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DID THE SNT FAIRNESS ACT CREATE A NEW SET OF CHALLENGES?

ASSESSING CAPACITY TO ESTABLISH A SELF-SETTLED TRUST

Mary Alice Jackson

Mary Alice Jackson
Boyer & Boyer, P.A.
Sarasota, FL
majackson@boyerboyer.com

I. Historical Overview.

For many years, the practice of self-settled special needs trust planning was hampered by a significant obstacle. The original language of 42 U.S.C. 1396p§ (d)(4)(A) described a self-settled, Medicaid payback trust in part, as follows: " A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court…".[1] (*emphasis added)* Despite the fact that a large number of individuals who wished to fund a self-settled trust had mental capacity, the law did not include those individuals in the list of qualified Establishers. A parent or grandparent was required to execute the trust, and if no parent or guardian was still living, or if such person(s) were unavailable, then the intervention of a court through guardianship or an independent legal action was required. This affront to individuals with disabilities with capacity who wished to sign their own Trust Agreement and set the terms of the trust, including naming trustees and residual beneficiaries, was disheartening to all and infuriating to others. The additional costs of court intervention added to the discontent. The issue was all the more confusing because the provisions of section (d)(4)(C)[2] relating to pooled special needs trusts permitted the pooled trust sub-account beneficiary to sign the necessary "Joinder Agreement" even if that individual was the individual beneficiary who was funding the trust. Many theories circulated among the special needs community about why (d)(4)(A) trusts prohibited trust execution by a capacitated Beneficiary, while execution was permissible by a competent beneficiary under (d)(4)(C). Nothing in the Congressional Record indicated that the omission was intentional. The most popular theory is that it was an oversight as the bill was hastily drafted in final form. A d4A trust is established using funds belonging to the d4A beneficiary, and critical decisions about the creation and administration of the trust were taken out of the hands of the Beneficiary.

In response to this inequity, a number of special needs organizations directed their public policy offices and committees to set out to change the law. The effort took almost 20 years, and to explain "How A Bill Becomes A Law", the process was documented by advocate and attorney Morris Klein in an article of the SNA publication "the Voice" soon after the bill's passage[3]:

[1] 42 U.S.C. Sec. 1396p(d)(4)(A), Omnibus Budget Reconciliation Act of 1993
[2] 42 U.S.C. Sec. 1396p(d)(4)(C), Omnibus Budget Reconciliation Act of 1993
[3] The Voice, February 2017 - Vol. 11, Issue 1, Special Needs Alliance

> "…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. 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)...[O]n 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)."

It's important to note that Special Needs planning attorneys from around the country, including Texas, worked tirelessly to change this law, and continue to work on issues of importance to our clients. (Recently, the same organizations joined with others on a bill improving the ABLE Act to raise the age before which an individual became disabled from 26 to 46. Prior

Title search: Did the SN Fairness Act Create a New Set of Challenges? Assessing Capacity to Establish a Self-Settled Trust

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