

Presentation To:

ALADDIN

**“QUALITY LIVING AND STAYING CONNECTED WITHIN THE
COMMUNITY”**

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I. Overview of Supplemental Needs Trust (SNT) for Disabled Adults

A. What is Supplemental Needs Trust?

A Supplemental Needs Trust can be established for disabled individuals who wish to shelter money or assets. The Trust will provide resources for enhanced care or living expenses without interfering with the receipt of government benefits such as Social Security Income and Medicaid. There are specific rules on creating such trusts and in maintaining them for the disabled person.

B. Types of Trust

There are three types of Trusts:

1. A Trust created by Another

A parent, relative, or the Court can set up an SNT for a disabled child. This Trust can either be created in the family member's Will or during the family member's lifetime using an "inter-vivos" Trust. Since the funds in the Trust are not the property of the disabled person, the transfer does not cause ineligibility for benefits. The disabled beneficiary may not receive the assets directly from this Trust.

2. A Self-created Payback Trust

This trust was authorized in 1993 by the federal budget act (OBRA '93). This type of SNT must be established by a parent, grandparent, legal guardian or a court using the assets belonging to the disabled individual under the age of sixty-five. Funding this Trust will not interfere with government benefits as long as there is a payback provision back at the disabled person's death.

3. A Pooled Trust This trust was authorized in 1993 by the federal budget act (OBRA '93). It is managed by a not-for-profit organization. Separate Trust accounts are created for each disabled participant and managed centrally by pooling the resources. This type of Trust does not require a payback of the remainder to Medicaid at the Trust creator's death. The remainder is paid to the not-for-profit organization.

C. What type of government benefits are involved?

Eligibility for Supplemental Security Income (SSI) and Medicaid are affected by asset transfers. Thus, an SNT can ensure continued eligibility for these benefits.

D. Can SSI and Medicaid recover from or invade a Supplemental Needs Trust?

When a Trust is set up by a parent, grandparent, or guardian for the disabled person, the Trust creator may, once the disabled person reaches the age of majority, designate individuals other than the disabled beneficiary as the final beneficiaries of this trust. Since there was no obligation to support the disabled person in life, the Trust fund can pass to other heirs at death. This asset is not in the disabled individual's estate to recover against.

In the alternative, if the Trust is set up by the disabled person with his/her own funds, then the remainder in the Trust is "paid back" to Medicaid. To avoid any payback, the Trustee should use the funds fully, leaving little to revert back to Medicaid.

E. What other protective measures should be put in place to develop a safety net for a disabled adult?

To the degree the disabled individual is competent to do so, a Power of Attorney (POA), Health Care Proxy and Living Will should be established. In addition, a comprehensive chart should be created and placed in an accessible place listing all the pertinent information a caretaker would need to know to provide for the disabled adult, including: (1) information on medications, (2) information on treating physician, (3) housing information, (4) program information, (5) important contacts and their phone numbers, (6) income and financial information, (7) government benefit information, (8) burial information, (9) medical records, (10) dietary needs, and (11) insurance information. This will enable the caretaking to continue uninterrupted.

II. ISSUES IN OBRA '93 SUPPLEMENTAL NEEDS TRUSTS

A. Who can "establish" the trust?

1. The Trust can be "established" by the disabled individual's parent, grandparent, legal guardian, or by a court.

2. A disabled individual is not allowed to "establish" his or her own trust. However, with "pooled trusts", the disabled individual, as well as the parents, grandparents, legal guardian, or court, may establish the account held by the trust.

B. Funding the Trust

1. The trust is funded with the disabled individual's assets.

2. If the assets used to fund the trust are from a third party (i.e. not the Medicaid applicant or applicant's spouse), then there would be no need to have a "payback" provision.

3. How the disabled individual obtained the assets is irrelevant. The source of funds could be a settlement from a personal injury case, an inheritance, or an already-existing asset of the disabled individual. The Trust can be funded with income. 96 ADM-8, also see Joseph R.N. v. DeBu no (NDNY 92.C.V. 0948) February 25, 1998 settled by stipulation and so ordered.

WARNING: A Medicaid lien against a recovery from a personal injury lawsuit must be satisfied before the trust can be funded. Cricchio v. Pennisi; and Link v. Smithstown, Cricchio v. Pennisi, 90 N.Y. 2d 296, 660 N.Y.S. 2d 679, 683 N.E. 2d 301(1997);

On remittal, the Supreme Court ruled that S.S.L. ¶8, 367-a(2)(b) entitled the Department of Social Services to enforce its lien for the entire proceeds of the settlement, not just the medical expenses.

C. Purpose of the Trust

The purpose of the trust is to provide goods and services which are not provided by Medicaid or other government programs such as housing, (purchasing a house or coop, paying rent, supplementing rent payments, etc.); vacations; recreation; restaurant meals; social services; legal services, etc. There is no limit on what services may be purchased. In addition, the trust may purchase goods, such as computers; stereos; televisions; exercise equipment; and medical equipment not covered by Medicaid. The only requirement is that the goods must be for the benefit of the disabled individual.

NOTE: The statutory language does not specifically require the distribution to be for the sole or exclusive benefit of the disabled individual. However, the distribution presumably must provide a substantial benefit to the disabled individual.

The trust language should clearly state that the grantor's intent is to create a trust that will be exempt under the Medicaid Law so that the court can interpret the trust should the trust require reformation.

Drafters differ in their approach as to guiding the trustee's discretion. Some grant total discretion, as in *Escher, supra*. Others limit discretion in a manner similar to the language of E.P.T.L. § 7-1.12. The trustee's discretion can be guided by the circumstances and needs of the beneficiary.

D. Who can be the Trustee?

1. A corporate trustee may be advisable if the Trust is large enough. An individual co-trustee is often advisable to address the personal needs of the beneficiary.
2. The statute places no limit on who may be the trustee. In a trust set up by a parent or grandparent, the choice of trustee is up to the family. In a trust established by a court-appointed guardian or by a court, the court may dictate who the trustee shall be.
3. Most families look to the parents (or other close relatives) of the disabled person to be trustees. However, some judges have been reluctant to appoint parents as trustees. For example, a judge could be concerned that the parents lack of sufficient experience or financial sophistication. Moreover, the parents' remainder interest in the trust could conflict with the "payback" provision in favor of the state. Another conflict of interest could arise where expenditures made "on behalf of" the disabled individual directly or indirectly benefit the parent -- such as home improvements, computers, recreational items, etc.
4. Most judges seek to safeguard against such potential conflicts by:
 - a. Bonding -- parents might not qualify for bond, and posting of bond could needlessly deplete trust assets.
 - b. Court supervision;
 - c. Compulsory annual accounting -- less intrusive, but can be an onerous burden on parents, and often will result in the use of trust assets to pay legal and accounting fees.
 - d. Appointment of a professional co-trustee -- co-trustee's commission would have to be paid from trust assets

- e. Prior court approval of distributions of principal -- most restrictive, and appears frustrate the legislative intent of OBRA '93 to encourage use of trust funds for disabled individuals.

E. Bonding

1. Most court-created trusts are requiring the trustee to be bonded. Most family-created trusts are not, although New York City HRA demands bonding in all Trusts. Many Trustees can not be bonded.

2. Under proposed emergency New York State Department of Social Services Regulations for trusts of less than a \$1,000,000, the trustee is not required to post bond unless required to do so by a court; trustees of trusts containing one million dollars must post a bond unless a court waives the requirement.

3. One issue, which has arisen, is the amount of the bond in the case of a structured settlement. The bond should bear a reasonable relationship to the funds, which are at risk, which would be the initial payment plus one or two years of income, rather than the full value of the structured settlement. This is because the trustee has control of trust income as it accrues, rather than the entire amount of the structured settlement.

F. "Payback" to the State

1. OBRA '93 provides that the payback to the state must be made after the death of the individual. There have been questions raised regarding the priority of claims. There is no question that the state is entitled to repayment before any distributions to beneficiaries are made. May funeral and burial costs be paid for by the Trust? Should the trustee pay the cost of administering the trust, including attorney's fees, before paying back Medicaid?

2. In "pooled Trusts", the assets must continue to be held by the trust, and cannot be distributed to the non-profit association in order to avoid the state "payback" requirement. To the extent that the assets are not retained by the trust, Medicaid is entitled to be paid back.

3. Following the payment to Medicaid, any additional assets remaining in the trust, would be distributed according to the provisions of the trust.

G. Notification requirements

1. The first requirement is for notification of the Department of Social Services at the creation and the funding of the trust.

2. The second requirement is for notification to the Department of Social Services upon death of the beneficiary, i.e. the termination of the trust.

3. The regulations also provide that The Department of Social Services is to be notified in advance of transactions tending to "substantially deplete" the principal of the trust.

4. New York City HRA has their own "regulations" of notice which go beyond the regulations. Most Trusts comply with these regulations. They have not been tested.

H. Compliance

The proposed regulations also authorize the Department of Social Services to commence proceedings against the trust for any act, commission or failure inconsistent with the trust agreement, or applicable laws and regulations. However it is unclear how a trustee is bound by the Department of Social Services regulations or how a court such as the Surrogate's Court could enforce the Department of Social Services Regulations.

I. Income

Income can be placed into an Exception Trust, and it will not count as income. See letter attached.

IV. SUPPLEMENTAL SECURITY INCOME (SSI)

The Supplemental Security Income (SSI) program is a federal program administered by the Social Security Administration (SSA), which provides supplements to the monthly income of financially qualifying individuals who are disabled, blind, or at least age 65.

A. When an SSI recipient receives funds (e.g. from a personal injury settlement) that are eventually used to fund a Supplemental Needs Trust, these funds would be "income" in the month received, thereby reducing SSI benefits for that month.

B. As of December 14, 1999 with the passing of the Foster Care Independence Act of 1999 Congress reinstated the penalty for transfer of assets for less than fair market value. Currently, there is a 36-month look-back period starting with the later of the SSI application date or the date of the transfer. The length of the penalty is the amount of the transfer divided by the SSI benefit rate (federal plus state). The maximum penalty is 36 months and the penalty begins in the month of the transfer, not the following month.

There are several exceptions to the application of the penalty: (1) resources transferred exclusively for a purpose other than to qualify for SSI; (2) denial of eligibility would work an "undue hardship" on the individual; (3) the individual "intended" to dispose of the assets at fair market value or for other valuable consideration; and (4) all resources transferred for less than fair market value have been

returned to the individual. Further, most of the Medicaid exceptions found in 42 U.S.C. §1396p(d)(2) apply including transfers to a “(d)(4)(A)” trust.

C. Is the trust corpus "available" for purposes of the SSI resource determination? While trusts would be considered resources regardless of whether they are revocable or irrevocable, the purpose of its creation, the discretion given to the Trustees or any other restrictions, several exceptions, similar to the Medicaid exceptions, do apply including, “(d)(4)(A)” trusts, (d)(4)(C) pooled trusts, and trusts established with assets transferred by will.