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ELEMENTS OF AN ABLE ACCOUNT IN NEW YORK

1. Introduction.

The simple truth is that to remain eligible for means-tested government benefits, an individual must remain poor! The ABLE Act is a public acknowledgment of the extra and significant costs of living with a disability. The text of the Federal Enabling Legislation expresses its purposes as follows: (i) to encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life; and (ii) to provide secure funding for disability related expenses that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program, SSI, the beneficiary's employment, and other sources.

While an ABLE Account is a tool which can be used to augment traditional Supplemental Needs Trusts (SNT), it has several advantages over a Pooled SNT or an individually trustee SNT. The ABLE Account will, most likely, provide more choice and control for the beneficiary and family than a Pooled SNT. For instance, an ABLE account will allow the designated beneficiary to exercise greater control over investment of their funds and distributions from their ABLE Account. Further, cost of establishing an ABLE Account will be considerably less than those required to establish an individually trustee SNT.

Section 529A of the Internal Revenue Code (the "Code") allows the creation of a qualified ABLE program by a State under which a separate ABLE Account may be established for an individual with a disability. Contributions to an ABLE Account are subject to both an annual and a cumulative limit; and, when made by a person other than the designated beneficiary, are treated as non-taxable gifts to the designated beneficiary. Distributions made from an ABLE Account for qualified disability expenses of the designated beneficiary are not included in the designated beneficiary's gross income. Most importantly, amounts in the ABLE Account are not considered an available resource for purposes of

means tested government benefits. However; the SSI benefits of a designated beneficiary will be suspended if the cumulative balance in the ABLE Account exceeds \$100,000.

2. Features of an ABLE Account.

An "ABLE Account" is one: (i) to which a person may make contributions in the form of cash, check, money order, credit card or other similar method of payment; (ii) for the benefit of an "eligible individual;" (iii) for the purpose of meeting the "qualified disability expenses" of the "designated beneficiary" of the account. Significant features of an ABLE Account include:

- Each designated beneficiary is limited to only one ABLE Account. If an ABLE Account is established for a designated beneficiary, no account subsequently established for the designated beneficiary will be treated as an ABLE account.
- No portion of an ABLE Account may be used as security for a loan.
- The account owner may, up to twice each year, select how amounts in the ABLE Account are invested.
- An ABLE Account may be set up by the designated beneficiary, an agent under a Power of Attorney or by a parent or guardian of a designated beneficiary.
- Any distributions from the ABLE Account for qualified disability expenses of designated beneficiary are not subject to the income tax.
- Any distribution from the ABLE Account which is not for a qualified disability expense of the designated beneficiary is subject to the income tax *and* to a 10% penalty tax.
- The total annual contributions to an ABLE Account by all participating individuals, including

family and friends, is limited to the amount of the Gift Tax “annual exclusion amount” (\$14,000 in 2016). This limit will increase in years to come as the annual Gift Tax exclusion amount is adjusted for inflation.

- Contributions to an ABLE Account are eligible for the annual Gift Tax Exclusion (\$14,000 in 2016). Therefore, a third party who contributes to an ABLE account will not have to file a Gift Tax Return to report the contribution.

- Subject to any outstanding payments due for qualified disability expenses, upon the death of the designated beneficiary, all amounts remaining in the ABLE account will be subject to state recovery for medical assistance payments made on behalf of the designated beneficiary after the date the ABLE Account was established. Contrast this with the pay-back provisions of a first party SNT which requires reimbursement of all amounts paid by the State(s) for Medicaid, even amounts paid before the first party SNT was established.

- An account owner may change the designated beneficiary of an account to another beneficiary who is an eligible individual.

3. **ABLE Account is a Disregarded Resource.**

Any amount (including earnings) in the ABLE Account; any contributions to the ABLE Account, and any distribution for “qualified disability expenses” will be disregarded for the purposes of means tested government benefits (*i.e.*, Medicaid, SNAP, and SSI).

- Contributions to an ABLE Account by the designated beneficiary will not be disregarded as income of the designated beneficiary. Thus, an ABLE Account is ineffective as a tool to “spend-down” excess income of the designated beneficiary to maintain his or her eligibility for means-tested government benefits.

- Distribution from an ABLE Account for housing expenses will be considered “in-kind support and maintenance” (ISM) and will reduce the designated beneficiary’s SSI benefits in the month disbursed.

- Any amount (including earnings) in an ABLE Account in excess of \$100,000 will be considered an available resource. As such, the SSI benefits of the

designated beneficiary will be suspended (not terminated) until the amount in the ABLE Account falls below the \$100,000 threshold.

- The suspension of SSI benefits by reason of amounts in excess of \$100,000 in an ABLE Account will have no impact on the individual’s eligibility for Medicaid.

4. **DEFINITIONS.**

Because the ABLE Account is a new concept in the Law, it is important to define certain key terms. The following is a paraphrase of the ABLE Act.

- **QUALIFIED DISABILITY EXPENSES-** means any 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, including the following expenses: 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 regulations.

- **ELIGIBLE INDIVIDUAL-** means an individual who: (i) is entitled to Social Security Disability Insurance benefits (SSDI) or Supplemental Security Income (SSI) and the onset of his or her disability occurred before the individual attained age twenty-six or (ii) has a physician’s certification that he or she has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, or is blind (within the Social Security definition) and such blindness or disability occurred before the date on which the individual attained age twenty-six.

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