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HB 768 - Georgia Achieving A Better Life Experience (ABLE)

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HANDICAPPED PERSONS

Georgia Achieving A Better Life Experience (ABLE): Amend Title 30 of the Official Code of Georgia Annotated, Relating to Disabled Persons, So As to Provide for the Establishment of a Qualified ABLE Program in This State to Enable the Contribution of Funds to Tax-Exempt Accounts to Pay for the Qualified Expenses of Eligible Individuals with Disabilities; Provide a Short Title; Provide for Legislative Intent; Define Certain Terms; Provide for the Creation of the Georgia ABLE Program Corporation; Provide for a Board of Directors and its Membership, Powers, Duties, and Administration; Provide for the Establishment of the Georgia ABLE Program; Provide for Participation Agreements and ABLE Accounts; Provide for the Trust Fund and the Administration Thereof; Provide for a Comprehensive Investment Plan; Provide for Effect of Account Deposits on Eligibility For Certain Public Assistance; Provide for Annual Reports; Provide for Confidentiality and Nondisclosure of Certain Records; Amend Code Section 7 of Article 2 of Chapter 7 of Title 48 of the Official Code of Georgia Annotated, Relating to Computation of Taxable Net Income, So As to Provide for Tax Treatment of Withdrawals from ABLE Accounts; Amend Code Section 2 of Article 1 of Chapter 14 of Title 50 of the Official Code of Georgia Annotated, Relating to the Definitions for Purposes of the Georgia Administrative Procedure Act, So As to Exclude the Georgia ABLE Program Corporation from the Meaning of “Agency”; Provide for Related Matters; Provide for an Effective Date; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 30-9-1, -2, -3, -4, -5, -6,
-7, -8, -9, -10, -11, -12, -13, -14,
15, -16 (new); 48-7-27 (amended);
50-13-2 (amended).

BILL NUMBER: HB 768

ACT NUMBER: 519

GEORGIA LAWS: 2016 Ga. Laws 588

SUMMARY: The Act creates a tax-exempt savings account program for persons with disabilities in order to help them live independently. It creates an ABLE Program Corporation whose board is authorized to implement and administer the program.

EFFECTIVE DATE: May 3, 2016

History

For many years, persons with disability or special needs who wished to save money for future expenses faced limits capping how much they could save.¹ Both Medicaid and the Social Security Administration place an upper limit on the assets a person can own to qualify for either Medicaid assistance or Social Security Disability Insurance.² Until recently, if parents or caretakers of persons with disabilities wanted to save beyond the upper limits the only alternative was to establish a special needs trust, with specific language allowing withdrawals only for medical or rehabilitative care.³ These special needs trusts give a person with disabilities access to necessary funds without barring him or her from receiving government funds for housing, food, and other necessities.⁴

Georgia is now among the vast majority of states that have created a new method of saving for individuals with disabilities.⁵ These programs are commonly referred to as ABLE accounts, which stands for “Achieving a Better Life Experience.”⁶ Ohio’s legislature enacted the first law allowing ABLE accounts in 2015, and its ABLE account

1. See, e.g., *Eligibility Criteria Chart*, GA. DEP’T OF CMTY. HEALTH, <https://dch.georgia.gov/eligibility-criteria-chart> (last visited June 4, 2016).

2. *Id.*

3. *The Special Needs Trust*, Possibilities: A FINANCIAL RESOURCE FOR PARENTS OF CHILDREN WITH DISABILITIES (Pacer Center 2010), <http://www.pacer.org/publications/possibilities/saving-for-your-childs-future-needs-part1.html> (last visited Oct. 4, 2016).

4. *Id.*

5. *ABLE State Legislation and Implementation Updates*, NATIONAL DOWN SYNDROME SOCIETY, <http://www.ndss.org/Advocacy/Legislative-Agenda/Creating-an-Economic-Future-for-Individuals-with-Down-Syndrome/ABLE-State-Bills/> (last updated Sept. 14, 2016) [hereinafter *ABLE State Legislation*]. A similar federal savings program went into effect in 2014. 26 U.S.C. § 529A (2015).

6. *ABLE State Legislation*, *supra* note 5.

program went into effect on June 1, 2016.⁷ Since then, all fifty states have followed Ohio's lead and introduced legislation to create ABLE programs, and all but two states have signed their bills into law.⁸

ABLE Accounts are often compared to special needs trust funds.⁹ However, they often have more flexibility and allow persons with disabilities or third parties to save money for necessities without affecting the beneficiary's eligibility for Medicaid.¹⁰ Under the federal ABLE program, an ABLE account can contain up to \$100,000 for medical needs before the beneficiary's Social Security Income payments are affected.¹¹ Additionally, Section 529A of the Internal Revenue Code exempts state ABLE programs from taxation.¹² HB 768 similarly amends Georgia Code section 48-7-27 to ensure that ABLE trust accounts are not subject to state taxation.¹³

Representative Lee Hawkins (R-27th) introduced the Georgia ABLE Act.¹⁴ The drafters modeled HB 768 after the Federal ABLE Act.¹⁵ The purpose of the bill is to allow persons with disabilities to save money without facing the limitations imposed by the caps set on Medicaid and Social Security Disability Insurance.¹⁶

Bill Tracking of HB 768

Consideration and Passage by the House

Representatives Hawkins, Wendell Willard (R-51st), Virgil Fludd (D-64th), Jan Jones (R-47th), Scot Turner (R-21st), and Terry

7. *Id.* Many other states are in the process of setting up ABLE accounts, which requires establishing a corporation or a board in order to administer the accounts, as well as implement them. *Id.*

8. *Id.* Mississippi and Wyoming have not passed the legislation. *Id.* Mississippi introduced a House Bill and a Senate Bill in the last session, both of which died in Committees. *Id.* Wyoming introduced a House Bill, which passed the House but died in the Senate. *ABLE State Legislation, supra* note 5.

9. Thomas E. Beltran, *Feature: Achieving: Ability Under the ABLE Act: Tax-Advantaged Savings Accounts Will Soon be Available to Provide for Disability Expenses*, 38 L.A. LAW. 18, 20 (Sept. 2015).

10. *Id.* at 21.

11. Stephanie R. Hoffer, *Making the Law More ABLE: Reforming Medicaid for Disability*, 76 OHIO ST. L.J. 1255, 1293 n.233 (2015).

12. 26 U.S.C. § 529A(a) (2015).

13. O.C.G.A. §§ 30-9-9, 48-7-27 (Supp. 2016).

14. Telephone Interview with Rep. Lee Hawkins (R-27th) (Apr. 15, 2016) [hereinafter Hawkins Interview].

15. *Id.*

16. *Id.*

England (R-116th) sponsored HB 768.¹⁷ The House read the bill for the first time on January 15, 2016, and for the second time on January 20, 2016.¹⁸ The bill was assigned to the House Ways & Means Committee, which amended the entire bill and reported the bill by substitute on February 17, 2016.¹⁹ The substitute delegated the authority to establish the Georgia ABLE program away from the legislature and into the hands of the ABLE Program Corporation board (the Board).²⁰ The bill also authorized the Board to create the ABLE Program Trust Fund described in Code section 30-9-8.²¹ The Committee substitute did not include an amendment to Code section 48-7-27 subsection (a) described in Section II of the original bill.²² Steve McCoy, who serves in the Office of the State Treasurer, worked on the substitute bill.²³ His intent was to provide the Board with broad authority and flexibility to tailor the implementation of the program.²⁴

The House read the bill for a third time on February 23, 2016.²⁵ It passed unanimously that same day with a vote of 161 to 0.²⁶

Consideration and Passage by the Senate

Senator Fran Millar (R-40th) sponsored HB 768 in the Senate.²⁷ The Senate read the bill for the first time on February 24, 2016.²⁸ The Senate referred it to the Finance Committee on the same day.²⁹ The

17. Georgia General Assembly, HB 768, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/768>.

18. State of Georgia Final Composite Status Sheet, HB 768, May 5, 2016.

19. *Id.*

20. *Compare* HB 768, as introduced, § 1, p. 4, l. 109, 2016 Ga. Gen. Assemb. *with* HB 768 (HCS), § 1, p. 4, l. 110, 2016 Ga. Gen. Assemb.

21. *Compare* HB 768, as introduced, § 1, p. 6, l. 176, 2016 Ga. Gen. Assemb. *with* HB 768 (HCS), § 1, p. 6, l. 188, 2016 Ga. Gen. Assemb.

22. *Compare* HB 768, as introduced, § 2, p. 11, ll. 345–62, 2016 Ga. Gen. Assemb. *with* HB 768 (HCS), 2016 Ga. Gen. Assemb.

23. Video Recording of House Ways & Means Committee Meeting, Feb. 17, 2016 at 3 min., 15 sec. (remarks by Steve McCoy), http://media.legis.ga.gov/hav/15_16/2016/committees/ways/ways021716EDITED.wmv [hereinafter Ways & Means Video].

24. *Id.*

25. State of Georgia Final Composite Status Sheet, HB 768, May 5, 2016.

26. Georgia House of Representatives Voting Record, HB 768 (Feb. 23, 2016).

27. Georgia General Assembly, HB 768, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/768>.

28. State of Georgia Final Composite Status Sheet, HB 768, May 5, 2016.

29. *Id.*

Finance Committee favorably reported on the bill on March 10, 2016.³⁰ The Senate read the bill for a second time on March 11, 2016, and for a third time on March 14, 2016.³¹ By a vote of 53 to 0, the Senate passed the bill with an amendment that included the Board of Regents as an entity excepted from the bill's definition of an "agency" for the purposes of the Administrative Procedure Act.³² On March 16, 2016, the House disagreed with the Senate amendment.³³ The Senate receded from the amendment on March 24, 2016.³⁴

The Act

Creation of the ABLE Program

Section 1 of the Act creates Chapter 9 in Title 30 of the Georgia Code, known as the ABLE Act.³⁵ The Act aims to allow persons with disabilities to save money in tax-exempt accounts to help pay for disability-related expenses and to administer the program in the most efficient way possible.³⁶ Chapter 9 of Title 30 creates the Georgia ABLE Program Corporation, which will be governed by a non-paid board of directors, and will "[establish] and [administer] the Georgia ABLE Program."³⁷ The Board has the authority to form contracts, bring and defend litigation, adopt rules and regulations necessary to implement the Act, regulate withdrawals and contributions to ABLE accounts, set and collect fees associated with the administration of ABLE accounts, and delegate authority to the state treasurer.³⁸

In general terms, the Act authorizes the Board to create and oversee a program that will establish ABLE accounts to help pay for qualified individuals' disability expenses.³⁹ The program will exist until it is terminated by law upon the state's determination that the

30. *Id.*

31. *Id.*

32. Georgia Senate Voting Record, HB 768 (Mar. 14, 2016); HB 768 (HCSFA), 2016 Ga. Gen. Assemb.

33. State of Georgia Final Composite Status Sheet, HB 768, May 5, 2016.

34. *Id.*

35. 2016 Ga. Laws 588, § 1, at 588–97.

36. O.C.G.A. § 30-9-2 (2016) (codifying the intent of the legislature).

37. O.C.G.A. § 30-9-4 (Supp. 2016).

38. *Id.*

39. O.C.G.A. § 30-9-5 (Supp. 2016).

program is no longer financially feasible, at which point the remaining account funds will be disbursed to their beneficiaries.⁴⁰

When the Board implements the ABLE program, it must comply with Section 259A of the Internal Revenue Code, market existence of the program to eligible persons, and make the accounts available to all eligible persons.⁴¹ The Board must also create participation agreements that include the following mandated terms: (1) a statement that the agreement does not constitute a debt on the part of the state; (2) a statement that the agreement does not guarantee sufficient funds will be available to cover all medical expenses; and (3) a statement that contributions must coincide with Section 529A of the Internal Revenue Code.⁴² These agreements must also include eligibility requirements for opening an ABLE account, fees associated with the account, restrictions to contributions, terms under which the agreement may be transferred or modified, and any other appropriate terms.⁴³

The Act also allows the Board to create the ABLE Program Trust Fund under the administration of the state treasurer, who will hold the funds separately until disbursed to the beneficiary.⁴⁴ Contributions are subject to Section 259A of the Internal Revenue Code.⁴⁵ These funds may be invested “in a manner reasonable and appropriate to achieve the objectives of the corporation, exercising the discretion and care of a prudent person in similar circumstances with similar objectives.”⁴⁶ The Board may contract with consultants and advisors to ensure prudent investing practices.⁴⁷ If the Board implements the trust fund program, it must prepare a report detailing the accounting of the program each year.⁴⁸ This report must be made available to contributors and beneficiaries of the trust fund.⁴⁹

Under the Act, an ABLE account that an individual holds in another state cannot be considered in determining eligibility for a

40. *Id.*

41. O.C.G.A. § 30-9-6 (Supp. 2016).

42. O.C.G.A. § 30-9-7 (Supp. 2016).

43. *Id.*

44. O.C.G.A. § 30-9-8 (Supp. 2016).

45. *Id.*

46. O.C.G.A. § 30-9-10 (Supp. 2016).

47. *Id.*

48. O.C.G.A. § 30-9-12 (Supp. 2016).

49. *Id.*

Georgia ABLE account.⁵⁰ Upon the death of the beneficiary, the ABLE corporation must assist the Department of Community Health and the Medicaid program of another state may make a claim to recover the cost of medical expenses covered by a Medicaid program.⁵¹ Remaining amounts must be distributed in accordance with the participation agreement.⁵²

Funds in an ABLE account may not be assigned to satisfy a debt, assigned as collateral for a loan, or be otherwise transferred for any other purpose.⁵³ Many documents related to the ABLE program are not considered public records, such as completed applications and participation agreements, account transactions, security codes, and bank routing information.⁵⁴ Other records are not considered public record “until the end of a calendar quarter,” including “investment trade tickets and bank statements.”⁵⁵ These exemptions do not apply to certain legal processes.⁵⁶

Computation of Income

Section 2 of the Act amends Code section 48-7-27 of the Georgia Code by adding that withdrawals from an ABLE account are not subject to state income tax.⁵⁷ Section 3 further amends Code section 50-13-2 to include the Georgia ABLE Program corporation in the definition of “agency.”⁵⁸

Analysis

Advancing Public Policy

Lawmakers behind the Act had one main goal: make it easier for people who are on Medicaid and Social Security Disability Insurance

50. O.C.G.A. § 30-9-11 (Supp. 2016).

51. O.C.G.A. § 30-9-14 (Supp. 2016).

52. *Id.*

53. O.C.G.A. § 30-9-15 (Supp. 2016).

54. O.C.G.A. § 30-9-16 (Supp. 2016).

55. *Id.*

56. *Id.*

57. 2016 Ga. Laws 588, § 2, at 597.

58. 2016 Ga. Laws 588, § 3, at 598.

to save money.⁵⁹ Prior to the Act, many people who relied on Medicaid or Social Security Disability Insurance could not afford expenses not covered by those programs, because they could not save money over the asset caps.⁶⁰ In addition, some individuals who do not qualify for government programs because they exceed the assets caps may not actually be in a position to save money.⁶¹ For example, neither Medicaid nor Social Security Disability Insurance income covers education or transportation costs, but an ABLÉ account does.⁶² For many, these restrictions on the use of Medicaid and Social Security Disability Insurance make attending school or holding a job very difficult.⁶³ ABLÉ accounts allow individuals in these situations to save money for school or transportation costs, as well as for medical treatments that may not be covered by Medicaid or Social Security Disability Insurance.⁶⁴ Representative Hawkins, who was instrumental in sponsoring HB 768 in the House, said that he was motivated to introduce the bill in part because of his experiences with the nonprofit organization called Randy and Friends.⁶⁵ Specifically, Representative Hawkins recalled interacting with individuals who wanted to work or attend school but were unable to do so because they could not afford it.⁶⁶ Representative Hawkins and the other legislators who sponsored the bill, were eager to pass the bill to give individuals who would otherwise be limited by the Medicaid and Social Security Disability Insurance asset caps a chance to be more active in society.⁶⁷

59. Hawkins Interview, *supra* note 14.

60. *See* Beltran, *supra* note 9, at 20 (describing how “the ABLÉ Act’s structure may offer an appropriate solution to the inconvenience of distributing funds from a special needs trust” limited by existing asset caps).

61. Telephone Interview with Marina Peck (July 29, 2016) [hereinafter Peck Interview].

62. *Id.*

63. Hawkins Interview, *supra* note 14.

64. *See* Beltran, *supra* note 9, at 20.

65. Hawkins Interview, *supra* note 14. Randy and Friends is a nonprofit organization that strives to make individuals with disabilities who may have been overlooked by society independent and successful. *Who We Are*, RANDY AND FRIENDS, <http://www.randyandfriends.org/aboutus.html> (last visited June 25, 2016).

66. Hawkins Interview, *supra* note 14.

67. *Id.*

Comparison with Ohio's ABLE Act

Ohio was the first state to adopt s ABLE legislation, and almost every state has followed suit.⁶⁸ While all intended for the same purpose, each state's legislation is slightly different.⁶⁹ For example, Ohio's ABLE Act enables its Treasurer of State to create the ABLE program, whereas the Georgia Act authorizes the establishment of a corporation to implement its program.⁷⁰ This difference is likely due to Georgia lawmakers' desire for greater flexibility in implementing the ABLE program.⁷¹ Though the Georgia and Ohio programs are administered by different types of entities, both Acts require a specific composition of a board to direct implementation.⁷² The Ohio Act requires the formation of an advisory board of nine members and describes the exact makeup of the membership, including: a member of the senate appointed by the president of the senate, the parent of a child with a disability, and, among others, a "representative of an intellectual or developmental disability advocacy organization."⁷³ Similarly, Georgia's nine-person board must include the state treasurer, individuals with or related to a person with a disability, the commissioner of behavioral health and developmental disabilities, and others.⁷⁴ The Ohio ABLE Act does not provide a mechanism for termination of the program; whereas the Georgia Act allows the state to dissolve the program if it becomes financially infeasible.⁷⁵

Unintended Consequences

Though passage of the ABLE Act is largely beneficial to individuals with disabilities, the passage of the federal legislation has

68. *ABLE State Legislation*, *supra* note 5; Michelle Diament, *ABLE Accounts Make Debut*, DISABILITYSCOOP (June 2, 2016), <https://www.disabilitycoop.com/2016/06/02/able-accounts-make-debut/22362/>.

69. Diament, *supra* note 68.

70. *Compare* OHIO REV. CODE ANN. § 113.51 (LexisNexis 2016), *with* O.C.G.A. § 30-9-4 (Supp. 2016).

71. *Ways & Means Video*, *supra* note 23, at 3 min., 15 sec.

72. *Compare* OHIO REV. CODE ANN. § 113.56 (LexisNexis 2016), *with* O.C.G.A. § 30-9-4.

73. OHIO REV. CODE ANN. § 113.56 (LexisNexis 2016).

74. O.C.G.A. § 30-9-4.

75. *Compare* OHIO REV. CODE ANN. § 113.56 (LexisNexis 2016), *with* O.C.G.A. § 30-9-5 (Supp. 2016). Though Ohio could repeal the statutes authorizing the ABLE Program if it sought to terminate the program, the existing ABLE accounts would need to be taken into account.

revealed a few unintended consequences of the program.⁷⁶ For example, the cap placed on the trust accounts is a set number that may not take an individual's actual healthcare expenses into account.⁷⁷ The program also enumerates the ways in which individuals may spend their money without allowing for flexibility to account for subjective differences of an individual's true needs.⁷⁸ The narrow, qualified spending limitations may prevent a person from functioning independently within a community.⁷⁹ Furthermore, the program implicates an element of human dignity.⁸⁰ To take advantage of the program, an individual is required to turn their wages over to a manager and may only retrieve their money upon request.⁸¹ This implies that the beneficiary is not capable of truly maintaining his or her own resources.⁸²

Finally, the Act is only effective if it reaches its intended beneficiaries. A major potential problem is that many people who stand to benefit from the legislation are unaware that the ABLE program exists.⁸³ Marina Peck, a mother of a child with muscular dystrophy, only became aware of the ABLE program when contacted for an interview.⁸⁴ She typically learns about changes in law through the community or non-profit organizations rather than through the government itself, which can delay access and result in misinformation.⁸⁵

The Act is a step in the right direction for persons with disabilities and their families or caregivers. However, it is possible that there could be issues going forward. Because the Act creates a Board that will have broad authority to implement the program, it remains to be

76. *E.g.*, Hoffer, *supra* note 11 at 1261 (describing the continuing need for special needs trusts to remedy the Medicaid requirement of "legal impoverishment").

77. 26 U.S.C. § 529A (2016) (placing a \$100,000 cap on contributions).

78. O.C.G.A. § 30-9-4(b)(7) (allowing the ABLE Program Corporation board to "impose a 10 percent penalty on the earnings portion included within a withdrawal of funds for nonqualified disability expenses . . ."); *see also* Hoffer, *supra* note 11 at 1295.

79. Kevin Urbatsch & Michel Fuller, *The Future of Planning for Persons with Disabilities: What Challenges Will Arise?*, 9 NAT'L ACAD. ELDER L.J. 189, 222 (2015).

80. Hoffer, *supra* note 11 at 1295.

81. O.C.G.A. § 30-9-8 (2015).

82. Hoffer, *supra* note 11 at 1295.

83. Peck Interview, *supra* note 61.

84. *Id.*

85. *Id.*

seen how the Board will actually use its authority.⁸⁶ Once the Georgia ABLE Account program is up and running, there is potential for further legislation or litigation over unseen issues in the Act. These issues could include issues over who may create or access an ABLE Account on behalf of a disabled person, and the role banks play in the formation of the accounts, among other things. However, because Georgia is one of many states with such a program, stakeholders will have ample resources to aid in resolving these issues.

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86. O.C.G.A. § 30-9-4 (Supp. 2016).