



ACHIEVING A BETTER LIFE EXPERIENCE (ABLE) ACCOUNTS: A NEW PLANNING TOOL FOR PERSONS WITH DISABILITIES

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I. ABLE PROGRAM SUMMARY

ABLE accounts are designed to allow persons with disabilities to control their own money in a tax-free environment without jeopardizing eligibility for public benefits, such as Supplemental Security Income ("SSI") and Medi-Cal. The law authorizing ABLE accounts is based on the law governing 529 Plan accounts, which allow individuals to save money for education expenses, and both provide for tax-free growth and tax-free distributions.

ABLE accounts are a boon for persons with disabilities; for the first time, such persons are allowed to save and control their own money for future expenses without risk of losing public benefits. Estate planners should be aware of these accounts so they can advise families planning for a loved one with disabilities, persons with disabilities, and trustees of a special needs trust ("SNT") regarding the use of ABLE accounts in connection with such trusts to enhance the quality of life of a SNT beneficiary.

Generally, funds in an ABLE account can be used in a number of ways to assist with the support of a person with a disability. For example, ABLE account funds can pay for a beneficiary's food or shelter, so that the account owner's Social Security funds can be used for other purposes. ABLE accounts also can hold modest litigation recoveries or unplanned inheritances, as part of a spend-down strategy. Further, ABLE accounts can receive funds from SNTs or other sources to allow persons with disabilities to manage their own money.

In addition to being exempt from income and asset calculations for purposes of SSI and Medicaid, ABLE accounts allow persons with disabilities to retain eligibility for Section 8 housing, food stamps, and other federal programs that have resource or income limitations.

To properly advise clients regarding ABLE accounts, a practitioner should understand the eligibility requirements and

management limitations related to such accounts. These include the following:

- To establish an ABLE account, a person must have been disabled prior to age 26;
- A disabled person can have only one ABLE account;
- An ABLE account can be funded with only one gift each year that qualified for the annual gift tax exclusion (\$15,000 for 2018 and indexed annually for inflation);
- An ABLE account can hold up to \$100,000 without disqualifying the account beneficiary from SSI benefits;
- An ABLE account can hold up to the state 529 plan limit (\$475,000 in California) and not disqualify the beneficiary from Medi-Cal;
- Disbursements must be for "Qualified Disability Expenses" (or risk triggering a penalty); and
- On the death of the person with a disability, any remaining funds in the ABLE account must be paid back to the state Medicaid program for any services paid to or for the benefit of that beneficiary since the opening of the account.

ABLE accounts are managed by each state that has created a program allowing for such accounts. The first ABLE program opened in Ohio. ABLE programs are now open in most states. California's ABLE program is expected to open this year. Californians interested in using an ABLE account can use programs in other states if those states allow out-of-state residents to join (which nearly all do). If a Californian wants to set up an account in another state, the person will be able to transfer that account to the California ABLE program once it is opened.¹

This article will review the history of ABLE accounts, the laws authorizing and interpreting the ABLE program, the eligibility requirements for the ABLE accounts, and how to properly evaluate and compare different ABLE programs.

II. ABLE'S HISTORY

ABLE stands for "Achieving a Better Life Experience." ABLE accounts were a grass-roots attempt by parents of children with disabilities to address the inability of persons with disabilities to save money for their future. The federal government defines "disability" as a physical or mental impairment that will last twelve months or longer and that

prevents a person from engaging in substantial gainful activity, which is defined as having the ability to earn no more than \$1,170 per month.²

Without an ABLE account, it is difficult for a person with a disability to secure resources to provide for his or her future. Even if capable of working, people with disabilities have difficulty finding employment:

In 2009, about one-fifth of people with disabilities were in the labor force compared to more than two-thirds of people without a disability. A higher proportion of people with disabilities actively look for employment but are unable to find work compared to those without disabilities. In November 2009, the unemployment rate was 14 percent for those with disabilities and 9 percent for those without. This disparity continues within the labor force: workers with disabilities tend to earn much less than those with no disabilities. In 2007, the median income of households with any working age people with disabilities was \$38,400 compared with \$61,000 for households without people with disabilities--a staggering difference of \$22,600.³

The only financial support and health care coverage available for many persons with disabilities has been that provided by government programs, like SSI and Medicaid (in California Medi-Cal). In California, the maximum SSI payment in 2018 for an individual with a disability is \$910.72 per month.⁴ This amount is designed to pay for all of the recipient's food and shelter costs. As explained below, if another person attempts to assist the recipient with money, food, or shelter, the monthly SSI amount is reduced or eliminated. Further, if assets are saved, SSI, and Medi-Cal benefits are eliminated. ABLE accounts are designed to address this predicament.

A. SSI Resource Test

SSI is the primary way most persons with disabilities pay for food or shelter. To qualify and remain qualified for SSI, an individual recipient must have countable resources below \$2,000 (\$3,000 for a couple).⁵ These resource numbers have stayed the same since 1989 and are not indexed for inflation.⁶ There has been no indication that these numbers will increase in the foreseeable future. SSI does allow a person to have some exempt assets that are not counted towards the resource limit.⁷ The two most significant exempt assets are a primary residence and an automobile.

If an SSI recipient attempts to save money, he or she loses eligibility for SSI and Medi-Cal coverage. The recipient also may be required to repay benefits paid when assets were over the \$2,000 threshold. Without an ABLE account, a recipient who accumulates money must spend it down below the \$2,000 threshold, even on things the recipient does not then need. Thus, pre-ABLE, this minimal asset threshold made it impossible for a person with a disability to save for future expenses.

B. SSI Income Test

SSI treats income received by the person with a disability harshly. SSI's monthly benefit is reduced by any "income" received by the recipient. For SSI purposes, income includes gratuitous transfers. In fact, it is broadly defined to include a recipient's earned income, unearned income (*e.g.*, cash gifts), in-kind support and maintenance ("ISM") (*e.g.*, free or reduced cost food or shelter), and deemed income (*e.g.*, income earned by a spouse or parent).⁸ SSI counts all types of income each month (over \$20) that a person receives with some type of penalty. Much like the outdated resource limitations, the SSI income disregards are even more hopelessly out of date:

The SSI income disregard amounts have not been updated since President Nixon signed the SSI program into law in 1972. For example, \$20 is the general or unearned income disregard whereby a beneficiary can receive a small amount of income from other sources, such as other Social Security benefits or a pension, without having his or her SSI benefits reduced. The cost of living today is more than 5.5 times what it was in 1972, meaning that \$20 today is equivalent in purchasing power to about \$3.50 in 1972.⁹

Under the SSI income rules, if a family member or friend wants to help a person with a disability by providing a cash stipend or offering free food or shelter, the SSA will reduce or eliminate that person's SSI.¹⁰

C. The Effect of the Public Benefit Eligibility Rules that Prevent Persons with Disabilities from Saving Money

Due to the low resource limits and harsh income penalties of public benefits programs, many persons with disabilities have no way to save money or pay for their own future needs. While an SNT, discussed in more detail below, is one solution, a SNT may not be suitable for modest amounts of support. For example, if a person with disabilities receives \$10,000, the costs of establishing and administering an SNT are prohibitive. Moreover, the SNT does not allow a person with disabilities to



control and manage the money. This loss of control demeans persons with disabilities who have full use of their faculties.

D. Special Needs Trusts Remain the Primary Planning Tool but May Not Be Cost Effective in All Situations

The primary planning tool for persons with disabilities remains the SNT, even with the availability of ABLE accounts.¹¹ An SNT allows persons with disabilities to have access to funds in excess of resource and income limitations required to stay eligible for public benefits. Such a trust can provide professional management of investments and distributions that could result in loss of public benefits. An SNT makes sense for persons with disabilities who do not have capacity to manage their own financial affairs, and replaces the need to establish a guardianship or conservatorship of the estate.

The cost of establishing and administering the SNT is a drawback. This cost may include attorney's fees for establishing the trust, trustee and more attorney's fees for administering the trust, and (if court supervised) court costs for accounts, reports, and bond. Spending \$5,000 to set up an SNT is easy to digest if the trust is being funded with \$1,000,000, but much harder to justify if it is being funded with \$50,000.

The other main drawback of SNTs is that the beneficiary with a disability can never be trustee of his or her own trust. A significant percentage of persons with disabilities have the complete capacity to manage their own financial affairs. A benefit of using an ABLE account for these persons is the ability to manage part of their own assets.

ABLE accounts, in their current form, will not replace SNTs as the primary planning tool for persons with disabilities. Instead, the ABLE account is a complementary tool to be used in the right situation to better enhance the quality of life for a person with disabilities. ABLE accounts and SNTs are best used together as part of an overall planning strategy.

E. The ABLE Act

As noted above, the ABLE program originally was designed to address the difficulties people with disabilities and their families have in saving for the future. The initial proposal allowed multiple accounts to be established by or for persons with disabilities of all ages, and unlimited funding for those accounts. However, the cost of that program was exorbitant. The Congressional Budget Office estimated the effect on the federal budget would increase direct spending by \$17.5 billion and reduce revenues by \$1.7 billion over the 2015 to 2024 time

period.¹² An ABLE proposal facing those hurdles had no chance of passing.

To reduce the effect on the budget and to make passage of the legislation possible, Congress reached a compromise that limited funding to an amount equal to the annual gift tax exclusion, and allowed a person to establish only a single ABLE account. This compromise reduced the effect on the federal budget to increase direct spending by \$2.1 billion and decrease revenue by \$0.9 billion over the same 2015 to 2024 time period,¹³ and allowed the legislation to pass with 379 co-sponsors (193 Republicans and 186 Democrats)—a rare bipartisan proposal.

ABLE accounts were enacted on December 19, 2014 as part of the Achieving a Better Life Experience Act of 2014 ("ABLE Act"). The ABLE Act amended the Internal Revenue Code of 1986 to create Section 529A. On June 19, 2015, the IRS issued proposed regulations for the ABLE program.¹⁴ Based on responses from advocates, these proposed regulations were modified to simplify the ABLE program administration, as set forth in IRS Notice 2015-81.¹⁵ The Department of Treasury, as of early October 2017, has not finalized the proposed regulations published in 2015. The IRS has stated that taxpayers may rely on the proposed regulations until the final regulations are issued.¹⁶ Practitioners should review the final regulations when published for any changes.

On March 21, 2016, the SSA published an updated version of its Program Operations Manual System ("POMS") regarding the ABLE Act, ABLE accounts, and ABLE funds.¹⁷ The POMS is a handbook used by Social Security employees to process claims for Social Security benefits. The court's give great deference to the POMS. As stated in one circuit court case, "[federal courts] further agree ... that the POMS provisions at issue here—namely, those in [special needs planning]—warrant relatively strong ... deference. The relevant POMS provisions fall squarely within the SSA's area of expertise."¹⁸ The recent POMS indicates how the SSA will treat ABLE accounts and ABLE funds for purposes of eligibility, and provides additional guidance on planning options that will be discussed below.

On September 7, 2017, the Centers for Medicaid and Medicare Services ("CMS"), the federal agency that runs the national Medicaid program, issued State Medicaid Director ("SMD") Letter, #17-002 concerning ABLE accounts.¹⁹ The stated purpose of that letter is to provide guidance to states on the implications of the ABLE Act for state Medicaid programs. It also addresses the treatment of funds in an ABLE account for purposes of post-eligibility treatment of income, and the disposition of amounts remaining in a Medicaid beneficiary's ABLE account upon the death of the beneficiary. Of note,

contributions by third parties into an ABLE account are not exempt transfers by the contributor, in determining the contributor's eligibility for long-term services and support from Medi-Cal.

Governor Brown signed the California ABLE Act into law in 2015.²⁰ The California ABLE Act added Sections 17140.4 and 23711.4 to the Revenue and Taxation Code and Sections 4875-4884 to the Welfare and Institution Code. California's ABLE program will be called CalABLE. It is expected to begin in 2018.

F. New ABLE Bills Have Been Proposed

Legislation related to ABLE accounts is pending that would increase the age of disability to 46.²¹ This bill has not yet passed, but the new 2018 tax law expanded the use of ABLE accounts in certain circumstances. Practitioners should remain informed regarding future changes that may increase the utility of ABLE programs.

G. Further Resources

To stay current on ABLE programs, the authors suggest that interested parties search the website for the ABLE National Resource Center at www.ABLENrc.org. This website provides a wealth of information on the status of legislation and state-level implementation of ABLE programs, and provides tools to evaluate different programs. California has a website dedicated to CalABLE's program at <http://treasurer.ca.gov/able/index.asp> that provides updates to California's program.

III. DEFINING "DISABILITY" FOR ABLE ELIGIBILITY

ABLE accounts are established and owned by a "designated beneficiary" who is a qualified person with disabilities whose disability occurred prior to age 26.²² The designated beneficiary can establish disability in one of two ways:

1. By showing that he or she currently is eligible for Social Security Disability Insurance (SSDI) or SSI disability benefits, based on a disability that began before age 26; or
2. By certifying, or having a parent or guardian certify, that the individual has a medically determinable impairment "which results in marked and severe functional limitations" that has lasted or is expected to last for 12 consecutive months, or is likely to result in death, with the disability or blindness occurring before age 26.²³

If the individual is not already receiving SSI or SSDI, he or she must meet SSA's definition of "disabled" for a minor. SSA defines "disability" for a minor as follows:

"Disability" for an individual under the age of 18 is defined as "a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than 12 months."²⁴

For those persons who are not already receiving SSI or SSDI, the ABLE act requires that the certification of disability must be filed with the Secretary of the Treasury.²⁵ The proposed regulations have defined this requirement to mean that the individual, the individual's agent under power of attorney, or his or her parent or guardian certify under penalty of perjury that they have a "signed physician's diagnosis" and will provide it if requested by the ABLE Plan Administrator or the IRS.²⁶ Eligible individuals with disabilities will not need to provide the written diagnosis when opening the ABLE account, and ABLE programs will not need to receive, retain, or evaluate detailed medical records. No submission of the doctor's letter is necessary unless requested.

The designated beneficiary's disability must have begun prior to age 26. Persons older than 26 can open accounts if their disabilities began before age 26. To stay current with ABLE's age limit requirements, readers should check the national ABLE website for updates.²⁷

IV. ESTABLISHING AND FUNDING THE ABLE ACCOUNT

An ABLE account is opened by joining one of the active State programs.²⁸ An account may be opened by the designated beneficiary or the beneficiary's agent, guardian, or parent (if a minor).²⁹ However, the ABLE account owner is always owned by the designated beneficiary.³⁰ Moreover, a designated beneficiary is permitted to have only one ABLE account.³¹ If more than one account is opened, the subsequent account is countable by the public benefit agency and provides no tax benefit to the person with a disability.³² However, if all contributed amounts are returned by the due date of the recipient's federal income tax return for the year in which the excess contribution is made, the additional account is treated as if had never been opened.³³

An ABLE account can only be funded with cash.³⁴ A roll over from one ABLE account for the designated beneficiary to another ABLE account, however, can be in-kind and is not



taxed.³⁵ Any person can contribute to an individual's ABLE account, including the beneficiary.³⁶ A person is defined to include a trust or estate.³⁷ This definition of a person authorizes an SNT trustee to fund an ABLE account with SNT funds. The contribution to an ABLE account is also deemed a completed gift for gift tax purposes.³⁸ There is no federal income tax deduction on contributions, but some state programs authorize a state income tax deduction.³⁹

An ABLE account has an aggregate annual funding limit equal to the annual federal gift tax exclusion amount (as set forth in IRC §2503(b)), which is \$15,000 in 2018.⁴⁰ The gift tax annual exclusion is indexed annually for inflation. Multiple contributors to an ABLE account must co-ordinate their contributions to avoid the aggregate limit.

The funding of the account does not need to occur all at once. An account contributor may fund the account up to \$1,250 per month in 2018. This approach allows a contributor to condition each subsequent month's funding on the beneficiary demonstrating the ability to manage the funds and resist predators. If a contributor overfunds an account, the excess amount must be returned to the contributor, including any income associated with it, on a last-in, first-out basis.⁴¹ The funds must be returned by the due date for the designated beneficiary's income tax return for the year in which the excess contribution is made.⁴² A six percent excise tax is applied to excess contributions if not returned.⁴³

Under the 2018 Tax Cut and Jobs Act⁴⁴, an individual's ABLE account can now be funded by a roll-over from the funds in that individual's 529 Plan.⁴⁵ This roll over counts towards the \$15,000 funding limit, so care should be made not to over fund the ABLE account. In addition, under the new law, an account owner who works can contribute an additional \$12,060 of earnings above the \$15,000 funding limit to his or her ABLE account.⁴⁶ Finally, under the new tax law, ABLE account owners who contribute to their own account, may be eligible to take advantage of the Retirement Savings Contributions Tax Credit that provides a special tax break to low- and moderate-income taxpayers who are saving for retirement.⁴⁷

V. LIMITS ON VALUE OF ABLE ACCOUNT

The limit on the size of an ABLE account depends on which needs-based public benefits the person with disabilities is receiving. The funds in an ABLE account are not counted towards the resource limit for any federal funded benefit that has at least one financial criterion for eligibility.⁴⁸ The focus is on SSI and Medi-Cal, but an ABLE account should not be counted for determining and maintaining eligibility for

Supplemental Nutrition Assistance Program ("SNAP") benefits (more commonly known as food stamps), public housing, or any other federal public benefit with at least one financial criterion.

If the designated beneficiary receives SSI, the ABLE account may grow up to \$100,000 and not be counted as a resource for SSI eligibility.⁴⁹ If the account grows over \$100,000, the designated beneficiary's SSI benefits are not terminated. Rather, the SSI benefits are suspended until the ABLE account balance drops below \$100,000, at which point the SSI benefits resume.⁵⁰

A designated beneficiary who receives SSI automatically receives Medi-Cal under the categorically eligible program.⁵¹ A suspension of SSI benefits due to excess funds in an ABLE account will not cause a loss of Medi-Cal benefits.⁵² Medi-Cal eligibility and benefits will continue uninterrupted.

A California designated beneficiary who qualifies for Medi-Cal under any Medi-Cal program other than SSI categorical eligibility can have up to California's "Qualified State Tuition Program" limit, currently \$475,000, in his or her ABLE account without jeopardizing Medi-Cal eligibility.⁵³

On January 6, 2017, the United States Department of Agriculture revised the eligibility rules for SNAP benefits. The revised rules now explicitly exclude funds held within an ABLE account in determining the resources of a SNAP household.⁵⁴ Currently, there is not yet any guidance from the United States Department of Housing and Urban Development (HUD) on the impact of ABLE accounts on Section 8 benefits. However, the ABLE Act itself references "federal means tested programs," which thereby includes Section 8 benefits.⁵⁵ Thus, Section 8 benefits should be preserved as well.

VI. PAYBACK PROVISION

When a designated ABLE account beneficiary dies with assets remaining in an ABLE account, the act provides that remaining assets shall be subject to "payback" from any state Medicaid plan, up to the value of Medicaid services provided to the beneficiary, from the time the account was opened to the filing of a claim by the State.⁵⁶ The State is considered a creditor of the ABLE account and not a beneficiary.⁵⁷

The payback amount is calculated after:

- all outstanding qualified disability expenses are paid,
- any funeral and burial expenses for the designated beneficiary are paid, and



- any Medicaid premiums paid by the beneficiary are subtracted.⁵⁸

The CMS director provided guidance to the States in determining how best to incorporate the payback language of the statute as follows:

The Treasury's and IRS's [Notice of Proposed Rulemaking] does not propose mandating that states file section 529A claims. However, even in the absence of a Treasury and IRS mandate regarding claims against ABLER accounts, pursuant to section 1917(b) of the Act, states are required to seek recovery against the estates of certain deceased Medicaid beneficiaries. Thus, consistent with section 1917(b) of the Act, states are required to seek recovery of funds in an ABLER account that have become part of an estate subject to recovery under the statute. If the estate of an ABLER account beneficiary is not subject to Medicaid estate recovery, states have discretion whether to file a section 529A claim against the ABLER account of a deceased individual who had been enrolled in a Medicaid Buy In program.⁵⁹

The CMS director acknowledges that no proposed Treasury regulation requires that a state make a claim for payback from an ABLER account. Nevertheless, he cites the mandatory estate recovery rules set forth in the Medicaid Act and believes payback is mandatory under those rules.⁶⁰ Under this reading of the Medicaid Act, an ABLER account is considered a part of the "estate" of the designated beneficiary and therefore subject to payback. For the mandatory estate recovery rules, the state has no right of payback for Medi-Cal benefits paid prior to age 55, or benefits paid to a recipient who leaves a minor child, child with a disability, or a spouse.⁶¹ Further, California has changed its law on what is counted as an "estate" for purposes of payback.⁶² As of January 1, 2017, recovery is now limited only to the probate estate.

The Pennsylvania legislature enacted an ABLER statute that provides for no payback from an ABLER account on the death of a designated beneficiary.⁶³ California followed Pennsylvania's lead, and on October 4, 2017, Governor Brown signed into law Welfare and Institutions Code Section 4885(b), which states:

(b) Following the death of a designated beneficiary, and only after the State Department of Health Care Services has received approval by the federal Centers for Medicare and Medicaid Services, both of the following shall apply:

(1) The state shall not seek recovery pursuant to Section 14009.5 of any amount remaining in the designated beneficiary's ABLER account for any amount of medical assistance paid for the designated beneficiary after the establishment of the account under the state's Medicaid plan established under Title XIX of the federal Social Security Act.

(2) The state shall not file a claim for the payment under subdivision (f) of Section 529A of the Internal Revenue Code.

California must obtain the approval of CMS before implementing this provision.

As noted above, the CMS director states that payback from an ABLER account should be subject to the "estate recovery" rules and no claim is required. The SNT payback, under similar statutory language, may not be subject to the estate recovery rules, but rather subject to a unique right of recovery.⁶⁴ For the SNT payback, CMS and DHCS take the same position that it creates a separate right of payback, independent from the mandated estate recovery rules.⁶⁵ The legislature apparently will limit payback rights to ABLER accounts, but payback rights from an SNT are broadly interpreted to allow state Medicaid agencies unfettered post-death recovery of those funds in SNTs. California legal authority is split on whether the language in the SNT statute allows for a separate right of recovery or is subject to the estate recovery rules.⁶⁶ The distinction for ABLER accounts created under nearly identical statutory language is difficult to interpret.

This treatment highlights the odd dichotomy between how ABLER accounts are expected to be treated and how SNTs have been treated. ABLER accounts are being broadly interpreted by the IRS, the SSA, CMS, and state laws to aid persons with disabilities in saving assets and using these accounts. Yet, these same agencies have often interpreted SNT laws narrowly, denying needed protection based on strict reading of rules and odd limitations on the use of SNTs.⁶⁷ Hopefully, the more liberal attitude towards the use of ABLER accounts will bleed into the review of statutory grounds for post-death recovery from SNTs.

VII. ABLER ACCOUNT BENEFITS

ABLER accounts provide people with disabilities several benefits, some of which are not made available by SNTs. This safe harbor account is tax-favored and allows people with disabilities to have more control over their own resources. The benefits of the ABLER account are summarized below.



A. Income in ABLE Account is Tax Free – If Used for Qualified Disability Expenses

Income earned inside an ABLE account grows tax-free.⁶⁸ Distributions from an ABLE account that are for “Qualified Disability Expenses” (“QDEs”) are also not taxed.⁶⁹ The ABLE Act defines QDEs as “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.”⁷⁰ It then lists a range of categories of potential uses for funds set aside in ABLE accounts, including the following:

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.⁷¹

In the proposed regulations released in June 2015, the Treasury stated that QDEs should be “broadly construed to permit . . . basic living expenses and should not be limited to expenses for which there is a medical necessity or which provide no benefits to others.” The proposed regulations further provided that QDEs should include any benefit related to the designated beneficiary “in maintaining or improving his or her health, independence, or quality of life.”⁷² As an example, the regulations specify that a smart phone could qualify as a covered expense, provided that it serves as an “effective and safe communication or navigation aid for a child with autism.”⁷³

Originally, the proposed regulations required states to establish safeguards for ensuring that ABLE funds were only used for QDEs, presumably by requiring beneficiaries to obtain pre-approval before distributing funds. In response to disability advocates, many of whom feared that such requirements would be unduly burdensome, the Treasury Department rescinded this requirement in a notice issued November 2015.⁷⁴ Now, pre-approval to withdraw funds to pay for QDEs is unnecessary.

To protect against future IRS inquiries, the ABLE National Resource Center recommends that beneficiaries maintain detailed records of expenses paid by ABLE account assets, as well as how these expenses relate to their disabilities.⁷⁵ The ABLE National Resource Center also provides valuable resources, including a fact sheet and seminars on what are appropriate QDEs.⁷⁶

1. Special Rule Concerning ABLE Account Disbursements for Shelter

As described above, the ABLE Act allows for distributions for QDEs to be disregarded when considering eligibility for means-tested public benefits. However, the Act specifically states that distributions for housing expenses “shall not be so disregarded.”⁷⁷ This potentially could have been an issue for SSI recipients who used ABLE accounts to pay for housing expenses because the SSA treats certain types of housing expenses as ISM. The SSA treats the following shelter expenses as ISM if someone else pays for them: mortgages, real estate taxes, rent, heating fuel, gas, electricity, water, sewer, and garbage removal.⁷⁸ Payment of ISM, like any other form of income, reduces a recipient’s SSI check.⁷⁹ The SSA stated in its POMS that housing expenses paid from an ABLE account are the same as “shelter” expenses under the Social Security rules.⁸⁰ Nevertheless, the SSA expressly exempted distributions from ABLE accounts as being treated as ISM.⁸¹ Thus, making housing disbursements from ABLE accounts should result in no penalty.

2. Effect of Distributions Not Made for QDEs

An ABLE account recipient who receives a distribution for non-QDEs is subject to a penalty. Distributions for non-QDEs will be includible as gross income and subject to a 10% penalty.⁸² The following exceptions are allowed:

- The penalty does not apply to any distribution made from the ABLE account on or after the death of the designated beneficiary to the estate of the designated beneficiary, to an heir or legatee of the designated beneficiary, or to a creditor.⁸³
- The penalty will not apply if the ABLE account refunds excess contributions that were made into the account.⁸⁴

B. Beneficiary Allowed to Control ABLE Account

Unlike SNTs, the designated beneficiary of an ABLE account can control his or her resources. For example, the individual may use the account to purchase items at his or her own discretion. Depending on the state program, access to the funds includes debit cards, setting up direct pay to service providers, and having ABLE funds direct deposited into another related bank account. This allows the individual to exercise financial independence without first asking permission from a trustee. In addition, a minor designated beneficiary may take control over the account after reaching age 18.

C. May Change ABLE Account's Named Beneficiary

The beneficiary of an ABLE account can be changed. The change of beneficiary is not treated as a distribution and will not be includible in gross income, if the new beneficiary is either a member of the family (meaning a sibling, whether by blood or by adoption, including a step or half sibling)⁸⁵ of the designated beneficiary or another individual who meets the requirements of being a designated beneficiary.⁸⁶ The proposed regulations do not state that the family member needs to be disabled, yet the ABLE Act requires in separate sections that tax-free treatment of the account and disbursements are only for persons with disabilities.⁸⁷ It begs the question why family members are included as permitted transferees, when other requirements necessarily include a person with a disability. This inconsistency may be corrected when final regulations are issued.

If the ABLE account is transferred to a person who does not meet the eligibility requirements, the former designated beneficiary of that ABLE account will be treated as having received a distribution of the fair market value of the assets in that ABLE account on the date on which the transfer is made.⁸⁸

D. May Join Other State's ABLE Program

The original ABLE Act only permitted an individual to set up an ABLE account in his or her home state. However, Congress eliminated the state residency requirement in 2015, thereby allowing each individual to set up an ABLE account in a state of his or her choosing. Currently, ABLE programs have been instituted in 28 states.⁸⁹

An individual may transfer an ABLE account from one state to another. For example, a California resident may transfer his or her ABLE account from any other state to California (once open for enrollment) if the California program is more beneficial for the participant. Fees may be charged to complete the transfer. The individual should check the transferor program's fees and policies to ascertain the associated procedures and costs.

E. Effect on ABLE Account if Loss of Qualification as Person with a Disability

If a person loses qualification as a person with a disability, the ABLE account will maintain its status as an ABLE account throughout the remainder of the taxable year.⁹⁰ If the person remains unqualified at the beginning of the first day of the next taxable year, the ABLE account will lose its status. The account loses tax-free growth and disbursements from it will not be treated as QDEs.⁹¹ If the person later qualifies as having

a disability, the ABLE account will regain its preferential status and disbursements can be made for QDEs.⁹²

VIII. HOW TO REVIEW DIFFERENT ABLE PROGRAMS

The state ABLE programs that are active can vary widely in investment opportunity, ease of use, and cost. It is important for the practitioner to know how to compare the different ABLE programs. The author's suggest that the ABLE National Resource Center's website be used for this purpose. It has a tool that can compare different programs.⁹³ It will evaluate up to three programs at a time, providing answers to the following questions on the following topics:

- Opening an account
 - Is there a minimum contribution required to open an ABLE account?
 - Is there a fee to open an account and, if so, how much is that fee?
 - What proof will the ABLE program require to open an account or to show that disbursements are qualified expenses?
- Maintaining the account and fees
 - What types of fees are associated with running the account?
 - Are there restrictions on how often withdrawals can be made?
- Investment opportunities
 - What investment options does the State ABLE program offer?
 - Does the program offer any unique or value-added program elements to help save, contribute to the account, grow the account, and manage the investments, like a match or rewards program, financial literacy information, or other programs for beneficiaries?
- Unique to State
 - Does the state offer a state income tax deduction for contributions to the account?
 - Is there a "debit card/purchasing card" available with the program? Are there added costs for this?

IX. USING ABLE ACCOUNTS TO AID PERSONS WITH DISABILITIES

The following discusses ways the authors have used ABLE accounts in their planning for persons with disabilities.

A. Funding ABLE with SNT Assets

As noted in the ABLE Act, any "person" may contribute to an ABLE account. For the purposes of ABLE account funding, "person" is defined by the IRS to include an individual, trust, estate, partnership, association, company, or corporation.⁹⁴ The SSA also expressly includes a "trust" as one of the entities that can fund an ABLE account.⁹⁵ Further, as noted in the CMS director letter:

[D]isbursements from an SNT or pooled trust to the ABLE account of the trust beneficiary are not counted as income under [ABLE Act]. Therefore, states should disregard as income a distribution from an SNT or pooled trust that is deposited into the ABLE account of the SNT or pooled trust beneficiary.⁹⁶

Unless the provisions of a SNT prevents the funding of an ABLE account, government agencies apparently will not penalize it.

1. SNT ABLE Provision

A specific trust provision authorizing the funding of an ABLE account is not necessary. However, it may be prudent to include such a provision to describe the factors that a trustee should consider when funding a beneficiary's ABLE account. In drafting both first- and third-party SNTs, the authors include a provision authorizing the funding of an ABLE account. Such a provision could read as follows:

Funding an ABLE Account

The Trustee, in its sole and absolute discretion, may make a distribution that will be treated as a contribution to a Beneficiary's ABLE account as defined under Internal Revenue Code Section 529A for meeting the Beneficiary's qualified disability expenses. Distributions can either be made as a lump sum or in monthly amounts designed to assist Beneficiary with ongoing care costs. In exercising the Trustee's discretion, the Trustee should consider:

- The person or entity managing ABLE account and their experience in managing funds;

- The benefit of using ABLE account funds to pay for Beneficiary's needs without triggering an In Kind Support and Maintenance (ISM) penalty from the SSA; and
- Any concerns that ABLE account funds may be subject to Medi-Cal recovery if one may not otherwise be necessary.

A distribution to an ABLE account will not be considered a delegation of investment responsibility under any applicable statute or other law.

2. SNT Trustee Funds ABLE Account

The authors have used ABLE accounts primarily in advising SNT trustees during administration. Instead of retaining funds, the SNT trustee provides a monthly stipend to the beneficiary's ABLE account. The beneficiary then has control and may choose to spend or save the funds. For beneficiaries who can use the money prudently, keep records, and follow the rules on distributions, ABLE accounts allow control over funds and much needed independence.

Funding an ABLE account is not always in the best interest of a SNT beneficiary. A SNT beneficiary may have diminished capacity and either be unable to manage the money or be subject to financial predators. An ABLE account may be the first time the beneficiary has ever had to manage money.

Further, a person with an ABLE account can unintentionally lose his or her public benefits by withdrawing from the ABLE account, depositing the withdrawn funds in his or her own account, and not spending those funds for a QDE by the end of the calendar month. For SSI and Medi-Cal eligibility purposes, the assets held in the separate bank account on the first day of a month are countable (even if they came from an ABLE account) and could cause loss of public benefits. The SSA uses the following example:

In June, Jennifer takes a \$7,000 distribution from her ABLE account to pay her college tuition—a QDE. Her tuition payment is due in September. In August, Jennifer gets a job offer and decides not to return to school. Since she no longer intends to use it for tuition, the \$7,000 becomes a countable resource in September unless Jennifer redesignates it for another QDE or returns the funds to her ABLE account prior to September.⁹⁷

A SNT trustee may be liable for breach of fiduciary duty by funding an ABLE account without ensuring that the beneficiary will spend the account funds appropriately.⁹⁸ To limit this risk,

the SNT trustee could fund the account with a modest monthly allowance. The trustee can then condition future funding of the ABLE account on an agreement by the account beneficiary to a budget and keeping proper records. Through this monthly monitoring, the beneficiary can learn how to use and save money prudently and the trustee will limit exposure to potential liability.

B. Using ABLE to Pay Housing for SSI Recipients

As described above, if a SNT trustee or another person helps an SSI recipient by paying for his or her food, rent, or utilities, that payment reduces that person's SSI check. However, the SSI penalty (in 2018) for ISM is capped at \$270.00 per month.⁹⁹ In most SNT administrations, intentionally triggering the penalty made sense. The trustee could pay monthly rent, pay utilities, and pay for food, and the SNT beneficiary still received some money from SSI, but had a safer and cleaner place to live.

For example, if the SSI recipient received maximum SSI (in 2018) of \$910.72 per month, and the SNT trustee paid monthly expenses of \$1,500 for rent, \$400 for food, and \$200 for utilities, the only loss of SSI would be \$270 as the ISM penalty. The SNT beneficiary had additional living expenses paid, and still received \$640.72 of SSI funds per month for other expenditures.

Now, an ABLE account allows for similar planning, but allows the recipient to keep his or her entire SSI benefit. The SNT trustee can fund the beneficiary's ABLE account with a monthly amount sufficient to pay for all food and shelter items. The SSI recipient can then use the ABLE account funds to pay for his expenses and keep the full \$910.72 check from SSI for other purposes. The difference for the SSI recipient is an additional \$3,240 per year of spending cash.

A couple of caveats:

- A. Once funds are distributed from the SNT to the ABLE account, the beneficiary has total control over the assets. The SNT trustee should make sure the beneficiary will spend money appropriately. If not, then the SNT trustee may be forced to stop funding.
- B. In 2018, an ABLE account can only be funded with \$15,000 a year (or \$1,250 a month). If the monthly costs exceed that amount, using an ABLE account may not provide any added benefit. In the example above, the monthly costs were \$2,100 per month. An ABLE account would not have been able to cover that amount for an entire year. The ISM penalty is not reduced if the trustee must also supplement the ABLE account distribution for food or shelter.

C. Using ABLE in Third Party Planning

In preparing an estate plan for families that include a loved one with special needs, it may be prudent to establish an ABLE account and fund it during the life of the parents or grandparents. This may allow for the use of gift-tax-free contributions. Contributions to ABLE account are non-taxable gifts.¹⁰⁰ The family also has the opportunity to train the person with a disability on how to manage money and use funds appropriately.

D. Using ABLE as Part of Settlement Planning

If a person with a disability receives a litigation recovery, an ABLE account can be used to hold part or all the settlement funds. If the recovery is modest, an ABLE account can be used as a part of a spend-down.

Example: SSI recipient receives litigation recovery of \$100,000. A plan may include placing \$15,000 into an ABLE account, paying off any debts, purchasing goods and services, and placing the balance into a (d)(4)(A) or Pooled SNT.

If the person has capacity, he or she can set it up the ABLE account. In other circumstances, the attorney should obtain court authority to fund the ABLE account. For example, if a person with a disability is receiving a litigation recovery and is a minor or an adult who lacks capacity, a petition to approve compromise must be filed. An attachment can be added to the petition to allow the funding of the ABLE account. Probate Code section 3600 et seq. gives the court broad discretion and authority to set the conditions on which the settlement proceeds are to be managed for the best interests of the minor or adult without capacity.

A structured settlement annuity is an alternative for a modest settlement recovery.¹⁰¹ When the annuity is purchased, the person's ABLE account can be named as the payee. For example, a settlement of \$60,000 is reached. Instead of paying a lump sum, the defendant agrees to buy an annuity and make the payee the plaintiff's ABLE account. The settlement can pay up to 1/12 of the federal annual gift tax exclusion amount per month without jeopardizing the person's SSI or Medi-Cal. The person can then manage his or her own funds. All the previously discussed issues need to be considered, including whether the beneficiary can manage his or her assets and maintain proper records, and whether he or she follow the rules of the ABLE account and public benefit programs. If the person lacks capacity to manage his or her affairs, the court will have to agree to this plan, but with proper education and the right client, it works well.



X. CONCLUSION

The ABLE account is a wonderful tool for assisting persons with disabilities. The ABLE account does not replace the SNT, and likely never will for persons who lack capacity. The legal protections in place for an SNT make it much more attractive for managing a person's assets when that person cannot manage his or her financial affairs.

For other persons with disabilities, however, ABLE accounts can be used in a variety of ways to enhance their quality of life. Certain limitations apply to the use of the accounts, primarily the age and contribution limits. For those persons who qualify, ABLE accounts can provide more control over their lives and allow them to save money for their future needs. ABLE accounts have become an indispensable tool.

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- 1 See proposed regulations, 26 CFR section 1.529 A-1(b) (12), allowing a program-to-program transfer of the entire account balance from one state program to another for the same beneficiary.
- 2 20 CFR section 416.905. Also see SSA's description of "substantial gainful employment" and accompanying chart for monthly substantial gainful activity amounts by disability type at <<http://www.ssa.gov/oact/cola/sga.html>> (as of October 4, 2017).
- 3 Karen Harris and Hannah Weinberger-Divack, *Accessible Assets: Bringing Together the Disability and Asset-Building Communities*, 44 Clearinghouse Review: Journal of Poverty Law and Policy Clearinghouse Rev. 4 (May/June 2010).
- 4 SSA Publication No. 05-11125, "Supplemental Security Income (SSI) in California," January 2018, available at <<http://www.ssa.gov/pubs/EN-05-11125.pdf>> (as of January 13, 2018).
- 5 20 CFR section 416.1201(a), but certain assets are not counted, like a principal residence, one automobile, household items, and a few other items. See 42 USC section 1382b(a).
- 6 "When the SSI program began in 1974, the asset limits were \$1,500 per individual and \$2,250 per couple. Asset limits were last revised over twenty years ago to \$2,000 per individual and \$3,000 per couple as specified in the law's schedule of increases. That means that since 1989 no adjustments have been made for inflation or cost of living. If the 1974 limits had been even moderately adjusted for inflation, the 2010 limits would be \$6,592 and \$9,889 respectively." Karen Harris, *supra* note 95.
- 7 42 USC section 1382b(a).
- 8 20 CFR section 416.1102.
- 9 Georgia Burke, Jennifer Goldberg, and Kate Lang, *Medicaid and Supplement Security Income Eligibility: Time for a Tune-Up*, 12 NAELA Journal 1 (Spring 2016).
- 10 20 CFR section 416.1124(c)(12), 20 CFR section 416.1130(c). See generally 20 CFR sections 416.1130-416.1148.
- 11 42 USC section 1396p(d)(4).
- 12 Congressional Budget Office, "Cost Estimate H.R. 647: Achieving a Better Life Experience Act of 2014," August 27, 2014, <<http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr647.pdf>> (as of October 4, 2017).
- 13 See *supra* footnote 12, *ante*.
- 14 80 Fed. Reg. 35602, available at <<https://www.gpo.gov/fdsys/granule/FR-2015-06-22/2015-15280/content-detail.html>> (as of October 4, 2017). See also "Internal Revenue Bulletin: 2015-27," July 6, 2015 available at <https://www.irs.gov/irb/2015-27_IRB/ar09.html> (as of October 4, 2017).
- 15 IRS Notice 2015-81, "New IRS Guidance to Simplify ABLE Program Administration," November 20, 2015 available at <<https://www.irs.gov/newsroom/new-irs-guidance-to-simplify-able-program-administration>> (as of October 4, 2017).
- 16 *Id.*
- 17 POMS SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts.
- 18 *Draper v. Colvin* (8th Cir 2015) 779 F.3d 556.
- 19 Centers for Medicare & Medicaid Services, letter to state Medicaid directors, September 7, 2017, available at <<https://www.medicaid.gov/federal-policy-guidance/downloads/smd17002.pdf>> (as of October 4, 2017).
- 20 Assem. Bill No. 449 (2015-2016 Reg. Sess.) available at <http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB449&search_keywords> (last visited on October 4, 2017).
- 21 See HR 4795/ S 2702.
- 22 26 USC section 529A(b)(1)(B) and 26 CFR section 1.529A-1(b)(4).
- 23 26 USC section 529A. See proposed regulations, 26 CFR section 1.529A-2(e)(2), noting that the term "marked and severe limitations" means the standard of disability for children under 18 claiming SSI benefits based on disability.
- 24 20 CFR section 426.906.
- 25 26 USC section 529A(e)(1).
- 26 26 CFR section 1.529A-2(e). See also IRS Notice 2015-81, "New IRS Guidance to Simplify ABLE Program Administration," November 20, 2015, available at <<https://www.irs.gov/newsroom/new-irs-guidance-to-simplify-able-program-administration>> (as of October 4, 2017).
- 27 ABLE National Resource Center website available at <<http://ablenrc.org>> (as of October 4, 2017).
- 28 See, e.g., Tennessee's ABLE program at <http://abletn.gov/> and Ohio's ABLE program at <https://www.stableaccount.com/>.
- 29 26 CFR section 1-529A-1(b)(4).
- 30 26 USC section 529A(e)(3); 26 CFR section 1.529A-1(b)(4).
- 31 26 USC section 529A(b)(1)(B).
- 32 8 26 USC section 529A(c)(4).
- 33 26 CFR section 1.529A-2(c)(2)(ii).
- 34 26 USC section 529A(b)(2)(A); 26 CFR section 1.529A-2(g)(1).
- 35 26 CFR section 1.529A-1(b) (17).

- 36 26 USC section 529A(b)(1)(A); 26 CFR section 1.529A-2(a)(4).
- 37 26 USC section 7701(a)(1) (defines "person" to include an individual, trust, estate, partnership, or corporation); POMS SI 01330.740.B.2; CMS SMD #7-002 (note 1), p. 4.
- 38 26 CFR section 1.529A-3(b)(2); 26 CFR section 1.529A-4(a)(1).
- 39 See the determination of state income tax deduction in the comparison of state ABLE programs, available at <http://www.ablenrc.org/state_compare> (as of October 4, 2017).
- 40 26 USC section 529A(b)(2)(B); 26 CFR section 1.529A-2(g)(2).
- 41 26 CFR section 1.529A-2(g)(4).
- 42 *Id.* The due date of the return includes extensions. See 26 CFR section 1.529A-2(g)(4): "Returned contributions must be received by the contributor(s) on or before the due date (including extensions) for the Federal income tax return of the designated beneficiary for the taxable year in which the excess contribution or excess aggregate contribution was made." The returned contribution must be received on or before the due date, not the filing date. The due date should not change if the return is filed early.
- 43 26 USC section 4973(a)(6). 26 USC section 529A-3(e).
- 44 Pub. L. No. 115-97
- 45 Pub. L. No. 115-97, Sec 11025.
- 46 Pub. L. No. 115-97, Sec 11024(a).
- 47 Pub. L. No. 115-97, Sec 11024(b).
- 48 Section 103(a), ABLE Act of 2014.
- 49 POMS SI 01130.740.C.3.
- 50 POMS SI 01130.740.D.1.a.
- 51 42 CFR section 435.120.
- 52 Section 103(b)(2), ABLE Act of 2014; POMS SI 01130.740.D.1.a.
- 53 <https://ca.db101.org/ca/programs/health_coverage/medi_cal/program2.htm> (as of October 1, 2017); 26 CFR section 1.529A-2(g)(3); <[http://www.savingforcollege.com/compare_529_plans/?plan_question_ids\[\]=308&page=compare_plan_questions](http://www.savingforcollege.com/compare_529_plans/?plan_question_ids[]=308&page=compare_plan_questions)> for a list of all State's 529 plan limits (as of October 1, 2017).
- 54 7 CFR section 273.8(e)(2)(ii).
- 55 Section 103(a), ABLE Act of 2014.
- 56 26 USC section 529A(f).
- 57 *Id.*
- 58 26 CFR section 1.529A-2(p); 26 CFR section 1.529A-3(b)(4).
- 59 CMS State Medicaid Director Letter, SMD #17-002, page 7.
- 60 42 USC section 1396p(b)(1).
- 61 42 USC section 1396p(b)(2); Cal. Welf & Inst Code section 14009.5.
- 62 Welf & Ins. Code section 14009.5 subd. (a) as amended by Stats 2016, ch 30 (SB 833).
- 63 Pennsylvania Achieving a Better Life Experience Act (PA ABLE)—2016 Act 17, Section 503.
- 64 42 USC section 1396p(d)(4)(A) and (C).
- 65 See *Herting v. Dept. of Health Care Services* (2015) 235 Cal.App.4th 607, but see *Shewry v. Arnold* (2004) 125 Cal.App.4th 186 that holds the estate recovery rules apply to SNT payback.
- 66 *Id.*
- 67 See *Draper v. Colvin* (8th Cir 2015) 779 F.3d 556 (holding that parents did not properly establish SNT because they were also agents of child under power of attorney).
- 68 26 USC section 529A(a).
- 69 26 USC section 529A(c)(1)(B); 26 CFR section 1-529A-3(a).
- 70 26 USC section 529A(e)(5).
- 71 *Id.*
- 72 26 CFR section 1.529A-2(h)(1).
- 73 26 CFR section 1.529A-2(h)(2).
- 74 Notice 2015-81, "Section 529A Interim Guidance Regarding Certain Provisions of Proposed Regulations Relating to Qualified ABLE Programs," available at <<https://www.irs.gov/pub/irs-drop/n-15-81.pdf>> (as of October 6, 2017).
- 75 <<http://www.ablenrc.org>> (as of October 6, 2017).
- 76 "Understanding What ABLE Funds Can Be Used For," available at <<http://www.ablenrc.org/week-3-what-can-funds-be-used>> (as of October 6, 2017).
- 77 Section 103(a)(1), ABLE Act of 2014.
- 78 20 CFR section 416.1133(c); POMS SI 00835.465(D)(1).
- 79 The SSA counts the receipt of certain housing expenses by a recipient of SSI as income. 20 CFR section 416.1102. When someone else pays for an SSI recipient's housing expenses, the SSA may treat it as "in-kind support and maintenance" (ISM). Payment of ISM causes a reduction in the beneficiary's SSI benefits. The reduction in benefits is determined by the one-third-reduction rule (VTR) (20 CFR section 416.1131(a)) or the presumed maximum value (PMV) (20 CFR section 416.1140(a)(1)). In general, payment for housing reduces the SSI check by either \$244.33 or \$264.33 depending on which reduction methodology is used.
- 80 POMS SI 01130.740(B)(8).
- 81 POMS SI 01130.740(C)(4).
- 82 26 USC section 529A(c)(3)(A); 26 CFR section 1-529A-3(a), (d)(1).
- 83 26 CFR section 1-529A-3(d)(2)(i).
- 84 26 CFR section 1-529A-3(d)(2)(ii).
- 85 26 CFR section 1-529A-(b)(13).
- 86 26 CFR section 1-529A-3(b)(3)(i).
- 87 26 CFR section 1.529A-1(b)(9), 26 CFR section 1.529A-2(d), 26 CFR section 1.529A-3(a).
- 88 26 CFR section 1-529A-2(d)(3).
- 89 See <<http://www.ablenrc.org/state-review>> (as of October 6, 2017): Montana, Missouri, Indiana, Kentucky, Louisiana, Alabama, Georgia, Pennsylvania, New York, Vermont, Maryland, Nevada, Colorado, Ohio, Nebraska, Tennessee, Oregon, Nevada, Kansas, Alaska, Minnesota, Iowa, Illinois, Michigan, Virginia, Rhode Island, North Carolina, and Florida. However, despite Congress' amendment, the following seven of

the 28 states do not allow out of state residents to enroll in the program: Florida, Louisiana, Missouri, Kentucky, Georgia, New York, and Vermont.

- 90 26 CFR section 1-529A-3(b)(3)(ii).
- 91 *Id.*
- 92 *Id.*
- 93 <http://www.ablenrc.org/state_compare> (as of October 4, 2017).
- 94 26 USC section 7701(a)(1).
- 95 POMS SI 01130.740.B.2.
- 96 CMS State Medicaid Director Letter, SMD #17-002, page 4.
- 97 POMS SI 01130.740.D.3.c.
- 98 The terms of an SNT require that the trustee meet the "special needs" of the beneficiary. The trustee has a fiduciary duty to administer the trust strictly by its terms. The trustee must be guided in all acts by the trust instrument. See Probate Code sections 16000, 16040, subd. (b), 16200. A trustee must always act to carry out the trust's intent and to further the interests of the beneficiary. Probate Code section 16002, subd.(a). In *Estate of McCabe* (1950) 98 Cal.App.2d 503, 507, the trustee was given "absolute and uncontrolled" discretion to determine the amount of distributions. The court noted that the purpose of the trust was to ensure proper support for the beneficiary and held that the trustee was required to use the income as far as necessary to support her, and had discretion only to determine what conditions would constitute necessity.

Two New York cases have held an SNT trustee liable for making improper disbursements. One trustee was held liable for making disbursements that could have been paid for by public benefits. The court ruled that a trustee had a duty to ensure the beneficiary was benefitting from disbursements from the SNT. In *Matter of the Accounting of J.P. Morgan Chase Bank, N.A. and H.J.P. as co-Trustees of the Mark C.H. Discretionary Trust of 1995 v. Marie H.* (N.Y. Surr. Ct. 2012) 956 N.Y.S.2d 856. In *Liranzo v. LI Jewish Education / Research* (N. Y. Sup. Ct., Kings Co. No. 28863/1996, June 25, 2013), a corporate trustee paid privately for caregivers and other services for the beneficiary of an SNT that might otherwise have been covered by Medicaid. Over time the funds in the trust were nearly depleted. The trustee sought to have its accounts settled when the trust became uneconomical to manage. The Court held that the trustee should have investigated whether some or all the goods and services purchased with trust funds could have been provided by Medicaid or some other benefit program. The Court refused to approve the accounting and release the trustee, and instead directed the trustee to return \$176,905.99 to the Trust and to pay the \$6,500 fee of the Court Examiner appointed to review the accounting. The court also refused to authorize payment of attorney fees.

- 99 For current monthly benefit and ISM amounts see <https://www.ssa.gov/news/press/releases/post/10-2017-1> (as of November 28, 2017). The monthly benefit increase annually by 2%, and the expected amount for 2018 is \$267.50.
- 100 ABLE Act section 102(20) (A), IRC section 529A(c)(2).
- 101 In physical personal injury cases, many settle with a structured settlement, i.e., annuity-funded, income-tax-favored, periodic payments for the life of the plaintiff or for a period of years. See IRC section 104(a)(1) (workers compensation); IRC section 104(a)(2) (personal physical injury); and Rev Rul 79-220, 1979-2 Cum Bull 74.

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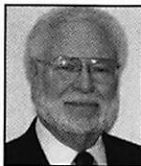
Recognized as a *Daily Journal Top Neutral* (2009-2012), Judge Bobb has 30 years of experience in family law, probate, and civil litigation and is known for stressing fairness and respect for all parties. As Supervising Judge of the probate and family law departments, she conducted hundreds of settlement conferences and heard many high-profile and celebrity cases. She serves as a mediator, arbitrator, special master and discovery referee at ARC.



HON. REVA G. GOETZ

Los Angeles County Superior Court, Retired

Judge Goetz handled hundreds of contested, complex probate, trust and estate and conservatorship cases, including matters involving Britney Spears, Mickey Rooney, Zsa Zsa Gabor and the widow of Sammy Davis, Jr. Prior to her appointment as a judge, she served as a Los Angeles Superior Court Commissioner for nearly 20 years. She handled Family Law from 2001-2007 and 2014-2015. She also served as a Deputy District Attorney and held public and private sector positions as an accountant, auditor and financial analyst.



HON. ARNOLD H. GOLD

Los Angeles County Superior Court, Retired

Named as a *Daily Journal Top Neutral* (2006-2010) and *Master of Mediation* (2013) and one of the state's most successful probate neutrals, Judge Gold was Supervising Probate Judge for Los Angeles County, handling probate mediations, long cause estate, trust, conservatorship and guardianship trials. Since he retired, he has conducted more than 1,200 probate mediations with an extraordinary settlement rate. He also serves as a referee and arbitrator.



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KENNETH S. WOLF, ESQ.

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A specialist for past four decades in estate planning, probate and trust law with an emphasis in litigation and ADR, Mr. Wolf mediates probate, trust and fiduciary matters with an extremely high settlement rate. He is one of the founders and chair since 1993 of USC Gould School of Law's annual Trust and Estate Conference. He is a proactive, evaluative mediator who understands both the legal and emotional components of probate and trust law.



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