

ABLE Accounts – What Are They and How Can They Be Utilized in The Practice of Family Law?

by Marisa Lepore Hovanec and Mark Friedman

Introduction

In 2014, federal legislation commonly known as the Achieving a Better Life Experience (ABLE) Act was passed allowing states to create tax-advantaged savings programs for individuals with qualifying disabilities.¹ These savings programs, now known as 529A ABLE accounts (ABLE accounts), operate similar to traditional 529s in that interest and earnings accrue tax-deferred and distributions are tax-free if used for qualified expenses.² However, the definition of a “qualified expense” in ABLE accounts is much broader than with a traditional 529 plan. With a traditional 529 plan, qualified expenses (and penalty-free withdrawals) are limited to education expenses. With an ABLE account, qualified expenses include education in addition to a wide range of other expenses deemed “qualified disability expenses” (QDEs).³ QDEs, as explained in more detail later, include without limitation 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, and basic living expenses for an individual with qualifying disabilities.⁴ Moreover, unlike traditional 529 plans (or almost any other financial instrument outside of a special needs trust), monies held in, and third-party contributions to, an ABLE account, up to a certain limit, will not disqualify the designated beneficiary from receiving means-tested public benefits such as Social Security and Medicaid.⁵

Though New Jersey has recognized the use of ABLE accounts since shortly after the ABLE Act was passed in 2014, these accounts are still used relatively rarely. One reason may be a lack of awareness among New Jersey residents of the existence of ABLE accounts and the benefits they can provide. Another reason is that, although New Jersey has recognized the use of ABLE accounts for several years, it did not have a state-specific ABLE account plan until June 2018. While New Jersey residents

could reap the benefits of ABLE accounts prior to June of 2018 by using other states’ ABLE plans, this option wasn’t fully apparent to the general population.

Here practitioners can get an introduction to the concept of ABLE accounts and explore the ways in which ABLE accounts may be a helpful tool in the practice of family law. In sum, ABLE accounts may, in select divorce cases, be useful alternatives to special or supplemental needs trusts in that they can enable the designated beneficiary to receive financial support in the nature of child support and/or alimony without disqualifying him or her from receiving valuable means-tested benefits, such as Supplemental Security Income (SSI) and Medicaid.

What Is An ABLE Account?

The United States Code generally defines a qualified ABLE program as a program established and maintained by a state or agency or instrumentality thereof, under which a person may make contributions for a taxable year for the benefit of a qualified beneficiary for the purpose of meeting the beneficiary’s disability expenses.⁶ To be an eligible designated beneficiary to an ABLE account, an individual must:

- a) Be eligible for SSI based on disability or blindness that began before age 26;
- b) Be entitled to disability insurance benefits (DIB), childhood disability benefits (CDB), or disabled widow’s or widower’s benefits (DWB) based on disability or blindness that began before age 26; or
- c) Certify (or an agent under a power of attorney or, if none, a parent or guardian must certify) that the individual:
 1. Has a medically determinable impairment meeting statutorily specified criteria or is blind, and,
 2. The disability or blindness occurred before age 26.⁷

An ABLE account can only accept monetary/cash contributions, as with a bank account.⁸ And, the amount of contributions, except in certain limited circumstances,

such as a rollover from another ABLE account, is limited each year to the federal gift tax exclusion (presently \$15,000).⁹ In other words, the sum total of all contributions as of 2019 is limited to \$15,000 per year. For example, if in 2019 the beneficiary contributes \$5,000, and parents contribute \$10,000, and then an aunt contributes another \$100, the account administrator is required to return the aunt's \$100 since the total would exceed \$15,000. As a result of the Tax Cuts and Jobs Act of 2017, effective Dec. 22, 2017, rollovers from traditional 529 accounts may also be made without penalty into ABLE accounts if the beneficiary of the traditional 529 is also the designated beneficiary of the ABLE account.¹⁰ However, the amount of the rollover is included in the annual contribution limitation.¹¹

Once funded, an ABLE account must be used to pay for the QDEs of the designated beneficiary. Luckily, QDEs are relatively broadly defined. The United States Code defines qualified disability expenses 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 not approved by the Secretary under regulations and consistent with the purpose of this section.¹²

So long as the contribution limits set forth above are observed and the account balance used only for the QDEs of the designated beneficiary, neither the distributions from the account, nor any earnings experienced by the ABLE account, including interest, dividends and the like, are subject to tax, nor are the distributions or earnings considered income to the designated beneficiary.¹³

Inasmuch as most individuals with disabilities depend on SSI and Medicaid to access disability-related services, establishing an ABLE account benefits those individuals by allowing them to save money for disability-related expenses while maintaining eligibility for means tested benefit programs.¹⁴ This is because money saved in an ABLE account will not affect an individual's eligibility for SSI, so long as they don't exceed the \$100,000 savings limit. Then use of an ABLE account will allow the beneficiary to maintain eligibility for Medicaid and other public benefits.¹⁵ By way of contrast, a disabled individual

with savings of only \$2,001 outside of an ABLE account or special needs trust would be *completely disqualified* from receiving any SSI benefits whatsoever.¹⁶

How Are ABLE Accounts Different Than Special Needs Trusts?

Prior to the legislation allowing for ABLE accounts, the only way for a disabled individual to save or receive gifts and income of significance without compromising his or her means-tested benefits was through a trust. More specifically, the disabled individual, or his or her representative(s), would need to set up a special needs trust, a supplemental needs trust, or a pooled trust (SNT) to receive and accumulate assets while still receiving means-tested aid. While the overall need for such trusts is lessened by the passage of the ABLE Act, there are still many instances in which an SNT will be the preferred method of protection. Conversely, ABLE accounts provide certain advantages over SNTs that may make them the better option for some individuals.

The primary advantage to establishing an ABLE account over an SNT is the low cost of plan participation. While establishing an effective SNT typically requires the involvement and expense of a skilled elder law attorney, an ABLE account can be easily established online at little to no cost, without an attorney, sometimes in a matter of minutes.¹⁷ Another significant advantage of ABLE accounts over SNTs is that the investments in ABLE accounts grow tax-free, and are not taxed upon withdrawal if used for QDEs. Yet a third significant advantage is the ability to transfer funds from a 529 account to an ABLE account for the same beneficiary without tax or penalty.¹⁸

That being said, there are significant disadvantages to ABLE accounts as compared to SNTs. For one thing, an individual who became disabled after reaching the age of 26 will not qualify for an ABLE account.¹⁹ Another obvious disadvantage is the limitation on contributions and balances. As stated, an ABLE account cannot accept annual contributions above the federal gift tax exclusion of \$15,000 for 2019. In addition, ABLE account balances above \$100,000 are considered resources for SSI purposes, so having more than \$100,000 in an ABLE account can disqualify that beneficiary from SSI, SSI-linked Medicaid, and other important benefits.²⁰ SNTs have no annual contribution limits; you can transfer in trust as much as you want at any time, and there are no limits on how much can be held in trust. For these reasons, an SNT is usually a better fit where a person with disabilities

will receive a significant amount in one lump sum, such as an inheritance or lawsuit recovery.

Finally, any balance remaining in an ABLE account when the beneficiary dies must be used to reimburse Medicaid for medical expenses paid on the beneficiary's behalf.²¹ While such requirement would apply to an SNT established by the beneficiary for his or her own benefit, or a first-party SNT (as is often used with lawsuit recoveries), it would not apply to an SNT properly established for the beneficiary by a third-party (as is often used for estate planning).

How Can ABLE Accounts Be Helpful In The Family Law Context?

Child support

The Social Security Administration (SSA) treats child support payments as unearned income to a child who receives SSI benefits.²² SSI pays a monthly check to disabled beneficiaries, like the Social Security retirement benefit most people receive when they get older. However, income reduces SSI benefits, and child support payments for the disabled child will therefore typically result in a lower monthly check and less money to meet the child's needs. Often, with people having significant disabilities, this is money that is sorely needed. To avoid such an unintended result, careful family law practitioners will often craft an agreement that calls for child support for the disabled child to be paid into an SNT.

That said, there are many cases where the parties' means and the amount of support in contest simply do not justify the high cost of establishing and administering an SNT. For example, when the child support amount is relatively low, parties may choose not to go to the trouble and expense of establishing an SNT, at a cost of thousands of dollars, just to preserve a few dollars in means-tested benefits. Prior to the existence of ABLE accounts, the custodial parent in this situation would be forced to choose between foregoing the payment of child support or receiving a reduced SSI benefit for the child.

Now, with the existence of ABLE accounts, parties in such situations can simply contract to have the non-custodial parent's child support payments paid directly into the ABLE account. As long as these payments do not exceed the annual gift tax exclusion, and the total account balance does not rise beyond \$100,000, the payments would not impact the child's means-tested benefits, thereby increasing the overall funds available to

the child and their caretaker.

Alimony

In a similar vein, ABLE accounts could be a useful receptacle for alimony payments in certain situations. As noted, only individuals who became disabled before reaching age 26 will qualify for ABLE accounts.²³ Thus, having alimony deposited into an ABLE account will not serve any potential alimony recipient whose disability arose after that age. Nor will it be very useful for anyone whose alimony entitlement greatly exceeds the annual gift tax exemption. However, for that narrow population of individuals who became disabled before reaching age 26 and have an alimony entitlement that is less than the then-existing gift tax exclusion, providing for alimony to be paid into an ABLE account could help to increase the family's total cash-flow by preserving the recipient's entitlement to valuable government benefits.

Equitable distribution

There are also conceivable scenarios whereby ABLE accounts could be utilized for equitable distribution purposes. As stated, an aggregate savings outside of an ABLE account or SNT of only \$2,001 will disqualify an otherwise qualifying individual from receiving SSI benefits.²⁴ Thus, a disabled spouse who is entitled to receive at least this amount in equitable distribution would normally do so to the exclusion of his or her eligibility for SSI. However, a qualifying disabled individual can have up to \$100,000 saved in an ABLE account without any impact on his or her means tested benefits whatsoever. In certain situations, it could therefore make sense to have the disabled spouse's share of equitable distribution paid into the ABLE account, so long as it could be paid in one or more annual installments that do not exceed the gift tax exclusion, which is \$15,000 as of 2019.

Conclusion

Prior to the establishment of ABLE accounts, the only way to prevent support and equitable distribution from impacting a disabled individual's eligibility for means-tested benefits was through the establishment of a special or supplemental needs trust. However, in some situations the cost and complexity of doing so created a barrier to entry. With the advent of ABLE accounts, those individuals for whom creating a special or supplemental needs trust was either too complex or too expensive no longer have to choose between receiving support and/

or equitable distribution and the maximum means-tested benefit for which he/she would otherwise be eligible. For these reasons, ABLE accounts can be a useful tool in the family law practitioner's toolbox. ■

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Endnotes

1. Public Law 113–295 The Stephen Beck, Jr., Achieving a Better Life Experience Act (ABLE Act) – Enacted December 19, 2014.
2. *Id.*
3. POMS, SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts (secure.ssa.gov/poms.nsf/lnx/0501130740)
4. *Id.*
5. Public Law 113–295 The Stephen Beck, Jr., Achieving a Better Life Experience Act (ABLE Act) – Enacted December 19, 2014.
6. 26 USC 529A(b)(1).
7. POMS, SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts (secure.ssa.gov/poms.nsf/lnx/0501130740)
8. 26 USC 529A(b)(2).
9. *Id.*
10. IRS Publication 907 (2018).
11. *Id.*
12. 26 USC529A(e)(5).
13. POMS, SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts (secure.ssa.gov/poms.nsf/lnx/0501130740)
14. State of New Jersey Department of Human Services, Division of Disability Services, “Achieving a Better Life Experience (ABLE),” available at <https://www.state.nj.us/humanservices/dds/hottopics/able/>.
15. *Id.*
16. “OASDI and SSI Program Rates & Limits, 2019 (released October 2018),” available at ssa.gov/policy/docs/quickfacts/prog_highlights/RatesLimits2019.html.
17. The New Jersey ABLE plan application can be found at <https://savewithable.com/nj/home/plan-benefits.html>.
18. IRS Publication 907 (2018).
19. 26 USC529A(e)(1)(A).
20. 26 USC 529A(b)(2).
21. 26 USC529A(f).
22. POMS, SI 00501.010 Determining Child Status for Supplemental Security Income (SSI) Purposes.
23. 26 USC529A(e)(1)(A).
24. “OASDI and SSI Program Rates & Limits, 2019 (released October 2018),” available at ssa.gov/policy/docs/quickfacts/prog_highlights/RatesLimits2019.html.