

Practical Perspectives on the ABLE Act

By Leo Sarkissian, Executive Director of The Arc of Massachusetts

President Obama signed the ABLE Act (The Achieving a Better Life Experience Act) on December 19, 2014. This piece of legislation provides an opportunity for an individual with special needs to have assets over \$2,000 in an account other than a trust account and not disqualify him or her for Medicaid Based benefits and Social Security Income (SSI). To read a description of the legislation, you may click these links from [National Down Syndrome Society](#) and [Autism Speaks](#).

Before we get into the interview, I would like to highlight that the passage of this bill is proof of how advocacy at the grassroots can have a significant impact. While President Obama signed the ABLE Act on December 22, 2014, the initial proposal for the bill was initiated in 2003 by the Governor's Commission on Developmental Disabilities in Massachusetts. Governor's Commission members Jim Brett, John Nadworny, Dafna-Krouk Gordon, Don Freedman and Barbara Mazzella drafted a proposal for a plan that provided a vehicle for families to use in order to save for their child that has a disability. It was Jim Brett's diplomacy at the 2004 President's Committee for People with Intellectual Disabilities summary meeting that moved the document the Commission had created from an idea to being a recommendation from the President's Committee to the President. It began to gain national public attention when an August 24, 2004 *Wall Street Journal* article referred to the plan as "a special vehicle -- akin to the so-called 529 plans." It took over 10 years of work and advocacy to get the ABLE Act passed. The first draft of a bill called "The Financial Security Account for an Individual with a Disability" was written in 2007.

In order to provide an overview of how individuals and families can practically apply the ABLE plan I have interviewed 2 subject area experts: **John Nadworny, CFP®**, co-author of "The Special Needs Planning Guide, How to Prepare for Every Stage of Your Child's Life" (Brookes Publishing Co) and Director of Special Needs Financial Planning specialty practice of Shepherd Financial Partners (JN) and **Attorney Fred Misilo, Group Chairperson** -- Special Needs Practice, of Fletcher Tilton, Attorneys at Law,(FM).

LS: What is the most important aspect of the ABLE Act?

JN: I feel the biggest impact of the ABLE Act will be to raise the awareness to families that they have to save and plan for their child with a disability. Unquestionably the bill has benefits to families and there is a lot to be excited about and thankful for; but this is not the solution for everyone. Families should learn about the benefits, and be made aware of the shortcomings of the bill.

FM: The ABLE Act will allow annual contributions of up to \$14,000 per year to grow tax-free in a Medicaid, a/k/a Mass Health pay-back account, without having the money be considered a resource for purposes of Medicaid financial eligibility. This will help in a couple of ways for those who are on Supplemental Security Income (SSI) or are receiving services from a Mass Health funded provider and receive a large retroactive check over the resource limit of \$2,000. When this happens, it creates the need to either go through the cost of setting up a Medicaid pay-back trust or spend-down the assets on things that don't count as a resource by Medicaid. Now, the excess money will be able to put in a Medicaid pay-back account. It is a more convenient option. Also, if a relative wants to give money to a person on SSI or who is receiving services funded by Medicaid, then putting up to \$14,000 per year into a Medicaid pay-back account will be a more economic alternative as well.

LS: One of the questions that always come up is “should a parent fund a special needs trust for their child?” Does the ABLE Act serve as a substitute for a trust?

JN: There have been a lot of comparisons between a Special Needs Trust and the ABLE Account. It should be made very clear that these are two different tools a family can use for planning. ABLE Accounts are used for savings and a Special Needs Trust's main function is to serve as an estate planning tool. Another way to look at it is ABLE Accounts are wealth accumulation vehicles (with limitations) and Special Needs Trusts are wealth distribution vehicles. Fred can discuss the legal implications but unless people are extremely wealthy where estate tax planning is a priority, Special Needs Trusts are usually not used as a vehicle to accumulate assets while a parent is still alive.

FM: These questions are really important because they raise some critical issues in the intersection between the financial planning aspects of special needs planning with the estate planning aspects of special needs planning. John's work as a financial and investment advisor and my work as an estate planning attorney with our clients are fundamentally related. We work with our clients to develop both a funding strategy and a legal structure to promote a lifetime of supplemental services and supports for a family member with a disability. While a parent or a set of parents are alive, most parents have traditionally chosen to retain ownership of their assets during their life. The special needs trusts are, therefore, normally funded upon the passing of the parents. There are limited situations, such as in Medicaid planning for a parent who needs nursing home care where assets can be distributed to a Medicaid pay-back trust for the benefit of a family member with a disability without creating a period of Medicaid disqualification for the parent or when a wealthy family member wants to lower his or her estate's exposure to estate taxes by gifting assets to an irrevocable special needs trust that does not have a pay-back obligation, when assets are transferred. What the new Medicaid pay-back accounts now allow is for assets in these accounts to grow tax-free. However, due to

the Medicaid pay-back and the annual limitation of \$14,000, Medicaid pay-back accounts are not a substitute for special needs trusts.

LS: What are some practical applications of the ABLE Act?

JN: I suggest that people look at the applicability of the ABLE Act from 3 perspectives:

1. It provides an individual with disabilities the opportunity to build investments for the long term. They should not be used as a substitute for a checking or savings account.
2. It eliminates the need for people to either do a “spend down” when a person with a disability has money in their own name when they are either applying for SSI, or are currently receiving SSI. Currently, the only option is to aggressively spend the money to get the savings below \$2,000, or to set up a Payback Special Needs Trust.
3. It can be used for parents to save some money for their child’s long-term needs, but they should not be used as the cornerstone of a person’s plan. The trade-offs of the annual saving limits, the cap on total savings and the fact that the government is reimbursed for any expenses paid at the death of the beneficiary are all factors that should be considered before using the plans.

FM: In my experience, the most practical use of a Medicaid pay-back account will be to avoid a forced spend-down of resources. I am not convinced that these accounts are the best option for long-term planning given the existence of well established planning options that do not have a Medicaid pay-back obligation.

LS: The above summarizes the 3 main areas that the ABLE accounts can be used; can you provide a little more detail on each?

JN: Yes. Currently, an individual with disabilities is penalized if they try to save money for themselves. The ABLE act provides them the opportunity to build investments for the long term. ABLE accounts are investment accounts and do not have a guarantee of principal. Again, because of this and any costs associated with the account, these accounts should not be used as a substitute for a checking or savings account.

FM: These Medicaid pay-back accounts will be an efficient option to shelter a modest amount of money from being considered a resource for purposes of financial eligibility for SSI and Medicaid. The tax-free growth aspect of these Medicaid pay-back accounts will be most useful for individuals who are not on Medicaid and who are not receiving any means-tested Medicaid funded services and/or supports. For instance,

an individual who is receiving social security disability payments from the social security contributions of his or her parent or from him or herself and who isn't getting any other services from a Medicaid funded program, will benefit.

LS: Turning age 18 is an important time in the life of an individual with disabilities as well as for their family. Can this be helpful as parents prepare for when their child turns age 18?

JN: Yes. Age 18 is when many families apply for SSI and other entitlement benefits. Since SSI rules do not allow an individual to have more than \$2,000 in assets in their name, an issue frequently develops. Currently there are two options: assets have to be "spent down" to get them below \$2,000 or assets can be transferred to a "Payback" Special Needs Trust. The savings are usually in a Uniform Transfer to Minor Act (UTMA) or a Uniform Gift to Minors Act (UGMA) accounts. Abruptly spending the money down almost always ends up with wasteful spending. The ABLE Act allows the transfer from UTMA or UGMA accounts to an ABLE Account. At this point there are no limits on how much can be transferred from one of the above accounts to an ABLE Account. This is one of the most significant benefits of the plan.

However, because there is restrictive language in the ABLE Act if there are significant assets involved, a trust should always be considered as an option. The term "significant assets" is different for everyone, but a starting point may be \$50,000 for most families. Again, every situation is different, therefore you should speak to a planner who specializes in Special Needs Planning or a qualified estate planning attorney.

FM: As we all know, the age of emancipation is 18 years. There are significant legal ramifications for individuals with intellectual and developmental disabilities when they turn 18 years old which are beyond the scope of this article. I have just published the 4th edition of *Coming of Age* which contains a concise description of these legal issues. As John has described, applying for SSI is an important step when turning 18. At that age, the income and the assets of the parents are no longer deemed to the SSI applicant. But, if the SSI applicant has U.S. savings bonds or other assets, the total value of those resources must be under \$2,000. A Medicaid pay-back account will be useful in those situations. However, there is one situation where a Medicaid pay-back trust and not a Medicaid pay-back account will still be important. This is where child support payments are being paid to the custodial parent. Child support payments are considered unearned income to the SSI applicant even though those payments go the custodial parent and not the SSI applicant. In these situations, parents will still need to obtain a Court-ordered irrevocable assignment of child support payments to a Medicaid

pay-back trust in order to avoid having the child support being counted as unearned income of the SSI applicant.

LS: Historically there have been mixed messages about a parent saving for a child with a disability due to the concern of losing eligibility for government benefits. The ABLE accounts seem to address this issue.

JN: The fact that there is public awareness about families beginning to save and financially plan for their child with a disability is a breakthrough. When our son James was born 23 years ago, the common planning strategy was to secure government benefits and plan for when I (the parent) would die. Passing this bill raises the awareness that in order for families to provide the best life possible for their family member, it is important for them to save as much as possible. Granted some families can save more than others; but then again money alone will not give our children the best lives possible. The key is for families to do as much as they possibly can from both the advocacy and planning perspectives. ABLE accounts will at least be one option for families to consider in their overall planning strategy.

FM: Planning for a family member with an intellectual or developmental disability involves a great deal more than planning for government benefits eligibility. There are important decisions regarding housing, employment, and selection of future advocates, trustees and those who will be part of supported decision-making. A special needs estate plan should address these issues in the context of these future planning issues. I hope that all this attention that has been given to the passage of the ABLE Act will help raise awareness of the importance of planning for the future of a family member with an intellectual and developmental disability.

LS: What are the limits that can be saved in an ABLE Account?

JN: Like a 529 College Savings Plan, the annual limit that can be deposited into an ABLE Account is \$14,000 each year. Although I have not seen this in the plan's language, this amount will likely increase, as it is tied to the amount that a person can annually gift for estate tax purposes. Currently with a 529 College Savings Plan a person can deposit up to \$70,000 in one year but not contribute any more over the next 5 years without filing a gift tax returns. This is a detail that will probably be worked into the plan as the US Treasury finalizes the regulations.

Keep in mind that when the ABLE account balance exceed \$100,000 there will be an offset for an individual's SSI check.

FM: I think it is prudent to wait for the federal and state regulations to be published to fully describe how this will all work. As John has noted, under the legislative language, SSI will only disregard up to \$100,000 in a Medicaid pay-back account as a resource of

the beneficiary. Once the account has more than \$100,000, SSI will be suspended (not terminated) for the period of time the account is over-limit. Once the account is spent down to \$100,000 or less, SSI will be reinstated without the need to re-apply. Additionally, distributions for food and housing expenses from an account will be counted as income for SSI purposes. Fortunately, the same restrictions do not apply to MassHealth and there is no asset limitation in Medicaid pay-back accounts for Medicaid eligibility, regardless of the suspension of SSI benefits.

LS: You made it perfectly clear that ABLE Accounts are not substitutes for trusts, but can you please tell me if there are any important differences that I can use in planning?

JN: There is one important distinction: ABLE Accounts allow distributions to pay for housing and utilities expenses and Special Needs Trust do not. Ultimately I see developing planning strategies around this concept as we work with our clients helping them address one of their biggest concerns: where will their child live and how will they pay for it.

FM: This important distinction is significant when a parent is supplementing a son or daughter's housing expenses. They will now be able to put money into a Medicaid pay-back account and then have the account fund housing related expenses.

LS: When do you anticipate these plans being available to families?

JN: The Department of Treasury has to finalize the federal regulations and states have to build out the administrative systems to implement them. In addition, the states will have to identify the financial institutions that they will partner with. Similar to 529 College Savings Plans, the states will have some flexibility in the specific language for their plans. Therefore before individuals put money into their state plans, they should make sure they understand the details of their state-specific plans.

FM: The federal and state regulations have to go through a formal rule-making process which requires public input. Hopefully, through this rule-making process, we'll be able to better learn how this new law will be implemented on both the federal and state level.

LS: Fred and John, thanks for sharing your thoughts on the new ABLE Act legislation, do you have any final thoughts?

JN: First of all, thanks for taking the initiative to connect us. Listening to Fred speak reinforced the fact that there are both legal implications to many of the financial decisions that families make and also financial implications to many of the legal decisions that families make. This just reinforces the fact that families have to make

sure that all of their planning is coordinated.

FM: Thanks again for all that The Arc of Massachusetts and you do to support individuals with intellectual and developmental disabilities. This conversation highlights the really important role The Arc of Massachusetts plays in raising awareness of important issues such as special needs planning and emerging laws which have a direct impact on the lives of individuals with intellectual and developmental disabilities and their families. It's really important to create a level playing field so that critical information is available and transparent so that individuals and parents can make informed choices.

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