



Legal Perspectives

from Abrahams Kaslow & Cassman LLP

ABLE May Lessen the Need for Special Needs Trusts

by Andrew P. Deaver

Good news is on the horizon for those who have disabilities and receive government benefits ("Individual"), such as Medicaid, SSI, and social security. With the late 2014 passage of the Achieving a Better Life Experience Act ("ABLE"), a new financial planning tool will soon be available for persons fitting this description. While the Treasury Department and the States continue to draft the regulations prior to their implementation, there is good reason for optimism.

ABLE allows an Individual to create a tax free savings account, which can contain monies that will not disqualify them from receiving government benefits until certain limits are reached. Any contributor, either the Individual or a third party, can establish an ABLE account on behalf of the Individual; however, each Individual may only have one ABLE account. To be eligible for an ABLE account, an Individual must have significant disabilities which began prior to their turning 26 years of age. Either the Individual or a third party can make contributions to the account; however, contributions to an ABLE account will not be tax deductible. Contributions to an ABLE account from all sources can total up to \$14,000.00 per calendar year¹ and the account can contain up to \$100,000.00 before eligibility from SSI is suspended, but Medicaid eligibility will not be affected by the amount of assets held in the account. Each State will establish the overall cap on the amount of monies held in an account in that State, similar to the cap placed by States on 529 college savings plans. The Individual can make withdrawals from the account at their discretion, without the requirement to involve a third party, such as a trustee; however, the money withdrawn must be spent on a qualified disability expense. Such an expense will likely include transportation, housing, and education, among others, with the Treasury Department specifically describing the allowable expenses in the finalized regulations. One negative aspect of an ABLE account is that following the Individual's death the State will have the ability to use any remaining funds for

repayment of the Medicaid benefits it provided during the Individual's lifetime.

Traditionally, two types of supplemental needs trusts have been the primary vehicles to provide for an Individual whose needs went beyond what government benefits would provide. In the first type, the Individual could place their own assets in a trust to protect the assets from required spend downs to attain government benefits; however, upon the Individual's death, any assets remaining in the trust would be used to repay the government for Medicaid benefits received during the Individual's lifetime. In the second type, a third party could place assets in a supplemental needs trust for the benefit of an Individual, with no requirement to use any remaining assets upon the Individual's death to repay benefits received. This second type of supplemental needs trust would allow a third party to put money in trust for the Individual during their lifetime, while giving the trustee directions as to the disposition of any remaining assets upon the Individual's death. In both types of supplemental needs trusts, there was no age restriction or resource limit, but the Individual lacked control over when and how distributions were made. A trustee, in its sole discretion, had to make these distribution determinations.

While supplemental needs trusts are expected to remain an important tool, ABLE accounts may prove to be a better option in certain situations. For example, it is anticipated that, upon the passage of the final regulations, creating and maintaining an ABLE account will be a relatively straightforward process. An Individual and family will hopefully be able to navigate the process without requiring the assistance of an attorney or other professional. This relative simplicity should allow the overall cost of using an ABLE account to be significantly lower than the creation and maintenance of a traditional supplemental needs trust. Because of this simplicity and do-it-yourself nature, an Individual and families who have little experience with attorneys, who may

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not be comfortable working with attorneys, or for whom hiring an attorney would be a financial hardship will be able to utilize ABLE accounts in their financial planning with relative ease.

ABLE accounts should especially benefit an Individual who is an active participant in the workforce. Their wages placed in an ABLE account will no longer need to count against their government benefit resource limit or be placed in a supplemental needs trust, so long as no more than \$14,000.00 is deposited per year¹ and the total assets accumulated in the account do not exceed \$100,000.00. Instead, this working

Individual can deposit their earnings into their ABLE account and have ready access to these funds, while still retaining their government benefits. If guidance is needed, a conservator can be appointed to help with account management.

At this point in time, the specifics of the ABLE accounts and the programs surrounding them have not been finalized by the Treasury Department and the States. The application of ABLE accounts to each Individual's situation should be made clear over the next few months. In the meantime there is reason to be hopeful about this new planning tool.

If you have any questions on ABLE, please contact one of our estate planning attorneys at 402-392-1250.

¹As of yet, there is no official interpretation available of the total aggregate annual contribution amount allowed under ABLE. Official interpretation must become available before action is taken based upon the position set out above.

The Perils of the Unlicensed Contractor Repair

By Aaron D. Weiner

Oftentimes, residential landlords use a good maintenance person to do most repairs, even electrical and plumbing. The practice saves time and money. The landlord may not even be aware whether any of the work performed required a licensed professional. If the repair is done correctly, no harm no foul, right? But beware of the litigious tenant who is creative about getting out of their rent obligations.

Once upon a time - in this hypothetical situation - a happy landlord had a happy tenant. The landlord had his own employees do some electrical and plumbing repairs in the home. Everything seemed to be working well. With the landlord's permission, the tenant moved out and tenant's relatives moved in. The relatives began storing their landscaping and junk business in the yard. Neighbors complained. The landlord could not get the tenants' cooperation in removing the nuisance and decided to see if the City would address the problem. The City ticketed the tenants.

But rather than comply and let it go, the tenants were vindictive. They withheld rent and turned around and requested the City inspect the premises for City Code violations. The tenants suspected that the landlord had used unlicensed persons to perform work in the home. The City found that various repairs had not been performed by licensed contractors as required and cited the home for the Code violations.

Some time passed during unsuccessful attempts to negotiate with the tenants. Losing patience, the landlord decided to evict the tenants for the non-payment of rent.

The tenants' defense: the landlord had no right to collect rent because the home was not compliant with Code. In fact, the tenant sought a refund of all the past rent and sought attorney fees for the landlord's alleged willful non-compliance.

On the tenants' side, the Landlord/Tenant law specifically required that the landlord supply a premises in compliance with the statute. The statute required that the landlord, "substantially comply, after written or actual notice, with the applicable housing codes materially affecting health and safety." Even if the electrical and plumbing repairs were done correctly, arguably compliance with those Codes materially affects health and safety. Did the landlord "have actual knowledge" that the work at the home required a licensed contractor?

On the landlord's side, the Landlord/Tenant law provides the tenant the right to give notice of Code violations and the landlord may avoid termination of the lease with timely remedy. In addition, the law specifically says "an aggrieved party" has a duty to mitigate and avoid damages, so if the tenants suspected repairs were not to Code when they moved in, shouldn't they have given immediate notice? The statute preserves the right of the tenant to pursue damages in addition to remedy, but how were the tenants damaged? Should the tenants be able to recover attorney fees for the landlord's willful breach even if they were not damaged? What about the tenants' apparent opportunism, lack of good faith, and arguably willful non-compliance with the rent obligation?



The action for possession would be decided by a Judge, but how can the landlord predict how the Judge would react to the Code violations? The Judge could determine that, however well intended the landlord or skilled his employees, the Code is there to protect health and safety; the Judge could decide to make the landlord an example. Would the Judge grant the tenant emergency discovery or a continuance to determine what the landlord actually knew? Would the court ignore the right to a speedy trial on possession? The attorney fees at stake, after the tenant has done discovery and briefed the matter could be substantial, and the tenant could theoretically add even more fees by demanding a jury trial on their claim for a refund of all their rent.

Although the landlord seems to have been well intended, the failure to use licensed contractors has given a litigious tenant leverage. Are the cost savings worth the risk?

If you have any questions about this article or landlord/tenant issues, please contact one of our attorneys at 402-392-1250.

Reverification - I-9 Compliance Tip *by Harvey B. Cooper*

Sixty-five to seventy-five percent of an employer's USCIS Form I-9 Employment Eligibility Verification are completed incorrectly, exposing employers to substantial fines for paperwork violations. Penalties for I-9 paperwork violations can be severe, and the higher the percentage of violations to the total workforce can result in a higher per violation penalty. A common error made by employers is failing to reverify I-9s of employees who, when hired, present certain documents with expiration dates.

Every employee hired after November 6, 1986, must complete a Form I-9 verifying their identity and authorization to work in the United States. As part of the I-9 process, new employees must present either one document from List A or one document from each List B and List C on the back side of the I-9. Some List A and List C documents have expiration dates, such as an Employment Authorization Document or Card (Form I-766) and an Employment Authorization Card issued by the Department of Homeland Security ("DHS"). Employers must reverify employee's documentation when the employee's employment authorization has expired. The employee must present the employer with new, unexpired documents and the employer must reverify the I-9 by completing Section 3 of the original I-9.

When reverifying documents, section 3 of the original I-9 form may be used only if it was completed on the current version of the I-

9 form, which went into effect on March 8, 2013. If the original I-9 was not completed on the current version, the employee should either fill out section 3 on the current version of the I-9 or complete a new I-9. In either case, the employer must attach the new I-9 to the old one.

Many employers fail to reverify the I-9 of non-U.S. Citizens. Employers are exposed to substantial fines if DHS discovers this during an I-9 audit. I-9s must be reverified no later than the actual expiration date of the work authorization document. If the employer fails to reverify the I-9, then the employee is not entitled to continue to be employed.

We suggest employers use a tickler system notifying them ninety days before the documents expire. The employer then notifies the employee of the expiring documents and asks the employee to present new unexpired documents in order to continue working. The tickler system can be set up internally or with a third party payroll service. However, if you use a third party payroll service, the employer is still responsible for reverifying the I-9.

If you have questions about I-9s or the DHS audit process, contact Harvey B. Cooper at 402-392-1250 or hcooper@akclaw.com.

Howard Kaslow Receives Nebraska Bar Foundation Lifetime Achievement Award

The Lifetime Achievement Award recognizes a lawyer who has made significant contributions to the legal profession, the Bar Foundation, and to his or her community.

Howard Kaslow has been a member of the Omaha legal community since 1964, when he joined Abrahams, Kaslow & Cassman, a firm founded in part by his father, Ben Kaslow. In his practice he has represented a multitude of companies, large and small, local and national. He has been recognized for over 20 years in Corporate Law by the Best Lawyers of America. Howard was named "Best Lawyers Corporate Lawyer of the Year" for Omaha in 2010. He maintains a 5 out of 5 AV Preeminent Martindale Hubbell Rating and has been ranked in Chambers and Partners for Corporate Law from 2008-2015.

Upon receiving the Inclusive Communities Award, Howard was interviewed by The Jewish Press. In that interview, he expressed two reasons in particular why he has

been involved with numerous non-profit organizations over the years:

"First is the possibility that my active involvement might contribute to the success of an organization's mission that is important to me. Second is the opportunity to become acquainted with people whom I might otherwise never have had the chance to know and to work with them for a common cause. Without the efforts of volunteers, the work of the many non-profit organizations that serve our community simply could not be accomplished. The community would be poorer for that loss, so I am glad to help when I can."



Howard J. Kaslow

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This newsletter is published by the law firm of Abrahams Kaslow & Cassman LLP to inform our clients and friends about various legal developments and to provide news about our firm. This newsletter is not intended to provide legal advice on specific matters but rather to provide insight into legal topics and issues of current interest. Please consult with legal counsel before taking action on matters covered in this newsletter. If you would like further information or would like to be added to our mailing list, please contact Debbie Watson at 402-392-1250 or via email at dwatson@akclaw.com.

The Nebraska Rules of Professional Conduct for attorneys require the following statement on newsletters of law firms:

This is an advertisement.



Attorneys in the Spotlight

Nicole Seckman Jilek recently concluded her term as the President of the Omaha Jaycees. The Nebraska Jaycees recognized Nicole as the 2014 Most Outstanding Local Chapter President. She has been nominated by the Nebraska Jaycees to receive the national Outstanding Local Chapter President award. At the recent annual Nebraska Jaycees convention, Nicole won the "Speak-Up" extemporaneous speech competition and will represent the Nebraska Jaycees as a competitor in the national "Speak-Up" competition at the US Jaycees National Convention in late March of 2015.



Nicole Seckman Jilek



A.M. Best recognized AK&C as a time-honored listee in Best's Directory of Insurance Attorneys. AK&C has been listed over 10 years as an industry professional whose clients consistently value our reputation and expertise.

Thank You Omaha!

We are honored to have been voted Best of B2B Law Firm for the 5th straight year!



Congratulations to John Herdzina who has been elected the President of Catholic Charities Board of Directors.

Congratulations to Jen Rattner who was elected to the Board of Nebraska Wildlife Rehab, Inc.

Ryan M. Kunhart has been appointed President-Elect of the Big Brothers Big Sisters of the Midlands Service League.

Three of our attorneys were recently honored by the Nebraska State Bar Association for their years of membership to the Bar.

Howard J. Kaslow - 50 years

Aaron D. Weiner - 25 years

Jeffrey J. Blumel - 25 years

We are pleased to have received a Tier 1 Ranking in Corporate Law and Municipal Law by U.S. News and Best Lawyers for 2015 for the fifth consecutive year. Firms included in the 2015 "Best Law Firms" list are recognized for professional excellence with impressive ratings from clients and peers.