

## Memorandum in Support

### ELDER LAW AND SPECIAL NEEDS SECTION

Elder #23

July 28, 2016

H.R. 670

S. 349

#### **THE ELDER LAW AND SPECIAL NEEDS SECTION SUPPORTS THIS BILL WHICH WOULD ENACT THE SPECIAL NEEDS TRUST FAIRNESS ACT OF 2015.**

The Special Needs Trust Fairness Act of 2015 corrects a problem in current law that presumes all individuals with disabilities lack the mental capacity to establish their own special needs trusts. This false and unfair presumption imposes unnecessary legal fees and costs, court delays, and uncertainty on people who can little afford it.

The fix is simple: H.R. 670 would add the words “the individual” to 42 U.S.C. § 1396(d)(4)(A) to allow people with disabilities to establish their own individual special needs trusts. The Senate passed a companion version of this bill (S. 349) by unanimous consent on September 9, 2015.

#### **Background:**

People with disabilities who want to live active lives face daunting costs to pay for what others do as a matter of course – from getting out of bed, taking a bath, or feeding or clothing oneself – to more complicated tasks – travel, reading and writing, or working productively. Medicaid may cover the medical and remedial costs for many, but of course there are many more expenses incurred during everyday living. Congress has long recognized the limits of Medicaid; in 1993, it authorized two types of special needs trusts that allow people to set aside funds to pay for supplemental care and meet their non-medical needs while retaining Medicaid. And, recently, Congress added ABLE Accounts, which provide tax incentives for individuals with disabilities to save funds for their non-medical disability needs without loss of Medicaid.

#### **The Problem:** “*The Individual*” is Missing from the Statute:

In 1993 Congress authorized two kinds of trusts – individual and pooled non-profit trusts. The law, as drafted, allowed individuals with disabilities to place their funds in a pooled non-profit trust, but in another section left out the words “the individual” thereby failing to allow individuals to establish their own special needs trust:

- Individual trusts “must be established by a parent, grandparent, legal guardian of the individual, or a court.” 42 USC §(d)(4)(A).
- Pooled Trusts accounts “must be established by a parent, grandparent, legal guardian of such individual, the individual, or a court.” 42 USC (d)(4)(C)(emphasis added).

More recently, in the related ABLE Act, Congress permitted these accounts to be “established by an eligible individual.” P.L. 113-295

There is no valid public policy reason for prohibiting competent individuals with disabilities from establishing their own individual special needs trusts where all of the other, much more significant requirements are met. These requirements are plainly more important than who signed the document; they are, briefly, that the trust or trust account be:

- Irrevocable;
- Provide payback to Medicaid following the death of the beneficiary for all of its expenditures for the beneficiary; and,
- Managed by a trustee for the “sole benefit” of the disabled individual.

This legislation would, of course, keep all of these requirements in place.

### **Reasons for supporting the legislation:**

#### *Current Law Violates the Dignity of People with Disabilities*

The presumption that people with disabilities lack mental capacity or are untrustworthy is unwarranted and offensive.

#### *The Bill Would End Unnecessary Judicial Red-Tape*

For individuals without parents or grandparents to set up their trust, the law requires court approval. Authorizing individuals to establish their own trusts will eliminate unnecessary court proceedings and reams of unnecessary complications.

### **Conclusion:**

The Special Needs Trust Fairness Act is a commonsense fix that is sorely needed. The Elder Law and Special Needs Section of the New York State Bar Association urges its swift passage by the House of Representatives.