



The “Special Needs Trust Fairness Act” is Finally Law: Individuals with Disabilities Can Now Establish Their Own Trusts

The Voice is the e-mail newsletter of The Special Needs Alliance. This installment of The Voice was written by Special Needs Alliance member [Morris Klein, CELA](#), who practices law in Bethesda, Maryland. Morris has been recognized as a Certified Elder Law Attorney by the National Elder Law Foundation, and focuses on elder law and special needs planning. He currently serves on the SNA Board of Directors, and is a former member of the Board of Directors of the First Maryland Disability Trust.

February 2017 - Vol. 11, Issue 1

As of December 13, 2016, a person who is mentally capable (yet also satisfies the government’s definition of “disabled”) will be able to establish his own first-party special needs trust (SNT). Previously, this type of SNT could only be established by the SNT beneficiary’s parent, grandparent, or guardian, or by a court. On that long-awaited December day, President Obama signed into law the “21st Century Cures Act” (P.L. 114-255), Section 5007 of which is titled “Fairness in Medicaid Supplemental Needs Trusts,” which adds the words “the individual” to the list of permissible settlors of first-party SNTs. This seemingly small (yet effectively monumental) change corrects a legislative error made more than 23 years ago in the Omnibus Budget Reconciliation Act of 1993 (OBRA ’93).

OBRA ’93 codified the right of persons with a disability to have a trust that would supplement the means-tested public benefits for which they were otherwise eligible. Prior to the permitted use of SNTs, persons with disabilities risked losing their means-tested public benefits if they were entitled to an inheritance, a personal injury award, or other non-exempt assets. Due to an unfortunate omission, however, the law inexplicably did not permit individuals with mental capacity to establish their own SNTs. Some observers think this omission was an oversight as the law was quickly assembled near the end of the congressional term, because another section of the law did allow individuals with disabilities to create their own first-party sub-accounts in a pooled SNT. Unfortunately, government agencies have strictly construed and enforced this omission. Consequently, a person with disabilities who did not have a living parent or grandparent, or who could not qualify under state law for a court-appointed guardian, was forced to spend time and money to petition a judge to establish the first-party SNT. Aside from the time and expense, it was degrading for an otherwise mentally capable person to depend on others for this task, contrary to the goal of maximizing a person’s independence whenever possible.

Legislative Perseverance

Although it soon became apparent that this oversight needed to be corrected, a change in the congressional membership during the next legislative session made it unlikely that such an amendment would be enacted any time soon. 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, as well as the Special Needs Alliance, corrective 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 twice. 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 estimated \$10 million cost to the government of enacting the legislation. 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, persons with a disability who nevertheless retain mental capacity can establish their own first-party SNTs. The Social Security Administration (SSA), in Emergency Message EM-16053, advised its caseworkers to permit individuals to establish their own first-party SNTs from and after December 13, 2016. Relevant provisions of the Program Operations Manual System (POMS) maintained by the SSA are also reportedly being updated to reflect this change in the law, specifically POMS SI 01120.203.

*The SNT Fairness Act is the second law in as many years to enhance the use of funds for people with disabilities. In December 2014, Congress enacted the “Stephen Beck, Jr. Achieving a Better Life Experience Act of 2014” (Public Law 113-295) (ABLE Act) that allows persons with disabilities to establish and benefit from ABLE accounts that are excluded as resources for purposes of means-tested government benefits. Under current law, however, [ABLE accounts have several significant limitations](#): only a person whose disability onset occurred prior to age 26 can qualify; only \$100,000 in an ABLE account is disregarded for purposes of SSI eligibility; and only \$14,000 can be added to an ABLE account from all sources each year. A first-party SNT does not present any of these restrictions. Please stay tuned for an upcoming article in *The Voice* on ABLE accounts.*

About this Article: *We hope you find this article informative, but it is not legal advice. You should consult your own attorney, who can review your specific situation and account for variations in state law and local practices. Laws and regulations are constantly changing, so the longer it has been since an article was written, the greater the likelihood that the article might be out of date. SNA members focus on this complex, evolving area of law. To locate a member in your state, visit [Find an Attorney](#).*

Requirements for Reproducing this Article: *The above article may be reprinted only if it appears unmodified, including both the author description above the title and the “About this Article” paragraph immediately following the article, accompanied by the following statement: “Reprinted with permission of the Special Needs Alliance – www.specialneedsalliance.org.” The article may not be reproduced online. Instead, references to it should link to it on the SNA website.*