



People With Disabilities Can Now Create Their Own Special Needs Trust

The Special Needs Trust Fairness Act, federal legislation that allows people with disabilities to create their own special needs trusts instead of having to rely on others, is now law. The measure was included in the 21st Century Cures Act, a \$6.3 billion package of health-related initiatives signed by President Obama on December 13, 2016.

The Fairness Act, introduced in 2013 by Rep. Glenn Thompson (R-Pa.), fixes an especially frustrating drafting error in the Social Security Act that has prevented people with disabilities from creating special needs trusts to hold their own funds.

Under the old law, only a parent, grandparent, guardian or court could establish a first-party special needs trust to hold the beneficiary's assets. This forced a competent person with disabilities to incur unnecessary expenses and waste time to set up a trust that she could otherwise create on her own with the help of an attorney. In most cases, not setting up a special needs trust is not an option, since the trust is typically needed to protect a person with disabilities' access to government benefits.

The Special Needs Trust Fairness Act inserts language into the Social Security Act to give individuals with special needs the same right to create a trust as a parent, grandparent, guardian, or court. If competent to do so, they can now create a trust on their own behalf using their own assets. (This change in the law does not affect people with disabilities who do not have capacity to set up a trust.)

The two-sentence law makes no other changes to the Social Security Administration's treatment of trusts and it does not alter the requirement that first-party trusts contain payback provisions allowing state Medicaid offices to recoup costs from a trust after the beneficiary's death.

Before the Fairness Act, it was demeaning for adults with capacity to be told they had to ask a parent or grandparent to help them establish a trust. For those people without a parent or grandparent, attorneys had to find creative ways to obtain court jurisdiction to establish a qualifying trust. Once an attorney was in court, sometimes the court used the opportunity to place the trust under ongoing court supervision. This meant that instead of using the person with a disability's funds to pay for their own special needs, the funds were used to pay for attorney's fees, bond, filing fees, and expensive court accountings, even though the beneficiary had total capacity to manage his or her own affairs. People with disabilities who had capacity (but no

parent or grandparent) were subjected to these unnecessary costs and fees while people with a parent and grandparent were not. It was fundamentally unfair and difficult to explain.

The Fairness Act will apply to trusts established on or after the date that the Cures Act was enacted, December 13, 2016.

A special needs trust should still be set up only with the help of a qualified attorney. To learn how a special needs trust might benefit you or a loved one, contact Attorney D'Onofrio.

For more information about special needs planning in general and special needs trusts in particular, contact Attorney John D'Onofrio today.

As a member of the Academy of Special Needs Planning, John is constantly reviewing new laws and amendments in this area of law as well as attending seminars and continuing education classes relevant to special needs planning and trusts.

Call today to schedule a free initial consultation. Call today, get peace of mind today.

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