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Planning With ABLE Accounts and Special Needs Trusts: Selecting the Best Approach for Elderly and Disabled Clients

Protecting Public Benefits With ABLE Accounts and SNTs;
Understanding Limitations and Tax Implications; Avoiding Pitfalls

THURSDAY, AUGUST 3, 2017

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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PLANNING WITH ABLE ACCOUNTS AND SPECIAL NEEDS TRUSTS

STRAFFORD CONTINUING
EDUCATION WEBINARS

August 3, 2017

Robert P. Mascali, J.D.

Admitted in Massachusetts and
New York

Goals of Planning

- Balance the family's present and future needs with the present and future needs of the individual
- Create and implement personal care, financial, and legal plans
- Communicate such plans to all relevant persons
- Review and revise plans as circumstances and laws and regulations change
- Provide peace of mind and family harmony

Planning Steps

You Need To:

- Create and implement a current personal care plan
- Create a transition Future Care Plan for continued personal care as circumstances change
- Create and execute a legal plan for individual and other family members
- Create and implement a financial plan

Federal Benefits: Need-based

- **Medicaid**
 - Joint federal and state program that helps with medical costs for some people with low incomes and limited resources
- **Supplemental Social Security Income (SSI)**
 - Provides monthly income to people age 65 or older, or who are blind or disabled, and who have limited income and financial resources

Supplemental Needs Trusts

- Supplemental or Special Needs Trusts (SNTs)
- Provide a supplemental source of funds for people with disabilities
- Because of certain legal limitations on these trusts, individuals can remain eligible for government benefits that are based on need, such as SSI and Medicaid

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Supplemental Needs Trusts

- Purpose of a SNT: to enhance the quality of life of the person with the disability
- Trust can purchase additional support services, therapy and care that are not covered by Government Benefits
 - Additional medical treatment or insurance
 - Individualized therapy
 - Special medical equipment
 - Case management
 - Recreational activities / Hobbies
 - Other goods, services and activities

SNTs and Government Benefits

- A properly drafted supplemental needs trust is *not* counted as a beneficiary's resources
- For purposes of SSI and Medicaid, the trust is not “actually available” to the beneficiary because he or she has no right to demand that the trust pay for any good or services

SNTs and Government Benefits

- In-Kind donations of food or shelter – that is, when someone (including a parent) gives the disabled individual a place to live for free or at a reduced rate - will generally reduce SSI payments by up to one-third
- ABLE Act considerations

Types of SNTs

- Self-settled or First-Party SNT
- Pooled SNT
- Third-party SNT

Self-Settled or First-Party SNT

- Created for sole benefit of individual with disability under age 65
- Created by parent, grandparent, guardian, or by the court
- Can now be created by the individual with disability
- Individual with disability can fund the trust

Pooled SNT

- Managed by a nonprofit organization
- Funds are pooled for investment purposes
- Sub-accounts maintained for each disabled beneficiary
- Can be created by the individual with disability for himself/herself of any age
- Pay back to Medicaid or retained by the nonprofit (Natl Federation v. Reese 2016WL6277617)

Pooled Trusts

- In some states (NY) can be used for an individual to deposit excess income or “spend down” amount when receiving Medicaid benefits
- Typically used for lump sum amounts that are received by an individual on Medicaid or SSI
- No Payback provision as long as the beneficiary’s remaining assets stay in the pooled trust after the beneficiary dies
- Established for person over 65 years old-penalty assessed?

DRAFTING CONSIDERATIONS

- Forms or templates-only the beginning
- Irrevocability
- Need Flexibility to amend
- Laws, Regulations and nature of disability may change over time
- Consider using a Trust Protector

DRAFTING CONSIDERATIONS THIRD PARTY

- Testamentary or Inter vivos
- Remainder provisions
- Trigger Provisions
- Retirement Accounts
- Fund an ABLE Account

DRAFTING CONSIDERATIONS THIRD PARTY

- Trustee Selection-individual or corporate
- Trustee Succession
- Decanting
- Use of Trust Protector
- Importance of Letter of Intent

DRAFTING CONSIDERATIONS

FIRST PARTY

- Federal and State law
- State regulations/POMS
- Sole benefit
- Who can establish
- Early Termination
- Funding an ABLE Account

DRAFTING CONSIDERATIONS FIRST PARTY

- Trustee Succession/Trust protector
- Special Needs Fairness Act-State implementation?
- Estate Recovery
- Medicaid Payback/multiple states
- Decanting

TRUST ADMINISTRATION

- Reporting Requirements
- Distribution Requests
- Common Mistakes
- Amendments
- Early Termination

TAX IMPLICATIONS

- Grantor Trust Treatment
- EIN-Required?
- Is It Income?
- Income, Gift and Estate Taxes

SNT VS. ABLE ACCOUNT

- Another tool-not a replacement
- No Distinction between first or third party set-up but payback an issue
- Individual can set up account
- Tax benefits
- Qualified expenses tied to disability
- Housing

SNT VS. ABLE ACCOUNT

- Ease of termination
- Taxes and penalties
- Medicaid Payback

Starts from account start-up-not
before

- Payments permitted after death

CHOOSING THE RIGHT APPROACH

- Who is the beneficiary
 - age
 - disability
 - saver/spendthrift
 - easily manipulated
- Is beneficiary on Medicaid now? In the future?

CHOOSING THE RIGHT APPROACH

How much money will be deposited

Now/in the future

What are expenses

What is housing situation

What is better for the beneficiary-
autonomy or control

PLANNING WITH ABLE ACCOUNTS AND SPECIAL NEEDS TRUSTS

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ABLE ACCOUNT OVERVIEW

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

Eligible individuals with disabilities can set-up an ABLE account, modeled after the Section 529 Savings Accounts.

Who is Eligible?

To be an ABLE Account Beneficiary must be eligible via 2 methods:

1. Age Requirement
 - Must be disabled before age 26; and
2. Disability Determination.
 - Have been determined to meet the disability requirements for Supplemental Security Income (SSI) or Social Security Disability (SSD) benefits; **OR**
 - Submit doctor's certification that the individual meets criteria to be further established in regulations (essentially equal to Social Security level of disability).

ABLE Accounts – Key Features

- ✓ Contributions into an ABLE Account may be made by any person (could be a trust);
- ✓ Contributions would not be tax deductible;
- ✓ Income earned in the account would not be taxed;
- ✓ Account withdrawals, including portions attributable to investment earnings generated by the account, for Qualified Expenses would not be taxable;

ABLE Accounts Overview

- i. Individuals limited to one (1) ABLE account;
- ii. Total annual contributions by all individuals to any one (1) account may be the annual gift tax limit [\$14,000 in 2017];
- iii. Aggregate contributions to an ABLE account would be subject to overall limit that matches the state limit for Section 529 Accounts.

For Example: the 529 limit in California is \$350,000. Divided by the annual exclusion of \$14,000 = 25 years!

ABLE Accounts Overview

Individuals with ABLE accounts may maintain eligibility for means-based benefits:

Supplemental Security Income (SSI)	Medicaid
<p>The first \$100,000 in the account balance are excluded from counting as a resource, as are most account withdrawals.</p> <p>If over \$100,000 SSI is suspended (not terminated)</p>	<p>ABLE account balances and withdrawals are completely excluded for the purpose of Medicaid.</p> <p>[Even if SSI is suspended]</p>

ABLE Accounts Overview

For Example:

An ABLE beneficiary in Virginia (with a 529 Plan maximum amount of \$500,000) may use an Ohio ABLE account (with a 529 Plan maximum amount of \$426,000). If the balance exceeds \$100,000, SSI eligibility would be suspended, but as long as the account remains below \$426,000, Medicaid eligibility would continue.

ABLE Accounts Overview

What can be contributed to an ABLE Account?

Contributions have to be in CASH.

Cash Contributions. A program shall not be treated as a qualified ABLE program unless it provides that no contributions will be accepted

- a) Unless it is cash; or
- b) Except for rollovers from another beneficiary; or
- c) If such contribution to an ABLE account would result in aggregate contributions from all contributors to the ABLE account for the taxable year exceeding the amount in effect under §2503(b) for the calendar year in which the taxable year begins.

ABLE Accounts Overview

Transfers of ABLE Account During Beneficiary's Lifetime or Upon Beneficiary's Death

The ABLE Act allows the transfer of an ABLE account during the lifetime of the beneficiary or at the beneficiary's death in very limited circumstances. If there is money remaining the account may be transferred to another family member that is disabled *only if* the new beneficiary is an eligible individual for such taxable year of the transfer of account and a member of the new beneficiary's family pursuant to IRC(ii) Section 102(c)(1)(C). This would be brothers, sisters, stepbrothers, stepsisters.

ABLE Accounts Overview

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ABLE Accounts Overview

Can an ABLE Account be Transferred During the Beneficiary's Lifetime or at the Beneficiary's Death?

The ABLE Act allows the transfer of an ABLE account during the beneficiary's lifetime in very limited circumstances. The account may be transferred to certain family members listed in the IRC Section 102(c)(1)(C) **only if** such "new" beneficiary is an eligible individual for the taxable year of the transfer. This would be brothers, sisters, stepbrothers, and stepsisters. No rollover at beneficiary's death.

ABLE Accounts Overview

Change of Designated Beneficiary

- For a rollover to a sibling (i.e., a program to program transfer), all the account funds may pass to the “new” beneficiary, even if the annual contribution has already been made during that tax year.
- If not transferred during the beneficiary’s lifetime, then there is a Medicaid lien subject to payback. No rollover allowed at death.

ABLE Accounts Overview

Qualified Disability Expenses

Qualified disability expenses are any expenses made for the designated beneficiary related to his or her disability, including:

- Education
- Housing
- Transportation
- Employment training & support
- Assistive technology & personal support services
- Health, prevention & wellness
- Financial management & administrative services
- Legal fees
- Expenses for oversight & monitoring
- Funeral & burial expenses

ABLE Accounts Overview

Limited Investment Direction

1. Beneficiary may direct the investment of any contributions to the program (or earnings thereon) no more than 2 times in any calendar year.

1. As with 529 College Savings Accounts, the range of investment options available for ABLE Accounts would be determined by each State.

ABLE Accounts Overview

Tax Free Growth and PENALTIES if used for Non-Qualified Expenses

Contributions are in after-tax dollars, but earnings would grow tax-free (just like 529 College Savings Accounts).

For example: Bruce saves \$50,000 over a decade, and during that time the account earns \$10,000 for a total of \$60,000. If Bruce were to use the \$60,000 for a down payment on a home = No Taxes. If Bruce were instead to use \$5,000 to pay for a trip to Busch Gardens, the \$5,000 = taxable, plus possible 10% penalty. Recreation is not a qualified expense.

ABLE Accounts Overview

- A qualified individual may join an ABLE Account in any state! It is not limited to the state in which the beneficiary resides.
- However, there remains a limit of 1 ABLE Account per eligible individual.

ABLE Accounts Overview

Paybacks

In the event the qualified beneficiary dies with remaining assets in an ABLE account:

- The remaining assets can be used to pay off outstanding bills for Qualified Disability Expenses, and then funeral / burial expenses, before the funds get distributed to Medicaid. Why is this important? Because funds in a first-party (or d4A) Special Needs Trust cannot be used for funeral / burial after the beneficiary dies.
- You can also deduct the amount of any premiums paid as part of a Medicaid Buy-In program (if the state has one).

ABLE Accounts Overview

Paybacks, cont.

In the event the qualified beneficiary dies with remaining assets in an ABLE account:

- The remaining assets in the ABLE account are then distributed to any state Medicaid plan that provided medical assistance to the designated beneficiary.
- The amount of any such Medicaid payback is calculated based on amounts paid by Medicaid after the creation of the ABLE account.

ABLE Accounts Overview

Paybacks, cont.

- The Medicaid pay back is only one consideration when deciding whether to use an ABLE Account or not.
- Compare the ABLE Account to a traditional 529 College Savings Account (no liens)
- Medicaid recovery for medical purposes after age 55.

ABLE Accounts Overview

Department of Treasury and Social Security Administration have given guidance on many questions about ABLE Accounts.

QUESTION 1: What happens if a state passes laws before the regulations are implemented.

ANSWER 1: The Treasury Department and the IRS said that states that enact legislation creating an ABLE program in accordance with Section 529A, and those individuals establishing ABLE accounts in accordance with such legislation, will not fail to receive the benefits of Section 529A, merely because the legislation or the account documents do not fully comport with the final regulations when they are issued.

ABLE Accounts Overview

QUESTION 2: Who is in charge of the Able Account?

ANSWER 2: The proposed regulations make it clear that the designated beneficiary is the owner of that account and manages the distributions.

QUESTION 3: What happens if a potential ABLE beneficiary lacks capacity to establish an ABLE Account?

ANSWER 3: If the eligible individual cannot establish the account, the eligible individual's agent under a power of attorney or, if none, his or her parent or legal guardian, may establish the ABLE Account for that eligible individual.

ABLE Accounts Overview

QUESTION 4: Do payments from an ABLE Account for shelter cause an ISM (In-Kind Support & Maintenance) reduction for the Supplemental Security Income (SSI) recipients?

ANSWER 4: The Social Security Administration recently directed that distributions from an ABLE Account do not count as income regardless of whether the distributions are for non-housing Qualified Disability Expenses or Non-Qualified Disability Expenses.

ABLE Accounts Overview

QUESTION 5: Can I do a direct transfer from a 529 College Savings Account to an ABLE Account?

ANSWER 4: No. There is no direct transfer from a college savings plan to an ABLE Account. With respect to taxes and penalties to withdraw the college savings plan in order to transfer to an ABLE Account:

A distribution from a 529 plan that is not used for qualified educational expenses may be subject to income tax and an additional 10% early-distribution penalty.

The penalty will be waived, however, if the distribution occurs for any of the following reasons:

- The designated beneficiary dies, and the distribution goes to another beneficiary or to the estate of the designated beneficiary.
- The designated beneficiary becomes disabled. A person is considered disabled if there is proof that he or she cannot do any substantial gainful activity because of a physical or mental condition. A physician must determine that the individual's condition can be expected to result in death or continue indefinitely.

ABLE Accounts Overview

REMEMBER: Apply normal SSI resource counting rules and exclusions to assets or other items purchased with funds from an ABLE Account



Thank You!

QUESTIONS



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