Achieving a Better Life Experience: An Overview of the ABLE Act

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On December 19, 2014, President Obama signed the Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014 into law. The ABLE Act amended Section 529 of the IRC to enable the creation of state-specific tax free savings accounts to cover "qualified" expenses for individuals with disabilities for tax years beginning after December 31, 2014. Such "ABLE" accounts are designed to "supplement and not supplant" public benefits like Medicaid (Medical Assistance) and Supplemental Security Income (SSI).

ABLE accounts are allowed a tax exemption similar to a Qualified Tuition Program or Section 529 Plan, and amounts in an ABLE account are to accumulate on a tax-exempt or in some cases tax-deferred basis. Like Section 529 Plans ABLE programs will be state-run with options presumably varying from state to state, and designated beneficiaries may be changed so long as a newly designated beneficiary is likewise eligible under the program and a family member of the initially designated eligible beneficiary.

ABLE accounts are a work in progress. The Treasury Department is to draft regulations in 2015 to provide better guidance on their qualifying criteria. Agencies administering means-tested public benefits (primarily the Social Security Administration and State Medicaid Agencies) may also publish guidelines.

> At this juncture qualified expenses are understood to include education, housing and transportation. Common examples of qualified expenses provided are medical and dental care, education, community based supports, employment training, assistive technology, specialized housing and disability-related transportation.

Non-tax deductible contributions may be made to an ABLE account by any person (the disable account beneficiary, family or friends), and income earned is understood to be tax-exempt or in some instances tax-deferred.

At this juncture ABLE account limitations are understood to require that:

• the ABLE account beneficiary must have significant disabilities meeting Social Security standards with a disability onset date prior to age 26;
• there may only be one ABLE account per disabled individual;
• total annual contributions to an individual's ABLE account by participating individuals may not exceed the applicable annual gift exclusion ($14,000 in 2015);
• total cumulative contributions to an individual's ABLE account over time may not exceed the state-specific limits for education-related 529 savings accounts;
• ABLE account beneficiaries who receive SSI may not have more than $100,000 in an ABLE account: anything over $100,000 may be considered an "available" asset that could cause a loss in SSI benefits;
• State Medicaid Agencies are "creditors" of ABLE accounts upon the death of the disabled beneficiary and entitled to reimbursement for certain MA benefits paid, similar to first-party funded 1396p(d)(4)(A) Special Needs Trusts.

Perhaps most notable among such requirements is the "payback" provision, which provides that:

> "upon the death of the designated beneficiary, all amounts remaining in the qualified ABLE account not in excess of the amount equal to the total medical assistance paid for the designated beneficiary after the establishment of the account, net of any premiums paid form the account or paid by or on behalf of the beneficiary to a Medicaid Buy-In

> program under any State Medicaid plan established under title XIX of the Social Security Act, shall be distributed to such State upon filing of a claim for payment by such State.

IRC Section 529A(e).

While ABLE accounts are a new tool in an experienced Special Needs Planner's arsenal, they are not anticipated to replace or significantly change traditional planning for individuals with special needs loved ones given their funding limits and the "payback" associated with their use.

Similar to a first-party funded Special Needs Trusts under 42 U.S.C.§ 1396p(d)(4)(A), State Medicaid Agencies are "creditors" of ABLE accounts upon termination up to the extent of certain MA benefits paid. Such payback can be avoided by gifting into third-party funded common-law Supplemental Needs Trusts under Pennsylvania law. The benefit of tax-free growth must be weighed against subjecting assets to unnecessary "payback."

Further, unlike the $100,000 limit for ABLE accounts, there is no cap in Pennsylvania on how much may be transferred into a third-party funded common-law Supplemental Needs Trust for SSI purposes. An ABLE account simply may not allow for sufficient savings to enable loved ones to adequately provide for special needs individuals with extensive needs.

In addition, it is not yet clear what other funding or distribution limitations will be set in final regulations.

ABLE accounts will certainly be useful to remedy a poorly planned gift or bequest or in cases where only minimal assets are presumed. Third-party funded Supplemental Needs Trust will undoubtedly remain an essential part of estate planning for families with greater means and the desire to provide additional funds for their special needs loved ones, and first-party funded Special Needs Trusts under 42 U.S.C.§ 1396p(d)(4)(A) will still play a vital role in planning, particularly in the litigation context.

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