

SPECIAL NEEDS TRUSTS AND GOVERNMENT BENEFITS

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In the past, parents with disabled children had only two options - disinherit the children so the children would not lose public benefits or leave enough money in a traditional support trust so the children would never need public benefits. Beginning in 1980, case law developed which allowed a parent to create a trust for a child with disabilities that would be insulated from the government and allow the child to remain eligible for public benefits. New York's Estate, Powers and Trusts Law ("EPTL") 7-1.12 later codified the concept of the Special Needs Trust ("SNT"). In order for a trust to qualify as a statutory SNT, the person who is the beneficiary must be a "person with a severe and chronic or persistent disability."

An SNT allows individuals with disabilities to receive public benefits, yet still have funds to supplement those benefits, enhance the quality of their lives, and improve their situations. The SNT can be used to provide better housing, private caregivers, and advanced medical treatments. It can even be used to provide for vacations, YMCA memberships, and trips downtown for baseball games. The SNT has been used to help persons with varied disabilities, including physical disabilities, mental disabilities, mental illness, and even blindness, while allowing the disabled person to remain eligible for needs based public benefits, namely, Medicaid and Supplemental Security Income ("SSI"). If properly drafted, the SNT will not be considered an available resource for SSI and Medicaid. As discussed below, distributions from the SNT can impact the amount or availability of the public benefits.

The first type of trust is called a third-party supplemental needs trust and is an SNT created by a person who has no legal obligation to support the disabled beneficiary. It can be created by lifetime transfer or by will. Parents of disabled children typically use this type of trust to ensure that their disabled child will not lose their entitlement to government benefits while at the same time, providing for the child during their lifetimes or after the death of the last parent. So long as the creator of the trust has no legal obligation to support the beneficiary, and the trust is not funded with any assets of the beneficiary, New York State has no right of recovery against this type of SNT.

The second type of trust is called a self-settled SNT. This trust is (i) funded with assets belonging to the individual with a disability, or assets to which that individual is entitled to receive, (ii) when that individual is under 65 years of age, (iii) established by a parent, grandparent, guardian, or the court, (If there is no living parent or grandparent, the court must establish the trust.), and (iv) it requires that Medicaid be repaid for all amount expended on the beneficiary's behalf from any monies left in the SNT upon the death of the beneficiary. Any transfer into this type of SNT by the disabled person after the age of 65 will be deemed a transfer of assets and a penalty period will apply.

The third type of SNT is known as a pooled trust. It is funded with assets belonging to the individual with a disability, or which the individual is entitled to receive. The individual may be any age. This type of SNT may be created by a parent, grandparent, guardian, the court, or the individual. (So, if the individual has capacity, or has a POA, he can avoid going to court.). The Trustee must be a non-profit organization. The Trustee creates the trust, an individual joins the trust through a "Joinder Agreement." Funds are pooled for investment purposes, but each beneficiary has his own sub-account. Upon the death of the beneficiary, any funds remaining in the trust must either:

- (1) First pay back to the state for the amount of Medicaid received, with the balance distributed pursuant to the terms set out in the Joinder Agreement; or
- (2) All funds remain in the Pooled Trust to benefit other individuals who are members of the trust.

Once the disabled person establishes one of the above SNTs, and the disabled person is eligible for public benefits, the SNT corpus is not considered “available” for SSI or Medicaid purposes. The SNTs usually provide that distributions by the Trustee from the SNT are completely discretionary and may not be made directly to the beneficiary, but instead to third parties who provide goods or services to the beneficiary. The trustee is also given discretion to pay monies directly to the beneficiary, but as discussed below, these payments may reduce or eliminate public benefits paid to the beneficiary.

As mentioned above, the two main means tested government programs for which disabled people might be eligible are SSI and Medicaid.

SSI is a needs-based poverty program that was signed into law in 1972 by President Nixon. This program provides a monthly income to the aged, blind and disabled poor and is paid by the federal government and administered by the Social Security Administration. The SSI program is intended to close gaps in federal benefit coverage for the aged, blind or disabled who have not been able to work long enough to receive Social Security Disability Income.

The federal SSI benefit amount is \$674. New York provided an optional state supplement of \$87 to the federal benefit. To be eligible for SSI, the disabled person can have no more than \$2,000.00 in assets, as well as limited income. A disabled or blind child becomes eligible for SSI when he or she turns 18. Before 18, the income of the parents will almost always render their children ineligible but their assets and income will no longer be counted once the child turns 18.

The purpose of the SSI benefit is to provide for a person’s food and shelter. (Clothing has been removed from the SSI regulations.) If the person receives these items from an outside source, either directly or “in kind” the SSI rules deem that as “income”, and the person’s benefit check is reduced. If SSI is reduced to zero, the person may lose Medicaid benefits.

In kind support or maintenance means any food or shelter given to the disabled person but paid for by someone other than the disabled person. Shelter includes rent, mortgage payments, property taxes, garbage pick up and utilities. Any gift or distribution from an SNT to an SSI recipient that is not food or shelter will not be considered income to the SSI recipient and will not result in a reduction of SSI benefits.

SSI has strict rules about the provision of food and shelter. To the extent these are provided by family, they may result in a one third reduction in SSI. The SSI deemed income rules are as follows:

- (1) Disbursements of cash directly to the beneficiary will reduce the recipient’s benefits dollar for dollar until the SSI payment is totally eliminated, which may then result in the loss of the recipient’s valuable Medicaid medical coverage;
- (2) Disbursements from a SNT for purposes other than food or shelter will not reduce a beneficiary’s SSI monthly payment as long as that disbursement is made directly to a third party; and
- (3) In kind disbursements from the SNT for the benefit of the recipient directly to third parties for items of food or shelter will result in a reduction of an SSI monthly payment, but generally not beyond the “presumed maximum value” (which is approximately one-third of its original amount).

The Trustee of an SNT is permitted to purchase a home for a beneficiary without the home being considered a resource of the beneficiary. If the SNT holds title to the house, it is not considered a resource of the beneficiary, even if the beneficiary moves out of the home. If the beneficiary lives in the home during the month that it is purchased by the SNT, the purchase of the home will be treated as in kind income for that month, resulting in a maximum one-third reduction of SSI benefits for that month only. The disabled individual is not considered to be receiving rent free shelter and is considered to be living in his/her home so the SSI benefit will not be reduced. Payments by the SNT for improvements and renovations to the home owned by the SNT will not reduce the recipient's SSI, but payments of household operating expenses such as fuel or water bills will reduce the SSI.

The other public benefit the eligibility for which SNTs are frequently used is Medicaid. Medicaid was created in 1965 to provide medical assistance to the aged, blind and disabled and to poor children with dependent children,. It is a needs-based joint federal-state program administered at the state level. The income and resource limits to be eligible for Medicaid in New York are \$13,800 or less in assets and income cannot exceed \$787. New York is a "spend down" so excess income can be either (i) spent down on medical expenses or (ii) deposited into an SNT.

Unlike SSI, Medicaid does not have an "in kind rule" so expenditures from an SNT for food and shelter on behalf of the disabled beneficiary can be made without a reduction in Medicaid benefits. A Medicaid recipient may transfer their own assets or excess income into an SNT without jeopardizing their Medicaid eligibility up until age 65. After age 65, New York does not allow additional transfers into self-settled SNTs but Medicaid does allow recipient receiving care at home to deposit excess income in a pooled trust. The excess income can then be used by the pooled trust to pay the third party creditors of the Medicaid recipient, such as rent, utilities, real estate taxes, and even the cost of a care giver that is not covered by Medicaid. Once this Medicaid recipient is placed in a nursing home, the income can longer be diverted into the pooled trust and must be paid to the nursing home.

In conclusion, the SNT is a wonderful tool that has helped many families improve the quality of life for their loved ones and ensured peace of mind for parents who are concerned about what will happen with their children with disabilities after their deaths.