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CONGRESS PASSES TWO SIGNIFICANT BILLS WHICH BETTER THE LIVES OF PERSONS WITH DISABILITIES

By: Theresa M. Varnet, M.S.W., J.D.

Prior to leaving Washington for Christmas break, Congress passed two significant pieces of legislation which will positively affect the lives of families with special needs children. First, the Disabled Military Child Protection Act was passed on Monday, December 15th. Then on Tuesday, December 16th, Congress passed the Achieving a Better Life Experience (ABLE) Act. Each bill had been proposed for the past six (6) years without ever coming close to passing. Advocates changed strategy and incorporated each bill into a bigger piece of legislation, which enabled the bills to be passed along with other proposals.

The DISABLED MILITARY CHILD PROTECTION ACT allows military families to protect their Survivor Benefit Plans (SBP) by allowing the benefits to be directed to a "payback" special needs trust. If there are any assets left in the trust when the recipient of SBP dies, the funds are paid back to Medicaid for the cost of the recipient's care. These individuals will now be able to remain eligible for Medicaid, which is the primary payer of residential placements such as group homes and other options for persons challenged with disabilities who need residential supervision and/or assistance from a Medicaid Waiver program. Up until now, individuals who received SBP have often been locked out of Medicaid funded support programs.

The Disabled Military Child Protection Act granted military members the authority to name a special needs trust as a beneficiary of Survivor Benefit Plans (SBP). The military allows members with special needs children to participate in the SBP, which permits monthly benefit stipends up to 55% of the military member's pension to be paid for the benefit of a disabled child. Previously, benefits were required to be paid directly to the disabled child. Because the benefits were not allowed to be redirected to a special needs trust, the child of a military member was often left in a worse-off position for having received the SBP, because the child lost eligibility for critically needed government benefits such as Supplemental Security Income (SSI) and Medicaid.

The Disabled Military Child Protection Act will allow the survivor benefit to be paid directly to a d4A or d4C Special Needs Trust (sometimes called a First Party Special Needs Trust or a Medicaid Payback Trust). If the benefits are distributed directly to the trust, the child will remain eligible for needs-based benefits such as SSI and/or Medicaid.

The Disabled Military Child Protection Act was introduced year after year for the past 6 years and until now, never came close to passing. This year, advocates added the provisions of this critically needed bill to the 2015 Defense Authorization Act, the annual bill that funds the military. This strategy worked and after 6 years of failing to be enacted, the bill passed on 12/15/2014. Passage of the bill is the first step. It is now time to spread the word so that military families are made aware of the need to create a 1st Party Special Needs Trust and to contact the military to change the beneficiary of their SBPs to this properly worded Special Needs Trust.

The second bill, ACHIEVING A BETTER LIFE EXPERIENCE (ABLE) ACT, was passed on the eve of Congress vacating Washington to return home for the Christmas holidays. Like the Disabled Military Child Protection Act, this bill has been proposed for each of the past 6 years and never came close to passing. The ABLE legislation was incorporated into H.R.5771, which amended the Internal Revenue Code of 1986 to extend certain expiring provisions and to make technical corrections to the IRS code. Certain key provisions of the bill were rewritten to gain the support of Congress to pass the bill. For example, the original bill allowed for all persons who qualify for SSI and SSDI to be able to create an ABLE Account. The bill, as passed, limits ABLE Accounts only for those persons who were disabled prior to the age of 26. Proof of disability requires the person to be receiving SSI or SSDI prior to 26, or in those cases where a person did not receive benefits, disability must be "certified" by medical providers to qualify to use an ABLE Account.

Under the new law, states have the option to establish ABLE programs. These programs will allow individuals who qualify to save in excess of $2,000 in an ABLE account (also referred to as a Medicaid Payback Account) for disability related expenses without disqualifying them from needs-based benefits, such as SSI and Medicaid. The ABLE account allows disabled individuals to accumulate funds in an ABLE account, which funds will grow tax free. The account can be funded only with after-tax funds and will be treated similar to a ROTH IRA account. All contributions to the account must be in the form of cash and not in the form of stocks or other assets. Any person can make a non tax deductible gift into the account. The income earned on the account will not be taxed and distributions for qualified goods and services will not be taxed. However, should a withdrawal be made for a non-qualified good or service, the withdrawal will be subject to a tax as well as a penalty. Qualified distributions include distributions made for 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; and funeral and or burial expenses.

ABLE accounts should be seen as another planning vehicle to use to help create a more comfortable and enriched life for persons with disabilities. Families should be cautioned that while these accounts have been compared to 529 accounts, they have a distinct difference in that the 529 account can be distributed to named remainder beneficiaries when the primary account holder dies. With an ABLE account, the funds remaining in the trust at the death of the account holder are first used to pay back the state Medicaid agency for the cost of Medicaid funded services the beneficiary received since the date of the creation of the ABLE Account. Families also need to be made aware that SSI will only disregard up to $100,000 in an ABLE account as a resource of the beneficiary. If an ABLE Account has more than $100,000 at any time, SSI will suspend SSI benefits until the Account is spent down below the $100,000 level. SSI will then be reinstated without the need to reapply. Additionally, it is important to know that SSI will deem any distributions for food and housing expenses from an ABLE Account as "In-Kind Income" and will reduce the SSI monthly benefit according to the one-third reduction SSI rules. Fortunately, the same restrictions do not apply to Medicaid and there is no asset limitation in ABLE accounts for Medicaid eligibility, regardless of the suspension of SSI benefits. If one is only interested in retaining eligibility for Medicaid, the maximum value of the ABLE Account can be higher. For continued Medicaid eligibility, he maximum value will be restricted to the State limitation for Section 529 plans. Currently in Massachusetts, the State limitation for a 529 plan is $350,000, so an ABLE account in Massachusetts could have a maximum of $350,000. Although this higher amount would trigger the suspension of SSI, it would enable the account owner to continue to be eligible for Medicaid. Total annual contributions from all sources is $14,000 per year. It is important to note that if more than $14,000 is contributed in any one year, the ABLE Account will lose its exempt status and the entire account will be deemed as an available resource.

Other key features of ABLE include the following:

- Contributions into an ABLE account can be made by any person, including the disabled individual;
- Contributions will not be tax deductible;
- Income earned by the accounts will not be taxed;
- Account withdrawals, including portions attributable to investment earnings generated by the account, for qualified expenses would not be taxable;
- Individuals are limited to one ABLE account, and total annual contributions by all individuals to any one account would be subject to the gift tax limit which is currently $14,000 per year; and -Aggregate contributions to an ABLE account would be subject to an overall limit matching the State limit for 529 accounts.