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## **Supplemental Needs Trusts**

### **TRAINING OUTLINE for ADVOCATES**

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## SUPPLEMENTAL NEEDS TRUSTS

### I. Introduction

#### A. Definition

Supplemental Needs Trust (“SNT”) enables a person with a disability to maintain eligibility for government benefits -- Medicaid and SSI. The purpose of the SNT is to enhance the quality of life for the disabled person, by permitting the trust to pay for expenses not paid for by Medicaid and/or SSI.

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

1. *Age of disabled person* - whether under 65 or age 65 or 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 a parent, in a “third-party” trust
3. *Type of benefit* -- Whether SNT is established to protect solely Medicaid benefits or also SSI benefits.

#### C. General terminology:

1. “Beneficiary” - the disabled person for whose benefit the trust is set up. The beneficiary must be a “person with a severe and chronic or persistent disability,” even if he or she is over age 65. The beneficiary must receive government benefits or be expected to receive them in the future
2. “Grantor” or “Settlor” - a third party who establishes and funds a trust for a disabled beneficiary. This may be a parent, friend, party in a lawsuit, a deceased person whose will establishes the trust, etc. These trusts are called a “third-party trust”
3. “Trustee” - Every trust appoints a person, organization, or corporate entity to administer the trust. Duties include investing and managing the funds in the trust, and making expenditures on behalf of the beneficiary according to the rules included in the trust.
4. “Self-settled” trust - a trust established by the disabled person with his or her own money - often from an inheritance or a lawsuit. Distinguished from a “third party trust,” established by a parent, other relative, or friend using the donor’s own money.

## **D. Law and regulations**

MEDICAID -- 42 U.S.C. § 1396p(d)(4)(A) and (d)(4)(c) (see Appendix I at end of this outline), NY SSL 366.2(b)(2), 96 ADM-8 with addendum, available at <http://tinyurl.com/375G63>

SSI - 42 U.S.C. § 1382b(e)(5) and 1382b(c)(1)(C)(ii) - cross-references to Medicaid SNT statute above (see Appendix I at end of this outline).

Social Security Program Operations Manual System (POMS) at SI 01120.200 - .203. <http://policy.ssa.gov/poms.nsf/lnx/0501120200>

EPTL § 7-1.12 - sets forth criteria that will afford a SNT the benefit of a presumption that the trust is a valid statutory SNT

## **II. Self-Settled SNTS**

A self-settled SNT is established using the disabled individual's own funds.

### **A. Payback Requirement**

Funds left in the trust after the beneficiary dies must be used to pay back Medicaid or, for a pooled trust, must be kept by a non-profit trustee. Only funds remaining after paying back Medicaid may be distributed to other heirs.

### **B. Disability**

A supplemental needs trust may only be established for "individuals who are disabled" within the meaning of the Social Security disability laws, no matter how old they are. 42 U.S.C. § 1396p(d)(4)(A) and (C). Because people over age 65 are usually not determined "disabled" because they receive Medicaid, SSI, or Social Security solely based on their age, it has taken a while for the state to develop a procedure to determine whether they are disabled. This is discussed more below.

### **C. There are 2 kinds of self-settled trusts.**

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. 42 U.S.C. § 1396p(d)(4)(a) - often called a "D-4- A" trust (language of law in Appendix I at end of outline).

2. POOLED TRUST - A trust that is established and managed by a non-profit association. A separate account is maintained "for the sole benefit of" the disabled beneficiary. 42 U.S.C. § 1396p(d)(4)(C)

#### **D. Differences between INDIVIDUAL and POOLED trusts**

##### **1. AGE**

###### **a) Individual trust**

MUST BE UNDER 65 -- A disabled individual who wants to place his own assets into an SNT may use an INDIVIDUAL SNT only when he or she is under age 65.. If the trust is established and funded before s/he reaches age 65, then assets in the trust remain exempt after the individual reaches age 65. But new funds may not be deposited into the same SNT after the individual is 65.

###### **b) Pooled Trust**

A disabled individual of any age may establish and fund an account. (however, there may be transfer of asset penalties for people age 65+ – see below)

##### **2. Who May Establish Trust?**

###### **a) Individual Trust**

*The individual trust* must be established for the benefit of such individual by a PARENT, GRANDPARENT, LEGAL GUARDIAN of the individual, or a COURT. This is true even if the funds for the trust belong to the individual and if the individual has full mental capacity.

- (1) If the individual has a living parent or grandparent, and has mental capacity, no court involvement is required. The parent or grandparent need not be the trustee - just has to sign the trust document. NOTE if individual lacks mental capacity, however, the parent or grandparent may need to become guardian in order to have authority to transfer the individual's funds into the SNT.
- (2) If the individual has a legal guardian, the guardianship order may need to be amended to authorize establishment of a trust. In 17A guardianships, order must specify that guardian has power over person as well as property.

- (3) If the individual has no parent, grandparent, or guardian, a special court proceeding is required to establish the trust. Notice to HRA must be given of the proceeding.

**b) Pooled Trust**

Unlike an individual trust, the “joinder” or “enrollment agreement” used to join the master trust may be signed by the DISABLED INDIVIDUAL him or herself, if she has mental capacity to sign the forms.

- (1) Alternately, the agreement may be signed by PARENT, GRANDPARENT, LEGAL GUARDIAN of the individual, or a COURT. If signed by a parent or grandparent, they must have “legal authority to act with respect to the assets<sup>1</sup>” of the beneficiary, either by a power of attorney or guardianship. So even where a parent or grandparent is alive to sign the trust, a guardianship may still be necessary.
- (2) A standard power of attorney form does NOT have language authorizing the POA to establish a trust. If not in the POA, a new POA should be executed with this language, if possible.

**3. Payback To State At Death**

Both types of SNT’s forbid funds remaining in the trust upon the death of the individual to be distributed to heirs or beneficiaries –

**a) Individual Trust**

Funds must be used to pay back Medicaid paid on behalf of the individual. If funds remain after that payback, they can go to heirs. For this reason, the trust must also name a remainder beneficiary(ies) - this is required for SSI. For Medicaid, New York says that in order for the trust to be for the "sole benefit" of the disabled beneficiary, the beneficiary's estate should be named as the remainder. One way around this issue is to name the remainder beneficiaries as "those individuals who would be the distributees of the Beneficiary if the Beneficiary died intestate," or language to that effect.

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<sup>1</sup> POMS 01120.203(B)(1)(e). This requirement is added in the POMS for SSI trusts. This requirement is not necessarily binding for Medicaid-only approval.

b) **Pooled Trust**

As an alternative to paying Medicaid back, the SNT may provide that funds remaining upon death be retained by the trust, to be used for the benefit of other beneficiaries who are disabled. To the extent funds do not remain in this way, the SNT must provide that remaining funds be paid back to the State for Medicaid paid on behalf of the individual. Some trusts permit a beneficiary to designate heirs to receive the remainder, if any, after Medicaid's claim. Only limited expenses may be paid after death.

**III. Third-Party Trust**

A third-party SNT is one established with funds from someone other than the disabled beneficiary.

**A. No Payback Requirement**

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

**B. No Right of Recovery or Lien**

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

**C. Form of Trust**

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

**D. Extra Benefit for Parent**

Parent who transfers assets into an SNT for the benefit of a disabled child of any age has no transfer of asset penalty that is otherwise imposed for the parent's OWN Medicaid eligibility for long-term care services. This type of

transfer is one of the exceptions to the transfer penalty.<sup>2</sup> Also no SSI transfer penalty for transferor. POMS SI 01150.121

NOTE: A strategy was tried in which a parent in a nursing home placed his or her own income into a pooled trust for the benefit of his or her disabled adult child. Initially, some courts found that there was no transfer penalty<sup>3</sup>. However, in *Jennings v. Comm’r. Nassau DSS.*, 893 N.Y.S.2d 103 (2<sup>nd</sup> Dept. Jan. 5, 2010) the Appellate Division of the Second Department rejected this strategy, relying on *Wong v. Doar, supra*. The Court rejected the ability of a nursing home resident to shelter their income in any type of trust, including an SNT.

#### **IV. Supplemental Security Income and SNTs**

##### **A. Is it a resource?**

No, as long as drafted properly to comply with rules in 42 U.S.C. § 1396p(d)(4)(a) (individual trust for person under age 65) or (d)(4)(c) (pooled trust). These requirements are not covered in this outline.

##### **B. Is there a Transfer Penalty?**

###### **1. Under age 65**

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

###### **2. Age 65 or over**

Transfers into an SNT by individuals age 65 *or over* WILL incur a transfer penalty

- a) This SSI penalty disqualifies the individual from SSI for up to three years, depending on amount transferred. (The penalty is calculated

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<sup>2</sup> 42 U.S.C. § 1396p(c)(2)(B)(iii); N.Y. Soc. Serv. L. § 366 subd. 5(d)(3)(ii)(C). 18 NYCRR § 360-4.4 (c)(2)(iii)(c)(1)(iv).

<sup>3</sup> *Correri v. N.Y. Dep’t of Health*, Index No. 017372/04 (N.Y. Sup. Ct. Nassau County 2005); *See also Kaiser v. N.Y. Dep’t of Health*, 824 N.Y.S.2d 755 (N.Y. Sup. Ct. Nassau County, July 24, 2006).

by dividing the amount transferred by the individual's SSI monthly payment rate, including the State supplement). EXAMPLE: Individual living alone transfers \$7100 - disqualified from receiving SSI for 10 months. Maximum disqualification is 3 years (2008 rate).

- b) The penalty may be worth incurring depending on amount transferred. If disqualified for 3 years, in NYS would lose \$25,560 worth of SSI. If funds are substantially higher than that figure, could be worth it.

### C. Are disbursements from SNTs treated as income?<sup>4</sup>

1. Payments made by the trust 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 plus \$20.<sup>5</sup> 42 U.S.C. § 1382(a)(2)(A); 20 C.F.R. § 416.1130(b); *Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989). The federal benefit rate in 2010 is \$674/month, so one-third is a reduction of \$224/month + \$20 = \$244. This reduction may be worth accepting if, for example, the rent or maintenance amount is very high, say \$1000 - it's worth the trust's paying that and accepting a one-third reduction in the monthly SSI amount.

NOTE: Until March 9, 2005, payments for CLOTHING were also counted as in-kind income. This SSI regulation was changed so that after 3/9/05 the SNT, a friend or other third party may purchase clothing for the client and it won't count as income.<sup>6</sup>

- a) SHELTER expenses include rent, mortgage, property taxes, heating fuel, gas, electricity, water, sewer, garbage removal. POMS SI § 835.465 NOTE: Condominium fees in themselves are not household costs. However, condominium fees may include charges which are household costs (e.g., garbage removal). To the extent that

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<sup>4</sup> SSI rules on trusts can be found in the Social Security Program Operations Manual System (POMS) at SI 01120.200 - .203. <http://policy.ssa.gov/poms.nsf/lnx/0501120200>

<sup>5</sup> This figure is updated every year, and is announced by the state Office of Temporary and Disability Assistance OTDA. 2010 chart is at <http://tinyurl.com/2FYNYLN>.

<sup>6</sup> Fed. Reg., February 7, 2005 [Volume 70, Number 24], pp. 6340-6345, amending 20 C.F.R. Section 416.1102, 1003, and other sections.

such charges are identifiable, use them in the computation of inside and outside ISM

INSURANCE -- "Only property insurance required by the mortgage holder in order to receive the mortgage is considered a household cost. Insurance (property, fire, theft, etc.) held at the owner's or renter's option is **not** a household cost." POMS SI § 835.465.

2. Direct payments for goods and services other than food and shelter will *not* reduce SSI benefits.
  - a) Cable, telephone, cell phone, and internet service are not shelter costs.
  - b) Payment for travel, local transportation, entertainment expenses, educational expenses, and (since 2/05) clothing, are all permitted. For example, an account could be set up with a local car service that would bill the trust monthly.
  - c) Pre-payment of burial expenses is permitted through a funeral agreement.
3. Cash paid directly from the trust to the beneficiary is unearned income, so would REDUCE SSI benefits dollar-for-dollar. Not a good idea.

#### **D. Can income be placed in the trust to reduce countable income?**

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

### **V. Medicaid and SNTs**

#### **A. Is it a Resource?**

No, as long as drafted properly to comply with rules in 42 U.S.C. § 1396p(d)(4)(a)(individual trust for person under age 65) or (d)(4)(c) (pooled trust). These requirements are not covered in this outline.

#### **B. Is there a Transfer Penalty?**

##### **1. Under age 65**

For individuals under age 65, there is no transfer penalty for transfers of either income or assets into an SNT, in both community and institutional budgeting. The individual must have been under 65 at the time of the

transfer in order for it to be exempt from transfer penalty. This includes Community Medicaid, Nursing Home, and Home and Community Based Services (HCBS) Waiver programs.

## 2. Age 65 and over

### a) Community Medicaid

- (1) Community Medicaid includes those who have Medicaid only for health insurance (who may attest to their assets), as well as those with coverage for Community-Based Long-Term Care services. These include home attendant (PCA), home health aide (CHHA), Managed Long-Term Care (MLTC), and the Assisted Living Program (ALP).
- (2) There is **no transfer penalty** for eligibility for community-based Medicaid for persons of *any age*. (NYS came close to – but did not -- impose a transfer penalty on community-based home care in the 2006 budget. Federal law makes it optional for states to penalize transfers for community-based care).
- (3) This is true for both transfers of *income* -- allowing use of the NYSARC trust to eliminate spend-down -- and for transfers of *assets*.

### b) Nursing Home

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

Many people don't realize that the nursing home transfer of asset rules penalize not only transfers of *assets* but also transfers of *income*. As long as you remain in the community, "transfers" of monthly income into a trust do not affect your Medicaid eligibility. However, if a person who had been using an SNT enters a nursing home, it was feared that the DRA would be interpreted to impose a penalty on transfers of excess income into the trust made on or after Feb. 8, 2006. By directive issued July 24, 2008, NYS DOH clarified in GIS 08

MA/020<sup>7</sup> that as long as funds deposited into the pooled trust were spent on the individual's expenses prior to applying for Medicaid for institutional care, the prior deposits of income into the trust will be considered a "compensated" transfer, so no transfer penalty will be imposed.

**Examples (FROM GIS 08 MA/020):** A pooled trust is established for a disabled individual, age 68. For 10 months, the individual deposits his monthly excess income of \$825 into the trust. While in the community, community budgeting applies and the \$825 is exempt as countable income. Then the individual is institutionalized and requires coverage for nursing home care. . . Since the individual was over age 65 when the deposits were made into the pooled trust, the income deposits are treated as a transfer ( $\$825 \times 10 = \$8,250$ ).

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

For more information on the DRA, see <http://wnylc.com/health/entry/38/>

### c) **HCBS Waiver Programs**

Home and Community Based Services (HCBS) Waiver programs include the Lombardi (aka "nursing home without walls" or LTHHCP), Traumatic Brain Injury (TBI), Office of Mental Retardation and Developmental Disabilities (OMRDD), Nursing Home Transition and Diversion (NHTD), and other programs.<sup>8</sup> They are special Medicaid programs that include some services not typically covered by Medicaid, all of which include some form of home care in the

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<sup>7</sup> N.Y. Dep't of Health, GIS 08 MA/020 (July 24, 2008), at <http://tinyurl.com/BSOK5S>.

<sup>8</sup> See article about waivers in NYS at <http://wnylc.com/health/entry/129/>. Lombardi program, SSL §§ 367-c, 366(6), 10 NYCRR § 505.21, 85 ADM-27; Traumatic Brain Injury (TBI) Waiver Program, N.Y. Pub Health § 2740 et seq, 95 LCM-70, 96 INF-21; Nursing Home Transition and Diversion Waiver - SSL § 366(6-a)(enacted 2004, waiver just approved by CMS, state has just begun to implement); OMRDD Home and Community-Based Services (HCBS) Waiver, SSL 366(7), 92 INF-33, 92 LCM-170, 94 LCM-24, and 94 LCM-147; AIDS Home Care Program: NY SSL §367-e; 18 NYCRR § 505.21(a)(2).

community. These special programs require a waiver of the Federal Medicaid rules, and are authorized under subsection (C) or (D) of Section 1915 of the Social Security Act.<sup>9</sup>

Until 9/23/07, the prevailing belief and state policy was that transfers by people age 65+ into an SNT triggered a transfer penalty, for all categories of Medicaid employing “institutional budgeting,” which was thought to include both nursing home and HCBS waivers.

A GIS issued by NYS DOH on Sept. 24, 2007 states that there is NO TRANSFER PENALTY applying to all these waiver services. GIS 07 MA/018 (9/24/07) (copy attached to this outline or at <http://tinyurl.com/CAJF6M>.)

Apparently this arises from the DRA provision which changed the starting date of the transfer penalty period to “. . . . or the date on which the otherwise eligible individual is receiving nursing facility services. . . . whichever is later. . . .” This actually makes no sense, since “nursing facility” is defined to include waiver services for purposes of the penalty. However, CMS has directed DOH and other states that the penalty may NOT begin when an individual who transferred assets applies for waiver services and is “otherwise eligible.”<sup>10</sup> Since the penalty may not begin unless an individual enters a nursing home, it seems only fair that no penalty should apply at all for all care other than nursing home care – and the GIS clarifies this policy.

EXAMPLE. Sadie lives in New York City, is 67 years old and transferred \$30,000 into an SNT in July 2006. In NYC, a penalty of about 3.1 months would apply (\$9,636/month 2008). She may receive Medicaid home care, **and under the GIS, also Lombardi or other waiver care**, immediately because there is no penalty on that care. In July 2010 she has a stroke and is admitted to a nursing home. Her application for nursing home Medicaid is denied and she is ineligible

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<sup>9</sup> SSL § 366.5(e)(1)(vii).

<sup>10</sup> See NYS Dep’t of Health, *Questions Regarding Effect of Medicaid Eligibility Changes On Long Term Home Health Program (LTHHCP)*, 2/12/07 (copy attached to this outline or on file with Selfhelp Community Services, Inc.)

for the number of months equal to \$30,000 divided by the 2010 regional nursing home rate because of the transfer 4 years earlier.

**CHART – Summary of Transfer Penalties in SSI and Medicaid**

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

Program	Category	Is there a penalty for transfer of assets into SNT?	Is there a penalty for transfer of income into an SNT?
			but unwritten DOH policy seems to be allowed for singles but not for married participants.

**C. Are disbursements from SNTs treated as income?**

**1. Cash Disbursements**

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

**2. 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 Medicaid purposes, regardless of what the payments are for. 18 NYCRR § 360-4.3(e). Payments may include rent, clothing, food, etc.

NOTE: At least one trustee of a pooled SNT, NYSARC, permits a family member or other individual who paid for a client's expense, such as buying clothing, to be reimbursed if receipts are submitted. However, they should contact NYSARC to get approval BEFORE making the expenditure to assure reimbursement.

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

**a) Rent**

NYSARC prefers RENT bills for which they can set up automatic payments. But if tenant needs to submit rent coupon to landlord with payment, then trust can’t do automatic payment. In such cases, client/representative must send the rent coupon each month to NYSARC. Also, for rent payments, Trust will initially ask for a copy of the lease verifying the client lives there. If s/he is not on the lease, or

there is no lease, they need a letter signed both by the landlord and the client stating client lives there, and the amount of rent.

WARNING - Ask NYSARC specifically to set up rent payments on automatic payment. Monitor closely. Glitches have happened. Other trustees policies on payment of rent are unknown.

b) CON ED, other utilities

NYSARC informed us in 6/04 that even when client enters a budget plan so that bills are in the same amount each month, they will not put this into an automatic payment mode. Client must send or fax bill to Trust on monthly basis. One may not ask the utility to send bills directly to the Trust. Again, other trustees policies may differ.

c) Credit cards

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

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

**D. Can income be placed in the trust to reduce countable income?**

**1. Community Medicaid**

**Yes.**

By placing one's excess or "surplus" monthly income into a Supplemental Needs Trust, the local Medicaid program must adjust the Medicaid budget to *eliminate* the spend-down for Community-Based Medicaid. This has been true in NYS since February 25, 2004, when the State Dept. of Health issued a fair hearing decision allowing use of the NYSARC trust to eliminate spend-down of income. Copy at [wnylc.net](http://wnylc.net). Fair Hearing Decision No. 3945750N, In the Matter of Mary O, dated Feb. 25, 2004

The decision relies on an old amended directive of the State Dept. 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."

Note it uses the term "exception trust" for what is otherwise known as a "supplemental needs trust." The letter and 96 ADM-8 directive are posted at <http://tinyurl.com/LYO79M>.

a) **Medicaid Managed Care**

In FH #4080991J, dated 05-17-2004, State DOH reversed Nassau County's attempt to disenroll a Medicaid recipient from Medicaid Managed Care because she had a spend-down, which she deposited into a Supplemental Needs Trust. Generally, people with an income spend-down are excluded from Medicaid Managed Care. The decision held that if income is deposited into an SNT, there is no spend-down, so she continued to be eligible for Medicaid Managed Care.

b) **Medicare Savings Programs**

Income placed in an SNT may also qualify someone for a Medicare Savings Program. (<http://wnylc.com/health/entry/99/>) See Fair Hearing No. 4399513P (Nassau Co., Jan. 31, 2006)(available in WNYLC Online Resource Center, Fair Hearing Database, free registration required).

<http://onlineresources.wnylc.net/welcome.asp?index=Welcome>

2. **Nursing Home**

No.

The spend-down is called a “NAMI” for clients in nursing homes, standing for Net Adjusted Monthly Income. Until recently, people under age 65 could eliminate this NAMI for nursing home (“chronic care”) budgeting by placing their “NAMI” into a trust. People over age 65 could never do this, because it was a transfer of assets (see p. 9).

However, the state recently started applying a rule that says that in chronic care budgeting, all income is to be applied to the cost of care “including income disregarded or considered unavailable for the purpose of determining MA eligibility.” 18 NYCRR § 360.9; 42 CFR § 435.832(c). The State has interpreted this to mean that they include income placed into the Trust.

In *Wong v. Doar*, 571 F.3d 247 (2d Cir. N.Y. 2009), 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 a trust to reduce his Net Available Monthly Income (NAMI). The case involves complex federal regulations on post-eligibility budgeting, which do not allow the same deductions from income that are allowed in the community. In *Jennings v. Comm’r. Nassau DSS.*, 893 N.Y.S.2d 103 (2<sup>nd</sup> Dept. Jan. 5, 2010), the Second Department held that Wong also precludes an institutionalized parent from transferring his or her own income into an SNT for the benefit of a disabled child.

### 3. HCBS Waiver Programs

#### **Maybe.**

Transfers of *income* to eliminate 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 institutional budgeting, which, under a recent federal court decision, do not permit use of an SNT to eliminate the “NAMI.” for nursing home residents of ANY age. 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).

While the State has not issued any guidance on whether this interpretation of the regulations applies only to nursing home coverage, or also HCBS Waiver programs, informal information from State employees as of

November 2010 is that state policy is to PERMIT single Lombardi and other waiver participants to place their excess income into SNTs, but prohibit this practice for married participants. The rationale is that married participants have the benefit of spousal impoverishment protections, which are an element of institutional budgeting. We hope DOH will clarify its policy so that counties have clear direction.

We have heard anecdotal reports that NYC permits the use of an SNT to eliminate the spend-down for participants in Lombardi programs. Contact Mr. Lee (212-896-8843) or Virginia Choy (212-835-5493) in HRA to inquire about using an SNT with the Lombardi program.

## **VI. Practical Issues with SNTs**

### **A. Choosing a Trust and Mental Capacity**

#### **1. Under age 65**

If the client is UNDER AGE 65, the client has the option of setting up an individual trust, with a friend or family member as trustee. As set forth above at pp. 2 *et seq*, if the client has a parent, grandparent, or legal guardian to “establish” the trust, this is the simplest way - the trust need only be drafted and executed, then submitted to and approved by the local Medicaid office (which must have it approved by the legal department). If a court proceeding is needed to establish this trust (because there is no living parent, grandparent, or guardian), notice of the proceeding must be given to HRA Office of Legal Affairs.

- a) If the client lacks mental capacity, however, even if client has a parent or grandparent, a guardian may be necessary to actually transfer the client’s funds into the trust.
- b) If the client has no parent, grandparent, or legal guardian, then EITHER a court proceeding is necessary to establish an individual SNT, OR
- c) Client may enroll in a POOLED trust as long as she has mental capacity to do so - with no court involvement, or if she signed a power of attorney with express power to establish a pooled trust.

#### **2. Age 65 or over**

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

Of the pooled trusts, the NYSARC Community Trust II is the most accessible because there is no minimum *asset* deposit and because it is open to all persons with disabilities.

Of the other pooled trusts that allow “pass-through” of income:

- a) Two require a minimum \$10,000 deposit. -- The Community Living Corporation (CLC) Foundation Inc. and AHRC NYC Foundation Inc.
- b) A third trust, Lifetime Care Foundation for the Jewish Disabled, requires a \$750 deposit and an annual fee of \$750 year (the annual fee is roughly comparable to NYSARC’s fee).

Contact info and fee schedules of trusts at <http://wnylc.com/health/download/10/>. NYSARC fees discussed below.

If client has mental capacity, s/he may enroll in trust with NO court order.

If s/he lacks mental capacity, she needs either:

- a) a **guardian** to enroll in the trust or
- b) a **Power of Attorney** that expressly authorizes her attorney in fact to establish a trust. The standard form durable power of attorney does not have such a clause.

## **B. Special rules about assigning “income” into trust.**

The Social Security Act prohibits assignment of Social Security income. 42 U.S.C. § 407. Because of this provision, one cannot simply direct Social Security to deposit one’s check directly into an SNT account. However, while the beneficiary must receive her Social Security check each month, she may voluntarily transmit all or part of it into the SNT each month.

Although this provision might appear to preclude the Assignment of Social Security benefits to a trust, the courts have made clear that the sole purpose of Section 407 is to prevent creditors from attaching or garnishing Social Security payments.<sup>11</sup> However, in Reames v. Oklahoma, 411 F.3d 1164 (10<sup>th</sup>

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<sup>11</sup> Mason v. Sybinski, 280 F.3d 788 (7<sup>th</sup> Cir. 2002); Kriegbaum v. Katz, 909 F.2d 70, 73 (2d Cir. 1990); Birdwell v. Concannon, 2 F.3d 1156 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2002) (Section 407 does not bar voluntary arrangement with bank to apply otherwise exempt funds to

Cir. 2005), 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 2<sup>nd</sup> Circuit, should be limited to chronic care or nursing home budgeting, not community budgeting.

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.

### **C. Logistics of enrolling in NYSARC trust for income.**

NOTE - NYSARC used to be the only trust allowing deposit of income without a substantial deposit of assets. Now there are other trusts in NYS. See **List of pooled trusts** posted at <http://wnylc.com/health/entry/4/>. NYSARC's procedures are given here because it is the largest trust and has lower fees than most of the other trusts.

All documents discussed below are available at <http://wnylc.com/health/entry/44/> and [http://nysarctrustservices.org/commtrust\\_trusttwo.php](http://nysarctrustservices.org/commtrust_trusttwo.php).

NOTE: Client's spend-down must be at least \$100/month to enroll.

#### **1. Joinder Agreement**

The beneficiary, parent, grandparent, guardian or person with power of attorney signs the "Joinder Agreement." Download blank at [http://nysarctrustservices.org/commtrust\\_trusttwo.php](http://nysarctrustservices.org/commtrust_trusttwo.php).

The "Joinder Agreement" allows the individual beneficiary to join the NYSARC Community Trust II Master Trust, which is posted at [http://nysarctrustservices.org/commtrust\\_trusttwo.php](http://nysarctrustservices.org/commtrust_trusttwo.php).

- Pages 2 – 5 are a "Beneficiary Profile." Client's signature is required on page 5.

- Page 2, Question 4 -- "Is the purpose of establishing this account to shelter monthly income? Answer: YES!! The form asks for an estimate of the monthly payment.
- Page 4, Question 9 -- "Relationship of donor to beneficiary?" Answer is "Self" or "same." This is to distinguish this type of trust, funded by the disabled beneficiary for herself, from those where a third party is using his or her own money to set up a trust for the disabled beneficiary.
- Page 4, Question 11 – NYSARC requires you to list a social worker, case manager, lawyer, or someone who will help you submit the Trust to Medicaid and get it approved.
- Pages 6 – 9 are the Joinder Agreement. The joinder agreement must be notarized on page 9. NOTE: This form was revised 9/14/05. Earlier versions without a notarized signature are no longer accepted.

*Capacity to sign pages 5 and 9 -- If client lacks mental capacity to sign it, then either a parent, grandparent, or legal guardian must sign it, or someone who has client's power of attorney, but only if the power of attorney specifically authorizes establishment of a trust.*

*Note that the standard power of attorney forms do not include this clause.*

- *Terminology -- "Donor" or "beneficiary" on the form means the client - in question 1 on pp. 2 and 6, for example.*

## 2. Fees for joining the NYSARC Trust

### a) Initial payments

As of Jan. 1, 2006, the initial funds to establish the account **must be "guaranteed" (cashier's check, money order or certified check** drawn on client's bank account). Future payments can be made by personal check. The initial payment must include the following:

- **AN INITIAL \$200 NON-REFUNDABLE FEE** – NYSARC keeps this fee, even when client leaves trust (dies or goes into a nursing home). No expenses may be paid from this fee.
- **DOUBLE INITIAL DEPOSIT** – When you first enroll, you must send NYSARC a payment for TWO months of the spend-down amount. The reason for this is that ONE MONTH's spend-down must always be on deposit with NYSARC. This is NOT available for payment of client's expenses. NYSARC will only pay expenses from money over and above

the \$200 fee PLUS one month's spend down payment. (See example below, with some options if cannot afford all this at once.

**b) ANNUAL \$50 FEE**

As of May 1, 2006, NYSARC also charges an annual \$50.00 accounting fee that is deducted from each client's account each July. This fee applies to the prior year's audit & tax work. Therefore, accounts established prior to Dec. 31, 2007 would be charged the fee in July of 2007. Accounts established in 2008 would not be charged the fee until July of 2009.

**c) MONTHLY FEE**

NYSARC deducts a monthly fee according to a sliding scale of the amount deposited. Effective June 1, 2008, the fees are<sup>12</sup>:

Monthly Deposit	Monthly Fee
Zero to \$350	\$30
\$351 to \$500	\$40
\$501 to \$700	\$50
\$701 to \$950	\$60
\$951 to \$1,200	\$75
\$1,201 to \$1,600	\$90
\$1,601 to \$2,000	\$120
\$2,001 to \$2,500	\$150
\$2,501 to \$3,000	\$180
\$3,001 to \$3,500	\$210
\$3,501 to \$4,000	\$240
\$4,001 and above	Contact NYSARC, Inc.

**3. How Much to Put Into the Trust?**

**EXAMPLE:** Sally is age 67. Her gross Social Security is \$1525.50. Her Medicare Part B premium of \$96.40 (2009) is deducted from her check, so she receives \$1429.10. She also pays for a Blue Cross Medigap policy of \$390/quarter or \$130/month. Her spend-down calculation is:

Total Income	1525.50	Gross Income
	- 96.40	Medicare Part B premium
	- 20.00	Disregard for aged, disabled (standard)
	- 140.00	<u>Blue Cross - premium</u>

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<sup>12</sup> The full NYSARC fee schedule is posted at [http://nysarctrustservices.org/commtrust\\_trusttwo.php](http://nysarctrustservices.org/commtrust_trusttwo.php)

- 246.40 TOTAL DEDUCTIONS
- 1279.10 Countable net income
- 767.00 Medicaid level for ONE (2009)
- 512.10 Spend-down

If Sally joins the trust, and deposits \$512.10 each month into the trust, once Medicaid approves it, she will have NO spend-down.

- o This is the minimum she should put into the trust, plus enough to pay the monthly fee, which is \$50 for this monthly amount.
- o If she puts in an additional \$96.40/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 an MSP. If she enrolls in an 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 \$96.40. If she puts this into the trust, she will still have a -0-spend-down.
- o She may only enroll in QMB or SLIMB - not QI-1 -- if she wants Medicaid too. Someone who does not want Medicaid may want to join the Trust simply to enroll in an MSP - not just to save \$96.40/month, but because it qualifies her for the Low Income Subsidy/ Extra Help for Medicare Part D. A fair hearing decision found that an SNT can be used to qualify for an MSP. FH No. 4399513P (REP: Judy Kaslow, Nassau-Suffolk Law Services)(posted on wnylc.net)

**Fee Example:** If Sally joins in July and wants NYSARC to start paying her expenses for July, she must send in a guaranteed check for at least:

$$\underline{\text{TOTAL}} = 2 \times \text{monthly spend-down} + \$200$$

$$\$1417.00 = 2 \times \$608.50 + \$200 \text{ (If she wants to join an MSP)}$$

OR

$$\$1224.20 = 2 \times \$512.10 + \$200 \text{ (Without joining an MSP)}$$

In the above example, Sally is sending her July spend-down to NYSARC, but must also send in an extra \$200 + an extra month's spend-down. If she does that, NYSARC can pay her July expenses from the 2<sup>nd</sup> month spenddown, after deducting the \$50 monthly fee.

**Married Couple** -- Where Medicaid applicant has little income of her own, but non-applying spouse's income gives her a spenddown, **Matter of JT**, Fair

Hearing # 4576742M (Nov. 16, 2006, Oneida Co., Julie Morse, Legal Services of Central New York, rep)<sup>13</sup> held that a NYSARC trust may properly be funded by the spouse of the person seeking medical assistance, and directs Oneida county to authorize the Appellant's request to deposit her Medicaid spenddown, composed of the spouse's income, into a pooled trust. Otherwise, the non-applying spouse would have to do a spousal refusal, and risk being sued by the County. If the higher income spouse was also disabled, and also needed Medicaid, then the non-applying spouse could open his own NYSARC trust account, and eliminate the spend down for both spouses.

EXAMPLE where non-applying spouse does *not* need 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 \$663 (\$1800 combined income less \$1117 income level for 2 less \$20 disregard = \$663). Under the fair hearing decision, SHE can open a NYSARC trust and deposit \$ 663 of HIS income, to eliminate HER spend down. This is better for her than opening her own trust and putting in her own income, since that would still leave a \$ 163 spend down.

EXAMPLE where spouse with higher income DOES need Medicaid – In the same couple, Ralph now needs Medicaid. Their spend down is still \$ 663 but he can open the NYSARC trust himself since he is disabled and put the same amount of money in - \$663 – to eliminate a spend down for both of them.

TIP: If both spouses are disabled and need Medicaid, open a NYSARC account only for one instead of both – and save money on fees and administrative hassle. One spouse can even put ALL his/her income into the trust – the idea is that the total income left after the NYSARC deposit should be the \$1117 couple rate plus enough to pay any health insurance premiums.

#### 4. **What if client cannot afford the large double payment up front?**

NYSARC will let you spread out the initial payment described above over two months. However, they will not pay your expenses out of any funds *until* they have on deposit the \$200 fee plus one month's spend-down. They will only use funds over and above that amount to pay your expenses. So -- Sally may just send in \$ 808.50 the first month (\$200 + one month's spend-down), instead of the full \$1417. However, NONE of this money can be paid out for her expenses. NYSARC keeps the \$200 as a

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<sup>13</sup> To view these hearings you must login to the WNYLC Online Resource Center at <http://onlineresources.wnylc.net>.

fee, and the rest must remain on deposit with NYSARC. Sally will have to find some other way to pay her first month expenses. Then, in the 2<sup>nd</sup> month, she would send in her regular spend-down for that month (\$608.50), and this full payment will be available for her expenses, minus the monthly fee of \$50.

Note that if you stretch the initial deposit over 2 months, the monthly fee must still be paid for each of these 2 months.

NYSARC will NOT reimburse a family member or charity if they directly pay the double deposit. If they pay rent or other expenses for the client, however, they will reimburse them... from the client's funds once enough is deposited for them to start paying. This could be a solution for payment of rent or other expenses for the first months when the double deposit must be paid. Of course, the reality is that because of the double deposit requirement, if she is someone who needs all of her income each month to meet her expenses, there will be no "extra" money left to reimburse them. In the example, if Sally sent \$ 808.50 in July, then her regular spend-down in August (\$608.50), NYSARC won't pay any expenses in July. The full August check will be available for her expenses, minus the monthly fee of \$50. If she has money left over after her August expenses are paid, NYSARC could reimburse her daughter if she paid Sally's rent or other expenses in July.

#### 5. **Package Of Documents To Send To NYSARC**

- a) Signed AND NOTARIZED Joinder Agreement
- b) CERTIFIED check to NYSARC (new requirement) including double initial payment and \$200 fee discussed above
- c) Copy of Social Security Card
- d) Copy of Social Security Award Letter, including type of benefit received and claim number

**NYSARC will sign the Joinder Agreement and send it back to you** in about 4 weeks. They will send you a packet that will include forms for submitting monthly bills, instructions for sending in the monthly deposit, and their procedures. They will tell you when you may start submitting bills. Each month, send the spend-down as instructed. Send it every month even if you are not yet on Medicaid, and while the Medicaid

application is pending. Otherwise, the reduction in your spend-down will not be retroactive

SEE NYSARC Submission Checklist at

[http://nysarctrustservices.org/commtrust\\_trusttwo.php](http://nysarctrustservices.org/commtrust_trusttwo.php)

## 6. Submitting the NYSARC package to Medicaid

a) WHERE TO SEND TO -- IN NYC, send the packets to the Medicaid office or CASA that handles client's Medicaid case. If she is near the time for recertification/ renewal, you can submit it with the renewal package. Be sure to send it CERTIFIED.

- (1) a copy of the fully signed Joinder Agreement,
- (2) the Master Trust,
- (3) proof that the spend-down amount was sent to the SNT initially and every month to the present (e.g., Verification of Deposits),
- (4) proof that client is disabled (see ¶ 7 below)
- (5) A signed HIPAA release for each medical provider (NYC form posted at <http://wnylc.com/health/file/56>)

## 7. 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 same standard is used as for SSI and SSD. NYS and NYC have issued procedures for determining disability generally and particularly for people age 65+. These are all posted at <http://wnylc.com/health/14/>.

- a) General: The NYS Medicaid Disability Manual - <http://tinyurl.com/PNBO6>
- b) Apr. 19, 2005 - NYS Dept of Health Informational Letter 05 OMM/INF-1 - "Pooled Trusts & Disability Determinations for Individuals 65 Years of Age & Older" (<http://tinyurl.com/B7ULA5> and <http://tinyurl.com/CN7GK6>)
  - (1) Says Form M11q is NOT sufficient to establish disability. Instead, the forms 486 and 1151 must be submitted.

- (2) Uses special rules for determining disability for people over age 65 from Social Security Ruling No. SSR 03-03p.<sup>14</sup>
- c) NYC has issued procedures – July 7, 2005 - NYC HRA Medicaid Alert “Disability Determinations for Individuals with a Pooled Trust” <http://wnylc.com/health/file/58> – clarifying procedure for submitting 486 and 1151 in NYC. Says that the AIDS releases are NOT necessary unless applicable to the client.
- d) NYS DOH GIS 06 MA/020 7/28/06 “Additional Special Medical - Vocational Profile for the Medicaid Disability Manual” for people age 60+ (<http://tinyurl.com/SXVBL>)
- e) Finally, DOH clarifies that special rules in SSR 03-3p, above, for elderly, must be followed.

You must submit the following two forms to their local Medicaid office processing their case, which in turn must forward the forms to Albany to determine disability. The forms are:

- **Form DSS-486T – Medical Report for Determination of Disability** – Filled out by treating physician. The basic form is only the first two pages. The rest of the 25 pages are attachments for different impairments. The doctor should fill out only those attachments that pertain to the client’s primary impairments. Also posted at <http://wnylc.com/health/file/60>
- **Form DSS-1151 – Disability Interview** – Completed by the client or her family or advocate. This form records clients’ educational and work background, and sources of medical treatment. <http://wnylc.com/health/file/61>

Proving disability can be a complicated process, but is made easier for those 65+. A sequential evaluation process is used. This process is briefly described in SSR 03-03p, which also gives some shortcuts to the usual evaluation process for people age 65+.

Social Security publishes “the listing” of impairments, which are criteria for finding that a particular impairment is so severe that the person is found disabled without looking further at age, education, or work

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<sup>14</sup> <http://tinyurl.com/OVOCX>

experience. Take a look at the listings - one for each body system.<sup>15</sup> Show the relevant listings to the doctor, and ask the doctor to verify whether she meets any of them. Doctor can't just give her opinion, must document that the criteria are met.

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 of 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. This does not mean DISABILITY is assumed, but that you only have to prove the fact that there is a medically determinable impairment to proceed to the next step of the evaluation process, which is whether the individual can return to past relevant work or perform other work, considering her age, education, and work experience.

If the client has no "past relevant work," meaning she did not perform substantial gainful activity in the last 15 years,<sup>16</sup> or can no longer perform "past relevant work," the Ruling uses two special vocational profiles. If client has a "severe impairment" (See note above for people age 72+ impairment is *deemed* to be severe) and meets either of these profiles, "a finding of disabled must be made." Ruling, p. 5. NYS DOH issued a directive July 28, 2007 -- GIS 06 MA/020 7/28/06 "Additional Special Medical -Vocational Profile for the Medicaid Disability Manual" for people age 60+, which essentially implements this 2003 Social Security Ruling. <http://tinyurl.com/SXVBL>

a) The "past arduous work" profile --

- Individual did 35 years of arduous physical unskilled labor which s/he can no longer do because of impairments, and
- has a marginal education (6<sup>th</sup> grade or less),

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<sup>15</sup> The listing is in federal regulations at 20 CFR. Part 404 Subpart P Appendix 1. It is online at <http://ssa.gov/disability/professionals/bluebook/>

<sup>16</sup> <http://tinyurl.com/RZ5DS>

- b) The “no work experience” profile --
  - Has not worked in 15 years
  - Is age 55 or over
  - Has a limited education (11<sup>th</sup> grade or less)

If either of the special profiles above don't apply, then the regular vocational-educational rules apply - Appendix 2 of subpart P of 20 CFR Part 404.<sup>17</sup> Since that chart ends at age 64, the Ruling directs use of the rules for people age 60-64 for people age 65+. The Ruling, p. 5 describes how these rules apply to people age 65+. You will see that only the most highly educated clients or those with skilled work experience in the last 15 years will not be found disabled. Lack of English literacy is considered and helps establish disability.

The model cover letter to Medicaid will help take you through these steps. You can edit it down, deleting the parts that don't apply. Also posted at <http://wnylc.com/health/file/64>

## 8. After Submitting the Documents to Medicaid

### a) WAIT and ADVOCATE

Medicaid offices still are new to this procedure and need to be pushed along. Give them copies of the city and state directives cited above. Go up to the head of the CASA or Medicaid office you are dealing with.

### b) The Medicaid office will send

- (1) the trust documents to their legal office for approval. This is routine and should not be a problem.
- (2) the disability office in the City which then sends them to the State. The first ones took months, hopefully now being more streamlined. If you hit a wall, Sheila Greene is the HRA contact person for forwarding the disability documents to Albany. 212-630-1993.

### c) Once disability is approved and the trust is approved by legal affairs, the Medicaid office must re-budget the spend-down. Make sure the

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<sup>17</sup> “The Grids,” available at <http://tinyurl.com/Y9DUJ8A>.

effective date is what you want - the month that the client first started sending her spend-down to the trust.

- d) Figure out and advise NYSARC which bills you want SNT to pay on a regular basis. The most efficient bills are regular ongoing bills - rent, mortgage, maintenance, cable, etc. (*beware* of SSI considerations - see p. 7). For rent, NYSARC can set up automatic payments. For all other bills, client/case manager must send/fax up bill each month to NYSARC.

CONTACT to set to set up initial & recurring payments:  
Heidi Flatt Tel 800-735-8924 Fax 518-439-2670

- e) Each month client must send the amount of their monthly surplus to NYSARC -- by check or money order. NYSARC has set up a lockbox and will notify you/client of where to send check each month. This must be sent separately from the bills sent for payment, which you send to NYSARC in Albany.
- f) Monthly statements

The NYSARC trust sends out monthly statements to the client or other person designated on the Joinder Agreement. These statements are not very detailed. They show only the beginning balance, total disbursements for month, not an itemized list of each disbursement. So client/representative is advised to keep a copy or log. **These statements (or canceled checks) will be important to save to show Medicaid that the client's income did in fact go into the Trust each month.** It is not enough to join the Trust - the client must also show that she is putting money into the Trust each month to eliminate her spend-down.

## APPENDIX I – APPLICABLE LAW

### FEDERAL MEDICAID STATUTE:

42 U.S.C. § 1396p(c)(2) An individual shall not be ineligible for medical assistance by reason of paragraph (1) [transfer of assets] to the extent that--

(B) the assets--

· · · ·  
(iv) were transferred to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of an individual under 65 years of age who is disabled

42 U.S.C. § 1396p(d)(4) This subsection [imposing penalties on transfers of assets in Medicaid] shall not apply to any of the following trusts

(A) - called a **D-4-A Trust - Individual Trust**

A trust containing the assets of an individual **under age 65 who is disabled** (as defined in section 1614(a)(3) [42 USCS § 1382c(a)(3)]) and which is established for the benefit of such individual **by a parent, grandparent, legal guardian** of the individual, **or a court if the State will receive all amounts remaining in the trust upon the death** of such individual up to an amount **equal to the total medical assistance paid** on behalf of the individual under a State plan under this title [42 USCS § § 1396 et seq.].

(C) - called a **D-4-C Trust - Pooled Trust**

A trust containing the assets of an individual who is disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)] that meets the following conditions:

(i) The trust is established and managed by a non-profit association.

(ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.

(iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)] by the parent, grandparent, or legal guardian of such individuals, **by such individuals**, or by a court.

(iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total

amount of medical assistance paid on behalf of the beneficiary under the State plan under this title [42 USCS § § 1396 et seq.].

42 USC 1396p(e) Definitions. In this section, the following definitions shall apply:

(1) The term "**assets**", with respect to an individual, **includes all income and resources** of the individual and of the individual's spouse ....

*Cross-reference to definition of "disabled" in 42 USCS § 1382c(a)(3)A) – "Except as provided in subparagraph (C), an individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."*

## SSI STATUTE

42 U.S.C. 1382b(e)(5) This subsection [counting trusts as resources] shall not apply to a trust described in subparagraph (A) or (C) of section 1396p(d)(4) of this title [see Medicaid section above].

## APPENDIX II – SNTs and OTHER BENEFITS

A Supplemental Needs Trust ("SNT") is generally established to protect SSI or Medicaid eligibility and, but may also affect other public benefits. This outline explains how SNT's affect Medicaid and SSI as well as Temporary Assistance ("TA"), Food Stamps ("FS"), Home Energy Assistance Program ("HEAP"), Senior Citizen Rent Increase Exemption ("SCRIE"), and Section 8 housing subsidies.

The issues considered for each benefit are whether the benefit 1) Treats the SNT as a resource, 2) Imposes a transfer or "lump sum" penalty on a recipient or applicant who transfers resources into an SNT, 3) Regards disbursements from the SNT as income, and 4) Deducts income that is diverted into the trust from countable income, as Medicaid allows to eliminate the spend-down.

The Office of Temporary and Disability Assistance ("OTDA") addressed some of these issues with regard to TA, FS, and HEAP in its March 8, 2001 Informational Letter 01-INF-08 ("2001 OTDA Letter").<sup>18</sup> 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.

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<sup>18</sup> See [http://www.otda.state.ny.us/main/directives/2001/INF/01\\_INF-08.pdf](http://www.otda.state.ny.us/main/directives/2001/INF/01_INF-08.pdf) ("2001 OTDA Letter").

## I. Temporary Assistance ("TA")

Background. Temporary Assistance is temporary financial assistance for needy men, women and children. It is administered through the New York State Office of Temporary and Disability Assistance ("OTDA"), and locally through the departments of social services. (See OTDA Temporary Assistance Source Book, <http://www.otda.state.ny.us/main/ta/TASB.pdf>). There are two major types of Temporary Assistance programs: 1) Family Assistance ("FA") and 2) Safety Net Assistance ("SNA"). Social Services Law 350-j.

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. (See GIS 03 TA/DC 005). 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. N. Y. Soc. Serv. L. Sec. 350-j; 18 N.Y.C.R.R. Part 372)

SNA benefits are for individuals 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.

### A. Is the SNT a resource?

The 2001 OTDA Letter (see n1) states at p. 3, "A[n] SNT is not considered an available resource for the purpose of determining TA eligibility."

The resource limits are \$2000 for households with no one over the age of 60, and \$3000 for households with a member who is age 60+. TA Source Book, p. 369. The home applicant lives in is exempt, and households may own one automobile with a fair market value of \$4,650. However, if the automobile is needed for the applicant or recipient to seek or retain employment or travel to and from work activities, the automobile exemption amount is increased to \$9,300, or such other higher value as the local district may elect to adopt. The fair market value of one automobile in **excess** of \$4,650 or \$9,300 may be applied to the \$2,000 general resource limit. TA Source Book, pp. 369-371.

## **B. Is there a transfer or "lump sum" penalty?**

### **1. The harsh "lump sum" rule**

Lump sum income is treated harshly in the TA programs. Whether the lump sum is transferred or spent, it must be budgeted to calculate a period of TA ineligibility. 18 NYCRR sec. 352.29(h), 2001 OTDA letter p. 3. 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 individual from receiving TA for the period that the lump sum would have lasted if spent gradually at the same rate of the monthly TA benefit. For example, if the monthly TA benefit is \$350, and the lump sum is \$3500, the TA disqualification period would be ten months. The period of disqualification does not change based on how gradually or immediately the recipient actually spends the lump sum. So, in the above example, even if the recipient spends all \$3500 of her lump sum on the day she receives it, she will nevertheless be disqualified from TA for a period of ten months.

### **2. Exception for SNTs**

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

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

2001 OTDA letter p. 3. Note that timing is important. The lump sum penalty will still apply even if the 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. 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.

**3. Another exception to the harsh lump sum rule applies when the lump sum is less than the TA resource limits set forth above**

In such cases, the agency must allow the recipient to set aside the portion of the lump sum which, when combined with the recipient's countable resources is less than the TA resource limit. See OTDA Administrative Directive 03-ADM-10, November 19, 2003 ("03-ADM-10").

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, his eligibility is not affected because even with his winnings, his countable resources are still less than the TA resource limit of \$2000. It should be noted, however, that lump sums that are for insubstantial amounts are deemed income in the month received. (See 03-ADM-10 p. 3) In the above example, if the lotto winning is \$250 -- an amount below this recipient's \$300 standard of need -- the winnings indeed count as income, and his SNA eligibility is affected.

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

**C. 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. (See 2001 OTDA Letter pp. 3-4.) 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 disabled beneficiary such as housekeeping, aides, social workers, therapists, and vocational rehabilitation aides, and legal expenses. (See 2001 OTDA Letter at p. 4.) 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. (See 2001 OTDA Letter at p. 4., EPTL 7-1.12, 18 NYCRR 352.16(a)).

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

#### **D. Can income be placed in the trust to reduce countable income?**

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

## **II. Food Stamps**

Background. The Food Stamps Program ("FS") is a benefit that enables people with limited income to increase their ability to purchase food. Through the use of a debit card, it works as a cash substitute redeemable for food in participating grocery stores. Recipients receive a monthly allotment which varied based on the household size and income.<sup>19</sup>

### **A. Is the SNT a resource?**

#### **1. RESOURCE TEST IN GENERAL FOR FOOD STAMPS**

There is **NO RESOURCE TEST** for Food Stamps as long as the household contains someone who is disabled or over age 60, and the gross monthly income is below 200% of the Federal Poverty Line (in 2010, \$1,805/mo. for single, \$2,428/mo. for couple).<sup>20</sup>

If the household contains an elderly or disabled member, but their 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 \$3,000.

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<sup>19</sup> See OTDA Food Stamp Source Book, <http://otda.ny.gov/main/programs/food-stamps/FSSB.pdf> and <http://www.nyc.gov/html/hra/html/directory/food.shtml>. See also <http://www.otda.state.ny.us/main/foodstamps/FSSB.pdf>

<sup>20</sup> See OTA 08-INF-03 Informational Letter: Categorical Eligibility for Food Stamps Q & As , <http://otda.ny.gov/main/policy/directives/2008/INF/08-INF-03.pdf> . See also **10-INF-07** LDSS-4943 (11/09): "Food Stamp Benefits Categorical Eligibility Desk-Aid" 10-INF-07 Attachment 1 - LDSS-4943 (11/09) <http://otda.ny.gov/main/policy/directives/2010/INF/10-INF-07-Attachment-1.pdf> ; 10-INF-06 Attachment 1 - LDSS-4314 "FS Benefits Household Composition Desk Guide, <http://otda.ny.gov/main/policy/directives/2010/INF/10-INF-06-Attachment-1.pdf>.

If there is no elderly or disabled household member, then the resource limit is \$2,000. Food Stamp Source Book, see n 29.

## 2. TRUST as a RESOURCE for Households with a RESOURCE TEST

If the household does not have an elderly or disabled household member, or if it does have an elderly or disabled household member, and the gross monthly income exceeds 200% FPL, then one must examine whether a Trust 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. 7 CFR 273.8(e)(8)(i) through (iv). 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.*

7 CFR 273.8(e)(8)(i) through (iv); OTDA Food Stamp Source Book at p. 363 - 364 (see n 2), 2001 OTDA Letter at p. 5.

3. Potential issues raised by the federal regulations include:

a) Who is the trustee?

Since the trustee may be an organization, all pooled trusts should be allowed. If the SNT is an individual trust established for someone under age 65, however, an issue might arise if the trust is established by a parent or guardian without a court order. The above regulation suggests that to ensure Food Stamp eligibility, a court order should be obtained. 7 CFR 273.8(e)(8)(ii). *NOTE* that the 2001 OTDA Letter does not differentiate between types of trustees, simply stating that irrevocable trust funds are excluded.

b) Source of funds

Under 7 CFR 273.8(e)(8)(iv), a third-party trust established from funds from a "non-household" member is no problem. But in a self-settled trust established from the household's own funds, the trust is considered "inaccessible" 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...**" Thus self-settled SNT "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." 2001 OTDA Letter at p. 5. Since these rules are very different than those for Medicaid, they must be heeded carefully.

**B. Is there a transfer or "lump sum" penalty?**

Generally, there is a disqualification from Food Stamp eligibility for one year for certain intentional transfers. The following is a direct excerpt from the OTDA Food Stamp Source Book, pp. 371-372.

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

*transferred knowingly in the 3-month period prior to application or if they are transferred knowingly after the household is determined eligible for benefits.*

*EXCEPTIONS -- TRANSFERS NOT AFFECTING ELIGIBILITY - The following transfers will not affect program eligibility:*

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

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

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

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

*INTERPRETATION Households which have transferred resources shall be disqualified from participation in the food stamp program if: The transfer occurred in the three month period prior to application and was knowingly for the purpose of qualifying or attempting to qualify for food stamp benefits, or; The transfer occurred after certification and was knowingly for the purpose of*

*continuing to qualify for food stamp benefits. The disqualification period must be applied if the resources are transferred knowingly to prevent the household from exceeding the maximum resource limit.*

OTDA Food Stamp Source Book, pp. 371-372.

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

### **C. Are disbursements from the SNT treated as income?**

The rules for Food Stamps 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 Food Stamp recipient, may prevent the payment from being counted as income.

These principles are set forth in the OTDA Food Stamp 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 a 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.*<sup>21</sup>

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

#### **D. 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 a 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." OTDA Food Stamp Source Book pp. 266, 278. <http://www.otda.state.ny.us/main/foodstamps/FSSB.pdf> Medicaid is the only benefit that allows income to be reduced by the amount that is put into the trust.

### **III. Home Energy Assistance Program**

Background. 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. (See [http://www.nyc.gov/html/dfta/html/senior/benefit\\_guide.shtml#heap](http://www.nyc.gov/html/dfta/html/senior/benefit_guide.shtml#heap), New York Social Services Law Sec. 97, 18 NYCRR 393.1).

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

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<sup>21</sup> 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.

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 (See 18 NYCRR 393.4(d)).

**A. Is the SNT a resource?**

There is no asset limit for HEAP eligibility. Therefore, an SNT does not affect HEAP eligibility. Eligibility for Emergency HEAP does not have an asset limit per se. Instead, determinations for Emergency HEAP eligibility are based on whether the household has the funds to ameliorate the emergency itself. See 18 NYCRR 393.4(d). Money that is in an SNT is not considered a resource that is available for amelioration (See 2001 OTDA Letter p. 5). Thus, an Emergency HEAP applicant who has an SNT is not expected to raid her SNT to ameliorate the emergency.

**B. 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.

**C. Are disbursements from SNTs 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."

**D. 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 the trust.

**IV. Senior Citizen Rent Increase Exemption**

The Senior Citizen Rent Increase Exemption ("SCRIE") exempts individuals age 62 or over living in rent controlled, rent stabilized, and certain limited income/limited equity apartments from rent increases provided they satisfy a number of specified criteria. See 9 NYCRR § 2202.20

(<http://www.metcouncil.net/factsheets/9NYCRR2200-2211.html#2202.20>). The criterion regarding income mandates that aggregate disposable income of all members of the household residing in the housing accommodation may not exceed a specified amount, currently \$28,000 ([http://www.nyc.gov/html/dfta/html/scrie/tenant\\_whocanapply.shtml](http://www.nyc.gov/html/dfta/html/scrie/tenant_whocanapply.shtml)).

**A. Is the SNT a resource?**

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

**B. Is there a transfer or "lump sum" penalty?**

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

**C. 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. 9 NYCRR § 2202.20(d). This regulation does list all compensation and cash retirement and government benefits, interest and dividends, rents, royalties, and alimony and support "... other than gifts and voluntary assistance payments from relatives and friends of members of the household not required to provide maintenance or support..." received by any member of the household, with deductions for payroll taxes, union dues, and court-ordered support.

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

#### **D. Can income be placed in the trust to reduce countable income?**

Presumably, 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 the trust.

#### **V. Subsidized Housing Programs**

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

Background. There are three main HUD-subsidized housing programs -- Public Housing; 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); and the inventory of privately-owned, multi-family housing developments where the subsidy is linked to a particular housing site, not to the tenant (often including HUD Section 8 "Project-Based" subsidies). The "income" regulations for all three of these programs are set out in one regulation, 24 CFR 5.609. In all these programs, the participating family pays a portion of the rent -- generally thirty percent -- based on their countable adjusted annual income and the local housing authority pays the remaining amount.

The applicable "income" regulations for all three of these programs are set out in two regulations, 24 CFR 5.609 which defines "income," and 24 CFR 5.611 which describes "adjustments" to income. In all these programs, the participating family pays a portion of the rent -- generally thirty percent of the household's income after the adjustments allowed by HUD. -- and HUD or the local public housing agency (PHA) pays the remaining amount.

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

#### **A. Is the SNT a resource?**

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

## 1. General Rule

For assets in excess of \$5,000 HUD programs count the larger of the actual income generated by the asset or an "imputed" income if the asset is not generating any actual income (or is generating only a very small amount). HUD instructs the administering housing agencies to use a fixed interest rate, approximately at the level of a passbook savings account interest rate, now set by HUD at an annual rate of 2%. *See* 24 C.F.R. 5.609(b)(3).<sup>22</sup> That means that once an asset produces enough actual or imputed income that the subsidy is reduced to zero, or if the income from the asset takes the household income over the income limit for the housing program, then the tenant will have to deal with the consequences of being over-income. So, the problem is not strictly an "assets" issue, it is an "income" issue.

In the case of the Section 8 programs, at some point the imputed income will cause the subsidy to be reduced to zero. If the subsidy stays at zero for more than six months, the program administrator has to terminate participation in the Voucher program. *See* 24 CFR 982.445. Or, if the tenant lives in a project-based housing development, the tenant may have his or her 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.

## 2. Exception – Irrevocable Trusts NOT counted as Assets.

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

## B. Is there a transfer or "lump sum" penalty?

### 1. General rule on transfer of assets

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<sup>22</sup> The current Passbook Savings Rate is 2 percent as determined by HUD. (See 24 CFR 5.603(b)(3) and Public Housing Occupancy Guidebook ("PHOG") p. 121-122, <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf>).

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. 24 C.F.R. 5.603. 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) 2% of the value of the transferred/disposed of asset (Note: the 2% is the current Passbook Savings Rate as determined by HUD. (See 24 CFR 5.603(b)(3) and, for an example of how this applies to the public housing program, see the PHOG at footnote 22).

2. **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.
- 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.

**C. Are disbursements from SNTs 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 CFR 5.609(c). As stated above, when a family's net assets are greater than \$5,000, Section 8 takes these assets into

account when computing annual income. Reading the lists of countable and excludable income together shows several points:

1. Although all payments made to, or on behalf of, a household member are generally treated as income,<sup>23</sup> the "income does not include" list describes pretty broad exceptions -- among other things, for "**sporadic, "nonrecurring" "temporary" and some one-time only "lump-sum" payments.** See 5.609(c)(3),(4) and (9). Income distributed "regularly" to the household from the trust is included in Annual Income. 24 CFR 5.603(b)(2); PHOG p. 121.

STRATEGY TIP: If you are setting up or in control of the frequency of the distribution from the SNT, it would probably make sense to have the payments provided for from the SNT fall into one of those categories, such as for randomly occurring expenses instead of making systematic payments for regularly occurring expenses. In the first case (random payments) the distributions from the SNT would not be income. BUT, in the later case (regular payments) they would be.

2. Payments made strictly for, or as reimbursement of, **medical expenses** (e.g. expenses not covered by Medicaid) are not counted as income in the HUD programs. See 24 CFR 5.609(c)(4).
3. The "not included" portion of the income regulation at 24 C.F.R. 5.609(c)(17) describes an exemption for "**[a]mounts specifically excluded by any other Federal statute from consideration as income.**" HUD periodically publishes a list of such statutory exclusions, but distributions from SNTs are not on that list since there is no such specific statutory exclusion. Nor has HUD found any other federal statute that would encompass distributions from SNTs.
4. The distribution of an asset to the household is not income to the extent that it merely reflects a **conversion of an asset or investment to cash**, rather than taking out the profit on the investment. "Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the

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<sup>23</sup> 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)).

family." 24 CFR 5.609(b) (Note that this exception is in the "income includes" list, rather than the list of exceptions on the "income does not include" list, 5.609(c)).

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

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

#### **D. Can income be placed into the trust to reduce countable income?**

There is nothing on point about this, but a regular income stream can probably not be diverted into the trust that would have been "income" if it had gone directly to the client. Arguably, the payments to the trust would not be income to the HUD household if neither the client nor any household member had any control over placing this income into the trust, but this would be a rare scenario, if possible at all. Moreover, the distributions from such trust would be subject to the regular income rules (i.e. random vs. regular payments; medical reimbursement exception, etc.).

## **VI. Family Health Plus**

Thanks to The Legal Aid Society Health Law Unit for part of this section). See article posted at <http://wnylc.com/health/entry/84/>.

**Family Health Plus ("FHPlus")** is a Medicaid program for uninsured adults between the **ages of 19 and 64**. FHPlus enrollees must enroll in a managed care plan.<sup>24</sup> When applying, applicants should be informed about whether they are eligible for Medicaid and/or FHPlus. If the applicant is eligible for regular MA she cannot enroll in FHPlus. However, if the applicant is only eligible for MA with a spend-down, she can choose to enroll in FHPlus. N.Y. Soc. Servs. L. §369-ee(2)(a)(2); 01 OMM/ADM-6 at 11-12.

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<sup>24</sup> See N.Y. Soc. Servs. L. § 369-ee et. seq. 01 OMM/ADM-6

All FHPlus enrollees must enroll in a FHPlus managed care plan and all services, including pharmacy and family planning, are provided through the plan. FHPlus enrollees receive primary, preventive, specialty and inpatient care. The FHPlus plan gets to determine if it will cover dental care (those plans that do get rate adjustments from the Department of Health).

FHPlus Enrollees have their **first 6 month's of coverage guaranteed**, even if their income goes above the guidelines (enrollees have a duty to report if their circumstances change).

FHPlus will **not** pay for long-term care services for the chronically ill, like nursing home stays, personal care services, hospice care, intermediate care facilities for developmentally disabled and private duty nursing. FHPlus **does** cover up to 40 home care visits in lieu of hospitalization. FHPlus also does not cover non-emergency transportation, medical supplies, non-prescription medications (other than diabetic supplies and equipment). See SSL §369-ee(1)(E); 01 OMM/ADM-6 (Attachment VI describes FHPlus benefit package).

See more information at <http://wnylc.com/health/entry/84/>.

#### A. Income

You may not spend-down to FHPlus.

1. Parents who live with children under 21 and 19-20 year olds living with their parents must have a gross income of less than 150% of the poverty level.
2. Single and childless couples and 19-20 year olds who do not live with their parents must have gross income less than 100% of the poverty level.
3. Income limits posted at  
[http://www.health.state.ny.us/nysdoh/fhplus/who\\_can\\_join.htm](http://www.health.state.ny.us/nysdoh/fhplus/who_can_join.htm)

#### B. Asset limits

Effective January 1, 2010, there is no longer an asset limit for this program.<sup>25</sup> If there is income or dividends generated by assets, or

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<sup>25</sup> *Elimination of Resource Test for Non-SSI Related Medicaid & Family Health Plus Applicants/Recipients* NYS DOH 2010-ADM-01 (January 2010), posted at [http://www.health.state.ny.us/health\\_care/medicaid/publications/docs/adm/10adm-1.pdf](http://www.health.state.ny.us/health_care/medicaid/publications/docs/adm/10adm-1.pdf) .

distributions from a retirement account such as an IRA, these would be counted as income. The principal, however, no longer counts as an asset.

### **C. PENALTIES ON TRANSFERS OF ASSETS**

With no limits on assets, there are no longer penalties on transfers of assets.

### **D. Can income be placed into the trust to reduce countable income?**

Not likely to be allowed, though no specific rule or court or administrative decision. Since an SNT may, by definition, only be used by someone who is determined “disabled,” s/he has the right to use an SNT to qualify for Medicaid.

## **VII. Medicare Savings Programs (MSP)**

In these programs, Medicaid pays the Medicare Part B premium and sometimes other Medicare cost-sharing for Medicare beneficiaries who meet the income limits. While they are authorized under the Medicaid statute, and paid for by Medicaid, an MSP beneficiary does not necessarily have to be a Medicaid recipient; one may apply for an MSP but not for Medicaid.

**A. NO ASSET LIMIT** – In New York State, these programs have no asset limit, so transfers into an SNT would incur no penalty.

**B. INCOME** – The programs generally use SSI-related Medicaid budgeting rules, with the SSI-related deductions from income. See information at <http://wnylc.com/health/entry/99/>). An exception is made for household size, which is more generous in some cases for couples than the SSI rules. In 2010, NYS DOH modified its rules so that all married individuals will be considered a household size of TWO for the MSPs. [DOH GIS 10 MA 10](#) *Medicare Savings Program Household Size*, June 4, 2010.

### **C. Can income be placed into the trust to reduce countable income?**

Income placed in an SNT may also qualify someone for a Medicare Savings Program. (See Fair Hearing No. 4399513P (Nassau Co., Jan. 31, 2006)(available in WNYLC Online Resource Center, Fair Hearing Database, free registration required). <http://onlineresources.wnylc.net/welcome.asp?index=Welcome>

**CHART – Summary of SNT Rules for Various Benefits**

<b>BENEFIT</b>	<b>SNT considered a resource?</b>	<b>Is Transfer of a Lump sum or Asset into an SNT Penalized?</b>	<b>SNT disbursements that ARE counted as income</b>	<b>SNT disbursements that ARE NOT counted as income</b>
<b>Temporary Assistance</b>	No	No, but only <i>IF</i> 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 (house-keeping, social workers, aides, therapists, legal expenses)
<b>Food Stamps</b>	No, but may require court order if individual (d)(4)(A) non-pooled trust even if set up by parent/grand-parent	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
<b>HEAP</b>	No	Unclear.	Unclear	Unclear
<b>SCRIE</b>	N/A	Unclear	Unclear	Unclear
<b>Section 8</b>	No as long as trustee is not a household member	Yes, if principal more than \$5000, for two years following the transfer into trust, the family's Annual Income increases by the greater of: actual income from the assets or 2% of the value of the transferred asset.	-- regular payments to household  -- distribution of interest or dividend income earned by trust	-- Reimbursed medical costs  -- sporadic, nonrecurring, or temporary payments  -- distribution of the principal of the trust should not count

<b>BENEFIT</b>	<b>SNT considered a resource?</b>	<b>Is Transfer of a Lump sum or Asset into an SNT Penalized?</b>	<b>SNT disbursements that ARE counted as income</b>	<b>SNT disbursements that ARE NOT counted as income</b>
<b>SSI</b>	No – if individual (d)(4)(A) trust established before age 65, or pooled trust account	<p>-- Under age 65: No transfer penalty for assets placed in trust, if disabled.</p> <p>-- Age 65+: Transfer penalty for assets placed in trust for up to 36-month disqualification, with 36-month lookback.</p>	<p>-- 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.</p> <p>-- shelter items include rent, mortgage, property taxes, heating fuel, gas, electricity, water, sewer, garbage removal, property insurance required by a mortgage</p> <p>-- cash</p>	<p>-- clothing purchase</p> <p>-- Insurance (property, fire, theft, etc.) held at the owner's or renter's option</p> <p>-- Cable, telephone, cell phone, and internet service</p> <p>-- travel, local transportation, entertainment, educational expenses</p> <p>-- Pre-payment of burial expenses is permitted through a funeral agreement – but only before death of beneficiary</p>
<b>Medicaid – Institutional services (nursing home, Lombardi &amp; other waiver programs)</b>	No – if individual (d)(4)(A) trust established before age 65, or funds deposited into pooled trust account before age 65	<p>NO if individual under age 65.</p> <p>YES if individual age 65+, except that since 9/24/07 GIS 07 MA/018, no penalty for waiver programs, only for nursing home.</p>	<p>-- cash</p> <p>-- trust may not pay for services that could be covered by Medicaid or that are not solely for benefit of beneficiary</p>	<p>In-kind 3<sup>rd</sup> party vendor payments for expenses not covered by Medicaid are OK</p> <p>– since nursing home rate includes food, etc. must be items or services to supplement Medicaid, e.g. private aide, clothing, entertainment</p>
<b>Medicaid – Community-based care (includes most home care, assisted living) and Medicare Savings Programs</b>	No	<p>NO if individual under age 65.</p> <p>If individual age 65+, transfer does not disqualify from community based care or, under GIS 07 MA/018, from waiver care, but under DRA may disqualify from nursing home care if needed within 5 years after transfer.</p>	<p>--cash</p> <p>-- payment for items not “supplemental,” could be covered by Medicaid or not solely for benefit of beneficiary</p>	<p>In-kind 3<sup>rd</sup> party vendor payments for any expenses – rent, food, clothing, travel, entertainment, education, etc. household items,</p>

<b>BENEFIT</b>	<b>SNT considered a resource?</b>	<b>Is Transfer of a Lump sum or Asset into an SNT Penalized?</b>	<b>SNT disbursements that ARE counted as income</b>	<b>SNT disbursements that ARE NOT counted as income</b>
<b>Family Health Plus</b>	No	No - not since Jan. 1, 2010, when asset limits were abolished for FHP.	-- cash  -- payment for items not "supplemental," could be covered by FHP or not solely for benefit of beneficiary	In-kind 3 <sup>rd</sup> party vendor payments for any expenses – rent, food, clothing, travel, entertainment, education, etc. household items,