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on Special Needs Planning and Special Needs Trusts
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*The Good, the Bad, and the Unknown of
Using ABLE Accounts*

Stephen W. Dale, JD, LLM
The Dale Law Firm, PC
Golden State Pooled Trust
www.dalelawfirm.com
steve@dalelawfirm.com

Bradley J. Frigon, JD, LLM, CELA, CAP
Law Offices of Bradley J. Frigon, LLC
www.bjflaw.com
bfrigon@bjflaw.com

Peter J. Wall
Director of Fiduciary Services
True Link Financial
www.truelinkfinancial.com
peter.wall@truelinkfinancial.com

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I. Introduction

Thanks to the tireless work of many advocacy organizations, lawmakers have recognized and attempted to address the significant costs and burdens inherent to people living with a disability. The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act (the “Act”) was passed by the 113th United States Congress and signed into law by President Barack Obama on December 19, 2014. There have been significant changes to the Act since its passing, which will also be addressed in this presentation. As the Act itself states, it is meant to “(1) encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life,” and “(2) provide secure funding for disability-related expenses of beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, title XVI (Supplemental Security Income) and title XIX (Medicaid) of the Social Security Act, the beneficiary’s employment, and other sources” (Achieving a Better Life Experience Act [“ABLE Act”], Pub. L. No. 113-295 § 101). According to the Social Security Administration’s (SSA) Monthly Statistical Snapshot for June 2020, over 5.3 million Americans receive Supplemental Security Income (SSI) benefits, and just under 2.7 million Americans receive SSI coupled with their traditional Social Security benefits. As such, close to 8 million people with disabilities in the United States can potentially benefit from this monumental Act.

This presentation will provide an overview of ABLE accounts and their utility in trust administration and planning for people with disabilities. Coordination with Special Needs Trusts (aka Supplemental Needs Trusts and Disability Trusts) administration will be evaluated. Analysis of ABLE Act changes and facets of beneficiary distribution mechanisms and public benefits eligibility will be provided, along with recent case law. In other words, all aspects of ABLE accounts will be covered - including the Good, the Bad, and the Unknown.

II. Overview

The ABLE Act is named after the late National Down Syndrome Society's Vice Chairman and quarterback of the legislation, Stephen Beck, Jr. - a father of a daughter with Down syndrome. The Act amends the Internal Revenue Code (IRC) Section 529 by adding Section 529A, creating a tax-free savings account option for people with disabilities. At its core, the ABLE Act provides an avenue for people with disabilities to save funds in excess of the \$2,000 resource cap in order to qualify for SSI and preserve their other vital public benefits such as Medicaid. ABLE accounts have become an incredible option not only as savings vehicles but also as a way to empower and promote independence for people with disabilities. Additionally, all income earned within an ABLE account can grow tax-free if properly administered. A copy of the applicable IRC section (26 U.S. Code § 529A) may be found in Appendix A.

In March of 2015, the U.S. Department of the Treasury, in collaboration with the Internal Revenue Service (IRS), issued Internal Revenue Bulletin 2015-18 providing authority for states to establish ABLE programs before full federal guidance on IRC § 529A. The majority of states that have established an ABLE program have done so through their State Treasurer or their state's existing 529 Qualified Tuition Program (QTP). Other states have authorized governmental agencies, such as their Department of Health and Human Services, to provide ABLE account administration services. It is important to note that the original Act language indicated that qualified individuals were only allowed to open ABLE accounts in their specific state of residence. However, that regulation was amended to remove the beneficiary residency requirement in the Consolidated Appropriations Act of 2016 (Pub. L. No. HR 2029 § 303). This means that people with disabilities can open an ABLE account sponsored by any state, regardless of their residence.

Some of the more salient features of ABLE accounts presented throughout this presentation include:

- Income and capital gains (as applicable) are non-taxable if the account is properly administered.
- Contributions of up to \$15,000 per year (2020) may be made by any "person."
 - Includes ABLE account beneficiary third parties, trusts

- Contributions are not tax-deductible.
- ABLE accounts do not count as a resource for SSI and Medicaid determination.
- Limited eligibility: the onset of an ABLE account beneficiary's disability must have occurred prior to age 26
- ABLE accounts are subject to estate recovery in most states.
- ABLE accounts may be used to pay for Qualified Disability Expenses (QDEs) without incurring a tax penalty.
- The maximum amount that may be held in an ABLE account without a potential reduction in an account holder's SSI eligibility is \$100,000 (2020).

III. ABLE Account Qualifications

The Act limits eligibility to individuals with disabilities who can prove that their disability had an age of onset before 26. A common misconception is that a person with a disability must be under the age of 26 to open an ABLE account, which is not true - the ABLE account holder must only be able to prove that their disability had an onset before age 26. If an individual with a disability meets this age-of-onset requirement and already receive SSI or Social Security Disability Insurance (SSDI) benefits, they automatically qualify for participation in an ABLE program.

However, if an individual with a disability is not a recipient of either SSI or SSDI, they may still qualify for an ABLE account. This may be achieved by submitting a letter of disability certification from a licensed physician (a Doctor of Medicine [M.D.] or Doctor of Osteopathic Medicine [D.O.]). It may behoove the applicant to follow the procedures outlined in the Disability Evaluation Under Social Security process. More information on this process and qualifications may be found at <https://www.ssa.gov/disability/professionals/bluebook>. It is important to note that qualifying for an ABLE account by submission of a doctor's certification does not mean the individual is qualified to receive SSI or SSDI benefits; they must apply for such benefits separately.

Limiting ABLE accounts to people with disabilities that have an onset before age 26 truly curbs the effectiveness and utility of this potent tool. Advocacy groups such as the National Academy of Elder Law Attorneys (NAELA) and the ABLE National Resource Center (www.ablenrc.org) continue to push for legislation that would adjust this age requirement. Proposed legislation in Congress suggests an extension of this age-of-onset requirement to age 46.

IV. Contributions

In its simplest terms, a “contribution” to an ABLE account is the payment of funds, regardless of source, into the ABLE account. Contributions may be made by any “person.” This includes third-party monies (e.g., from a relative of the ABLE account holder), first-party monies (e.g., the ABLE account holder’s personal funds received from wages, inheritances, public benefits programs, etc.), or trust vehicles. In 26 CFR 301.7701-6(a), the IRC defines “person” to include “an individual, *trust*, estate, partnership or corporation” [emphasis added]. Transfers from an SNT to an ABLE account are certainly allowable, and the effectiveness of such transfers will be addressed further herein

More information for treatment of deposits into an ABLE account may be found in the Social Security Administration (SSA) Program Operations Manual System (POMS) SI 01130.740.B.2, which states (in part) that:

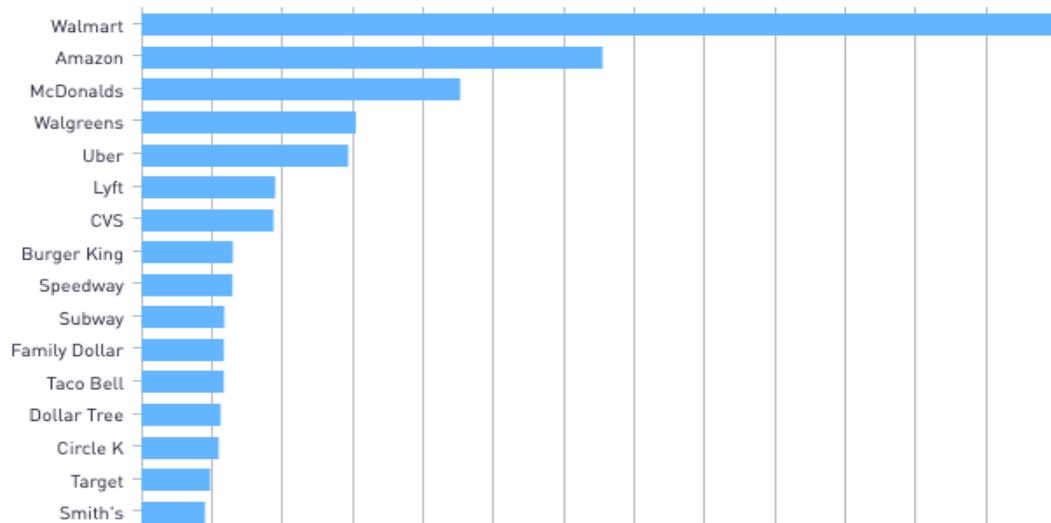
- Contributions are payments of funds into an ABLE account.
- Contributions may be made by any person. (Again, “person,” as defined by the IRC, includes an “individual, *trust*, estate, partnership, association, company, or corporation” [emphasis added].)
- The total annual amount of contributions from all sources is limited to the amount of the per-donee gift-tax exclusion in effect for a given calendar year.

The amount of funds allowable for contribution to an ABLE account in any calendar year is currently set at \$15,000, subject to additional situations that will be subsequently reviewed. As stated above, this amount coincides with the federal gift-tax exclusion amount. This contribution

limit is applicable per ABLE account beneficiary, and not per donor to the ABLE account. This is important to note as it is a deviation from the rules governing 529 QTPs.

Per POMS SI 01130.740.A.1, “[A] designated beneficiary is limited to one ABLE account, which a qualified ABLE program administers. Except in the case of a rollover or program-to-program transfer, if a designated beneficiary has an additional account, it generally will not be treated as an ABLE account, and will be subject to normal resource counting rules.” However, should an ABLE account holder have more than one ABLE account, they have 90 days from the latest ABLE account opening to close or transfer all but one of the accounts and avoid the extra ABLE accounts counting as resources.” Again, the overall contribution limit of \$15,000 annually is applicable in aggregate across all accounts.

Section 103 of the Act “requires amounts in ABLE accounts to be disregarded in determining eligibility for means-tested federal programs except...for amounts in an ABLE account exceeding \$100,000” (Pub. L. No. 113-295 § 103). However, funds in an ABLE account tend to be transitory in nature. In other words, funds deposited to an ABLE account are typically expended on the ABLE beneficiary’s needs rather than used as a savings vehicle. True Link Financial, LLC (True Link), provided the True Link Protection Visa Prepaid Card (True Link Card) to the STABLE program; the data True Link analyzed through January 16, 2020 show that most purchases made from the ABLE accounts analyzed are for daily necessities at low-cost merchants and food vendors:



This transitory-money theory is further illustrated in the chart below, which shows that the average ABLÉ account size nationally is only approximately \$5,000:

As of September 30, 2018	Plan Type	Launch Date	Accounts	Accounts (%)	Assets	Assets (%)	Average Account
STABLE Account (12)			8,324	28%	\$42,107,507	29%	\$5,059
Ohio	National	6/1/2016	5,426		\$30,941,841		\$5,703
Kentucky	State	12/13/2016	260		\$1,229,372		\$4,728
Vermont	State	2/22/2017	211		\$684,299		\$3,243
Missouri	State	4/24/2017	786		\$3,421,898		\$4,354
Georgia	State	6/14/2017	392		\$1,374,114		\$3,505
South Carolina	State	11/16/2017	442		\$1,569,916		\$3,552
New Hampshire	State	12/15/2017	129		\$534,644		\$4,145
New Mexico	State	1/18/2018	156		\$565,833		\$3,627
West Virginia	State	2/9/2018	75		\$154,647		\$2,062
Wyoming	State	3/2/2018	54		\$153,760		\$2,847
Arizona	State	3/5/2018	296		\$1,238,404		\$4,184
Oklahoma	State	5/31/2018	97		\$238,779		\$2,462
National ABLÉ Alliance (15)			5,129	17%	\$27,051,129	19%	\$5,274
Alaska	National	12/15/2016	197		\$925,716		\$4,699
Colorado	National	8/23/2017	327		\$1,618,229		\$4,949
Delaware	National		13		\$60,646		\$4,665
District of Columbia (DC)	National	7/27/2017	33		\$135,762		\$4,114
Illinois	National	1/26/2017	519		\$2,825,937		\$5,445
Indiana	National	7/27/2017	217		\$762,948		\$3,516
Iowa	National	1/26/2017	336		\$1,754,338		\$5,221
Kansas	National	1/26/2017	233		\$1,149,132		\$4,932
Minnesota	National	1/26/2017	648		\$3,382,724		\$5,220
Montana	National	7/27/2017	135		\$567,093		\$4,201
Nevada	National	1/26/2017	308		\$1,355,671		\$4,402
New Jersey	National	6/18/2018	60		\$242,150		\$4,036
North Carolina	National	1/26/2017	450		\$2,248,464		\$4,997
Pennsylvania	National	4/3/2017	1,550		\$9,539,173		\$6,154
Rhode Island	National	12/15/2016	103		\$483,146		\$4,691
Other Partnership States (2)			1,190	4%	\$6,403,609	4%	\$5,381
Nebraska	National	6/30/2016	1,065		\$5,945,437		\$5,583
Alabama	State	2/27/2017	125		\$458,172		\$3,665
Florida	State	7/1/2016	2,521	8%	\$10,611,710	7%	\$4,209
Louisiana	State	6/28/2017	129	0%	\$396,679	0%	\$3,075
Massachusetts	National	5/10/2017	1,771	6%	\$11,611,534	8%	\$6,556
Maryland	National	11/28/2017	762	3%	\$3,428,184	2%	\$4,499
Michigan	National	11/1/2016	1,265	4%	\$6,234,904	4%	\$4,929
New York	State	8/10/2017	489	2%	\$2,471,003	2%	\$5,053
Oregon		12/6/2016	1,713	6%	\$8,289,988	6%	\$4,839
	National		1,355		\$6,495,034		\$4,793
	State		358		\$1,794,954		\$5,014
Tennessee	National	6/10/2016	1,821	6%	\$12,217,135	8%	\$6,709
Texas	National	5/8/2018	261	1%	\$424,547	0%	\$1,627
Virginia		12/19/2016	4,230	14%	\$12,593,117	9%	\$2,977
	National		4,173	14%	\$12,290,454	9%	\$2,945
	Advisor		57	0%	\$302,663	0%	\$5,310
Washington	National	7/23/2018	102	0%	\$186,991	0%	\$1,833
Totals			29,707	100%	\$144,028,040	100%	\$4,848

Ignoring the aforementioned \$100,000 cap for means-tested public benefits, the total account balance allowable in an ABLE account is subject to the individual state program and its limit for 529 QTPs. This aspect of ABLE accounts, compounded by the \$15,000 annual contribution limit, most likely indicates that it will be quite some time before any practitioners or planners will have to address any negative consequences to ABLE beneficiaries as they relate to this overall limit. For example, the maximum amount that may be contributed to an Alaska 529 QTP is \$475,000. Assuming \$15,000 per year in contributions to an Alaska ABLE account (and disregarding any investment growth), it would take just over 31 years to hit that limit. Additionally, if these contributions were, for example, third-party contributions, there are most likely better planning options available - such as a third-party SNT (especially given estate recovery considerations). Lastly, there are no “catch-up” or “lump-sum” contribution provisions to ABLE accounts as there are for contributions to 529 QTPs.

Contributions to an ABLE account must always be after-tax dollars, and thus grow tax-free similar to 529 QTPs and Roth IRAs. Per POMS SI 01130.740.B.2, “contributions must be in cash and may be made in the form of cash or a check, money order, credit card, electronic transfer, Gift of Independence card, or a similar method.” Transfer of securities or other investments into an ABLE account is unallowable. In other words, donors looking to pass highly appreciated assets on to beneficiaries for tax planning purposes should review other avenues to achieve their goals.

The vast utility of ABLE accounts is beginning to manifest itself in unique and creative ways throughout the country. In *Warchol v Kings County Office of Education*, 2018 WL 118 5052 (ED Calif, March 6, 2018), the plaintiff (a minor who had “previously been diagnosed with autism and is non-verbal”) alleged that over the course of a school year they had been subjected to verbal and physical abuse by the defendant. The settlement provisions in the case stipulated in part that settlement proceeds were to be placed in an ABLE account for the plaintiff, staggered in roughly \$15,000 amounts annually over a period of four years.

In a 2015 child-support proceeding (*Kirby v Semeyn*, 2017 Ark App 556, 531, S.W. 3d 462 (October 25, 2017)), the custodial parent petitioned the court for an increase in child-support

payments as well as requesting child-support payment in arrears. The custodial parent argued that the original child-custody agreement required annual computations of child support and contained an automatic escalation clause. Further, the custodial parent took the position that the non-custodial parent had a duty to revise their income figures annually and adjust their child-support obligation accordingly, which had not been done. The claim for child support in arrears totaled \$255,000. To further complicate the issue, the parents had a child with special needs. They had previously agreed to set up a trust for the benefit of their child with disabilities, with each party funding the trust with three percent of their gross income. It came to light during the proceedings that the trust had never been established or funded. As such, the lower court ordered both parties to establish an SNT for the child and pay their past due amounts into the trust. The order of the lower court also erroneously held that these payments constituted child support. Statutorily, child support is paid by the non-custodial parent to the custodial parent - not to a trust, and not by each party. Additionally, funding the SNT with child-support payments comes with its own set of problems and potentially confuses the important distinction between first-party and third-party monies. Parental income is deemed to the child for SSI and most Medicaid programs. In other words, the parents' income is considered the child's own income when determining the child's financial eligibility for means-tested benefits. Additionally, child-support payments are considered unearned income to the child on whose behalf the payments are made, thus potentially further reducing their SSI benefits. While the particulars associated with the child's needs and planning are unknown in this case, there may have been a creative way to use an ABLE account to satisfy some of the complexities of the child-support payments. In summary, it is clear that planners and attorneys have a tool at their disposal in ABLE accounts and should always be looking for opportunities to use it.

V. Signature Authority

When creating an ABLE account, a planner must consider who owns the account and who has signature authority to manage the account. POMS SI 01130.740.B.6 states:

“A person with signature authority can establish and administer an ABLE account for a designated beneficiary who is a minor child or is otherwise incapable of managing the

account. Signature authority is not the equivalent of ownership. The person with signature authority must be the designated beneficiary's agent acting under power of attorney, or if none, a parent or legal guardian of the designated beneficiary. Always consider the designated beneficiary to be the owner of the ABLE account, regardless of whether someone else has signature authority over it.”

When advising people with disabilities and families about how and when to use an ABLE account, practitioners should consider the ramifications of ownership of the account by the ABLE beneficiary. For instance, the ABLE Act and the POMS consider the ABLE beneficiary the owner of the account. If a parent were to establish an account for their child, when the child reaches the age of majority, they can demand to control the account unless the parent can establish their child lacks capacity. It should be noted that there is a difference between having capacity and being able to prudently manage one’s finances.

In California, for instance, guidance is given in California Probate Code 810, which states in part that “there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.” Merely being diagnosed with a mental disorder or developmental delay does not establish a lack of capacity. When someone is seeking a determination that a person with a disability lacks capacity, California Probate Code 810 requires:

“...a judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person’s mental functions rather than on a diagnosis of a person’s mental or physical disorder.”

Before contributing or building substantial funds in an ABLE account, parents should also consider the capacity of the ABLE beneficiary. For instance, if the parents were to establish an account and then die or lose capacity themselves, the only option remaining to control the account would be the establishment of a guardianship or conservatorship of the estate.

VI. Qualified Disability Expenses

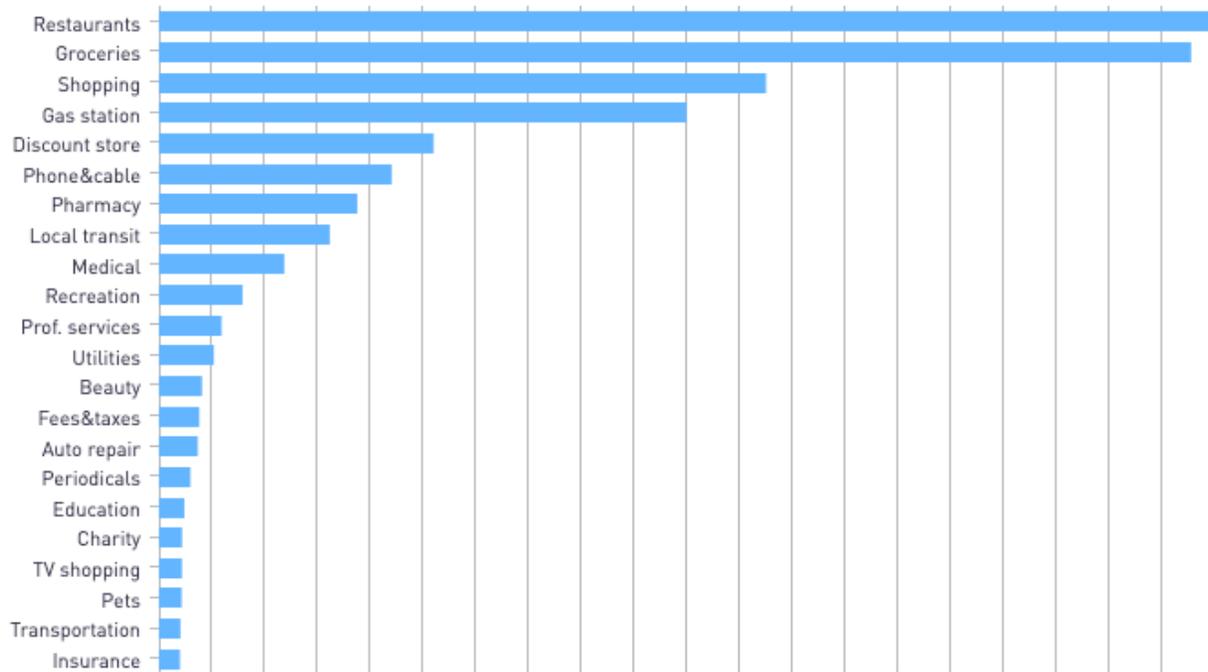
Distributions from an ABLE account are to be used for a Qualified Disability Expense (QDE) only. Thankfully, QDEs cover a vast amount of categories and allowable distributions, which should greatly increase ABLE's efficacy in empowering individuals with disabilities and assisting them in achieving a better quality of life.

POMS SI 01130.740.B.8 indicates that a "QDE includes, but is not limited to, an expense for":

- Education
- Housing
- Transportation
- Employment training and support
- Assistive technology and related services
- Personal support services
- Health
- Prevention and wellness
- Financial management and administrative services
- Legal fees
- Expenses for ABLE account oversight and monitoring
- Funeral and burial
- Basic living expenses

Of note, POMS SI 01130.740.B.9 clarifies that "for ABLE purposes, food is considered a qualified disability expense (basic living expense)." This provision is a large deviation from the Social Security Administration's prohibition on distributions from an SNT for in-kind support and maintenance (ISM). In general, the POMS defines ISM as unearned income in the form of food or shelter to the recipient and/or beneficiary. In many cases, receipt of ISM by an SNT beneficiary from their SNT would result in a reduction of their SSI benefit amount. See POMS SI 00604.058 for ISM attribution specifics. As such, whereas an SNT trustee would, in most cases (e.g., without the beneficiary's one-third reduction in SSI to allow for receipt of ISM), be unable to pay for food for their beneficiary, payment for food for the same beneficiary through

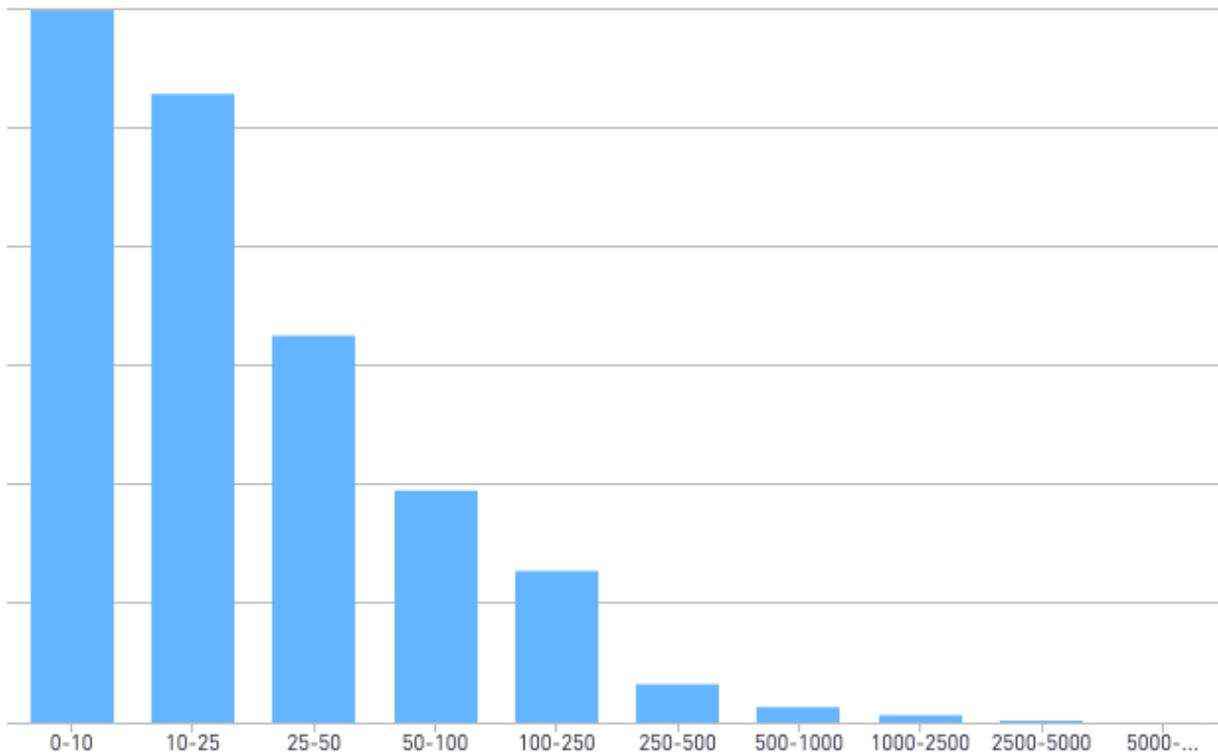
an ABLÉ account is now allowable. Of note, the aforementioned True Link research shows that most purchases made from an ABLÉ account are for food:



The payment of housing expenses is another way in which ABLÉ account administration differs from ISM attribution. When computing household operating expenses for ISM the following categories are typically considered (again, please reference POMS SI 00604.058 for ISM attribution specifics):

- Food
- Rent
- Heating fuel
- Electricity
- Water
- Mortgage (including property insurance required by the mortgage holder)
- Real property taxes
- Gas
- Sewage
- Garbage removal

Interestingly, POMS SI 01130.740.B.9 defines allowable housing distributions from an ABLE account as “similar to household costs for in-kind support and maintenance purposes” and lists the exact same categories above as QDEs (with the exception of food as noted above). Here again, whereas the SNT trustee is limited in their avenues of paying for housing or shelter without potentially negatively impacting their beneficiary’s SSI amount via ISM attribution, an ABLE account beneficiary has no such barriers. However, as per the data provided from True Link’s analysis, it does not appear that the payment of rent using an ABLE account is not common. The chart below shows that ABLE beneficiaries are typically using their accounts to make purchases of \$25 or less, and overwhelmingly for transactions \$250 or less. Because rent payments are typically much higher than \$250 per month, it may be inferred that ABLE accounts are seldom used to make.



However, it should be noted that a distribution for a housing-related QDE or for an expense that is not a QDE is a countable resource if the beneficiary retains the distribution into the month following the month of receipt. If the beneficiary spends the distribution within the month of receipt, there is no effect on public benefits eligibility.

For example, if an ABLÉ account beneficiary takes a distribution of \$500 from their ABLÉ account in May to pay for their rent in June, such rent payment must not linger past month-end in May. If this distribution for a housing-related QDE is part of their checking account balance from June 1 on, it is a countable resource for the month of June.

ABLE accounts may also be invaluable to beneficiaries with an SNT in certain states. For example, some states' Medicaid programs highly scrutinize or even disallow any payments (prepaid or otherwise) from an SNT for funeral and burial expenses. For reference, the specific payment of funeral and burial expenses is not only cited in POMS SI 01130.740.B.8 but also in the Act itself (Pub. L. No. 113-295 § 102).

The IRS is the auditing body for ensuring that ABLÉ funds are expended on QDEs. It is recommended that ABLÉ beneficiaries keep detailed records of all purchases (including receipts) in case of an audit. Additionally, should an ABLÉ account holder use their ABLÉ account to make a non-QDE purchase, the ABLÉ account earnings attributable to that withdrawal are subject not only to regular income tax but also to a 10% penalty. It is important to note that in addition to this 10% federal penalty, such non-QDE purchases may be subject to state-specific penalties.

Amounts distributed from a qualified ABLÉ account are included in the gross income of the distributee as provided in IRC § 72 (relating to annuities) to the extent not otherwise excluded from gross income. If the distributions from an ABLÉ account do not exceed the QDEs of the designated beneficiary, no amount is included in gross income. If distributions exceed the allowable QDEs, the amount otherwise included in gross income is reduced by an amount that bears the same ratio to the distributed amount as the QDEs bear to that amount. The portion of any distribution that is includible in gross income is subject to the aforementioned 10% federal penalty.

For example, assume a qualified ABLÉ account with a balance of \$100,000 (of which \$50,000 consists of contributions) distributes \$10,000 to a beneficiary who has incurred \$6,000 of QDEs.

Pursuant to IRC § 72, one-half of the distribution (\$5,000) is included in the beneficiary's gross income. The \$5,000 amount otherwise includible in gross income is reduced by \$3,000 (\$6,000/\$10,000 [60%] multiplied by \$5,000) to \$2,000. An additional tax of \$200 (10% of \$2,000) is imposed on the distribution.

VII. ABLE Advantages (aka “The Good”)

One of the main advantages of ABLE accounts is their ability to provide people with disabilities a tax-free vehicle for their savings. Before the ABLE Act, many people with disabilities on means-tested public benefits were forced into the untenable position of being unfairly impoverished (e.g., having to potentially frivolously waste monies at month's end to meet their \$2,000 resource cap). For this reason alone, the ABLE Act is a monumental step forward for disability rights.

Additionally, allowing people with disabilities to pay for food and shelter/housing expenses from their ABLE accounts without any ISM reduction to their SSI benefits is a game-changer - not only for the individual with a disability but also for planners, attorneys, and trustees. Family members are now able to contribute their own funds to their loved one's ABLE account and have those monies used for rent or food without worrying about running afoul of public benefits regulations, albeit only up to the \$15,000 annual contribution limit.

Most contributions to an ABLE account do not count as income to the beneficiary for SSI determination purposes. In addition to contributions of the ABLE beneficiary's Social Security funds and contributions from any “person” (to include third parties and trusts - see above), POMS SI 01130.740.C.1 excludes the following contributions as countable income for the ABLE beneficiary:

- Rollovers from a family member's ABLE account
- Rollovers from a 529 QTP
- Contributions in excess of the \$15,000 annual limit if the ABLE beneficiary worked and did not contribute in the same taxable year to a defined contribution plan, annuity contract under section 403(b) of the IRC, or eligible deferred compensation plan

- Contributions from an employed ABLE beneficiary annually up to the lesser of:
 - Federal Poverty Level (FPL) for a one-person household for the preceding calendar year
 - The amount of the ABLE beneficiary's earnings and other compensation

However, POMS SI § 01130.740.C.1 goes on to state that “income received by the designated beneficiary and deposited into his or her ABLE account is income to the designated beneficiary.” In other words, making a deposit of income to an ABLE account does not remove its treatment as income for public benefits qualification purposes. POMS SI 01130.740.C.1.a makes it clear that “an individual cannot use direct deposit to avoid income counting.” Lastly, POMS SI 01130.740.C.2 states that income earned on investments within the ABLE account does not count as income for the ABLE account beneficiary.

The ABLE Act can facilitate financial independence and empowerment for people with disabilities, including simplifying the seemingly simple act of paying for goods and services. Many people without disabilities take for granted the fact that they can easily pay for goods and services using a credit card, cash, or other forms of payment. For beneficiaries of an SNT, this is not always the case. They may have to coordinate with the vendor and the SNT trustee to arrange for payment. This process can be demeaning, frustrating, and overly cumbersome. Thankfully, many states' ABLE programs offer credit cards or checks to their beneficiaries. STABLE (www.stableaccount.com), the largest national provider of ABLE accounts, offers fee-free True Link Cards to its beneficiaries. With its online account management and tracking of distributions, a True Link Card may be a very valuable tool in case of an IRS audit of a beneficiary's QDE compliance. Additionally, True Link Cards are noted as a viable distribution mechanism in POMS SI 01120.201.I.1.e.

Finally, distributions from an ABLE account do not count as income to the beneficiary for public benefits qualification purposes. POMS SI 01130.740.C.4 states that a “distribution from an ABLE account is not income but is a conversion of a resource from one form to another....” This is further confirmed in POMS SI 01110.600B.4. Additionally, distributions from an ABLE account do not count as income of the designated beneficiary, even if the distributions are for a QDE that is not related to housing, are for a housing expense, or are for a non-qualified expense.

VIII. ABLÉ Disadvantages (aka “The Bad”)

The full utility of ABLÉ accounts is somewhat hampered by their limited scope. These limitations include:

- \$100,000 balance disqualification for SSI benefits
- Small annual contribution limit (\$15,000 annually)
- Age restrictions (must be able to prove onset of disability before age 26)
- Non-SSI/SSDI recipients must obtain a doctor’s (M.D. or D.O.) certification of disability
- Various state-to-state differences in administration of ABLÉ programs

Additionally, financial fraud and exploitation are some of the largest issues for older adults and people with disabilities. According to the National Adult Protective Services Association, 1 in 20 older adults or people with disabilities report some form of financial exploitation. That number may in fact be even higher as some studies indicate that only 1 in 44 cases such as these are actually even reported. Financial exploitation may include instances where trusted individuals force a person with a disability to take cash from an ATM using their ABLÉ account funds; they may even obtain a financial power of attorney from the person with a disability, allowing the fraudster potential unfettered access to the ABLÉ account. Individuals with disabilities are sometimes more trusting and may not realize that they are being taken advantage of. Coupling this trusting nature with a cognitive disability makes it more likely that such predatory behaviors will go unreported. As such, the “pros” of empowerment and financial independence must be carefully weighed against the potential for fraud and exploitation when considering opening an ABLÉ account.

With a few state-specific exceptions (e.g., California, Oregon, Pennsylvania), Medicaid estate recovery of funds within an ABLÉ account must also be considered a disadvantage. A prudent planner or attorney will almost certainly advise family members or other potential third-party donors to an ABLÉ account to consider a third-party SNT or another vehicle when contemplating estate planning of larger funding amounts.

The limited options for the remainder interest of an ABLÉ account upon the death of the ABLÉ beneficiary must also be considered. Although there is nothing in the ABLÉ Act that restricts programs from allowing a beneficiary designation on the account, all programs list the remainder

beneficiary as the beneficiary's estate. This has several disadvantages. If the ABLE beneficiary wants to name someone other than their heirs at law the beneficiary would need to execute a will. If the beneficiary lacks the ability to execute a will then the only option for remainder beneficiaries will be the beneficiary's heirs at law. Contrast that with a 3rd party SNT, which will allow the grantor not only to designate the remainder beneficiary but also the terms of the ultimate distribution.

Depending on the amount of the remainder, the lack of an option to place a beneficiary designation on the account could have the effect of subjecting the funds to a Medicaid Recovery lien even in states where the ABLE account itself is not subject to a Medicaid lien. For example, in California, the Estate Recovery lien is subject to any Medicaid expense after the age of 55, payable from any assets that are subject to probate. It is very possible that a CalABLE account could avoid any Medicaid lien on the ABLE account itself, but in turn, have those funds subject to an Estate Recovery lien because of the inability to place a beneficiary designation on the account. It is recommended that practitioners familiarize themselves with options in their states.

Finally, while an ABLE account is not considered an asset or resource for SSI determination, it may certainly be considered as such in a creditor proceeding. Of note, the Act itself removes an ABLE account from bankruptcy proceedings in certain circumstances. Pub. L. No. 113-295 § 104 amends the bankruptcy code to exclude ABLE account funds from a person's estate if "(1) the designated beneficiary of such account was a child, stepchild, grandchild, or step grandchild of the debtor; (2) such funds are not pledged or promised to any entity in connection with any extension of credit and are not excess contributions to an ABLE account; and (3) such funds do not exceed \$6,225 during a specified time period." That noted, there are no such exclusions for other creditor proceedings such as divorce or foreclosure.

IX. Trust Coordination

As addressed throughout this presentation, ABLE accounts offer maximum flexibility in terms of distributions not generally afforded to SNT trustees without consequences to the beneficiary's public benefits. The ability to pay for ISM items (food and shelter) from an ABLE account with

no negative effect on the beneficiary's public benefits is enviable to the SNT trustee. Thankfully, transfers from an SNT to an ABLE are allowable, providing the SNT trustee with unique planning and distribution opportunities.

As noted previously, funds transferred from a trust account are excluded from being counted as income to the trust and ABLE beneficiary. Recall that POMS SI 01130.740.B.2 states (in part) that "contributions [to an ABLE account] may be made by any person. ("Person," as defined by the Internal Revenue Code (IRC), includes "an individual, *trust*, estate, partnership, association, company, or corporation" [emphasis added].) As such, should there be a viable and prudent need for a beneficiary's SNT trustee to distribute funds for the beneficiary's food or shelter, they may do so via a transfer to the beneficiary's ABLE account.

Caution must be taken by the trustee to assess all of the beneficiary's public benefits before making any discretionary distribution. In cases wherein the U.S Department of Housing and Urban Development (HUD) (aka Section 8) waiver programs may be received by the beneficiary, it should be noted that some housing authorities count regular distributions from an SNT as income when determining a beneficiary's ongoing or initial waiver eligibility. Therefore, it may be in the best interest of the trust beneficiary to establish an ABLE account to pay those expenses per the HUD Notice H-2019-06.

Certainly, transferring funds from an SNT to an ABLE account is not a panacea. For example, should the beneficiary be susceptible to exploitation or undue influence, the issues mentioned in the previous section in regards to fraud remain. Additionally, the trustee should carefully consider their potential liability in changing the nature of funds under their full discretion to funds controlled only by the beneficiary. Such a transfer of discretionary authority may be challenged generally, including a potential violation of settlor intent (especially in third-party trust situations). It is highly recommended that drafting attorneys discuss ABLE options with settlors and include language permitting transfers from the trust vehicle to ABLE accounts in the trust document.

X. Recent ABLE Act Changes

Passed in December of 2017, the Tax Cuts and Jobs Act (TCJA) provided some interesting planning opportunities for ABLE account beneficiaries. Of note, all of the following provisions expire or “sunset” after 2025.

The first change for ABLE accounts in the TCJA allows a rollover of limited amounts from a 529 QTP account of a designated beneficiary to the ABLE account of the same beneficiary, as per the guidelines found in IRC § 529(c)(3)(C)(i)(III). This change also allows a designated beneficiary of a 529 QTP to make a transfer of funds from the QTP account to an ABLE account for a member of their family. Such transfers are not subject to income tax as long as the distributed funds are contributed to an ABLE account within 60 days of their withdrawal and, when added to all other contributions to the receiving ABLE account for the taxable year, are within the limitations set forth in IRC § 2503(b) (the annual gift-tax exclusion amount, or \$15,000 for 2020). Should such a direct transfer (or, in the case of a rollover, a contribution) exceed the annual gift-tax exclusion amount, it is subject to income tax and a 10% additional tax under IRC § 529(c)(6), as applicable.

The second improvement enacted in the TCJA for ABLE accounts provides for a Saver’s Credit for ABLE account beneficiaries. Essentially, the Saver’s Credit is a tax credit that offsets income if a person makes eligible contributions to an IRA or employer-sponsored retirement plan. This credit is now available for contributions to an ABLE account for the designated beneficiary. In order to qualify for this credit, an ABLE account beneficiary must be age 18 or older, not be a full-time student, and not be claimed as a dependent on another person’s tax return. The amount of the credit can range from 10-50% depending on the ABLE account beneficiary’s adjusted gross income (AGI) reported on their 1040 tax return. The maximum contribution amount that can apply for the credit is \$2,000 for an individual and \$4,000 if the ABLE account beneficiary files their 1040 as “married filing jointly.” As such, the maximum amount for the Saver’s Credit tops out at \$1,000 ($\$2,000 \times 50\%$) or \$2,000 if married filing jointly ($\$4,000 \times 50\%$). Rollover contributions from a QTP do not qualify for the credit. A chart illustrating the Saver’s Credit specifics follows:

2020 Saver's Credit

Credit Rate	Married Filing Jointly	Head of Household	All Other Filers
50% of contribution	AGI no greater than \$39,000	AGI no greater than \$29,250	AGI no greater than \$19,500
20% of contribution	AGI \$39,001 - \$42,500	AGI \$29,251 - \$31,875	AGI \$19,501 - \$21,250
10% of contribution	AGI \$42,501 - \$65,000	AGI \$31,876 - \$48,750	AGI \$21,251 - \$32,500

With access to the Saver's Credit, people with disabilities with ABLE accounts are now afforded retirement savings opportunities commensurate with credits previously only afforded to people without an ABLE account.

Finally, the ABLE to Work Act (AWA) assisted people with disabilities in being able to contribute more than the \$15,000 annual limit to their ABLE account if they are working. This act also sunsets in 2025. The AWA allows employed ABLE beneficiaries who do not or cannot participate in an employer pension plan to make additional contributions to their ABLE account up to the lesser of the Federal Poverty Level (FPL) or the account beneficiary's compensation for that taxable year. The 2020 FPL limits are as follows:

- 1 person family/household: \$12,760
- 2 person family/household: \$17,240
- 3 person family/household: \$21,720
- 4 person family/household: \$26,200
- 5 person family/household: \$30,680
- 6 person family/household: \$35,160
- 7 person family/household: \$39,640
- 8 person family/household: \$44,120

The AWA allows people with disabilities to work and save their way out of unfairly imposed poverty by permitting them to save more of their earnings. Additionally, it provides an avenue

for people with disabilities to potentially become less dependent on governmental support without risking their vital public benefits.

XI. “The Unknown”

The benefits and utility of ABLE accounts are certainly clear. However, as stated previously, an ABLE account is not a cure-all and may not be the best planning vehicle in all cases.

ABLE account beneficiary intent is always a difficult and esoteric topic. For example, if an ABLE account beneficiary took a distribution for a non-housing-related QDE and the beneficiary subsequently changes their mind and uses the funds for a non-qualified purpose or a housing-related QDE, the funds used for a non-qualified expense or housing-related QDE are countable as a resource as of the first moment of the month in which the funds were spent. SSA will presume that the individual’s intent to use the funds for a QDE changed as of the first of the month they spent the funds. Additionally, if an ABLE account beneficiary’s intent to use the funds for a QDE changes at any other time, but they have not spent the funds, the retained funds are countable as a resource as of the first day of the following month. Examples of the implications of change of beneficiary intent follow:

Example of a previously excluded distribution used for a non-QDE

An ABLE account beneficiary takes a distribution of \$25,000 to modify a specially equipped van in May, immediately paying a \$10,000 deposit. While waiting for delivery of the van, the beneficiary takes a trip to a local casino in July where he loses \$1,000 of the ABLE distribution gambling. The \$1,000 lost gambling funds are therefore a countable resource in July. The other \$14,000 in retained funds is an excluded resource while it continues to meet the requirements of POMS SI 01130.740.C.5.a.

Example of a previously excluded distribution used for a housing-related QDE

In June, an ABLE account beneficiary takes a \$7,000 distribution from their ABLE account to pay their college tuition (which qualifies as a QDE). The beneficiary’s tuition payment is due in September. However, in the interim, the ABLE account beneficiary has to make a \$750 advance rent payment for their college apartment in August. Understandably, the ABLE account

beneficiary uses some of the distribution they took in June to make the rent payment, thus changing the ABLE account distribution's nature to a housing-related QDE. This \$750 rent payment is therefore a countable resource in August. The remaining \$6,250 of the retained distribution is excluded while it continues to meet the requirements of POMS SI 01130.740.C.5.a.

Example of a change of intent for the use of a distribution

In June, the aforementioned ABLE account beneficiary takes a \$7,000 distribution from their ABLE account to pay their college tuition (which qualifies as a QDE). The beneficiary's tuition payment is due in September. However, in August, the ABLE account beneficiary gets a job offer and decides not to return to school. Since the ABLE account beneficiary no longer intends to use the distribution for tuition, the \$7,000 becomes a countable resource in September unless the ABLE account beneficiary redesignates it for another QDE or returns the funds to their ABLE account prior to September.

While ABLE accounts are the "shiny new toy" in a planner's arsenal, an SNT is still often the most appropriate route. As a refresher, in the most general terms, an SNT is needed for people with disabilities on means-tested public benefits with assets exceeding \$2,000. These assets may come from:

- Inheritances
- Back-payments of Social Security benefits
- Gifts
- Settlements (e.g., Personal Injury, Worker's Compensation, Medical Malpractice)
- Divorce
- Liquidation of personal assets (e.g., sale of home, etc.)
- Excess resources (e.g., PETI funds, wages, etc.)

Additionally, an SNT is a wonderful vehicle for people who may be unable to handle large sums of money or may be vulnerable to exploitation, or people who may receive means-tested benefits in the future. See below for a brief analysis of ABLE accounts versus SNTs:

	ABLE Account	SNT
Age limit	No maximum, must be disabled before age 26	First party - before age 65 Third party - none
Can be managed by a beneficiary/owner with a disability	Yes	No
Maintain public benefits eligibility	Yes	Yes
Annual contribution limit	\$15,000 (excluding ABLE to Work)	None
Tax-free growth	Yes	No
Unlimited number of accounts	No	Yes
Medicaid Estate Recovery	Yes (with CA exception)	First party - yes Third party - no
ISM payments without SSI reduction	Yes	No
SSI disqualification amount	Over \$100,000	None
Fraud/exploitation concerns	Yes	Minimized when administered by professional trustee

Additionally, SNTs may offer other tax-related benefits to the settlor as well as potentially qualifying for the Qualified Disability Trust (QDT) tax exemption of \$4,300 (2020).

Lastly, not all SNT trustees or ABLE account programs offer the same benefits. Before establishing either vehicle, beneficiaries and their advocates must consider the ease of account opening, the ongoing costs of administration, investment options and returns, and the ease of obtaining and requesting distributions. Beneficiaries and their advocates should also scrutinize the ABLE account program or trustee’s leadership, expertise, knowledge, and tenure in the field, and their values or the overarching mission of the organization. Being trapped with an

organization that does not share the goal of empowerment and enhancement of quality of life for people with disabilities will at the least be unfruitful and at the worst cause legal, tax, or health issues for the beneficiary. A great resource for research and guidance on ABLE program providers can be found at www.ablecompare.org.

X. Conclusion

ABLE accounts offer tremendous benefits and planning opportunities for people with disabilities. Coordinated correctly, an ABLE account can be quite a valuable tool and resource. However, as with all vehicles related to planning for people with disabilities - beneficiaries, trustees, planners, and attorneys must be prudent and cautious when using ABLE accounts. The ABLE Act is to be a true benefit for people with disabilities, especially as amendments to its scope and limitations continue to be made.

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Appendix A

*2020 National Conference
on Special Needs Planning and Special Needs Trusts
Stetson University*

The Good, the Bad, and the Unknown of Using ABLE Accounts

Stephen W. Dale, JD, LLM
The Dale Law Firm, PC
Golden State Pooled Trust
www.dalelawfirm.com
steve@dalelawfirm.com

Bradley J. Frigon, JD, LLM, CELA, CAP
Law Offices of Bradley J. Frigon, LLC
www.bjflaw.com
bfrigon@bjflaw.com

Peter J. Wall
Director of Fiduciary Services
True Link Financial
www.truelinkfinancial.com
peter.wall@truelinkfinancial.com

26 U.S. Code § 529A

(a) General rule

A qualified ABLE program shall be exempt from taxation under this subtitle. Notwithstanding the preceding sentence, such program shall be subject to the taxes imposed by section 511 (relating to imposition of tax on unrelated business income of charitable organizations).

(b) Qualified ABLE program For purposes of this section—

(1) In general The term "qualified ABLE program" means a program established and maintained by a State, or agency or instrumentality thereof—

(A) under which a person may make contributions for a taxable year, for the benefit of an individual who is an eligible individual for such taxable year, to an ABLE account which is established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account,

(B) which limits a designated beneficiary to 1 ABLE account for purposes of this section, and

(C) which meets the other requirements of this section.

(2) Cash contributions A program shall not be treated as a qualified ABLE program unless it provides that no contribution will be accepted—

(A) unless it is in cash, or

(B) except in the case of contributions under subsection (c)(1)(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 section 2503(b) for the calendar year in which the taxable year begins.

For purposes of this paragraph, rules similar to the rules of section 408(d)(4) (determined without regard to subparagraph (B) thereof) shall apply.

(3) Separate accounting

A program shall not be treated as a qualified ABLE program unless it provides separate accounting for each designated beneficiary.

(4) Limited investment direction

A program shall not be treated as a qualified ABLE program unless it provides that and designated beneficiary under such program may, directly or indirectly, direct the investment of any contributions to the program (or any earnings thereon) no more than 2 times in any calendar year.

(5) No pledging of interest as security

A program shall not be treated as a qualified ABLE program if it allows any interest in the program or any portion thereof to be used as security for a loan.

(6) Prohibition on excess contributions

A program shall not be treated as a qualified ABLE program unless it provides adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the limit established by the State under section 529(b)(6). For purposes of the preceding sentence, aggregate contributions include contributions under any prior qualified ABLE program of any State or agency or instrumentality thereof.

(c) Tax treatment

(1) Distributions

(A) In general

Any distribution under a qualified ABLE program shall be includible in the gross income of the distributee in the manner as provided under section 72 to the extent not excluded from gross income under any other provision of this chapter.

(B) Distributions for qualified disability expenses

For purposes of this paragraph, if distributions from a qualified ABLE program—

- (i)** do not exceed the qualified disability expenses of the designated beneficiary, no amount shall be includible in gross income, and

(ii) in any other case, the amount otherwise includible in gross income shall be reduced by an amount which bears the same ratio to such amount as such expenses bear to such distributions.

(C) Change in designated beneficiaries or programs

(i) Rollovers from able accounts

Subparagraph (A) shall not apply to any amount paid or distributed from an ABLE account to the extent that the amount received is paid, not later than the 60th day after the date of such payment or distribution, into another ABLE account for the benefit of the same designated beneficiary or an eligible individual who is a member of the family of the designated beneficiary.

(ii) Change in designated beneficiaries

Any change in the designated beneficiary of an interest in a qualified ABLE program during a taxable year shall not be treated as a distribution for purposes of subparagraph (A) if the new beneficiary is an eligible individual for such taxable year and a member of the family of the former beneficiary.

(iii) Limitation on certain rollovers

Clause (i) shall not apply to any transfer if such transfer occurs within 12 months from the date of a previous transfer to any qualified ABLE program for the benefit of the designated beneficiary.

(D) Operating rules

For purposes of applying section 72—

(i) except to the extent provided by the Secretary, all distributions during a taxable year shall be treated as one distribution, and

(ii) except to the extent provided by the Secretary, the value of the contract, income on the contract, and investment in the contract shall be computed as of the close of the calendar year in which the taxable year begins.

(2) Gift tax rules

For purposes of chapters 12 and 13—

(A) Contributions Any contribution to a qualified ABLE program on behalf of any designated beneficiary—

- (i) shall be treated as a completed gift to such designated beneficiary which is not a future interest in property, and
- (ii) shall not be treated as a qualified transfer under section 2503(e).

(B) Treatment of distributions

In no event shall a distribution from an ABLE account to such account's designated beneficiary be treated as a taxable gift.

(C) Treatment of transfer to new designated beneficiary

The taxes imposed by chapters 12 and 13 shall not apply to a transfer by reason of a change in the designated beneficiary under subsection (c)(1)(C).

(3) Additional tax for distributions not used for disability expenses

(A) In general

The tax imposed by this chapter for any taxable year on any taxpayer who receives a distribution from a qualified ABLE program which is includible in gross income shall be increased by 10 percent of the amount which is so includible.

(B) Exception

Subparagraph (A) shall not apply if the payment or distribution is made to a beneficiary (or to the estate of the designated beneficiary) on or after the death of the designated beneficiary.

(C) Contributions returned before certain date

Subparagraph (A) shall not apply to the distribution of any contribution made during a taxable year on behalf of the designated beneficiary if—

- (i) such distribution is received on or before the day prescribed by law (including extensions of time) for filing such designated beneficiary's return for such taxable year, and
- (ii) such distribution is accompanied by the amount of net income attributable to such excess contribution.

Any net income described in clause (ii) shall be included in gross income for the taxable year in which such excess contribution was made.

(4) Loss of ABLE account treatment

If an ABLE account is established for a designated beneficiary, no account subsequently established for such beneficiary shall be treated as an ABLE account. The preceding sentence shall not apply in the case of an account established for purposes of a rollover described in paragraph (1)(C)(i) of this section if the transferor account is closed as of the end of the 60th day referred to in paragraph (1)(C)(i).

(d) Reports

(1) In general

Each officer or employee having control of the qualified ABLE program or their designee shall make such reports regarding such program to the Secretary and to designated beneficiaries with respect to contributions, distributions, the return of excess contributions, and such other matters as the Secretary may require.

(2) Certain aggregated information

For research purposes, the Secretary shall make available to the public reports containing aggregate information, by diagnosis and other relevant characteristics, on contributions and distributions from the qualified ABLE program. In carrying out the preceding sentence an item may not be made available to the public if such item can be associated with, or otherwise identify, directly or indirectly, a particular individual.

(3) Notice of establishment of able account

A qualified ABLE program shall submit a notice to the Secretary upon the establishment of an ABLE account. Such notice shall contain the name of the designated beneficiary and such other information as the Secretary may require.

(4) Electronic distribution statements

For purposes of section 103 of the Achieving a Better Life Experience Act of 2014,¹ States shall submit electronically on a monthly basis to the Commissioner of Social Security, in the manner specified by the Commissioner, statements on relevant

distributions and account balances from all ABLÉ accounts.

(5) Requirements

The reports and notices required by paragraphs (1), (2), and (3) shall be filed at such time and in such manner and furnished to such individuals at such time and in such manner as may be required by the Secretary.

(e) Other definitions and special rules

For purposes of this section—

(1) Eligible individual

An individual is an eligible individual for a taxable year if during such taxable year—

(A) the individual is entitled to benefits based on blindness or disability under title II or XVI of the Social Security Act, and such blindness or disability occurred before the date on which the individual attained age 26, or

(B) a disability certification with respect to such individual is filed with the Secretary for such taxable year.

(2) Disability certification

(A) In general

The term "disability certification" means, with respect to an individual, a certification to the satisfaction of the Secretary by the individual or the parent or guardian of the individual that—

(i) certifies that—

(I) the individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, or is blind (within the meaning of section 1614(a)(2) of the Social Security Act), and

(II) such blindness or disability occurred before the date on which the individual attained age 26, and

(ii) includes a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a physician meeting the criteria of section

1861(r)(1) of the Social Security Act.

(B) Restriction on use of certification

No inference may be drawn from a disability certification for purposes of establishing eligibility for benefits under title II, XVI, or XIX of the Social Security Act.

(3) Designated beneficiary

The term "designated beneficiary" in connection with an ABLE account established under a qualified ABLE program means the eligible individual who established an ABLE account and is the owner of such account.

(4) Member of family

The term "member of the family" means, with respect to any designated beneficiary, an individual who bears a relationship to such beneficiary which is described in subparagraph ² section 152(d)(2)(B). For purposes of the preceding sentence, a rule similar to the rule of section 152(f)(1)(B) shall apply.

(5) Qualified disability expenses

The term "qualified disability expenses" means 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.

(6) ABLE account

The term "ABLE account" means an account established by an eligible individual, owned by such eligible individual, and maintained under a qualified ABLE program.

(f) Transfer to State

Subject to any outstanding payments due for qualified disability expenses, 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 from 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. For purposes of this paragraph, the State shall be a creditor of an ABLE account and not a beneficiary. Subsection (c)(3) shall not apply to a distribution under the preceding sentence.

(g) Regulations

The Secretary shall prescribe such regulations or other guidance as the Secretary determines necessary or appropriate to carry out the purposes of this section, including regulations—

- (1) to enforce the 1 ABLE account per eligible individual limit,
- (2) providing for the information required to be presented to open an ABLE account,
- (3) to generally define qualified disability expenses,
- (4) developed in consultation with the Commissioner of Social Security, relating to disability certifications and determinations of disability, including those conditions deemed to meet the requirements of subsection (e)(1)(B),
- (5) to prevent fraud and abuse with respect to amounts claimed as qualified disability expenses,
- (6) under chapters 11, 12, and 13 of this title, and
- (7) to allow for transfers from one ABLE account to another ABLE account.

(Added Pub. L. 113–295, div. B, title I, §102(a), Dec. 19, 2014, 128 Stat. 4056; amended Pub. L. 114–113, div. Q, title III, §303(a)–(c), Dec. 18, 2015, 129 Stat. 3087.)