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ISSUE

04

## The ElderCounselor

*"Providing Solutions to Seniors and People with Disabilities"*

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### Special Needs Planning Updates

The special needs community and its advocates are making headway as of late. Last month, the IRS proposed regulations for the new state-sponsored ABLE accounts. In addition, the Special Needs Trust Fairness Act was reintroduced to Congress earlier this year and appears to be making progress. As advocates for those with special needs, we celebrate these minor, but important accomplishments and can use them as inspiration as we continue to fight for the rights of this special community.

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### The ABLE Act

**ABLE Accounts:**

A recent edition of the ElderCounselor™ newsletter explained the recently passed ABLE Act. The Act was passed in December 2014 and allows states to opt into state-sponsored savings accounts. These accounts are similar to the educational 529 savings accounts in terms of tax implications.

So long as an individual is deemed disabled (as defined by the Act), and such disability occurred prior to the age of 26, that person may become the owner and designated beneficiary of an ABLE account. An amount less than or equal to the annual gift tax exclusion amount (currently \$14,000) can be contributed to the account each year without causing the individual to be disqualified for SSI or Medicaid benefits. Any distributions used to pay for qualified disability expenses are made tax free (see below for a discussion of qualified disability expenses).

### **IRS Proposed Regulations (State-Sponsored ABLE Accounts):**

On June 19, 2015, the IRS proposed regulations to the state ABLE Act programs. The regulations provide guidance of several aspects of the Act. Following is an explanation of a few of the regulations.

#### *Eligibility*

While the ABLE Act states that the individual with special needs is to be considered the owner and the designated beneficiary of the account, the regulations clarify that where an individual is unable to open an account for himself or herself, “the eligible individual's agent under a power of attorney or, if none, his or her parent or legal guardian may establish the ABLE account for that eligible individual.” fn. 1.

#### *Disability Determination*

The proposed regulations allow the states flexibility with regard to determination of disability. The regulations state that an individual may be deemed disabled under the ABLE Act so long as an impairment meets or is “equal in severity and duration to the severity and duration” of any disability used in the SSA’s listing. fn. 2.

#### *Change in Eligible Individual Status*

The regulations seek to clarify situations where a disabled individual becomes no longer disabled for a period of time and then regains eligibility at a later date. In these circumstances, the regulations state that the individual may maintain the ABLE account. However, during a period where the individual is not deemed disabled under the Act, no contributions or tax-free distributions may be made. Upon becoming disabled again, the individual may resume making contributions and taking distributions as before.

#### *Contributions to the ABLE Account*

The ABLE Act allows contributions of less than or equal to the annual gift tax exclusion amount each year. These contributions must be made in cash. Finally, the total contributions may not exceed the state's limit for aggregate contributions under its qualified tuition program. Any contribution amount that causes the account to exceed these limits must be returned to the contributor. The regulations provide guidance in these situations. They provide a formula by which the income attributable to a certain contributed amount may be calculated. Therefore, any contribution amount over and above that allowed by the law plus its accrued income may be returned to the contributor.

#### *Qualified Disability Expenses*

The ABLE Act allows distributions from these accounts to be made tax free so long as they are used on a qualified disability expense. Such expenses include, but are not limited to, expenses for education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, oversight and monitoring, funeral and burial, and other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin.

The IRS states that qualified disability expenses should be defined broadly and should include household expenses rather than being limited to medically related expenses. The regulations require the programs to establish safeguards in order to distinguish qualified disability expenses from other expenses. In addition, the regulations require implementation of a process to determine distributions made for household expenses as defined by the SSA for purposes of the SSI program.

#### *Distribution on Death of Beneficiary*

The ABLÉ Act provides that upon the death of the designated beneficiary of the ABLÉ account, the remaining balance must be used to first reimburse the state for any amounts paid out for Medicaid benefits.

For tax purposes, the proposed regulations provide that upon the death of the designated beneficiary, all amounts remaining in the ABLÉ account are includible in the designated beneficiary's gross estate for purposes of the estate tax.

#### *Reporting Requirements*

The proposed regulations set forth the reporting requirements for the ABLÉ accounts. The regulations require an ABLÉ program to maintain records regarding all contributions, distributions, returns of excess contributions or additional accounts, income earned, and account balances for any designated beneficiary's ABLÉ account. Also, establishment of each ABLÉ account must be reported.

#### **Comments to Proposed Regulations**

The IRS is accepting comments on the proposed regulations through September 21, 2015. Comments may be submitted electronically, by mail, or hand delivered to the IRS. A public hearing is scheduled for Oct. 14, 2015, at the IRS Auditorium, 1111 Constitution Ave. NW, in Washington.

fn.1--See <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs#h-13>

fn. 2--See <http://www.ecfr.gov/cgi-bin/retrieveECFR?>

<http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=0a2fe824cf8813ced765a01275750260&ty=HTML&h=L&mc=true&r=PART&n=pt20.2.404#sp20.2.404.p>

and <http://www.ecfr.gov/cgi-bin/text-idx?SID=0a2fe824cf8813ced765a01275750260&mc=true&node=20150520y1.5>

## Special Needs Trust Fairness Act

Congress established first-party special needs trusts (SNTs) in 1993 with the intent to allow individuals with disabilities to remain eligible for public benefits, such as SSI and Medicaid, when receiving a lump-sum settlement or inheritance, or otherwise. Normally, receipt of a large sum of money would disqualify these individuals from the means-based governmental benefit.

SNTs generally may not pay for food or shelter, which is what Social Security Income is designed to pay for. The SNT is used to supplemental the individual's needs by paying for expenses such as physical therapy, medications, medical treatment, transportation, education, furniture, etc. Direct payments to the beneficiary should never be made.

Currently, an SNT may only be established by a parent, grandparent, legal guardian, or court. The Special Needs Trust Fairness Act of 2015 would allow the individual to establish an SNT as well. The Act purports to correct an oversight of the original law and would allow an individual who has capacity to establish this type of trust.

This Act was first introduced in 2013 and did not pass. It has been reintroduced this year and, as advocates for those with special needs, we are hopeful it will gain support. If you wish to contribute and show your support, visit NAELA's website where the organization has outlined ways you can get involved:

[https://www.naela.org/Public/Advocacy\\_Public\\_Policy/Public\\_Policy/SNT\\_Fairness\\_Act.aspx](https://www.naela.org/Public/Advocacy_Public_Policy/Public_Policy/SNT_Fairness_Act.aspx) .

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## Summary

The special needs community is making some progress as these two legal issues progress. As advocates for people with special needs, we hope that this progress will stimulate more concern and attention to the issues of this community. If you, a client, or a loved one has a need for a special needs planning attorney, or you have any questions or comments about the issues raised in this Newsletter, please reach out to us. We are always happy to hear from you.

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