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Elder Law Memo - 2020

- Goal: Paying for assisted living, in-home care, or skilled nursing care while minimizing financial and emotional burden on loved ones
- Holistic approach – elder law should be part of every estate plan
 - Provisions in documents – will, trust, deeds, powers of attorney
- ABLER accounts (Code §529A): (1/person¹, rollover to disabled sibling²)
 - Annual contributions (all sources) limit \$15,000
 - Pay for food and shelter w/o SSI impact (coordinate w/ SNT provisions)
 - Aggregate contributions limit 529 limit
 - \$100,000 cap for SSI
 - Medicaid payback
 - US regs and state law (IRS Notice 2015-18)
 - Social Security³
 - ABLER accounts and Medicaid eligibility⁴
 - ABLER accounts and SNAP eligibility⁵
 - ABLER accounts and HUD eligibility⁶
 - ABLER accounts and IRS/Treasury guidance⁷
- Medicaid – KS \$2,000 individual limit or \$3,000 married couple limit (MO HealthNet similar \$2,000 individual \$4,000 married)
 - Federal program/\$, state administration/rules
 - Estate recovery
 - Gifting/Medicaid spend down – exempt assets, gifts to family, but caveat 5 year claw back
- Special Needs Trusts (federal and state law)
 - Usually irrevocable (can be revocable), may need provision allowing estate recovery for state to approve
 - 1st party/self-settled trust – 42 U.S.C. §1396p(d)(4)(A) – disabled individual funds special needs trust for their own benefit
 - SSA disability⁸ not medical diagnosis/personal opinion, under 65

¹ Code §529A(b)(1)(B)

² Code §529A(b)(1)(C)(i), (ii)

³ Social Security POMS TN 75 (04-19), <https://secure.ssa.gov/poms.nsf/lnx/0501130740>

⁴ http://www.ablenrc.org/wp-content/uploads/2019/07/ABLE-CMS-Guidance_0.pdf

⁵ <https://www.federalregister.gov/documents/2017/01/06/2016-30663/supplemental-nutrition-assistance-program-snap-eligibility-certification-and-employment-and-training#p-96>

⁶ <https://www.hud.gov/sites/dfiles/OCHCO/documents/2019-09pihn.pdf>

⁷ <https://www.federalregister.gov/documents/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs>

⁸ 42 U.S.C. §1382c(a)(3)(A)

- Self-settled with individual's assets and Medicaid payback (death or early termination)
 - Started by parent, grandparent, guardian, Court, or individual (SNT Fairness Act (2016))
- Irrevocable written trust
- No SSI/Medicaid penalty period
- Payback
 - State/US estate taxes and trust admin fees priority
 - Before debts to 3rd parties, funeral expenses, or residual beneficiaries
 - Pro rate if multi-state Medicaid
- Tax issues
- Pooled Trusts—(d)(4)(C) trusts– managed by nonprofit for disabled/special needs people, best for <\$100K assets
- 3rd party trust – family member, attorney/accountant, or friend funds special needs trust for individual
 - > 1 beneficiary allowed, any age
 - SSA disability definition N/A – medical diagnosis/personal opinion OK
 - No payback required
 - Completely discretionary
 - Assets never belonged to beneficiary
 - Supplements, not supplants, gov't benefits
 - Remaining trust corpus at death can go to any individual or other trust
 - US law silent
 - Inter vivos – revocable or irrevocable, letter to family
 - Funding by life care plan, life insurance, or family's EP
- Different programs (VA, Medicaid, SSI, etc) have varying eligibility standards and qualifying levels
 - Have to choose based on individual situation – usually can't combine them
- Make sure family aware/harmonious and working together
- Bankruptcy – Ch 7 (liquidation) vs Ch 13 (reorganization), limit on how many times in span of years