Frequently Asked Questions About ABLE Act Accounts for People with Disabilities

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<u>Question 1:</u> Introduction to the federal ABLE Act.

<u>Answer 1</u>: On December 19, 2014 the ABLE Act became a new federal law (Section 529A of the US Internal Revenue Code of 1986, as amended). The ABLE Act provides an opportunity for individuals with disabilities to have savings accounts that will support their education, health and other disability related needs. The ABLE Act is modeled after the IRC 529 college savings plans that have been available since the 1990's (Section 529 of the US Internal Revenue Code of 1986, as amended).

<u>Question 2</u>: Overview of the 529 college savings plan concept to see the context.

<u>Answer 2</u>: 529 plans allow parents, grandparents and other loved ones to set aside after tax dollars each year, for a child's college education beginning as early as the year of the birth of a child. The money can be invested and grow without federal income taxes. Then when the child goes to college, the money can be spent for qualifying post-secondary education payments without federal income tax on the growth of the fund. This law has encouraged parents, grandparents and others to help more with college costs.

<u>Question 3</u>: Are ABLE Act accounts only for education?

<u>Answer 3</u>: No. The ABLE Act is patterned after the 529 law, and the ABLE Act account can be used for education, but also for other disability-related expenses.

<u>Question 4</u>: What can an ABLE Act account pay for?

<u>Answer 4</u>: There is a list of 12 items stated in the ABLE law describing what ABLE Act accounts can pay for:

1. Health
2. Independence
3. Quality of life purchases
4. Education
5. Housing (with some limitations)
6. Transportation
7. Employment training and support
8. Assistive technology and personal support services
9. Prevention and wellness expenses
10. Funeral and burial expenses
11. Financial management and administrative fees
12. Expenses for oversight and monitoring

Also included as permitted purchases in the ABLE Act are: "Other expenses approved by US Treasury regulations". The US Treasury Department has not adopted final regulations as of the date of this article (February 8, 2017). On June 19, 2015 Treasury issued proposed regulations (IR-2015-91) which discuss tax issues and reporting requirements but do not set forth an additional list of permitted purchases. However, the IRS issued Guidance on November 20, 2015 and on January 29, 2016, stating that:

1. The final regulations for the ABLE Act will be issued later this year [2016]; and
2. States administering ABLE Act programs will have greatly eased State reporting and monitoring duties in the final regulations compared to the proposed regulations.

Taking the lead regarding public benefits issues, the US Social Security Administration has issued a list of permitted purchases as part of its Program Operations Manuel System (POMS SI 01130.740(5)) which is somewhat differently worded than the above statutory federal ABLE Act list. The POMS list of permitted purchases states:

> Qualified disability expenses (QDE) are expenses related to the blindness or disability of the designated beneficiary and for the benefit of the designated beneficiary. In general, a QDE includes, but is not limited to, the following types of expenses:
>
> 1. Education
> 2. Housing
> 3. Transportation
> 4. Employment training and support
> 5. Assistive technology and related services
> 6. Health
> 7. Prevention and wellness
> 8. Financial management and administrative services
> 9. Legal fees
> 10. Expenses for ABLE account oversight and monitoring
> 11. Funeral and burial; and
> 12. Basic living expenses

__Question 5__: Are there any limitations on what can go into the ABLE Act account each year?

__Answer 5__: Yes. The limit on how much can go into an ABLE Act account each year is $14,000. Each beneficiary can have only one ABLE Act account and the total going into it each year is $14,000 from all sources. Only cash can go in.

__Question 6__: What total amount can be held in the ABLE Act account?

__Answer 6__: For most people with disabilities there is a $100,000 limit on the size of the account. This limit would apply if the person with disabilities is receiving Social Security SSI monthly payments. If the person with disabilities is not receiving SSI monthly payments, the limit is higher and depends on the State limit for 529 college plans (typically $350,000). New Hampshire's 529 college plan limit is $375,000.

__Question 7__: What is an example of when people would want to set up an ABLE Act account?

__Answer 7__: One example would be parents setting up an ABLE account for a young child with disabilities with $14,000. Then the parents repeat that $14,000 gift each year up to $100,000 (including gains from investments in the ABLE account at any given time). So, if the disability occurred at birth and disability was determined to be present at birth then $14,000 a year times 5 years equals $70,000 when the child with disabilities is 5 years old. The interest, dividends and capital gains in the ABLE account are not taxed on the parents' 1040, and there may also be significant unrealized growth in the investments on the $70,000. The accumulated interest dividends and realized and unrealized gains might with luck reach near the $100,000 limit at the end of the five years of gifting. So, before that happened, the fund could start to be used for the items listed in the federal statute. If instead a more modest amount is put in each year, you get the same result over a longer period of time.

This scenario is consistent with the Congressional testimony of the co-sponsors and what public witnesses who testified talked about. One of the public witnesses, Robert D'Amerlio, testified his way:

"…My story is about a middle class family… I am a data center manager…and Christi is a realtor… Like many families across the nation, our family is an autism family – both of my sons are affected, Christopher more severely than his brother… An ABLE account would enable families like mine to save… the ABLE Act is about fairness. If Christi and I can use a college savings account to provide for our daughter Lindsey's future, why can't we use something similar to take care of Nicholas and Christopher?"

<u>Question 8</u>: What would be another example where a person would set up an ABLE Act account?

<u>Answer 8</u>: A second scenario for an ABLE Act account would be an adult with disabilities who has a part time job. For example, Jane Jones is a veteran who uses a wheelchair for mobility and can only work part time with assistance. Her finances are constrained, but she is a saver. She could put 10% of her earned income into an ABLE Act account as a rainy day fund for future needs.

Another public witness, Chase Phillips, testified before Congress this way: "This…legislation will afford…individuals with disabilities the opportunity to… keep three to six months worth of expenses in cash reserves in preparation for life's unexpected turns."

<u>Question 9</u>: How do people apply for an ABLE Act account, and how does the program operate?

<u>Answer 9</u>: ABLE Act accounts are established for an eligible individual, are owned by the person with disabilities or their guardian as guardian on their behalf and are maintained by "a State or agency or instrumentability thereof…" This concept of State maintenance is similar to the 529 college savings plan law. Most states have 529 accounts. Typically the State Treasurer (with an advisory committee) is in charge. A contracting financial institution helps operate the program (Fidelity in New Hampshire for New Hampshire's 529 program). Unlike the 529 college program, there can only be one ABLE account for a person with disabilities. The person with disabilities must have had the onset of disability prior to reaching the age of 26. The disability standard is the same as the US Social Security Administration definition. A disability certification must be provided to the US Treasury Department. There are also additional reporting and accountability requirements, including a notice of establishment of the account to the US Treasury Department, a separate accounting for each beneficiary and also monthly electronic distribution statements to the US Social Security Administration sharing purchases and account balances. There are penalties for making purchases not allowed (10% penalty and federal income taxes), or for having more assets in the account than allowed (usually $100,000). The account may not be used to secure any loan. There is a limited roll over opportunity to benefit the same beneficiary in a different plan or another beneficiary with disabilities who is a sibling or a stepsibling (without tax at the time of the rollover). As in 529 college savings accounts, contributions to ABLE Act accounts are made with after-income-tax dollars. Income taxes are not levied on deposits while held in the ABLE account. If only approved purchases are made from the ABLE account, then there is no income tax paid on the ABLE account generated income. Distributions are penalized and taxed and public benefits may be lost unless used for "qualified disability expenses". Annual contributions are limited to $14,000 per year per beneficiary from any number of people. Only cash contributions are allowed. The contribution is considered a completed gift to the donor. The State of residence is considered a creditor and entitled to make a claim after the beneficiary dies to be reimbursed for Medicaid benefits provided.

Question 10: **Can a person apply now?**

Answer 10: Yes. The ABLE Act itself provides that it shall "apply to taxable years beginning after December 31, 2014 [so as to be in effect for the tax year 2015]". The US Department of the Treasury is required by the ABLE Act to issue regulations "not later than 6 months after the date of the enactment of this Act [December 19, 2014], which means by June 19, 2015. The federal ABLE Act is in effect now and, like the 529 college savings account, the ABLE Act accounts can be established by a State and run from the clear language of the federal law if a State has passed its law as well. A State's program may be made available to residents of other States. The **Ohio** ABLE Act program was the first State to launch its ABLE Act program on June 1, 2016.

The States that have passed state ABLE laws and have launched programs (as of February 27, 2017) in the order in which they launched are:

1. **Ohio**
2. **Tennessee**
3. **Nebraska**
4. **Florida**
5. **Michigan**
6. **Oregon**
7. **Kentucky**
8. **Alaska**
9. **Rhode Island**
10. **Virginia**
11. **Kansas**
12. **Illinois**
13. **Iowa**
14. **Minnesota**
15. **Nevada**
16. **North Carolina**
17. **Vermont**
18. **Georgia**
19. **Massachusetts**
20. **Alabama**
21. **Missouri**
22. **Pennsylvania**
23. **Montana**
24. **Louisiana**
25. **Indiana**

The States that have passed State ABLE laws, but have not yet launched programs are:

1. **Arizona**
2. **Arkansas**
3. **California**
4. **Colorado**
5. **Connecticut**
6. **Delaware**
7. **Hawaii**
8. **Maine**
9. **Maryland**
10. **New Hampshire (RSA 195-K)**
11. **New Jersey**
12. **New Mexico**
13. **New York**
14. **North Dakota**
15. **Oklahoma**
16. **South Carolina**
17. **South Dakota**
18. **Texas**
19. **Utah**
20. **Washington**
21. **West Virginia**
22. **Wisconsin**
23. **Idaho**
24. **Mississippi**

The State that has not passed an ABLE enabling law and has no bill pending is:

1. **Wyoming**

<u>Question 11</u>: Has Congress passed additional ABLE legislation?

<u>Answer 11</u>: Yes, on December 18, 2015 additional ABLE legislation was passed into law as part of the Consolidated Appropriations Act of 2016 (P.L. 114-113 H.R. 2029). This new law eliminates the requirement that ABLE accounts be established only in the ABLE account owner's State of residence. This new law allows people in one State to enroll in the ABLE program established by another State. This a change which was also made in the 529 college Plans after they were first only allowed if offered in the State of residence.

Question 12: Who owns the ABLE Act account and what happens upon death?

<u>Answer 12</u>: The ABLE Act account is owned by the beneficiary with disabilities. If the beneficiary with disabilities has a guardian the account is held by the guardian for the person with disabilities.

Upon the death of the person with disabilities, a State is considered a creditor and entitled to make a claim for reimbursement for the cost of Medicaid benefits provided by the State for the person with disabilities.

Question 13: Tax Considerations.

<u>Answer 13</u>: ABLE Act accounts are patterned after 529 college savings plan accounts and work in a similar way, but the two types of accounts are treated differently for tax purposes in certain respects. First, the similarities. Both types of accounts are funded with donor after-tax dollars and give the donor completed gift status. Both types of accounts grow income tax deferred and then are not taxed at all if used for the approved purposes. Now the nuances: the total amount going into an ABLE account is limited to $14,000 per year from <u>all sources</u>, whereas 529 accounts are limited to $14,000 <u>per donor</u> per year and have "front-loading" options as well. The total account balance limit in an ABLE account is $100,000 when the Beneficiary is receiving supplemental Security income (SSI) payments. The balance limit for a 529 account in New Hampshire is $375,000 also applicable to an ABLE account if the Beneficiary is not receiving SSI.

Question 14: Compare ABLE Act accounts and Special Needs Trust accounts.

Answer 14: First the similarities. Both benefit an individual with disabilities. Both can enhance the life options of the person with disabilities. Both temper the extreme poverty of people with disabilities who have challenges in life few others share. An otherwise divided Congress voted together to enhance the life options of people with disabilities in the 2014 ABLE Act, just as Congress did in 1993 when the federal special needs trust law was passed. The ABLE Act in 2014 had more co-sponsors in Congress than any other bill filed in the same session of Congress.

Here are the differences: (1) ABLE Act accounts have an income tax benefit. Special Needs Trusts pay income taxes unless the income tax liability is passed through to the beneficiary with a K-1 reporting form. (2) ABLE accounts give parents, grandparents and other loved ones a completed gift status on their contributions whereas special needs trusts by themselves do not. (3) ABLE accounts have no minimum balance, but do have an account balance top limit. Special needs trusts have no minimum and no maximum account balance requirements. (4) ABLE accounts have a list of twelve permitted purchases, whereas special needs trust may make purchases for purposes other than the food or shelter which public programs pay for. (5) ABLE accounts have a top $14,000 per year contribution limit from all sources. Special needs trust have no contribution limits. (6) With an ABLE Act account, the owner of the account is the person with disabilities (or their guardian if they have a guardian). With a special needs trust the person with disabilities may be a grantor and the beneficiary but may not be the trustee. (7) With an ABLE account, the State will make a claim for reimbursement for Medicaid provided after the death of the person with disabilities. An inheritance special needs trust can generally name subsequent family beneficiaries without a State pay-back. (8) ABLE accounts must be funded with cash only. Special needs trusts can receive all types of property, including appreciated stock, real estate and tangible personal property. (9) Special needs trusts involve legal fees to create them unless a pooled special needs trust is chosen. With ABLE accounts a trust created by an attorney is not required. (10) ABLE accounts are only available if the onset of the disability was before the age of 26. Special needs trusts are available without that limitation.

With their specific differences and similarities, ABLE Act accounts and Special Needs Trust accounts can work together so that family funds and public programs can work together cooperatively and so that family and friends can help out more than in the past.

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