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The ABLE Act has been signed into law by President Obama. I believe the ABLE Act is a tool for individuals with developmental disabilities but there are many options that need to be consider when planning for an individual with special needs.

With that in mind, I asked Brian Rubin of Rubin Law an expert in Special Needs Legal & Future Planning to share his expertise on the ABLE Act. Brian is also the President of The Arc of Illinois.

The following is an excellent summary from Brian.

Thank you Brian!

Lastly, I would advise that all individuals considering special needs legal and future planning that they work only with professionals with background and experience in this very specialized field.

Tony Paulauski

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SPECIAL NEEDS LEGAL & FUTURE PLANNING

The ABLE Act… What is it? It is a "Medicaid Pay Back Account".

With overwhelming support, Congress has passed the ABLE Act of 2014 (Achieving a Better Life Experience), providing an opportunity for qualified individuals with special needs to have a tax-free savings account that will support their health and independence while preserving their means-tested government benefits. On December 3, 2014 the House passed ABLE on a vote of 404-17. It was then merged with the Tax Increase Prevention Act of 2014 (H.R. 5771), which also passed the House and on December 16, 2014 was approved by the Senate on a vote of 76 to 16. President Obama signed the legislation into law.

Some individuals with special needs, but not all, could benefit from an ABLE account. We are available to make presentations to groups and organizations to explain how and when an ABLE Account can be useful, in addition to, and not in lieu of other required special needs planning.

Beginning in 2015 under the federal ABLE Act, states may, but are not required to, choose to develop programs enabling persons with disabilities to establish accounts modeled on the popular 529 college savings plans. Certain balances and disbursements will not be considered when establishing an individual's eligibility for such means-tested government benefits as Medicaid and Supplemental Security Income (SSI). Funds can be used for approved healthcare, education, housing, personal support and other care expenses. The first $100,000 in an ABLE account will not adversely affect the individual's eligibility for SSI.

To qualify, the onset of the individual's disability must have occurred prior to the age of 26. Only one ABLE account maybe established for each qualified person with special needs. Total annual contributions cannot exceed the federal gift tax limit ($14,000 as of 2015), while total contributions from all contributors to the one account are capped at the limit established by each state for its 529 accounts (In Illinois $350,000). Although contributions are not tax-deductible, income earned by such accounts will not be taxed. Funds remaining in the account at the beneficiary's death (even funds contributed by parents, grandparents and siblings) must first be used to repay Medicaid expenses incurred.

So will an ABLE Act account be of benefit to you or your family member with special needs? Maybe, just maybe. Consider the following:

1. An ABLE Account is limited on how you can spend the money in the account, far more limited than a Special Needs Trust!

2. The ABLE Act limits how much can be contributed annually (Only $14,000 from all sources) to the one and only one allowable ABLE Account, unlike Special Needs Trusts which have no limits on contributions & can have multiple Trusts & Accounts.

3. An ABLE Account, again, must "payback" (reimburse) the State(s) when the beneficiary dies, for all that the State(s) paid (Medicaid, Medicaid Waiver programs, etc.) after the date the ABLE Account was created, even from funds contributed by parents, grandparents and others, unlike a 3rd party Special Needs Trust which has no pay back!

4. If the amount in the ABLE Account (again, can only have one account) for a beneficiary, exceeds $100,000, then the beneficiary will lose their SSI. Not the case with either a 3rd party or 1st party SNT that can have unlimited amounts!

5. If there is a Guardianship, & the beneficiary's funds are going to be "saved" in an ABLE Account, then, in the State of Illinois, court approval is required to establish the ABLE Account; in many counties court approval of all ABLE Account expenditures will be required; there will be required notice to, & approval of the State of Illinois, of all expenditures; there will be an additional cost of a required annual surety bond. None of which would be necessary for third party contributions when using a 3rd party Special Needs Trust.

6. ABLE Accounts are "tax free". In truth, this is an "illusionary benefit" (i.e. the "tax free nature of these accounts").

1. A 3rd party Special Needs Trust, if drafted as a Qualified Disability Trust (QDT), has a full $4,000 exemption in 2015, All distributions from the Trust for the benefit of the beneficiary are taxed to the beneficiary, & the beneficiary could have their own exemption, of $4,000, & a standard deduction in 2015 of $6,300. Therefore, with a 3rd party QDT Special Needs Trust you may be able to shelter from income tax in 2015

$14,300. An ABLE Account with $100,000 (maximum not to lose SSI) would need to earn over 14% for any income tax benefit over a 3rd party Special Needs Trust. But with the ABLE Account, there would be a needless pay back to the state(s) on third party contributions, & limitations on the expenditures. Further investments can easily be selected which produce no, or minimal federal taxable income.

2. For a 1st party "pay-back" Special Needs Trust, all income is taxed to the beneficiary, not to the Trust. Again, the beneficiary could have a $4,000 exemption & $6,300 standard deduction. Therefore, no federal tax anyway until the income exceeds $10,300, and, then at the lowest tax bracket (10% on next $9,225). So, again, $100,000 in ABLE Accounts is not producing any income tax benefit, and has more limited uses of the funds in the accounts than a 1st party special needs trust!

7. In Illinois the maximum that can be in an ABLE Account for a beneficiary is $350,000 (the same as for college 529 plans) or will lose Medicaid. There is no limit for Special Needs Trusts!

8. If the amount in the ABLE ACCOUNT exceeds $100,000, even for one day, the individual loses SSI, unlike for a Special Needs Trust! SSI amount in 2015 is $733 a month, $8,796 annually, and already is income tax free dollars.

9. If the age of the "disability" onset is age 26 or older, you cannot use an ABLE Account. So many with a mental illness diagnosis, or traumatic brain injury, if it cannot be documented that the onset was prior to age 26, cannot use ABLE Accounts!

When does ABLE make sense? Consider: The individual received an inheritance of less than $14,000, not correctly left to a 3rd party Special Needs Trust; The individual received a "Litigation Settlement" of less than $14,000; The individual has unspent SSI/SSDI/Earnings that will push the individual's resources over the allowable amount.

However, remember, in one year can only add to the account (only one account allowed) in total, from all contributors $14,000!

Also consider as a better alternative Illinois' HBWD (Health Benefits for Workers with Disabilities) in some situations for someone working… If the individual is working, is on SSDI, not on SSI, & only Medicaid is the issue, under HBWD the individual can have up to $25,000 in assets, & unlimited qualified plan benefits... not limited to ABLE's $14,000 a year… and no restrictions on use as ABLE has.

ABLE is definitely another "tool" to consider, but only makes sense in very few situations.