

# Los Angeles Lawyer

SEPTEMBER 2015 / \$4

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# Achieving Ability

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by Thomas E. Beltran

# Achieving ABILITY

## Under the ABLE Act, tax-advantaged savings accounts will soon be available to provide for disability expenses

THE ACHIEVING A BETTER LIFE EXPERIENCE ACT OF 2014 (ABLE Act) provides for the establishment of tax-advantaged savings accounts similar to 529 plans.<sup>1</sup> Rather than providing for distributions to meet educational expenses as 529 plans do, however, ABLE Act accounts are specifically tailored to provide for disability expenses. Two bills are pending in the California Legislature to implement the act in California.<sup>2</sup> In addition, the IRS issued guidance on June 19,<sup>3</sup> and proposed regulations were published in the Federal Register on June 22.<sup>4</sup> Guidance from the Social Security Administration and the Centers for Medicare and Medicaid Services should also provide answers to public benefits questions, and practitioners await further information about ABLE account distributions from the Program Operations Manual System (POMS) of the Social Security Administration (SSA).<sup>5</sup> Once fully implemented, ABLE plans should add

a useful tool to the kit available to attorneys serving the needs of people with disabilities.

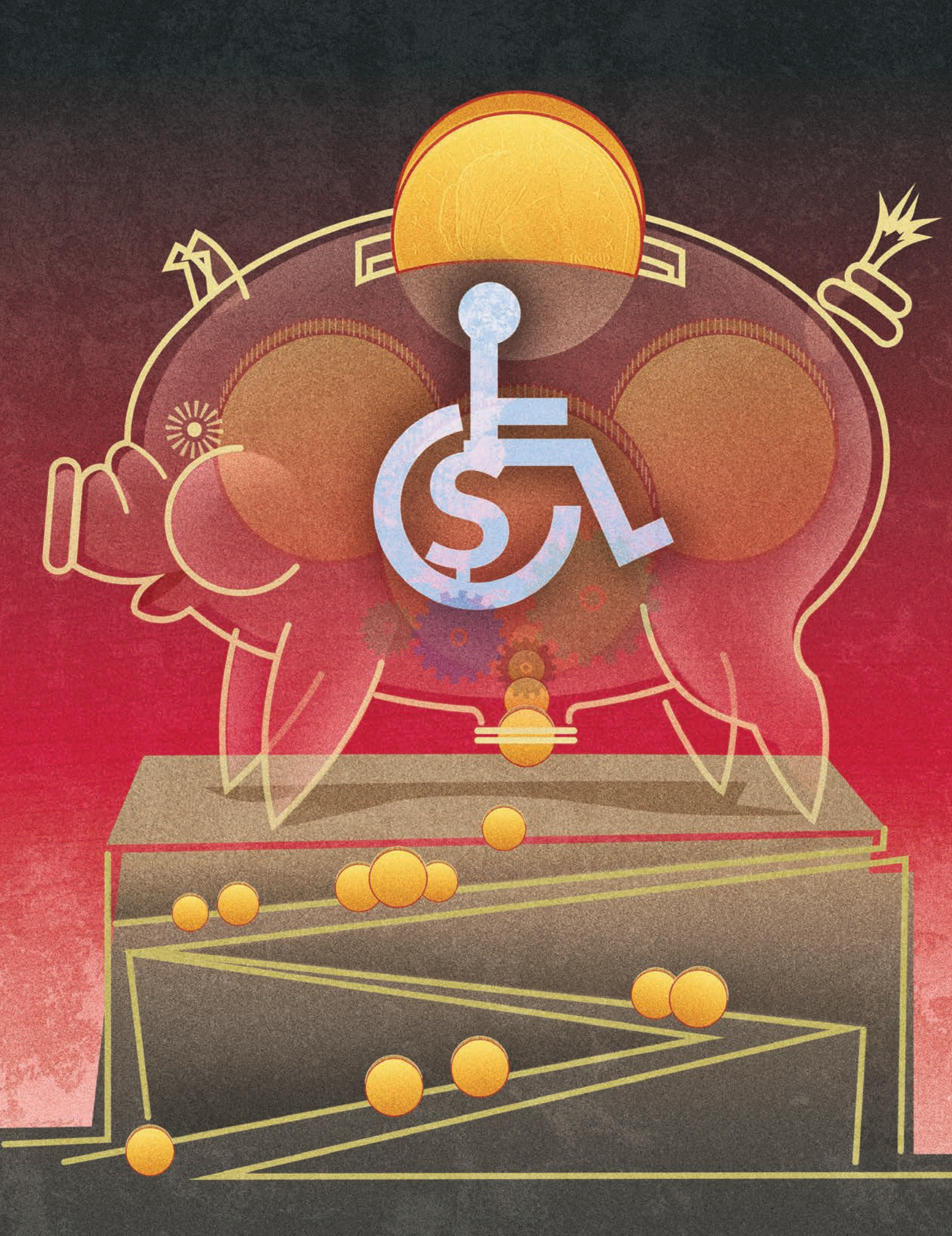
In addition to 529 plans, ABLE plans bear comparison to special needs trusts. These comparisons provide insight into how ABLE accounts may best be structured to provide for clients with disabilities. For example, one similarity that ABLE accounts appear to have with 529 plans is that distributions from an ABLE account may apparently be made to the participant, the beneficiary, an eligible institution, or to a third party.<sup>6</sup> While specifics have yet to be resolved, the ABLE Act does refer to distributions to the account's "designated beneficiary."<sup>7</sup> Assuming that ABLE plan distributions will follow the model of 529 plans, distributions to a beneficiary who receives needs-tested public benefits such as SSI and Medi-Cal would not result in any reduction of the monthly cash payment or loss of eligibility due to the distribution, as long as the funds distributed from the ABLE

account are utilized for qualified disability expenses.<sup>8</sup> The funds held in an ABLE account are not considered a countable asset for purposes of needs-tested benefits.<sup>9</sup>

Under the federal regulations, an ABLE account's services may be delegated to one or more community development financial institutions.<sup>10</sup> Legislation currently pending in California provides that the ABLE program will be administered by the treasurer.<sup>11</sup> A state ABLE program must allow 1) input from the designated beneficiary to directly or indirectly direct the investment of any contributions to the program or its earnings "no more than 2 times in any calendar year,"<sup>12</sup> 2) only cash contributions to the account, 3) total annual cash contributions of no more than the \$14,000, 4) maximum

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“aggregate contributions on behalf of a designated beneficiary” that are limited to that “established by the State under section 529(b)(6),”<sup>13</sup> and 5) separate accounting for each designated beneficiary.<sup>14</sup>

While the benefits of the ABLE Act may be relatively modest compared to, for example, a special needs trust or 529 plan, they are nonetheless significant. For example, in California, the monthly Supplemental Security Income (SSI) cash payment amount is \$889.40,<sup>15</sup> or \$10,672.80 annually, yet with an ABLE account, the SSI recipient can shelter, or by third-party contributions receive, up to \$14,000 per year of additional assets. Borrowing from California’s 529 plan asset limit, in turn, an ABLE account’s total asset limit is \$371,000, unless the designated beneficiary is an SSI recipient, in which case the aggregate contributions are limited to \$100,000.<sup>16</sup> Under an ABLE account, on the other hand, total annual contributions cannot exceed the maximum of \$14,000.<sup>17</sup> For some clients, however, the ABLE Act’s structure may offer an appropriate solution to the inconvenience of distributing funds from a special needs trust.

### Eligibility

One example of how the ABLE Act may be well suited for the needs of some clients is found in its eligibility requirements. A person is eligible if for a taxable year that person meets the act’s test for disability. Unlike, for example, a first-party special needs trust, an ABLE account can be established by or for a person with his or her own assets who does not meet the SSA’s strict definition of disability. Instead, the person may utilize a less-strict disability certification process to qualify for an ABLE account.<sup>18</sup>

It can be of great significance to some clients that an ABLE account is available to an individual not meeting the strict disability test that is required for the establishment of a special needs trust.<sup>19</sup> For example, minors who are wards of the court fall within a category of eligibility for Medi-Cal without meeting any disability test. Minors who can meet at least the second prong of the eligibility test could benefit from an ABLE account. The ABLE Act’s definition of disability includes individuals “entitled to benefits based on blindness or disability under title...XVI of the Social Security Act” and would include children.<sup>20</sup>

An eligible individual who opens, or for whom an ABLE account is opened, is referred to as a designated beneficiary. Only one account may be opened for or on behalf of the eligible individual, and the account can only be opened in the state in which the individual is a resident.<sup>21</sup> The ABLE account can remain in the same program, however, even

after the beneficiary moves to a different state.<sup>22</sup> If the eligible individual is unable to open the account on his or her own behalf, it can be opened by an “agent under a power of attorney or, if none, by a parent or legal guardian of the eligible individual.”<sup>23</sup>

### Disability Definition

For purposes of the act, the term “eligible individual” means 1) one whose disability “occurred before the date on which the individual attained age 26,” who either receives SSI or Social Security Disability Insurance (SSDI) benefits or 2) “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.”<sup>24</sup>

The first prong of the disability test covers those who have met the SSA’s definition of disability before the age of 26 years and are entitled to receive a monthly cash payment. This should not rule out an individual well over the age of 26 who can demonstrate that he or she met the definition prior to age 26. While children cannot receive SSDI, they can become eligible for SSI. The SSA’s disability definition, as applied to adult applicants for SSDI or SSI benefits, is centered on the ability to obtain and maintain employment. An individual with a “severe impairment” found in the Social Security Act’s listings of conditions who is unable to engage in substantial gainful activity (SGA, defined as the ability to earn monthly gross income of at least \$1,090 this year<sup>25</sup>) should be eligible for SSI.<sup>26</sup> If the individual had sufficient earnings and paid into FICA for the required period of time, or was disabled prior to age 22 and has a parent who has worked a sufficient time for SSA retirement benefits, he or she may be able to qualify for SSDI.<sup>27</sup> One can receive both SSI and SSDI concurrently.<sup>28</sup>

The second prong of the disability test is likewise limited to those whose disability began prior to age 26 but contains a disability definition that is an amalgam of various elements of the Social Security Act, borrowing heavily from the children’s disability definition.<sup>29</sup> The SSA’s disability definition applied to child applicants for SSI benefits excludes consideration of an inability to perform past work and/or the inability to achieve SGA from the evaluation process.<sup>30</sup> Instead, the issue of SGA arises in the initial phase of the evaluation; if a minor is performing work that is substantial—i.e., doing SGA—he or she is simply denied benefits, ending the eligibility analysis.<sup>31</sup> A minor who receives children’s SSI and later engages in SGA will be found ineligible.<sup>32</sup> With respect to determinations of severity, the ABLE regulations do

not clarify the issue of how the children’s definition of disability (which is generally based upon a comparison of the applicant’s functioning to that of same-aged, nondisabled children to determine severity) will be applied to adults.<sup>33</sup> Instead, the regulations propose a determination of severity that in part takes “into account the effect of the individual’s prescribed treatment.”<sup>34</sup>

This second prong also includes the requirement that the eligible individual or his or her parent file a disability certification each taxable year, and the certification must include a diagnosis signed by a physician.<sup>35</sup> The qualified ABLE program can vary the recertification period, providing for example, “that the initial certification will be deemed to be valid for a stated number of years, which may vary with the type of impairment.”<sup>36</sup> But under the second prong individuals who could not qualify for an account under the first prong may well qualify as an eligible beneficiary.

### Distributions, Assets, and Income

In order for the eligible beneficiary to enjoy not only the tax-free nature of distributions from his or her account but also their exemption (also referred to as a “disregard”) from public benefit limits, the distributions must be restricted to payments for qualified disability expenses.<sup>37</sup> Currently, when an SSI recipient must spend down excess assets, the SSA typically requests copies of invoices to show the funds were actually spent down and not simply gifted or hidden in other accounts. Practitioners should be aware that two of the distribution categories (housing and funeral and burial expenses) implicate public benefits rules when distributions are made for the benefit of a public benefits recipient, and in particular one who receives SSI. Further, if distributions appear to be made directly to the designated beneficiary at the beneficiary’s request, in a manner similar to a 529 plan, a host of income rules are raised that, but for the ABLE Act’s exemptions, could result in a reduction of the monthly SSI check.<sup>38</sup>

The scope of the distributions that fall within the definition of “qualified disability expenses” are broadly defined to mean 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

the Secretary under regulations.”<sup>39</sup> The regulations are equally broad: “Qualified disability expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit a disabled individual.”<sup>40</sup>

In addition to allowable distributions, assets are another consideration for practitioners evaluating ABLE Act plans. Under the rules applicable to all SSI recipients, all assets owned by an SSI recipient are either deemed “countable” or “exempt” (or a “disregard”) by the SSA. When a recipient’s total assets exceed the asset limit set by the SSA (\$2,000), the recipient becomes ineligible for a monthly SSI check.<sup>41</sup> Federal needs-tested public benefits programs in which the needs test is used to determine “eligibility to receive, or the amount of, any assistance or benefit authorized by such provision to be provided to or for the benefit of such individual,” cannot consider the amount of assets or resources in the plan account, contributions to the account, or distributions from the account for qualified disability expenses for any “period during which such individual maintains, makes contributions to, or receives distributions from such ABLE Account.”<sup>42</sup> Both resource and income determinations are made by the SSA on a month-by-month basis.

By contrast, it is not until assets and earnings owned by an SSI recipient beneficiary exceed \$100,000 that they become a countable resource and the regular SSI asset rules are applied. When the assets in an individual’s ABLE account exceed the resource limit, the SSI recipient beneficiary becomes ineligible for a monthly SSI cash payment. If the excess resources are not spent down and the recipient is ineligible for 12 consecutive months, SSI benefits are terminated at the beginning of the 13th month.<sup>43</sup>

Since in California SSI recipients are categorically eligible for Medi-Cal,<sup>44</sup> a serious consequence of suspense or ineligibility for SSI is a loss of the eligibility linkage for Medi-Cal.<sup>45</sup> The county then has the duty to find a different Medi-Cal program for which the recipient is eligible prior to termination of Medi-Cal benefits.<sup>46</sup> In any case, when excess resources are spent down to below the \$2,000 asset limit the SSI/Medi-Cal recipient will regain SSI in the following month and the categorical Medi-Cal linkage is restored. After 12 consecutive months one must reapply for SSI, and if successful regain Medi-Cal as well.

With an ABLE account, if the SSI monthly cash payment is suspended due to excess resources (more than \$100,000), the recipient-designated beneficiary continues to be eligible for categorically linked Medi-Cal. This rule bears some similarity to the income remedies under the Pickle Amendment<sup>47</sup> or under Section 1619(b) of the Social Security

Act that retain eligibility for Medicaid, notwithstanding excess income.<sup>48</sup> In California, however, after an SSI recipient’s benefits terminate state law operates to continue Medi-Cal benefits long enough for a redetermination of whether the recipient is eligible for Medi-Cal under a different program or category.<sup>49</sup>

Countable income is the portion of the income that actually affects the monthly SSI benefits check, resulting in a reduction by an amount equal to the countable income.<sup>50</sup> The balance is exempt or disregarded. Countable income can be received in cash, a cash substitute, or in-kind. While countable income

Unlike unearned income, only a portion of earned income is countable. Unless the recipient has unearned income, the first \$85 is disregarded.<sup>53</sup> The monthly SSI cash payment amount is reduced by an amount equal to 50 percent of every dollar over \$85. At the point that income equals \$85 plus two times the amount of the SSI monthly cash payment, the recipient is no longer eligible for an SSI monthly cash payment under the regular SSI program.

### Housing

When any third party, including a trustee, distributes funds directly to a landlord for



directly affects the SSI monthly cash payment (unlike excess resources, which immediately result in loss of eligibility), income results in somewhat of a gradual reduction of the monthly cash payment until the countable income exceeds a certain limit. Once the limit is reached, the recipient becomes ineligible for a monthly SSI cash payment. The limit depends upon the characterization of the income as either earned (wages) or unearned (gifts, dividends, interest, etc.). Either earned or unearned income can be received as cash or income in-kind.<sup>51</sup> All unearned income above \$20 is countable and thereby reduces the monthly SSI cash payment dollar for dollar.<sup>52</sup>

However, distributions from an ABLE account for qualified disability expenses appear to be exempt from these income rules.

payment of shelter for the SSI recipient, the payment is characterized as in-kind support and maintenance<sup>54</sup> to the beneficiary SSI recipient. In-kind income is characterized as either earned or unearned.<sup>55</sup> Unearned income in the form of shelter—i.e., in-kind support and maintenance—results in a reduction of the monthly SSI cash payment under the SSA’s presumed maximum value rule.<sup>56</sup> The result is not the dollar-for-dollar reduction of the SSI monthly cash payment that results from unearned income but a reduction in an amount equal to one-third of the federal benefit rate, which in 2015 amounts to \$244.33.<sup>57</sup>

Housing, however, is one category of allowable expenses from an ABLE account. The SSA uses the term “shelter” to describe expenses that if provided by a third party,

result in a penalty. The term “shelter,” as used in the Social Security regulations and POMS, refers to the following expenses: room, rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewer, and garbage collection services.<sup>58</sup> The regulations use a broad definition of housing but require the qualified ABLÉ program to “establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions,” permitting identification of those expenditures that fall within the SSI definition of housing expenses.<sup>59</sup>

In the case of a distribution from an ABLÉ account to a beneficiary for housing, the act states: “a distribution for housing expenses (within the meaning of such subsection) shall not be so disregarded.”<sup>60</sup> What is unclear is how a distribution of cash directly to the SSI recipient-designated beneficiary for housing expenses would be treated, if permitted by the regulations. Consistent with other provisions of the act, it should be treated as in-kind income, reducing the monthly cash payment by a third of the benefit rate.

One possible use of an ABLÉ plan involving housing could combine an income stream, such as an annuity, with an ABLÉ account to pay certain regular costs such as condominium fees. Even for an SSI recipient, a home is an excluded resource. ABLÉ account funds can pay housing expenses, subject to the limitations for SSI recipients. Third-party payments for condominium fees are not deemed as income to the recipient by the SSA, except to the extent the fee includes a certain sum for a household cost such as utilities or garbage removal. Therefore a third party—for example, a parent—could gift a condominium to a child and fund an annuity that would pay the annual exclusion amount to the ABLÉ account each year until the annuity is fully paid out. The ABLÉ account in turn could pay the condominium fees.

### Comparison to Special Needs Trusts

There are two types of special needs trusts: individual<sup>61</sup> and pooled.<sup>62</sup> Typically, a special needs trust is considered a resource remedy. When placed into a special needs trust, a sum of money, or resource, that exceeds \$2,000 maintains eligibility when it would otherwise result in ineligibility for needs-tested benefits. Special needs trusts and ABLÉ accounts may also serve as remedies for this type of excess countable income when funded with an irrevocable assignment of periodic payments (including child support or alimony payments under certain circumstances), which are then no longer deemed countable income for SSI purposes.<sup>63</sup> Without the irrevocable assignment, however, the income would reduce a monthly cash payment, even if upon

receipt the funds were placed into a special needs trust or ABLÉ account.

There are several scenarios in which an irrevocable assignment of an income stream to an ABLÉ account might avoid a finding of countable income by the SSA. For example, individuals residing in a Medi-Cal funded long-term care facility retain \$35 per month of their income, which is referred to as a monthly personal allowance.<sup>64</sup> For a resident who does not make use of the funds, they accumulate to the point that they exceed the \$2,000 resource limit. At that point he or she becomes ineligible for Medi-Cal, and the funds are spent down, and Medi-Cal benefits resume. This \$35 per month can now be placed in the ABLÉ account and accumulated to the point at which something useful could be purchased for the resident, for example a medical device that is not available through existing benefit programs. This same cycle can occur in a community care licensed board and care facility where the SSI residents receive a monthly personal and incidental needs allowance, which this year is \$131 per month.<sup>65</sup>

Distributions of cash from a special needs trust follow the SSI income rules and reduce the monthly cash payment. One would expect the same rule would apply to distributions from an account. It appears, however, that under the ABLÉ Act cash can be distributed directly to a designated beneficiary in the same manner as distributions from a 529 plan. There is no consequence of a reduced monthly SSI cash payment as long as the funds are spent for qualified disability expenses. Therefore, a third party, contributing funds to an ABLÉ account can create additional cash income for the designated beneficiary without a reduction of the SSI check. Typically, a loan was the method of meeting an immediate need for cash without a reduction in benefits.<sup>66</sup>

The ABLÉ Act provides a remedy for annual contributions that exceed the annual allowable maximum, stating that rules similar to those pertaining to individual retirement accounts under 26 USC Section 408(d)(4) apply.<sup>67</sup> In the event that a contribution to an ABLÉ account exceeds the annual exclusion amount should occur, one should be able to remove the contribution from the account in the same manner in which a person can take back a contribution to an IRA account.<sup>68</sup>

Although ABLÉ plans show promise at covering for some immediate needs with additional income, they should not be viewed as replacements for special needs trusts. Instead, the ABLÉ Act provides another tool for the estate planner. In fact, it could be beneficial to utilize both an ABLÉ Act account and special needs trust, taking advantage of the

strengths and avoiding the weaknesses of each. One similarity between ABLÉ Act plans and special needs trusts is that the eligible individual with capacity can, as with pooled special needs trusts, establish an ABLÉ account funded with his or her own assets, without court intervention.<sup>69</sup> An ABLÉ account and a pooled trust both relieve the beneficiary of the burden of finding an adequate pool of potential trustees, which is often one of the difficult establishment issues in individual special needs trusts.

An ABLÉ plan may also be beneficial in comparison to an established pooled special needs trust. If the trust is funded by a rather small settlement, typically under \$20,000, it may not be cost-effective in comparison to an ABLÉ plan, under which a successful litigant could retain up to \$2,000 (depending upon his or her existing resources) in a savings account, spend down some money, and place \$14,000 in the ABLÉ account. In the alternative, a larger settlement could be structured to some extent to pay no more than the annual exclusion each year until the entire settlement has been deposited into the ABLÉ account.

There are also some distinctions between these two devices. Unlike a first-party special needs trust, an ABLÉ account can be established by a person who does not meet the SSA's strict definition of disability. Instead, the person may utilize a less strict disability certification process to qualify for an ABLÉ account. Unlike any type of trust, whether first- or third-party, a SSI recipient can compel a distribution to him- or herself directly, and the trust assets are not countable.<sup>70</sup> The designated beneficiary does, however, need to demonstrate that the amount of money distributed from the ABLÉ account was utilized for qualified disability expenses.

An ABLÉ account shares what may be a drawback with first-party special needs trusts: the payback clause. This clause ensures that the state is repaid the Medicaid funds it expended through Medi-Cal for medical expenses. A third-party special needs trust, on the other hand, is exempt from Medicaid claims. But even when an ABLÉ account is entirely funded with contributions from the third parties, making it comparable to a third-party special needs trust, the payback clause is enforced. While the payback clause provisions in an ABLÉ plan are similar to those of a special needs trust, the payback burden on an ABLÉ account is not as great.<sup>71</sup>

In particular, the ABLÉ Act's payback clause states that upon the death of the “designated beneficiary, all amounts remaining in the qualified ABLÉ account not in excess of the amount equal to the total medical assistance paid for the designated beneficiary after the establishment of the account...shall be distributed to such State upon filing of a

claim for payment by such State.”<sup>72</sup> Under the ABLE Act, the payback of medical assistance payments on behalf of the designated beneficiary is only for the period beginning with the date the account was established.<sup>73</sup> By comparison, the payback clause of a first-party special needs trust recovers all medical assistance paid for the special needs trust beneficiary, even predating the establishment of the special needs trust.<sup>74</sup> The amount of the state’s Medicaid claim is reduced by the amount of premiums paid by the ABLE account on behalf of the designated beneficiary, to a Medicaid Buy-In program.<sup>75</sup> Also, this distribution, which might be viewed as a distribution not used for disability expenses, is not subject to the tax imposed by the act.<sup>76</sup> The act reverses the reporting duties required of a special needs trustee. Unlike the duty of the trustee of a special needs trust to give the required notice, the duty under an ABLE plan lies with the state Medicaid agency to file a claim (presumably with the ABLE plan) as a creditor.

Perhaps one of the most unfavorable aspects of an ABLE account in comparison to a special needs trust or a 529 plan is the funding restriction limiting annual contributions to the maximum amount allowed for the annual exclusion<sup>77</sup> while also limiting the total assets to state limits.<sup>78</sup> There are no such limits with special needs trusts, at least in California. The ABLE account limit may have its benefits, however. On a small scale, an ABLE account can provide quick solutions to situations involving relatively small amounts of money, which would not justify the engagement of a trustee to manage the funds, much less a court proceeding to establish an individual special needs trust. Such funds might be received by accumulation, gift, devise, or by way of a settlement or judgment in a lawsuit. In the case of a settlement or judgment in a lawsuit, one might proceed in accordance with Section 3611(d) of the Probate Code.

A distribution of these funds from a qualified ABLE program is includible in the gross income of the designated beneficiary, unless the distribution is excluded from the designated beneficiary’s gross income because it does not “exceed the qualified disability expenses of the designated beneficiary.”<sup>79</sup> If distributions exceed the disability expenses, the “amount otherwise includible in gross income shall be reduced by an amount which bears the same ratio to such amount as such expenses bear to such distributions.” But a contribution to an ABLE account will “not be treated as a qualified transfer” under IRC Section 2503(e), which is an “exclusion for certain transfers for educational expenses or medical expenses.”<sup>80</sup> These are tuition payments that are made directly on behalf of a

person to an educational organization, or payments for medical care made directly to the medical provider.

### Gift Tax and Burial

While those direct payments will not be qualified, there is good news regarding contributions to ABLE accounts for gift tax purposes. These contributions are treated in the same way as contributions to a qualified tuition program.<sup>81</sup> That is, they “shall be treated as a completed gift to such beneficiary which is not a future interest in property,” qualifying for the annual deduction.<sup>82</sup> This is a significant issue for many donors. Given the direct cash distribution penalty, techniques to obtain the annual exclusion for contributions to a special needs trust, would have to rely on structuring Crummey powers in a manner similar to that described in *Cristofani v. Commissioner*, which can lead to exposure to the IRS.<sup>83</sup>

Another potential benefit is burial payments. SSI recipients under existing SSI rules can own a burial plot, but a cash account to pay other burial expenses is limited to \$1,500.<sup>84</sup> These expenses should be payable from the ABLE account without the \$1,500 limit as qualified disability expenses. The regulations allow payment of expenses after the death of the designated beneficiary but before the payment of a Medicaid claim. A first-party special needs trust has restrictions on expenditures at the death of the beneficiary for funeral expenses, which cannot be paid until after satisfaction of the Medicaid claim.<sup>85</sup> Therefore, a beneficiary of such a trust might benefit from an ABLE account, which would allow such expenses to be paid before satisfaction of the Medicaid claim.<sup>86</sup>

An ABLE account can provide solutions to situations involving relatively small amounts of money that would not justify the engagement of a trustee to manage the funds, much less a court proceeding to establish an individual special needs trust. It does not appear, however, that ABLE accounts can be opened in California until early in 2016. Once California fully implements the act, however, practitioners working may encounter situations for which an ABLE account may fit a need more precisely than similar devices and provide families with some much-needed relief from financial worries. ■

<sup>1</sup> The Achieving a Better Life Experience Act of 2014, Pub. L. 113-295, div. B, 128 Stat. 4063 (Dec. 19, 2014) (ABLE Act), available at <https://www.govtrack.us>, codified at 26 U.S.C. §529A.

<sup>2</sup> See AB 449; SB 324, available at <http://www.leginfo.ca.gov>.

<sup>3</sup> See [http://www.irs.gov/irb/2015-12\\_IRB/ar08.html](http://www.irs.gov/irb/2015-12_IRB/ar08.html).

<sup>4</sup> See <https://www.federalregister.gov/articles/2015/06/22/2015-15280/guidance-under-section-529a-qualified-able-programs>.

<sup>5</sup> The Social Security Administration’s Program Operations Manual System (POMS), available at <https://www.ssa.gov/poms>.

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<sup>6</sup> See <https://www.scholarshare.com/learn/withdrawal.shtml>.

<sup>7</sup> 26 U.S.C. §529A(c)(2)(B); see also Instructions to IRS Form 1099-QA, Box 1, Gross Distribution.

<sup>8</sup> ABLE Act, Pub. L. No. 113-295, div. B, §103(a).

<sup>9</sup> *Id.*

<sup>10</sup> 26 C.F.R. §1.529A-2(b)(3).

<sup>11</sup> See SB 324 at <http://www.leginfo.ca.gov>.

<sup>12</sup> 26 U.S.C. §529A(b)(4).

<sup>13</sup> 26 C.F.R. 1.529A-1(b)(15); 26 U.S.C. §529A(b)(6).

<sup>14</sup> 26 U.S.C. §529A(b)(3).

<sup>15</sup> See, e.g., California Health and Human Services Agency, Department of Health Care Services, All County Welfare Directors Letter No. 15-08 (Feb. 9, 2015).

<sup>16</sup> 26 C.F.R. §1.529A(b)(6); ABLE Act, Pub. L. No. 113-295, div. B, §103(a)(2); <https://www.scholarshare.com>.

<sup>17</sup> 26 U.S.C. §2503(b).

<sup>18</sup> 26 U.S.C. §529A(e)(1), (2).

<sup>19</sup> See 42 U.S.C. §1396p(d)(4)(A) or (C).

<sup>20</sup> 26 U.S.C. §529A(e)(1)(A).

<sup>21</sup> 26 C.F.R. §1.529A-2(c)(1).

<sup>22</sup> 26 C.F.R. §1.529A-2(o).

<sup>23</sup> 26 C.F.R. §1.529A-2(c)(1).

<sup>24</sup> 26 U.S.C. §529A(e)(2)(A)(i)(I).

<sup>25</sup> 42 U.S.C. §416(l)(1); 20 C.F.R. §404.350(a)(5).

<sup>26</sup> 42 U.S.C. §1382c(a)(3)(A).

<sup>27</sup> 42 U.S.C. §416(l)(1); 20 C.F.R. §404.350(a)(5).

<sup>28</sup> 20 C.F.R. §404.408b.

<sup>29</sup> 42 U.S.C. §1382c(a)(3)(C)(I); see *Marquez on Behalf of Infante v. Shalala*, 898 F. Supp. 238 (1995).

<sup>30</sup> 20 C.F.R. §404.1572.

<sup>31</sup> 20 C.F.R. §416.924(a).

<sup>32</sup> 42 U.S.C. §1382c(a)(3)(C)(ii).

<sup>33</sup> 20 C.F.R. §416.924b(a)(1).

<sup>34</sup> 26 C.F.R. §1.529A-2(e)(2).

<sup>35</sup> 26 U.S.C. §529A(e)(2); see also 42 U.S.C.

§1395x(r)(1).

<sup>36</sup> 26 C.F.R. §1.529A-2(d)(2)(ii).

<sup>37</sup> 26 U.S.C. §529A(c)(1)(B).

<sup>38</sup> See, e.g., CAL. CODE REGS. tit. 5, §§30950, 30954; 20 C.F.R. §416.1123.

<sup>39</sup> 26 U.S.C. §529A(e)(5).

<sup>40</sup> 26 C.F.R. §1.529A-2(h)(1).

<sup>41</sup> 20 C.F.R. §416.1205.

<sup>42</sup> See ABLE Act, Pub. L. No. 113-295, div. B, §103(a)(2) (“Treatment of ABLE Act Accounts Under Certain Federal Programs”).

<sup>43</sup> 20 C.F.R. §416.1335.

<sup>44</sup> WELF. & INST. CODE §14050.1; CAL. CODE REGS. tit. 22, §50179.7.

<sup>45</sup> 20 C.F.R. §416.1324.

<sup>46</sup> WELF. & INST. CODE §§14005.31(a)(1), 14005.32.

<sup>47</sup> 42 U.S.C.A. §1396a (note); 42 C.F.R. §435.135.

<sup>48</sup> 42 U.S.C.A. §1382h.

<sup>49</sup> See *Craig v. Bonta* (enforcing Welfare & Institutions Code §14005.37). See All County Welfare Directors Letters Nos.: 01-36, 01-39, 02-40, 02-45, 02-48, 02-54, 02-59 and 03-24, available at <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/CWDLbyyear.aspx>.

<sup>50</sup> 20 C.F.R. §416.1104.

<sup>51</sup> 20 C.F.R. §416.1130.

<sup>52</sup> 20 C.F.R. §416.1123.

<sup>53</sup> 20 C.F.R. §416.1112.

<sup>54</sup> 20 C.F.R. §416.1130.

<sup>55</sup> 20 C.F.R. §416.1110.

<sup>56</sup> 20 C.F.R. §416.1141.

<sup>57</sup> California Health and Human Services Agency, Department of Health Care Services, All County Welfare Directors Letter No. 15-08 (Feb. 9, 2015).

<sup>58</sup> 20 C.F.R. §416.1130(b).

<sup>59</sup> 26 C.F.R. §1.529A-2(h)(1).

<sup>60</sup> See 26 U.S.C. §529A (“Treatment of ABLE Act Accounts Under Certain Federal Programs”).

<sup>61</sup> 42 U.S.C. §1396p(d)(4)(A).

<sup>62</sup> 42 U.S.C. §1396p(d)(4)(C).

<sup>63</sup> POMS SI 01120.200.G.1.d.

<sup>64</sup> CAL. CODE REGS. tit. 22, §§50601, 50605(a).

<sup>65</sup> CAL. CODE REGS. tit. 17, §56002(a)(28), tit. 22, §87801(b)(1).

<sup>66</sup> 20 C.F.R. §416.1103(f).

<sup>67</sup> 26 C.F.R. 1.529A-2(g)(4); 26 U.S.C. §529A(b)(2)(B) (qualified ABLE programs).

<sup>68</sup> 26 U.S.C. §408(d)(4).

<sup>69</sup> See 42 U.S.C. §1396p(d)(4)(C).

<sup>70</sup> POMS SI 01120.200.D.1.a.

<sup>71</sup> Compare 26 U.S.C.A. §529A(f) with 42 U.S.C. §1396p(d)(4)(A).

<sup>72</sup> 26 U.S.C. §529A(f).

<sup>73</sup> *Id.*

<sup>74</sup> 42 U.S.C. §1396p(d)(4)(A).

<sup>75</sup> WELF. & INST. CODE §14007.9; 42 U.S.C. §1396a(a)(10)(A)(ii)(XIII).

<sup>76</sup> 26 U.S.C. §529A(c)(3). This exemption is found both at 26 U.S.C. §529A(c)(3)(B) and the last sentence of 26 U.S.C. §529A(f).

<sup>77</sup> 26 U.S.C. §2503(b).

<sup>78</sup> Established under 26 U.S.C. §529A(b)(6).

<sup>79</sup> 26 U.S.C. §529A(c)(1)(B)(i) & (ii).

<sup>80</sup> 26 C.F.R. 1.529A-4(a)(1); I.R.C. §2503(e).

<sup>81</sup> 26 U.S.C. §529(c)(2)(A).

<sup>82</sup> 26 U.S.C. §529A(c)(2)(A)(i), so the transfer qualifies for the gift tax annual exclusion under §2503(b). Prop. Treas. Reg. §1.529-5(b)(1).

<sup>83</sup> *Cristofani v. Comm’r*, 97 T.C. 74 (1991); *Crummey v. Comm’r*, 397 F. 2d 82 (9th Cir. 1968). The withdrawal right can be exercised for a limited time following the notice of right to withdraw, and most often the amount that can be withdrawn is limited to annual gift tax exclusion for that particular year.

<sup>84</sup> 20 C.F.R. §416.1231.

<sup>85</sup> POMS SI 01120.203B.3.b.

<sup>86</sup> 26 C.F.R. §1.529A-2(p).