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The ABLE Act – Uses and Limitations for Persons with Disabilities and Their Families

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At the end of the 2014 Congressional session, Congress passed, and the President signed, the Achieving a Better Life Experience Act, otherwise known as the ABLE Act. The plan was first introduced into Congress in 2006, and was intended to substantially mirror, for persons with disabilities, the provisions of 529 Plans which provide for individuals who attend post-high school education programs. However, in the years before the ABLE Act became law in late 2014, the original Act was amended in a many significant ways which are critical to understanding the limitations and proper uses of ABLE Plans.

The primary advantage of the law is that contributions grow tax–free until withdrawals are made for specific "qualified disability expenses", such as education, housing, transportation, wellness, legal fees, administrative fees, financial planning, funerals and "oversight" expenses. These permitted ABLE expenditures may, in some instances, be more narrow than under a Special Needs Trust. At the same time, however, there are limitations or differences from 529 Plans which will significantly limit the use of ABLE Plans in special needs/estate planning.

For example, the <u>total</u> <u>annual</u> contribution permitted by <u>all</u> individuals under the ABLE Act is only $14,000 per year, which will be adjusted each year slightly for inflation. The <u>total</u> <u>aggregate</u> contributions (that is, the contributions for all years by all persons) cannot exceed more than $100,000 without losing Supplemental Security Income, and while Medical Assistance may continue, it remains to be seen how states will act when the total aggregate sums reach the level (often a higher level than $100,000) set by the state's 529 Plan. A payback to the state Medicaid agency exists under the ABLE Act, thus meaning that any sums remaining in the account after the death of the disabled beneficiary are subject to payment to the state Medicaid agency to repay that agency for Medicaid provided to the beneficiary after the account was created. States which establish ABLE accounts must periodically submit an electronic report regarding each account to the Social Security Administration to reflect the amount in the account and its uses. No such payback or reporting requirement exists with a Third-Party Funded Special Needs Trust which is used in a typical estate plan for families with a loved one with a disability.

Contributions to an ABLE Plan must be in cash or its equivalent, and not by a gift of stock or other similar instruments. Each individual beneficiary can have only one ABLE account, but anyone can contribute to it. ABLE accounts may only be created by or for individuals who have a "disability" as defined by the Social Security Act which existed before the age of 26, and thus persons whose disabilities manifest after the age of 26 are not eligible for the ABLE program. It is not mandatory for any state to establish an ABLE program; in light of the substantially greater complexity of ABLE plans than 529 Plans, is reasonable to expect that some states may decline to create these plans. While 529 Plans may be rolled over into an ABLE plan, the limit of the annual rollover is $14,000. No tax deduction is obtained for deposits into an ABLE account. Withdrawals beyond qualified expenses are subject to both income taxation and a 10% penalty.

These provisions represent substantial limitations of the usefulness of ABLE accounts, especially in contrast to the initial concept of these plans when first introduced into Congress. Therefore, families must carefully decide whether these limitations are such that the substantial, broader benefits of Special Needs Trusts which have no resource limits continue to weigh in favor of that option. Individuals with a disability that manifested after age 26 who receive, or who expect to receive, significant (over $14,000) amounts of money through an inheritance, personal-injury matter, gifts, etc., will not generally benefit from ABLE accounts, and we can expect the continued extensive use of Self-Funded Special Needs Trusts and Third Party-Funded Special Needs Trusts (the latter of which involves no age limit and no repayment to the state Medicaid agency) as critical tools of estate planning for families which include a person with disabilities, especially since most such Trusts also pay no income tax.

At the same time, ABLE accounts can provide, in certain very specific, limited circumstances, some benefits for persons with disabilities. For example, an SSI recipient who maintains some modest employment will be able to accumulate those wages beyond the SSI resource limit of $2000 for subsequent withdrawal for qualified expenses, and thus maintain control of some limited funds without the loss of SSI or Medicaid. Additionally, where a small personal injury recovery is obtained (less than $14,000) these resources could be held in an ABLE account for subsequent withdrawal for qualified expenses. Unfortunately, the exact scope of precisely what expenses will be “qualified” remains for federal and state regulatory agencies to define with greater specificity than the ABLE Act.

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