Special Needs Trust Fairness Act
(H.R. 2123)

Sponsor
- Congressman Glenn Thompson (R, PA-5th)
- Congressman Frank Pallone (D, NJ-6th)

What’s the Problem?
- Current law assumes a person with disabilities lacks the requisite mental capacity to enter into a contract.
- An individual with disabilities who has the requisite mental capacity is not legally allowed to create his or her own (d)(4)(A) trust.
  - An individual with disabilities who has the requisite mental capacity is legally allowed to create his or her own (d)(4)(C) trust.
- (d)(4)(A) trusts and (d)(4)(C) trusts are both exempt trusts under the Omnibus Budget Reconciliation Act of 1993 (OBRA ’93) and there should be no difference in who can create such a trust.
- The disparity in the law creates an equality/fairness issue.
  - One should have the right to contract if one has the requisite legal capacity.

What are Supplemental Needs Trusts?
- Congress officially recognized the use of Supplemental Needs Trusts (sometimes called Special Needs Trusts) “SNTs” in OBRA ’93.
- SNTs allow assets to be held in a trust for an individual with disabilities.
- These assets in SNTs are not considered countable assets for purposes of Medicaid or SSI
  - It therefore protects against risk of complete impoverishment.
- (d)(4)(A) trusts can be used to
  - Supplement daily living expenses and care when government benefits alone are insufficient.
    - Provide for private, rehabilitative care

What Does the Law Say?
- Individuals with disabilities are treated differently when creating a (d)(4)(A) trust and a (d)(4)(C) trust.
- USC §1396p(d)(4)(A): the trust must be established by a parent, grandparent, legal guardian of the individual, or a court.
  - The individual cannot create his or her own (d)(4)(A) trust even if he or she is mentally competent.
- USC §1396p(d)(4)(C): the trust must be established by a parent, grandparent, legal guardian of such individual, the individual, or a court.
  - (d)(4)(C) trusts allows the individual to create the trust.
Reason for the Disparity
- There appears to be no apparent reason why “by the individual” was left out, but it could be a legislative drafting error during the writing of OBRA ’93.

Inequity this Mistake Creates
- This omission has created a presumption that a disabled individual lacks the requisite mental capacity to create his or her own (d)(4)(A) trust.
- Not all individuals are lucky enough to have a living and willing parent or grandparent to create their (d)(4)(A) trusts.
  - Having to petition the court results in unnecessary legal costs for the individual with disabilities and a significant amount of time spent in petitioning the court.
- Example: 62 year old client who was a victim of medical malpractice. She is paralyzed and is living in a nursing home that charges more than $100,000 per year for her care. She was a key witness in her own lawsuit and has the mental capacity to create a trust. She is legally prohibited from creating her own (d)(4)(A) trust and must petition the court to authorize the trust because she does not have a living parent or grandparent.
  - Unnecessary expenditure of money in legal fees and court costs (depending on location, approximately $1,500) and time spent.
  - In some cases, if the individual does not have the funds to hire a lawyer, then said individual loses his access to necessary government benefits.

Why Congress Must Act
- Will remove the misplaced presumption that individuals with disabilities lack mental capacity.
- This inequity affects disabled veterans and their families.
- Since an individual with disabilities who has the requisite mental capacity can create a (d)(4)(C) trust by him or herself, often without legal assistance, allowing an individual with disabilities who has the requisite mental capacity to create his or her own (d)(4)(A) trust will put (d)(4)(A) trusts on equal footing with (d)(4)(C) trusts.
- This change would be cost-neutral!
  - (d)(4)(A) trusts have a payback provision.
    - Upon the disabled individual’s death, any funds remaining in the d(4)(A) trust after the individual’s death must first be used to pay back the state for any Medicaid benefits received during the individual’s lifetime.
  - This is a simple fix and will not be costly.
    - If adding by such individuals was a costly addition, it would not have been included in the language for (d)(4)(C) trusts.
- This change won’t be costly to Congress but will save disabled individuals, including veterans, thousands of dollars!
  - Thousands of dollars that can be spent on necessary items and care for these individuals to survive and have the best chance for a quality life.

For more information, contact Brian Lindberg (brian@consumers.org), NAELA Public Policy Advisor, or Sadia Sorathia (ssorathia@consumers.org), NAELA Public Policy Associate (202-789-3606).