

The Special Needs Trust Fairness Act Is Law
Individuals with Disabilities Can Establish Their Own Trusts
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President Obama signed the 21st Century Cures Act (P.L. 114-255) on December 13, 2016. Now, mentally capable persons can establish their own self-settled special needs trusts (SNTs). Before December 13, these trusts could only be established by a parent, grandparent, a guardian or a court. Section 5007 of this law contains the “Fairness in Medicaid Supplemental Needs Trusts,” which adds two words (“the individual”) to the laws governing SNTs.

This small change corrects an error made more than 23 years ago in the Omnibus Budget Reconciliation Act of 1973. That law codified the ability for persons with special needs to have a trust that would supplement the public benefits they were otherwise receiving. Without an SNT, persons with disabilities risked losing public benefits if they had an inheritance, a personal injury award or received other funds. Due to an unfortunate omission, however, the law did not permit individuals to establish their own SNTs. Some think it was an oversight as the law was quickly assembled near the end of the Congressional term, as another mechanism in the same section of the law — a pooled SNT — did allow individuals to self-fund. Unfortunately, government agencies have strictly enforced this omission. Consequently, a person with disabilities who did not have a living parent or grandparent was forced to spend time and money to go to court and have a judge approve the trust (directly or through a guardianship proceeding). Aside from the time and expense, it was degrading for an otherwise capable person to depend on others for this task — contrary to the goal of maximizing a person’s independence.

Although it soon became apparent that this oversight needed to be corrected, a change in Congress in the next session made it unlikely such an amendment would get enacted. Over the course of the following 20 years, the opportunity never seemed right to correct the law. Spurred by members of the National Academy of Elder Law Attorneys and the Special Needs Alliance, legislation was introduced in May 2013 in the 113th Congress. Representative Glenn Thompson (R-PA) introduced the Special Needs Trust Fairness Act in the House and Senator Bill Nelson (D-FL) introduced a similar bill in the Senate. Neither passed. Luck changed in the 114th Congress, when the House and Senate each approved the legislation two times. Representative Thomas reintroduced the bill in the House, garnering 51 co-sponsors. Senator Chuck Grassley (R-IA) introduced a similar bill in the Senate, where it passed unanimously. The House did not act on the Senate bill, but approved its own version that contained additional legislation to “pay for” the \$10 million the legislation was expected to cost the government. Since the House and Senate versions of the bills differed, the legislation did not become law until it was added to the 21st Century Cures Act, which both the House and Senate approved in December 2016.

Now, a mentally competent disabled person can establish a SNT without the intervention of a third party. The Social Security Administration recently announced emergency provisions for its caseworkers to permit individuals to establish their own self-settled trusts.

The Fairness Act is the second law in as many years liberalizing the use of funds on behalf of people with disabilities. Last Year, Congress enacted the ABLE law that allows persons with disabilities to have accounts that are sheltered from being counted as a resource for public benefits. ABLE, however, has three significant limitations: only a person whose disability

occurred prior to age 26 can qualify; only \$100,000 is protected against SSI eligibility; and only \$14,000 can be added to the account each year. **A self-settled SNT does not contain any of these restrictions.**