

2024 National Conference on Special Needs Planning and Special Needs Trusts

STETSON UNIVERSITY

ABLE ACCOUNTS

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PRESENTER'S BIO

Bradley J. Frigon, JD, LLM, CELA, 43 years as a practicing attorney

- Extensive experience in estate planning, estate and probate litigation, special needs planning, elder law, guardianship and conservatorship; Medicaid, and taxation;
- Master of Laws in Taxation;
- Licensed to Practice Law in Colorado, Wyoming and Kansas;
- Co-Author Fundamentals of Special Needs Trusts;

Associations:

- Past-President of the National Academy of Elder Law Attorneys (NAELA);
- NAELA Fellow;
- Appointed member of the Special Needs Alliance for Colorado and Wyoming;
- Counsel for the Colorado Fund for People with Disabilities;
- Fellow of the American College of Trust and Estate Counsel (ACTEC);
- Certified Elder Law Attorney (CELA);
- Colorado, Wyoming and Kansas Bar Associations.

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About ABLE

- June 2024 - Social Security Administration's Monthly Statistical Snapshot-More than 7 million individuals receive SSI;
- IRC Section 529A;
- Internal Revenue Bulletin 2015-18 provides state authority to run ABLE programs;
- Consolidated Appropriations Act of 2016 (Pub. L. No. HR 2029 § 303);
- Allows people with disabilities to open an ABLE account in any state, regardless of residence;

Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act

"(1) encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life," and "(2) provide secure funding for disability-related expenses of beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, title XVI (Supplemental Security Income) and title XIX (Medicaid) of the Social Security Act, the beneficiary's employment, and other sources."

Achieving a Better Life Experience Act ("ABLE Act"), Pub. L. No. 113-295 § 101

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About ABLE

Tax-advantaged savings accounts for individuals with disabilities

- Income earned is non-taxable;
- Contributions (up to \$18,000/year total – 2024, \$19,000 - 2025) may be made by any "person;"
- ABLE account does not count as resource for public benefits determination;
- Limited eligibility: Onset of disability before age 26, **age 46 starting 1/1/2026**;
- Medicaid Estate Recovery? Depends on State;
- Distributions for "Qualified Disability Expenses" ("ODEs").



Achieving a Better Life Experience (ABLE) Act



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ABLE Eligibility

Eligible individuals must meet two requirements:

Age	Disability Determination
Must be disabled before age 26 (age 46 starting 1/1/2026)	Must have been determined to meet the disability requirements for Supplemental Security Income (SSI) or Social Security disability benefits OR Must submit a doctor's certification (M.D. or D.O.) that meets criteria (essentially equal to Social Security "listings" level of disability, including a physician's diagnosis, see here: https://www.ssa.gov/disability/professionals/bluebook/)

I.R.C. § 529A(e)(2) defines a "disability certification" to be a physician's certification that the individual is disabled as that term is defined in the Social Security Act. The statute makes clear that the physician's certification for this purpose may not then be used to compel a decision that the person is disabled for purposes of becoming entitled to a disability benefit under the Social Security Act.

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Definition of Disabled - Secure ACT

- The definition of "disabled" varies depending on whether at the time of the owner's death, the beneficiary is over age 18 or not. If the beneficiary has already been determined to be disabled for the purposes of qualifying for Social Security disability benefits, the beneficiary does not need to separately convince the IRS or the plan administrator of his or her disability "An individual who, as of the date of the owner's death, **is age 18 or older** is disabled if, as of that date, the individual is 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 be of long-continued and indefinite duration." Prop. Reg. § 1.401(a)(9)-4(e)(4)(ii).
- "An individual who, as of the date of the owner's death, **is not age 18 or older** is disabled if, as of that date, that individual has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or to be of long-continued and indefinite duration." Prop. Reg. § 1.401(a)(9)-4(e)(4)(iii).
- "If the Commissioner of Social Security has determined that, as of the date of the employee's death, an individual is disabled within the meaning of 42 U.S.C. 1382c(a)(3), then that individual will be deemed to be disabled within the meaning of this paragraph (e)(4)." Prop. Reg. § 1.401(a)(9)-4(e)(4)(iv).

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Contributions

POMS SI 01130.740.B.2:

- Contributions are payments of funds into an ABLE account.
- Contributions may be made by any person.
 - IRC 26 CFR 301.7701-6(a) "Person" defined as "an individual, trust, estate, partnership, association, company, or corporation."
- The total annual amount of contributions from all sources is limited to the amount of the per-donee gift-tax exclusion in effect for a given calendar year.
 - \$18,000 (2024), \$19,000 (2025)

POMS SI 01130.740.B.2:

- "[A] designated beneficiary is limited to one ABLE account, which a qualified ABLE program administers. Except in the case of a rollover or program-to-program transfer, if a designated beneficiary has an additional account, it generally will not be treated as an ABLE account, and will be subject to normal resource counting rules."



Program Operations
Manual System (POMS)

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CONTRIBUTIONS

ABLE Contributions are after-tax dollars with tax deferred growth.

Aggregate contributions to an ABLE account subject to the overall limit matching the state limit for Section 529 accounts.

- Colorado ABLE limit is \$400,000
- \$400,000 / \$18,000 = 22+ years
- No "catch-up" or "lump-sum" contributions as in QTPs

Some payments cannot be directly contributed to an ABLE. Examples of payments that cannot be contributed to an ABLE account after receipt but ***still are counted as income as they otherwise would be:***

- Wages;
- Benefit payments (Title II, Veterans Administration, PETI, pensions, etc.);
- Alimony-Maintenance Payments;
- Child Support Payments;

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ABLE and SSI Eligibility

- If the beneficiary is receiving Supplemental Security Income (SSI) benefits, when the assets in the ABLE account total \$100,000, the beneficiary's monthly SSI benefits will be placed in suspension.
- Once the ABLE Account is below \$100,000, the SSI benefit suspension ceases and any SSI benefit resumes.
- The beneficiary will not have to reapply for SSI benefits once the account drops back below the \$100,000 threshold.



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Contributions

POMS SI 01130.740.B.2: "Contributions must be in cash and may be made in the form of cash or a check, money order, credit card, electronic transfer, or a similar method."

- No appreciated assets;
- No stocks, securities, etc.;
- Life Insurance;

The total amount of annual contributions that an ABLÉ account can receive from all sources is limited to the amount of the per-donor gift-tax exclusion in effect for a given calendar year \$18,000 for 2024, \$19,000 for 2025.



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Contributions

- POMS SI 01130.740.B.2 - "Contributions [to an ABLÉ account] may be made by any person. ("Person," as defined by the Internal Revenue Code (IRC), includes "an individual, **trust**, estate, partnership, association, company, or corporation.")
- A person with signature authority can establish and administer an ABLÉ account for a designated beneficiary who is a minor child or is otherwise incapable of managing the account. Signature authority is not the equivalent of ownership. The person with signature authority must be the designated beneficiary's agent acting under power of attorney, or if none, a parent or legal guardian of the designated beneficiary. Always consider the designated beneficiary to be the owner of the ABLÉ account, regardless of whether someone else has signature authority over it.

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Best Uses for ABLÉ Accounts

- Unexpected gifts/inheritance of modest amounts;
- Excess monthly earnings;
- Distributions from SNTs;
- Alternate to College 529 Plan for individuals who are unlikely to attend college;
- Savings account for families not ready to fund SNT;
- Alternative to SNT for families with very modest means;
- Minimizing ISM.



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Qualified Disability Expenses

POMS SI 01130.740.B.8

Expenses related to the blindness or disability of the designated beneficiary and for the benefit of the designated beneficiary. In general, a QDE includes, but is not limited to, an expense for:

- Education
- Housing
- Transportation
- Employment training and support
- Assistive technology and related services
- Personal support services
- Health
- Prevention and wellness

- Financial management and administrative services
- Legal fees
- Expenses for ABLE account oversight and monitoring
- *Funeral and burial*
- Basic living expenses.

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Liberal Application Applied to Distributions to be Classified as QDEs

The ABLE regulations provide that QDEs are not limited to the items listed in the Code Section and regulations. The intent is to be liberal in classifying distributions from a ABLE accounts as a QDE.

Even though distributions may be classified as a QDE, the distribution may impact a beneficiary's SSI/Medicaid. There are many eligibility traps for the unwary and overly complicated.

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Qualified Disability Expenses

When computing household operating expenses for ISM the following 10 items are the only ones used in the applicable computations:

☒ Food –No longer counted as ISM

☒ Mortgage (including property insurance required by the mortgage holder)

☒ Real Property Taxes

☒ Sewer

☒ Heating Oil

☒ Gas

☒ Electricity

☒ Water

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Example of an Excluded Distribution

Eric takes a distribution of \$500 from his ABLE account in June 2024 to pay for a health-related QDE. His health-related expense is not due until September, so Eric deposits the distribution into his checking account in June. The distribution is not income in June. Eric maintains his ABLE account at all relevant times, and the distribution is both unspent and identifiable until Eric pays his health-related expense in September. The \$500 is excluded from Eric's countable resources in July, August, and September.

Since other expenses are being paid from Eric's account, he may have difficulty maintaining the necessary identity of the \$500 ABLE distribution.

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Example of a previously excluded distribution used for a non-QDE

Sam takes a distribution of \$25,000 from his ABLE account to modify a specially equipped van in May. He pays a \$10,000 deposit to the repair shop. While waiting for delivery of the van, Sam takes a trip to a local casino in July, and loses \$1,000 of his remaining \$15,000 ABLE distribution gambling. The \$1,000 he lost gambling is a countable resource in July. The other \$14,000 Sam retains is an excluded resource while it meets the requirements of [SI 01130.740C.5.a.](#)

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Example of a change of intent on the use of a distribution

- In June, Jennifer takes a \$7,000 distribution from her ABLE account to pay her college tuition which qualifies as a QDE. Her tuition payment is due in September. In August, Jennifer receives a job offer and decides not to return to school. Since Jennifer no longer intends to use the \$7,000 for tuition, the \$7,000 becomes a countable resource in September unless Jennifer redesignates it for another QDE or returns the funds to her ABLE account prior to September.
- How is Jennifer to redesignate her QDE from tuition to another QDE?

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Distributions for a non-housing related QDE

Distributions for a non-housing related QDE are excluded from the designated beneficiary's countable resources (other than housing) if he or she retains the distribution beyond the month received. This exclusion applies while:

- * The designated beneficiary maintains, makes contributions to, or receives distributions from the ABLE account;
- * The distribution is unspent;
- * The distribution is identifiable. (NOTE: excludable funds commingled with non-excludable funds must be identifiable.); and
- * The individual still intends to use the distribution for a non-housing related QDE.

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Count as a resource retained distributions for housing-related QDEs or expenses that are not QDEs

A distribution from an ABLE account is not income, but it may be a conversion of an exempt resource to a non-exempt resource. A distribution for a housing-related QDE or for an expense that is not a QDE is a countable resource if the beneficiary retains the distribution into the month following the month of receipt. If the beneficiary spends the distribution within the month of receipt, there is no effect on eligibility. If the distribution is a non-QDE, there may be tax consequences to the beneficiary.

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Example Housing Related -QDE

- * In June, Martha takes a \$2000 distribution from her ABLE account to pay her security deposit and first month rent for her new apartment which is a QDE. Her landlord notifies Martha that the her apartment will not be ready for occupancy until August. Martha keeps the \$2,000 in her checking account until August. Because Martha did not return the \$2,000 distribution to her ABLE account in June, the \$2,000 is a resource to her in July. If Martha has more than \$500 in her checking account August 1, she will be over resourced.

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Example of a previously excluded distribution used for a housing-related QDE

In June, Jennifer takes a \$7,000 distribution from her ABLE account to pay her college tuition - a QDE. Her tuition payment is due in September. However, she needs to make a \$750 advance rent payment to her landlord for her college apartment in August. She uses \$750 of the distribution she took in June to make the rent payment – a housing-related QDE. The \$750 is a countable resource in August. The remaining \$6,250 of the retained distribution is excluded while it continues to meet the requirements of [SI 01130.740C.5.a](#).

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Avoiding ISM

- Grandparents (or any family, individual, or SNT) funds an ABLE account. Adult disabled beneficiary receiving SSI lives with parents. ABLE account pays the parents a monthly rent that equals to or exceeds the one-third federal benefit rate plus \$20. Since the rent payments are being made to parents from the ABLE account, the beneficiary's SSI is not reduced by PMV.
- The payment of rent from the ABLE account allows beneficiary to retain his or her full SSI payment. The parents receive a rental payment to offset monthly costs for housing the beneficiary.
- If the Beneficiary's SSI application is pending, an ABLE account can be used to pay rent for the beneficiary so that if a back benefit is awarded it will not be reduced by 1/3 for ISM.

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Tax Consequences for Non QDE Distributions.

- IRC § 72 (relating to annuities)
- If distributions do not exceed beneficiary QDEs, no amount is included in gross income.
- If distributions exceed beneficiary QDEs, amount included in gross income:
 - Reduced by ratio of QDEs to total distributions
 - 10% penalty
- Ex: ABLE account with \$100,000 balanced (\$50,000 = contributions)
 - Distributes \$10,000 to beneficiary who has only incurred \$6,000 of QDEs
 - IRC § 72 - ½ \$10,000 distribution amount (\$5,000) included in gross income
 - This \$5,000 is reduced by \$3,000 (\$6,000/\$10,000 or 60% of total distributions multiplied by \$5,000 gross income amount).
 - \$2,000 is included in gross income
 - Plus tax of \$200 (10% of \$2,000)
- Contributions to an ABLE account are not tax deductible.

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Change in an Individual's Status as an Eligible Beneficiary

If at any time a designated beneficiary no longer qualifies as an eligible individual, his or her ABLE account remains an ABLE account to which all of the provisions of the ABLE Act continue to apply, and no (taxable) distribution of the account balance is deemed to occur.

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Change In Eligible Individual Status (cont.)

The intent of the regulations is to prevent a deemed distribution of the ABLE account and preserve the account's qualification as an ABLE account for all purposes if, for example, the beneficiary's impairment goes into a temporary remission, and to preserve the ABLE account with its tax-free distributions for qualified disability expenses if the impairment resumes and once again qualifies the designated beneficiary as an eligible individual.

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Change in eligible individual status (cont.)

Note that a distribution will not be a qualified disability expense if made at a time when a designated beneficiary is neither disabled nor blind within the meaning of §1.529A-1(b)(9)(A) or §1.529A-2(e)(1)(i).

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Change In Eligible Individual Status (cont.)

The regulations provide that, beginning on the first day of the taxable year following the taxable year in which the designated beneficiary ceased to be an eligible individual, no contributions to the ABLE account may be accepted.

If the designated beneficiary subsequently becomes an eligible individual, then additional contributions may be accepted subject to the applicable annual and cumulative limits.

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Change In Eligible Individual Status (cont.)

Example:

- Jennifer has been on SSI for many years and has an ABLE Account that her parents and other family members have been contributing into annually. In 2024 total contributions of \$14,000 were made and the account now has \$50,000.
- Jennifer gets a job, and is being paid a salary of \$34,000 a year.
- Since Jennifer is working, she no longer qualifies under the definition of "disabled" under the first category as an eligible designated beneficiary since she no longer receives SSI benefits or disability benefits under Title II of the Social Security Act.

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Change in eligible individual status (cont.)

- Jennifer can still qualify as an eligible disabled beneficiary under the doctor certification process. If Jennifer does not qualify under the certification process, then contributions cannot be made to the ABLE account beginning with the first day of the following year in which she no longer qualified as a disabled beneficiary.
- For 2024, another \$4,000 of contributions could be made to the ABLE account.

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ABLE participants use cards primarily for day-to-day spending

Overview of True Link ABLE Visa Card usage

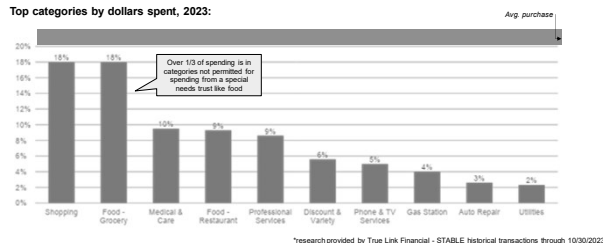
Spending money	\$49	average dollar amount per purchase*
	34	average number of purchases made per True Link ABLE Visa*
Loading money	\$300	median amount transferred to card each time the card is loaded*
	\$650	average amount transferred to card each time the card is loaded*

*Research provided by True Link Financial - STABLE Historical transactions through 10/30/2023

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Top spending categories largely center on necessities and purchases not permitted with funds from a special needs trust

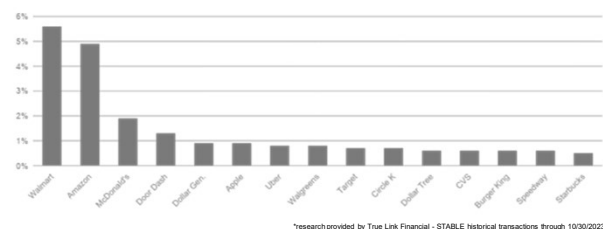
Top categories by dollars spent, 2023:



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The most popular 15 merchants represent 61% of purchases, with Amazon and Walmart accounting for almost 46% of purchases

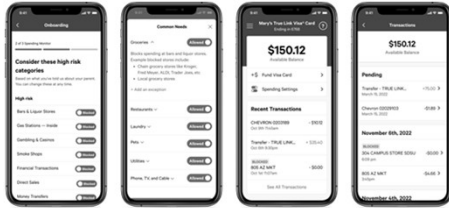
Percent of total purchases at top 15 merchants, 2023:



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True Link Visa® Prepaid Card

Promoting Beneficiary Independence



The True Link Visa Prepaid Card is issued by True Link Bank, a Member FDIC, pursuant to a Prepaid Card U.S.A. Inc. Web Cardholder Agreement. The cardholder is responsible for the cardholder's obligations under the cardholder agreement. The cardholder is responsible for the cardholder's obligations under the cardholder agreement.

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ABLE Changes – Tax Cuts and Jobs Act

SUNSETS AFTER 2025

529 QTP Rollover

- Rollover limited amounts of a QTP to an ABLE account of same beneficiary;
- IRC § 529(c)(3)(C)(i)(III);
- Rollover limited amounts of a QTP to an ABLE account of a family member of the same beneficiary provided the rollover beneficiary is disabled as defined by ABLE;
- Not subject to income tax if distributions are contributed to an ABLE account within 60 days;
- Subject to annual gift-tax exclusion amount (IRC§ 2503(b): \$18K for 2024);
- Should transfer or contribution plus all other contributions exceed \$18,000 in a tax year, rollover is subject to income tax and 10% additional tax under IRC § 529(c)(6), as applicable.



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Member of Family Defined

IRC § 529(c)(3)(C)(i)(III);

The term "member of the family" means, with respect to any designated beneficiary— (A) the spouse of such beneficiary; (B) an individual who bears a relationship to such beneficiary which is described in subparagraphs (A) through (G) of section 152(d)(2); (C) the spouse of any individual described in subparagraph (B); and (D) any first cousin of such beneficiary.

Section 152(d)(2);

- (A) A child or a descendant of a child.
- (B) A brother, sister, stepbrother, or stepsister.
- (C) The father or mother, or an ancestor of either.
- (D) A stepfather or stepmother.
- (E) A son or daughter of a brother or sister of the taxpayer.
- (F) A brother or sister of the father or mother of the taxpayer.
- (G) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.

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ABLE Recent Changes – Tax Cuts and Jobs Act

SUNSETS AFTER 2025

- People with disabilities who work can contribute more than \$18,000/year (2024)-\$19,000 (2025)
- Cannot contribute to an employer-sponsored retirement plan.
- Can make contributions up to the lesser of the Federal Poverty Level (FPL) or beneficiary's taxable year compensation.

2024 FPL LIMITS:

1 Person family/household

\$15,060

2 Person family/household

\$20,440

3 Person family/household

\$25,820

4 Person family/household

\$31,200

5 Person family/household

\$36,580

6 Person family/household

\$41,960

7 Person family/household

\$47,340

8 Person family/household

\$52,720

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ABLE vs. SNT

ABLE Account

- Tax-advantaged savings accounts for individuals with disabilities
- Person with disabilities can manage their own account or it can be managed by an authorized representative
- Savings without affecting SSI, Medicaid, and other need-based benefits (up to account maximum)
- Funds in account can be used for QDEs with no impact on benefits (shelter)
- Can enroll in any state's program

SNT

- A legal arrangement wherein a trustee manages assets on behalf of a beneficiary (note: must be managed by someone other than the individual with a disability)
- Funds can be used for allowable expenses without affecting SSI, Medicaid, need-based benefits
- Funds cannot be used for shelter without affecting benefits (In-Kind Support & Maintenance or "ISM")
- 3rd-party SNT qualifies for QDT Exemption (\$4,300)
- Key terms: 1st-party, 3rd-party, Pooled

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Overview of ABLE vs. SNTs

	ABLE Account	Standalone SNT	Pooled SNT
Contribution Amount	\$18,000/year	Unlimited	Unlimited
Shelter Payments w/o SSI reduction	YES	NO	NO
Taxable Income	NO	YES	YES
Beneficiary Eligibility Requirements	Must be disabled before age 26	Federal definition of disability before age 65 (3rd party-any age)	Federal definition of disability before age 65 (3rd party-any age)
Medicaid Recovery	Depends on State	YES: 1st-Party NO: 3rd-Party	YES: for PSNT NO: 3rd-Party
Disqualification from SSI	Account balance over \$100,000	NONE	NONE
Abuse / Vulnerability	Fraud, coercion, disqualification from benefits	MINIMIZED if administered by professional trustee	MINIMIZED

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POA Provision for an eligible Individual

- To establish, execute and fund a qualified ABLE account under Section 529(A) of the Internal Revenue Code on my behalf upon such terms and conditions as my Agent shall deem appropriate. My agent is authorized to establish, fund and sign for me as a designated beneficiary. To make withdrawals, investment decisions, receive account information and to exercise all other powers regarding such 529A account, including but not limited to, the power to rollover such account to another qualified 529A account or to a 529A account to another eligible individual as defined under Section 529A(c)(1)(C)(ii). Notwithstanding any authority granted to my agent under this document, my agent shall not acquire any beneficial interest in the 529A account during my lifetime and must administer the account for the benefit of me as required by Section 529A and corresponding regulations and such rules and regulations as imposed by any applicable state 529A plan.
- I further authorize my agent to provide, access and sign any disability certification to verify that I am an eligible individual as defined under 529A(c)(1) that has been diagnosed with a disability prior to the age of 26 years old, who has a medically determined physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months or is blind. (Document should include HIPPA authorization to obtain medical records).

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POA Provision for a Parent - Family members to authorize agent under POA or a Trustee of Revocable Trust to make contributions to ABLE Account

To make a contribution or contributions to a qualified ABLE account on behalf of any eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All contributions shall be made in cash. Any contribution to any one eligible individual shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).

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Trust Distribution Provision to Authorize a Trustee to make Contributions to ABLE Account for an Eligible Beneficiary

To distribute income or principal on behalf of the beneficiary to a qualified ABLE account provided the beneficiary is, at the time of any such distribution, an eligible individual as defined under Section 529A(e)(1) of the Internal Revenue Code. All distributions of principal and income made on behalf of the beneficiary shall be made in cash directly to the qualified ABLE account. A distribution for the benefit of the beneficiary to a qualified ABLE account shall not exceed such annual contribution limits (from all sources) as imposed by Section 529A(b)(2)(B) and the aggregate excess limitations (from all sources) as imposed by 529A(b)(6).

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