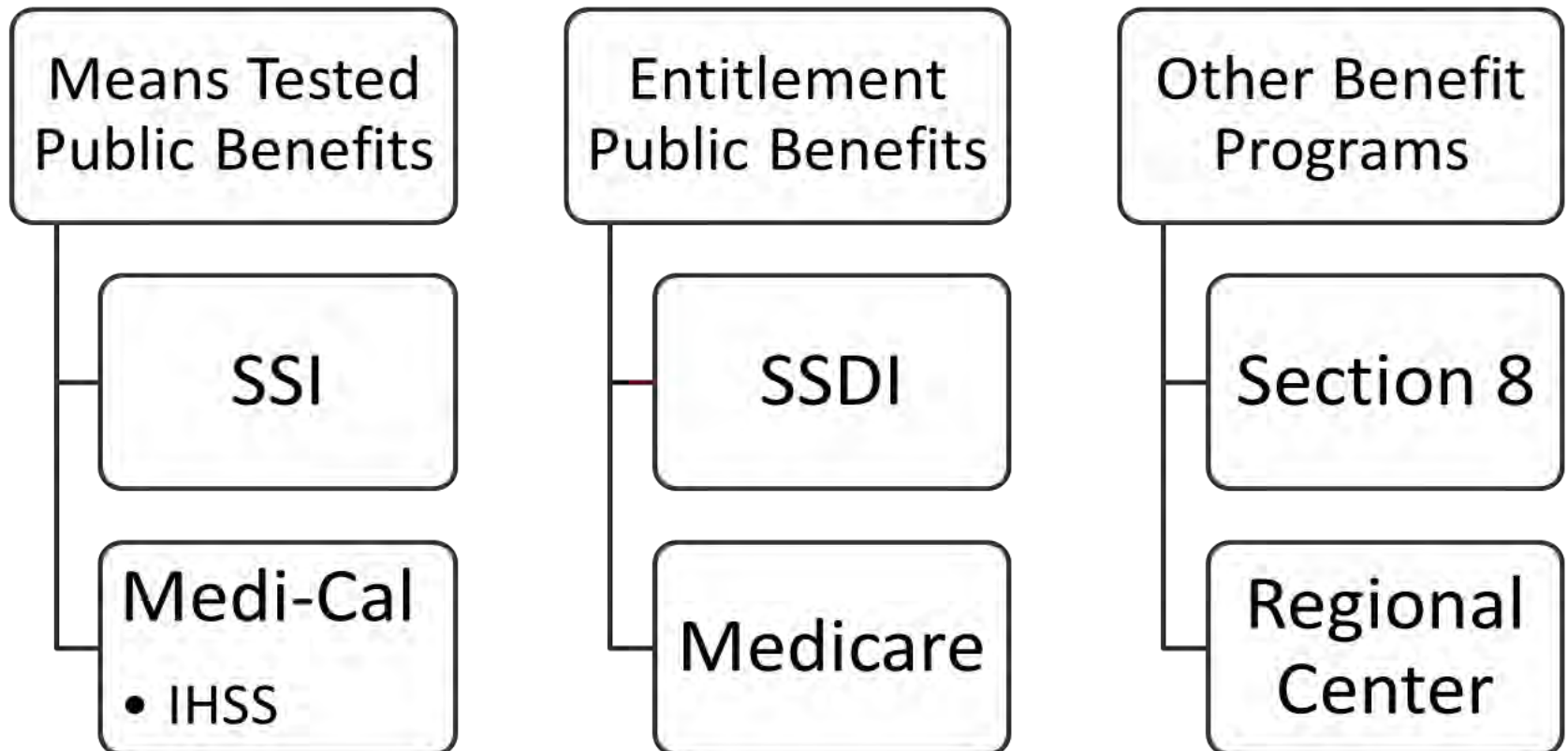
Irvine Unified School District: *Special Needs Trusts and Conservatorships*

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What Does Planning Involve?

- ▶ Preserving your child's financial security and quality of life.
- ▶ Addressing key issues:
 - Understanding the role of public benefits
 - Making decisions about the future
 - Using estate planning/trusts to protect assets

Public Benefits At A Glance



Public Benefits – Supplemental Security Income (SSI) & Medi-Cal

- ▶ SSI is to pay for food and shelter
- ▶ If qualified, then can receive up to \$954.72 a month in 2021
- ▶ Must be disabled as defined by law
- ▶ Means tested - Must have less than \$2,000 in resources, some exempt resources
- ▶ Automatically qualifies for Medi-Cal
- ▶ Medi-Cal is a health insurance program which provides needed healthcare service
 - Provides access to In-Home Support Services (IHSS) and long-term care

Public Benefits - Social Security Disability Insurance (SSDI) & Medicare

- ▶ Child might qualify on their own if:
 - Disability
 - Sufficient work history (credits)
- ▶ Entitlement based - No resource test for SSDI
 - Will lose if working and earning over \$1310 per month in 2021
- ▶ SSDI benefit based on past wages
- ▶ Can apply for Medicare after 24 months
- ▶ Can receive SSDI and SSI if wages were low
- ▶ Medicare is a health insurance program

Public Benefits - Childhood Disability Benefits (CDB)

- ▶ Childhood Disability Beneficiary benefits (sometimes called “Disabled Adult Child Benefits”):
 - Child is disabled before age 22
 - Parent paid into the social security system
 - Child with benefits based on parent’s Social Security when parent becomes disabled, retired, or dies,
 - Child will receive 50% of parent’s check amount while parent is alive and 75% of parent’s check when parent dies
 - After receipt for two years, will qualify for Medicare
 - May reduce or eliminate SSI benefits

Third Party Special Needs Trust

- ▶ A document setting forth legally binding instructions concerning your loved one with special needs
- ▶ It is created with the assets of someone other than your loved one with special needs
- ▶ Preserves government benefits
- ▶ Trust assets provide opportunities to enhance that person's quality of life to the maximum extent possible
- ▶ Can be customized to meet your child's specific needs
- ▶ Can be created by will, revocable living trust or standalone
 - "Living" SNT lets other family members and friends contribute

Third Party Special Needs Trust – Cont'd

- ▶ Provides a system of checks and balances and financial management and oversight
- ▶ Directs personal care and advocacy
 - Appoints a “Lifetime Management Team”
 - Trustee
 - Provides protection from creditors and predators
 - Trust Advisory Committee
 - Good check and balance on Trustee
 - Makes certain the needs of beneficiary are being met
 - Trust Protector
 - Allowed to modify SNT terms to keep current with changes in law and benefit rules

Creating An Effective Plan - Envision Your **Loved One's** Future

- ▶ Planning ahead makes all the difference:
 - Where and with whom will your loved one live?
 - What type/level of care will be required?
 - Will a Conservator be necessary?
 - Who else will be involved?
 - What kind of lifestyle is desired?
 - Consider potential future challenges?

Creating An Effective Plan - Create A Memorandum Of Intent

- ▶ Lay out goals/expectations:
 - Details preferences, needs, wishes, both medical and personal
 - Lists key people in loved one's life
- ▶ Helps guide:
 - Family members
 - Trustee
 - Caregivers
 - Others

Creating An Effective Plan - Estimate Income & Expenses

- ▶ Monthly income:
 - SSI, SSDI, Social Security, earned/unearned income
- ▶ Monthly living expenses:
 - Housing, food, transportation, medical, recreation, etc.
 - Consider how any shortfall will be met

$$\underline{\text{Income} - \text{Expenses} = \text{Shortfall}}$$

Parents' Common Concerns

When Their Child With Special Needs Becomes An Adult

- ▶ Is my child capable of making important decisions or should we seek legal authority to make decisions for him or her?
- ▶ Is my child eligible for governmental income assistance and health care benefits?
- ▶ If my child is capable of making important decisions, how do I make certain my child is not unduly influenced and a victim of predators and creditors?
- ▶ How do we make certain our child is cared for when we can no longer care for him or her?

Multiple Ways For Parents To Plan

- ▶ Understand your child's eligibility for public benefits
- ▶ Make plans for the future to maximize public and private resources for your child's benefit
- ▶ Create a Revocable Living Trust
- ▶ Create a Memorandum of Intent
- ▶ Create a Will
- ▶ Create a Health Care Directive
- ▶ Create a Financial Power of Attorney
- ▶ Establish a Special Needs Trust
- ▶ Name the Special Needs Trust as beneficiary of accounts, plans, etc.
- ▶ Determine whether a Conservatorship for your child is needed

Revocable Living Trust Planning

- ▶ Avoids Probate
- ▶ Plans for your Disability
- ▶ Private and Confidential
- ▶ Reflects your wishes and values
- ▶ Controls how & when assets are distributed
- ▶ Provides for minor children, grandchildren and family members with disabilities
- ▶ Funds can remain in trust for creditor/predator protection for heirs
- ▶ No court involvement
- ▶ Best planning tool even for modest estates
- ▶ Good in every state
- ▶ More expensive initially – much less costly in the end

Will Planning

- ▶ Specifies who you want to inherit your property when you pass, transfers assets outright, and no creditor protection
- ▶ Names a Personal Representative to administer your estate
- ▶ Names a Guardian for minor children and a Guardian/Conservator to manage assets of minor children or adult child with disabilities
- ▶ Requires ongoing court involvement of assets passed to minors and adult child with disabilities (unless trusts are included)
- ▶ Requires Probate (approx. 12 to 24 months, and longer)
- ▶ Only becomes effective when you die, won't provide for your disability!
- ▶ All your information is a matter of public record - Wills can fall short of Estate Planning goals!
- ▶ Less expensive initially – far more costly in the end

Probate Fees

Probate fees are set by Probate Code §10800. The probate estate value is based on the gross value of the assets regardless of the amount of equity in the property (loans).

Estate Value	%	Executor Fee	Attorney Fee	Total Fee
\$100,000	4%	\$4,000	\$4,000	\$8,000
\$200,000	+ 3%	\$7,000	\$7,000	\$14,000
\$300,000	+ 2%	\$9,000	\$9,000	\$18,000
\$400,000	+ 2%	\$11,000	\$11,000	\$22,000
\$500,000	+ 2%	\$13,000	\$13,000	\$26,000
\$600,000	+ 2%	\$15,000	\$15,000	\$30,000
\$700,000	+ 2%	\$17,000	\$17,000	\$34,000
\$800,000	+ 2%	\$19,000	\$19,000	\$38,000
\$900,000	+ 2%	\$21,000	\$21,000	\$42,000
\$1,000,000	+ 1%	\$23,000	\$23,000	\$46,000

Legal Tool Box

- ▶ If your loved one with special needs has capacity, they can execute:
 - Durable Powers of Attorney for Financial Management
 - Advance Health Care Directive (sometimes called Power of Attorney for Health Care)
 - HIPAA
- ▶ If loved one with special needs does not have capacity, the following may be needed:
 - Special Needs Trust
 - Conservatorship (Limited, General, or LPS)

What is a Conservatorship?

PERSON

- ▶ Personal needs are not properly met.
- ▶ Cannot provide for physical health, medical care, food, clothing, or shelter.
- ▶ Conservator may be required to decide whether the conservatee should live at home or in an institution.

ESTATE

- ▶ Unable to manage his or her own financial resources.
- ▶ Cannot resist fraud or undue influence.
- ▶ Conserve, manage, and use the conservatee's property in California for the benefit of the conservatee.

Limited Conservatorships

- ▶ A protective judicial proceeding for persons whose developmental disability substantially impairs their ability to care for themselves or their property.
- ▶ Used only when necessary to promote and protect the well-being of the limited conservatee.
- ▶ Ordered only to the extent necessitated by proven mental and adaptive limitations.
- ▶ Available only for adults who have developmental disabilities.

Limited Conservatorships – Cont'd

- ▶ The limited conservatee
 - Is not presumed to be incompetent
 - Retains all legal and civil rights except those the court specifically grants to the limited conservator.
- ▶ The limited conservator oversees the care, custody, and control of the limited conservatee, subject to the certain limitations ordered by a court.
- ▶ Intended to protect the **conservatee's** health, welfare, and safety to the extent necessary while reserving to the limited conservatee any civil rights that he or she can reasonably manage without conservatorship.

Duties of a Limited Conservator

- ▶ Responsible in assisting the limited conservatee to be self-reliant and independent by securing:
 - Appropriate habilitation or treatment
 - Training and education
 - Medical and psychological services
 - Social and vocational opportunities
 - Increasing the limited conservatee's functional abilities in the least restrictive manner

Powers of a Limited Conservator of the Person:

▶ “Standard Five”

- Select the residence of the limited conservatee
- Have access to the limited conservatee's confidential records and papers
- Control the right of the limited conservatee to contract
- To give or withhold medical consent
- Make decisions concerning the education of the limited conservatee

▶ Available but Seldom Granted by Orange County Superior Court

- To consent or withhold consent for marriage
- To control social and sexual contacts

How a Conservatorship is Established

- ▶ A Petition for appointment of a conservator is filed with the court and a hearing is set.
 - Orange County – approximately 14 weeks
- ▶ The proposed conservatee must attend the hearing unless a doctor certifies he or she cannot attend for medical reasons.
- ▶ The Petition can be filed shortly before the proposed conservatee's 18th birthday, or any time afterwards.
- ▶ Fees and Costs to Establish:
 - Attorney Fees
 - Varies if objection filed and/or Temporary Conservatorship required
 - Costs for Petition filing, Court Reporter, Court Investigator Fee, Parking, Attorney Service Fee, certified copies of Letters, personal service, and other miscellaneous fees

How a Conservatorship is Established – Cont'd

- ▶ Prior to the hearing:
 - The court investigator is appointed and will interview the proposed conservatee, the petitioner, and the proposed conservator. The investigator will submit a report to the court with their findings.
 - An attorney is appointed for the proposed limited conservatee to represent him or her.
 - Regional Center is given notice and they prepare and file a report.

How a Conservatorship is Established – Cont'd

At the hearing:

- ▶ Petitioner, proposed conservatee, and the proposed conservator are required to attend
- ▶ Proposed conservatee's opinion is sought – if he or she objects, they have a right to a trial
- ▶ Court must scrutinize the propriety of a limited conservatorship and whether it is in the proposed conservatee's best interest
 - Not every developmental disabled individual requires a conservatorship
 - Depends upon the individual's
 - Functional abilities and needs
 - Capacity to care for himself or herself as a “reasonably prudent” person
 - Must promote and protect the well being of the individual
 - Must encourage maximum self-reliance and independence

Helpful Resources

- ▶ Support for Families
 - <http://www.supportforfamilies.org/>
- ▶ California Foundation for Independent Living Centers (CFILC) is a statewide organization of 25 independent living centers that promote independent living by individuals with disabilities. The centers provide counseling on public benefits, housing, and access to services.
 - <http://www.cfilc.org>.
- ▶ Disability Rights California is an advocacy group that provides numerous services to individuals with disabilities.
 - <http://www.disabilityrightsca.org>
- ▶ Disability Benefits 101 offers easy to understand, practical information on public and private benefits, employment services, and other programs, as well as interactive benefits calculators for individuals with disabilities.
 - <http://www.ca.db101.org>

Questions?

Thank You!!!

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ABLE Accounts – A New Tool in the Toolbox

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Individuals with disabilities now have a new tool to help build a foundation for independence, life-improving opportunities and financial flexibility – the ABLE account. The ABLE account was created as a result of the passage of The Achieving a Better Life Experience Act (ABLE Act) in 2014 (which added Section 529 A to the Internal Revenue Code) and the subsequent enactment of state ABLE laws. An ABLE account is a tax-advantaged savings account for qualified individuals with disabilities and their families. ABLE accounts allow eligible individuals with disabilities to save money for disability-related expenses beyond the existing ceiling of \$2,000.00 and still maintain eligibility for government benefits. California's ABLE program (CalABLE) became operational and open to the public on December 18, 2018.

Requirements for Eligibility

An individual must meet the following requirements to be eligible to own an ABLE account:

- the individual must meet the Social Security Administration's definition of disability, and
- the onset of this disability must have commenced before age 26.

It is important to note that an ABLE account may be opened for individuals of any age *provided the onset of the individual's disability occurred before age 26*. There is currently a bill in Congress to amend the ABLE Act to raise the age of onset of disability from 26 to 46.

If the disabled individual meets the age of onset criteria and is currently receiving benefits under the Supplemental Security Income (SSI) and/or Social Security Disability Insurance (SSDI) program because of their disability, that individual is automatically eligible for an ABLE account. If the disabled individual meets the age of onset requirement but is not currently receiving SSI and/or SSDI benefits, the individual may still be eligible for an ABLE account if he or she meets Social Security Administration's definition and criteria regarding "marked and severe functional limitations" *and* obtains a letter of disability certification from a licensed physician. The specific requirements for a letter of disability certification vary on a state by state basis. Depending upon the particular state's ABLE program procedures, the letter of disability certification may be a form that a physician must fill out or a simple letter within which the physician must provide pertinent information (such as the nature of the disability and date of onset). California's ABLE program requires that the individual have, available upon request, a written, signed diagnosis from a licensed physician. When an ABLE account is opened, the individual will self-certify that he or she is eligible and has obtained the requisite letter of disability certification from a physician. However, the letter does not need to be submitted at that time and should be kept on file to be produced in the event of an audit or if the individual's eligibility is otherwise questioned by Social Security or the Internal Revenue Service.

Ownership Rules and Limitations

The beneficiary of the ABLE account is also the account owner (this feature is important to help individuals who are able to handle their own finances become independent as much as possible). However, a parent, legal guardian, or the holder of a valid power of attorney may open and manage the account if the beneficiary is unable to do so. An individual may only own one (1) ABLE account (unlike 529 college savings accounts) and the account may be opened in any state with a qualified ABLE program. Additionally, Federal law allows the individual to switch ABLE programs by transferring the account from one state program to another and to rollover the ABLE account to an ABLE account owned by a sibling, half-sibling, or step-sibling of the disabled individual without creating a taxable event so long as the recipient account owner is also eligible to open an ABLE account.

Funding the Account

Contributions made to an ABLE account may be made by any person (the account beneficiary, friends and family, an employer, etc.) on an after-tax basis. ABLE account owners who choose to contribute into their own ABLE account may now be eligible to benefit from the Retirement Savings Contributions Tax Credit (also known as the Saver's Credit). Some states are even offering state tax incentives to their residents for ABLE account contributions depending on the specific state's ABLE laws. CalABLE offers state income tax deductions in computing adjusted gross income to California residents who contribute to a CalABLE account. The total annual contributions by all contributing individuals for a single tax year are capped at \$15,000.00 for 2021. This amount is tied to the annual gift tax limit and may be adjusted periodically to account for inflation. ABLE account owners who have employment may be eligible to contribute up to \$12,760.00 in addition to the \$15,000.00 annual contribution limit. The aggregate contributions to an ABLE account over time are subject to the overall limit matching the state threshold for Section 529 educational accounts. For example, in California, this amount is currently \$529,000.00, while most other states have set this limit at an average of \$400,000.00 or more per plan. Because of the relatively low contribution limits, ABLE accounts won't meet the needs of all individuals with disabilities, but will act as a companion to other special needs planning tools.

It is currently allowable to transfer funds from a 529 college savings account to an ABLE account without incurring any tax or penalty, provided that the beneficiary is the same individual on both accounts (or a family member of the 529 college savings account beneficiary as defined by law). Funds rolled over from the 529 college savings account to an ABLE account are still subject to the annual contribution limit of \$15,000.00.

Withdrawals from the Account

ABLE programs offer multiple investment platforms based on risk tolerance and liquidity needs. Earnings on ABLE funds are tax-free if used for "qualified disability expenses". A qualified disability expense means any disability-related expense incurred by the account beneficiary as a result of living with a disability. These expenses can include housing, education, transportation, health, prevention and

wellness, employment training and support, assistive technology and personal support services, and other disability-related expenses to enhance the quality of life. If money is withdrawn from an ABLE account to pay a non-qualified expense, the earnings portion of the withdrawal will be treated as income, will be taxed at the designated account beneficiary's tax rate, and will be subject to a 10% federal tax penalty (state penalties could also apply). The good news is that the Internal Revenue Service has indicated that "qualified disability expenses" will be broadly construed.

Generally speaking, withdrawals from an ABLE account will not affect an individual's eligibility for SSI. However, withdrawals for housing expenses and non- "qualified disability expenses" must be spent in the same calendar month as the withdrawal or they will be considered an asset of the beneficiary, potentially reducing or eliminating SSI benefits. Options for accessing ABLE funds will vary from program to program and include debit cards, online bill pay directly to providers, and/or direct deposit of funds from the ABLE account to a personal bank account.

ABLE Accounts and Government Benefits

One of the primary benefits to individuals with disabilities is that funds in ABLE accounts are not countable assets for the purpose of qualifying for means tested government benefits, such as Medi-Cal or SSI, which limit the disabled individual's assets to \$2,000.00. Now, eligible individuals with disabilities and their families can go one step further to better secure their financial futures and to help offset the often significant financial challenges that accompany living with a disability. The first \$100,000.00 in an ABLE account will be exempted from SSI's \$2,000.00 resource limit for an individual and, accordingly, will not affect his or her eligibility for government benefits. When the ABLE account funds exceed \$100,000.00, the disabled individual's eligibility for SSI will be suspended, but not terminated, and he or she will not receive the SSI monthly cash benefit until such time as the ABLE account is spent down below the \$100,000.00 threshold. It is important to note that while the individual's eligibility for the monthly SSI cash benefit is suspended, his or her ability to receive or be eligible to receive medical assistance through Medi-Cal remains intact.

Distributions Upon Death of Account Beneficiary

California residents with a CalABLE account are not subject to Medi-Cal reimbursement. Medi-Cal is prohibited from filing a claim against an account after the death of the beneficiary which provides individuals the opportunity to leave a legacy for loved ones. However, ABLE Accounts administered by some other states do require Medicaid (Medi-Cal in California) reimbursement. In these situations, when the ABLE account beneficiary dies, all amounts remaining in the qualified ABLE account, up to but not in excess of the amount equal to the total medical assistance paid for the eligible individual after the establishment of the account, shall be distributed to the state(s). In other words, each state that paid medical assistance to the beneficiary is a creditor of (has a lien on) the ABLE account. All outstanding qualified disability expenses will be given priority over the claims of the state(s). Any amount remaining after reimbursement to the state(s) may be distributed to the designated beneficiaries on the individual's ABLE account. This Medicaid payback requirement is a significant drawback to ABLE accounts. This

should not be the deal-breaker, but rather is something that must be considered in the overall financial plan.

Conclusion

While the ABLE account is not a replacement for the time-tested Special Needs Trust, it is a useful tool in the special needs planning toolbox and should not be overlooked. For example, in California, there is no authority to direct a settlement into an ABLE account. This would require an amendment to California's applicable law, found in Probate Code §3611, governing the special needs planning options allowed in a personal injury settlement. Additionally, the assignment of a structured settlement to an ABLE account is permitted but it will be counted against SSI and Medi-Cal resource and income limits. The ABLE account maintains its status as one new piece of the puzzle. When creating an overall savings plan to provide sufficient future income for an individual with disabilities, disabled individuals and their families should consider the ABLE account in conjunction with other special needs planning tools. By doing so, this type of holistic planning will address the long-term financial support of the beneficiary, the short-term desire for flexibility and quality of life, and the need to maintain eligibility for government benefits for health care and basic living expenses.



Susan is a Special Needs Planning Attorney in Newport Beach, California. She practices exclusively in the areas of special needs planning, litigation settlement planning, trust and estate planning, conservatorships, and probate and trust administration. Susan is a member of the Academy of Special Needs Planners and Special Needs Coalition, writes and regularly teaches courses to the public, financial professionals, and other attorneys on special needs trusts, estate planning, litigation settlement planning, conservatorships, and probate and trust administration. Contact her at susan@skatzenlaw.com or visit the web site at www.skatzenlaw.com.



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