

Top 10 Questions and Answers

The following questions were asked in the “Chat Box” during the January, 2019 webinar. The answers below were provided by the Special Needs Alliance.

1. If I do Special Needs Trusts, how do I add myself to the Special Needs Alliance?

The Special Needs Alliance is a by invitation only group of attorneys that focus on serving persons with disabilities and have distinguished themselves in their community. If interested in applying for membership, email jihane@specialneedsalliance.org. The value of the Special Needs Alliance is working with the top practitioners in the country who collaborate with each other as well as leading disability rights organizations like the ABLE National Resource Center.

2. Who is able to establish an ABLE account of an adult with profound intellectual disability who is not conserved by their parents and resides in a state developmental center where the DC is the representative payee?

You need to look at who can be a person with signature authority, which is the person with a disability, the parents, guardian or conservator, and agent under a power of attorney. The list does not include rep payees. The parents can set up the account and manage the ABLE Account, though they should make the rep payee aware they are doing so. This is in part because if there is a problem with benefits, it is the rep payee that will be noticed. In addition, a conservatorship or guardianship could be established by almost any entity with standing according to the law of the state in which the person with a disability lives. Assuming, in this case, that the ABLE beneficiary lacks capacity to open or manage an ABLE account and the parents establish the account, the parents should think ahead about who will manage the account if they lose capacity themselves or pass away.

3. When parents set up an ABLE account for their child, do they continue to keep control of the account/money even when the child becomes an adult?

The ABLE beneficiary that has capacity to manage the account has first priority to manage the account. Unless the child is adjudicated not to have capacity, the child could demand to be in charge of the account. This is where tying an ABLE Account to a 3rd party special needs trust might be a good alternative if there is a concern regarding the financial literacy of the beneficiary. Consider feeding the account as needed – and increasing the funds available as the ABLE beneficiary gains skills.

- 4. When I eventually have a distribution from my trust, is there a special type of accountant that would be knowledgeable about trusts and related tax preparation? If so, where could I find one?**

The accountant needs to understand deductible expenses for a person with a disability, how to use the QDT Exemption, and how to handle irrevocable trusts. With some guidance from an experienced special needs trust attorney – the fundamentals are not that difficult. Most Special Needs Alliance members have CPAs they work with and could be a good source to find an experienced tax professional. Here is a link to articles on the Special Needs Alliance website on taxation <https://www.specialneedsalliance.org/search/?q=taxation#/> .

- 5. I am a trustee of a Special Needs Trust (SNT). How can I tell if my SNT may contribute to my beneficiary's ABLE account? SSA says OK but I'm told there are problems in SNT wording. What do I look for?**

When tying a special needs trust to an ABLE Account, the ABLE Account is merely a mode of making distributions. It is unlikely that your trust needs revising if it does not include a provision allowing transfer to an ABLE Account. You might look to see if the trust forbids using funds for food and shelter which was a common provision decades ago. You might want to look for a Special Needs Alliance attorney in your state to review your trust and advise you on how to make distributions. To find your Special Needs Alliance member – go to <https://www.specialneedsalliance.org/find-an-attorney/>

- 6. I have a supplemental needs trust established for my brother in NY. How do I figure out what type of trust (pooled, unpooled, 2nd 3rd party)? The trust document does not specifically specify.**

Unless the trust document refers to a pooled trust (and names a trustee who operates a pooled trust) it is not a pooled trust. The 1st party / 3rd party distinction depends on where the money comes from. If you are named as trustee you should meet with a lawyer experienced in special needs trust administration about your duties and the procedures. An accountant will be able to help with some of the trust administration issues, as well.

- 7. What are the annual costs of a Special Needs Trust?**

Do you mean the cost to administer a special needs trust? That depends on who the trustee is (family member trustees may choose not to charge at all), what kinds of assets the trust contains, the size of the trust, and the oversight level required by the circumstances of the beneficiary. If you are asking about the annual cost of a special needs trust after you complete your estate planning but before you die, there are usually no recurring costs associated with the trust until it receives funds.

8. Can a Pooled Special Needs Trust's money be transferred to ABLE with the intent of closing the SNT?

The trustee probably has discretion to make a distribution into an ABLE Act account. It should not matter that the trustee's intent is to terminate the trust – the question is really only whether the transfer is in the beneficiary's best interests. Pennsylvania is the only state that does not require a Medicaid payback on its ABLE accounts.* Therefore, PA DHS has not confirmed its position on direct transfers from a d4a SNT to an ABLE account and this transaction may cause problems without prior authorization or further clarification by DHS in the future.

*Remark added by ABLE NRC: The following states have waived Medicaid Payback to date: Arkansas, California, Kansas, Illinois, Maryland, Pennsylvania, Oregon and West Virginia.

9. A person has SSI and Medicaid and receives 20 hours/week of help with ADLs from a home health aide, thru Medicaid. But if he needs to have an additional 10 hours/week of help with ADLs, can a legal guardian supplement the Medicaid hours with money from Special Needs Trust?

There is some disagreement among the states on this point, but the general answer is that in most states it is permissible.

10. Can a life insurance policy be added to a Special Needs Trust?

If by "added to" you mean name a SNT as beneficiary, yes. If the policy is on the life of a caretaker/parent, and the SNT is a third-party SNT, this is a common funding mechanism. If the life insurance is not on the beneficiary's life, it probably does not make sense to name a self-settled SNT as beneficiary – since that would just subject the life insurance proceed to the SNT's payback provisions.

If by "added to" you mean that the SNT might actually *own* the policy, it should be no problem in the case of a third-party SNT. In addition to the other concerns listed above, know that some states misunderstand the nature of life insurance and so prohibit the self-settled SNT from owning a life insurance policy – whether on the beneficiary's life or on the life of a caretaker or other third party.