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ABLE ACCOUNTS

The 529A "ABLE" account is a relatively new planning tool that affords an individual with disabilities a tax-free savings option (similar to a 529 College Savings Plan) that does not interfere with the individual's eligibility for means-tested government benefits, such as Supplemental Security Income (SSI) and Medicaid. Understanding the key features of an ABLE account is necessary for making an educated decision about when and how to use this new tool.

Who Qualifies for an ABLE Account?

The ABLE Act limits eligibility for an ABLE account to an individual whose disability onset occurred prior to the age of 26. This can be established in either of two ways. The first is to show that the person with a disability was receiving SSI and/or Social Security Disability Income (SSDI) prior to age 26. If this was not the case, then a doctor's letter of certification will suffice. The letter should recite that the individual in fact met the age 26 disability onset requirement and satisfies Social Security's criteria regarding significant functional limitations stemming from the disabling condition.

How Much Can Be Deposited into an ABLE Account?

An individual may have only one ABLE account. Annual contributions to an ABLE account are limited by reference to the amount of the federal annual gift tax exclusion ($15,000 for 2019). The $15,000 annual limit is not per contributor, but applies to aggregate contributions from all donors during the year. For example, if one person deposits $10,000 into an ABLE account, all subsequent contributors during the year are limited to aggregate deposits of no more than $5,000.

If the balance in an ABLE account exceeds $100,000, any amount above that value counts towards the individual's $2,000 resource limit for SSI and Medicaid eligibility, and causes the individual's SSI payments to be suspended until the account balance decreases to less than $100,000. If all other eligibility rules are followed, the individual's SSI payments will resume when the account balance drops below $100,000 without the need to reapply for SSI. During the SSI suspension period, the individual's SSI-linked eligibility for Medicaid continues uninterrupted.

Total lifetime contributions to an ABLE account are limited by reference to each state's limit on total aggregate contributions to a 529 College Savings Plan maintained under the state's 529 Plan program. State limits vary from approximately $250,000 to $450,000. In light of the annual contribution limit of $15,000, these lifetime limits would not be reached for decades, even if no disbursements are made from the ABLE account during the accumulation period.

Who Can Establish and Manage an ABLE Account?

The law and regulations consider that the beneficiary of an ABLE account is the owner of the account and will control the management of the account. If, however, the beneficiary lacks the capacity to create or manage the ABLE account, it can be established and/or managed by the beneficiary's agent under a power of attorney, parent(s), or conservator (also referred to as a guardian in many states). If the beneficiary initially has capacity to establish the ABLE account, it is also advisable for the beneficiary to execute a power of attorney designating a third party to manage the account if the beneficiary is subsequently unable to do so. If the beneficiary lacks the capacity to establish or manage the account, and there is no power of attorney that authorizes a third party to create and manage the account for the beneficiary, a parent may undertake these tasks. If a parent does assume the role of manager of the account, the beneficiary's family should lay the ground work for the appointment of a conservator if the parent subsequently becomes incapacitated or dies.

What Can an ABLE Account Be Used For?

An ABLE account may pay for the beneficiary's "qualified disability expenses" (QDEs), to maintain or improve the health, independence, or qualify of life of the beneficiary. QDEs include basic living expenses, education, housing, transportation, employment training and support, assistive technology, personal support services, health care expenses, financial management and administrative services. More categories may be added by further regulations. If withdrawals are made for expenditures other than QDEs, the earnings portion of the withdrawal would be subject to regular income tax and a 10% penalty. In those states that have adopted special state income tax benefits, improper withdrawals might also incur additional state tax penalties.

ABLE Accounts and Housing Expenses of SSI Recipients

Using an ABLE account to pay for the housing expenses of an SSI recipient can be particularly beneficial. When these expenses are paid from an ABLE account, there is no reduction of the beneficiary's SSI payment that is otherwise required by the "In-Kind Support and Maintenance" (ISM) rules. For example, if a third party (including the trustee of a special needs trust) pays the SSI recipient's rent directly to the landlord, the monthly SSI payment would be reduced by up to $277 a month (in 2019). If instead the third party contributed those same funds to an ABLE account, which were then used to pay for the beneficiary's housing, there would be no reduction in the SSI payment. This approach could result in the beneficiary receiving an additional $3,324 of SSI payments each year ($277 times 12 months).

ABLE Accounts and Taxes

Many believe that the most beneficial provision of an ABLE account is that it grows "income tax-free," at least for federal income tax purposes. However, few individuals who receive public benefits actually pay any income tax. Even $100,000 set aside in an ABLE account is unlikely to change the tax picture for a person who is eligible for SSI or Medicaid.

Contributions to an ABLE account are not deductible under federal income tax rules (although some states do provide for a modest state income tax deduction). A transfer to an ABLE account by a third party does qualify as a present interest gift for purposes of the federal annual gift tax exclusion. The modest tax benefits associated with an ABLE account may merit a professional review of the beneficiary's particular individual tax situation to determine whether those tax considerations could make an ABLE account a worthwhile option.

The Medicaid Payback

State Medicaid programs that provide medical assistance and/or "waiver" services for the benefit of the beneficiary of an ABLE account (including community-based residential services) may assert a "payback" claim for reimbursement upon the beneficiary's death payable from the funds then remaining in the ABLE account. All funds contributed to an ABLE account, including donations from third parties, are subject to this Medicaid payback if a state elects to assert the reimbursement claim. Subject to the payment of any outstanding QDEs, a state must limit its payback claim to Medicaid expenditures for the benefit of the beneficiary which occurred after the creation of the ABLE account. Although unlikely, it is theoretically possible that a state may elect not to seek any payback recovery from ABLE accounts, and this beneficial feature, if available, may certainly influence a beneficiary's choice when considering which ABLE program to select.

When is an ABLE Account the Right Tool?

When pondering the establishment of an ABLE account, the beneficiary (or the beneficiary's attorney-in-fact, parent or conservator, as the case may be) should ideally consult with a special needs planning attorney about its suitability for that particular beneficiary, including how an ABLE account compares to a special needs trust (SNT). The attorney can discuss in detail how these two techniques interact. A carefully drafted SNT might well authorize the trustee to transfer money into the beneficiary's ABLE account to maximize the benefits of both tools simultaneously. For help finding a special needs planning attorney, visit http://www.specialneedsalliance.org/find-an-attorney. (The Special Needs Alliance is a national not-for-profit association of experienced special needs planning attorneys.)

An ABLE account might also be useful where a relative has misguidedly left a small inheritance (i.e. less than $15,000) directly to a person who receives Medicaid and/or SSI (instead of designating the bequest to be paid to a third party SNT). Another possible use for an ABLE account is to receive support or alimony payments ordered by a court in the context of a divorce, so as not to adversely impact the beneficiary's SSI or Medicaid eligibility.

As discussed above, an ABLE account may also be used to avoid an ISM reduction to the beneficiary's SSI payment if contributions are used to provide for the beneficiary's food and shelter expenses. Lastly, an ABLE account might be an excellent vehicle to hold a small litigation settlement or an unexpected windfall such as lottery winnings.

An ABLE account is not an ideal vehicle to manage significant third party funds due to the likelihood of a Medicaid payback claim upon the death of the beneficiary, unless there is also the strong likelihood that all third party funds contributed will in fact be spent on QDEs before the beneficiary dies. For most individuals with disabilities, an ABLE account is not a substitute for comprehensive SNT planning, but it may be a helpful secondary tool to help secure their financial futures.

Evolution of ABLE Accounts

The ABLE Act has evolved since it was passed in December of 2014. The Tax Cuts and Jobs Act passed in December of 2017 increases how much working ABLE account-holders can contribute each year, provides tax credits for certain contributions, and allows funds to be rolled over from a qualified 529 plan to a 529A ABLE account. Meanwhile, the SSA and other agencies have adopted rules that continue to clarify the legitimate use and benefits of this tool. A special needs planning attorney monitors these changes so that he or she can best advise individuals with disabilities whose independence and autonomy can be enhanced with an ABLE account.

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