



MAINE ELDER LAW FIRM

ABLE Accounts: Housing and ISM 2 of 3 Articles

The ABLE account is a relatively new planning tool that offers an individual with eligible disabilities a tax-free savings option that does not interfere with their eligibility for means-tested government benefits. As discussed in the first article in this series, an individual who had a disability before age 26 may accumulate savings in an ABLE account without risking eligibility for means-tested public benefits such as Supplemental Security Income (SSI) and Maine Medicaid (MaineCare).

A significant advantage of an ABLE account is that distributions from an ABLE account can be used for housing-related expenses without causing a reduction in the beneficiary's SSI payment. To explain this important benefit, we need to review the Social Security Administration's (SSA's) rules regarding income.

SSI is only available to individuals with limited income and assets. If an individual is receiving SSI and then is given cash by a friend or family member or by a trustee of a special needs trust for the benefit of that individual, the SSI benefit will be reduced dollar-for-dollar.

Example 1: Assume Martha has a daughter named Daphne, and assume that Martha gives Daphne \$1,000 in the month of January to pay rent. Daphne would lose her SSI for the month because of the receipt of that cash which exceeded her SSI benefit of \$783 in 2020.

When the individual on SSI receives food and shelter from someone else, the SSA treats that as a special category of unearned income called "in-kind support and maintenance" or ISM. That is because SSI is intended to pay for food and shelter. Therefore, when the individual receives ISM, the SSI benefit will be reduced dollar-for-dollar but up to a maximum of one-third of the SSI benefit.

Example 2: Assume that Daphne lives with Martha rent-free. Instead of receiving the full SSI benefit of \$783 in 2020, Daphne's SSI will be reduced to \$522 (\$783 - \$261).

Example 3: The same reduction will occur if, instead of giving Daphne \$1,000 to pay for rent, Martha pays the landlord \$1,000 directly.

How can an ABLE account help? Any distribution from an ABLE account for a qualified disability expense (QDE) will not result in an SSI reduction. Typical QDEs include education, transportation, legal fees, health and wellness, funeral and burial expenses, and basic living expenses, and housing. For this purpose, housing expenses include a mortgage, real estate

taxes, rent, heating fuel, gas, electricity, water and sewer, and garbage removal. Let's apply this to Martha and Daphne:

Example 4: What if Martha contributes \$1,000 to Daphne's ABLE account and then Daphne withdraws \$1,000 and uses the funds in the month of withdrawal to pay her own rent? The SSA will not reduce Daphne's SSI benefit.

However, any distribution from an ABLE account that does not fall into a QDE category is considered taxable income to the beneficiary of the account, and the IRS will assess a 10% penalty tax on the income portion of the funds used for the non-qualified expense. Additionally, the SSA will count as a resource any distribution from an ABLE account not used for a QDE.

How might a special needs trust work in conjunction with an ABLE account? A carefully drafted special needs trust might authorize the trustee to transfer money into the beneficiary's ABLE account to maximize the benefits of both tools simultaneously.

Example 5: Assume that Martha includes a third-party special needs trust for Daphne's benefit in her estate plan. When Martha dies, assets that she leaves for Daphne's benefit are directed to the trust to be managed by a trustee in that trustee's sole and absolute discretion. Those trust assets will be treated as "noncountable" to Daphne and will not affect her eligibility for SSI and MaineCare. The trustee could distribute cash to Daphne as described in Example 1 or pay the landlord directly as described in Example 3. In both cases, there would be adverse consequences for Daphne's SSI benefits. Instead, the trust should make distributions from the trust to Daphne's ABLE account just as Martha did in Example 4. Daphne (or her guardian or agent under power of attorney) could, in turn, use those funds to pay the \$1,000/month rent or for any other QDE.

When considering whether to establish an ABLE account, the individual with disabilities (or his or her legal representative) should ideally consult with a special needs planning attorney about its suitability for that particular individual. For more details about ABLE accounts for individuals with disabilities, see the first and third articles in this series.