

**ABLE ACCOUNTS UNDER THE
ACHIEVING A BETTER LIFE
EXPERIENCE ACT OF 2015**

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Probate, Elder Law & Guardianship Section

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BY

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- A. Passage by the U.S. Congress of the Achieving A Better Life Experience Act of 2015 (the "ABLE Act") was covered in detail by my presentation given at the 37th Annual Judge Robert H. Staton Indiana Law Update sponsored by the Indiana Continuing Legal Education Forum (ICLEF).
1. My materials are available on my website, www.rkcraiglaw.com.
 2. The materials for the 37th annual conference on my website are titled 2015 Elder Law Developments.
- B. Additional information explaining developments that occurred subsequent to enactment were also addressed by me in my presentation at the 38th Annual Judge Robert H. Staton Indiana Law Update sponsored by the Indiana Continuing Legal Education Forum (ICLEF).
1. My materials are available on my website, www.rkcraiglaw.com.
 2. The materials for the 38th annual conference on my website are titled 2016 Elder Law Developments.
 3. The first actual ABLE accounts were not established until the middle of 2016, when Ohio launched its STABLE accounts, followed shortly thereafter by Tennessee.
 4. As stated later in these materials, ABLE account enrollment began in Indiana in July of 2017.
- C. For a detailed analysis of ABLE accounts and a comparison of planning opportunities involving special needs trusts, refer to my materials presented at the 28th Annual Evansville Bar Association Estate and Business Planning Institute, Special Needs Trusts for Asset Protection - Planning, Implementation, Recent Developments, and a Comparison of ABLE Accounts.
1. Those materials are available on my website, www.rkcraiglaw.com.
 2. That presentation addressed in detail many of the special rules that apply to the Medicaid and SSI programs, as well as other benefit programs.
- D. General background.
1. The ABLE Act allows each state to establish and operate an ABLE program.

2. The purpose of the ABLE Act is to allow contributions to be made to an ABLE account that was established for the purpose of meeting the Qualified Disability Expenses (QDE) of the disabled beneficiary.
3. Because the ABLE Act amended § 529 of the Internal Revenue Code and provides for thresholds tied to that section's permitted accounts in each state, ABLE accounts are similar to § 529 college savings accounts.
 - a. For those under 19, must establish that beneficiary was either blind or disabled under the Social Security Act definitions, or under the new disability certification criteria set forth in § 529A(e)(2) of the Act.
 - b. For those older than 19, must establish that beneficiary was either blind or disabled under the Social Security Act definitions, and that such blindness or disability occurred before the date on which beneficiary turned age 26.
 - c. For the purpose of defining disability, the phrase "marked and severe functional limitations" means the standard of disability in the Social Security Act (see 20 C.F.R. § 416.906).

E. Purposes and goals of the ABLE Act.

1. To allow persons to place their own assets in an account that presumably would be easier to establish and to administer than a "(d)(4)(A)" trust.
2. To avoid the limitation prohibiting the disabled person himself from being able to establish a "(d)(4)(A)" trust, but this limitation has now been eliminated by the Special Needs Trust Fairness Act (SNTFA).
3. To allow the disabled person to manage his or her own account, if able to do so; note, however, that the ability to manage is very limited.

F. Advantages of ABLE accounts.

1. Simplicity and economy in terms of establishment and administration.
2. Allows the disabled person himself or herself to be the account manager and decide what distributions should be made and for what purposes, unlike a Medicaid-exempt and SSI-exempt "(d)(4)(A)" trust or a "(d)(4)(C)" pooled trust for which a third-party trustee is needed for that role.
3. All growth in an ABLE account is income-tax free.
4. Contributions by third parties qualify for the annual gift tax exclusion, but contributions must be in cash unless it is the result of an in-kind rollover.

5. The designated beneficiary of the ABLE account can be changed to a different disabled family member.
6. There is no age-65 limit on the disabled person funding his or her own ABLE account as long as the disability occurred before age 26.
7. Distributions for QDE are income-tax free.
 - a. QDE are defined as: "Any expenses related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary, including the following expenses: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses which are approved by the Secretary under regulations and consistent with the purposes of this section."
 - b. Proposed IRS regulations interpret QDE very liberally and broadly, perhaps even more broadly than would be allowed for distributions from a "(d)(4)(A)" trust or a "(d)(4)(C)" pooled trust.
 - c. The IRS has concluded that QDE "should be broadly construed to permit the inclusion of basic living expenses and should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the disabled individual."
 - d. The proposed regulations include in QDE "expenses that are for the benefit of the designated beneficiary in maintaining or improving his or her health, independence, or quality of life." [Prop. Reg. §1.529A-1(b)(16)].
 - e. Expenses will not be QDE if they are incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of Treas. Reg. § 1.529A-1(b)(9)(A) and § 1.529A-2(e)(1)(I).
 - f. If the IRS imputes a penalty because a distribution is not a QDE, the impact could be minimal or irrelevant:
 - (1) The ten percent withdrawal penalty is only levied on the income (the appreciation portion) of the account that is distributed.
 - (2) For example, if the parents contribute \$1,000 per month at the beginning of each month, which is used immediately to pay a

non-qualified expense, the penalty would be zero, since there would be no income earned from that investment, nor would there be any chance of a Medicaid pay-back requirement on the ABLE account funds since the account would be a conduit for payments and there would be no significant account build-up subject to the lien.

- (3) If an ABLE beneficiary is also a beneficiary of a third party SNT which owns a home in which the beneficiary lives, there will be no Medicaid lien or estate recovery because the beneficiary does not own the home; if the SNT funds the ABLE account with money that can be used to pay taxes and utilities, there will be no loss to the beneficiary of benefits, as noted below, and the beneficiary will not be saddled with the obligation of paying rent.

8. Distributions for QDE are not countable income for public benefits purposes (see POMS SI § 01130.740).

- a. This makes distributions from ABLE accounts more beneficial than administering a “(d)(4)(A)” trust or a “(d)(4)(C)” pooled trust, or even, perhaps, a third-party SNT.

- b. Distributions of cash can be made from an ABLE account without affecting benefits, although accounting to public benefits agencies for such distributions could be complex and administratively inconvenient.

- (1) Unfortunately, Housing Authorities in the case of the Section 8 Housing Program have generally regarded virtually any distribution to be income for Section 8 purposes, thus increasing rent by 30 percent of the amount distributed.

- (2) However, see *DeCambre v. Brookline Housing Authority*, Nos. 15-1458 and 15-1515 (U.S. Court of Appeals, First Circuit, June 14, 2016) decision, in which the U.S. Court of Appeals for the First Circuit ruled that it is only actual income distributed from a “(d)(4)(A)” trust that should be countable, which might make the importance of an ABLE account for a Section 8 beneficiary less significant.

- c. An ABLE account’s greatest benefit may be the ability to use the ABLE account funds for housing assistance without SSI reduction for in-kind support and maintenance (ISM).

- (1) The SSA has determined that distributions from an ABLE account do not count as income for SSI purposes regardless

of whether the distributions are for non-housing QDEs, housing QDEs, or non-qualified expenses. (POMS SI § 01130.740).

- (2) For persons with disabilities and their families, and especially those on public benefits, finding sustainable housing can be daunting.
- (3) The ABLE Act provides a new tool to assist persons with disabilities and their families to secure housing and in some cases minimize the loss of benefits.
- (4) The ABLE Act can be used to assist a beneficiary of an ABLE account to provide for their housing needs.
 - (a) For example, a major expenditure of many special needs beneficiaries is for housing and utility payments;
 - (b) If parents provide money directly, there is a dollar-for-dollar reduction in SSI which can cause the complete loss of benefits;
 - (c) If the parents pay the housing costs directly, the payments would be counted as ISM, and the child's SSI benefits would be reduced but not eliminated;
 - (d) If instead the parents contribute to his or her ABLE account, and in turn the funds in the ABLE account are used to pay the housing costs, then there would be no reduction in SSI.
- (5) As a planning maneuver, a parent's planning for a disabled child presumably could entail establishing a third-party SNT and directing the SNT to continue to contribute to the ABLE account annually in an amount necessary to pay or contribute toward the housing costs.
- (6) The POMS provide that QDEs for housing, as well as for non-housing QDEs, are excluded as income and are treated instead as a conversion of a resource from one form to another.
 - (a) The POMS exclude from the designated beneficiary's countable resources a distribution for non-housing QDE if the beneficiary retains that distribution beyond the month of receipt.

- (b) The exclusion applies as long as the distribution is unspent and identifiable and is intended to be used for a non-housing-related QDE.
- (c) If the beneficiary uses a distribution previously excluded for either a non-qualified purpose or as a housing-related QDE, or if the individual's intent to use it for a qualified disability expense changes, the amount of funds used for a non-qualified expense or for a housing-related QDE will be treated as a resource as of the first moment of the month in which the funds were spent, or if the individual's intent changes, the funds will be treated as a resource as of the first day of the following month.
- (d) If the beneficiary spends the housing-related distribution within the month of receipt, there is no effect on eligibility; however, the distribution for housing-related QDE or for an expense that is not a QDE will be treated as a resource if the beneficiary retains the distribution into the month following the month of receipt.

G. Disadvantages of ABLE accounts.

1. While not necessarily disadvantageous, the advantages of accumulations not being taxable may be negligible due to the fact that most disabled beneficiaries are in a very low or zero income-tax bracket.
2. In order to establish an ABLE account, the disabled person must be eligible for SSDI or SSI, or submit a disability certification, which is not required in the case of a "(d)(4)(A)" trust or a "(d)(4)(C)" pooled trust.
3. A disabled person can have no more than one ABLE account.
4. The disabled person or his or her guardian cannot direct investments of the account more than two times per calendar year, and the range of investment options are determined by the state.
5. Distributions other than for QDE are subject to income tax under the annuity rules, and an additional penalty of ten percent is imposed on the taxable amount distributed.
6. There is a Medicaid payback requirement on the death of the disabled beneficiary, which applies, also, in the case of a "(d)(4)(A)" trust and a "(d)(4)(C)" pooled trust.

- a. In the case of a "(d)(4)(A)" trust and a "(d)(4)(C)" pooled trust, the Medicaid payback covers all medical assistance ever received under Medicaid programs in any and all states, even if the trust was established and funded long after the Medicaid benefits began.
 - b. In the case of an ABLE account, payback is only required for medical assistance paid by the Medicaid program **after** the ABLE account was established.
7. The disabled person must have been disabled prior to attaining age 26.
 - a. Proposed legislation is pending in Congress which would raise the age to 46 from 26.
 - b. It may be difficult for older persons to prove their disability onset was prior to age 26.
 8. Any amounts in the ABLE account in excess of \$100,000 are countable for SSI purposes (but not for Medicaid purposes).
 9. Annual contributions from all sources combined, including the disabled person, cannot exceed an amount equal to the annual gift tax exclusion (currently \$15,000 per year).
 10. Aggregate contributions from all sources, including the disabled person, are limited to the state's aggregate contribution limit for § 529 plans (the Indiana limit is \$450,000).

H. Planning considerations:

1. In most cases, and certainly in the case of larger distributions over time, third-party contributions can be made more favorably by means of other arrangements than by means of funding an ABLE account.
 - a. Because Medicaid payback is required for ABLE accounts, and not in the case of a third-party special needs trust, then in most instances it will be better for a parent or other third-party donor to establish a separate third-party SNT in order to avoid the Medicaid payback.
 - b. An ABLE account might be useful for small gifts from other people, but it would generally not be a very good receptacle for a significant gift or bequest.
2. An ABLE account might be appropriate for a disabled person who is able to manage his or her own funds and who finds it very important personally to maintain control and individual autonomy.

3. For a disabled person who is accumulating income, perhaps from wages, SSI benefits, etc., over a period of time, placing funds in an ABLE account may be an easy and convenient mechanism for placement of funds in order to avoid accumulating resources in excess of the \$2,000 resource limitation.
4. An ABLE account might be a convenient and easy way to preserve funds from a small Uniform Transfers to Minors Act (UTMA) account when a young disabled person expects to apply or to become eligible for SSI when the UTMA account would become a countable asset (age 21 in Indiana).
5. An ABLE account would be a convenient way to save for a major purchase, whether for a service or for a non-countable asset (a home, car, etc.) without the cost and complexity of setting up a separate trust.
6. An ABLE account might be useful for a disabled person who is over the age of 64 and cannot utilize a (d)(4)(A) trust or when a (d)(4)(C) pooled trust arrangement is not available in his or her jurisdiction, or if the state in which he or she resides would treat the funding of a pooled trust sub-account as a penalizable transfer.
7. An ABLE account might be a convenient source to deposit a distribution from a larger SNT, including possibly a third-party SNT, which might make a direct distribution to an ABLE account to allow the beneficiary some degree of autonomy and control or to fund regular payments of housing expenses.
 - a. Making such a distribution would allow the beneficiary to take advantage of other benefits of an ABLE account, such as non-countability of distributions for housing purposes.
 - b. Query: would the distribution from the trust to the ABLE account, to the extent that it included income from a separate trust, be deemed income for Section 8 purposes? According to the reasoning of the *DeCambre* decision, such distributions would not be treated as income except to the extent of actual income from the trust.

I. Availability of ABLE accounts.

1. Ohio became the first state to offer ABLE accounts on June 1, 2016 (called STABLE accounts in Ohio), followed by Tennessee on June 13, 2016, Nebraska on June 30, 2016, and Florida (for Florida residents only) on July 1, 2016. In addition to Indiana's recent commencement of ABLE account enrollment, the following states are among those which currently have ABLE programs up and open for enrollment: Alabama, Alaska, Colorado, District of Columbia, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont and Virginia.

- a. ABLE account enrollment began in Indiana in July of 2017. For more information, contact Amy Corbin, Executive Director of the Indiana ABLE Authority (Acorbin@tos.IN.gov).
 - b. For an update of various available state plans, refer to the website of the ABLE National Resource Center at www.ablenrc.org/.
2. There is no residency requirement, and an ABLE account can be established in any state that allows a non-resident of that state to establish an ABLE account [Consolidated Appropriations Act, 2016, PL114-113 12/18/2015, Division Q(III)(A), Section 303]. Most current plans allow enrollment of out-of-state residents.
3. It would usually be best to enroll in plans which permit transfers to different ABLE accounts to allow switching to a different plan in the future.
 - a. A “rollover” from one ABLE account to another is permitted, if accomplished within 60 days, although the process may be inconvenient and involve certain risks.
 - b. It may be better to establish an ABLE account through a plan which permits a direct transfer to another ABLE account.
4. It should be noted that presently final regulations have not been established by the Treasury Department regarding the rules applicable to ABLE accounts.
 - a. See IRS Notice 2015-81 issued November 20, 2015.
 - b. You may refer to the materials that I presented at the 38th Annual Judge Robert H. Staton Indiana Law Update referenced previously in these materials, or consult my website at www.rkcraiglaw.com under the title *2016 Elder Law Developments*.
 - c. The IRS has stated that various states and financial institutions may rely on the current Proposed Regulations.
5. It should be noted also that not all federal public benefits programs are yet fully in compliance with ABLE statutes.
 - a. As noted in the materials that I presented at the 38th Annual Judge Robert H. Staton Indiana Law Update, the Social Security Administration has published revisions to its Program Operations Manual System (POMS), which I addressed in some detail in my 2016 Elder Law Developments materials (which are available on my

website as referenced above), and in regard to which some of the changes have been previously discussed in this outline.

b. Thus far nothing has been published in conjunction with the Section 8 housing (HUD) program or the Veterans Administration pension program.

c. There are also certain unanswered Medicaid issues pending the adoption of specific Medicaid rules and regulations.

(1) In Indiana, ABLE accounts are covered by IHCPPM § 2615.10.30.

(2) It states merely that these tax-favored accounts established on behalf of designated beneficiaries deemed disabled before age 26 are exempt as resources.

J. Other ABLE account issues:

1. The proposed IRS regulations make it clear that the designated beneficiary is the owner of the account and manages the distributions.

a. The IRS recognizes, however, that certain eligible individuals may be unable to establish an account themselves.

b. Therefore, the proposed regulations clarify that 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.

2. Compare this to the (d)(4)(A) and (d)(4)(C) trust requirements and the SNTFA.

a. As a planning matter, as in the case of virtually every other individual, if the eligible individual has capacity, it is a good idea for the individual to sign a power of attorney immediately.

b. If the beneficiary lacks capacity to manage the account and the parents have signature authority, the parents may want to consider establishing a conservatorship or guardianship to fund and manage an ABLE account, and to include a successor to be able to continue managing both accounts.

K. Attached is a chart comparing ABLE accounts and Special Needs Trusts prepared by the Tucson, Arizona firm of Fleming & Curti, PLC.

- L. The Centers for Medicare and Medicaid Services (“CMS”) released guidance to the State Medicaid Directors regarding the treatment of funds held in, contributed to, and distributed from, ABLE accounts.
1. See the letter to the State Medicaid Directors, SMD # 17-002 RE: Implications of the ABLE Act for State Medicaid Programs (September 7, 2017), which is available online at <https://www.medicaid.gov/federal-policy-guidance/downloads/smd17002.pdf>.
 2. The new guidance contains a special rule for distributions into an ABLE account from a special needs trust or a pooled trust; such distributions are disregarded as income from the SNT or the pooled trust. [*Id* at p.4].
 3. SMD # 17-002 also clarifies, at page 6, that any income from an ABLE account that is used for a qualifying disability expense must be disregarded from an individual's total income in computing the patient pay amount, with respect to the post-eligibility treatment of income.
- M. On December 22, 2017, President Trump signed H.R. 1, the Tax Cuts and Jobs Act, into law. Three provisions in the tax reform bill impact state ABLE programs:
1. Rollovers from § 529 college savings accounts into § 529A ABLE accounts, up to the annual maximum contribution amount, are now permitted under federal law. The state tax treatment of these rollovers is currently being determined by each individual state.
 2. Account owners who work and earn income are permitted to make contributions into their ABLE accounts in excess of the \$15,000 annual contribution limit under certain circumstances. The designated beneficiary (the ABLE account owner) is responsible for ensuring compliance with the ABLE contribution limits. State ABLE programs are in the process of implementing these changes and will provide updates accordingly.
 3. The Federal Tax Savers Credit has been extended to include contributions to ABLE accounts with some limits.

Comparing ABLÉ Act accounts and special needs trusts

| | ABLE Account | First-party Special Needs Trust | "c-2-B" Third-Party Special Needs Trusts | Third-party Special Needs Trust |
|--------------------------|---|--|--|--|
| Governing authority | 26 USC §529A (tax code) | 42 USC §1396p(d)(4)(A) and (C) | 42 USC §1396p(c)(2)(B)) | State Trust law |
| Cost to establish | Nominal startup fee | (A): Legal fees for preparing trust; additional fees for limited guardianship if no living parent/grandparent (C): Legal fees for advising re use of trust; nominal trust joinder fee | Legal fees for preparing trust | Legal fees for preparing trust |
| Payback provision | Yes. State entitled to receive all ABLÉ balance at death of beneficiary up to amount of Medicaid provided | Yes. (A): State named as remainder beneficiary to extent of Medicaid provided (C): Same, collected after PSNT retention | No, but as alternative, trust must make distributions on an "actuarially sound basis" | No |
| Eligibility requirements | Individual entitled to Social Security benefits (or otherwise disabled) before age 26 | (A): Under 65 at time of trust creation and funded and disabled by Social Security definition. (C): No age limit, but some states impose penalty for long term care; disabled by SSA definition. | For child of grantor, no age limit but must be disabled by Social Security definition For all others, under 65 at time of trust creation and funded and disabled by Social Security definition. | No limits or requirements |
| Grantor/settlor | Any person (but beneficiary owns account) | (A): Person with disability, but trust must be established by parent, grandparent, guardian or court; (C): Person with disability; trust must be established by beneficiary, parent, grandparent, guardian or | Anyone | Anyone other than person with disability |

Comparing ABLE Act accounts and special needs trusts

| | | | |
|-------------------------------------|---|---|---|
| Tax issues | No tax on earnings, distributions taxed unless used for "qualified disability expenses" | court. Trust earnings taxed to beneficiary under grantor trust rules; no separate tax on distributions | Taxed at higher trust rates but distributions to or for beneficiary carry out income tax liability; may be set up to grantor pays income tax at his or her rate |
| Effect of distributions on benefits | If for "qualified disability expenses," no effect on eligibility or benefit levels | Only distributions for food and shelter raise issues re: eligibility; distributions directly to beneficiary generally precluded | Distributions to beneficiary may cause benefit reduction or loss, as may distributions for food or shelter; other distributions have no effect on most eligibility programs |
| Management of assets | State program provider; account holder may choose state | (A) Someone other than beneficiary; court often supervises (C): Pooled trust administrator | Someone selected by settlor; often family members but sometimes professionals (with costs and bureaucracy) |
| Countable resource? | Yes for SSI if balance exceeds \$100,000 | No | No |
| Maximum contribution | Gift tax exemption amount (currently \$14,000) per year total, from any source | No limit | No limit |
| Limit on number of accounts | 1 per beneficiary | No limit | No limit |