

## Memorandum in Support

### **The Elder Law And Special Needs Section Supports The Enactment Of The Special Needs Trust Fairness Act**

Elder #12

October 26, 2015

H.R. 670  
S. 349

By: Rep. Glenn Thompson  
By: Senator Charles Grassley

The Elder Law and Special Needs Section of the New York State Bar Association supports the enactment of the Special Needs Trust Fairness Act, H.R.670/S.349. This corrects an error in current law by allowing individuals with disabilities, who have mental capacity, to create their own special needs trusts. A special needs trust allows funds which otherwise would disqualify individuals from receiving Supplemental Security Income (SSI) or Medicaid benefits to be protected in the trust and used for their benefit without effecting their eligibility for those programs. The trust must provide that, upon the individual's death, any funds remaining in the trust will be used to reimburse the Medicaid program.

Under current law only a parent, a grandparent, guardian or court can establish such a special needs trust. This poses a significant barrier to using these trusts for individuals who have no living parent or grandparent, or who may be estranged from them. While it is possible for the individual to petition a court to establish the trust, this entails significant additional legal expense and delay, as well as potential significant ongoing expense for reporting to the court, in addition to reporting to the Social Security Administration or Medicaid program.

Other types of trusts for disabled individuals can be set up by the individual himself or herself. A pooled supplemental needs trust, administered by a charity, can be set up by the individual, as well as by a relative. Likewise, disabled individuals can establish funds for their own benefit under the recently enacted ABLE Act which will not be counted in determining their eligibility for SSI or Medicaid benefits but which have funding limitations and other requirements which do not provide the flexibility of a special needs trust.

The Special Needs Trust Fairness Act would solve this inequity by making a simple change to permit the individual to establish the trust in addition to a parent, grandparent, court or guardian. The Senate unanimously passed S.349 on September 9, 2015. The House Energy and Commerce Committee Subcommittee on Health held a hearing on H.R.670 on September 18, 2015. In the 114<sup>th</sup> Congress this bill has bipartisan support, sponsored by Representatives G.T. Thompson (R-PA) and Frank Pallone (D-NJ) and Senators Chuck Grassley (R-IA) and Bill Nelson (D-FL). In the House of Representatives, Representatives John Katko, Richard Hanna and Louise Slaughter of New York are co-sponsors.

The cost of this proposal is modest. The Congressional Budget Office recently estimated that the cost over 10 years would be just \$8,000,000. This bill would not open the door to more people receiving benefits. Rather the modest cost associated with the bill is due to the fact that individuals will not have to go through several months of unnecessary judicial hoops before being able to have a special needs trust established.

For all of these reasons the Elder Law and Special Needs Section of the New York State Bar Association supports this legislation.

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