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Regulations Governing ABLE Accounts

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The Stephen Beck Jr. Achieving a Better Life Experience (ABLE) Act, effective December 19, 2014, created another tool for planning for the financial well-being of a person with a disability. This law permits each state to establish and maintain a tax favored savings program, akin to a college savings plan. Contributions to an ABLE account are not deemed taxable transfers, earnings inside the ABLE account are exempt from federal income tax, and distributions for Qualified Disability Expenses (QDE) are not subject to federal income tax. Importantly, contributions to the ABLE account, the ABLE account itself, and distributions for QDE will not impact eligibility for most state and federal public benefit programs, including Medicaid, Supplemental Security Income (SSI), and Section 8 subsidized housing.

Since the law was first enacted, the Department of the Treasury issued proposed regulations and amendments governing the use of ABLE accounts. On November 19, 2020, the Department of the Treasury issued final regulations. This article will discuss some of the salient features of ABLE accounts and how the new regulations impact them.

Who qualifies for an ABLE account?

As a reminder, to qualify for an ABLE account under existing law, an eligible individual must have a disability that occurred prior to age 26. An “eligible individual” is someone receiving Social Security Disability Insurance (SSDI) or SSI, or who files a disability certificate that the individual has a “medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or has lasted or is expected to last for a continuous period of not less than 12 months or is blind” which onset occurred before age 26.

Several commenters on the proposed final regulations requested that an individual who is not determined disabled prior to the age of age 26 but has a diagnosed condition before age 26 that will result in the individual being determined disabled after reaching age 26, be permitted to qualify for an ABLE account. These suggestions were not integrated into the final regulations. However, the ABLE Age Adjustment Act was introduced in the House and Senate in February of 2021. If it becomes law it would extend the disability onset age from 26 to 46 making these accounts available to many more Americans with disabilities.

Each state ABLE program can establish its own rules for redetermining eligibility. Some commenters to the proposed final regulations recommended that certain bilities that are lifelong conditions, such as autism,

be exempt from redetermination. Again, these comments were not incorporated and each state that has chosen to enact an ABLE program is charged with developing their own framework.

How does an ABLE account get established and who controls it?

The final regulations create a hierarchy of persons who have authority to create an ABLE account if the individual with the disability (known in the regulations as the "designated beneficiary") is unable to do so. The following, in the order named, may create the account:

- Agent under a durable power of attorney
- Conservator or guardian
- Spouse
- Parent
- Sibling
- Grandparent
- Social Security representative

The final regulations provide that the ABLE program may accept a certification by the person, under penalties of perjury, that he has authority to create the account and that there is no other person with a higher priority willing and able to do so.

As a practical matter, if a guardian of the property of a person wishes to establish an ABLE account the guardian should contact an attorney who specializes in special needs planning as some state ABLE account

programs require specific court authority to establish an ABLE account.

In the same vein, if a representative payee is planning to establish an ABLE account on behalf of a recipient for whom they collect benefits, the representative payee may wish to seek the advice of counsel to understand how to properly manage and keep records on the ABLE account.

How many ABLE accounts can be established for the same person?

Only one ABLE account can be created for the individual with a disability (the "designated beneficiary"), and the designated beneficiary is deemed to be the account owner. The final regulations, however, do not prohibit an ABLE program from permitting the establishment of sub-accounts within the ABLE account. The person who creates the account is automatically the authorized signer. The signatory over the ABLE account will maintain authority over investments, but the designated beneficiary can authorize another person to make withdrawals from the ABLE account.

How much can be contributed to the ABLE account and how does the ABLE account get funded?

Total annual contributions to an ABLE account cannot exceed the federal gift tax annual exclusion (\$16,000 2022), but after the \$16,000 cap is met (at least

until December 31, 2025), an eligible individual for whom no contributions have been made to a qualified retirement plan can contribute the lesser of (a) the individual's compensation for the tax year or (b) an amount equal to the poverty line for the preceding year applicable for that person's state of residency for a one-person household.

The final regulations confirm that contributions to an ABLE account may be in cash, check, money order, credit card payment, electronic transfer, or other similar method. Some commenters asked that contributions be made without regard to applicable tax provisions such as allowing a tax-free contribution to an ABLE account from an IRA or that the eligible individual's SSI be deposited directly into the ABLE account without being counted against the \$16,000 annual cap. The final regulations did not incorporate those suggestions but did highlight that the enabling legislation does not prevent a transfer from a supplemental needs trust (SNT) to an ABLE account. Any such transfer is subject to the annual cap and the aggregate contributions limits.

How much money can be in an ABLE account without impacting benefits?

The total contributions to an ABLE account can never exceed the limit established by each state for its 529 accounts (the "aggregate contribution limit"). There is a harbor that allows the ABLE provider to refuse to

accept additional contributions once the account balance reaches the limit. Once the account falls below that aggregate contribution limit, contributions can resume. Treasury and the IRS also view the safe harbor as protecting the eligible individual in a situation where the aggregate contributions are at the limit, but the account balance falls below due to market fluctuation. The aggregate contribution limit varies from state to state so it may be another factor to consider when selecting an ABLE provider. The final regulations confirm that the eligible individual does not need to be a resident of the state's ABLE provider.

The first \$100,000 in an ABLE account will not be counted in determining an individual's eligibility for SSI. The final regulations clarify that a person will remain an eligible individual even if his SSI payment is suspended temporarily due to an ABLE account's value exceeding \$100,000.

What can ABLE account funds be spent on and how are they taxed?

Income earned in an ABLE account will not be subject to income tax, provided that the funds in the account are used for approved "qualified disability expenses" (QDE), such as healthcare, education, housing, transportation, personal support, assistive technology, or other expenses related to the individual's blindness or disability. The final regulations clarify that QDE "can include basic living expenses and are not limited to

items for which there is a medical necessity, or which solely benefit an individual with a disability." An example might be a purchase of a cell phone that will enable the individual to communicate safely while living in the community. Nevertheless, the account owner must still pay close attention to the interplay between SSI and ABLE. Funds distributed from an ABLE account for housing in month one will be exempt for SSI purposes, but any portion of the distribution not spent on housing retained in month two will become a countable resource.

The final regulations provide that a lifetime transfer of an ABLE account to an eligible sibling of the eligible individual will not be subject to gift tax or generation-skipping transfer (GST) tax. The balance of the ABLE account at the end of the account owner's lifetime is includable in his or her estate for estate tax purposes.

How are expenses paid from an ABLE account monitored?

The final regulations do not require the account owner to report QDE to the IRS or the ABLE program. Nonetheless, a state ABLE program can choose to impose reporting requirements that the account owner will be subject to. Under the regulations, the state ABLE providers have reporting requirements. An account owner should be sure to understand his or her state programs reporting requirements before establishing using an ABLE account.

What happens to funds in the ABLE account after the death of the owner?

The ABLE Act provides that after the death of the account owner/designated beneficiary, the state Medicaid Program has a repayment right. The final regulations provide that a QDE incurred but not paid prior to death may be paid prior to Medicaid payback. In addition, the final regulations permit funeral expenses to be paid after death and prior to Medicaid reimbursement, even if the funeral expenses were incurred after death.

Further, the final regulations confirm that each state can make Medicaid reimbursement optional for their residents. While a non-resident can open an ABLE account in a state that does not permit reimbursement for its residents, the non-resident's state Medicaid program can still make a claim against the ABLE account.

Another feature of the final regulations is that an ABLE provider may permit the account owner to name another eligible individual as the successor designated beneficiary to receive the account at the death of the account owner. The designated beneficiary must qualify as an eligible individual at the date of designation as well as at the death of the primary account owner. If no qualified designated beneficiary exists, the balance, after Medicaid payback, is paid to decedent's probate estate. Medicaid

reimbursement is still required even if the account owner names an eligible individual as the successor designated beneficiary.

What is the interplay between ABLE accounts and supplemental needs trusts?

While most special needs practitioners will advise that an ABLE account is not a replacement for a third-party supplemental needs trust, an ABLE account can be very useful as a stand-alone tool in certain circumstances and when used in tandem with a First Party SNT or Third-Party SNT. Among its benefits:

- ABLE accounts are only liable for Medicaid reimbursement for medical assistance paid from the date the ABLE account was created. First-party SNTs are liable for Medicaid reimbursement for medical assistance provided over the course of the beneficiary's entire lifetime.
- ABLE accounts provide a convenient place to deposit assets more than the \$2,000 SSI asset limit, such as a small inheritance, without incurring the expense of creating and managing a First Party SNT.
- Distributions from the ABLE account are non-countable for VA Aid and Attendance and do not increase Section 8 rent.
- The trustee of an SNT can contribute funds to an ABLE account and in turn the account owner can use the funds for housing expenses, thereby

avoiding in-kind support and maintenance (ISM)
reduction in the context of SSI.

The final regulations do raise some questions for the trustee of an SNT who distributes trust funds to an ABLE account. Not that other individuals could be involved in the establishment and administration of the ABLE account, does the trustee have any obligation to find out who established the account and on what authority? Is the trustee obligated to confirm that the trust beneficiary is and continues to be an eligible beneficiary? Are there other signers on the account with access to the funds? Is the trustee obligated to inquire about how the funds are being used or to request an accounting?

While the final regulations present some clarity in many respects, they still leave some questions open for trustees of an SNT who may wish to make annual contributions to an ABLE account. Consultation with a special needs practitioner about the utility, advantages, and potential pitfalls of these accounts in light of the final regulations can help the account owner, the account owner's family and trustees of trusts for the account owners benefit determine if and how an ABLE account can be beneficial in their circumstances.

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