

**Hickman  
& Lowder**  
Co. L.P.A.  
Attorneys at Law

# **The ABLE Act**

## **Achieving a Better Life Experience**

**Blaine P. Brockman, Esq.**



Northeast Lawyers Club  
Cincinnati, Ohio  
April 7, 2017

# Road Map

- ✓ The Basics
- ✓ The Latest Regulations
- ✓ Tax Considerations
- ✓ Uses for Special Needs Planning
- ✓ Ohio's STABLE Program

# ABLE Act History

- ✓ *Originally*, a bill to reduce (eliminate) the need of trusts, courts and lawyers in special needs planning. There was:
  - No Limitation Beneficiary's Age
  - Cost \$19 billion over 10 years
- ✓ Passed Congress on December 12, 2014
  - Scaled down significantly
  - Cost \$2 billion over 10 years
- ✓ IRS regulation history
- ✓ Ohio statute HB155 (2015) (ORC §§113.50-.56)

# Eligibility

- ✓ Blind or disabled before reaching age 26
  - Receiving Social Security benefits based on a disability
  - *Otherwise meeting the Social Security disability test*
- ✓ A person can have only ONE ABLE account
- ✓ The Beneficiary does not have to reside in the state where the ABLE account is opened

# Eligibility

## Otherwise Meeting SSA Disability Test

- ✓ Unable to engage in “Substantial Gainful Activity” (SGA) due to a physical or mental impairment lasting more than 12 months or expected to result in death. 20 CFR § 404.1505(a)
  
- ✓ SSA Five-Step process for determining whether one is disabled.
  - It is a very complex process
  - For a deceptively simplified walk through, see <https://www.ssa.gov/policy/docs/rsnotes/rsn2013-01.html>

# Eligibility

## IRS (Notice 2015-81)

- ✓ This is a tax law
- ✓ IRS (Notice 2015-81)
  - Person opening the account must swear under *penalty of perjury* that the beneficiary meets the eligibility requirements
  - Signed physician's statement confirming the diagnosis must be held by the Beneficiary and available if requested by Plan Administrator and/or IRS

# Establishing the Account

- ✓ ABLE Accounts can be opened by
  - The Beneficiary (owner) of the account
  - Or the Beneficiary's
    - Parent
    - Guardian
    - POA

# Contributions

## Who?

- ✓ Any “Person” can contribute to an ABLE account
  - Remember - this is a tax law
  - “Person” means individual, trust, estate, partnership, association, company, or corporation.
- ✓ Change in beneficiary allowed for siblings
- ✓ Rollovers from other ABLE Accounts
  - Only between family members
  - No rollovers from standard 529 accounts



# Contributions

- ✓ Rules from the IRS ease administration (Notice 2015-81)
  - Contributor's TINs not required
    - State must be able to reject contributions that exceed annual limit
  - Disability certification will not be done by Plan Administrator

# Contributions

## How Much?

- ✓ Annual contribution limits
  - From all sources, the individual gift-tax exclusion
  - 2017 = \$14,000
- ✓ Total Balance
  - The state's limit for 529 accounts
  - Ohio 2017 = \$414,000
- ✓ Consequences
  - Excess contributions must be returned to the contributor
    - If not returned there is a 6% penalty

# Impact on SSI and Medicaid

- ✓ SSI eligibility suspended if account exceeds \$100,000
- ✓ Medicaid (and other programs like SNAP) eligibility continues if account exceeds \$100,000

# Medicaid Payback

- ✓ The account Beneficiary (or the estate) must pay back Medicaid in an amount equal to the Medicaid benefits provided to the Beneficiary.
  - But, only for the amount following establishment of the ABLE account.
  - Recall for 1st party SNTs, it's the total assistance provided.
  
- ✓ Consider how the timing of assistance may control the choice of an ABLE account instead of a SNT.

# Qualified Disability Expenses

- ✓ Understanding ISM and PMV
  
- ✓ QDEs are
  - Expenses are expenses that...
  - relate to the Beneficiary's disability and...
  - are for the benefit of that Beneficiary...
  - in maintaining or improving his or her health, independence, or quality of life.

# Qualified Disability Expenses

- ✓ The list you have probably seen.
  - Education
  - *Housing*
  - Transportation
  - Employment training and support
  - Assistive technology and related services
  - Health and wellness
  - Financial management and administrative services
  - Legal fees
  - Expenses for ABLE account oversight and monitoring
  - Funeral and burial; and
  - Basic living expenses

# Qualified Disability Expenses

## POMS SI 01130.740

(This is a big deal!)

- ✓ The beneficiary is the “owner” of the account, regardless of who has signature authority.
- ✓ “Housing expenses” are identical to those related to in-kind support and maintenance (ISM) (except for food)
- ✓ Distributions from accounts are NOT income. Including housing, non-housing and non-QDEs
  - There is no ISM or PMV reduction

# Qualified Disability Expenses

## POMS SI 01130.740

- ✓ Distributions for housing and non-QDEs retained beyond the month of distribution will count as resources.
- ✓ Distributions for QDEs will not count as resources beyond the month of receipt if...
  - Beneficiary maintains the ABLE account
  - The distribution is unspent
  - The distribution is not comingled with other non-excludable funds



# Tax Considerations

- ✓ Qualified disability expenses are not gross income
- ✓ Contributions are not tax deductible
- ✓ ABLE account earnings are tax free
- ✓ Non-qualified expenditures are taxed and subject to a 10% penalty
- ✓ The Beneficiary must categorize distributions as qualified or non qualified on their federal income returns

# ABLE Act

## Ohio STABLE Accounts

- ✓ IRS Regulations are not final
  - But, IRS is holding states harmless
- ✓ Ohio passed ABLE legislation in October 2015
  - ORC §§113.50 -.56
- ✓ See <http://stableaccount.com>
  - This will be the Ohio portal for creating accounts
- ✓ 5 Investment options
- ✓ Debit/Cash card option

# ABLE Act

Which states have ABLE programs?



- <http://www.ablenrc.org/state-review>

# ABLE Act Takeaways

## ✓ Cautions

- Reduced competence Beneficiary
- Undue influence and exploitation
- Record keeping requirements
- Disability certification and the nuance of SGA

# ABLE Act Takeaways

- ✓ Role in Special Needs Planning
  - ABLE is only a tool in the toolbox.
  - It does not diminish the importance of correct special needs planning
- ✓ Likely Uses
  - Distributions for settlement payments
  - Accumulation of excess wages
  - Avoid PMV reduction for shelter expenses
  - Small amounts of excess money
  - Small inheritances

**Hickman  
& Lowder**  
Co. L.P.A.  
Attorneys at Law

# QUESTIONS?

**Blaine P. Brockman, Esq.**



Northeast Lawyers Club  
Cincinnati, Ohio  
April 7, 2017

**Hickman  
& Lowder**  
Co. L.P.A.  
Attorneys at Law

**Turning Your Obstacles Into Opportunities**

**Hickman-Lowder.com**

216-861-0360  
Cleveland

440-323-1111  
Sheffield Village

614-879-4143  
Dublin

