

House Passes Special Needs Fairness Act

October is Special Needs Trust Month which is particularly special this year since the Special Needs Fairness Act is making good progress in Congress.

On September 20th, the House of Representatives passed H.R. 670, an amended version of the original bill called the Special Needs Fairness Act. For those of our readers who have children or grandchildren or if this affects you personally, then you will want to follow it through Congress.

The long title of the bill is called the Special Needs Trust Fairness and Medicaid Improvement Act which also covers some non-controversial amendments that were related to Medicaid and were added in the House amended version.

The significance of this bill if it passes the Senate and is signed into law by the President is that it will allow individuals who have disabilities and who also have the requisite capacity necessary to execute a special needs trust to do so themselves.

Currently, federal law only allows a parent, grandparent, legal guardian of the individual or a court to establish a special needs trust.

This has caused persons who were mentally capable but physically impaired to be stymied and stigmatized since they were not allowed to establish these trusts on their own.

Special needs trusts allow a person who is on or who needs to be on a means tested program such as Medicaid, to be able to shelter assets that they have in this special trust and not have the assets counted against them by Medicaid. The trust may be used to pay for things that Medicaid doesn't pay.

Special needs trusts come in two basic types: self settled and third party. There are significant differences between these two types.

A third party special needs trust is one which is set up and funded by a grantor who is not also the beneficiary. An example would be a grandparent or parent who wants to leave Robert money at the time of their deaths. One or both of them set up a testamentary trust for the benefit of Robert, as beneficiary. Robert is on Medicaid and the trust, if written correctly, would not be counted against Robert's countable resources for Medicaid purposes. Upon Robert's death, if there are still assets being held in the trust, then the remaining assets belonging to the trust can pass to the designated beneficiaries named in the trust, with no payback to the State of Texas.

A self settled trust is one in which the trust was funded by the assets of the grantor, who is also the beneficiary. For example, if Robert were to inherit money that was paid to him directly and not distributed into a trust for his benefit, he would be knocked off of means tested benefits like Medicaid. In order to avoid this, Robert can still do something to help become or maintain eligible for Medicaid. He can have his money transferred into a self settled special needs trust which is considered a first party trust because the grantor and the beneficiary are the same person. When he dies with this type of trust,

any remaining assets belonging to the trust must be paid to the state of Texas to the extent that Medicaid benefits were provided to Robert during his lifetime. This is called a payback provision.

If the proposed Act is successfully passed and signed into law, Robert would be able to create and fund his own self-settled special needs trust assuming he had capacity.

Help support the Special Needs Fairness Act.

You may email your questions to education@wrightabshire.com or visit our website at www.wrightabshire.com. Wesley E. Wright and Molly Dear Abshire are attorneys with the firm Wright Abshire, Attorneys, P.C., with offices in Bellaire, the Woodlands, and Carmine. Both Wright and Abshire are Board Certified by the Texas Board of Legal Specialization in Estate Planning and Probate Law and are certified as Elder Law Attorneys by the National Elder Law Foundation. Nothing contained in this publication should be considered as the rendering of legal advice to any person's specific case, but should be considered general information.