

“ABLE Act” [I.R.S. §529A]

Achieving a Better Life Experience Act

P.L. 113-295 of December 19, 2014

by Thomas F. Kendziorski

Executive Director, Attorney at Law

The Arc of Oakland County, Inc.

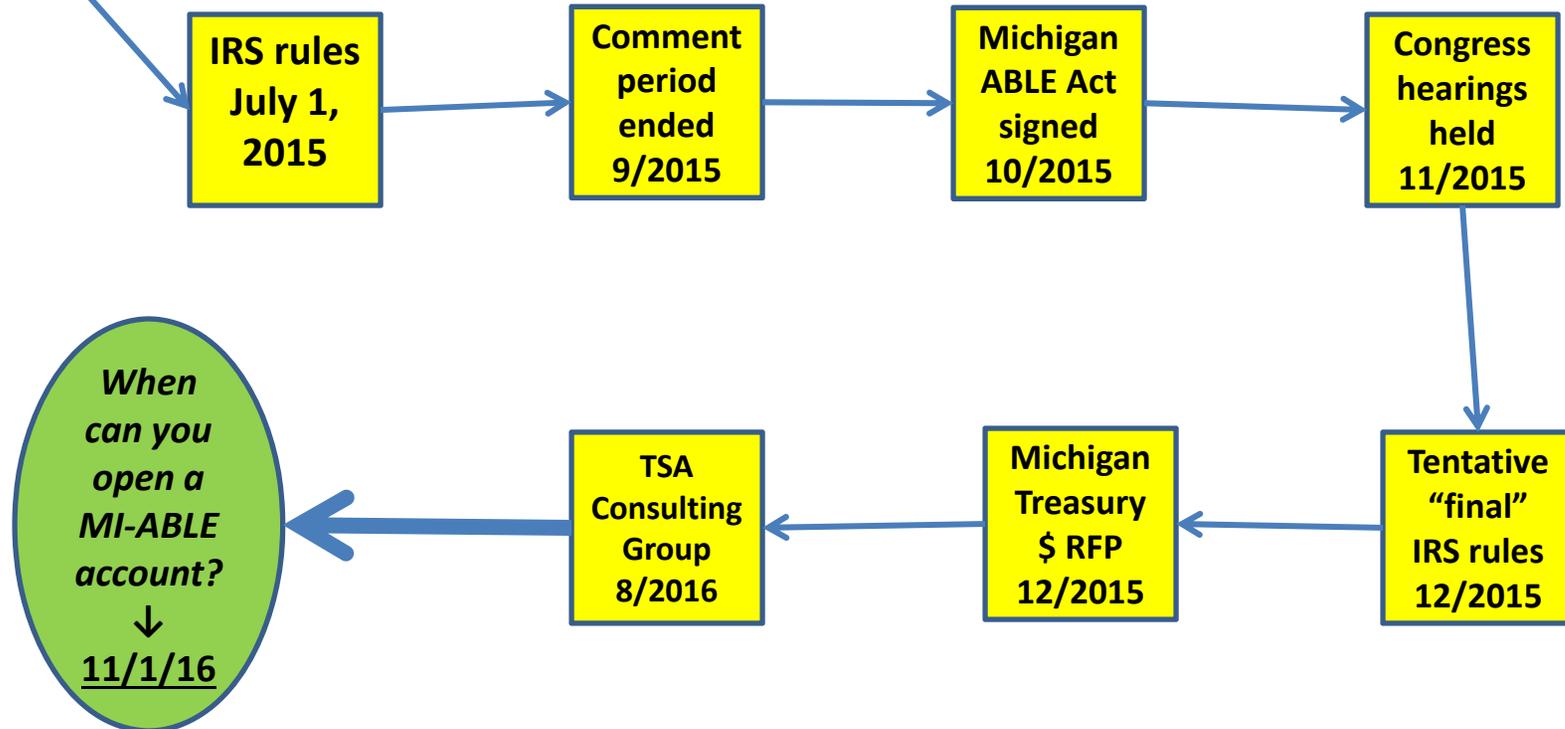
1/22/18

OVERVIEW

- The ABLE Act arose out of the federal “Tax Increase Prevention Act of 2014.” It creates **tax-favored savings accounts** for individuals with disabilities for tax years beginning after December 31, 2014.
- The ABLE Act account creates a new option for some people with disabilities and their families to **save for the future**, while **protecting eligibility** for public benefits.
- It closely resembles a college “529 account,” better known as a qualified tuition savings program. The ABLE Act is now known as IRS Code **§529A**.

Legislative Chronology

12/31/14 – Congress passed law and President signed



OVERVIEW

- ABLE accounts are **intended to be easy** to open and available in any state.
- Each state will need to take action to make the accounts available to its residents. **Authorizes states to create** an ABLE Act program.
- Distributions from an ABLE account for qualifying expenses would be disregarded or receive special treatment when determining the beneficiary's eligibility for most federal **"means-tested"** benefits.

WHO IS ELIGIBLE TO BE AN ABLE ACT BENEFICIARY?

Must meet two requirements:

1. **Age: disabled prior to age 26** (**NOTE:** federal legislation introduced to raise the age limit to 46 --- as of 12/31/17 --- has not passed)
2. **Severity of disability:**
 - Have been determined disabled under the Social Security Administration’s (SSA) Title XVI (SSI) or Title II (SSDI) benefits programs
 - *The **Social Security Act** generally defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) that can be expected to last for a continuous period of not less than twelve months.*
 - or ---
 - Submit a **“disability certification”** of *“marked and severe functional limitations,”* signed by the individual under penalties of perjury, including a physician’s diagnosis, that the individual essentially meets or equals the criteria set forth by the SSA.

KEY CHARACTERISTICS OF AN ABLE ACT ACCOUNT

- An individual may have **only one** ABLE account;
- May be **established in any state**, not just the one where the participant resides; **NEW:** (see: Wolters Kluwer/CCHGroup “Tax Briefing” dated 12/18/15); your state may choose not to participate in the ABLE Act account program.
- **Anyone may contribute** to the account (i.e., individual, trust, estate, partnership, association, company, or corporation).
- Total annual contributions may not exceed the federal limit, which is currently **\$15,000** for 2018.

KEY CHARACTERISTICS OF AN ABLE ACT ACCOUNT

- Aggregate contributions may not exceed the state's limit for its §529 college savings accounts, in Michigan that figure is \$500K; **BEWARE-The suspension of SSI and automatic MA at \$100K!**
- The eligible individual who established the ABLE account and who is the owner of the account is the “designated beneficiary;”
- Earnings on an ABLE account and distributions from the account for qualified disability expenses do not count as taxable income of the contributor or the eligible beneficiary;

KEY CHARACTERISTICS OF AN ABLE ACT ACCOUNT

- **Contributions** to an ABLE account must be made in **“cash”** (or, check, money order, credit card, etc.) from the contributor’s after-tax income. Cannot include real property (house, land, etc.)
- Assets in an ABLE account may be **rolled over** without penalty into another ABLE account for either the designated beneficiary (e.g., when moving to another state) or any of the beneficiary’s qualifying family members. This does not apply in the case of the death of a beneficiary.

QUALIFIED DISABILITY EXPENSES (“QDE”)

[What can ABLE account funds be used for without penalty?]

- Education
- Housing (e.g., mortgage, property insurance, property taxes, rent, heating fuel, gas, electricity, water, sewer, garbage removal)
- Transportation
- Employment training & support
- Assistive technology & personal support services
- Health
- Prevention and wellness

- Financial management and administrative services
- Legal fees
- Expenses for ABLE account oversight and monitoring
- Funeral and burial expenses
- Basic living expenses
- Other expenses as approved by US Treasury

NOTE: *Broad interpretation of QDE’s is encouraged. Probably can’t use ABLE Act funds for casinos or liquor stores!*

Possible “Practical” Ways To Use ABLE Act Account Funds

1. Save for a down payment on a house.
2. Save for the first and last month’s rent plus the security deposit for an apartment.
3. Safe place to deposit excess SSI/SSDI funds without losing Medicaid eligibility under the current \$2,000 asset rule.
4. Pay routine bills.
5. Save for medical or dental work that Medicaid does not cover.
6. Safe place to deposit formerly unknown resources, such as: sudden inheritances; legal action settlements; etc.
7. Pre-pay burial expenses.

IMPACT ON FEDERAL BENEFITS

- Supplemental Security Income (**SSI**):
 - Only the first **\$100,000** in ABLE account assets will be disregarded
 - SSI payments will be **suspended** (although eligibility remains) if above \$100K
 - Assets above \$100K will count as **resources**
 - Distributions **for housing** will receive the same treatment that all housing costs paid by outside sources receive (1/3rd reduction of SSI benefit) if the distribution is retained **into the month following the month of receipt**. In other words, ABLE account funds may be used to pay rent, but the rent must be paid within the same calendar month as the distribution.

IMPACT ON FEDERAL BENEFITS (cont.)

- **MEDICAID**

- Benefits are **NOT suspended** if the ABLE account balance exceeds \$100K
- **Payback/Lien Provision**: any assets remaining in the ABLE account when a beneficiary dies, subject to outstanding qualified disability expenses, will be used to reimburse a state for Medicaid payments made on behalf of the beneficiary after the creation of the ABLE account
- For purpose of this section, the **state is considered a creditor** of the ABLE account, not the beneficiary

TAX IMPLICATIONS

- Contributions to an ABLE account are made with post-tax dollars
- **FEDERAL** – in general, exempt from taxation. **Distributions** for qualified disability expenses are **exempt from taxation**. With certain exceptions, non-qualified distributions are taxable AND subject to an additional 10% penalty.
- **STATE** – ABLE Act contributors may claim up to **\$5,000** (single filer) or **\$10,000** (joint filers) **deduction** on their Michigan income tax returns.

MISCELLANEOUS BUT IMPORTANT ITEMS TO KNOW

- The IRS understands that certain individuals may be unable to establish an account by themselves, so, **a legal guardian** or an **agent under a Power of Attorney** will be allowed to do so for the “designated beneficiary.”
- A guardian or an agent CANNOT have or acquire any beneficial interest in the account during the “designated beneficiary’s” lifetime; they must administer the account solely for the benefit of the beneficiary.

MISCELLANEOUS BUT IMPORTANT ITEMS TO KNOW (continued)

- A beneficiary is allowed to maintain an ABLE account that was **created in another state**, even if that person is no longer a resident
- A prior ABLE account that was **closed** does not prohibit the subsequent creation of another ABLE account for the same beneficiary
- **Annual re-certifications** are required to demonstrate that the beneficiary continues to satisfy the definition of an individual.

ABLE vs. Special Needs Trust

- An ABLE account is **another tool** for special needs planners; another arrow in their quiver
- An ABLE account is **not a replacement** for a traditional special needs trust (SNT); however, it may become a consideration for “third-party” contributors (e.g., parent or grandparent)
- A so-called **“third-party” SNT has no payback** or lien provision --- a “first-party” SNT does.

ABLE vs. Special Needs Trust

- There is **no annual cap** of \$15,000 on the contributions to a SNT
- An ABLE account in Michigan has a cap of \$500K total; there is **no such cap** on a SNT; **BEWARE** of the \$100K SSI “suspension” of benefits!
- **ABLE accounts grow tax-free**, and unlike a trust, there is no need to ensure that income is paid out each year to minimize higher trust tax rates
- **SNT’s can hold property**, vehicles, etc.

FINAL THOUGHTS

- The **beneficiary's control** over the ABLE account may become a **huge risk** where that person uses funds for something other than a qualified disability expense.
- **Limited protection** from financial exploitation.
- **Limited investment** direction
- **Choice and competition of investments**
Aggressive, moderate, conservative, “no risk.”

FINAL THOUGHTS (continued)

- We await (as of 1/1/2018) the **final IRS regulations** for ABLE Act accounts. It is still okay for states to create accounts despite this situation.
- In December 2015 and in May 2016 RFPs were issued by Michigan soliciting financial institutions to administer ABLE Act accounts. The state contracted with “TSA Consulting Group” of Ft. Walton Beach, FL. **The “go-live” enrollment date for “MIABLE” occurred on November 1, 2016!!!** (see: www.MIABLE.org)

NEW STUFF for 2018

(see: §§11024 and 11025 of the Tax Cuts and Jobs Act of 2018)

- **NEW**: An ABLE Act beneficiary who earns **income from a job** may save up to the Federal Poverty Level, which is pegged at \$12,060 for 2018, **in addition to** their annual contribution limit of \$15,000 (for 2018). Be aware that although such earnings may enhance annual ABLE Act account contributions, it may negatively affect receipt of SSI due to higher monthly earned income.
- **NEW**: An ABLE Act beneficiary may now receive a **rollover** from a traditional §529 (“Qualified Tuition Plan”), but must adhere to the annual contribution limit of \$15,000 (for 2018). This allows individuals who may have been saving for a child’s college tuition, but if it is no longer needed, to roll-over up to the maximum contribution each year until the §529 account has been depleted.

HISTORY & RESOURCE LISTING

- P.L. 113-295 of 12/19/2014 (**federal statute**)
- **The Arc of the U.S.** overview guidance of the ABLE Act dated 1/19/2015
- *“The ABLE Act and Special Needs Planning”* article by **Christopher Smith, Esq.**, March 2015
- *“Understanding ABLE Act”* webinar slides by the **ABLE National Resource Center** dated March 26, 2015
- P.A. 160, 161, 162 and 163 of 2015 (**Michigan statutes**; signed into law on 10/28/2015)
- **IRS Notice** 2015-81 of 11/20/15
- **Disability Scoop** article dated 11/30/2015
- **SSA P.O.M.S.** §SI 01130.740 (12/18/2015)
- **The Arc of the U.S. - Disability Policy Seminar:** *“ABLE ACT Improvements Fact Sheet,”* dated 3/21/2016
- *“Tax Cuts and Jobs Act of 2018”* at §§11024 and 11025.