The ABLE Case Summary Series

A Range of Strategies for Funding an ABLE Account

This is the fifth in a six-part Case Summary Series to explore ways to benefit from an ABLE account that complement continued eligibility for selected public benefits and programs and/or use of special needs trusts (SNTs). The purpose of the series is to help current or future ABLE account owners and beneficiaries understand better the possibilities of an ABLE account complementing other strategies to improve health, independence and quality of life.

Introduction

The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act is found in section 529A of the Internal Revenue Code and became law in December 2014.[1] Proposed ABLE regulations were published by the Department of the Treasury on June 22, 2015 and have not been issued as final.[2] ABLE accounts offer qualified individuals with disabilities an opportunity to save funds, in a dedicated account, to meet "qualified disability expenses (QDE)" that will allow them to improve health, independence and quality of life. The first ABLE accounts were introduced in late spring and summer of 2016. As this is written, approximately 33,000 individuals have established an ABLE account in one of the 41 states plus District of Columbia that have programs and maintain active accounts.

This article focuses on a range of strategies for funding an ABLE account. After reviewing the basic rules governing contributions to an account (e.g., who can fund, annual limits on contributions, permitted rollovers from other ABLE accounts or 529 college savings accounts), we walk through a number of strategies that have been or could be used to ensure that contribution money is available, contributions are easy to make and, if possible, occur automatically. We also use several case scenarios to illustrate the use of this range of methods to fund an ABLE account.

The Basic Rules on Contributions to ABLE Accounts

Any "Person" Can Contribute: This includes the designated beneficiary (i.e., the individual with a disability who owns the account), a parent or other relative, a friend or

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[1] 26 USC 529A.

[2] 80 Federal Register 35602-01.

any other third party. A person, as defined by Internal Revenue Service (IRS) rules, includes a trust or estate.[3]

Annual Contribution Limits: Generally, the maximum combined contributions for a calendar year cannot exceed the current year's IRS gift tax exempt amount – $15,000 in 2019 (was $15,000 in 2018, $14,000 in 2016 and 2017).[4] End-of-2017 ABLE Act amendments now allow the beneficiary to exceed the $15,000 contribution limit if depositing a part of his or her own wages into the account and if no contributions have been made to a range of retirement plans for the benefit of the designated beneficiary including, for example, 401k and 403(b) plans. If the designated beneficiary has worked during the calendar year, he or she can contribute all or a part of their gross earned income for the year up to a maximum of 100 percent of the Federal Poverty Level (FPL) for one person for the previous year ($12,140 in 2019, based on the 2018 FPL)[5] – even if the $15,000 maximum yearly amount was contributed through other sources.

Rollover from a Family Member's ABLE Account: A designated beneficiary of an active ABLE account can make a distribution to be paid into another person's ABLE account so long as: the distribution from the first ABLE account is paid into the ABLE account owned by a family member; and that amount is paid into the family member's account within 60 days of the original distribution.[6] The IRS defines family member to include a brother, sister, stepbrother, stepsister or half-brother and half-sister.[7]

Example: Alan, age 38, is the older brother of Sharon, age 21. Alan has had an ABLE account since 2016 and its current balance is $48,000. He wishes to give Sharon, a Supplemental Security Income (SSI) beneficiary with no ABLE account, $14,000 from his account so that she can purchase a good used car. Alan understands that a gift to Sharon is not considered a QDE under ABLE policy. If he just gave $14,000 directly to Sharon from his ABLE account, some of that money would be considered part of his taxable income under IRS policy.[8] Also, the SSI program would treat this gift as income in the month of receipt and a resource in later months if part of the money was left.

Alan and Sharon decide on a different approach. Sharon opens an ABLE account with a $150 deposit from her modest savings. Once that account is established, Alan makes a

[3] 26 USC 529A(b)(1)(A); proposed regulations, 26 CFR 1.529A-2(a)(4).

[4] 26 USC 529A(b)(2)(B); proposed regulations, 26 CFR 1.529A-2.

[5] See amendments to ABLE Act in sections 11024 and 11025 of the Tax Cuts and Jobs Act of 2017, 26 USC 529A(b)(2)(B)(ii) & (b)(7).

[6] 26 USC 529A(c)(1)(C)(i).

[7] 26 USC 529A(e)(4) (suggesting that an adopted sibling or step sibling would also meet the family member definition).

[8] 26 USC 529A(c)(1)(A) (explaining that the part of the non-QDE distribution that represents ABLE account earnings is included in taxable income).

distribution of $14,000 from his ABLE account into Sharon's newly-established ABLE account. Since the $14,000 was deposited in an ABLE account of Alan's family member (his sister), this permitted rollover is not considered taxable income to Alan, nor is this deposit into Sharon's ABLE account treated as her income by the SSI or Medicaid programs.

Rollover from a 529 College Savings Account: Under the ABLE Financial Planning Act of 2018, the person who established the 529 account (to purchase tuition credits/ certificates or to meet higher education costs for a designated beneficiary) may make a rollover to the ABLE account of the 529 account's designated beneficiary or a member of that designated beneficiary's family.[9] The term "member of the family" includes: biological and step parents, aunts, uncles, siblings, children, first cousins, nieces and nephews; parents, siblings, children, nieces and nephews by marriage; legally adopted children; and half-brothers or half-sisters of the designated beneficiary.[10] The rollover amount can be no more than the current year's ABLE account contribution limit ($15,000 in 2019) in case any other ABLE account contributions are made for the calendar year.

> ***Example:*** Donna started 529 college savings accounts 15 years ago for each of her six grandchildren. Her grandson, 23-year-old JP, is a designated beneficiary of one of the 529 accounts. His account balance is now $63,500. JP has a severe learning disability and was recently approved for SSI. JP struggled with most subjects in high school and is not expected to enroll in a 529-eligible college/university for use of the 529 savings. However, JP has a good aptitude for working with small engines and recently was approved for a 12-month small engine repair training program to be funded by his state vocational rehabilitation (VR) agency. JP has been able, without any formal training, to do minor repairs to the family lawn mower and snow blower, has done the same for three different neighbors and hopes to establish his own business after the training program.

After discussing the matter with JP and his parents:

- Donna agrees to provide JP with $500 to open an ABLE account. Her check is made payable to the entity that operates the ABLE program to avoid any possibility of the SSI program treating the $500 as income to JP.
- Donna then makes a $14,500 rollover from the 529 college savings account, set up for JP's benefit, to JP's ABLE account. Since total contributions to the ABLE account are within 2019's $15,000 limit, this is a permitted rollover under IRS policy.

JP's long-term plan, if the training program goes well, is to establish a small engine repair business in a section of his parents' three-car garage. JP hopes to get some

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[9] 26 USC 529(c)(3)(C)(i)(III).

[10] 26 USC 529(e)(2).

assistance from his state VR agency to purchase equipment, supplies and to pay for business cards to start his business. JP wants to keep his ABLE account available to pay for items the VR agency does not pay for, possibly including a pickup truck to transport lawn mowers and snow blowers.[11] Donna has decided to retain the remaining $49,000 in the 529 college savings account, knowing she can either move additional money from the account into JP's ABLE account, or roll over some of his account's money into the account of his younger sister or a cousin as permitted by IRS policy.[12]

Identifying Money to Put in an ABLE Account; Methods for Making Contributions

Contributions by the Designated Beneficiary

Using the Beneficiary's Wages: If the beneficiary receives SSI and works, the SSI program will ignore a significant portion of the gross wages after deducting a $20 general exclusion – e.g., the first $65 and half of the remaining wages if no other work incentives apply; the first $1,870, up to a 2019 yearly maximum of $7,550, if he or she is a student who is regularly attending school and under age 22. Since either of these work incentives will result in the beneficiary having more disposable income, some part of that extra income could be used to contribute to an ABLE account.

> ***Example***: In JP's example, above, if he is an SSI beneficiary and works a part-time job, he could put all or part of his part-time wages into his ABLE account even though the maximum of $15,000 is already going into the ABLE account from other sources.

Using the Beneficiary's Income Tax Refund: If the beneficiary works and files a tax return, he or she may qualify for a federal and/or state tax refund. The refund(s) could range from a few hundred dollars to a much larger amount, particularly if the beneficiary qualifies for the federal Earned Income Tax Credit (EITC).[13] If the refund is not needed to pay off debt or to purchase badly needed items, all or a part of it can be contributed to an ABLE account.

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[11] If JP is currently an SSI beneficiary, he may also want to explore setting aside some of his self-employment earnings in a Plan to Achieve Self Support (PASS). With an approved PASS the income set aside reduces his countable income and allows him to increase his SSI payment or retain a higher SSI payment. See Social Security Spotlight on the Plan to Achieve Self Support, https://www.ssa.gov/ssi/spotlights/spot-plans-self-support.htm.

[12] 26 USC 529(c)(3)(C)(i)(II).

[13] The beneficiary/ABLE account owner may want to consult a tax professional to see what other tax deductions or credits could be available (e.g., Child and Dependent Care Credit, Credit for Elderly or Disabled, or deduction for impairment related work expenses to lower his or her tax bill).

Depositing Earnings to an ABLE Account Through a Direct Deposit: In some states, the ABLE program has established a system for employers to allow an individual to make a direct deposit from their paycheck into an ABLE account. This could involve a direct deposit from the designated beneficiary's earnings. Direct deposit, however, cannot be used to avoid SSI income counting rules.

Using an SSI or Social Security Lump Sum Retroactive Payment: A retroactive payment could occur for any number of reasons: to cover months of back benefits when an application is approved; to cover one or more years of back benefits when the beneficiary wins an appeal; or to correct an underpayment of benefits if the Social Security Administration (SSA) had been paying the wrong benefit level. Subject to the annual limits on ABLE account contributions (i.e., $15,000 in 2019), this can be a great way to fund the account and save for future purchases.

Contributions by Parents, Other Third Parties

The parents or other third parties (typically other family members) can use some of the same strategies as the designated beneficiary: e.g., using wages (possibly with a direct deposit to the ABLE account); using an income tax refund; and using their own Social Security payment (for disability or retirement). Some additional possibilities are present as noted below.

A Tax Refund Based on the Earned Income Tax Credit: Under federal EITC policy, the highest federal EITC amounts are for a working parent or parents who have one or more dependent children, with refundable credits (a refund is paid even when little or no taxes are owed) as high as $6,431 for tax year 2018 (based on taxpayer's adjusted gross income and number of dependent children). Generally, a dependent child, under EITC policy, must be under age 19 or under age 24 if attending high school or college. However, an adult child of any age is considered a dependent child if he or she has a disability (such as one meeting the SSI criteria). You may also qualify for the EITC without a qualifying child if you are at least age 25, but under age 65. This credit, payable as a refund, creates a great opportunity to fund the designated beneficiary's ABLE account.

> ***Example***: Jenna, age 32, is deaf and lives with her father and 16-year-old brother. She receives SSI and started a small ABLE account last year. Her father had $18,000 in adjusted gross income (AGI) in 2018. Both Jenna and her 16-year-old brother meet the IRS definition as dependent children under the IRS's EITC policy (in Jenna's case because she has a disability). With AGI of $18,000, and two dependent children, Jenna's father will qualify for an EITC of $5,716 when he files his 2018 tax return and will receive this full amount as a tax refund.[14] Jenna's father can use part of his EITC-based tax refund to contribute to Jenna's ABLE account.

[14] See IRS Publication 596, Earned Income Credit (for 2018 tax returns) and EIC Table on pp. 30-38, https://www.irs.gov/pub/irs-pdf/p596.pdf.

Contributions Through a Will: If the designated beneficiary receives SSI, parents and grandparents will often avoid direct bequests to the child or adult who gets SSI because anything received by the SSI beneficiary in cash would be treated as income in the month of receipt, with any remaining money treated as a resource in the following month. Often, the alternative is to have the bequest go directly into an SNT that is set up to avoid negative SSI implications. An alternative that now exists is to leave money through a will to go into an SSI beneficiary's ABLE account (subject to annual contribution limits). As noted below, parents and grandparents may still opt to make the bequest to an SNT with the trustee given authorization to make contributions to the ABLE account.

Contributions from a Trust

As noted above, IRS policy allows a trust to make contributions to an ABLE account. One concern we hear from trust lawyers and trust experts is whether the trustee, who decides on trust distributions, has the authority to make a contribution to the beneficiary's ABLE account. To date, trustees of SNTs drafted before ABLE accounts were an option must rely on language used in the trust to decide, in consultation with a trust attorney if necessary, whether they have authority to make a distribution into an ABLE account.

Use Language in Trust Document Giving Trustee Authority to Make Distributions into an ABLE Account: Going forward, this may be the best approach for newly-created SNTs. In fact, if state or local practice make it possible to amend trust language, it may be advisable to amend the trust document to clarify that the trustee has this authority.

Bequest in a Will to a Trust with Trustee Authority to Deposit to ABLE Account May Be a Good Approach: An SNT may be the preferred place for a bequest through a will if the amount to be given to the ABLE account's designated beneficiary is expected to be more than the contribution limit for a future year. Additionally, even if the bequest is safely below the ABLE contribution limit in place as the will is written, that bequest, combined with other account contributions, might exceed the annual limits. By depositing the bequest into the trust, the trustee has maximum flexibility to distribute or not distribute to the ABLE account based on changing annual contribution limits and other factors.

> ***Example*:** Amanda is 43 years old, has an intellectual disability and has been on SSI since she turned 18 in 1993. Her parents, who are both in their 70s, helped Amanda start an ABLE account in 2017 using some of the strategies outlined above. Recently, they worked with their lawyer to create an SNT for the benefit of Amanda and put $5,000 into that trust. Under the terms of the SNT, the trustee is given explicit authority to make distributions from the SNT into Amanda's ABLE account. At the same time the SNT was created, the parents amended their wills

to arrange for one-third of their estate to go into Amanda's SNT (with one-third going to each of her two siblings). This combination of an SNT and an ABLE account will allow Amanda's parents to provide for her future needs without jeopardizing her continuing eligibility for SSI, Medicaid and potentially other federally-supported, needs-based benefit programs.

A much longer discussion of the relative merits of ABLE accounts and SNTs appears in the earlier case summary, *ABLE Accounts Compared to Special Needs Trusts: When Is One or the Other Preferred? When Do Both Work Well Together?*

Conclusion

This short article has presented a number of key options available to ABLE account owners (i.e., designated beneficiaries) and family members to fund an ABLE account. As thinking about ABLE accounts continues, we expect that creative new approaches to funding an ABLE account will continue to emerge.

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