

New Law Allows Disabled Individuals to Establish Their Own Special Needs Trusts

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by Jeramie J. Fortenberry, JD, LLM (Taxation)

WealthCounsel, Executive Editor and Legal Education Faculty

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On December 7, 2016, the Senate approved H.R. 34, the 21st Century Cures Act by a vote of 94 to 5. The new law includes the Special Needs Trust Fairness Act,ⁱ which adds provisions to the law allowing competent individuals with disabilities to create their own special needs trusts.

Background of Special Needs Trusts

Under means-tested benefit programs like Medicaid and Supplemental Security Income (SSI), disabled individuals can only qualify for benefits if they have no more than \$2,000 in countable assets. Special needs trusts allow disabled beneficiaries to receive the benefit of trust assets without disqualifying those beneficiaries from receiving means-tested benefits. With a properly drafted special needs trust, trust assets can be used to pay for expenses that are not covered by means-tested governmental benefit programs without displacing the governmental benefits that the beneficiary would otherwise be eligible to receive.

Special needs trusts may be established using assets of family members or other third parties (*third-party special needs trusts*) or using the assets of the disabled beneficiary herself (*first-party special needs trusts*). But prior law included a built-in assumption that the disabled beneficiary lacks mental capacity to manage her own affairs. Because of this assumption, the law required a first-party special needs trust to be established on behalf of the disabled individual by a parent, grandparent, guardian or court; the disabled individual could not establish a first-party special needs trust on her own.

The requirement that someone act on a disabled person's behalf to establish the trust was widely viewed as a drafting oversight in the prior law, OBRA-93.ⁱⁱ It is also inconsistent with similar laws affecting disabled individuals. For example, disabled individuals have long been able to transfer funds to "pooled" first-party special needs trusts that are administered by nonprofit organizations. Similarly, under the ABLE Actⁱⁱⁱ that was passed in 2014, disabled beneficiaries can create their own savings accounts.

Disability advocates—including National Association of Elder Law Attorneys—believe that the inability of a person with disabilities to establish her own first-party special needs trust is insulting to the disabled individual and causes unnecessary complication. The prior law required a disabled person with full mental capacity—a physically disabled veteran, for example—to seek the assistance of her parents, grandparents, guardian, or a court in order to establish her own trust to hold her own assets.

Requiring someone else to establish a first-party special needs trust provides no economic benefit to federal or state government, but could impose economic hardship on the disabled beneficiary, especially when a court is required to establish the trust. The first-party special needs trust rules require the trust to contain a payback provision that allows the government to seek reimbursement from trust assets upon the death of the disabled beneficiary. This provides protection to the government regardless of who establishes the trust.

The Special Needs Trust Fairness Act

The Special Needs Trust Fairness Act makes a simple modification to 42 U.S.C. 1396p(d)(4)(A). The prior version required a first-party special needs trust to be “established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court.” The amendment simply adds a phrase allowing the individual to establish her own first-party special needs trust (“established for the benefit of such individual by the individual, a parent, grandparent, legal guardian of the individual, or a court”).

This small change has big consequences. Disabled beneficiaries with mental capacity to establish their own trust no longer need to seek the assistance of their parents, grandparents, guardians, or the court. They may now act on their own behalf to establish a first-party special needs trust and fund it with their own assets, without any undue legal difficulties.

The Special Needs Trust Fairness Act will have a direct impact on all attorneys who create special needs trusts for their disabled clients.

WealthCounsel is the publisher of Wealth Docx®, the estate planning industry’s leading document assembly systems for attorneys. Wealth Docx contains provisions allowing attorneys to design and implement third party special needs trust solutions for families with disabled individuals. ElderCounsel, our partner company, provides solutions to help attorneys design and implement first party special needs trust solutions for individuals with special needs.

ⁱ See Section 5007, Fairness in Medicaid Supplemental Needs Trusts.

ⁱⁱ Omnibus Budget Reconciliation Act of 1993. Pub. L. 103-66. 107 Stat. 312. Aug. 10, 1993

ⁱⁱⁱ Achieving a Better Life Experience Act of 2014. div. B of Pub. L. 113-295. 128 Stat. 4056. Dec. 19, 2014

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