



## **Should a Special Needs Trust Pay for Medical Marijuana?**

*The Voice is the e-mail newsletter of The Special Needs Alliance. This installment was written by Special Needs Alliance member [Kyle Moore, Esq.](#), who practices with the law firm of Weems, Schimpf, Haines, Shemwell & Moore, in Shreveport, Louisiana. He focuses on special needs planning, elder law and estate planning.*

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*Thirty-one states and the District of Columbia have legalized the use of marijuana for medical purposes, including for relief from chemotherapy-induced nausea, seizures, nerve pain and other symptoms. Should a special needs trust (SNT) be used to pay for such treatment?*

*Despite the groundswell of state legislative activity in this area, the Food and Drug Administration has yet to approve marijuana for such purposes. Moreover, the sale, possession, and cultivation of marijuana remain illegal under federal law, which classifies marijuana as a Schedule I controlled substance having no medical value and significant potential for abuse. Although doctors are prevented from prescribing marijuana, they are not prohibited from “recommending” it to patients. The FDA has approved alternative therapies for some of the uses for which marijuana is being recommended. FDA approval of prescribing marijuana likely would require large-scale clinical trials, however, which could prove difficult to conduct in light of the drug’s status as illegal at the federal level. Without formal clinical trials, questions remain regarding the possibility of unknown side effects and consequences from its use.*

*In 2013, the Department of Justice signaled that prosecuting medical marijuana use in states where it had been legalized was not a priority as long as certain guidelines were followed. For instance, distribution to minors, gang-related sales, and distribution in states where it had not been legalized likely would prompt federal involvement. The current Attorney General of the United States indicated during his confirmation hearings that he did not intend to use his office to pursue users of medical marijuana in states where the drug*

has been legalized. Of course, government administrations change over time and the Department of Justice priorities regarding prosecution of marijuana cases has shifted in recent years, so this uncertainty regarding prosecutions will continue in states that have legalized its use, at least until the drug is legalized formally at the federal level.

Federal law also causes operational problems for state-approved marijuana businesses. Because banks may resist working with organizations that are at odds with the U.S. government by allowing the banking system to be used for “illegal” businesses, many medical-marijuana-related enterprises are forced to function on a cash-only basis. This obviously complicates the payment process, as well as record keeping and security.

What does all this mean to an SNT trustee who has been asked by a beneficiary or family members to help defray the cost of medical marijuana that is legal in the state in which the beneficiary lives? It is unlikely that the existing federal-state conflict concerning the legality of medical marijuana will be resolved any time soon. On the one hand, obviously, an SNT trustee should be very cautious about using trust assets in a way that may be permissible under state law but illegal under current federal law. A trustee who expends funds in a SNT to purchase medical marijuana for the beneficiary, even when state law authorizes this use, assumes a risk that the trust distribution will be regarded by federal law enforcement officials as violating federal drug laws.

On the other hand, it seems unreasonable to deny individuals who have disabilities to access to medications, including medical marijuana, that are available to others. [One possible solution is available to SNT beneficiaries who also qualify for ownership of an Achieving a Better Life Experience \(ABLE\) account.](#) Through an ABLE account, an alternative source of funding potentially is available to purchase medical marijuana by means other than the use of SNT assets if a trustee understandably is hesitant to make a distribution due to conflicting state and federal laws.

An ABLE account is a savings tool that often works in tandem with a SNT by allowing an individual with disabilities personally to own and directly control funds without affecting eligibility for means-tested benefits such as Medicaid or Supplemental Security Income (SSI). [Although special rules apply concerning who may own and manage an ABLE account,](#) the funds in the account may be used to pay for a broad range of “qualified disability expenses” which are specific expenses of the beneficiary related to blindness or disability. Health, prevention, and wellness are considered qualified disability expenses. ABLE accounts may receive cash assets from a variety of sources including the beneficiary personally, any third party (like a parent, grandparent, sibling, friend, etc.), and even from a trustee of a SNT, although there are annual limits on contributions to an ABLE account. Because assets are owned personally by the ABLE account owner/beneficiary, the funds in

*the account may be used to pay for expenses the ABLÉ account owner considers to be “qualified disability expenses,” potentially including medically recommended marijuana in a state that has legalized its use. Until federal law has decriminalized marijuana, however, the person managing the ABLÉ account—whether the account owner/beneficiary personally, a parent, a guardian or an agent under a power of attorney—should undertake a similar and careful analysis regarding the propriety of using ABLÉ account funds to purchase state-legalized marijuana for health, prevention or wellness purposes.*

*Ultimately, using trust funds to pay for medical marijuana, whether directly, or indirectly by transferring these funds to an ABLÉ account, carries both risks and benefits for both the trustee and the beneficiary. The best approach is likely a candid discussion about these risks and whether and how to access medical marijuana given the uncertain legal status of purchasing and using the drug and the enforcement priorities in place at the time the decision is made.*

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