

Heard About **ABLE** Accounts?

ABLE accounts allow individuals with disabilities to have a tax-free savings account, similar to 529 College Savings Plans (ABLE accounts are "529A" accounts). For information specifically on the State of Illinois ABLE Account program please visit: <http://www.illinoistreasurer.gov/Individuals/ABLE>. However, Illinois residents may also use many other State's ABLE Account programs. The first State to have an ABLE Account, and it is the opinion of many, arguably, the easiest to use, is Ohio's found at: <http://www.stableaccount.com>. Illinois has revised its ABLE program several times in the past several years in an attempt to better compete with other State ABLE programs. To compare the different State ABLE programs go to: http://www.ablenrc.org/state_compare/.

While an ABLE account may be a very useful additional "tool" in some circumstances, an ABLE account may not be as widely applicable as first thought for many families of individuals with disabilities.

First, the ABLE account is limited in terms of the amount of money that can be deposited on an annual basis; the 2020 limit is \$15,000 per year, and there is a limit of only one ABLE account per individual. However, in addition, beginning in 2018, due to the December 2017 Federal Tax Bill (the Tax Cuts and Jobs Act), until 12/31/25, an ABLE beneficiary who has income from employment may make an additional contribution of the lesser of the beneficiary's earned gross income from employment for the year, and an amount equal to the Federal Poverty Level for a one-person household (\$12,880 for 2021), if there is no contribution by or for the beneficiary, to an employer retirement saving plan. However, beware, the earned income will still be counted for purposes of eligibility for SSI and Medicaid. Additionally, the Tax Cuts and Jobs Act allows, beginning in 2018 until 12/31/25, a designated beneficiary of an ABLE account, to claim the saver's credit for contributions made by the beneficiary to his or her ABLE account, if not a full time student, and if age 18 or older. Of note is another newer provision regarding ABLE accounts under the December 2017 Federal Tax Bill. That is, as of 2018 a traditional 529 college tuition account which has an ABLE beneficiary as the beneficiary, may be transferred to the 529A ABLE Account for that beneficiary, but the amount of the "rollover" is subject to the annual limitation for contributions, again \$15,000 for 2021.

Second, the total value of an ABLE account cannot exceed \$100,000 or an individual who receives SSI will have their SSI eligibility suspended until the account balance returns below that level. Further, the ABLE account is capped at the College Savings 529 Plan maximum in the state in which the ABLE account is open; State limits vary from approximately \$250,000 to more than \$500,000.

Third, ABLE accounts, per federal statute can be used solely to cover disability related expenses or face a penalty. That is, they are, in accordance with a literal reading of the federal statute, not as flexible or available as a special needs trust. Notwithstanding, the IRS and SSA appear to have taken the position that if spent for the beneficiary's benefit that they will not object, will not challenge the expenditure. At least that is their position at the time of writing.

Fourth, an ABLE account requires, again, technically, strict, complex reporting and record keeping, depending on the State.

Fifth, the individual, unless there is a court appointed Guardian, has full control and access to the Account. That is there is no "trustee" or "custodian" to protect the individual from themselves or third parties.

Finally, be aware that the States that provided medical assistance and/or Medicaid waiver services during the life of the individual, such as Home Based Support or residential services, are allowed on the individual's death to claim a "payback" or reimbursement, for all such amounts (including medical assistance and Medicaid Waiver programs and services) which were provided to the individual after the establishment of the ABLE account.

There are several circumstances in which an ABLE account may be very useful. For example, in situations where an

individual with disabilities wants to save excess work earnings or Social Security money so that such amounts may be used in the future, as this money cannot be accumulated over \$2,000 in their own name (under SSI and “traditional” Medicaid rules) but they can place up to \$15,000 a year into an ABLE Account (more if they have earned income as discussed above). An ABLE account might also be useful where a relative has left an inheritance of less than \$15,000 directly to the child who is on “traditional” Medicaid and/or SSI, and mistakenly did not leave it to a 3rd party Special Needs Trust. ABLE accounts could also be used to avoid the 1/3 reduction to SSI for family or trust contributions to the individual for food and shelter. If the family or a trust contributes the funds for food and shelter to the ABLE Account, its use will not cause the 1/3 reduction to SSI as it would if such funds came from them directly or through a special needs trust. Lastly, it might be the perfect vehicle for small litigation settlements.

However, due to the “payback” or reimbursement to the State(s) on death for Medicaid use, it is definitely not an appropriate vehicle for gifts or inheritances from others for the benefit of the individual with disabilities, unless there is the strong belief that all funds gifted will be spent for disability related expenses before the individual with disabilities dies. In that situation a “Third Party” Special Needs Trust is the appropriate option, and with a Third Party Special Needs Trust’s favorable income tax rules, that is, being taxed as a Qualified Disability Trust with a \$4,300 exemption in 2021, and with the beneficiary’s standard deduction of \$12,550 in 2021, the Trust can shelter potentially (subject to the beneficiary’s earned income) \$16,850 in annual Trust investment income.

In short, the ABLE account has some use for the individual’s own savings, but generally not for gifts or inheritances from others due to the pay-back on death of the individual.

Many believe that the most beneficial provision of an ABLE account is that it grows “income tax free”, at least for Federal Income Tax purposes. However, if you “do the math” you will see that, that fact is really of little benefit. If the individual is receiving SSI, the ABLE account cannot have more than \$100,000. The individual can use their standard deduction of \$12,550 to shelter their earned income and any income on ABLE account investments. Further, If you add the average individual’s (receiving SSI) annual earned income to the current possible return on \$100,000 in ABLE account investments, you will see that more than likely than not there wouldn’t be any income tax anyway on those funds, even if they were “taxable”.

As stated previously, Illinois has passed several changes to the Illinois ABLE program subsequent to its establishment in 2017. However, many of those changes are, simply stated, not as beneficial as they may appear. What is the truth about the “ineffective” new Illinois laws on ABLE accounts? First, while Illinois Public Act 100-713 provides that there is no longer a “pay-back” or “claw back” from an ABLE Account on the death of the Beneficiary, unless Federal law requires otherwise, Federal law does so require otherwise. The truth is that the Illinois law does not apply to most individuals with Intellectual and or developmental disabilities. CMS, the Federal agency governing State Medicaid programs, stated in a letter dated 9/7/17, that pursuant to Federal law, all States are required to seek recovery against the estates of certain deceased Medicaid beneficiaries. The specific individuals whose estates State Medicaid agencies must seek recovery from include those who received Medicaid Waiver services under any of the Illinois’ ten Medicaid Waivers, which includes Home Based Support and Residential Services. So, the truth is that most individuals with Intellectual and or developmental disabilities who have an Illinois ABLE account, who receives such services through any one of the 10 Illinois Medicaid Waivers, including children, are in fact subject to a payback! In addition the Illinois amendment, Public Act 100-713, provides that child support and maintenance (Court ordered in a divorce) can be ordered by court directly to an ABLE Account, again, unless prohibited by Federal law, however, that is contrary to the SSA position and the SSI POMS (SSI’s internal manual that implements SSA Regulations) which require it to be paid by court order to a d4A or d4C, 1st Party Special Needs Pay Back Trust, and not to an ABLE Account in order for it not to impact SSI.

It is important to remember the benefits as well as the shortcomings of ABLE accounts as you consider them as one of the savings tools for an individual with disabilities.