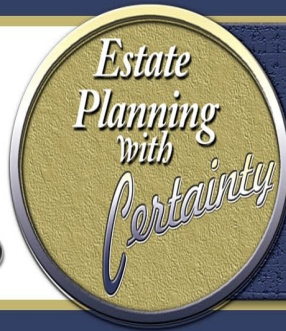


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## Single Member Limited Liability Companies State Law vs. Bankruptcy Law

In a continuing line of bankruptcy cases, the Federal Bankruptcy Courts and Federal District Courts are exerting authority over single member LLC interests. In all of the cases, there is one common element: There is a bona fide limited liability company created under state law; however, it is owned by one person and thus, a single member LLC. The problem comes when the single member owner of the LLC is in Chapter 7 Bankruptcy. A recent US District Court case, *In Re: Cleveland, 2014 WL 4809924(D. Nev. Sept. 29, 2014)*, affirms a Bankruptcy Court determination which allows a Chapter 7 Bankruptcy Trustee to sell the assets of two single-member LLC's. Notwithstanding Nevada State Law which only gives creditors a Charging Order against the Debtor's interest in an LLC, the Court has nonetheless allowed the Bankruptcy Trustee to essentially reach through the LLC veil and take charge and sell the company's asset to satisfy creditors.

In doing so, the District Court has agreed with numerous Bankruptcy Courts that in a Chapter 7 Bankruptcy, the Trustee succeeds to all of the debtor's rights, including the right to take control of the LLC entity and the Trustee need not take any further action to comply with state law before exercising such control. To further its position, the Court also stated "[s]tate law does not control administration of property interest that are part of the bankruptcy estate." As such, the Trustee is not limited to just a state charging order.

*So what does this mean? How do we further protect assets using limited liability companies?* For state law purposes, a single member LLC should suffice to protect the assets inside the LLC from claims of creditors. Most states, like New York, have provisions that allow creditors only a "Charging Order" which in essence would only allow a creditor to seize any distribution the LLC makes to the debtor party. However, if the owner of the LLC should find him or herself in a Chapter 7 Bankruptcy proceeding, perhaps a single member LLC will not be enough. For sometime we at Brooks & Brooks have advised clients, where possible, to have two or more owners of an LLC. So far there has been no reported federal bankruptcy case which allow a Trustee to take control of a company where there are two or more owners, a multi-member LLC.

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### Free Workshops

April 21, 2015

Chanderson's at Yorkshire  
6:30 to 8:30 p.m.

May 12, 2015

Cattaraugus-Little Valley  
Adult Education  
6:00 to 8:30 p.m.

May 21, 2015

Randolph VFW  
6:30 to 8:30 p.m.

June 2, 2015

Irving Colony House with  
Andersen Cuddihy, Inc.  
6:30 to 8:30 p.m.

## New Federal Law Attempts to Help People with Disabilities

The new Achieve a Better Life Experience (ABLE) Act, signed into law on December 19, 2014, allows a tax free account to be established for individuals with disabilities, much as an education account may be setup for future college expenses. The ABLE Act amends Section 529 in the Internal Revenue Code of 1986 to allow the creation of tax-free savings accounts specifically for people who become disabled before they turn 26 years old.

The objective of the Act is to allow an account to be funded to pay for a variety of potentially essential expenses for disabled individuals. These may include medical and dental care, education, community based supports, employment training, assistive technology, housing and transportation. The ABLE Act is intended to provide individuals with disabilities the types of flexible savings tools that other Americans have through the college savings accounts, health savings accounts and individual retirement accounts.

### Who qualifies for such an account?

Eligibility is limited to individuals with significant disabilities that are onset before reaching 26 years old. An individual must meet the SSI criteria regarding significant functional limitations. Although the law has been passed, regulations to implement the law will not be written by the Treasury Department until sometime in 2015, which will further define and explain the standard of proof and required medical documentation for disability. If an individual is already receiving SSI and/or SSDI, he or she will automatically be eligible to establish an ABLE account.

### Who can contribute and how much?

Anyone can contribute to an ABLE account for a beneficiary, with total contributions to the account being limited to \$14,000 per year and total value of such an account will be limited to \$100,000. If an account is over \$100,000, the excess will be considered a resource to the beneficiary and will affect the individual's qualification for SSI, etc.

### What expenses are allowed to be paid from ABLE Accounts?

Each payment must qualify as a "qualified disability expense." These expenses will further be described in regulations to be developed by the Treasury Department later this year.

**One word of caution** - it would seem that an ABLE Account would be more appropriate for investments of smaller amounts. An ABLE account will be easy to establish and administer with very little cost. However, under the provisions of the ABLE Act, there is a Medicaid payback provision when the beneficiary passes away. This effectively means that family members may contribute to a beneficiary's ABLE account and then see all of the money in the account go to reimburse the government when the beneficiary passes away....effectively a 100% tax! If an account were to be funded to the maximum amount allowable, it may be better funded through a Special Needs Trust than an ABLE account, so that upon the beneficiary's passing, the money can be returned to the family.

Another option is to participate in a Pooled Trust, which gives professional management and oversight of the investments and a dedicated staff to handle the payment of qualified disability expenses. Upon the beneficiary's passing, the family will not see a return of the unused portion of the trust, but the government will not get it either. The unused funds stay in the pooled trust for the benefit of other disabled beneficiaries. At least a family has the satisfaction of knowing they are helping other disabled persons rather than helping the government.

We at Brooks & Brooks have assisted many families with Special Needs Trusts for disabled persons, in the individual trust context and also assisting in pooled trusts situations.

*"Hard work spotlights the character of people: some turn up their sleeves, some turn up their noses, and some don't turn up at all." Sam Ewig*