

Supplemental Needs Trusts

Impact on Medicaid and Other Public Benefits



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Introduction

Supplemental Needs Trusts (SNTs) are a very useful tool for helping people with disabilities preserve their public benefits without having to completely impoverish themselves. However, they are complex and come in a variety of flavors. To get us off on the right foot, we'll start out with an overview of trusts in general, and then zoom in on SNTs.

Trust Overview

A trust is a legal arrangement where one party has the legal ownership of money or property but must hold it or spend it for the benefit of some other party. There are thousands of different types of trusts with a myriad of different uses. Some of the most common reasons trusts are used in elder law are:

- **Estate planning** – allows testator to make gifts to family members but have strings attached, and allows more complex dispositions of estate than possible with a will
- **Avoidance of probate** – can substitute for a will, and avoid cost of probate
- **Protection from creditors** – spendthrift trusts cannot be reached by creditor claims
- **Supplementing public benefits** – supplemental needs trusts, special needs trusts, or exception trusts

Trust Terminology

Grantor / Donor / Settlor – all of these terms refer to the person who owned the property prior to it being conveyed into the trust.

Corpus – the property conveyed into the trust.

Trust Agreement – the legal document establishing the trust and containing the instructions to be followed by the trustee in administering the trust. These instructions might include rules on how the trust corpus should be spent during the beneficiary's lifetime, under what circumstances the principal can be invaded, and who receives any corpus remaining at the death of the primary beneficiary.

Trustee – the person or entity that holds and manages the trust property on behalf of the beneficiary, subject to the terms of the trust agreement.

Beneficiary – the person(s) or entity(ies) on whose behalf the corpus (or income generated thereby) is to be spent.

Fiduciary Duty – the high standard of loyalty to which the trustee is held. The trustee must administer the trust in the best interests of the beneficiary(ies) and must not engage in self-dealing.

Revocable – a trust is revocable if the grantor can change their mind and dissolve the trust and get their money/property back.

Irrevocable – a trust is irrevocable if once the grantor establishes and funds the trust, it cannot be dissolved. Although most grantors would prefer to have the option to change their mind if things don't work out, an irrevocable trust often makes sense for Medicaid planning, where the goal is to ensure that the corpus is not deemed an available asset.

Self-Settled – this means that the settlor (aka grantor) of the trust is the same as the beneficiary.

Third-Party – this means that the settlor and beneficiary are different parties.

Remainder Interest – this refers to any trust corpus remaining upon the death of the primary beneficiary.

What Makes a Trust a Supplemental Needs Trust?

A Supplemental Needs Trust (“SNT”) enables a person with a disability to maintain eligibility for government benefits, primarily Medicaid and Supplemental Security Income (“SSI”). The purpose of an SNT is to enhance the quality of life for the person with a disability, by permitting the trust to pay for expenses not paid for by public benefits. New York State law contains standards for a valid SNT in this state.¹

Although there are many different kinds of SNTs, they all have some things in common:

- **They are all irrevocable.** If the settlor/beneficiary could just ask the trustee to dissolve the trust and get all their money back, then it would be deemed an available asset. Thus, it must be irrevocable to work as an SNT. In addition, the beneficiary must not have the right to direct the use of the corpus or to sell their beneficial interest.²
- **Beneficiary must be disabled.** Not everyone can use an SNT! The beneficiary must be determined disabled, as defined by the Social Security Administration for purposes of SSI and Social Security Disability Insurance (“SSDI”) eligibility. Individuals who do not receive those

benefits can be determined disabled by the State Medicaid program using Social Security's standard.

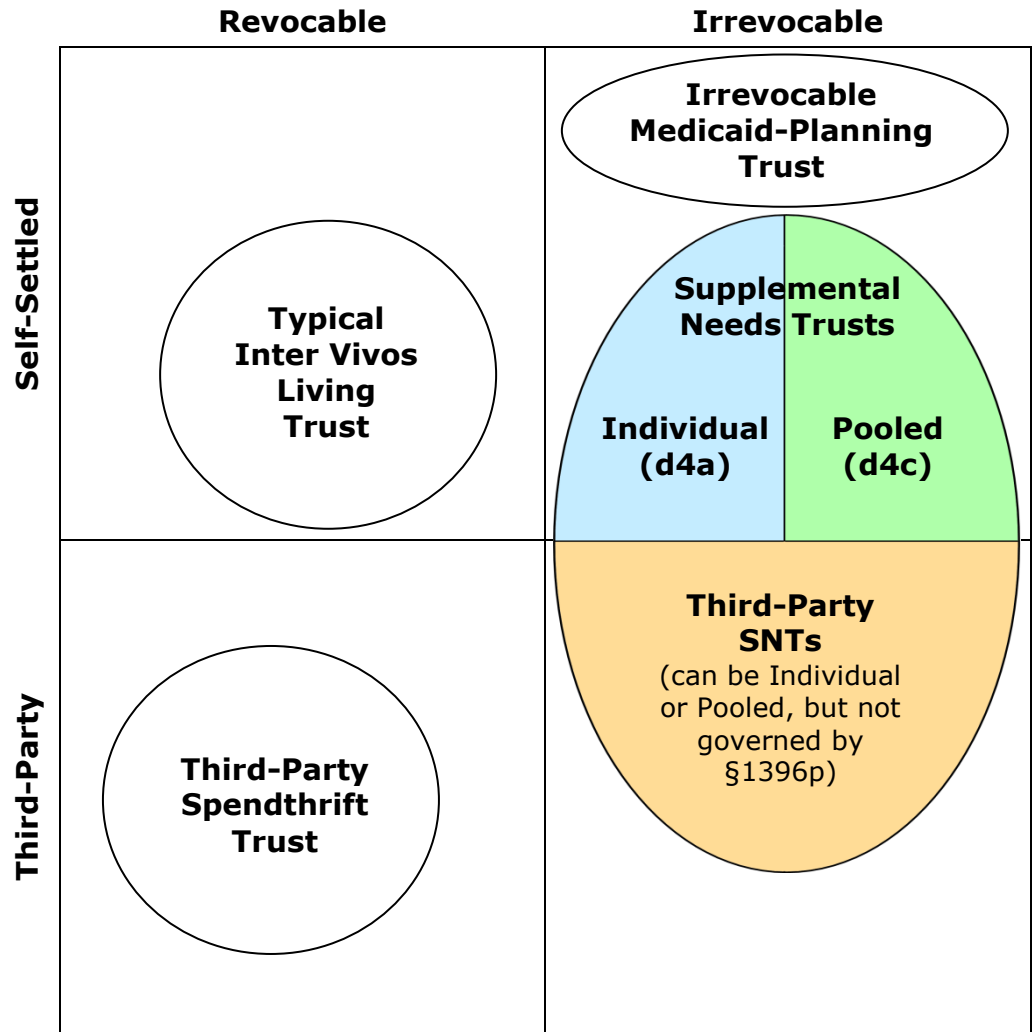
- **Payback to the State upon death.** The State Medicaid program must be made the primary remainderman, to receive the funds remaining in the trust upon death of the beneficiary. For a pooled trust, the non-profit trustee organization may be the remainderman.
- **Must Preserve Public Benefits.** The trust agreement establishing an SNT always contains language stipulating that the trustee cannot do anything with the funds that would impair the beneficiary's eligibility for public benefits. This is why, for example, the trustee cannot give cash disbursements to the beneficiary.

The rules for SNTs are complicated. The rules depend on several factors:

- **Age of disabled person** – whether under 65 or age 65 and over
- **Whose money is used to establish trust** – funds of the disabled person in a “self-settled” trust or the funds of a third party, such as a parent, in a “third-party” trust
- **Type of benefit** – every public benefit program has different financial eligibility rules, which all treat SNTs somewhat differently. Thus, even the same SNT for the same client may have different effects on that client's various benefits. Although we will go over the impacts of SNTs on various programs later in this outline, for now we will focus on Medicaid and SSI.

Trust Venn Diagram

SNTs are just one kind of trust. This diagram attempts to divide up the universe of possible trusts along two factors: whether they are revocable, and whether the settlor is also the primary beneficiary. You can see that although all SNTs are irrevocable, they can be both self-settled or third-party. Within the universe of SNTs, there are some that are **Individual** and some that are **Pooled**. We will discuss this distinction later.



Self-Settled SNTs

A self-settled SNT is established using the person with a disability's own funds. In other words, the settlor (aka "grantor") and beneficiary are the same person. This is the kind of SNT most commonly used, because it allows a person with a disability to obtain public benefits in spite of having income or assets in excess of the applicable limits.

Having Your Cake and Eating It Too

Many of the restrictions governing self-settled SNTs can be better understood if you think about the public policy behind SNTs. The purpose of income and resource limits for public benefit programs is to conserve scarce tax-funded benefits for only those people who are deemed needy by some uniform standard. In the case of Medicaid and SSI, for example, the government will only make those benefits available to people who either have almost no assets, or who have already spent their assets on their own needs before applying for benefits.

In light of this policy, the government is loathe to allow someone to "have their cake and eat it too." With a self-settled SNT, a person with a disability is allowed to do just that. The person can transfer excess assets to the trust, and then receive public benefits. The assets held by the SNT are essentially invisible to Medicaid or SSI. However, the person is still able to benefit from the assets by having the trustee pay certain living expenses out of the trust.

Because this seems to go against the public policy of restricting eligibility only to those with no available means of support, there are several strings attached to this arrangement. For one thing, this privilege is only extended to those who are determined disabled – unable to work due to permanent, severe physical or mental impairments. The government essentially makes a deal with the person using an SNT: We will let you have your cake and eat it too, but only if you pay back to us any money left over after your death, and you can't make any transfers of assets after age 65.

Payback Requirement

Funds left in the trust after the beneficiary dies must be used to pay back Medicaid for the cost of Medicaid services provided or, for a pooled trust, must be kept by a non-profit trustee. In the case of an individual trust, funds remaining after paying back Medicaid may be distributed to other named remaindermen. Some pooled trusts also allow distribution of a portion of the funds to named remainderman after a portion is kept by the non-profit trustee.



SSI rules were promulgated in 2010 regarding special needs trusts established with assets, that contain early termination provisions. If the trust contains a provision or clause that allows the trust to terminate before the death of the beneficiary, such as if the beneficiary is no longer determined disabled, then it must contain a provision for Medicaid pay-back at the time of termination, that after Medicaid reimbursement all funds (other than some administrative expenses) must be paid to the beneficiary, and the power to terminate must be held by someone other than the beneficiary. These rules found at POMS SI 01120.199 (effective 11/08/2010) apply to the Medicaid program because Medicaid eligibility rules cannot be more restrictive than the eligibility rules for SSI.³

Disability

AN SNT may only be established for “individuals who are disabled” within the meaning of the Social Security disability laws, no matter how old they are.⁴ People over age 65 usually have not been determined disabled previously since they can receive Medicaid, SSI, or Social Security Retirement Insurance solely based on their age. It has taken awhile for the State to develop a procedure to determine whether they are disabled. This is discussed more at page 59. See the section immediately above for provisions allowing a trust to terminate if disability ceases.

There are 2 kinds of self-settled trusts.

- An **Individual SNT** is a trust drafted particularly for one beneficiary, appointing a trustee to manage the trust and make disbursements. The trustee might be a family member, friend, an attorney, or a bank. These are often called “D4A” trusts after the section of the Federal Medicaid statute relating to them.⁵ See below strict rules that prevent an individual from establishing his or her own SNT – must have a parent, grandparent, guardian or a court order, even though the funds belong to the beneficiary and not a third party.
- A **Pooled SNT** is established and managed by a non-profit association, that acts as the trustee. A separate account is maintained “for the sole benefit of” the disabled beneficiary.⁶

There are over a dozen non-profit organizations in New York State that offer pooled trusts for disabled individuals. We compiled an unofficial list at <http://wnylc.com/health/entry/4/>

Differences Between Individual and Pooled Trusts

Age

Individual Trust

MUST BE UNDER 65 – A person with a disability who wants to place their own assets into an SNT may use an INDIVIDUAL SNT only when they are under age 65. If the trust is established and funded before they reach age 65,

then assets in the trust remain exempt after the person reaches age 65. But new funds may not be deposited into the same SNT after the person turns 65.

Pooled Trust

A person of any age with a disability may establish and fund an account.⁷ (However, there may be transfer of asset penalties for people over age 65 – see below)

Who May Establish the Trust?

Individual Trust

An individual SNT must be established for the benefit of the person with a disability by a **parent, grandparent, legal guardian** of the person, or a **court**. This is true even if the funds for the trust belong to the person with the disability themselves and if the person has full mental capacity.

- If the person with a disability has a living parent or grandparent, and has mental capacity, no court involvement is required. The parent or grandparent need not be the trustee – they just have to sign the trust document. NOTE: If the person with a disability lacks mental capacity, the parent or grandparent must have legal authority with respect to the person’s assets, which means either a Power of Attorney or guardianship.⁸
- If the person with a disability has a legal guardian, the guardianship order may need to be amended to authorize establishment of a trust. In 17A guardianships, the order must specify that the guardian has power over person as well as property.
- If the person with a disability has no parent, grandparent, or legal guardian, a special court proceeding is required to establish the trust. Notice of the proceeding must be given to the local social services district.

Pooled Trust

Unlike an individual SNT, the **joinder agreement** used to join the master trust may be signed by the person with a disability themselves, if they have mental capacity to sign the forms.

- If the person with a disability lacks capacity, the agreement may be signed by a **parent, grandparent, legal guardian** of the person, or a **court**. If signed by a parent or grandparent, they must have “legal authority to act with respect to the assets”⁹ of the donor/beneficiary, either by a Power of Attorney or guardianship. So even where a parent or grandparent is alive to sign the trust, a guardianship may still be necessary.
- There is a difference of opinion on whether a standard Power of Attorney (“POA”) form authorizes the attorney-in-fact to establish a trust.¹⁰ If not

specifically authorized as an additional power in the POA, a new POA should be executed with this language, if possible. Since the amendments to the POA law in 2009 and 2010, it is also necessary to execute a modified Statutory Gifts Rider to convey the authority to establish and fund trusts, including SNTs.¹¹

Payback to State at Death

Both types of SNTs forbid funds remaining in the trust upon the death of the beneficiary to be distributed to heirs or remaindermen, without first paying back the State for the cost of Medicaid services provided.

Individual Trust

Funds must be used to pay back the State for the cost of Medicaid-covered services paid on behalf of the person with a disability. If funds remain after that payback, they can go to contingent beneficiaries.

Pooled Trust

As an alternative to paying Medicaid back, the pooled SNT may provide that funds remaining upon death be retained by the trust organization, to be used for the benefit of other beneficiaries with disabilities. To the extent funds do not remain in this way, the SNT must provide that remaining funds be paid back to the State for the cost of Medicaid-covered services paid on behalf of the person with a disability. Some trusts permit a beneficiary to designate heirs to receive the remainder, if any, after Medicaid's claim. Also, only limited expenses may be paid after death.

Third-Party Trust

A third-party SNT is one established with funds from someone other than the person with a disability.

No Payback Requirement

A trust established by a parent or other third party has **no payback requirement**, unlike the self-settled trusts described above. For this to be true, the parent must no longer have a duty to support the child with a disability— so the child must be age 21 or older.

No Right of Recovery or Lien

In these trusts, the State has no right of recovery and no right to place a lien against the trust property. Parents or other relatives or friends can use the SNT to provide for a child with a disability for life and are free to direct how any remaining trust property will be distributed upon the child's death. If a pooled trust is used, the non-profit might require that some of the balance left

upon death of the beneficiary remain in the trust, and the rest may go to heirs.

Form of Trust

These trusts may be individual SNTs or pooled SNTs. They may be established during the grantor's life (living trust or inter vivos trust) or in the grantor's will.

Extra Benefit for Parent

A parent who transfers assets into an SNT for the benefit of a child of any age with a disability has no transfer of asset penalty that would otherwise be imposed upon the parent's OWN Medicaid eligibility for nursing home care. This type of transfer is one of the exceptions to the transfer penalty.¹² There is also no SSI transfer penalty for the transferor.¹³

NOTE: A strategy was tried in which a parent in a nursing home placed their own income into a pooled trust for the benefit of their adult child with a disability. Initially, some courts found that this did not create a transfer penalty.¹⁴ However, in Jennings v. Comm'r. Nassau DSS, the Appellate Division of the Second Department rejected this strategy, relying on Wong v. Doar, infra.¹⁵ The Court rejected the ability of a nursing home resident to shelter their income in any type of trust, including an SNT.

How Does an SNT Affect Public Benefits?

There are different types of financial eligibility tests employed by the wide range of means-tested public benefit programs out there. We have tried in this outline to describe the interaction between SNTs and program rules by asking four questions for each program:

- **Resources**
 - Does the trust property count as a resource to the beneficiary?
 - If the applicant transfers money into an SNT, does it create a transfer penalty?
- **Income**
 - Does the trust create countable income for the beneficiary?
 - If the beneficiary transfers money to the SNT each month, are those contributions deducted from countable income?

A Note on Transfer Penalties

The second question asks whether the transfer of funds into an SNT will create a transfer penalty. A transfer penalty is a policy used by government

benefit programs to deter those with available means of support from giving those means away to artificially impoverish themselves, thereby becoming eligible for government assistance. The way it usually works is that when someone applies for the program, they are asked about any transfers of assets made within a certain period of time before the date of application (a **look-back period**). The program adds up the value of all the money transferred, and then imposes a period of disqualification whose length is proportional to the amount transferred. During that penalty period, the applicant is not eligible to receive the benefit.

We will now go in depth into each program to try to answer those four questions.

Medicaid

Who gives it?	New York State Department of Health (DOH) and the Federal Centers for Medicare and Medicaid Services (CMS), partly administered by the Local Department of Social Services
Who gets it?	New Yorkers of limited means
Eligibility	<ul style="list-style-type: none">• TWO CATEGORIES:<ol style="list-style-type: none">1. "MAGI" Category (Modified Adjusted Gross Income) – People not eligible for Medicare – Mostly under age 652. "Non-MAGI" - Disabled, Aged 65+, Blind• Income – Different rules for MAGI and non-MAGI• Resources – No resource limit for MAGI, only for non-MAGI• Immigration Status• Residency
What do you get?	Comprehensive health insurance coverage, including long-term care services (home care & nursing home)

Medicaid is a comprehensive health insurance program for low-income people. Medicaid pays for all medically necessary care, including: hospitalization, outpatient care, mental health care, physical therapy, diagnostic tests, durable medical equipment, and pharmacy. Most, but not all, New York State residents who receive Medicaid are now required to join managed care plans.

The Affordable Care Act created a new Medicaid category that encompasses a large population of New Yorkers, called the "MAGI" category. People in the MAGI category are people who are not eligible for Medicare (with an exception for people who are caretakers of a minor) and are mostly under 65 and do not have disabilities (with an exception for SSDI recipients who are not yet eligible for Medicare).

Is the SNT a Resource?

No, as long as the SNT is properly drafted to comply with the rules in 42 U.S.C. § 1396p(d).¹⁶ But only a person with a disability can be the beneficiary of an SNT. Many Medicaid recipients do not have disabilities. However, many of those people without disabilities are eligible for Medicaid in the MAGI category so they do not have any resource limit for Medicaid at all.

Is there a Transfer or “Lump Sum” Penalty?

Under Age 65 and Disabled (Non-MAGI)

For people under age 65 who have a disability, there is no transfer penalty for transfers of either income or assets into an SNT.¹⁷ This includes Community Medicaid, Nursing Home Medicaid, and Home and Community Based Services (HCBS) Medicaid Waiver programs.

MAGI Medicaid has NO RESOURCE TEST. A lump sum received in the past and saved does not impact current eligibility. A person can save, transfer, or put the lump sum in an SNT if they are disabled but otherwise eligible for MAGI Medicaid. (Putting the lump sum in an SNT is good idea if the disabled person is approaching age 65 or obtaining Medicare, which will make her ineligible for MAGI Medicaid and will place a limit on her assets unless she has a dependent child living with her.)

A lump sum may or may not be considered income when received, under MAGI Medicaid rules, depending on the sum’s source. MAGI Medicaid uses Federal income tax rules for Adjusted Gross Income, with slight modifications dictated in the Affordable Care Act. Gifts or inheritances and Workers Compensation, for example, are not counted as income. However, some lawsuit awards and settlements and lottery winnings are counted as income.

For MAGI Medicaid, a countable lump sum is only income in the month received and is a resource in later months. Since there is no resource test in MAGI Medicaid, eligibility is only affected for one month. By the time receipt of the lump sum is reported to Medicaid, the person is again eligible for Medicaid because the lump sum was counted as income only in the month received. Even if saved, in the following month, there is no asset test so eligibility is retained.

Even if a lump sum or other new income caused a MAGI Medicaid recipient to become ineligible, “Individuals who had a Medicaid eligibility determination that was based on MAGI budgeting and who subsequently lose Medicaid eligibility, are eligible to have Medicaid coverage continue until the end of the 12-month authorization period.” NY Soc. Serv. L. § 366 (c)(4)(c); NYS DOH 2013 ADM-03.

NOTE: The Advanced Premium Tax Credits established by the Affordable Care Act and coinsurance subsidies offered by NY State, are based on **annual** income, so a lump sum that would be taxable is counted as income (lottery winnings, for example).

For more information on MAGI Medicaid, see the National Health Law Program’s Advocates Guide to MAGI and other resources.¹⁸

Age 65 and Over (Non-MAGI)

Community Medicaid

There is no transfer penalty for Community Medicaid for people of any age. This is true for both transfers of income and for transfers of assets. This is true whether they whether they want solely medical care or are also seeking Community-Based Long-Term Care services -- which include personal care/home attendant (PCA/PCS), Consumer-Directed Personal Assistance (CDPAP), home health aide (CHHA), Managed Long-Term Care (MLTC), and Assisted Living Program (ALP) services.

Medicaid application procedures are slightly different for people who want Medicaid only for medical insurance and people who want coverage for Community-Based Long-Term Care services. The asset limit and rules are the same for both, and neither group has a penalty for transfers of assets or any “lookback” period. Those who solely want medical coverage without long term care may “attest” to their assets without actually documenting them. Those seeking Community-Based Long-Term Care must prove their assets and submit “Supplement A” to the application. For more information about “attestation” see <http://www.wnylc.com/health/entry/30/>.

Nursing Home

There is a transfer penalty for people 65 and over applying for nursing home care. If a person transferred income or assets into an SNT after age 65, and that person applies for Medicaid coverage of a nursing home stay, there will be a transfer penalty if those transfers occurred within the five-year look-back period.

Many people don’t realize that the nursing home transfer of asset rules penalize not only transfers of assets but also transfers of income. As long as a person remains in the community, transfers of monthly income into a trust do not affect their Medicaid eligibility (see above). However, when the transfer penalty rules were made stricter in the Deficit Reduction Act of 2005,¹⁹ it was feared that the Act would be interpreted to impose a penalty on transfers of excess income into an SNT made on or after February 8, 2006 (the effective date of the Act). Thankfully, the New York State Department of Health clarified that as long as funds deposited into the SNT were spent on the beneficiary’s expenses prior to applying for Nursing Home Medicaid, the prior deposits of income into the SNT will be considered a “compensated” transfer so no transfer penalty will be imposed.²⁰

Here are some examples from the State’s directive:

A pooled trust is established for a disabled individual, age 68.
For 10 months, the individual deposits his monthly excess

income of \$825 into the trust. While in the community, community budgeting applies and the \$825 is exempt as countable income. Then the individual is institutionalized and requires coverage for nursing home care. Under chronic care budgeting, the income deposited into the trust is countable as part of the individual's net available monthly income (NAMI). Since the individual was over age 65 when the deposits were made into the pooled trust, the income deposits are treated as a transfer ($\$825 \times 10 = \$8,250$).

Situation 1. The individual provides proof that the non-profit association managing the pooled trust paid \$700 monthly for rent and \$125 monthly for household utilities. The total monthly expenses paid by the non-profit association equal the monthly income deposited into the pooled trust. The transfers are, therefore, considered to be compensated transfers.²¹

HCBS Medicaid Waiver Programs

Home and Community Based Services ("HCBS") Medicaid Waiver programs include the Traumatic Brain Injury ("TBI"), Office for People With Developmental Disabilities ("OPWDD") (formerly the Office of Mental Retardation and Developmental Disabilities, "OMRDD"), Nursing Home Transition and Diversion ("NHTD"), Care at Home ("CAH") and other programs.²² They are special Medicaid programs that include services not typically covered by Medicaid and all of which include some form of home care in the community. These special programs require a waiver of the Federal Medicaid rules, and are authorized under subsection (C) or (D) of Section 1915 of the Social Security Act.²³

Although these programs have certain technical similarities to Nursing Home Medicaid, there is no transfer penalty for waiver eligibility.²⁴

Are Disbursements from SNTs Treated as Income?

Cash Disbursements

Cash is always considered income for Non-MAGI Medicaid and the trustee of the SNT should never give cash to the beneficiary. This will result in a dollar-for-dollar increase in the beneficiary's spend-down, and may also result in the SNT being counted as an available resource. In a properly drafted SNT trust agreement, the trustee is prohibited from making cash disbursements that will impair the beneficiary's eligibility for benefits.

In-Kind Disbursements

The trustee may make direct payments to third parties that provide goods and services to the beneficiary. Such in-kind payments are not considered “income” for Non-MAGI Medicaid purposes, regardless of what the payments are for.²⁵ Payments may include rent, clothing, food, etc.

NOTE: Some pooled SNTs permit a person who paid for the beneficiary's expense, such as buying clothing, to be reimbursed if receipts are submitted. However, they should contact the pooled trustee to get approval BEFORE making the expenditure to assure reimbursement.

Here are some examples of types of expenses for which an SNT can make in-kind payments:

Rent

The easiest type of bill to pay via SNT is rent (or maintenance for co-op/condo). NYSARC and many other pooled trustees prefer rent bills for which they can set up automatic payments. This is also more convenient for the beneficiary, who generally does not need to send disbursement requests once the automatic payment system is set up. However, this might not be logistically feasible if the landlord requires inclusion of a payment coupon with the rent check, or if the landlord will not accept payment from a third party. Also, for rent payments, the pooled trustee will initially ask for a copy of the lease verifying that the beneficiary lives there. If they are not on the lease, or there is no lease, they need a letter signed both by the landlord and the beneficiary stating that the beneficiary lives there and the amount of rent.

Utilities

Utility bills, including electric, gas, phone, cable, and internet, are also convenient to pay from an SNT. However, it may not be possible to set these up for automatic payment even if the beneficiary enters a budget plan so that bills are in the same amount each month. The pooled trustee will usually require that the beneficiary send or fax the utility bill to the trustee every month. NOTE that SSI rules are different than Medicaid – see below.

Credit Cards

Many stores now issue store-only credit cards, which can be given to the beneficiary to purchase books, videos, CDs, etc. The bill can be sent directly to the pooled trustee. As long as no cash withdrawal is possible from the card, this may be acceptable.

Most pooled trustees will pay credit card bills, provided that the bill is in the beneficiary's name, and that there are no past due charges being carried forward. The actual monthly bill must be submitted for the trustee to verify

that no cash withdrawals were made. The trustee has the right to inquire whether the expenses were for the benefit of the beneficiary and not for anyone else.

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The easiest type of bill to pay via SNT is rent (or maintenance for co-op/condo). NYSARC and many other pooled trustees prefer rent bills for which they can set up automatic payments. This is also more convenient for the beneficiary, who generally does not need to send disbursement requests once the automatic payment system is set up. However, this might not be logistically feasible if the landlord requires inclusion of a payment coupon with the rent check, or if the landlord will not accept payment from a third party. Also, for rent payments, the pooled trustee will initially ask for a copy of the lease verifying that the beneficiary lives there. If they are not on the lease, or there is no lease, they need a letter signed both by the landlord and the beneficiary stating that the beneficiary lives there and the amount of rent.

Utilities

Utility bills, including electric, gas, phone, cable, and internet, are also convenient to pay from an SNT. However, it may not be possible to set these up for automatic payment even if the beneficiary enters a budget plan so that bills are in the same amount each month. The pooled trustee will usually require that the beneficiary send or fax the utility bill to the trustee every month.

Credit Cards

Many stores now issue store-only credit cards, which can be given to the beneficiary to purchase books, videos, CDs, etc. The bill can be sent directly to the pooled trustee. As long as no cash withdrawal is possible from the card, this may be acceptable.

Most pooled trustees will pay credit card bills, provided that the bill is in the beneficiary's name, and that there are no past due charges being carried forward. The actual monthly bill must be submitted for the trustee to verify that no cash withdrawals were made. The trustee has the right to inquire whether the expenses were for the benefit of the beneficiary and not for anyone else.

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Summary of Transfer Penalties in SSI and Medicaid

Program	Category	Is there a penalty for transfer of assets into SNT?	Is there a penalty for transfer of income into an SNT?
SSI	Age 65+	YES – up to 3 year disqualification	Yes – not permitted
	Under 65	NO	Yes – not permitted
Medicaid Age 65+	Nursing Home	YES Depending on amount transferred if SNT is for oneself, but no penalty if SNT is for benefit of another disabled person under age 65.	Under GIS 08-MA-020, deposits of income made into an SNT while on community Medicaid will not be penalized later when beneficiary enters nursing home, if money was spent on beneficiary’s needs. However, beneficiary may no longer shelter excess income in a trust when in a nursing home. Unwritten DOH policy allows SINGLE but not MARRIED waiver participants to place income into a trust to eliminate spend-down.
	Waivers NHTD, TBI, OPWDD, etc.	NO penalty under DOH GIS 07 MA/018, 9/24/07	
	Community care	NO – but under DRA, a transfer now will affect FUTURE institutional eligibility for nursing home care	
Medicaid Under age 65	All categories	NO	NO – However, transfers of monthly income cannot be used to reduce NAMI for nursing home. It is somewhat unclear whether transfers of monthly income may be used to reduce spend-down for waiver programs, but unwritten DOH policy seems to be allowed for singles but not for married participants.

Can Income be Placed in the Trust to Reduce Countable Income?

Community Medicaid (Non-MAGI)

Yes.

When a person with a disability places their excess or surplus monthly income (also called a spend-down) into an SNT, the local Medicaid program must adjust the person's Medicaid budget to eliminate their spend-down for Community Medicaid. This has been true in NY State since February 25, 2004, when the State Department of Health issued a fair hearing decision allowing use of the NYSARC trust to eliminate the spend-down of income.²⁷

The decision relies on an old amended directive of the State Department of Health – a letter dated September 23, 1997 that amends directive 96-ADM-8, titled "OBRA '93 Provisions on Transfers and Trusts." The 1997 letter states:

While most exception trusts are created using the individual's resources, some may be created using the individual's income, either solely or in conjunction with resources. Income diverted directly to a trust or income received by an individual and then placed into a trust is not counted as income to the individual for Medicaid eligibility purposes. Verification that the income was placed into the trust is required. In order to eliminate the need to verify this on a monthly basis, it is recommended that you advise the recipient to divert the income directly to the exception trust.²⁸

Medicaid Managed Care

Generally, people with an income spend-down are excluded from Medicaid Managed Care, which is a type of managed care program for people without Medicare or other third party insurance. S.S.L. §364-j. Thus, a Medicaid recipient who has used an SNT to eliminate their spend-down should not be excluded from managed care. This was the holding of a fair hearing decision in which Nassau County attempted to disenroll a Medicaid recipient from Medicaid Managed Care even though she deposited her spend-down into an SNT.²⁹ The decision held that if income is deposited into an SNT, there is no spend-down, so the appellant continued to be eligible for Medicaid Managed Care.

Nursing Home Medicaid

No. Excess income transferred monthly into an SNT does NOT work to eliminate the Medicaid recipient's obligation to contribute towards the cost of their nursing home care.

The spend-down for Medicaid recipients in nursing homes is called a NAMI (Net Available Monthly Income). Until recently, people under age 65 could eliminate this NAMI for nursing home (aka **chronic care**) budgeting by placing their NAMI into an SNT. People over age 65 could never do this because it created a transfer penalty.

However, the State recently started applying a rule that says that in chronic care budgeting, all income is to be applied to the cost of care "including income disregarded or considered unavailable for the purpose of determining MA eligibility."³⁰ The State has interpreted this to mean that they include income placed into an SNT.

In Wong v. Doar, the court held that the plaintiff, who was a disabled 54-year-old nursing home resident, could not place his "excess income" from Social Security Disability benefits into an SNT to reduce his NAMI.³¹ The case involves complex federal regulations on post-eligibility budgeting, which do not allow the same deductions from income that are allowed in the community. In Jennings v. Comm'r. Nassau DSS, the NY Appellate Division held that Wong also precludes an institutionalized parent from transferring their own income into an SNT for the benefit of a child with a disability.³²

Managed Long Term Care (MLTC)

There is no question that single Medicaid recipients who enroll in MLTC plans may use an SNT to shelter their income and eliminate their spend-down. Since MLTC is a community-based long-term care program, community Medicaid budgeting applies, which allows use of SNTs.

However, the rules have been in flux for married couples. Now, as of March 26, 2015, a married individual may use a pooled trust to reduce the spend-down. However, this resulted from DOH's rescission of its August 2014 policy directive GIS 14/MA-015,³³ that in effect prohibited use of SNTs to shelter income for married couples, who were now required to use "spousal impoverishment" budgeting. All of this confusion has come from a change in federal law effective January 1, 2014, part of the Affordable Care Act called the PPACA. Under that law, spousal impoverishment with "post-eligibility rules" must be used when determining income and resource eligibility for married couples with a spouse receiving Managed Long Term Care (MLTC) or other Home-and-Community-Based Services under a waiver (Traumatic Brain Injury (TBI), Nursing Home Transition and Diversion (NHTD),

OPWDD waivers. These spousal impoverishment protections are generally -- but not always -- favorable. The August 2014 directive [NYS DOH GIS 14 MA/015](#) had required use of the spousal impoverishment protections even when they were unfavorable. Spousal protections can be *unfavorable* if the individual still has a high spend-down even after the spousal impoverishment allowances are allocated. Such an individual would normally want to use an SNT in order to reduce his or her spend-down. But under the State's interpretation in August 2014, these married individuals were not allowed to use an SNT. The State's view was that the spousal impoverishment protections are used in "post-eligibility budgeting" which is the same budgeting used in nursing homes. Just as one cannot reduce one's NAMI in a nursing home by depositing excess income into a pooled trust, see *Wong* case above, the State's view was that married individuals in an MLTC plan cannot reduce their spend-down by using a pooled trust. ("NAMI" is Net Available Monthly Income - the name for "spenddown" for people in nursing homes on Medicaid).

But on November 4, 2014, the State issued [GIS 14 MA/025 - Spousal Impoverishment Budgeting with Post-Eligibility Rules Under the Affordable Care Act](#),³⁴ which states, "Spousal impoverishment budgeting with post-eligibility rules is not mandated for married individuals receiving home and community-based services (HCBS) pursuant to a waiver under Section 1915(c) of the Social Security Act or through enrollment in a managed long term care (MLTC) plan..." The November 2014 directive reinstates two previous GIS directives -- [NYS DOH GIS 13 MA/018](#) and [GIS 12 MA/013](#) to the extent that they gave married individuals receiving MLTC or other HCBS waiver services an OPTION of choosing NOT to use the spousal impoverishment protections, if it was more favorable for the couple not to use them. It could be more favorable NOT to use the protections if a married MLTC recipient instead used a pooled trust to eliminate his or her Medicaid spend-down. Even if s/he would otherwise have a very high spend-down, by using a pooled trust, she qualifies for Medicaid and MLTC without any spend-down. Even though the spousal impoverishment protections may reduce the spend-down, they may not eliminate it altogether if the individual's or spouse's income is high enough. Since this area is rapidly changing, stay tuned.

Other HCBS Medicaid Waiver Programs

Maybe.

Managed Long Term Care is one type of Medicaid Waiver Program, granted under Section 1115 of the Medicaid Act. There are also "1915" waivers that establish Home and Community Based Services (HCBS) Waiver programs. Transfers of income to eliminate a spend-down is a gray area in the context of

waiver programs. This is because waiver programs are a hybrid of rules for Community Medicaid, which clearly permit transfers of excess income into an SNT to reduce or eliminate the spend-down for Community Medicaid, and Nursing Home Medicaid, which, under Wong does not permit use of an SNT to eliminate the NAMI.³⁵ The same section of the Affordable Care Act (PPACA) that requires spousal impoverishment budgeting for the MLTC program also requires it for 1915 waiver programs, which include the “Lombardi” long term home health care program, which is being phased out in the transition to MLTC. The authors of this manual believe that the same rules set forth above for MLTC apply for other waiver programs – that single recipients can use SNTs to shelter income, and that under the current State directives, married couples can as well if they elect not to use spousal impoverishment budgeting.

While the State has not issued any guidance on whether the post-Wong interpretation of the regulations applies only to Nursing Home Medicaid, or also HCBS Medicaid waiver programs, informal information from State employees as of November 2010 in regards to the former Lombardi waiver, is that State policy is to PERMIT single waiver participants to place their excess income into SNTs, but prohibit this practice for married participants. The rationale is that married participants have the benefit of spousal impoverishment protections, an element of Nursing Home Medicaid budgeting.

We have also heard informally that a participant in the OPWDD waiver is permitted to transfer monthly excess income into an SNT to eliminate the spend-down.

Our interpretation of the available guidance at this time is that all waiver participants should be entitled to shelter excess income using an SNT. The basis for this conclusion is that post-eligibility budgeting for waiver programs allows deduction of all SSI-related income disregards (unlike Nursing Home Medicaid budgeting, which does not).³⁶ We hope the State Department of Health will clarify its policy so that counties have clear direction.

MAGI Medicaid

MAGI Medicaid uses Federal income tax rules to define and calculate adjusted gross income, with a few modifications under the Affordable Care Act. Neither the Act’s modifications nor IRS rules allow for income to be sheltered in an SNT. The income used to fund the SNT would be counted towards MAGI Medicaid eligibility; however the Act and the IRS call for that type/source of income to be counted.

Supplemental Security Income

Who gives it?	Federal Government – Social Security Administration (SSA)
Who gets it?	Aged, blind, or disabled people with limited income and resources
Eligibility	<ul style="list-style-type: none">• Category – must be 65 or over, or blind, or disabled• Citizenship – must be a U.S. citizen (with major exceptions- such as five years as a Legal Permanent Resident, aka “green card” holder)• Residency – not eligible for SSI if residing outside of United States• Income – countable income under \$820/mo. (single, living alone) or \$1,204/mo. (couple, living alone)• Resources – countable resources under \$2,000 (single) or \$3,000 (couple)
What do you get?	Monthly cash income, usually direct-deposited into bank account. In New York, SSI recipients automatically get Medicaid. In New York, SSI recipients who live alone automatically get SNAP through NYSNIP.

Supplemental Security Income (SSI) is a Federal monthly cash income benefit provided to people with very low income and resources who are either aged (65 or over), blind or disabled. It is administered by the Social Security Administration (SSA). The income limit and amount of monthly benefit depend upon the applicant’s other income and living arrangement. For a person living alone with no other income, the income limit and monthly benefit amount is \$820/mo (2015). The resource limit is \$2,000 (2015). Those who are approved for SSI receive Medicaid automatically in New York State.

The rules governing the SSI program, including the treatment of trusts and SNTs in particular, can be found in the **Program Operations Manual System (POMS)** on the Social Security Administration website at <http://policy.ssa.gov/poms.nsf>.³⁷

Is the SNT a Resource?

Short Answer

No, as long as drafted properly to comply with rules in 42 U.S.C. § 1396p(d)(4) (the Federal Medicaid statute).³⁸

Long Answer

The SSI statute very simply states that “This subsection [providing that ‘the corpus of the trust shall be considered a resource available to the individual’] shall not apply to a trust described in subparagraph (A) or (C) of section 1917(d)(4) [42 USCS § 1396p(d)(4)].”³⁹ The citation referred to is the Federal Medicaid statute establishing individual and pooled SNTs.

However, the POMS provides that even if a trust is an SNT that complies with § 1396p(d), it still needs to be evaluated to determine if it is an available resource.⁴⁰ SSI considers a trust to be a countable resource if it is revocable (or if the beneficiary may direct the use of the trust assets for their own support and maintenance).⁴¹ Under New York law, a trust where the grantor is the sole beneficiary is deemed to be revocable, notwithstanding any language in the trust agreement to the contrary.⁴² This would seem to make an SNT an available resource for SSI purposes, because it is for the sole benefit of the grantor.

But, a POMS section applicable only to New York and New Jersey clarifies that a trust will not be deemed revocable (and therefore an available resource) if its residual beneficiaries include a named living person, the term “issue” (if living and the grantor’s issue), and/or the State of New York (or similar language).⁴³ Because all “D4A” individual SNTs must include the State of New York as the residuary beneficiary in the first position, this clause means that they should be deemed irrevocable and therefore unavailable resources for SSI purposes. Similarly, all “D4C” pooled SNTs that name the pooled trustee organization as the residuary beneficiary should also be deemed irrevocable, because they have a named residual beneficiary.⁴⁴

Is there a Transfer or “Lump Sum” Penalty?

Under age 65

For SSI recipients under age 65, there is no transfer penalty for transfers into an SNT.⁴⁵ Placing assets into an SNT is an EXCEPTION to the usual penalty on transferring assets that would otherwise disqualify a SSI applicant or recipient from SSI for a period of up to 3 years.⁴⁶ If a SSI recipient receives a lump sum and is under age 65, an SNT is the perfect solution.

Age 65 or over

Transfers into an SNT by a person age 65 or over WILL incur a transfer penalty for purposes of SSI.

This SSI penalty disqualifies the person from SSI for up to three years, depending on the amount transferred. (The penalty is calculated by dividing

the amount transferred by the person's SSI monthly payment rate, including the State supplement).⁴⁷

EXAMPLE: Person living alone transfers \$8,200 – disqualified from receiving SSI for 10 months [$\$8,200 \div \$820 = 10$].

The penalty may be worth incurring depending on the amount transferred. In New York, a person would be disqualified for no more than three years for transferring \$29,520 or more [$\820×36 months]. If the funds are substantially higher than that figure, it could be worth the penalty to be able to shelter the funds in an SNT.

Are Disbursements from SNTs Treated as Income?

AN SNT does not give cash disbursements to the beneficiary of the trust. Instead, the SNT pays various bills for living expenses on behalf of the beneficiary. This type of income is known as **in-kind income**.

Unfortunately, some types of in-kind income are deemed countable for purposes of SSI. Payments made by the SNT to third parties for **food** or **shelter** are considered **In-kind Support and Maintenance (ISM)** and will reduce SSI payments by the lower of (1) the actual value or (2) a maximum of one-third of the monthly Federal benefit amount.⁴⁸

The Federal benefit rate in 2015 is \$733/month, so after the one-third reduction the individual would get \$576 (includes the \$87 NY State supplement). This reduction may be worth accepting if, for example, the rent or maintenance amount is very high, say \$1,000 – it's worth the SNT paying that and accepting a one-third reduction in the monthly SSI amount.

NOTE: Until March 9, 2005, payments for **clothing** were also counted as in-kind income. This SSI regulation was changed so that the SNT, a friend or other third party may purchase clothing for the SSI recipient and it won't count as income.⁴⁹

Shelter expenses include rent, mortgage, property taxes, heating fuel, gas, electricity, water, sewer, or garbage removal.⁵⁰

NOTE: Condominium fees in themselves are not household costs. However, condominium fees may include charges which are household costs (e.g., garbage removal). To the extent that such charges are identifiable, use them in the computation of inside and outside ISM.

Homeowner's Insurance – "Only property insurance required by the mortgage holder in order to receive the mortgage is considered a household

cost. Insurance (property, fire, theft, etc.) held at the owner's or renter's option is not a household cost."⁵¹

Direct payments for goods and services other than food and shelter will not reduce SSI benefits:

- Cable, telephone, cell phone, and internet service are not shelter costs.
- Payment for travel, local transportation, entertainment expenses, educational expenses, and (since 2005) clothing, are all permitted. For example, an account could be set up with a local car service that would bill the SNT monthly.
- Pre-payment of burial expenses is permitted through a funeral agreement.

Cash paid directly from a trust to the beneficiary is unearned income and would reduce SSI benefits dollar-for-dollar as a result. Therefore, this would violate an SNT's prime directive not to impair the beneficiary's eligibility for benefits.

Can Income be Placed in the Trust to Reduce Countable Income?

No. A transfer of excess monthly income will not result in eligibility for or an increase in SSI benefits. Unlike Community Medicaid, if an applicant for SSI has countable income over the SSI limit, they cannot become eligible by transferring excess income into an SNT.

Temporary Assistance

Who gives it?	State Government – the Office of Temporary and Disability Assistance (OTDA)
Who gets it?	People with very low income and resources
Eligibility	<ul style="list-style-type: none">• Work requirements – should be waived if person is found disabled, in which case they will eventually be able to get SSI.• Citizenship – must be a U.S. citizen, Legal Permanent Resident (aka “green card”) or PRUCOL (permanently residing under the color of law).• Residency – must live in New York State to receive TA from NYS.• Income – must be below the Federal Poverty Level (FPL) and 185% of Standard of Need.• Resources – countable resources under \$2000, or \$3000 if household includes someone over 60 or disabled.
What do you get?	Monthly cash income for basic needs. Some expenses are paid by voucher to the vendor, others by EBT (debit) card. TA may be a stopgap while your client is applying for SSI.

Temporary Assistance (“TA”) is temporary financial assistance for needy people. It is administered through the New York State Office of Temporary and Disability Assistance (“OTDA”) and locally through the departments of social services.⁵² There are two major types of Temporary Assistance programs: 1) Family Assistance (“FA”) and 2) Safety Net Assistance (“SNA”).⁵³

FA provides cash assistance to families containing a minor child in the household. FA operates under the guidelines established under Temporary Assistance for Needy Families (“TANF”). Eligibility is determined on the family's amount of available income. It must be at or below 200% of the federal poverty level based on the size of the family.⁵⁴ Eligible adults are limited to a lifetime maximum of sixty months of FA benefits. After receiving FA benefits for two years, adult recipients who can work must work.⁵⁵

SNA benefits are for people who meet the eligibility requirements and are ineligible for other types of assistance. Eligible people are limited to a lifetime maximum of two years of SNA cash assistance. After the two year

maximum is met, in certain cases SNA assistance may continue in a non-cash form, such as a two party check or voucher.

OTDA addressed some of the issues of SNTs with regard to TA, FS, and HEAP in a 2001 directive.⁵⁶ Consistent with Chapter 433 of the Laws of 1993 Section 7-1.12 of the Estates, Powers and Trusts Law, the OTDA Letter at page 2 defines an SNT as:

... a discretionary trust established for the benefit of an individual of any age with a severe and chronic or persistent disability, designed to supplement, not supplant, government benefits or assistance for which the individual is otherwise eligible. Under the terms of such a trust:

- the beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from the trust; and
- the trust document generally prohibits the trustee from expending the trust assets in any way that would diminish the beneficiary's eligibility for or receipt of any type of government benefit.⁵⁷

Is the SNT a Resource?

The 2001 OTDA Letter (see endnote **Error! Bookmark not defined.**) states at p. 3, "A[n] SNT is not considered an available resource for the purpose of determining TA eligibility."

The resource limits are \$2000 for households with no one over the age of 60, and \$3000 for households with a member who is over the age of 60.⁵⁸ The home applicant lives in is exempt, and households may own one automobile with a fair market value of \$4,650. However, if the automobile is needed for the applicant or recipient to seek or retain employment or travel to and from work activities the automobile exemption amount is increased to \$9,300 or such other higher value as the local district may elect to adopt. The fair market value of one automobile in excess of \$4,650 or \$9,300 may be applied to the \$2,000 general resource limit.⁵⁹

Is there a Transfer or "Lump Sum" Penalty?

The Harsh "Lump Sum" Rule

Lump sum income is treated harshly in the TA programs. Whether a lump sum is transferred or spent, it must be budgeted to calculate a period of TA ineligibility.⁶⁰ A lump sum, even if transferred or spent, is deemed to be available to the TA recipient for a period of time based on the amount, thus disqualifying the person from receiving TA for the period that the lump sum would have lasted if spent gradually at the same rate of the monthly TA benefit. For example, if the monthly TA benefit is \$350, and the lump sum is \$3500, the TA disqualification period would be ten months. The period of disqualification does not change based on how gradually or immediately the recipient actually spends the lump sum. So, in the above example, even if the recipient spends all \$3500 of their lump sum on the day they receive it, they will nevertheless be disqualified from TA for a period of ten months.

Exception for SNTs

The OTDA letter notes an exception to the harsh lump sum penalty if, at the time the lump sum is received, it is deposited directly into an SNT.

[I]f the lump sum monies are not available to the TA recipient because the receipt of the lump sum monies simultaneously coincides with the creation of an SNT, then no period of ineligibility must be determined. For example, a disabled TA recipient will receive a lawsuit settlement that has been set up to be placed directly into an SNT. In this instance, no lump sum period of ineligibility must be calculated.⁶¹

Note that timing is important. The lump sum penalty will still apply if the TA recipient intends to later establish an SNT with the lump sum funds. The SNT must be created before or at the same time that the lump sum is received for the exception to apply. There is no further detail about what constitutes "simultaneous" creation of an SNT, but to be safe the SNT should be established before the lump sum is received so that the funds can immediately be placed into the SNT.

Another Exception When the Lump Sum is Less than the Resource Limit

In such cases, the agency must allow the TA recipient to set aside the portion of the lump sum which, when combined with the recipient's countable resources, is less than the TA resource limit.⁶²

For example, if a single SNA recipient under age 60 with needs of \$300 has countable resources of \$600 and then wins \$1200 in lotto, their eligibility is

not affected because even with the winnings, their countable resources are still less than the TA resource limit of \$2000. It should be noted, however, that lump sums for insubstantial amounts are deemed income in the month received.⁶³ In the above example, if the lotto winning is \$250 – an amount below this recipient's \$300 standard of need – the winnings indeed count as income, and their SNA eligibility is affected.

When lump sums are greater than the TA resource limit, certain expenditures made within ninety days from receipt of the lump sum are deducted from the lump sum overage, and thus do not translate into a period of ineligibility. These expenditures include cars for work, college tuition, a burial plot, and a funeral agreement. (For more details on maximum amounts that can be set aside, see 03 ADM-10 p. 3)

Are Disbursements from SNTs Treated as Income?

As a general rule, disbursements from an SNT must be considered under the rules of the government program from which a person is receiving benefits.⁶⁴ TA rules require, according to the OTDA Letter, that income earmarked for a specific purpose must be exempted for TA unless it supplements benefits provided for in the TA standard of need. Certain earmarked expenses are not counted as income for TA. These expenses include education expenses, medical expenses including the cost of private health insurance or medical expenses not covered by Medicaid or health insurance, child care costs, expenses related to the special needs of the beneficiary with a disability such as housekeeping, aides, social workers, therapists, and vocational rehabilitation aides, and legal expenses.⁶⁵ In contrast, certain disbursements that are not exempt – and therefore must be counted as income for TA – include expenditures for day-to-day living expenses, hobbies, vacations, recreation and entertainment.⁶⁶

TIP: AN SNT could be drafted to ensure that expenditures by the SNT are earmarked for the purposes listed above so they would not count as income.

Can Income be Placed in the Trust to Reduce Countable Income?

No. Income that is diverted into an SNT remains countable income for purposes of TA. Medicaid is the only benefit that allows income to be reduced by the amount that is put into SNTs.

SNAP (Food Stamps)

Who gives it?	Federal Government – administered in NYC by the Human Resources Administration (HRA)
Who gets it?	People with limited income and resources (no resource test if over 60 or with a disability and income below 200% FPL). People who have a disability or are over 60 can deduct several expenses from their net income to help them qualify.
Eligibility	<ul style="list-style-type: none">• Citizenship – U.S. citizen, Legal Permanent Resident (aka “green card”) with work history, and qualified aliens.• Residency – must live in NYC to apply in NYC; eligibility is the same for all of NYS.• Income – countable income below the Thrifty Food Plan amount, after deductions for shelter, utilities, and medical costs• Resources – for households containing someone over age 60 or with a disability with gross income below 200% FPL, no resource test (i.e., categorically eligible)
What do you get?	Monthly allowance for food, given on an EBT card. Amount depends on household size, income, and disregards. Can be used at any participating store.

The Supplemental Nutrition Assistance Program (“SNAP”), or still commonly called Food Stamps) is a benefit that enables people with limited income to increase their ability to purchase food. Through the use of a debit card, it works as a cash substitute redeemable for food in participating grocery stores. Recipients receive a monthly allotment which varies based on household size and income.⁶⁷

Is the SNT a Resource?

Resource Test in General for Food Stamps

There is NO RESOURCE TEST for Food Stamps as long as the household contains a person with a disability or a person over age 60, and the household’s gross monthly income is below 200% of the Federal Poverty Level (in 2015, \$1,962/mo. for single, \$2,656/mo. for couple).⁶⁸

If the household contains an elderly person or a person with a disability, but the household income is over 200% FPL (or if any household member is

disqualified due to an Intentional Program Violation or sanction), then the resource limit is \$3,250.

If there is no elderly person or a person with a disability, then the resource limit is \$2,000.⁶⁹

Trust as a Resource for Households With a Resource Test

If the household does not have an elderly person or a person with a disability, or if it does have an elderly person or a person with a disability, and the household income exceeds 200% FPL, then one must examine whether an SNT held by a household member counts as a resource.

Irrevocable trusts are among several “inaccessible resources” that are excluded as a resource under federal regulations.⁷⁰ The regulations set forth the following requirements for excluding a trust:

- (e) (8) Resources having a cash value which is not accessible to the household, such as but not limited to, irrevocable trust funds. . . . Any funds in a trust or transferred to a trust, and the income produced by that trust to the extent it is not available to the household, shall be considered inaccessible to the household if:
 - (i) The trust arrangement is not likely to cease during the certification period and no household member has the power to revoke the trust arrangement or change the name of the beneficiary during the certification period;
 - (ii) The trustee administering the funds is either:
 - (A) A court, or an institution, corporation, or organization which is not under the direction or ownership of any household member, or
 - (B) an individual appointed by the court who has court imposed limitations placed on his/her use of the funds which meet the requirements of this paragraph;
 - (iii) Trust investments made on behalf of the trust do not directly involve or assist any business or corporation under the control, direction, or influence of a household member; and
 - (iv) The funds held in irrevocable trust are either:

- (A) Established from the household's own funds, if the trustee uses the funds solely to make investments on behalf of the trust or to pay the educational or medical expenses of any person named by the household creating the trust, or
- (B) established from non-household funds by a nonhousehold member.⁷¹

Potential Issues Raised by the Federal Regulations Include:

Who is the Trustee?

Since the trustee may be an organization, all pooled SNTs should be allowed. If the trust is an individual SNT established for a person under age 65, an issue might arise if the SNT is established by a parent or guardian without a court order. The above regulation suggests that to ensure SNAP eligibility, a court order should be obtained.⁷² NOTE that the 2001 OTDA Letter does not differentiate between types of trustees, simply stating that irrevocable trust funds are excluded.

Source of Funds

Under 7 CFR 273.8(e)(8)(iv), a third-party trust established with funds from a "non-household" member is considered "inaccessible" to the household and will not be counted as a resource.

Self-settled trusts are considered inaccessible to a household *only* "if the trustee uses the funds solely to make investments on behalf of the trust or to pay the educational or medical expenses of any person named by the household creating the trust..."⁷³ Since these rules are very different than those for Medicaid, they must be heeded carefully.

Is there a Transfer or "Lump Sum" Penalty?

Generally, there is a disqualification from SNAP eligibility for one year for certain intentional transfers. The following is a direct excerpt from the SNAP Source Book:

Households which have transferred resources knowingly for the purpose of qualifying or attempting to qualify for food stamp benefits shall be disqualified from participation in the program for up to 1 year from the date of the discovery of the transfer. This disqualification period shall be applied if the resources are transferred knowingly in the 3-month period

prior to application or if they are transferred knowingly after the household is determined eligible for benefits.

1. Transfers Not Affecting Eligibility

The following transfers will not affect program eligibility:

- a. Resources which would not otherwise affect eligibility.
- b. Resources sold or traded at, or near, fair market value.
- c. Resources which are transferred between members of the same household (including excluded individuals whose resources are considered available to the household); and
- d. Resources which are transferred for reasons other than to qualify or attempt to qualify for food stamp benefits. Example: a parent placing funds into an educational trust fund described in this section.

2. Determining Length of Disqualification

The length of the disqualification period must be based on the amount by which non-exempt transferred resources, when added to other countable resources, exceed the allowable resource limits. The following chart shall be used for the determination.

Amount in Excess of the Resource Limit	Period of Disqualification
\$ 249	1 month
\$250 - \$999	3 months
\$1,000 - \$2,999	6 months
\$3,000 - \$4,999	9 months
\$5,000 +	12 months

NOTE: Proving "intent" in this case is very difficult. If a case is denied on this basis, the local district needs significant documentation in order to have the district's decision upheld at a Fair Hearing should one ensue.

3. Interpretation

Households which have transferred resources shall be disqualified from participation in the food stamp program if:

- a. The transfer occurred in the three month period prior to application and was knowingly for the purpose of qualifying or attempting to qualify for food stamp benefits, or
- b. The transfer occurred after certification and was knowingly for the purpose of continuing to qualify for food stamp benefits. The disqualification period must be applied if the resources are transferred knowingly to prevent the household from exceeding the maximum resource limit.⁷⁴

Comment

Since SNTs are exempt resources, and there is no disqualification penalty for transfers of resources “which would not otherwise affect eligibility,” there should be no transfer of resources disqualification on this basis. However, since this interpretation is not certain, a risk-free strategy would be to wait until 3 months after the transfer into an SNT to apply for SNAP, since there is only a 3-month look back period – or go off SNAP during the month of the transfer then re-apply 3 months later.

Are Disbursements from the SNT Treated as Income?

The rules for SNAP are similar to those for SSI, in that certain disbursements are counted as income. Like Medicaid, however, and unlike SSI, a payment made as a third party vendor payment, rather than paid directly to the SNAP recipient, may prevent the payment from being counted as income. Disbursements from an SNT paid directly to third-party vendors for household expenses will not be counted as income.⁷⁵ However, “disbursements made directly to Food Stamp households for normal household living expenses, such as rent or mortgage, personal clothing, or food eaten at home are a gain or benefit and, therefore, are counted as income.”⁷⁶

These principles are set forth in the SNAP Source Book section on Income Exclusions, with a paragraph dedicated to SUPPLEMENTAL NEEDS TRUSTS (SNTs) –

1. Interest accruing to the trust would be excluded as income for Food Stamps.
2. Any cash disbursements, however, must be evaluated under normal FS budgeting rules.
3. Disbursements from an SNT may be excludable from household income if they are reimbursements for past or future expenses that do not exceed actual expenses and are not a gain or benefit to the household.
4. To be excluded, reimbursements must be for an identified expense other than normal living expenses.
5. Disbursements made directly to Food Stamp households for normal household living expenses, such as rent or mortgage, personal clothing, or food eaten at home are a gain or benefit and, therefore, are counted as income.
6. An SNT disbursement that is not payable to the household, but is instead directed to a third party would be excluded from countable income as a vendor payment. To the extent that the vendor payment meets expenses that would otherwise be allowed as deductions such as shelter, medical costs or childcare, however, the expense would not be allowed as a deduction.⁷⁷
7. Income that is legally obligated to a household and countable as FS income, but is diverted by the household into an SNT account is NOT excluded from FS income.⁷⁸

Can Income be Placed in the Trust to Reduce Countable Income?

NO. “Income that is legally obligated to a household and countable as FS income, but is diverted by the household into an SNT account is NOT excluded from FS income. For example, Social Security benefits that are diverted by the recipient into a Supplemental Needs Trust account remain countable as income to the household.”⁷⁹ Medicaid is the only benefit that allows income to be reduced by the amount that is put into an SNT.

Home Energy Assistance Program

Who gives it?	N.Y. State Office of Temporary and Disability Assistance (OTDA)
Who gets it?	Low-income New Yorkers who pay to heat their dwelling
Eligibility	<ul style="list-style-type: none">• Immigration Status Must be U.S. citizen or qualified alien; AND• One of the following:<ul style="list-style-type: none">– Income Gross monthly income must be under \$2,244/mo. for one-person or \$2,935 for two-person household (2016)⁸⁰; OR– In receipt of SNAP; OR– In receipt of Public Assistance; OR– In receipt of SSI (Living Alone living arrangement)
What do you get?	One-time payment made directly to the vendor supplying heating fuel or cash benefit to renters available through EBT card.

The Home Energy Assistance Program (“HEAP”) is an annual grant for low income homeowners or renters to help pay for fuel and utilities. It comes in the form of a cash payment or credit to the household's energy supplier. The amount of the payment or credit depends on the household composition, the energy bills, and the income tier.⁸¹

HEAP also offers an emergency benefit. Payments to households pursuant to the HEAP Emergency benefit may be disbursed when a household experiences a non-utility fuel emergency or must repair or replace heating equipment or seek emergency shelter because of a heating failure. HEAP Emergency funds are issued on a case-by-case basis and are not issued if a household has available resources to ameliorate the problem.⁸²

Is the SNT a Resource?

There is no asset limit for HEAP eligibility. Therefore, an SNT does not affect HEAP eligibility. Eligibility for Emergency HEAP does not have an asset limit per se. Instead, determinations for Emergency HEAP eligibility are based on whether the household has the funds to ameliorate the emergency itself. Money that is in an SNT is not considered a resource that is available

for amelioration.⁸³ Thus, an Emergency HEAP applicant who has an SNT is not expected to raid their SNT to ameliorate the emergency.

Is there a Transfer or “Lump Sum” Penalty?

Because there is no asset limit for HEAP eligibility, there is no penalty associated with transferring a lump sum into an SNT. The law, regulations, and directives are silent with regard to transfer penalties associated with Emergency HEAP. It is possible that money transferred into an SNT AFTER the emergency condition arises will render an Emergency HEAP applicant ineligible for the benefit.

Are Disbursements from the SNT Treated as Income?

There is no law, directive or regulation that specifically addresses this issue. However, 18 NYCRR 393.4(c)(2) states that income is determined by “total household income. . . Total income cannot include any income required by State or Federal law to be excluded or disregarded.”

Can Income be Placed in the Trust to Reduce Countable Income?

Income placed in the SNT will not reduce countable income for purposes of HEAP. Medicaid is the only benefit that allows income to be reduced by the amount that is put into an SNT.

Senior Citizen Rent Increase Exemption

Who gives it?	New York City Department Of Finance (DOF) [for rental housing] Department of Housing Preservation and Development (HPD) [for Mitchell-Lama housing]
Who gets it?	Low-income tenants of rent-regulated housing over age 62
Eligibility	<ul style="list-style-type: none">• Type of Housing – Must be one of the following:<ul style="list-style-type: none">– Rent controlled apartment– Rent stabilized apartment– Rent stabilized hotel unit– Mitchell-Lama co-op, Redevelopment Company development, Article XI co-op established under the Private Financing Housing Law, or Federally-assisted co-op• Age – Head of household must be 62 or older• Income – Annual income must be under \$50,000 or less• Proportion of Rent to Income – Rent must exceed one-third of monthly income
What do you get?	Eligible seniors have their rent frozen at the current level, with almost all future increases paid by the city through tax abatements to the landlord

The Senior Citizen Rent Increase Exemption ("SCRIE") exempts people age 62 or over living in rent controlled, rent stabilized, and certain limited income/limited equity apartments from rent increases provided they satisfy a number of specified criteria.⁸⁴ The criteria regarding income mandates that aggregate disposable income of all members of the household residing in the housing accommodation may not exceed a specified amount, increased in 2014 to \$50,000.⁸⁵

Is the SNT a Resource?

There is no resource test applicable to SCRIE. Therefore, an SNT does not affect SCRIE eligibility with respect to resources.

Is there a Transfer or “Lump Sum” Penalty?

Because there is no resource test associated with SCRIE, resources that are transferred into an SNT presumably do not impact SCRIE eligibility.

Are Disbursements from an SNT Treated as Income?

It remains unclear whether disbursements from an SNT are treated as income for purposes of SCRIE eligibility. The SCRIE definition of “aggregate disposable income” does not specifically include or exclude SNT disbursements.⁸⁶ This regulation does list all compensation and cash retirement and government benefits, interest and dividends, rents, royalties, and alimony and support “... other than gifts and voluntary assistance payments from relatives and friends of members of the household not required to provide maintenance or support...” received by any member of the household, with deductions for payroll taxes, union dues, and court-ordered support.

There are several arguments why disbursements from an SNT should not be counted as income. First, the regulation does not list in-kind vendor payments to a landlord or other third party as countable; hence, such payments by an SNT should not be counted. Second, in the absence of any specific requirement to include disbursements from a trust, none should be implied. Third, a payment from an irrevocable trust might be considered akin to “...gifts and voluntary assistance payments from relatives and friends of members of the household not required to provide maintenance or support...” which are specifically excluded as income.

Can Income be Placed in the Trust to Reduce Countable Income?

Income placed in the SNT will not reduce countable income for purposes of SCRIE. Medicaid is the only benefit that allows income to be reduced by the amount that is put into an SNT.

Subsidized Housing Programs

Thanks to Michael L. Hanley, Empire Justice Center, Rochester, NY, for information used in this section and for edits.

Background

There are three main HUD-subsidized housing programs:

1. Public Housing;
2. Section 8 Housing Choice Vouchers (i.e. the “tenant-based” subsidy program, which enables eligible families to find and lease a unit in the private sector);
3. privately-owned, multi-family housing developments where the subsidy is linked to a particular housing site, not to the tenant (often including HUD Section 8 “Project-Based” subsidies).

The “income” regulations for all three of these programs are set out in two regulations: 24 C.F.R. § 5.609 which defines “income,” and 24 C.F.R. § 5.611 which describes “adjustments” to income. In all these programs, the participating family pays a portion of the rent – generally thirty percent of the household’s income after the adjustments allowed by HUD – and HUD or the local public housing agency (“PHA”) pays the remaining amount.

Special rules apply to households who receive Temporary Assistance, so that a household may have to pay as its rent the portion of the public assistance payment designated for shelter if that amount is greater than 30% of their adjusted income. Also, the rent will be set at 10% of the household’s “gross” income if that amount is greater than either 30% of the “adjusted” income or the welfare shelter allowance.

Is the SNT a Resource?

Although Section 8 eligibility does not have an “asset” or “resource” limit, per se, there is a level at which significant assets or resources do affect the computation of the subsidy and even eligibility.

General Rule

For assets in excess of \$5,000 HUD programs count the larger of the actual income generated by the asset or an “imputed” income if the asset is not generating any actual income (or is generating only a very small amount). HUD instructs the administering housing agencies to use a fixed interest rate,

approximately at the level of a passbook savings account interest rate, finally reduced in 2015 by HUD from an annual rate of 2% to 0.06%.⁸⁷ That means that once an asset produces enough actual or imputed income that the subsidy is reduced to zero, or if the income from the asset takes the household income over the income limit for the housing program, then the tenant will have to deal with the consequences of being over-income. So, the problem is not strictly an “assets” issue, it is an “income” issue.

In the case of the Section 8 programs, at some point the imputed income will cause the subsidy to be reduced to zero. If the subsidy stays at zero for more than six months, the program administrator has to terminate participation in the Voucher program.⁸⁸ Or, if the tenant lives in a project-based housing development, the tenant may have their rent increased to a “market rent” or, in some cases, have to pay a “move-out” rent and may eventually have to move depending on the income limit rules in the project-based housing program.

Exception – Irrevocable Trusts NOT Counted as Assets.

The “Net Family Assets” definition in 24 C.F.R. § 5.603(b)(2), excludes trusts from consideration as assets so long as the trust is not within the control of a household member. This regulation does not differentiate SNTs from other types of irrevocable trusts – all should be exempt as long as not under the control of any household member. Since they are not considered an asset or resource, no income should be imputed based on the principal in the trust.⁸⁹

Is there a Transfer or “Lump Sum” Penalty?

General Rule on Transfer of Assets

If assets are transferred or disposed of for less than fair market value – including into an SNT or any type of irrevocable trust – Section 8 imposes a two year penalty following the date of the divestiture.⁹⁰ This applies when combined net family assets exceed Five Thousand Dollars (\$5,000). In such cases, for the two years following the transfer, by trust or otherwise, the family's Annual Income increases by the greater of:

- a) Actual income from the assets; or
- b) 0.06% of the value of the transferred/disposed of asset (Note: reduced from 2% as the current Passbook Savings Rate effective Feb. 1, 2015, and current as of March 2016. See footnote 86. Also see 24 CFR 5.603(b)(3) and, for an example of how this applies to the public housing program, see the Public Housing Occupancy Guidebook (PHOG) at footnote 86.

However, there is an exception to the transfer penalty for certain types of transfers:

- a) Lump-sum additions to family assets, such as inheritances, insurance payments (including payments under health and accident insurance and worker's compensation), capital gains and settlement for personal or property losses (except as provided in paragraph (b)(5) of this section) – these types of income are not countable as income. 24 CFR 5.609(c)(3). Therefore, transfer of any of these lump-sum sources of income into a trust should not incur any penalty, since the income/asset transferred was not countable in the first place. In *DeCambre v. Brookline Hous. Auth.*, 95 F.Supp.3d 35 (D. Mass. 2015), *appeal pending*, the Court held, in part, that no transfer penalty applied to transfer of a personal injury settlement into an SNT. The holding was based on the fact that the assets placed in trust were from settlements or judgments.⁹¹ Therefore, interest income from the trust principal did not need to be imputed as countable income for the rental subsidy. However, the same decision decided that certain disbursements from the trust would be counted as income. See below.
- b) Retroactive Social Security payments made at the time a person is approved for SSA or SSI benefits are counted as lump-sum additions (and therefore NOT counted as income), notwithstanding the very confusing language of the HUD regulation. In a nutshell, Section 5.609(b)(4) is trumped by Section 5.609(c)(14).

However, if a Section 8 applicant or recipient transfers into an SNT assets other than the types of lump sum addition to assets described above, income based on the principal transferred will be imputed to the applicant or recipient for two years following the transfer.

Are Disbursements from the SNT Treated as Income?

The Federal HUD regulation defining “income” for purposes of Section 8 has two separate lists – an “income includes” list in 24 CFR 5.609(b) and an “income does not include” list in 24 C.F.R. § 5.609(c). Reading the lists of countable and excludable income together shows several points which have resulted in conflicting federal court decisions from 2011 and 2015, discussed below.⁹²

1. All payments made to, or on behalf of, a household member are generally treated as income.⁹³ However, the “income does not include” list describes fairly broad exceptions – among other things, for “**sporadic**,” “**nonrecurring**” “**temporary**” and some one-time only “lump-sum” payments.⁹⁴ Income distributed “regularly” to the household from the trust is included in Annual Income.⁹⁵

In *DeCambre*, supra note 91, **cable and internet** expenses were held not to count as income "...even though they may not be 'temporary,'" with the court citing a *Lewis v. Alexander*, 685 F.3d 325, 333 (3d Cir.2012) cert. denied, — U.S. —, 133 S.Ct. 933, 184 L.Ed.2d 724 (2013).

Also, the beneficiary's **travel costs** to visit family were held not to count as annual income. *DeCambre*, supra, note 91.

DeCambre quoted the Lewis decision in support of exempting these expenses:

"A supplemental needs trust is a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability and is intended to provide for expenses that assistance programs such as Medicaid do not cover...[citations omitted]. These expenses—books, television, Internet, travel, and even such necessities as clothing and toiletries—would rarely be considered extravagant..."

DeCambre, supra, 95 F.Supp.3rd at 50.

STRATEGY TIP: As the discussion above shows, there is inconsistency in how the federal regulations are implemented. If you are setting up or in control of the frequency of the distribution from the SNT, the most cautious strategy is for payments from the SNT to pay for randomly occurring or temporary expenses instead of regularly occurring expenses. However, the above opinions do allow cable, internet and telephone expenses.

2. **Payments made strictly for, or as reimbursement of, medical expenses** (e.g. expenses not covered by Medicaid) are not counted as income in the HUD programs.⁶ In *DeCambre*, supra, the 2015 Massachusetts court decision, direct trust payments for undisputed medical expenses were not counted as income.
 - a. **Emotional Support and Service Animals** - The federal court remanded the case to the local Housing Authority to consider whether the tenant's pet qualified as an emotional support animal, in which case the veterinary expenses could qualify as medical expenses, and not be counted as income. 95 F. Supp. 3rd at 51.
 - b. **TRUST PURCHASE OF CAR.** While expenses for medical transportation are not counted as income, the *DeCambre* court, supra, held that purchase of a car by an SNT, even if used for medical transportation, would not normally be excluded as income. However, since the SNT – and not the tenant -- held title to the car, the court held

that the purchase of the car was not income to the tenant.
Id. at 51.

ADVOCACY TIP: If trust funds used to purchase a car, car title should be held by trust, not beneficiary.

3. The “not included” portion of the income regulation at 24 C.F.R. 5.609(c)(17) describes an exemption for “[a]mounts specifically excluded by any other Federal statute from consideration as income.” HUD periodically publishes a list of such statutory exclusions, but distributions from SNTs are not on that list since there is no such specific statutory exclusion. Nor has HUD found any other federal statute that would encompass distributions from SNTs.
4. The distribution of an asset to the household is not income to the extent that it merely reflects a conversion of an asset to cash, rather than taking out the profit on the investment. “Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the family.”⁹⁷ (Note that this exception is in the “income includes” list, rather than the list of exceptions on the “income does not include” list, 5.609(c)).

Using this regulation, one might argue that if the assets of the SNT came from the applicant or person with a disability’s own resources or from a lump sum received by the person, a distribution from an SNT is not income. HUD should treat a distribution from such self-settled trusts just like it would any other asset of the person – the distribution of the funds back to the person would not be income to the extent that they simply reduce the corpus of the trust.⁹⁸

On the other hand, if the distributions are limited to the earnings of the trust, and had not been reported as income because they were in the trust, then the distributions of the profits would be treated as income.

Can Income be Placed into the Trust to Reduce Countable Income?

No. A regular income stream can probably not be diverted into an SNT that would have been “income” if it had gone directly to the person with a disability. Arguably, the payments to the SNT would not be income to the household if neither the person with a disability nor any household member had any control over placing this income into the trust, but this would be a rare scenario, if possible at all. Moreover, the distributions from such trust would be subject to the regular income rules (i.e. random vs. regular payments; medical reimbursement exception, etc.).

Practical Issues with SNTs

Choosing a Trust and Mental Capacity

Under Age 65

If the person with a disability is UNDER AGE 65, the person has the option of setting up an individual SNT, with a friend or family member as trustee. As set forth above, if the person with a disability has a parent, grandparent, or legal guardian to establish the SNT, this is the simplest way – the SNT need only be drafted and executed, then submitted to and approved by the local Medicaid office (which must have it approved by the legal department).⁹⁹ If a court proceeding is needed to establish this SNT (because there is no living parent, grandparent, or legal guardian), notice of the proceeding must be given to the local Department of Social Services.

If the person with a disability lacks mental capacity, even if the person has a living parent or grandparent, a legal guardian may be necessary to actually transfer the person's funds into the SNT. *See* discussion about use of Powers of Attorney in establishing trusts above, at p. 11.

If the person has no parent, grandparent, or legal guardian, then EITHER a court proceeding is necessary to establish an individual SNT, or the person may enroll in a pooled SNT. To “establish” (join, enroll in) the pooled SNT, the person must either have mental capacity or a power of attorney with express power to establish an SNT.

Age 65 or Over

If the client is AGE 65 OR OVER, the sole option is a POOLED SNT.

There are over 20 pooled trusts available in New York State.¹⁰⁰ They are all administered by non-profit organizations serving people with disabilities, and most of them were established with the goal of sheltering excess resources, not income. However, as of this writing, there are ten pooled trusts known to the authors that allow beneficiaries to contribute monthly excess income for purposes of eliminating a Medicaid spend-down:

1. Catholic Family Center
<http://www.cfcrochester.org/>
2. Center for Disability Rights, Inc.
<http://www.cdmnys.org>

3. Community Living Corporation (CLC)
<http://www.clcpooledtrust.org>
4. Future Care Community Pooled Trust
<http://www.futurecareplanning.org/>
5. LCG Community Trust
<http://www.lcgcs.org/>
6. NYSARC, Inc. Trust Services
<http://nysarctrustservices.org>
7. The Rose and Maurice Halpern Lifetime Care Foundation at OHEL
<http://www.ohelfamily.org/>
8. The Theresa Foundation Pooled Trust of New York
<http://www.theresafoundation.org>
9. United Community Services of Boro Park
(718) 854-9300
10. Western New York Coalition Pooled Trusts
<http://www.lsed.org/pooled.trusts.php>

Contact info and fee schedules of trusts at <http://wnylc.com/health/entry/4/>.

Special Rules about Assigning Income into a Trust

The Social Security Act prohibits assignment of Social Security income.¹⁰¹ Because of this provision, a person cannot simply direct Social Security to deposit their check directly into their SNT account. However, while the person must receive their Social Security check directly each month, they may then voluntarily transmit all or part of the funds into their SNT each month.

This provision might appear to preclude the assignment of Social Security benefits to an SNT entirely, but the courts have made clear that the sole purpose of Section 407 is to prevent creditors from attaching or garnishing Social Security payments.¹⁰² However, in *Reames v. Oklahoma*,¹⁰³ a nursing home resident was barred from placing her Social Security into an SNT to eliminate her monthly spend-down because of the anti-assignment provisions. This decision, which does not directly affect New York and the 2nd Circuit, should be limited to chronic care or Nursing Home Medicaid budgeting, not Community Medicaid.

Some types of income other than Social Security and pensions, however, MAY be legally assigned to an SNT. For example, income from a lawsuit settlement or an annuity may be assigned.

How Much to Contribute to an SNT

This section focuses on issues related to contributing excess monthly income to an SNT to eliminate a Medicaid spend-down.

One of the trickiest issues with SNTs and Medicaid is trying to determine the appropriate monthly contribution amount. You should decide this BEFORE helping your client to enroll in an SNT, in fact, even before they apply for Medicaid if possible. Sometimes issues arise when working out the expected monthly contribution that will actually render the SNT infeasible for a particular person.

In general, there are three options for the amount of monthly income to contribute: the exact Medicaid spend-down, more than the spend-down, or less than the spend-down. An additional complicating factor throughout is eligibility for the Medicare Savings Program, which generally benefits the person using the SNT but if not planned for properly will cause their spend-down to increase.

Just the Spend-Down

If the goal is simply to contribute the bare minimum necessary to obtain Medicaid without a spend-down, then the person should contribute exactly their spend-down amount. This is the amount that will be deducted from their countable income after the trust is approved by Medicaid, and it will zero out their excess income so that they will have “full Medicaid.”

More than the Spend-Down

In some cases, it will make sense to contribute MORE than the spend-down. For example, if the person with a disability's spend-down is \$600/month but their rent is \$800/month, it might make more sense to use the SNT to pay the whole rent, rather than pay part of the rent and require the person to send a second check each month for the balance of the rent. In this case, the person might actually need to contribute more than \$800/month because the SNT might charge a monthly fee based upon the size of the contribution or number of disbursements requested. If, for example, the monthly fee was \$20, then the person would need to send \$820/month to have enough money left over after the fee to cover the rent bill.

Less than the Spend-Down

The assumption underlying the use of an SNT is that the person with a disability cannot afford their monthly living expenses on only \$825/mo. (the allowable Medicaid income limit for a single person with a disability in 2015). But some people, either due to high income or low living expenses, can

afford to pay some amount toward the cost of their care. In these cases, it is prudent to leave the person with a small spend-down.

For example, let's say a person has income of \$3,000/month and total monthly living expenses of \$1,500/month. Before applying for Medicaid, the person was spending \$1,500/month of their income on home care but now Medicaid will cover that. Let's assume that this person's spend-down would be about \$2,000/month. If the person contributes the whole \$2,000/month to the SNT, they will only be spending \$1,500/month of that money on living expenses. This means that each month, the balance in their SNT account will increase by \$500. It also means that the \$825/month the person is allowed to keep would accumulate in their bank account, potentially causing their balance to rise above the resource limit of \$14,850 (2015). The growing balance in the SNT account is problematic because (a) it could create a transfer penalty for a future Nursing Home Medicaid application, and (b) if the beneficiary dies before spending the funds, the funds are forfeited to the trustee.¹⁰⁴

In this case, it might make more sense for the person only to contribute \$1,500/month to the SNT, to cover their expenses. This will leave the person with a \$500/month spend-down, but apparently they can afford to pay this. If a person can afford to contribute to the cost of their care, there is no reason why they shouldn't.

Effect of the Medicare Savings Program

The Medicare Savings Program ("MSP") is a separate benefit provided through the Medicaid program where the State pays the Medicare Part B premium for low-income individuals. Most Medicare recipients have a monthly premium of \$104.90 deducted from their Social Security check. With MSP, the State will pay the \$104.90 instead so the person's Social Security check will increase by that amount. If someone has income below \$1,325/month (2015), they can get a type of MSP called QI-1.

However, individuals with Medicaid are ineligible for QI-1. Instead, there are two other MSPs – QMB (\$981/mo.) and SLIMB (\$1,177/mo.) – which Medicaid recipients *are* eligible for. The catch is that once the State is paying the Medicare premium, it is no longer allowed as a deduction from income for Medicaid purposes. For people using an SNT, this means they have to increase their contribution to the trust to \$104.90/month more than their Medicaid spend-down amount if they want to get both full Medicaid and MSP.

Example

Sally is age 67. Her gross Social Security is \$1525.90. Her Medicare Part B premium of \$104.90 is deducted from her check, so she receives \$1421.00. She

also pays for a Blue Cross Medigap policy of \$420/quarter or \$140/month. Her spend-down calculation is:

\$1525.90	Gross Income
- 104.90	Medicare Part B premium
- 20.00	Unearned income disregard
- 140.00	Blue Cross - premium
<hr/>	
264.90	TOTAL DEDUCTIONS
1261.00	Countable net income
- 825.00	Medicaid level for ONE (2015)
<hr/>	
436.00	Spend-down

If Sally joins an SNT, and deposits \$436.00 each month into the trust, once Medicaid approves it, she will have NO spend-down.

- \$436 is the minimum she should put into her SNT. If she were using The Center for Disability Rights SNT (for example), she would have a \$20/month fee, which would be deducted from the \$436, leaving \$416/month available for disbursements.
- If she puts in an additional \$104.90/month, she can enroll in a Medicare Savings Program (MSP), and still have no spend-down. In the example above, her Part B premium is deducted from her gross income because she is not in a MSP. If she enrolls in a MSP, the Part B premium will no longer be deducted from her check because Medicaid will pay it. Her net income will go up by \$104.90. If she puts this into the trust, she will still have a ZERO spend-down.
- Remember, she may only enroll in QMB or SLIMB – not QI-1 – if she wants Medicaid too. Someone who does not need Medicaid may join an SNT simply to enroll in a MSP – not just to save \$104.90/month, but because it qualifies them for a prescription assistance program called Extra Help (or the Low Income Subsidy) that drastically lowers out-of-pocket Medicare Part D prescription drug costs. A fair hearing decision found that an SNT can be used to qualify for a MSP.¹⁰⁵

Strategy Tip

Clients complaining of high prescription drug costs may not need Medicaid! They can use an SNT to get MSP, which entitles them to Extra Help with drug costs.

Married Couples

Some additional issues arise when the Medicaid applicant or recipient seeking to use an SNT is married. This is true even when the spouse does not want Medicaid because Medicaid deems the income and resources of the non-applicant spouse to be available to the applicant spouse.¹⁰⁶

There is no such thing as a “couple’s” or joint SNT. By definition, there can only be a single beneficiary of an SNT. Thus, a married couple must decide which spouse should establish an SNT.

If only one spouse requires Medicaid, but the non-applicant spouse’s income gives the applicant a spend-down, an SNT can be properly funded by the non-applicant spouse.¹⁰⁷ Otherwise, the non-applicant spouse would have to do a spousal refusal and risk being sued by the County.

If both spouses need Medicaid, then it doesn’t matter which spouse establishes the SNT; one spouse’s contributions to an SNT will eliminate the spend-down for both spouses.

Example: Only One Spouse Needs Medicaid

Ralph’s income is \$1300/month. He is not disabled and does not need Medicaid. Betty, his wife, has Social Security of \$500/month and needs Medicaid. Her spend down is \$571 (\$1800 combined income less \$1,209 income level for 2 less \$20 disregard = \$571). Betty can join an SNT and deposit \$571 of Ralph’s income, to eliminate Betty’s spend-down. This is better for her than opening her own trust and putting in all of her own \$500 income, since that would still leave a \$71 spend-down.

Example: Both Spouses Need Medicaid

In the same couple, Ralph now needs Medicaid. Their spend-down is still \$571, but now Ralph would establish an SNT himself since he has a disability and put the same amount of money in – \$571 – to eliminate the spend-down for both spouses.

TIP: If both spouses have a disability and need Medicaid, open an SNT only for one instead of both – to save money on fees and administrative hassle. One spouse can even put ALL of their income into the trust – the idea is that the total income left after the SNT deposit should be the \$1,209 couple rate plus enough to pay any health insurance premiums.

Timing Considerations

Ironically, the first step in using a pooled SNT to eliminate a Medicaid spend-down is not necessarily to enroll in a pooled SNT. The timing depends on the type of services the Medicaid applicant receives or seeks.

For example, if the applicant needs home care services, the Medicaid applicant or their family might be spending a lot of money for home care during the pendency of the application. In these situations, the applicant wants the fastest possible turnaround of the Medicaid application.

Unfortunately, if the SNT is established before applying for Medicaid, some Medicaid offices will delay approval of the Medicaid application (and thus the provision of home care services) until the SNT and disability documentation are reviewed. This can add an additional delay of three to six months to the process.

As a result, it makes more sense simply to apply for Medicaid with a spend-down as if there were no SNT (because there isn't if it hasn't been established yet). Then make another submission after the Medicaid acceptance with the SNT and disability paperwork, asking Medicaid to rebudget the case with no spend-down. This way, Medicaid will be approved within the normal 45-day time-frame, without the additional wait required for a disability determination and legal review of trust documents.

Note, however, that this procedure only works when the applicant is seeking long-term care services that can be used to "meet" their spend-down between the Medicaid acceptance and the SNT approval. If the applicant only seeks Medicaid for medical insurance (either because they are uninsured or as secondary coverage to Medicare), then they probably must first enroll in an SNT and then apply for Medicaid, because otherwise the Medicaid application will be denied due to the lack of medical bills to meet the spend-down. If they do have medical bills to meet their spend-down during the months they enroll in an SNT and wait for Medicaid to process it, then you can follow the advice in the preceding paragraph.

An issue for home care recipients is how they will afford to pay their spend-down pending Medicaid approval of the SNT. For example, let's say a person applies for Medicaid home care and has a \$1000/month spend-down. They simultaneously enroll in a pooled SNT and begin contributing \$1000/mo. to the SNT. They begin receiving Medicaid home care services and also will begin receiving bills from their Medicaid Managed Long-Term Care ("MLTC") plan for \$1000/month. They submit their SNT and disability documents to Medicaid, but while they wait an eternity for Medicaid to process these, they must continue sending \$1000/month to their SNT. How can they afford to also pay \$1000/month to the MLTC plan for their spend-down as well?

Prior to the implementation of mandatory MLTC, most home care recipients received personal care (aka "home attendant") or CHHA services. Under those programs, the recipient's home care could not be terminated due to inability to pay the spend-down. Thus, one option was simply not to pay the spend-down, and if the agency complained, remind them that they will be able to back-bill Medicaid for this money once the SNT is approved, because the approval should be retroactive to the date the SNT was established.¹⁰⁸

If no home care, then you must submit SNT documents concurrently with Medicaid application

Strategy Tip

Get home care with a spend-down first, then submit SNT documents to Medicaid

Paying two spend-downs?

Now that MLTC is mandatory for most home care recipients in New York,¹⁰⁹ this strategy has changed somewhat. MLTC plans MAY terminate services due to failure to pay the spend-down. People enrolled in MLTC plans should let their plans know that they are establishing an SNT to eliminate their spend-down. The MLTC plans' contract with the State only allows the plans to involuntarily disenroll members for non-payment of A spend-down when they fail to pay "or make arrangements satisfactory to [the plan] to pay" the spend-down.¹¹⁰ Arguably establishing an SNT to eliminate the spend-down is such an arrangement.

Submitting the SNT Paperwork to Medicaid

IMPORTANT!!! AN SNT WILL NOT ELIMINATE YOUR CLIENT'S SPEND-DOWN UNTIL MEDICAID HAS REVIEWED AND APPROVED YOUR CLIENT'S SNT.

Where to Send SNT Paperwork

- **Personal Care/ Home attendant recipients** – for the small percentage of home care recipients in NYC still receiving home attendant services fee-for-service, submit the paperwork to the CASA office. Outside NYC, submit to the Department of Social Services ("DSS") office. Since 2011, many Medicaid-only home attendant recipients are receiving their services through Mainstream Medicaid Managed Care (MMC) plans. They should submit the trust paperwork to their plans.
- **MLTC members** – these people can submit the paperwork to their plan to have it forwarded to Medicaid, but in NYC you can also submit directly to the Medicaid Home Care Services Program unit at:

NYC Human Resources Administration
Home Care Services Program
785 Atlantic Avenue, 7th Floor
Brooklyn, NY 11238

Telephone: 929-221-0849

- **Other long-term care recipients** – in NYC, contact the long-term care provider to see if they can submit directly to Medicaid through a client representative liaison.
- **Recertification** – if a person recently received a recertification packet from Medicaid, they can take this opportunity to include the SNT and disability paperwork with their recertification.
- **Everyone else** – submit to local Medicaid office/DSS

Regardless of where the paperwork is submitted, be sure to have proof of delivery and date of delivery. Certified mail is a suitable way of doing this.

What to Submit

This is what must be sent to Medicaid for approval of an SNT:

- a copy of the fully executed **Beneficiary Profile Sheet and Joinder Agreement** (most pooled SNTs require that the beneficiary's signature be notarized),
- the **Master Trust Agreement**,
- proof that the spend-down amount was sent to the SNT initially and every month to the present (e.g., **Verification of Deposits**),
- A signed Medicaid-specific HIPAA release appointing you as their representative for matters involving Medicaid eligibility (in NYC, form **MAP-751D** posted at <http://wnylc.com/health/download/63/>)
- **proof of disability** (see below)

Proof of Disability

Because SNTs may only be used by people with disabilities, even people over age 65 must prove that they are disabled. The term "disabled" here is defined the same as for Social Security benefits based on disability: Supplemental Security Income ("SSI") and Social Security Disability Insurance ("SSDI"). If the applicant has already been determined disabled by Social Security for purposes of those benefits, then the only proof of disability that needs to be provided with the SNT is an award letter from SSA showing that they were found disabled or are currently in receipt of benefits.

However, an applicant need not be in receipt of those benefits to be eligible to use an SNT, because the NY State Medicaid program can make a disability determination applying the SSA rules. NY State and NYC have issued procedures for determining disability, and particularly for people over age 65. These are all posted at <http://wnylc.com/health/entry/128/>.

Helpful resources:

- Social Security Bluebook – Listings of Impairments¹¹¹
- Medicaid Disability Manual¹¹²
- N.Y. Dep't of Health, Informational Letter: Pooled Trusts & Disability Determinations for Individuals 65 Years of Age & Older, 05 OMM/INF-1 (April 19, 2005), available at <http://tinyurl.com/B7ULA5> and <http://tinyurl.com/CN7GK6>.¹¹³

If the person was ever approved for SSI or SSDI (and was not subsequently found UN-disabled), then proof of disability is just an Award Letter from SSA:

<http://ssa.gov/beve>

- Says Form M-11q (NYC physician’s request for personal care services) is NOT sufficient to establish disability. Instead, the forms DSS-486 and LDSS-1151 must be submitted.
- Uses special rules for determining disability for people over age 65 from Social Security Ruling No. SSR 03-03p.¹¹⁴

In 2012, the NY State Medicaid program changed the forms and procedure for Medicaid disability determinations.¹¹⁵ The forms themselves are less onerous, but now the State requires us to provide medical records from the treating physician(s), which can add significantly to your preparation time.

As discussed below, there are special medical-vocational profiles for certain conditions which allow you to circumvent some portions of the five-step sequential evaluation process used by Social Security in disability determinations. There are directives from SSA and the NY State Department of Health that discuss the application of these profiles.¹¹⁶

You must submit the following items to the local district, which in turn forwards them to Albany to determine disability. The forms are:

- **Form DSS-486T – Medical Report for Determination of Disability**
Filled out by treating physician(s). Recently shortened from 25 pages to just one. Available at http://www.health.ny.gov/health_care/medicaid/publications/docs/gis/12ma027att1.pdf
 - Applicable medical records (e.g., progress notes, testing reports, hospital discharge reports, etc.) for the most recent 12 months, or for the desired disability determination timeframe, from every provider that fills out a DSS-486T and any recent hospitalizations and nursing home stays.
 - **Form DSS-1151 – Disability Interview**
Completed by the person with a disability or their family or advocate. This form records educational and work background, and sources of medical treatment. Every physician that is listed on this form should fill out a 486T and 12 months of medical records from every provider listed, including hospitals and nursing homes, also need to be provided to the State. There is no requirement to list all physicians and providers seen on this form. Available at http://www.health.ny.gov/health_care/medicaid/publications/docs/gis/12ma027att2.pdf
- If you run out of space for all the doctors/hospitals, use: http://www.health.ny.gov/health_care/medicaid/publications/docs/gis/12ma027att2a.pdf

- **Form OCA-960-3** signed and initialed NY Office of Court Administration HIPAA Releases with the provider information left blank:
http://www.nycourts.gov/forms/hipaa_fillable.pdf

Proving disability can be a complicated process but is made easier for those over age 65. A five-step sequential evaluation process is used for everyone. Although it can seem quite involved (as it definitely is for those applying for Social Security disability benefits), our experience has been that the disability reviewers in Albany apply this method in a more streamlined fashion, particularly for elderly applicants who are only seeking a disability determination to enable them to use an SNT. However, it is helpful to know how the sequential evaluation works so that you can ensure the person with a disability meets the standard.

Sequential Evaluation in a Nutshell

1. Is the individual working?

If the individual is performing substantial gainful activity (“SGA”), then they cannot be determined disabled. Work is generally considered not to be SGA if the individual earns less than \$1,130/month (2016).¹¹⁷

2. Does the individual have a medically-determinable, permanent, severe impairment?

- **Medically-determinable:** the impairment must be proven by adequate medical evidence (this is why the 486 must be completed by a physician)
- **Permanent:** the impairment must be likely to last for at least 12 months or result in death
- **Severe:** the impairment must significantly limit the individual's physical or mental abilities to do basic work activities. This prong is deemed met for individuals age 72 or older.

3. Does the individual have an impairment that meets or equals a listed impairment?

This step is where you check the Bluebook to see if the individual meets a listing.¹¹⁸ If the impairment perfectly fits the diagnostic and severity criteria of a listing, then the individual should be determined disabled at step three and is not required to advance through further steps. However, you should never assume that someone will be determined disabled on step three. Conversely, just because a person's impairment is not found in the listings does not mean they cannot be determined disabled on a subsequent step.

4. Does the individual have the residual functional capacity (“RFC”) in spite of their impairment to return to past relevant work (“PRW”)?

This is where you land if you fail to meet a listing. PRW is defined as SGA-level work done in the last 15 years. If the individual has no PRW, then proceed to step five. If the individual did have PRW, then the question is whether the impairments prevent them from returning to that work, in light of the individual's age, education, and experience.

5. Does the individual have the residual functional capacity (“RFC”) in spite of their impairment to transition to any other work available in the national economy?

Here, the individual's fate depends upon whether their impairments are solely exertional, non-exertional, or a combination.

- **Solely Exertional:** the individual's RFC is evaluated to determine the exertional level to which they are limited in light of their impairments (e.g., sedentary, light, medium, heavy). Then the medical-vocational guidelines (“The Grids”)¹¹⁹ are used to determine disability in light of

the individual's age, education, and experience.¹²⁰

- **Solely Non-Exertional:** The Grids cannot be used for non-exertional impairments, such as mental impairments.¹²¹ Instead, the agency must consider whether the potential occupational base is limited by a substantial loss of the ability to meet any basic work-related activities. Such activities include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting.¹²²
- **Combination of Exertional and Non-Exertional:** In this case, the Grids will not determine the outcome unless the exertional impairments alone are sufficient to direct a finding of disability based upon the Grids. Otherwise, the non-exertional impairments are considered as above, and the Grids merely provide a framework for decision.¹²³

When preparing the packet to send to Medicaid with the SNT paperwork, it is a good idea to review the Listings to see if your client with a disability meets a listed impairment. You can even provide a printout of the relevant Listing to the person's physician to make sure they address the relevant factors.

EXAMPLE: Alzheimer's disease is listing 12.02 Organic mental disorders. Note that this listing includes many functional impairments, such as "Marked restriction of activities of daily living;" or "Marked difficulties in maintaining social functioning." Be sure to ask Medicaid to consider not only the Form 486 and 1151 but also the assessments done for the home care application that may help. The M11q, the nurse's assessment and/or the Affiliation Physician may document the client's lack of short term memory, restricted activities of daily living, and reduced social functioning.

Impairment is assumed to be "severe" for persons age 72 or over.¹²⁴ This does not mean DISABILITY is assumed, only that they automatically pass step two of the sequential evaluation once they have established a medically-determinable impairment.

Special Medical-Vocational Profiles

There are three special profiles that allow a person to short-circuit the sequential evaluation. These profiles apply if a person does not meet or equal a Listing and allows them to skip steps four and five of the sequence. These profiles are:

- **History of Arduous Unskilled Work**¹²⁵
 - Not working at SGA level, and
 - No more than a marginal education (6th grade level or less), and
 - Work experience of 35 years or more during which they did only arduous unskilled physical labor, and
 - No longer able to do this kind of work because of a severe impairment(s).
- **No Work Experience**¹²⁶
 - Has a severe, medically determinable impairment(s), and
 - Is of advanced age (age 55 or older), and
 - Has a limited education or less (i.e., advancement not beyond 11th grade), and
 - Has no Past Relevant Work experience (i.e., no SGA-level work in the last 15 years).
- **Lifetime Commitment**¹²⁷
 - Not working at SGA level, and
 - Have a lifetime commitment (30 years or more) to a field of work that is unskilled, or is skilled or semi-skilled but with no transferable skills, and
 - Can no longer perform this past work because of a severe impairment(s), and
 - Are closely approaching retirement age (age 60 or older), and
 - Have no more than a limited education (i.e., advancement not beyond 11th grade).

In addition to the DSS-486T and LDSS-1151, we recommend that you write a cover letter that briefly discusses how you believe your client should be determined disabled. Mention in this letter which Listing you believe they meet (if any), and whether any special medical-vocational profile applies. We created a Microsoft Word template that you can use as a starting point for your cover letter: <http://wnylc.com/health/file/64>

After Submitting the Documents to Medicaid

Wait and Advocate

Even though this policy has been in effect for over a decade, there are still many Medicaid workers who are unfamiliar with it. Therefore, it may help to enclose copies of the pertinent directives to remind them of the process. You should also call to confirm receipt and check in every month or so to make sure the package hasn't gotten lost in the shuffle. It is not unusual for SNT approvals to take 6 months (or longer!), so it behooves you to push the process along. If you fail to get responses from the worker you are in contact with, move up the chain of command.

Once disability is approved and the trust is approved by legal affairs, the Medicaid office must re-budget the spend-down. Make sure the effective date is what you want - the month that your client first started sending their spend-down to the trust.

Ongoing Trust Maintenance

Even though the pooled trustee takes care of the tax returns and accountings, there is still some ongoing administration for the person with a disability or their representative.

You and your client must make sure that the proper contribution is paid into the SNT each month. If they miss a month, they can't make up for it by doubling their contribution in the next month. This is because Medicaid budgets income in the month of receipt; by the time they hit the next month, it's too late to take any action to reduce countable income in the previous month.

Also make sure that your client submits enough disbursement requests each month to consume most of the available funds in the trust account. It is bad to allow too much of a balance to accumulate in the trust account, because (a) if there's any left upon the client's death, it is forfeited to the trust, and (b) this amount could create a transfer penalty for purposes of Nursing Home Medicaid coverage.¹²⁸ It is not a problem to allow a relatively small balance to accumulate (for example, if the client is saving up for a major purchase, or for annual trustee fees).

Remember also that the client's income may fluctuate from year to year, as will the Medicaid income limit. As a result, the spend-down amount may change over time. At the end of each year, it is a good idea to re-do the calculations discussed at page 53 above and adjust the monthly contribution to avoid a new spend-down.

To locate contacts dealing with pooled SNT submissions in NYC, see our unofficial contact lists at:

<http://wnylc.com/health/file/27/>

<http://wnylc.com/health/file/93/>

Monthly contributions

Monthly disbursements

Adjustments to contribution amount

Watch out for recerts!

Finally, remember that Medicaid recipients must recertify annually. In order to avoid having the client's spend-down become resurrected upon recertification, make sure to enclose with the recertification packet proof of the last twelve months' contributions to the SNT.

Summary of SNT Rules for Various Benefits

Benefit	SNT considered a resource?	Is Transfer of a Lump sum or Asset into an SNT Penalized?	SNT disbursements that ARE counted as income	SNT disbursements that ARE NOT counted as income
Temporary Assistance	No.	No, but only IF SNT created before or simultaneously with receipt of lump sum. Otherwise, harsh "lump sum" rule deems lump sum available as income for penalty period.	Expenses related to: <ul style="list-style-type: none"> • Day-to-day living • Hobbies • Vacations • Recreation • Entertainment 	Expenses related to "supplemental" needs: <ul style="list-style-type: none"> • Education • Medical (including health insurance) • Childcare • Special needs of disabled (house-keeping, social workers, aides, therapists, legal expenses)
SNAP	Most SNAP recipients have no resource test. For those who do, the SNT should not be considered a resource, but may require court order if individual (d)(4)(A) trust.	Disqualification up to 12 months based on "knowing" transfers within 3 months pre-application or after eligibility determination, made with intent to obtain or maintain eligibility.	Disbursements directly to the household for normal living expenses (e.g. rent or mortgage, clothing, food eaten at home)	<ul style="list-style-type: none"> • Reimbursements or past or future expenses that are 1) not a gain or benefit to the household AND 2) are not a normal living expense • Vendor payments directly to third party
HEAP	No resource test.	No transfer penalty.	Unclear.	Unclear.
SCRIE	No resource test.	No transfer penalty.	Unclear.	Unclear.

Summary of SNT Rules for Various Benefits

Benefit	SNT considered a resource?	Is Transfer of a Lump sum or Asset into an SNT Penalized?	SNT disbursements that ARE counted as income	SNT disbursements that ARE NOT counted as income
Section 8 / Public Housing	No as long as trustee is not a household member.	<p>Yes, if principal more than \$5000, for two years following the transfer into trust, the family's Annual Income increases by the greater of:</p> <ul style="list-style-type: none"> • actual income from the assets or • 2% of the value of the transferred asset. 	<ul style="list-style-type: none"> • Regular payments to household • Distribution of interest or dividend income earned by trust 	<ul style="list-style-type: none"> • Reimbursed medical costs • Sporadic, nonrecurring, or temporary payments • Distribution of the principal of the trust should not count
SSI	No.	<ul style="list-style-type: none"> • Under age 65: No transfer penalty for assets placed in trust. • Age 65+: Transfer penalty for assets placed in trust for up to 36-month disqualification, with 36-month look-back. 	<ul style="list-style-type: none"> • Payments for food or shelter items will reduce SSI benefit by lower of actual value of benefit or one-third of the Federal Benefit Rate. <ul style="list-style-type: none"> – Shelter items include rent, mortgage, property taxes, heating fuel, gas, electricity, water, sewer, garbage removal, property insurance required by a mortgage • Cash 	<ul style="list-style-type: none"> • Clothing purchase • Insurance (property, fire, theft, etc.) held at the owner's or renter's option • Cable, telephone, cell phone, and internet service • Travel, local transportation, entertainment, educational expenses • Pre-payment of burial expenses is permitted through a funeral agreement – but only before death of beneficiary
Medicaid – Institutional (nursing home)	No – if individual (d)(4)(A) trust established before age 65, or funds deposited into pooled trust account before age 65.	<ul style="list-style-type: none"> • NO if individual under age 65. • YES if individual age 65+. 	<ul style="list-style-type: none"> • Cash • Trust may not pay for services that could be covered by Medicaid or that are not solely for benefit of beneficiary 	<p>In-kind 3rd party vendor payments for expenses not covered by Medicaid are OK</p> <ul style="list-style-type: none"> • Since nursing home rate includes food, etc. must be items or services to supplement Medicaid, e.g. private aide, clothing, entertainment

Summary of SNT Rules for Various
Benefits

Benefit	SNT considered a resource?	Is Transfer of a Lump sum or Asset into an SNT Penalized?	SNT disbursements that ARE counted as income	SNT disbursements that ARE NOT counted as income
Non-MAGI Medicaid – Community (includes most home care, assisted living, and waivers)	No	<ul style="list-style-type: none"> • NO if individual under age 65. • NO if individual age 65+, but transfer penalty for Institutional Medicaid if within 5 years of institutionalization and funds not paid out for expenses. 	<ul style="list-style-type: none"> • Cash • Payment for items that could be covered by Medicaid • Payments not solely for benefit of beneficiary 	In-kind 3 rd party vendor payments for any expenses – rent, food, clothing, travel, entertainment, education, household items, etc.

Endnotes

Guide to Online Citations

All of the sources of law cited in this manual are available for free online. Alternate internet citations are provided in some cases, but to avoid lengthy URLs they have been omitted for most recurring sources. This guide will lead you to the general website for each source, from which you can obtain any particular section or page by using the citation provided in the endnote. The Social Services Law and NYCRR are also available on Lexis and WestLaw.

United States Code

<http://www.law.cornell.edu/uscode/>

Code of Federal Regulations

<http://www.gpoaccess.gov/ecfr/>

Social Security Administration Program Operations Manual System (POMS)

<http://policy.ssa.gov/poms.nsf>

N.Y. Social Services Law

<http://public.leginfo.state.ny.us> – click on Laws of New York, and then SOS - Social Services Law

N.Y. Codes, Rules and Regulations, Title 18

http://nyhealth.gov/regulations/nycrr/title_18/

Medicaid Reference Guide (MRG)

http://www.health.ny.gov/health_care/medicaid/reference/mrg/

Note that each section of the MRG includes citations to the Social Services Law, NYCRR, and administrative directives pertaining to that section, so it is a good idea to start with the MRG section and work backward to the other sources.

Administrative Directives, General Information System messages and Informational Letters (1995-present)

http://nyhealth.gov/health_care/medicaid/publications/

Administrative Directives, General Information System messages and Informational Letters (older than 1995); also includes Local Commissioners Memoranda

<http://onlineresources.wnyc.net/pb/default.asp>

- 1 N.Y. Estates, Powers and Trusts Law § 7-1.12.
- 2 Social Security Administration, Program Operations Manual System (POMS) SI 01120.200(D)(1)(a) (January 13, 2009), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120200>.
- 3 42 U.S.C §§.1396a(a)(10)(C)(i)(III); 42 C.F.R. §§ 435.831(b), 435.845, 436.601.
- 4 42 U.S.C. § 1396p(d)(4)(A) and (C).
- 5 42 U.S.C. § 1396p(d)(4)(A).
- 6 42 U.S.C. § 1396p(d)(4)(C).
- 7 42 U.S.C. § 1396p(d)(4)(C).
- 8 SSA, POMS SI 01120.203(B)(1)(g) (January 29, 2010), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120203>.
- 9 SSA, POMS SI 01120.203(B)(2)(f) (January 29, 2010), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120203>.
- 10 N.Y. General Obligations Law § 5-1513. But see N.Y. Gen. Oblig. L. § 5-1502N, construing the language conveying authority over “all other matters,” which arguably includes establishment and funding of a trust, including a Supplemental Needs Trust.
- 11 N.Y. Gen. Oblig. L. § 5-1514.
- 12 42 U.S.C. § 1396p(c)(2)(B)(iv); N.Y. Soc. Serv. L. § 366 subd. 5(d)(3)(ii)(C); 18 N.Y.C.R.R. § 360-4.4 (c)(2)(iii)(c)(1)(iv).
- 13 SSA, POMS SI 01150.121 (July 21, 2010), available at <http://policy.ssa.gov/poms.nsf/lnx/0501150121>.
- 14 Correri v. N.Y. Dep’t of Health, Index No. 017372/04 (N.Y. Sup. Ct. Nassau County 2005), available at <http://wnylc.com/health/download/55/>; see also Kaiser v. N.Y. Dep’t of Health, 824 N.Y.S.2d 755 (N.Y. Sup. Ct. Nassau County, July 24, 2006).
- 15 Jennings v. Comm’r. Nassau DSS, 893 N.Y.S.2d 103 (2d Dept. Jan. 5, 2010).
- 16 42 U.S.C. § 1396p(d)(4)(A) and (d)(4)(c); N.Y. Social Services Law § 366.2(b)(2)(iii); N.Y. Dep’t of Health, Administrative Directive: OBRA ’93 Provisions on Transfers and Trusts, 96 ADM-8 (March 29, 1996), available at <http://tinyurl.com/375G63>; N.Y. Dep’t of Health, Medicaid Reference Guide at 358 (“MRG” June 2010), available at http://www.health.ny.gov/health_care/medicaid/reference/mrg/.
- 17 N.Y. Dep’t of Health, Administrative Directive: Deficit Reduction Act of 2005 – Long-Term Care Medicaid Eligibility Changes, 06 OMM/ADM-5 at 3 (July 20, 2006), available with attachments at http://www.health.state.ny.us/health_care/medicaid/publications/pub2006adm.htm; MRG Resources at 441 (June 2010).

- ¹⁸ Advocates Guide to MAGI, available at <http://www.healthlaw.org/publications/agmagi#.VRSRaOFO3O>. Also see NYS DOH ADM 2013 ADM-03, posted with related directives at <http://www.wnylc.com/health/entry/193/>.
- ¹⁹ For more information on the Deficit Reduction Act, see <http://wnylc.com/health/entry/38/>.
- ²⁰ N.Y. Dep't of Health, General Information System Message: Transfers to Pooled Trusts for Disabled Individuals Age 65 and Over, GIS 08 MA/020 (July 24, 2008), available at <http://onlineresources.wnylc.net/pb/docs/08ma020.pdf>.
- ²¹ Id.
- ²² See article about waivers in NYS at <http://wnylc.com/health/entry/129/>.
Long-Term Home Health Care Program (LTHHCP, aka "Lombardi"): N.Y. Soc. Serv. L. §§ 367-c, 366(6); 10 N.Y.C.R.R. § 505.21; 83 ADM-74; 85 ADM-27 [these old directives are not available online].
Traumatic Brain Injury (TBI) Waiver Program: N.Y. Pub. Health L. § 2740 et seq.; 95 LCM-70 (http://onlineresources.wnylc.net/pb/docs/95_lcm-070.pdf), 96 INF-21 (http://onlineresources.wnylc.net/pb/docs/96_inf-21.pdf).
Nursing Home Transition and Diversion Waiver: N.Y. Soc. Serv. L. § 366(6-a); 08 OLTC/ADM-1 (<http://onlineresources.wnylc.net/pb/docs/08oltcadm-1.pdf>); GIS 08 OLTC/003 (<http://onlineresources.wnylc.net/pb/docs/08oltc003.pdf>).
Office of People With Developmental Disabilities (OPWDD) Waiver: N.Y. Soc. Serv. L. § 366(7); 92 INF-33 (http://onlineresources.wnylc.net/pb/docs/92_inf-33.pdf), 92 LCM-170 (http://onlineresources.wnylc.net/pb/docs/92_lcm-170.pdf), 94 LCM-24 (http://onlineresources.wnylc.net/pb/docs/94_lcm-024.pdf), and 94 LCM-137 (http://onlineresources.wnylc.net/pb/docs/94_lcm-137.pdf).
AIDS Home Care Program: N.Y. Soc. Serv. L. § 367-e; 18 N.Y.C.R.R. § 505.21(a)(2).
- ²³ N.Y. Soc. Serv. L. § 366.5(e)(1)(vii).
- ²⁴ N.Y. Dep't of Health, General Information System Message: Transfer of Assets and Medicaid Waiver Applicants/Recipients, GIS 07 MA/018 (September 24, 2007), available at <http://tinyurl.com/CAJF6M>.
- ²⁵ 18 N.Y.C.R.R. § 360-4.3(e).
- ²⁶ 18 N.Y.C.R.R. § 360-4.3(e).
- ²⁷ In the Matter of Mary O., Fair Hearing Decision No. 3945750N (February 25, 2004), available from Fair Hearing Database at <http://onlineresources.wnylc.net>.
- ²⁸ N.Y. Dep't of Health, Department Release – Transmittal No. 96 ADM-8 (January 3, 1997), available at http://www.health.state.ny.us/health_care/medicaid/publications/docs/adm/departmentrelease1-97.pdf.
- ²⁹ In the Matter of D.C., Fair Hearing Decision No. 4080991J (May 17, 2004), available from Fair Hearing Database at <http://onlineresources.wnylc.net>.

- 30 42 C.F.R. § 435.832(c); 18 N.Y.C.R.R. § 360.9.
- 31 Wong v. Doar, 571 F.3d 247 (2d Cir. 2009).
- 32 Jennings v. Comm’r. Nassau DSS, 893 N.Y.S.2d 103 (2nd Dept. Jan. 5, 2010).
- 33 NYS DOH GIS 14 MA/015, issued August 5, 2014, available at http://www.health.ny.gov/health_care/medicaid/publications/index.htm,
- 34 Available at http://www.health.ny.gov/health_care/medicaid/publications/pub2014gis.htm.
- 35 See 42 C.F.R. § 435.733 regarding post-eligibility budgeting; Reames v. Oklahoma, 411 F.3d 1164 (10th Cir. 2005), Wong v. Doar, 571 F.3d 247 (2d Cir. N.Y. 2009).
- 36 MRG Income at 283 (January 2011).
- 37 The sections addressing SNTs are at POMS SI 01120.203 (January 29, 2010), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120203>.
- 38 42 U.S.C. § 1382b(e)(5); SSA POMS SI 01120.203.
- 39 42 U.S.C. § 1382b(e)(5).
- 40 SSA POMS SI 01120.203(B)(1)(a) (June 16, 2011), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120203> (“A trust which meets the exception to counting the trust under the SSI statutory trust provisions of Section 1613(e) must still be evaluated under the instructions in SI 01120.200 to determine if it is a countable resource.”)
- 41 SSA POMS SI 01120.200(D)(1)(a) (January 13, 2009), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120200>.
- 42 N.Y. Estates, Powers and Trusts Law § 7-1.9 (providing that a trust can be revoked upon written consent of all persons with beneficial interest in trust property, and that a disposition in favor of a class of persons, such as heirs, next of kin, or distributees, does not create a beneficial interest in such persons such that their consent is required for revocation. The upshot: the grantor of such a trust may unilaterally revoke it.)
- 43 SSA POMS SI NY01120.200(B)(1) (April 26, 2005), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120200NY>.
- 44 See also SSA POMS SI 01120.201(F)(2) (February 3, 2010), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120201> (a trust may still be deemed for the “sole benefit” of the individual even if the State, the pooled trust organization, or other contingent remaindermen are named).
- 45 42 U.S.C. § 1382b(c)(1)(C)(ii)(IV).
- 46 42 U.S.C. § 1382b(c)(1)(A).
- 47 42 U.S.C. § 1382b(c)(1)(A)(iv).
- 48 42 U.S.C. § 1382(a)(2)(A); 20 C.F.R. § 416.1130(b); Ruppert v. Bowen, 871 F.2d 1172 (2d Cir. 1989). The Federal benefit rate and N.Y. state supplement amounts

- are updated every year, and are announced by the N.Y. State Office of Temporary and Disability Assistance (OTDA) on their website at <http://otda.ny.gov/policy/directives/2010/>.
- ⁴⁹ Fed. Reg., February 7, 2005 [Volume 70, Number 24], pp. 6340-6345, amending 20 C.F.R. §§ 416.1102, 1003, and other sections.
- ⁵⁰ SSA POMS SI 00835.465 (February 18, 1997), available at <http://policy.ssa.gov/poms.nsf/lnx/0500835465>.
- ⁵¹ Id.
- ⁵² N.Y. Office of Temporary and Disability Assistance (“OTDA”), Temporary Assistance Source Book, available at <http://www.otda.state.ny.us/main/ta/TASB.pdf>.
- ⁵³ N.Y. Soc. Serv. L. § 350-j.
- ⁵⁴ N.Y. OTDA, General Information System Message: 2003 Emergency Program Income Guidelines for Emergency Safety Net Assistance (ESNA) and Emergency Assistance to Needy Families with Children (EAF), GIS 03 TA/DC005 (February 20, 2003), available at <http://www.wnyc.net/pb/docs/GIS03TA-DC005.pdf>.
- ⁵⁵ N.Y. Soc. Serv. L. § 350-j; 18 N.Y.C.R.R. Part 372.
- ⁵⁶ N.Y. Office of Temp. and Disability Assistance, Informational Letter 01-INF-08 (“2001 OTDA Letter,” March 8, 2001), available at http://www.otda.state.ny.us/main/directives/2001/INF/01_INF-08.pdf.
- ⁵⁷ Id.
- ⁵⁸ TA Source Book, p. 369.
- ⁵⁹ TA Source Book, pp. 369-371.
- ⁶⁰ 18 N.Y.C.R.R. § 352.29(h); 2001 OTDA letter p. 3.
- ⁶¹ 2001 OTDA letter p. 3.
- ⁶² OTDA, Administrative Directive 03 ADM-10 (November 19, 2003).
- ⁶³ Id. at 3.
- ⁶⁴ Id. at 3-4.
- ⁶⁵ 2001 OTDA Letter at p. 4.
- ⁶⁶ 2001 OTDA Letter at p. 4; N.Y. E.P.T.L. § 7-1.12; 18 N.Y.C.R.R. § 352.16(a).
- ⁶⁷ See N.Y. OTDA Food Stamp Source Book, available at <http://otda.ny.gov/main/programs/food-stamps/FSSB.pdf>, and <http://www.nyc.gov/html/hra/html/directory/food.shtml>.
- ⁶⁸ N.Y. OTDA, Informational Letter: Categorical Eligibility for Food Stamps Q & As, 08 INF-03, available at <http://otda.ny.gov/main/policy/directives/2008/INF/08-INF-03.pdf>. See also 10-INF-07, LDSS-4943 (11/09): “Food Stamp Benefits Categorical Eligibility Desk-Aid” (11/09) available at <http://otda.ny.gov/main/policy/directives/2010/INF/10->

- [INF-07-Attachment-1.pdf](#); 10-INF-06 Attachment 1 - LDSS-4314 "FS Benefits Household Composition Desk Guide, available at <http://otda.ny.gov/main/policy/directives/2010/INF/10-INF-06-Attachment-1.pdf>.
- ⁶⁹ NY OTDA General Information System Message GIS 14 TA/DC038 available at <https://otda.ny.gov/policy/gis/2014/14DC038.pdf>.
- ⁷⁰ 7 C.F.R. § 273.8(e)(8)(i) through (iv).
- ⁷¹ 7 C.F.R. § 273.8(e)(8)(i) through (iv); OTDA Food Stamp Source Book at pp. 363 - 364; 2001 OTDA Letter at p. 5.
- ⁷² 7 C.F.R. § 273.8(e)(8)(ii).
- ⁷³ 7 C.F.R. § 273.8(e)(8)(iv)(A)
- ⁷⁴ OTDA Food Stamp Source Book, *supra*, 17-16 to 17-17.
- ⁷⁵ 2001 OTDA Letter at p. 5.
- ⁷⁶ 2001 OTDA Letter at p. 5.
- ⁷⁷ Food stamp households may deduct certain rent and other shelter costs from their income, thereby increasing their Food Stamp allotment. In households with an elderly person (age 60+), the shelter expense deduction is not limited – the actual rent or other expense may be deducted. In other households, the shelter deduction is limited. Elderly households may also deduct unreimbursed medical expenses exceeding \$35/month from their income. *See* Food Stamp Source Book at 245, 252 *et seq.* This SNT rule precludes a recipient from claiming an income deduction for a rent expense where that expense has been paid by the SNT.
- ⁷⁸ OTDA Food Stamp Source Book, *supra*, p. 278 (formatting changes are added for emphasis); see also 2001 OTDA Letter at p. 5.
- ⁷⁹ OTDA Food Stamp Source Book, *supra*, pp. 266, 278.
- ⁸⁰ Check website of NYS Office of Temporary & Disability Assistance for updates <http://otda.ny.gov/programs/heap/program.asp#income>.
- ⁸¹ N.Y. Soc. Serv. L. § 97; 18 N.Y.C.R.R. § 393.1; http://www.nyc.gov/html/dfta/html/senior/benefit_guide.shtml#heap.
- ⁸² 18 N.Y.C.R.R. § 393.4(d).
- ⁸³ 2001 OTDA Letter p. 5.
- ⁸⁴ 9 N.Y.C.R.R. § 2202.20, available at <http://www.metcouncil.net/factsheets/9NYCRR2200-2211.html#2202.20>
- ⁸⁵ http://www.nyc.gov/html/dfta/html/scr/tenant_whocanapply.shtml
- ⁸⁶ 9 N.Y.C.R.R. § 2202.20(d).
- ⁸⁷ 24 C.F.R. § 5.609(b)(3). Eff. Feb. 1, 2015, the Passbook Savings Rate was finally reduced from 2 percent to 0.06%, in light of falling interest rates. It remains at 0.06% for 2016. *See* 24 C.F.R. §5.603(b)(3) and U.S. HUD, Notice 16-01, *Passbook*

Savings Rate Effective February 1, 2016, dated Jan. 19, 2016, available at <<http://portal.hud.gov/hudportal/documents/huddoc?id=16-01hsgn.pdf>> (last accessed Mar. 14, 2016) ; Notice 14-16, *Passbook Savings Rate Effective February 1, 2015 and Establishing Future Passbook Savings Rates*, dated Oct. 31, 2014, available at <http://portal.hud.gov/hudportal/documents/huddoc?id=14-15hsgn.pdf>>, last accessed Mar. 14, 2016. Find other HUD notices at http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hud_clips/notices/hsg. This manual has not been updated with the new interest rates. Public Housing Occupancy Guidebook ("PHOG") p. 121-122, <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf>).

⁸⁸ 24 C.F.R. § 982.445.

⁸⁹ 24 C.F.R. § 5.603(b)(2).

⁹⁰ 24 C.F.R. § 5.603.

⁹¹ The decision, at 95 F.Supp.3d at 45-46, relied on HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs, U.S. Department of Housing and Urban Development ("HUD Handbook") 5-39 (Nov. 3, 2014), <http://portal.hud.gov/hudportal/documents/huddoc?id=43503c5HSGH.pdf>.

⁹² See fn 98.

⁹³ Annual Income includes the full amount of wages, salary, overtime, commissions, fees, tips, net income from businesses, interest, dividends, gains from divested investments, other income from real or personal property, social security, annuities, insurance policies, retirement funds, pension, disability or death benefits, unemployment and disability compensation, alimony and child support payments (see PHOG, p. 113-6 and 24 CFR 5.609(b)).

⁹⁴ 24 C.F.R. § 5.609(c)(3),(4) and (9).

⁹⁵ 24 C.F.R. § 5.603(b)(2); PHOG p. 121.

⁹⁶ 24 C.F.R. § 5.609(c)(4).

⁹⁷ 24 C.F.R. § 5.609(b).

⁹⁸ A California state court held that because sums received as a "settlement for personal or property losses" in a suit against a former employer were excludable from annual income under 24 CFR §5.609(c)(3), they would remain exempt when the principal of the settlements was used to fund distributions from an SNT. *Finley v. City of Santa Monica*, No. BS 127077 (Cal. Super. Ct. May 25, 2011), 2011 WL 7116184, available at <http://wnylc.com/health/file/302>. The court interpreted section 5.603(b)2 of the regulations, which says that any income distributed from a trust shall be counted as income, as inapplicable where the source of the corpus of the SNT was otherwise exempt as income. A Massachusetts court reached the opposite result, terminating a Section 8 subsidy after counting distributions from a trust as income. *DeCambre v. Brookline Hous. Auth.*, 95 F.Supp.3d 35 (D. Mass.

2015), *appeal pending*. In DeCambre, the trust payments were for cell phone, cable, and internet bills; veterinary care for companion animals, dental and medical costs; and travel expenses.

⁹⁹ See p. 10, above.

¹⁰⁰ See NYHealthAccess.org, List of Pooled SNTs in New York State, at <http://wnylc.com/health/entry/4/> (updated March 2015 but not guaranteed to be complete).

¹⁰¹ 42 U.S.C. § 407.

¹⁰² Mason v. Sybinski, 280 F.3d 788 (7th Cir. 2002); Kriegbaum v. Katz, 909 F.2d 70, 73 (2d Cir. 1990); Birdwell v. Concannon, 2 F.3d 1156 (9th Cir. 1993). Thus, Section 407 does not bar the voluntary assignment of funds (e.g., for the purpose of paying for institutional care), Fetterusso v. State of New York, 898 F.2d 322 (2d Cir. 1990). Accord, Johnson v. Wing, 178 F.3d 611 (2d Cir. 1999) (Section 407 does not bar voluntary agreement to pay costs of homeless shelter); Lopez v. Bowman, 302 F.3d 900 (9th Cir. 2002) (Section 407 does not bar voluntary arrangement with bank to apply otherwise exempt funds to overdraft charges). Research is excerpt of letter by Ed Josephson, South Brooklyn Legal Services, to ALJ in fair hearing.

¹⁰³ Reames v. Oklahoma, 411 F.3d 1164 (10th Cir. 2005).

¹⁰⁴ See p. 16.

¹⁰⁵ In the Matter of R.T., Fair Hearing No. 4399513P (January 31, 2006), available from Fair Hearing Database at <http://onlineresources.wnyc.net>.

¹⁰⁶ MRG Income at 237 (August 1999).

¹⁰⁷ In the Matter of J.T., Fair Hearing No. 4576742M (November 16, 2006), available from Fair Hearing Database at <http://onlineresources.wnyc.net>.

¹⁰⁸ We have heard anecdotal evidence that personal care agencies cannot back-bill farther than two years. Even if the SNT doesn't take that long, it can still be difficult to get the correct effective date of the rebudgeting to zero spend-down, and to get the agency to correct their billing records. If the effective date is wrong, then you should request a fair hearing to challenge this.

¹⁰⁹ See article on Medicaid Redesign initiatives at <http://wnylc.com/health/news/20/>.

¹¹⁰ N.Y. Dep't of Health, MANAGED LONG TERM CARE PARTIAL CAPITATION CONTRACT, Art. V, §(D)(5)(b) at 16 [p.23 of PDF], available at http://www.health.ny.gov/health_care/medicaid/redesign/docs/mrt90_partial_capitation_model.pdf ("Model Contract").

¹¹¹ 20 C.F.R. Part 404, Subpart P, Appendix 1 ("Blue Book"), available at <http://ssa.gov/disability/professionals/bluebook/>.

¹¹² N.Y. Dep't of Health, Medicaid Disability Manual (December 2010), available at <http://tinyurl.com/PNBO6>.

- ¹¹³ See also NYC Human Resources Administration, Medicaid Alert: Disability Determinations for Individuals with a Pooled Trust (July 7, 2005), available at <http://wnylc.com/health/file/58>.
- ¹¹⁴ Social Security Administration, Evaluation of Disability and Blindness in Initial Claims for Individuals Aged 65 or Older, SSR 03-3p (November 10, 2003), available at <http://tinyurl.com/OVOCX>.
- ¹¹⁵ N.Y. Dep't of Health, General Information System Message: Medical Evidence Gathering for Disability Determinations – Adult Cases, GIS 12 MA/027 (October 12, 2012), available at http://www.health.ny.gov/health_care/medicaid/publications/docs/gis/12ma027.pdf; NYC Human Resources Administration, Medicaid Alert: Medical Evidence Gathering for Adult Disability Determinations, (January 24, 2013), available at <http://wnylc.com/health/download/402/>.
- ¹¹⁶ SSA, Medical-Vocational Profiles Showing An Inability To Make An Adjustment To Other Work, SSR 82-63 (August 20, 1980), available at <http://tinyurl.com/6JCVUMH>; N.Y. Dep't of Health, Medicaid Disability Manual at II.D.2.f [page 13] (December 2010), available at <http://tinyurl.com/6K2CWFZ>; N.Y. Dep't of Health, General Information System Message: Additional Special Medical -Vocational Profile for the Medicaid Disability Manual, GIS 06 MA/020 (July 28, 2006), available at <http://tinyurl.com/SXVBL>.
- ¹¹⁷ This figure changes annually. See <http://www.ssa.gov/oact/cola/sga.html>.
- ¹¹⁸ See note 114.
- ¹¹⁹ 20 C.F.R. Part 404, Subpart P, Appendix 2, available at <http://tinyurl.com/2FQTSGW>.
- ¹²⁰ 20 C.F.R. § 404.1569a(b).
- ¹²¹ 20 C.F.R. § 404.1569a(c)(2).
- ¹²² 20 C.F.R. § 404.1569a(c)(1); SSA, Titles II And XVI: Capability To Do Other Work – The Medical-Vocational Rules As A Framework For Evaluating Solely Nonexertional Impairments, SSR 85-15 (August 20, 1980), available at <http://tinyurl.com/6CB83ZF>.
- ¹²³ 20 C.F.R. § 404.1569a(d).
- ¹²⁴ Social Security Administration, Evaluation of Disability and Blindness in Initial Claims for Individuals Aged 65 or Older, SSR 03-3p (November 10, 2003), available at <http://tinyurl.com/OVOCX>.
- ¹²⁵ SSA, Medical-Vocational Profiles Showing An Inability To Make An Adjustment To Other Work, SSR 82-63 (August 20, 1980), available at <http://tinyurl.com/6JCVUMH>; N.Y. Dep't of Health, Medicaid Disability Manual at II.D.2.f.1 [page 13] (December 2010), available at <http://tinyurl.com/6K2CWFZ>.
- ¹²⁶ SSA, Medical-Vocational Profiles Showing An Inability To Make An Adjustment To Other Work, SSR 82-63 (August 20, 1980), available at

<http://tinyurl.com/6JCVUMH>; N.Y. Dep't of Health, Medicaid Disability Manual at II.D.2.f.2 [page 13] (December 2010), available at <http://tinyurl.com/6K2CWFZ>.

¹²⁷ N.Y. Dep't of Health, General Information System Message: Additional Special Medical -Vocational Profile for the Medicaid Disability Manual, GIS 06 MA/020 (July 28, 2006), available at <http://tinyurl.com/SXVBL>; N.Y. Dep't of Health, Medicaid Disability Manual at II.D.2.f(3) [page 13] (December 2010), available at <http://tinyurl.com/6K2CWFZ>;

¹²⁸ See p.16.