Supplemental Needs Trusts

Impact on Medicaid, SSI and Other Public Benefits – With Rules about Strategies for Handling Lump Sums for Various Benefits


http://nyhealthaccess.org is a joint venture of NYLAG, Empire Justice Center, the Legal Aid Society, and Western New York Law Center with extensive information. This outline is posted at http://www.wnylc.com/health/entry/5/.

By the Evelyn Frank Legal Resources Program (updated Jan. 7, 2019)

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2018-19 Updates:

- Revisions to SSA POMS April 2018 re “Sole Benefit” Rule - expenses that may be paid by SNTs to third parties, and other changes
- Veterans’ pension – added new transfer penalties, asset limits
- ABLE accounts
- 2016 Law changing asset limits for Section 8 and public housing (not yet implemented as of Jan. 2019)

WHAT IS NOT INCLUDED

This manual is not intended for guidance on drafting SNTs, and does not include various sections of the SSA POMS and other laws and regulations that impact drafting of trusts. It is meant to guide advocates for low income people to maximize eligibility for public benefits by using SNTs for resources and lump sums, and for depositing “excess income” for community Medicaid and Medicare Savings Programs.
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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.

On Monday, December 18, 2017, Governor Andrew Cuomo signed into law the "Pooled Trust Notification Bill." This legislation will require -- for the first time -- that Medicaid applicants and recipients who have a spend-down be given notice in plain language that explains the availability of SNTs to eliminate the spend-down for people with income above the Medicaid income limits. The notice shall include information on how to enroll in a trust and how to request the local Dept. of Social Services to rebudget income. Social Services Law § 366, subd. 5(f) and (g), as amended by L. 2017, ch.475, effective June 16, 2018.

The law states that the change is effective 180 days after it becomes law, which would be June 18, 2018. However, the subdivision of the law that is amended requires State Dept. of Health to adopt rules and regulations necessary to carry out the provisions of this section of law. If the Department believes regulations are necessary to implement this law, this may delay implementation beyond six months. Social Services Law § 366, subd. 5(g) as amended. Stay tuned for further information in how new applicants will receive information about the option of using an SNT.

Trust Overview

A trust is a property interest held by an individual or entity (such as a bank), called the trustee, who or which is subject to a fiduciary duty to use the property for the benefit of another (the beneficiary). There are many different types of trusts with a myriad of different uses. They are often used for tax planning reasons which are beyond the scope of this memorandum. Some of the most common other reasons trusts are used in elder law are:

1. **Estate planning** – allow testator to make gifts to family members and others with strings attached, and allow more complex estate plans than possible with a will

2. **Avoidance of probate** – can substitute for a will, and avoid cost and public disclosure of probate
3. **Protection from creditors** – “spendthrift trusts” cannot be reached by creditor claims\(^1\)

4. **Supplementing public benefits** – supplemental needs trusts, also known as special needs trusts or exception trusts

### Trust Terminology

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

**Corpus** – the property conveyed into the trust and accumulated earnings, also known as the principal.

**Medicaid Trust** – a type of inter vivos (living) trust established by an individual, or his/her spouse directly or by a court, guardian, or Power of Attorney, with assets of the individual. Trusts established before August 11, 1993 were “Medicaid Qualifying Trusts.” Trusts established after that date are “Medicaid Trusts.” The trust must be irrevocable in order to exclude the corpus as “resource” for Medicaid. The trust limits the trustee’s discretion to make payments of principal and/or income to the beneficiary, so as to exclude the principal and/or income from Medicaid. Drafting this type of trust is beyond the scope of this outline.\(^2\)

**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 and income should be spent during the beneficiary’s lifetime, under what circumstances the principal may be invaded, and who receives any corpus remaining at the death of the primary beneficiary.

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

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

**Residual beneficiary** (contingent beneficiary or remainderman) - is not a current beneficiary of a trust, but he or she will receive the residual benefit of the trust contingent upon the occurrence of a specific event, such as the death of the primary beneficiary.

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

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**Inter vivos trust (also called a living trust)** is a trust established during the lifetime of the grantor.

**Revocable** – a trust is revocable if the grantor may change his/her mind and dissolve the trust and get his/her money/property back. “If the individual at issue (an applicant, recipient, or deemor) is the grantor of the trust, the trust is usually a resource to that individual if he or she can revoke the trust and reclaim the trust assets. A deemor is generally the ineligible parent or spouse of the individual who is eligible for (or receiving) SSI. Social Security considers the deemor’s income and resources when determining the SSI recipient’s eligibility and payment amount. However, if a third party is the grantor of the trust, and the individual at issue (an applicant, or recipient,...) is the beneficiary of the trust, the trust is not a resource to the beneficiary merely because the trust is revocable by the grantor. In a third party trust situation, the focus should be on whether the individual at issue (applicant, recipient, or deemor) can terminate the trust and obtain the assets for himself or herself.”

**Irrevocable** – a trust is irrevocable if once the grantor establishes and funds the trust, it cannot be dissolved and the assets deposited into the trust may not be withdrawn. Although most grantors would prefer to have the option to change their mind if circumstances change, 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, Self-Funded or Grantor Trust** – (also First Party trust) this means that the settlor (aka grantor) of the trust is the same as the beneficiary.

**Third-Party** – the settlor or grantor and beneficiary are different parties. For example, Uncle Jerry has established a trust for the sole benefit of Nephew Nick.

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

**What Makes a Trust a Supplemental Needs Trust?**

An 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. The Social Security Administration (SSA) has also provided guidance on Supplemental Needs Trusts and “Medicaid Trusts.” Medicaid
rules for the aged, blind, and disabled population cannot be more strict than the SSI rules.

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

1. **They are all irrevocable.** If the settlor/beneficiary could just ask the trustee to dissolve the trust and get all his/her 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 his/her beneficial interest.6

2. **Beneficiary must be disabled.** Not everyone may use an SNT! 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.7 People 65 or older usually have not been determined disabled previously since they may receive Medicaid, SSI, or Social Security Retirement Insurance solely based on their age. New York State has developed a procedure for the state Medicaid program to determine whether they are disabled. This is discussed more at pp. 78-82.

3. **Payback to the State upon death (Self-settled trusts only)**- Funds left in a self-settled trust after the beneficiary dies must be used to pay back Medicaid for the cost of Medicaid services provided; the State Medicaid program must be made the primary remainderman.8 For a pooled trust, funds remaining at death must be kept by a non-profit trustee to be used for the benefit of other beneficiaries with disabilities.9 In an individual trust, funds remaining after paying back Medicaid may be distributed to contingent beneficiaries. 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 in the amount of Medicaid’s claim. Payback to the State Medicaid Program is not required in a third party trust.

4. **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 may not give cash to the beneficiary.

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

1. **Age of disabled person** – whether under 65 or age 65 and over

2. **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 an uncle, in a “third-party” trust
3. **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 impact 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 disabled person’s own funds or the funds of a legally responsible relative such as the parents of a disabled minor child. 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 may 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 if you make any transfers of assets to a trust once you are age 65, you will suffer a transfer penalty for SSI and for Institutional Medicaid.

Payback & Disability Requirements – see infra, p. 8.

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. 10 These SSI rules apply to the
Medicaid program because Medicaid eligibility rules cannot be more restrictive than the eligibility rules for SSI.¹¹

### Two Types of Self-Settled SNT’s: Individual vs. Pooled Trusts

There are 2 kinds of self-settled supplemental needs trusts. The key factor for determining which trust to use is AGE – whether age 65+ or under 65.

1. **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.¹² The harsh rule that only a parent, grandparent, guardian or court order may establish an Individual SNT has been modified to permit the individual contributing his or her money to also establish the trust.¹³

   - MUST BE UNDER AGE 65 – Only people under age 65 with a disability may place their own assets into an Individual SNT. 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.

2. **A Pooled SNT** is established and managed by a non-profit association, that acts as the trustee; a trust company must act as co-trustee. A separate account is maintained “for the sole benefit of” the disabled beneficiary.¹⁴

   MAY BE ANY AGE – A person of any age with a disability may establish and fund a pooled trust account.¹⁵ This is the only option for people age 65 and over. (However, there may be transfer of asset penalties for people 65 or older – see below). These are sometimes called “D4C” trusts after the federal Medicaid statute. See n 14.

### Who May Establish the Trust?

**Individual Trust for people under age 65**

Thanks to the federal Special Needs Fairness Act enacted in 2016, implemented in New York in 2017, adults with a disability may now establish their own individual SNT with their own funds for their own benefit. They no longer need a **parent, grandparent, legal guardian**, or a **court** to establish the trust. This is true for trusts established on or after August 21, 2017, or arguably after Dec. 13, 2016.¹⁶ Trusts established before

There are over 20 non-profit organizations in New York State that offer pooled trusts for individuals with disabilities. We compiled an unofficial list at http://wnylc.com/health/entry/4/. Some operate in only certain geographic areas, or serve certain populations. Their fees and minimum deposits also vary. The chart indicates whether they accept deposit of excess income to eliminate the spend-down, or solely deposits of assets.
Dec. 13, 2016 are under the old rules, and may not be established directly by the individual.

- Even after Dec. 13, 2016, if the person with a disability lacks mental capacity, he or she may still need a legal guardian to establish the trust, unless they have appointed an agent through a validly executed Power of Attorney and Statutory Gift Rider.\(^{17}\)

- A 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.

**Pooled Trust (for people any age, including > 65)**

The *joinder agreement* used to join the master trust may be signed by disabled individuals themselves, if they have mental capacity to sign the forms, or by a parent, grandparent, legal guardian, or a court. “A pooled trust account may be established under a Power of Attorney [POA] given by the individual, a parent, or a grandparent.”\(^{18}\)

**Using a Power of Attorney to Enroll in a Pooled Trust**

To enroll in a pooled SNT, the person must either have mental capacity to execute a joinder agreement, or an agent appointed by a valid Power of Attorney may execute this agreement on their behalf. Several issues have arisen regarding POA’s and trusts in New York.

First, there is a difference of opinion on whether a standard New York Power of Attorney (“POA”) form authorizes the attorney-in-fact to establish a trust.\(^{19}\) To avoid problems, if authority to establish a trust is not specifically enumerated as an additional power in the POA, a new POA should be executed with this language, if possible.

The second change followed the amendments to the New York POA law in 2009 and 2010,\(^{20}\) which requires any POA that authorizes the agent to make transfers or gifts to include a separate Statutory Gift Rider form. NYC HRA in July 2017 issued a Medicaid Alert, *Powers of Attorney and Statutory Gift Riders*, requiring POA’s executed after Sept. 1, 2009 to include a Statutory Gift Rider (SGR) if used to enroll in a pooled trust.\(^{21}\) On June 25, 2018, HRA issued another directive, *Deferral of SNT’s Submitted with Invalid Power Of Attorney*,\(^{22}\) which says that an SNT/ pooled trust signed with a POA without a Statutory Gift Rider will be deferred (rather than rejected outright), with opportunity for the applicant to execute a new POA with a Statutory Gift Rider, assuming capacity to do so. It is unclear if the approval will be retroactive to initial submission of SNT. If a new POA is not submitted, HRA will reject the trust as invalid without this rider.

Under state law, a POA must be executed at the same time as the SGR. Therefore, if there is no SGR, the POA and SGR must be re-executed.
as new or the applicant, if s/he has capacity, may sign a new joinder agreement directly. At least one pooled trust -- CDR-- will amend an existing trust if provided with the re-executed joinder agreement. Then that re-approved trust should be submitted to HRA with the request for approval. NYLAG has had a few trusts approved using this procedure.

NYLAG and the NYSBA Elder Law Section question HRA’s authority to reject a pooled trust signed with a POA that lacks a Statutory Gift Rider but is otherwise valid. If you have a case where the POA cannot be re-executed and the client is harmed if the trust is not approved, contact eflrp@nylag.org.

Payback to State at Death – see page 8 above – and payment of expenses after death
Only limited expenses may be paid after death. The trust may pay expenses of administering the state and state or federal taxes due from the trust because of the death of the beneficiary, but the trust may not pay after the death of the beneficiary other taxes due from the beneficiary’s estate, inheritance taxes due for residual beneficiaries, payment of debts owed to third parties. The trust may not pay funeral expenses after the beneficiary’s death, but may fund a pre-paid funeral arrangement during the beneficiary’s lifetime. Id.

Third-Party Trust
A third-party SNT is one established with funds from someone other than the person with a disability. The third party may not be a legally responsible relative (a parent cannot establish a third party trust for a child under age 21).

No Payback Requirement
A trust established by a parent or other third party with his or her own funds 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. EPTL 7-1.12 (c)(1), Soc. Serv. Law § 101.

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 may 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 or all of the balance left upon death of the beneficiary remain in the trust, and the rest, if any, 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. There is also no SSI transfer penalty for the transferor.

**NOTE:** A parent in a nursing home may not shelter their income by placing it into a pooled or individual SNT for the benefit of their adult child with a disability; a transfer penalty will be imposed. *Jennings v. Comm’r. Nassau DSS*, 893 N.Y.S.2d 103 (2d Dept., 2010 relying on *Wong v. Doar*, infra). Before *Jennings*, some courts found that this did not create a transfer penalty.

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**Is an ABLE Account an Alternative to an SNT?**

**What is an ABLE account?**

“ABLE” is an abbreviation for the Achieving a Better Life Experience Act of 2014, which allows qualified people with disabilities to save for qualified disability expenses without the risk of losing SSI and Medicaid. The funds in the account may be used for disability-related expenses that assist the beneficiary in increasing and/or maintaining his or her health, independence, or quality of life. The New York ABLE Program is administered by the Office of the New York State Comptroller.

**Who may use an ABLE account?**

The individual must have become disabled prior to age 26, and either be entitled to SSI or Social Security Disability Insurance (SSDI) or meet specified criteria for disability. (This seems to exclude people age 65+).

Proof of eligibility isn’t required to open an account. However, eligible individuals should maintain a benefits verification letter, a record of diagnosis, or other relevant documents should they need to prove eligibility at a later time.

**Who may open an ABLE account?**

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**ABLE accounts may only be used for an individual who was disabled prior to reaching age 26.**
Eligible people may open the account for themselves, or a parent or legal guardian may open one on their behalf. An agent of the eligible individual may also open an account under a power of attorney. The eligible individual is the Account Owner and the Beneficiary.

**How much may be deposited into an ABLE account?**

The maximum account balance for a New York ABLE account is $100,000. The maximum deposit per year is $14,000, which may be from one or multiple sources – including the beneficiary, family, a trust or estate, or any third party. An individual may transfer funds from their SNT to their ABLE account, and it will not count as income to the individual. SSA POMS SI 01130.740.

**What may a disabled person spend ABLE account funds on?**

A “Qualified Disability Expense” means any expenses eligible individuals incur that relate to their blindness or disability and are intended to maintain or improve their quality of life.

These qualified expenses include:

- Education
- Health and wellness
- Housing
- Transportation
- Legal fees
- Financial management
- Employment training and support
- Assistive technology
- Personal support services
- Oversight and monitoring
- Funeral/ burial expenses

The NYS Comptroller’s Office recommends that a record of expenses and payment receipts be maintained should they be needed at a later time.

If NY ABLE savings are used for non-qualified expenses, the earnings portion of the withdrawal will be treated as income – subject to federal and applicable state taxes. In most cases, it will also be subject to a 10% federal tax penalty.

**What about account maintenance fees?**

There is a $45 annual fee payable at $11.25 quarterly (for paper statements $13.75/quarter). There is also a monthly maintenance fee of $2, which can be waived if the average daily balance is over $250 or by electing electronic statements. The annual investment fee is 0.40%. 

Is the beneficiary’s income deposited into an ABLE Account exempt for SSI or Medicaid, SNAP or Temporary Assistance?

Income deposited into ABLE Account is NOT exempt for SSI or Medicaid. See Jim Sheldon article on ABLE Accounts, Sept. 2017. Because of this, the best use of ABLE accounts for Medicaid is to shelter a beneficiary’s assets, gifts, inheritances, etc., and not to shelter the beneficiary’s monthly income. However, funds deposited and interest earned in ABLE accounts are exempt as income and resources under 18 NYCRR §352.16(a) for Temporary Assistance applicants and recipients, and under 18 NYCRR §387.11 and §387.9 for SNAP applicants and recipients.29

Also, ABLE accounts may be used to help an SSI beneficiary with rent or other shelter costs. If a parent or an SNT pays rent or other shelter expenses, a beneficiary’s SSI is reduced by one-third of the monthly federal benefit amount. However, rent paid from an ABLE account does not reduce SSI. A parent of an adult child receiving SSI could either make direct deposits into an ABLE account to be used as rent, or contribute to an SNT, which in turn transfers funds into the ABLE account, which are then used for rent.30

What happens to the balance of ABLE Account at death?

Like self-settled supplemental needs trusts, at termination of an account there is required payback to Medicaid, but payback is limited to the costs paid since the date the account was established. In contrast, payback for an individual SNT is for all expenses paid by Medicaid in one’s lifetime.

Want more information?

See the state website MyNYABLE.org.
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. This outline describes the interaction between SNTs and benefit programs by asking five questions for each program:

- Does the trust property count as a resource to the beneficiary?
- Is the lump sum countable as “income” when received that negatively impacts eligibility?
- If the applicant transfers the lump sum or other money into an SNT, does it create a transfer penalty?
- Do the trust’s disbursements 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. Imposing a transfer penalty is a practice 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. An applicant for the benefit is 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 assets transferred during that period, and then imposes a period of disqualification whose length is proportional to the amount transferred. During that “transfer penalty” period, the applicant is not eligible to receive the benefit.
# Medicaid

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## Eligibility

- **TWO CATEGORIES:**
  1. "MAGI" Category (Modified Adjusted Gross Income) – People not eligible for Medicare – Mostly under age 65
  2. "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/Citizenship
- Residency in New York State

## 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.

**MAGI Medicaid.** The Affordable Care Act created a new Medicaid category that encompasses a large population of New Yorkers, called the “MAGI” category. The MAGI category is primarily children, their parents and single adults under age 65. Anyone who has Medicare or is age 65+ is not eligible for MAGI Medicaid unless they are caretakers of a minor relative. People receiving Social Security Disability can be MAGI if they do not yet have Medicare, or even if they do have Medicare, if they are a caretaker for a minor child.

**Non-MAGI Medicaid.** People age 65+ or who have Medicare based on disability are non-MAGI, but may choose MAGI Medicaid if they are parents or other relatives who live with a minor child/grandchild or other minor –age relative. People under 65 who receive Social Security Disability but do not yet have Medicaid have a choice of MAGI or non-MAGI.

1. Is the SNT a Resource?

A main difference between MAGI Medicaid and non-MAGI Medicaid is that MAGI Medicaid has no resource test. 42 CFR 435.603(g). Non-MAGI Medicaid has strict resource limits, with exceptions. See http://www.wnyc.com/health/entry/113/ and other references above.

As long as the SNT is properly drafted to comply with the rules in 42 U.S.C. § 1396p(d), and if the beneficiary is a person with a disability, an SNT is not a countable resource for non-MAGI Medicaid.

2. Is Receipt of a Lump Sum “Income” or an Asset that counts toward eligibility?

Non-MAGI Medicaid

A lump sum is “income” in the month received, and if saved, becomes a “resource” in the next month. Some lump sums are exempt entirely (lawsuit award or settlement of negligence suit against a nursing home, Pub. Health L. 2801-d(5)), or are exempt for a certain period of time (retroactive Social Security award exempt for nine months). See chart at http://www.wnyc.com/health/entry/113/ for list. Others count as income in the month received.

Some types of lump sums may not be fully countable. Only net lawsuit proceeds after attorney fees and other costs count. If the award could be considered earned income, such as claim for bonuses, severance pay, retroactive pay increases, then the earned income disregards apply (only half of the gross award is counted).

The lump sum must be actually “available.” Inheritances are only considered available resources when actually received, not simply because the client is named in a will of someone who died. See Matter of Little, 684 NYS2d 124 (4th Dept. 1998).
Community Medicaid, including People in Assisted Living Programs or MLTC plans. While receipt of any income must be reported to the Medicaid agency (HRA or DSS) by the 10th of the month following the month of receipt,33 as a practical matter, Medicaid will not be affected if, by the time of the reporting, the assets are brought under the Medicaid limits. In other words, if the money received in April is spent or transferred so that resources are within the Medicaid limit by April 30th, so that the amount of assets is under the limit as of May 1st, and the lump sum income is reported in May, then Medicaid cannot be discontinued.34 (This is for Community Medicaid only; transfer penalties apply for Institutional or nursing home Medicaid, discussed below). The individual may be liable to repay the State for the cost of Medicaid services received in the month of receipt of the lump sum, but as a practical matter, most Medicaid agencies will not pursue liability for one month since it requires bringing a lawsuit; there is no mechanism to administratively collect overpayments.

MAGI Medicaid (Most but not all are under 65)
Whether a lump sum is considered income in the month received depends on the source. MAGI Medicaid uses Federal income tax rules for Adjusted Gross Income, with modifications dictated in the Affordable Care Act. Gifts or inheritances, Workers Compensation, and personal injury settlements, for example, are not counted as income. However, some other lawsuit settlements, such as for back pay, are counted as income.

LOTTERY - Note Federal changes in 2018 that prorate lottery winnings over $80,000 as income over a period of time from two months to ten years, depending on the amount of the award. For extensive information about MAGI rules and the new lottery rules see NHELP guide.35

For MAGI Medicaid, a lump sum received within the 12 months after MAGI Medicaid is authorized or re-authorized will not affect eligibility. This is because of the 12-month continuous eligibility rule for MAGI Medicaid. “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. A lump sum still must be reported to the Medicaid agency (where the person applied) but will not affect eligibility if received during the 12-month continuous eligibility period. Even if saved, it becomes a resource in the following month, but there is no asset test so eligibility is retained.

Structured Settlements and MAGI Medicaid. If a lump sum is not countable MAGI income because it is not taxable, then regular payments in a
structured settlement are also not countable as income. In a personal injury lawsuit, for example, a structured settlement in which monthly payments of even $10,000 month would be exempt as income. This may be preferable to receiving a large lump sum, since dividends and interest generated on investments are countable as income. If the individual is close to age 65 or to becoming eligible for Medicare, however, they will be required to switch to non-MAGI Medicaid, under which payments under a structured settlement would count as income.

BEWARE that some lawsuit settlements are taxable so DO count as MAGI income, e.g. claims for discrimination/employment, business, punitive damages. In such cases, it is better to receive a lump sum than a structured settlement. Because of the 12-month continuous eligibility rule, a lump sum would not jeopardize MAGI Medicaid eligibility.

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). This is in contrast to the MAGI Medicaid rules.

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

3. Is there a Transfer Penalty if Lump Sum Transferred to an SNT or otherwise?

MAGI Medicaid (Most but not all are under 65)
Since MAGI Medicaid has NO RESOURCE TEST, savings that includes a lump sum received in the past do not impact current eligibility. A person may 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 a good strategy if the disabled person is approaching age 65 or close to obtaining Medicare based on disability. Once on Medicare, she will be required to transition to non-MAGI Medicaid with a limit on her assets, unless she has a dependent child/relative living with her.)

MAGI MEDICAID FOR NURSING HOME CARE
MAGI Medicaid will pay for Nursing Home care if individual is “medically frail,” which is deemed if the individual is found to need nursing home care. Even though there is no asset test for MAGI Medicaid, if a MAGI recipient needs nursing home care for more than 29 days, she may receive it through MAGI Medicaid but must still document resources in the 5-year lookback. A transfer penalty will be imposed just like in non-MAGI Medicaid.
(discussed below). Id. n 42. There is no lien on the homestead in MAGI Medicaid. GIS 14 MA/16. However, the home equity limit applies to single individuals. 15 OHIP/INF-1 Q. #11.

Regarding income, if the individual’s income is under the MAGI limit, there is no Net Available Monthly Income (NAMI) due to the nursing home. In 2018, that means the individual may keep $1397 in countable income per month without being required to make any contribution for the nursing home care. Spousal impoverishment may not be used in MAGI. However, an individual has the choice of switching to non-MAGI budgeting, where spousal impoverishment budgeting is available.

A MAGI recipient in a nursing home, who is under age 65 and disabled, might consider depositing assets into an SNT for two reasons. There is no transfer penalty, as is also true in non-MAGI Medicaid. Also, it is a good strategy to prepare for the time that she is required to switch to non-MAGI Medicaid because of becoming eligible for Medicare, whether based on age or disability. If over 65, there would be a transfer penalty for placing assets into an SNT.

**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 for their own benefit. This includes Community Medicaid, Nursing Home Medicaid, and Home and Community Based Services (HCBS) Medicaid Waiver programs.

**Age 65 and Over (Non-MAGI)**

*Community Medicaid including MLTC and Home & Community Based Waiver Programs*

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 want solely medical care or also Community-Based Long-Term Care services. Although these programs have certain technical similarities to Nursing Home Medicaid, there is no transfer penalty for home care or waiver eligibility.

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 document
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 applying for nursing home care. For people 65 and over, a transfer of assets to their own SNT is considered a transfer, and will trigger a transfer penalty if the transfer occurred within the five-year look-back period.

There is no transfer penalty, however, for a transfer of a lump sum in the case of:

- A disabled person under age 65 who deposits assets into an SNT for her own benefit,
- A deposit by a person age 65+ into an SNT for the benefit of any person under age 65 who is disabled;
- Transfer to one’s spouse;
- Transfer to one’s disabled child of any age (including age 65+)(does not have to be in trust).

The transfer rules and their exceptions are beyond the scope of this guide. See http://www.wnylc.com/health/entry/38/.

Potential Penalty for Deposits into Pooled Trust After Age 65.
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 adversely affect her Medicaid eligibility (see above). However, it was feared that the Deficit Reduction Act of 2005, 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. For this reason, it is important that care be taken to avoid accumulation of funds in the SNT. See examples in GIS.

4. Alternative Strategies to Trusts for Maintaining Non-MAGI Medicaid After Receiving a Lump Sum

An individual may prefer not to deposit a lump sum into an SNT or not be able to do so (not disabled, age 65 or older). Other basic strategies to keep Medicaid are to Spend, Convert, or Transfer all or part of the resources:
1. Consider whether client needs Medicaid, or could instead meet needs with a Medicare Savings Program, which has no asset test and automatically qualifies client for Extra Help with Medicare Part D. See [http://www.wnylec.com/health/17/](http://www.wnylec.com/health/17/). Could buy a Medigap policy with lump sum. If client needs home care, this isn’t likely an option.

   a. Is client eligible for MAGI Medicaid? Even if age 65+ or has Medicare, is she a parent, grandparent or other caretaker relative for a child under age 18 or under 19 in school? If so, there is no asset test and she can keep assets and Medicaid. Income and dividends will count toward eligibility.

2. Spend excess resources:

   a. Purchase items for oneself for fair market value – household goods, clothes, furniture, vacations, modifications for apartment/home for accessibility, etc.

   b. Pre-pay household expenses – keep receipts (mortgage, cable, utilities, cell phone, rent, property taxes, insurance)(must be paid irrevocably; may need written agreement with landlord)

   c. Pay down credit card debt or other loans (may need proof of bona fide loan or could be viewed as a gift)

3. Convert excess resources into an exempt resource:

   a. Pre-pay funeral expenses for recipient and certain family members.\(^{44}\)

   b. Buy a car (exempt if member of household is using it). 18 NYCCR 360-4.7(a)(2)(iv); MRG p. 348-349.

   c. Buy a home (equity must be under cap if no spouse, minor or disabled child reside in home)(2019 cap is $878,000).

   d. Open an IRA (must be working) – exempt as resource if in periodic payout status (GIS 98 MA/024) or if in Medicaid Buy-In Program for Working People with Disabilities < 65. See [http://www.wnylec.com/health/entry/59/](http://www.wnylec.com/health/entry/59/)

   e. Is client eligible for an ABLE account? Or a PASS plan (SSI).

4. Transfer excess resources (for community Medicaid only). See section on Transfers above. For community Medicaid there is no transfer penalty, so if a lump received on May 5\(^{th}\), and transferred on May 15\(^{th}\), client is eligible for full Community Medicaid on June 1\(^{st}\). But be aware that if applies for Nursing Home care in next 5 years, penalty will be imposed. Therefore – look to see if an exempt transfer is possible (to a disabled child, to a spouse). See other exceptions above.
5. For all options, keep records so that can show money was actually spent or transferred. Just showing a withdrawal from client’s bank account, without receipts or proof that it was spent or transferred, is not enough – the money could be under her mattress.

Take all of these steps as quickly as possible to minimize period of ineligibility and potential liability to repay Medicaid. Report receipt of lump sum to Medicaid within 10th day of month after month of receipt (if that is not possible, report as soon as possible, preferably in a month in which the assets were under the limits as of the 1st of that month). See n. 75.

### 5. Are Disbursements from SNTs Treated as Income?

**No Cash Disbursements! – SSI and Medicaid**

Cash is always considered income for Non-MAGI Medicaid and the trustee of the SNT should never give cash to the beneficiary. This would result in a dollar-for-dollar increase in the beneficiary’s spend-down, and may also result in the SNT’s 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. Disbursement to the beneficiary’s debit card or purchase of a gift card for the beneficiary is considered cash and is income.45

**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.46 Payments may include rent, clothing, food, etc. (But beware SSI rules count payments for rent/shelter or food as income).

**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, she 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 may make in-kind payments for Medicaid (SSI rules are stricter – see below):

**Rent**

The easiest type of bill to pay via an 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. If the beneficiary is receiving SSI, in most cases the trust should pay expenses other than food and shelter. See, the discussion below re SSI.

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 and Debit Cards (Medicaid and SSI)
A pooled or individual trust may pay a credit card bill in the beneficiary’s name, though it will scrutinize the items and may inquire to ensure that expenditures are for the sole benefit of the beneficiary, that no cash withdrawals are made, and to ensure there are no past due charges being carried forward. 47 Debit cards may NOT be used in this manner.48 A payment of a debit card account is treated the same as a payment of cash to the beneficiary, i.e., as unearned income. (For SSI, if the card is used for shelter or food expenses it will be counted as income). Gift cards or gift certificates purchased by the trust count as income.

“Administrator-managed prepaid cards, such as True Link cards, are a type of restricted debit card that can be customized to block the cardholder’s access to cash, specific merchants, or entire categories of spending.”49 The POMS as amended in 2018 allows use of these if the the trustee is the account owner and administrator, and the trust beneficiary is the cardholder, not the owner. Id. The type of expenses allowed is stricter for SSI than Medicaid.

Sole Benefit Rule (applies to Medicaid and SSI)
Although trust expenditures must be for the “sole benefit” of the beneficiary, 2018 changes in the POMS clarify that this is not read so narrowly as to preclude certain expenditures for which others receive a collateral benefit.50 The Medicaid rules for trusts for the non-MAGI population may be no more restrictive than the SSI rules set forth in the POMS. See note 50. Payment to a third party for goods or service must be for the primary benefit of the beneficiary, but others may receive a collateral benefit. For example, if
housing or a car is purchased for a beneficiary, this does not mean that he or she must live there alone.\(^51\) The deed or title must show the individual or trust as the owner of the item in the percentage that the funds represent the value of the item, or the trust must hold a lien on the car; otherwise it may be considered a transfer of resources. If a television is purchased for a beneficiary, others may also watch it.\(^52\) On the other hand, purchase of an automobile which is used twice a month to take the beneficiary to the doctor and is used every day by the trustee to commute to work is not permissible.\(^53\)

The trust may pay a third party for companion services for a disabled beneficiary or a minor disabled child, and for incidental expenses of the companion.\(^54\) For example, supervising an individual with dementia or driving a beneficiary to a store may be compensated. Even if a family member would sometimes do these activities without compensation, the trust may pay them and for the incidental expenses of a companion. For example, if an aide or a family member as a companion is paid to take the beneficiary to a museum, the trust may pay for museum admission for the aide for a family member.

Changes in the POMS in 2018 prohibit asking for proof of medical necessity for a companion or proof of medical training or certification of the companion. “Absent evidence to the contrary, accept a statement from the trustee that the service or assistance provided is necessary to permit the trust beneficiary to travel.” Id. Nor may the companion be asked for “income tax information or similar evidence from a service provider to establish a business relationship.” Id. “A third party service provider can be a family member, a non-family member, or a professional services company. The policy is the same for all.” Id.

Payment to a third party for travel expenses to visit the beneficiary is allowed, if necessary to ensure the safety or medical well-being of the beneficiary. A third party may be a family member, non-family person, or a professional entity. This may be payment to a service provider to oversee living arrangements in a facility, or to a trustee for travel expenses when they are exercising their fiduciary responsibilities. For example, reimbursement of travel to a trustee enabling the trustee to supervise treatment in a facility is permissible.\(^55\)

The POMS instruct SSA staff to use a reasonableness test to evaluate the number of people who may accompany the beneficiary and have their expenses paid. For example, if parents take a disabled child on vacation, the trust may pay for the parents’ expenses. However, the trust may not pay for other family members, even if it is not feasible to leave other children at home.\(^56\)
The trust may also provide for reasonable compensation for a trustee to manage the trust and reasonable costs associated with investment, legal, or other services rendered on behalf of the individual with regard to the trust.57

**Transfers to ABLE Account**
Funds transferred to an ABLE account are not counted as income. SI 01130.740.

### May Income be Placed in the Trust to Reduce Countable Income?

#### Community Medicaid (Non-MAGI)
Yes.

When individuals with a disability place their excess or surplus monthly income (also called a spend-down) into an SNT, the local Medicaid program must adjust their Medicaid budget to eliminate their spend-down for Community Medicaid. This has been true since a 2004 fair hearing decision allowed use of the NYSARC trust to eliminate the spend-down of income.58

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.59

#### 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. 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. Individuals who do not have Medicare (who are excluded from Medicaid managed care anyway), but who would have a spend-down because of excess income, may want to reduce the amount of their deposit into an SNT so that they have a minimal spend-down, if they wish to avoid being required to enroll in a Medicaid managed care plan. They would then use Medicaid on a fee for service basis.

**Nursing Home Medicaid**

No. Excess income transferred monthly into an SNT does NOT 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). Chronic care institutional budgeting uses “post-eligibility” budgeting, which does not allow the same deductions from income that are allowed in the community. All income is to be applied to the cost of care, “including income disregarded or considered unavailable for the purpose of determining MA eligibility.” This includes 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. In Jennings v. Comm’r, Nassau DSS, the Appellate Division Second Department 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.

**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. Since 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, 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.

The 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 jargon 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, 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.66 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. The authors of this manual believe that the same rules set forth above for MLTC apply for other waiver programs – that single recipients may use SNTs to shelter income, and that under the current State directives, married couples may as well if they elect not to use spousal impoverishment budgeting.

While the State has not issued guidance on whether the post-Wong analysis applies only to Nursing Home Medicaid, or also HCBS Medicaid waiver programs, informal information from State employees as of November 2010 is that State policy PERMITS single waiver participants to place their excess income into SNTs, but prohibits this practice for married participants. The rationale is that married participants have the benefit of spousal impoverishment protections.

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).67 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 if the Act and the IRS require that type/source of income to be counted.
### Supplemental Security Income

#### Who gives it?

#### Who gets it?
Aged 65+, blind, or disabled people with limited income and resources

#### Eligibility
- **Category** – must be 65 or over, or blind, or disabled
- **Citizenship** – must be a U.S. citizen (with certain complex exceptions - such as five years as a Legal Permanent Resident, aka “green card” holder, but the rules are more restrictive for individuals who did not lawfully reside in the United States on August 22, 1996.
- **Residency** – not eligible for SSI if residing outside of United States
- **Income** – countable income < $858/mo. (single, living alone) or $1,261/mo. (couple, living alone)(2019)
- **Resources** – countable resources under $2,000 (single) or $3,000 (couple)

#### What do you get?
Monthly cash income, usually direct-deposited into bank account. Most get two deposits – one from the federal SSA and one from state OTDA for the State Supplemental Payment (SSP) portion of the benefit.

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. See table above. Those who are approved for SSI receive Medicaid automatically in New York State.

1. 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).

**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)].” 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. 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). 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. 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). 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.

2. Is the lump sum “income” that would negatively impact SSI benefits?

The SSI rules on what counts as income are complex and not addressed in detail in this outline. See SSI POMS SI 00810.005, SI 00830.050 Overview of Unearned Income Exclusions; SI 00815: What Is Not Income. Examples of exempt lump sums are some disaster relief and Japanese or Holocaust restitution. Some lump sums are exempt for a limited period, such as
retroactive SSI/SSD benefits, State crime victims compensation, or state and local relocation assistance – exempt for nine months.

Unless specifically exempted, receipt of a lump sum is generally considered income in the month received, and a resource if saved into the next month(s). Assuming that the lump sum is countable income in the month received, the individual is not eligible for SSI in that month and could be liable for an overpayment for that month. However, the individual is not required to report the lump sum in the month of receipt. They must report receipt of income (and any other change) “within 10 calendar days after the month in which the change occurred.” If a lump sum is received at the beginning of April, for example, it must be reported to the SSA by the 10th of May. A report by mail must be postmarked by that deadline. 

TIP: If a court order assigns a payment directly to a trust, the payment is deemed irrevocable and not countable as income. Some payments are not assignable by law, and should not be paid directly into the trust (Social Security, federal or private pensions, Veterans benefits). Alimony, child support, U.S. Military Survivor Benefit Plan (SBP) payments may be irrevocably assigned to a trust by court order.

With advance planning and quick action, the individual can either quickly spend the money down on permitted expenses, establish an SNT if allowed (see below), or make an exempt transfer (spouse, disabled child, etc.). The same options exist as apply to Community Medicaid, see supra at pp. 25-26, except that transfers will trigger an SSI transfer penalty unless they are specifically exempt. Documentation of how the lump sum was spent or transferred to an SNT may be included in the report to the SSA. Ideally, at the time of the report, the recipient would be then eligible for SSI she had excess income in the month of receipt, but her resources are within the allowed limits in the month of reporting). Therefore, SSI cannot be discontinued. The sole adverse consequence is an “Overpayment” for one or two months. With this planning and quick action, the individual’s overpayment liability is limited and she has been able to benefit from the lump sum (whether by spending it or preserving it in an SNT). Request of a waiver is also possible to reverse an overpayment if the recipient is “without fault” in incurring it. 20 CFR 416.550-556.

3. Is there a Transfer or “Lump Sum” Penalty?

Transfers of income or assets generally incur a transfer penalty for SSI, with exceptions. This SSI penalty disqualifies the applicant or recipient from SSI for up to three years, depending on the amount transferred. (The penalty

TIP for settling lawsuits or for drafting orders in court orders – provide that payment be assigned directly to SNT.
is calculated by dividing the amount transferred by the person’s SSI monthly payment rate, including the State supplement).^78

**EXAMPLE:** Person living alone transfers $8,580 – she is disqualified from receiving SSI for 10 months \([8,580 \div 858 = 10]\).

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 $30,888 or more \([858 \times 36 \text{ months}]\). 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. Note, the impact of Medicaid Nursing Home penalty periods should also be considered. Unlike the SSI disqualification period, there is no maximum Medicaid transfer period. For example, if an individual 65 or older transferred $1 Million into an SNT and entered a nursing home in New York City within the next five years, the SSI disqualification period would be 36 months but the nursing home penalty period would be approximately 81.2 months \((1,000,000 \div 12,319)\) or almost 7 years.

**No Penalty for Transfer into SNT for Disabled Individual < 65 or to a Disabled Child of any age**

There is no transfer penalty if an individual transfers a resource into an SNT for the sole benefit of an individual who is under age 65 and disabled – who may be themselves or any other person who is under 65 and disabled.\(^79\) This may be a family member or friend. If an SSI recipient or a disabled or blind person who in the next three years may apply for SSI receives a lump sum and is under age 65, an SNT is the perfect solution.

Also, there is no transfer penalty for an individual who transfers a resource to the individual's child of any age who is blind or disabled, directly or to an SNT established for that child’s benefit. POMS SI 01150.120.A.2; 01150.123. There are some other exceptions to the SSI transfer penalty not discussed here, which vary depending on whether the asset is a home or another type of asset. See POMS SI 01150.120, et seq.; POMS SI 01150.122 (transfers of the home).

**Age 65 or over**

Transfers by a person over age 65 into a pooled SNT for their own benefit WILL incur a transfer penalty for purposes of SSI. (A person over age 65 may not transfer assets into an individual trust at all, only a pooled trust). A person over age 65 may, however, make a transfer to a trust for the benefit of their child or of any another person who is under age 65 and disabled, without any SSI transfer penalty. A person over age 65 may also transfer assets to their child of any age who is disabled or blind directly, not through
an SNT, without any penalty. POMS SI 01150.123. There are some other exceptions to the transfer penalty. See POMS SI 01150 et seq. Special rules apply to transfers of the home not discussed here. POMS SI 01150.122.

4. Are Disbursements from SNTs Treated as Income?

The rules barring an SNT from giving give cash disbursements to the beneficiary applies to SSI as described above for Medicaid. Cash paid directly from a trust to the beneficiary is unearned income and would reduce SSI benefits dollar-for-dollar as a result.

Like Medicaid, the SNT may pay various bills directly 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 even though they are not counted by Medicaid. 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.80

The Federal benefit rate in 2019 is $771/month, so after the one-third reduction the individual would get $514 (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’s paying that and accepting a one-third reduction in the monthly SSI amount.

**NOTE:** Until 2005, payments for clothing were also counted as in-kind income. Since then, an SNT, a friend or other third party may purchase clothing for the SSI recipient and it wouldn’t count as income.81

Shelter expenses include rent, mortgage, property taxes, heating fuel, gas, electricity, water, sewer, or garbage removal.82

**NOTE:** Condominium fees in themselves are not shelter costs. However, condominium fees may include charges which are shelter 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 shelter cost. Insurance (property, fire, theft, etc.) held at the owner’s or renter’s option is not a household cost.”83

**TIP:** If the SSI recipient needs the trust to pay for rent, explore whether she is eligible to establish an ABLE Account, payments from which do not reduce SSI when used for shelter expenses. See, supra, at pp. 14-16. Funds in an SNT can be transferred to an ABLE account with no penalty.
Direct payments to third parties for goods and services other than food and shelter will not reduce SSI benefits. A credit card bill will be scrutinized to ensure the trust is not paying for food or shelter expenses. Allowed expenses include:

- 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. An account could be set up with a local car service that would bill the SNT monthly.
- Pre-payment of burial expenses through a funeral agreement.
- See Medicaid section above pp. 28-29 regarding 2018 POMS changes expanding the expenses that can be considered to be for “sole benefit” of the beneficiary, such as paying a third party, such as paying a companion or aide and their incidental expenses, or buying a home or television that also benefits someone else.

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

Generally No. A transfer of excess monthly income will not result in eligibility for or an increase in SSI benefits. Unlike Community Medicaid and Medicare Savings Programs, if applicants for SSI have countable income over the SSI limit, they may not become eligible by transferring excess income into an SNT.

There is an exception to this rule for payments that are irrevocably assigned to a trust. Assignment of payment by court orders are irrevocable. For example, child support or alimony payments paid directly to a trust or trustee because of a court order are considered irrevocably assigned and thus are not treated as income. Similarly, U.S. Military Survivor Benefit Plan (SBP) payments assigned to an SNT do not count as income because they are not revocable. This is a narrow exception because many types of benefits are treated as non-assignable including many pension benefits, Social Security Retirement and Disability benefits and SSI.84
## Temporary Assistance (including HASA)

<table>
<thead>
<tr>
<th>Who gives it?</th>
<th>State Government – the Office of Temporary and Disability Assistance (OTDA), administered by local DSS</th>
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<tbody>
<tr>
<td>Who gets it?</td>
<td>People with very low income and resources</td>
</tr>
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</table>

### Eligibility

- **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 applying for SSI.

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### FOR MORE INFO RE TA ELIGIBILITY and LUMP SUMS


### What is Temporary Assistance (TA?) and HASA?

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. There are two major types of Temporary Assistance.
Temporary Assistance (including HASA)

programs: 1) Family Assistance (“FA”) and 2) Safety Net Assistance (“SNA”).

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. 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.

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.

What are HASA Benefits? (HIV/AIDS Services Admin.)

NYC HRA administers case management and financial benefits for people living with HIV/AIDS through the HIV/AIDS Services Administration. NYC Administrative Code § 21-128 and https://www1.nyc.gov/site/hra/help/hiv-aids-services.page. A key benefit is rental assistance. “Eligible clients who reside in private market apartments and who have income other than Cash Assistance, will not be required to pay more than 30% of their income towards rent. The client’s rent level must also be approved by HASA.” https://www1.nyc.gov/site/hra/help/hasa-faqs.page. The rental assistance is available to people whose countable income is SSI, Social Security, work, or other sources, if the difference between their income and their rent is less than $376/month, which is the state-set level of need, and other criteria. See the website for eligibility rules (i.e. earned income disregard rules, rent limits).

HASA benefits are subject to the same resource limits and lump sum rules as applicable to Temporary Assistance, described below.

Is the SNT a Resource?

OTDA addressed some of the issues of SNTs with regard to TA, FS, and HEAP in a 2001 directive, which states, “A[n] SNT is not considered an available resource for the purpose of determining TA eligibility.” 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.\textsuperscript{90}

The resource limits for TA benefits include the following (NY Soc. Serv. L. § 131-n, 18 NYCRR 352.23):

- $2000 cash and liquid resources for households or $3000 for households with a member who is over the age of 60.\textsuperscript{91}
- The home applicant lives in is exempt, but the LDSS may take a mortgage against the home to recover public assistance properly paid;
- One automobile per household with a fair market value of $12,000 or such other higher value as the local district may elect to adopt (effective 4/1/18)\textsuperscript{92}. The fair market value of one automobile in excess of $12,000 may be applied to the $2,000 general resource limit.\textsuperscript{93}
- $4,650 in separate bank account to purchase first or replacement vehicle to seek or maintain employment;
- $1,400 in a separate bank account to pay tuition at a 2- or 4-year post-secondary educational institution;
- Burial -- one plot per household member, and one bona fide funeral agreement up to $1,500 in equity per household member;
- Funds in an Individual Development account funded with earned income, per Soc. Ser. L. 358(5), 18 NYCRR 532.21;
- Real property while household making good faith effort to sell for up to 6 months;
- 529 educational plans are exempt; 15 OTDA LCM-15, Q. 6.1, and other sources of funds with restricted use, such as an award, trust fund or agreed upon intent of a friend, non-legally responsible relative, organization. 18 NYCRR 352.16.
Temporary Assistance (including HASA)

- Grants or loans to undergraduate students for educational purposes are excluded; or to undergrad or grad students if they preclude use for living expenses. TASB Ch. 18 § 5 pp 568-69.

- Exclude resources of someone not required to be in the public assistance household. See FH 7597285K (2/23/18 NYC)(agency should have counseled household that 20 year old with a resource did not have to be part of a household).

For a more detailed discussion of what are countable resources for this program, see the 2018 Lump Sum Partnership Outline, available at http://www.wnylc.com/health/download/676/.

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. 84 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, with limited exceptions described below. 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.

Which Lump Sum Income is/ is not Subject to Lump Sum Rule
Most lump sums are subject to the lump sum penalty – settlements, inheritances, retroactive Social Security checks, workers compensation awards, etc. An exception exists for a lump sum that is earmarked and used for a specific purpose, i.e. reimbursement for incurred medical bills from an accident or injury, funeral and burial costs, gift for a particular purpose such as car repair (FH No. 2151432P Onondaga Co. 1994), and replacement or repair of resources.

PERSONAL INJURY CASES -- These settlements are subject to the lump sum rule. An attorney in a personal injury action is required to give notice to LDSS when filing the action on behalf of a Medicaid or PA recipient. CPLR §
306-c. The LDSS must serve notice of the lien and file it with the county clerk. See also NYS DOH 02 ADM-03 - Medicaid Liens and Recoveries.

The LDSS also has a lien on a personal injury claim for Medicaid and PA benefits provided from the time of the injury. Soc. Serv. L. § 104-b. The LDSS may sue to recover PA paid during the preceding 10 years. Soc. Serv. L. § 104.

**Strategies for Handling Lump Sums for Client Receiving TA**

**Exception for SNTs or ABLE Accounts**

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.\(^{95}\)

Timing is important. The period of ineligibility begins on the date of receipt of the lump sum. Soc. Serv. L. § 131-a(12)(a). The 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.

While not stated in the 2001 OTDA letter, funds deposited into ABLE accounts are also exempt as income or assets. See pp. 17-18 above. Remember the individual must have been disabled before age 26.

**Other Strategies**

A TA recipient who expects to receive a lump sum is advised to close their TA case before receiving it. A lump sum penalty does not apply to closed cases. They can reapply for benefits when they drop below the resource limit again, but may need to document how the lump sum was spent. See cautionary notes in *2018 Lump Sum Partnership Outline*, p. 7, available at http://www.wnylc.com/health/download/676/.

If the lump sum is less than the resource limit, the TA recipient may set aside the portion of the lump sum which, when combined with the recipient's
countable resources, is less than the TA resource limit. 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, her eligibility is not affected because even with the winnings, her countable resources are still less than the TA resource limit of $2000. However, lump sums for insubstantial amounts are deemed income in the month received. If the lotto winning is $250 – an amount below this recipient’s $300 standard of need – the winnings count as income, and her SNA eligibility is affected – her grant will be reduced for that month.

When lump sums are greater than the TA resource limit, the penalty period can be shortened by:

- excluding up to $2000 ($3000 if anyone in household is over age 60) in exempt resources, and/or
- spending the remainder on “big ticket” set-asides of funds within 90 days on exempt resources listed above under 18 NYCRR 352.23(b) 17-OTDA INF-09, and 03 ADM-10 p. 3, ie. car purchase, burial plot, funeral agreement, dedicated bank account for car or educational accounts for any family member.
- If lump sum spent on emergency expenses, excess housing or utility costs, medical expenses, or circumstances beyond household’s control, penalty period might be reduced. 18 NYCRR 352.29(h); FH 7397705Y (NYC 12/30/1)

Other Defenses:

- Did the client receive notice of the lump sum penalty so that she had warning about the consequences of receiving the lump sum? In NYC, a 2016 lawsuit settlement requires HRA to provide an informational insert in its letter to personal injury attorneys and their clients, after being given notice of the pendency or the lawsuit.
- Technical procedural challenges may be possible to challenge the content or timing of the notice of discontinuance. See 2018 Lump Sum Partnership Outline, available at http://www.wnyc.com/health/download/676/.
- If possible, settle for relief in lieu of cash settlement, e.g. in landlord/tenant claim, give rent abatement or agreement to repair or renovate.
- Explore use of SNT if client is disabled or, if client became disabled before age 26, an ABLE account. (See ABLE account section above).
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.99 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.100 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.101

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 and Medicare Savings Programs are the only benefits that allows income to be reduced by the amount that is put into SNTs.
SNAP (Food Stamps)

<table>
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<tr>
<th>Who gives it?</th>
<th>Federal Government – administered in NYC by the Human Resources Administration (HRA)</th>
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</thead>
<tbody>
<tr>
<td>Who gets it?</td>
<td>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.</td>
</tr>
</tbody>
</table>
| Eligibility  | • 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 – Many households in NYS have no resource test (including those with a household member age 60+ or disabled if income is < 200% FPL). See more rules below. |
| 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”) 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.102

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, or if the household pays dependent care costs, and the household’s gross monthly income is below 200% of the Federal Poverty Level (in 2018, $2,024/mo. for single, $2,744/mo. for couple).103 Also, if a household member has earned
income and household gross income is under 150% FPL, there is no resource test (i.e., categorically eligible)

If the household contains an elderly person (60+) 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 $2,000.104

**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.105 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.106

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.107 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…”108 Since these rules are very different than those for Medicaid, they must be heeded carefully.

Is there a Transfer or "Lump Sum" Penalty?

Because there is no resource test for most SNAP recipients, receipt of a lump sum is not disqualifying. The lump sum will count as income in the month received, unless exempt, but it becomes a resource in the next month so only affects eligibility in the month received. The case could potentially be closed in the month the lump sum is received, but as a practical matter this is
unlikely, and it is more likely that the household will be liable for an “overpayment” for the month of receipt.

A small number of households are subject to a resource test – those with no member age 60+ or disabled, or with an age 60+/disabled member but gross income is over 200% FPL. They are potentially subject to the same lump sum penalty described above for Temporary Assistance. There is a disqualification from SNAP eligibility for up to one year for certain intentional transfers, with the length of time depending on the amount transferred. “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.”

For a household that is not subject to a resource test, and deposits the lump sum into an SNT, 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, 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. 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.”

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.\textsuperscript{112}

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.\textsuperscript{113}

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**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.”\textsuperscript{114} Medicaid is the only benefit that allows income to be reduced by the amount that is put into an SNT.
Home Energy Assistance Program

<table>
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<tr>
<th>Who gives it?</th>
<th>Federally funded administered by LDSS under supervision of N.Y. State Office of Temporary and Disability Assistance (OTDA)</th>
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<tr>
<td>Who gets it?</td>
<td>Low-income New Yorkers who pay to heat their dwelling or who have heat included in their rent</td>
</tr>
</tbody>
</table>
| Eligibility  | • Must be U.S. citizen or qualified alien; AND  
• Gross monthly income under $2,318/mo. (one) or $3,031 (two) (2018)\(^1\), OR  
  In receipt of SNAP, Public Assistance; OR SSI  
  (Living Alone living arrangement)  
• No asset test |
| 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.\(^2\)

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.\(^3\)

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, but Emergency HEAP eligibility is based on whether the household has resources to ameliorate the emergency itself. Money that is in an SNT is not considered a resource that is available for amelioration.\(^4\)

Thus, an Emergency HEAP applicant who has an SNT is not expected to raid their SNT to ameliorate the emergency. See HEAP manual Ch. 9, infra n 113, for countable and non-countable resources.
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.
# SCRIE/DRIE Senior/Disability Rent Increase Exemptions

| **Who gives it?** | New York City Department Of Finance (DOF) [for rental housing]  
| **Where is Information online?** | Department of Housing Preservation and Development (HPD) [for Mitchell-Lama housing]  
| | [https://www1.nyc.gov/nyc/resources/service/2424/senior-citizen-rent-increase-exemption-scrie](https://www1.nyc.gov/nyc/resources/service/2424/senior-citizen-rent-increase-exemption-scrie)  
| | [https://www1.nyc.gov/nyc/resources/service/1522/disability-rent-increase-exemption-drie-program](https://www1.nyc.gov/nyc/resources/service/1522/disability-rent-increase-exemption-drie-program)  
| **Who gets it?** | Low-income tenants of rent-regulated housing over age 62 or based on disability  
| **Eligibility** |  
| **Type of Housing** – Must be one of the following:  
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  
**Head of household or spouse must be 62+ or receive disability benefits** from SSA, VA or US govt. or receive Medicaid based on disability.  
**Income** – Annual income must be under $50,000 or less.<br>(See definition income)  
**Proportion of Rent to Income** – Rent must exceed one-third of monthly income or PA shelter allowance.  
**No asset test**  
| **What do you get?** | Eligible seniors have their rent frozen at the current level in effect at the time they apply, with almost all future increases paid by the city through tax abatements to the landlord  

The Senior Citizen Rent Increase Exemption ("SCRIE") and Disabled Rent Increase Exemption ("DRIE") exempts people age 62 or over or people who are determined to be “disabled” living in rent controlled, rent stabilized, and certain limited income/ limited equity apartments from rent increases, provided they satisfy a number of specified criteria.120 The criteria regarding income mandates that aggregate disposable income of all members of the household residing in the housing accommodation may not exceed $50,000.121 Eligibility is based on income in the prior calendar year.
Is the SNT a Resource?

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

Does Lump Sum Count as Income and Is there a Transfer or “Lump Sum” Penalty?

Gifts and inheritances and Nazi restitution are excluded as income. However, income generated by assets such as distributions from an IRA or annuity, interest and dividends (taxable and non-taxable), net rental income, rent from boarders, income from estates or trusts, or capital gains does count as income. Other income includes net business income, alimony, child support, non-personal injury settlements, miscellaneous income for which a 1099 form is generated. Social Security, pensions, and retirement income, including retroactive benefits, counts as income.

The NYC SCRIE application packet FAQs specifically exclude “cash gifts, inheritance, damages award from personal injury lawsuit, emergency assistance payments, income tax refunds, IRA Rollovers, and SNAP.” These FAQs specifically include as income cancellation of debt, money received from family or friends for rent, gambling or lottery winnings. Money received from family or friends for rent may arguably be inconsistent with the state statutory exemption for “gifts.”

If a lump sum is countable as income, what is the impact on SCRIE eligibility, since SCRIE eligibility is based on annual income? A SCRIE/DRIE application or renewal is based on income in the previous calendar year. If someone has not yet applied for SCRIE/DRIE and receives a countable lump sum so that income exceeds $50,000 they should wait to apply in the second calendar year following the year of receipt. If a SCRIE/DRIE recipient receives a lump sum, and this is reported in a renewal the following year, as it must be, fortunately, state law has a remedial provision. Though SCRIE/DRIE can be terminated the year after receipt of the lump sum, if it results in income that exceeds $50,000, or because the legal rent does not exceed one-third of the household income, they may reapply the next year. If then eligible, the tax abatement amount will revert to the old level, as if the rent exemption had not expired. In other words, the SCRIE/DRIE is essentially suspended for one year – in which the tenant must pay the full rent – but as long as the tenant reapplyes, it will be reinstated the next year.

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. 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?

No. 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.
Section 8 & Subsidized Housing Programs

Thanks to Michael L. Hanley, Empire Justice Center, Rochester, NY, for information used in this section and for edits. New asset limits described in this section were enacted in 2016, but are not yet in effect as of 12/31/18. This outline will be updated when this information is obtained.

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).

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 Temporary Assistance shelter allowance.

Is the Lump Sum Income that would Increase Rent or Affect Eligibility?

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. “Annual income” DOES NOT include (5.609(c)):

- Lump sum additions to family assets, such as:
  - inheritances,
  - insurance payments (including health & accident insurance and worker’s compensation),
  - capital gains,
Section 8 & Subsidized Housing Programs

- settlement for personal or property losses,
- reimbursement of medical expenses,
- Same time-limited disregards as for SSI if received by a person with a disability, and benefits set aside under a Plan to Attain Self-sufficiency (PASS);
- Temporary, nonrecurring or sporadic income (including gifts)
- See entire list in regulations cited above.

24 CFR 5.611 lists mandatory and additional permissible deductions. The local public housing authority (NYCHA) or responsible entity for HUD programs may adopt additional deductions from income through a written policy. The NYCHA Management Manual additionally excludes the following, which fall under the federal regulatory exception for “temporary, nonrecurring or sporadic income:”

- Retroactive Social Security or SSI benefits excluded as income, but may be included in family’s assets.
- Retroactive payments for welfare, unemployment or similar benefits
- Lottery winnings received in one payment

Lump sum receipts that are temporary or nonrecurring are included in the family’s assets only if the retain them in savings. If spent, the lump sum is not classified as an asset so cannot be considered disposed of for less than fair market value. NYCHA Management Manual, Ch. III (rev. 3/8/16)(excerpt in Appendix Exh. E to 2018 Lump Sum Partnership Outline, http://www.wnylc.com/health/download/676/.

Are there Resource limits – and is an SNT a resource?

Public housing law currently has no asset test per se, but a 2016 federal law, when implemented thru regulations that have not yet been proposed, will impose a $100,000 asset limit, described below. Until that law is implemented, there are two ways that assets can impact a tenant. First, if a tenant has more than $5,000 in assets, income can be imputed from the excess assets, as described below. Second, if a tenant transfers assets, there is a penalty by imputing income for two years, described in the next section.

Under current regulations, if a “trust is not revocable by, or under the control of, any member of the family or household, the value of the trust fund will not be considered an asset so long as the fund continues to be held in trust. Any income distributed from the trust fund shall be counted when
determining annual income under § 5.609.” 24 CFR § 5.603(b)(Definitions -- under “Net Family Assets” (2).

New Asset Test – Enacted 2016 but not yet in effect as of 12/31/18

The Housing Opportunity & Modernization Act of 2016 (“HOTMA”) established a new $100,000 limit on “net family assets,” to be increased annually based on an inflation index, 42 U.S.C. 1437n(e), and disqualify a tenant who owns real property that is suitable for occupancy by the family, unless the property is up for sale, the tenant or applicant is a victim of domestic violence, or the home is a manufactured home. 42 U.S.C. 1437(f)(y).

The new asset limit and its exceptions, however, are not in effect as of 12/31/18. This is because the 2016 law provides that the statutory change regarding assets is not self-effectuating, but must be implemented by regulations, which shall take effect on January 1st of the following year. 42 USCA § 1437a NOTE. Initial guidance was issued Oct. 24, 2016, but that regulation said that the asset limits would require regulatory action. 81 Fed. Reg. 73030 (10/24/16). No regulations have been adopted as of 12/31/18. This outline will be revised to indicate the effective date of the changes when this information is available.

When the 2016 changes are adopted, exemptions from assets will include, under 42 U.S.C. 1437n(e)(2)(B):

(i) personal property, except for items of significant value, as the Secretary may establish or the public housing agency may determine;

(ii) retirement accounts (IRA);

(iii) real property which the family does not have the effective legal authority necessary to sell;

(iv) civil judgment or settlement for malpractice, negligence, or other breach of duty owed to a member of the family and arising out of law, that resulted in a member of the family being disabled;

(v) Coverdell education savings account under section 530 of title 26 or any qualified tuition program under section 529 of such title;

(vi) **Irrevocable Trusts NOT Counted as Assets.** The 2016 statutory amendments codify the existing regulation 24 C.F.R. § 5.603(b)(2), and exclude irrevocable trusts from consideration as assets so long as the trust is not within the control of a household member. 42 U.S.C. 1437n(e)(2)(C). The statute and regulation do not differentiate SNTs from other types of irrevocable trusts – all are exempt as long as not under the control of any household member.
Since they are not an asset, no income should be imputed based on the principal in the trust.\textsuperscript{126}

While interest on the trust assets is not \textit{imputed} as income to the beneficiary, the 2016 statutory amendments provides, ”Any income \textit{distributed from} the trust fund shall be considered income for purposes of \textit{section 1437a(b) of this title} and any calculations of annual family income, except in the case of medical expenses for a minor.” 42 U.S.C. §1437n(e)(2)(C)(emphasis added).

(vi) Other exceptions the Secretary may establish.

As to verification of assets, the 2016 statutory amendments allow a public housing authority or subsidizing building owner to allow a tenant to self-certify (attest): (1) that the family has less than $50,000 in assets (if above $50,000 must provide verification; and (2) that such family does not have any current ownership interest in any real property the tenant owns no real property is also permitted. 42 U.S.C. §1437n(e)(3).

\textbf{LOCAL HOUSING AUTHORITY or PROPERTY OWNER MAY ESTABLISH EXCEPTIONS TO ASSET LIMIT or NOT ENFORCE IT}

The 2016 law, not yet in effect, gives local public housing agencies discretion to establish a formal policy that is set forth in the public housing agency plan under 42 USC section 1437c–1 to, choose not to enforce the asset limitation. 42 U.S.C. 1437n(e)(4). Similarly, a public housing agency or owner of a subsidized building may choose not to enforce the asset limitation or may establish formal exceptions to such limitation. Eligibility criteria for establishing exceptions may provide for separate treatment based on family type and may be based on different factors, such as age, disability, income, the ability of the family to find suitable alternative housing, and whether supportive services are being provided. 42 U.S.C. 1437n(e)(5).

\textbf{Imputing Income from Assets}

\textit{Current Rule until 2016 Law is implemented (not in effect as of 12/31/18)}

Current law, in effect until the Housing Opportunity & Modernization Act of 2016 is implemented, states that, for assets in excess of $5,000, HUD programs count the larger of the actual income generated by the asset or of “imputed” income if the asset is not generating any actual income (or is generating only a very small amount). HUD instructed the administering housing agencies to use a fixed interest rate, approximately at the level of a passbook savings account interest rate, reduced in 2015 by HUD from an annual rate of 2% to 0.06%.\textsuperscript{127}
In the case of the Section 8 programs, as the amount of assets increase, 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. 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. So, the problem is not strictly an “assets” issue, it is an “income” issue.

**New Rule – Enacted July 29, 2016 but not yet in effect**

Under the 2016 amendments, actual income from assets will be counted when determining rent. Imputed income is only counted to the extent that net family assets exceed $50,000. The law is not yet in effect, as it must be implemented by regulation, which is not yet adopted. When regulations are adopted, they will be take effect the 1st of the following year. 42 USCA § 1437a NOTE. This outline will be revised to indicate the effective date when this information is available.

**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. 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.)  

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. Authority*, the First Circuit, affirming the district court, held, in part, that no transfer penalty applied to transfer of a personal injury settlement into an SNT, since the settlement or judgment would have been exempt as income under 5.609(c)(3). Additionally, the decision holds that interest income from the trust principal is not imputed as countable income for the rental subsidy, until actually distributed to the beneficiary. 826 F.3d at 14.

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). All payments made to, or on behalf of, a household member are generally treated as income. 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. Income distributed “regularly” to the household from the trust is included in Annual Income.

In *De Cambre vs. Boston Housing Authority*, the First Circuit Court of Appeals, reversing the district court, held that disbursements of principal from a self-settled first party SNT are not countable as income. See fn 131. Had the personal injury settlement that was deposited into the trust instead been kept in the tenant’s bank account, withdrawals from the account – which is exempt since assets don’t count – would not have counted as “income.” The Court held that the settlement did not lose its exempt status as exempt income and an exempt asset because it was placed in a trust instead of a bank account. See fn 131.

One regulation cited by the First Circuit provides that 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.”

This exception is in the “income includes” list, rather than on the “income does not include” list, 5.609(c)). So 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. The fact that the asset was held in trust does not change this reasoning.

The De Cambre Court of Appeals decision reversed the district court decision, which had held that most SNT payments from principal counted as income – disqualifying the tenant from Section 8. The lower court exempted as income only SNT disbursements for cable, internet, travel and medical expenses, remanding to the public housing agency to determine whether a pet was an emotional support animal, in which case payment of veterinary expenses would have been exempt as medical expenses. Also, the district court had held that purchase of a car directly by the SNT – with the SNT and not the beneficiary having title -- was not income. The De Cambre appeal decision reversed the district court, including the lower court holdings that most SNT disbursements did count as income.

Caveats to the De Cambre First Circuit holding -

1. Distributions from earnings -- rather than principal -- of the trust, which had not been reported as income because they were in the trust, would be treated as income.
2. Third Party trusts are not part of the DeCambre ruling. It is not clear whether distributions from such trusts count as income.
3. DeCambre is only binding in the First Circuit, but it should be persuasive authority elsewhere that SNT expenditures from principal do not count as income.
4. On July 29, 2016, soon after the 1st Circuit decision in DeCambre, Congress enacted the Housing Opportunity Through Modernization Act (HOTMA), which imposed resource limits of $100,000 on some HUD housing programs. See above. The law specifically exempts irrevocable trusts as assets, which should include self-settled SNTs.

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

No. Regular countable income cannot be diverted into an SNT. 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. Plus the trust distributions would be subject to the regular income rules (i.e. random vs. regular payments; medical reimbursement exception, etc.).
Veteran’s Pension Benefits

On Oct. 18, 2018, new regulations became effective that establish an asset limit, a look-back period, and asset transfer penalties for claimants applying for VA pension benefits that require a showing of financial need. Pension benefits based on financial need include the Veterans Pension and Aid and Attendance allowance.

To receive the Veterans Pension, the veteran must be either age 65+ or disabled, must have served for the requisite time period, have the proper discharge status (honorable discharge or other permitted discharge), and meet the financial eligibility criteria. This outline focuses only on the new asset rules and transfer penalties. For other criteria and how to apply see https://www.benefits.va.gov/pension/vetpen.asp

The annual income limits effective Dec. 1, 2018 are, for a single veteran, $13,535 per year ($1,127/mo.) or $17,724 per year if the veteran has one dependent. For example, a qualified veteran who is receiving SSI and SSP benefits (which total $858 per month - 2019) is eligible for a Veterans Pension to bring their income up to $1,127 per month. The benefit can increase to up to $1,881 per month if the veteran is in need of the aid and attendance of another person, a cash benefit given to veterans or their spouses who are in nursing homes or who need help at home with activities of daily living.

New Asset Limit
The new “net worth” limit is equal to the maximum community spouse resource allowance for Medicaid. The net worth limit effective December 1, 2018 is $127,061. See https://www.benefits.va.gov/PENSION/pencalc.asp. Unlike Medicaid, net worth is the sum of the claimant’s and spouse’s assets and annual income. 38 C.F.R. § 3.274(a)-(b). Rules for income/assets of children of the veteran and not covered here.

Income deductions include unreimbursed medical expenses, which the new regulation defines in more detail than before. 38 C.F.R. § 3.278(c). Income exclusions include relocation, crime victim compensation, Japanese and Nazi persecution compensation, Payments to Native Americans, income tax refunds, Food stamps, HEAP, and others. 38 C.F.R. § 3.279.

Excluded from assets are the primary residence (which can be sold if proceeds used to purchase another residence within same calendar year). 38 C.F.R. § 3.275(b). Personal mortgage does not reduce value of assets. If the lot exceeds 2 acres, the value of additional land above 2 acres is included in...
asset calculation. Id. Also excluded is a car and personal effects “suitable and consistent with a reasonable mode of life.” 38 C.F.R. § 3.275(b)(2).

If net worth exceeds the limit, net worth may be reduced if income and/or assets decrease, but assets must be spent on purchases for fair market value unless the items purchased are part of their net worth. 38 C.F.R. § 3.274(f)(1).

Eligibility is effective on the date net worth ceases to exceed the limit, provided a certified statement that net worth has decreased is received before the claim has been finally adjudicated. Otherwise a new pension claim must be filed.

When an increase in net worth results in a reduction or discontinuance of benefits, the reduction or discontinuance is effective the last day of the calendar year in which net worth exceeds the limit. If net worth is brought below the limit before the end of the same calendar year, no reduction or discontinuance will occur. 38 C.F.R. § 3.274(h)(2).

Transfers of Assets and Penalty Periods

Like Medicaid, only transfer of amounts exceeding the net worth limits (called “covered assets”) are subject to a penalty.

The lookback period for all transfers on and after October 18, 2018 is 36 months preceding filing of an original pension claim or a new pension claim after a period of non-entitlement. 38 C.F.R. § 3.276(a)(7). Transfers before Oct. 18, 2018 have no penalty.

Exceptions to the transfer penalty include:

1. **Transferred as the result of fraud or unfair business practice** related to marketing or sale of annuity/financial products for purposes of establishing entitlement to VA pension. Must file complaint with authorities. 38.F.R. § 3.276(a)(8)(c).

2. Veteran, spouse, or surviving spouse, may transfer assets to a trust established for a child incapable of self-support, if there is no circumstance the trust could benefit the veteran, spouse or surviving spouse. 38 C.F.R. §§3.276(a)(8)(d). Note there is no exception for a supplemental needs trust for the veteran.

The maximum length of the penalty period is 5 years. The length of the penalty period is determined by dividing the total amount of the transferred assets by the “monthly penalty rate,” rounded down to the nearest whole number. The result is the number of months of the penalty.
The “monthly penalty rate” is the maximum annual pension rate (MAPR) under 38 U.S.C. 1521(d)(2) for a veteran in need of aid and attendance with one dependent that is in effect as of the date of the pension claim, divided by 12, and rounded down to the nearest whole dollar. The monthly penalty rate is located on VA’s website at https://www.benefits.va.gov/PENSION/current_rates_veteran_pen.asp.

Effective Dec. 1, 2018, the “monthly penalty rate” is $26,766/12 = $2,230.

The penalty period begins the first day of the month following the transfer (periods run consecutively, not simultaneously, if there is more than one transfer). Penalty period is reduced or removed if assets are returned within 60 days of the claimant being notified of the penalty period.

Example of penalty period calculation (from regulation).

VA receives a pension claim in November 2018. The claimant’s net worth is equal to the net worth limit. However, the claimant transferred covered assets totaling $10,000 on August 20, 2018, and September 23, 2018. Therefore, the total covered asset amount is $10,000, and the penalty period begins on October 1, 2018. Assume the MAPR for a veteran in need of aid and attendance with one dependent in effect in November 2018 is $24,000. The monthly penalty rate is $2,000. The penalty period is $10,000/$2,000 per month = 5 months. The fifth month of the penalty period is February 2019. The claimant may be entitled to pension effective February 28, 2019, with a payment date of March 1, 2019, if other entitlement requirements are met.

38 C.F.R. § 3.276(e)(4)(Eff. 12/1/18, the penalty period would be $10,000/$2,230 per month = 4 months).
Pooled Income Trusts – Practical Tips

Special Rules about Assigning Income into a Trust

The Social Security Act prohibits assignment of Social Security income.139 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,140 but the courts have made clear that the sole purpose of Section 407 is to prevent creditors from attaching or garnishing Social Security payments.

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.141

How Much Income 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.

TIP: Beware of annual COLA increases in income! A $20 increase in income from cost of living increase may increase the spend-down by $20 or near that amount.

Be sure to INCREASE THE AMOUNT deposited into the trust when that happens, to ensure a -0- spend-down.
**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.”

Don’t forget the trust will withhold a monthly fee, so the amount available for the trust to pay bills with is less than the amount deposited.

**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 of the SNT’s monthly fee. Contributing more than the spend-down may not be advisable if the SNT charges 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**

Most people seeking Medicaid need all of their income to meet their living expenses, so depositing their entire spend-down into the trust makes sense. 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 may be appropriate to leave the person with a spend-down that they can afford.

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 $2,000/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 $859/month the person is allowed to keep would accumulate in their bank account, potentially causing their balance to rise above the resource limit of $15,450 (2019). 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.142
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 $134 deducted from their Social Security check. With an MSP, the State will pay the $134 instead so the person’s Social Security check will increase by that amount. If someone has income below $1,366/month (2018), 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 ($1,012/mo.) and SLIMB ($1,214/mo.) (2018) – 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 $134/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. Her Medicare Part B premium of $134 is deducted from her check, so she receives $1391. She also pays for a Blue Cross Medigap policy of $420/quarter or $140/month. Her spend-down calculation is:

\[
\begin{align*}
1525 & \quad \text{Gross Income} \\
- & - \\
134 & \quad \text{Medicare Part B premium} \\
- & - \\
20 & \quad \text{Unearned income disregard} \\
- & - \\
140 & \quad \text{Blue Cross - premium} \\
\hline
294 & \quad \text{TOTAL DEDUCTIONS} \\
1231 & \quad \text{Countable net income} \\
- & - \\
859 & \quad \text{Medicaid level for ONE (2019)} \\
\hline
372 & \quad \text{Spend-down}
\end{align*}
\]

If Sally joins an SNT, and deposits $372 each month into the trust, once Medicaid approves it, she will have NO spend-down.
• $372 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 $372, leaving $352/month available for disbursements.

• If she puts in an additional $134/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 $134. 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 $134/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.143

• Another reason why a person may enroll in an MSP rather than Medicaid is that the MSP program does not have a resource test.

**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.144

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.145 Otherwise, the non-applicant spouse would have to do a spousal refusal and risk being sued by the County. Remember that the person establishing the SNT must be “disabled.”

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 $547 ($1800 combined income less $1,233 income level for 2 less $20 disregard = $571). Betty can join an SNT if she is disabled and deposit $547 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 $47 spend-down.

Example: Both Spouses Need Medicaid
In the same couple, Ralph now needs Medicaid. Their spend-down is still $547, but now Ralph would establish an SNT himself since he has a disability and put the same amount of money in – $547 – 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 $1,233 (2018) 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

Strategy Tip
Get home care with a spend-down first, then submit SNT documents concurrently with Medicaid application

If no home care, then you must submit SNT documents concurrently with Medicaid application
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 enrollment, 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.146

Now that MLTC is mandatory for most home care recipients in New York,147 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.148 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 – Medicaid Dept.  
  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)(See above warning re Powers of Attorney, at pp. 53-54)

• the **Master Trust Agreement**,
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- 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 Impairments
- Medicaid Disability Manual


  - 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.

In 2012, the NY State Medicaid program changed the forms and procedure for Medicaid disability determinations. 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.154

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/12
  ma027att1.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/12
  ma027att2.pdf

  o 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 $1,180/month (2018).\(^{155}\)

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.\(^{156}\) 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")\(^{157}\) are used to determine disability in light of the individual’s age, education, and experience.\(^{158}\)
   - **Solely Non-Exertional**: The Grids cannot be used for non-exertional
impairments, such as mental impairments.\textsuperscript{159} 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.\textsuperscript{160}

- **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.\textsuperscript{161}

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.\textsuperscript{162} 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**\textsuperscript{163}
  - Not working at SGA level, and
  - No more than a marginal education (6th grade level or less), and
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- 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**
  - 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**
  - 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](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 the month that your client first sent 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.

**Ensure 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 next month, it’s too late to take any action to reduce countable income in the previous month.

Submit enough disbursement requests 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. 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).

Since the client’s income may increase with cost of living increases, the spend-down amount may increase. At the end of each year, it is a good idea to re-do the calculations discussed above and increase the monthly contribution to avoid a new spend-down.

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. These are called “VOD’s” or Verifications of Deposit. HRA’s renewal forms now specifically ask for these documents.
# Summary of SNT Rules for Various Benefits

<table>
<thead>
<tr>
<th>Benefit</th>
<th>SNT considered a resource?</th>
<th>Is Transfer of a Lump sum or Asset into an SNT Penalized?</th>
<th>SNT disbursements that ARE counted as income</th>
<th>SNT disbursements that ARE NOT counted as income</th>
</tr>
</thead>
</table>
| 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:  
  - Day-to-day living  
  - Hobbies  
  - Vacations  
  - Recreation  
  - Entertainment | Expenses related to "supplemental” needs:  
  - Education  
  - Medical (including health insurance)  
  - Childcare  
  - Special needs of disabled (housekeeping, social workers, therapists, aides, 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) | 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 |
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Section 8 / Public Housing</td>
<td>No as long as trustee is not a household member.</td>
<td>Under <em>DeCambre</em> 1st Circuit decision, no penalty if lump sum transferred into trust would not count as income (inheritance, insurance payments – health, accident insurance and worker’s compensation, capital gains and settlement for personal or property losses; retro Social Security/SSI). Otherwise, if principal more than $5000, for two years following the transfer into trust, the family’s Annual Income increases by the greater of:</td>
<td>• Regular payments to household</td>
<td>• Reimbursed medical costs</td>
</tr>
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<td></td>
<td></td>
<td>• actual income from the assets or</td>
<td>• Distribution of interest or dividend income earned by trust</td>
<td>• Sporadic, nonrecurring, or temporary payments</td>
</tr>
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<td></td>
<td></td>
<td>• 0.06% of the value of the transferred asset.</td>
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<td>• Distribution of the principal of the trust should not count</td>
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<td></td>
<td></td>
<td>When 2016 law is implemented, actual income from assets will be counted when determining rent. Imputed income is only counted to the extent that net family assets exceed $50,000. (law not implemented as of 1/8/2019)</td>
<td></td>
<td>• cable, internet, travel and medical expenses (per <em>DeCambre</em> 1st Circuit decision)</td>
</tr>
<tr>
<td>Benefit</td>
<td>SNT considered a resource?</td>
<td>Is Transfer of a Lump sum or Asset into an SNT Penalized?</td>
<td>SNT disbursements that ARE counted as income</td>
<td>SNT disbursements that ARE NOT counted as income</td>
</tr>
<tr>
<td>------------------</td>
<td>----------------------------</td>
<td>----------------------------------------------------------</td>
<td>---------------------------------------------</td>
<td>-------------------------------------------------</td>
</tr>
<tr>
<td>SSI</td>
<td>No.</td>
<td>Under age 65: No transfer penalty for assets placed in trust; may use individual SNT or pooled trust.</td>
<td>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.</td>
<td>Clothing purchase</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Age 65+: YES- Transfer penalty for assets placed in trust for up to 36-month disqualification, with 36-month look-back.</td>
<td>Shelter items include rent, mortgage, property taxes, heating fuel, gas, electricity, water, sewer, garbage removal, property insurance required by a mortgage.</td>
<td>Insurance (property, fire, theft, etc.) held at the owner's or renter's option</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Age 65+ may only use pooled trust, though assets placed in individual SNT prior to age 65 remain exempt.</td>
<td>Think about ABLE Acct?</td>
<td>Cable, telephone, cell phone, and internet service</td>
</tr>
<tr>
<td>Non-MAGI Medicaid – Institutional (nursing home)</td>
<td>No – if individual (d)(4)(A) trust established before age 65, or funds deposited into pooled trust account before age 65.</td>
<td>NO if individual under age 65.</td>
<td>Cash</td>
<td>Pre-payment of burial expenses is permitted through a funeral agreement – but only before death of beneficiary</td>
</tr>
<tr>
<td></td>
<td></td>
<td>YES if individual age 65+.</td>
<td>Trust may not pay for services that could be covered by Medicaid or that are not solely for benefit of beneficiary</td>
<td>Payment for companion services for a disabled beneficiary or a minor disabled child, and for incidental expenses of the companion, can be a valid expense</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>In-kind 3rd party vendor payments for expenses not covered by Medicaid are OK</td>
<td>Since nursing home rate includes food, etc. must be items or services to supplement Medicaid, e.g. private aide, clothing, entertainment</td>
</tr>
<tr>
<td>Benefit</td>
<td>SNT considered a resource?</td>
<td>Is Transfer of a Lump sum or Asset into an SNT Penalized?</td>
<td>SNT disbursements that ARE counted as income</td>
<td>SNT disbursements that ARE NOT counted as income</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>----------------------------</td>
<td>-----------------------------------------------------------</td>
<td>---------------------------------------------</td>
<td>------------------------------------------------</td>
</tr>
<tr>
<td>Non-MAGI Medicaid – Community</td>
<td>No</td>
<td>• NO if individual under age 65.</td>
<td>• Cash</td>
<td>In-kind 3rd party vendor payments for any expenses – rent, food, clothing, travel, entertainment, education, household items, etc.</td>
</tr>
<tr>
<td>(includes most home care, assisted living, and waivers)</td>
<td></td>
<td>• NO if individual age 65+, but if later needs Institutional Medicaid within 5 years of transfer, there will be a transfer penalty</td>
<td>• Payment for items that could be covered by Medicaid</td>
<td>Payment for companion services for a disabled beneficiary or a minor disabled child, and for incidental expenses of the companion, can be a valid expense.</td>
</tr>
<tr>
<td>MAGI Medicaid</td>
<td>No (but no asset limit)</td>
<td>• No. MAGI Medicaid has transfer penalties for institutional care but transfer to SNT presumably exempt.</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Veteran’s Pension</td>
<td>Yes</td>
<td>• Yes. Transfer to SNT for child determined incapable of self-support allowed. But not to one’s own SNT.</td>
<td>NA</td>
<td>NA</td>
</tr>
</tbody>
</table>
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/
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.

NYS Medicaid Administrative Directives, General Information System messages and Informational Letters (1995-present)
https://www.health.ny.gov/health_care/medicaid/publications/

Administrative Directives, General Information System messages and Informational Letters (older than 1995); also includes Local Commissioners Memoranda
http://onlineresources.wnylc.net/pb/default.asp
According to the Social Security Administration, “A spendthrift clause or
sendthrift trust generally prohibits both involuntary and voluntary transfers of
the trust beneficiary’s interest in the trust income or principal. This means that
the trust beneficiary’s creditors must wait until the trust pays out money to the
trust beneficiary before they can attempt to claim it to satisfy debts.

It also means that, for example, if the trust beneficiary is entitled to $100 a month
from the trust, the beneficiary cannot sell his or her right to receive the monthly
payments to a third party for a lump sum. In other words, a valid sendthrift
clause would make the value of the trust beneficiary’s right to receive payments
not countable as a resource.

However, not all States recognize sendthrift trusts, and States that do recognize
sendthrift trusts often do not allow a grantor to establish a sendthrift trust for
the grantor’s own benefit. In those States that do not recognize sendthrift trusts
(whether at all or because the trust is a grantor trust), we would count the value
of the trust beneficiary’s right to receive monthly payments as a resource because
it may be sold for a lump sum.

We do not require trusts to include a sendthrift clause. If the trust provides for
mandatory periodic payments to the beneficiary, then the trust may need a
sendthrift clause for the trust not to count as a resource.”

POMS SI 01120.200(B)(13), available at
recognize sendthrift trusts.

2 POMS SI 01730.048(C)(2) ; SI 01120.200(H), supra.

3 POMS SI 01120.200(B)(11), supra.

4 N.Y. Estates, Powers and Trusts Law § 7-1.12.

5 Social Security Administration, Program Operations Manual System POMS
The key POMS sections on SNTs were revised effective April 30, 2018. These are
POMS SI 01120.200, 01120.201, 01120.202, 01120.203, available starting at
http://policy.ssa.gov/poms.nsf/lnx/0501120200. Section 01120.203 was further
amended effective 7/6/18, available at
http://policy.ssa.gov/poms.nsf/lnx/0501120203

6 POMS SI 01120.200(D)(1)(a) (April 2018), available at

7 42 U.S.C. § 1396p(d)(4)(A) and (C).

8 POMS SI 01120.203.B.10 and D.8, available at
https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203

9 POMS SI 01120.203.C, available at
https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203. Rules re the payback
provision for pooled trusts are in SI 01120.203.D(8); rules re payback for
individual trusts established after 12/13/16 are in SI 01120.203.C(1)
POMS SI 01120.199 (effective 11/08/2010, revised May 2013, available at 


POMS SI 01120.203.C.2, available at 
https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203

42 U.S.C. § 1396p(d)(4)(C). See also, POMS SI 01120.203, available at 


The Federal Special Needs Trust Fairness Act, part of the 20th Century Cures Act, 
was signed into law by President Barack Obama on December 13, 2016, 
amending Section 1917(d)(4)(A) of the Social Security Act (42 U.S.C. 
1396p(d)(4)(A)). See https://www.congress.gov/bill/114th-congress/house- 
bill/34/. The POMS implementing this law distinguishes trusts created before or 
after Dec. 13, 2018. Before the POMS were amended effective April 2018, New 
York Social Services Law §366(2)(b)(2)(iii) was amended by S4779/A6743, to 
apply to all trusts established in NYS on or after August 21, 2017. Before the 
state law was amended, NYS DOH issued GIS 17 MA/008: Policy Change for 
Trusts Established for Disabled Individuals Under Age 65 -- PDF, stating that 
trusts could be established by a disabled individual "effective immediately," 
which was May 22, 2017, provided the trust otherwise complies with the 
“exception trust” provisions set forth in Administrative Directive 96 ADM-8, 
“OBRA ’93 Provisions on Transfers and Trusts.” Amendment of  POMS SI 
01120.203.C(2) sets Dec. 13, 2016 as the effective date of the change in who may 
establish a trust, available at 
https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203 (rev. 4/30/18)

SSA POMS SI 01120.203(C)(2)(a) (eff. April 2018), available at 

SSA POMS SI 01120.203(B)(2)(f) (January 29, 2010), available at 

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.


NYC HRA MICSA Alert, Powers of Attorney and Statutory Gifts Rider, dated July 


POMS SI 01120.203.E.2 available at SI 01120.203
https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203


29 See OTDA GIS 17 TA/DC 033 (“Care must be taken to ensure that TA and/or SNAP benefits of ABLE participants are not inappropriately reduced or discontinued.” See also 7 U.S.C. § 2014(d)(10),(g)(8)(B); 7 C.F.R. § 273.8(b)(2)(ii); Memorandum re ABLE accounts and SNAP eligibility, Food and Nutrition Service, USDA (Apr. 4, 2016), available at https://www.fns.usda.gov/snap/treatment-able-accounts-determining-snap-eligibility. See also 18 DOH GIS 18-GIS-02 (Medicaid – MAGI & Non-MAGI).


33 See n 75. This reporting requirement is imported from the SSI rules. The methodologies for assessing the income and resources of medically needy groups must be comparable to and no more restrictive than those used in the most closely-related cash assistance program, which here is SSI. 42 U.S.C. § 1396a(a)(10)(C)(i)(III); 42 C.F.R. §§ 435.831(b), 435.845, 436.601; CMS, State Medicaid Manual § 3625.
Both Medicaid and SSI count resources as of the 1st moment of the month, the snapshot date. Transfers or payments made close to the end of the month should be made by cashier’s check, so that the check clears before that snapshot date. See FH No. 76600482M (Monroe County 2017)(check deposit hand delivered to an SNT trustee on Nov. 30th, but not cashed until Dec. 5, 2017, was out of the client’s control on Nov. 30th, so client’s resources considered under Medicaid limit as of Dec. 1st; reverses discontinuance of Medicaid for excess resources).


IRC 104(a)(2); IRS Revenue Ruling 85-97 confirms structured settlement not taxable; IRS Publication 525.

See n. 32 supra.

These 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. This also includes Home and Community Based Services (“HCBS”) Medicaid Waiver programs that require a waiver of the Federal Medicaid rules, and are authorized under subsection (C) or (D) of Section 1915 of the Social Security Act.. See article about waivers in NYS at http://wnyc.com/health/entry/129/ and N.Y. Soc. Serv. L. § 366.5(e)(1)(vii). Waivers include the Traumatic Brain Injury (TBI) Waiver Program: N.Y. Pub. Health L. § 2740 et seq.; 95 LCM-70 (http://onlineresources.wnyc.com/pb/docs/95_lcm-070.pdf), 96 INF-21 (http://onlineresources.wnyc.com/pb/docs/96_inf-21.pdf).


**AIDS Home Care Program:** N.Y. Soc. Serv. L. § 367-e; 18 N.Y.C.R.R. § 505.21(a)(2).


42 For more information on the Deficit Reduction Act, see [http://wnylc.com/health/entry/38/](http://wnylc.com/health/entry/38/).


46 18 N.Y.C.R.R. § 360-4.3(e).


50 POMS SI 01120.201F, available at [https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120201](https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120201) (April 2018). The methodologies for assessing the income and resources of medically needy groups (which includes the Aged, Blind, Disabled whose income or assets exceed the SSI levels) must be comparable to and no more restrictive than those used in the most closely-related cash assistance program. Hence the SSI regulations and POMS set a floor for Medicaid eligibility rules. See 42 U.S.C. § 1396a(a)(10)(C)(i)(III); 42 C.F.R. §§ 435.831(b), 435.845, 436.601; CMS, State Medicaid Manual § 3625.


52 Id.


54 Id.

56 POMS SI 01120.201F.3.b available
   https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120201
57 POMS SI 01120.201F.3.c.4 available at
   https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120201
58 In the Matter of Mary O., Fair Hearing Decision No. 3945750N (February 25,
59 N.Y. Dep’t of Health, Department Release – Transmittal No. 96 ADM-8
   Attachment 2, Sept. 23, 1997, available at
   https://www.health.ny.gov/health_care/medicaid/publications/docs/adm/depart
   mentrelease9-97.pdf
60 In the Matter of D.C., Fair Hearing Decision No. 4080991J (May 17, 2004),
   available from Fair Hearing Database at http://onlineresources.wnylc.net.
61 42 C.F.R. § 435.832(c); 18 N.Y.C.R.R. § 360.9.
62 Wong v. Doar, 571 F.3d 247 (2d Cir. 2009).
64 NYS DOH GIS 14 MA/015, issued August 5, 2014, available at
65 Available at
66 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).
67 MRG Income at 283 (January 2011).
68 42 U.S.C. § 1382b(e)(5); SSA POMS SI 01120.203.
69 42 U.S.C. § 1382b(e)(5).
70 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.”)
71 SSA POMS SI 01120.200(D)(1)(a) (January 13, 2009), available at
72 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 not unilaterally revoke it.)

See also SSA POMS SI 01120.201(F)(2) (2018), available at http://policy.ssa.gov/poms.nsf/lnx/0501120201

POMS SI 02301.005.B.3. SSI Posteligibility - Recipient Reporting.

SSA POMS SI 01120.200.g.1.d (2018)


42 U.S.C. § 1382b(c)(1)(C)(ii)(IV); POMS SI 01150.121.A.3


Id.

POMS SI 01120.200G.1.c available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120200


Id.

TA Source Book, p. 369. The resource limits are at N.Y. Soc. Serv. L. § 131-n (resource rules), 131-a (only “available” resources count); 18 N.Y.C.R.R. § 352.23
Soc. Serv. L. § 131-n(1)(3); In Stewart v. Roberts, ___ AD3d ___, 2018 NY Slip Op 04609 (3d Dept. 2018), held that equity value – not fair market value- was counted as a resource, relying on NY Soc. Serv. L. § 131-a(1) language stating that only “available” resources can be considered. See also TA Source Book, Ch. 19B.1 pp. 19-3 – 19-4.


N.Y. Soc. Serv. L. § 131-a(12); 18 N.Y.C.R.R. § 352.29(h); 2001 OTDA letter p. 3.

OTDA, Administrative Directive 03 ADM-10 (November 19, 2003).

Id. at 3.


Id. at 3-4.

2001 OTDA Letter at p. 4.

2001 OTDA Letter at p. 4; N.Y. E.P.T.L. § 7-1.12; 18 N.Y.C.R.R. § 352.16(a).


7 C.F.R. § 273.8(e)(8)(i) through (iv).

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.

7 C.F.R. § 273.8(e)(8)(ii).

7 C.F.R. § 273.8(e)(8)(iv)(A)

OTDA Food Stamp Source Book, supra, 17-16 to 17-17.

2001 OTDA Letter at p. 5.

2001 OTDA Letter at p. 5.
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.

OTDA Food Stamp Source Book, supra, p. 278 (formatting changes are added for emphasis); see also 2001 OTDA Letter at p. 5.

OTDA Food Stamp Source Book, supra, pp. 266, 278.


Check website of NYS Office of Temporary & Disability Assistance for updates http://otda.ny.gov/programs HEAP. heap-program.asp#income.


18 N.Y.C.R.R. § 393.4(d).

2001 OTDA Letter p. 5.;


NY RPTL §467-b(1)(c); 467-c(1)(d), (f); NYC Admin. Code §26-601(d), (f).


RPTL § 467-b(2)(3).

9 N.Y.C.R.R. § 2202.20(d).

24 C.F.R. § 5.603(b)(2); see also DeCambre case, fn 96.


Section 102(c), amending section 3(b)(4) of the U.S.H.A.) 42 U.S.C. §1437a(b)(4)(B), as amended by Section 102(c) of P.L. 114-201; July 29, 2016, 130 Stat 782.

24 C.F.R. § 5.603(b) under definition of “Net Family Assets.”


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)).

24 C.F.R. § 5.609(c),(4) and (9).

24 C.F.R. § 5.603(b)(2); PHOG p. 121.

Similarly, 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/download/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.

24 C.F.R. § 5.609(b).

24 C.F.R. § 5.609(c)(4)(excluding medical expenses or reimbursement for paid medical expenses)

Income limits and transfer penalty rates posted at https://www.benefits.va.gov/PENSION/current_rates_veteran_pen.asp.
140 In Reames v. Oklahoma 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. Reames v. Oklahoma, 411 F.3d 1164 (10th Cir. 2005).

141 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.

142 See p. 16.


144 MRG Income at 237 (August 1999).


146 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.


151 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/download/58.
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.


This figure changes annually. See http://www.ssa.gov/oact/cola/sga.html.

See note 116 - 117.


20 C.F.R. § 404.1569a(b).

20 C.F.R. § 404.1569a(c)(2).

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.

20 C.F.R. § 404.1569a(d).

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.


166 See p.16.