



Evelyn Frank Legal Resources Program

Supplemental Needs Trusts

Impact on Medicaid and other public benefits



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Introduction

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

Trust Overview

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

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

Trust Terminology

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

Corpus – the property conveyed into the trust.

Trust Agreement – the legal document establishing the trust and containing the instructions to be followed by the trustee in administering the trust.

These instructions might include rules on how the trust corpus should be spent during the beneficiary's lifetime, under what circumstances the principal can be invaded, and who receives any corpus remaining at the death of the primary beneficiary.

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

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

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

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

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

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

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

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

What makes a trust a Supplemental Needs Trust?

A Supplemental Needs Trust enables a person with a disability to maintain eligibility for government benefits, primarily 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 public benefits. New York State law contains standards for a valid SNT in this state.¹

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

- **They are all irrevocable.** If the settlor/beneficiary could just ask the trustee to dissolve the trust and get all their money back, then it would be deemed an available asset. Thus, it must be irrevocable to work as an SNT. In addition, the beneficiary must not have the right to direct the use of the corpus or to sell his beneficial interest.²
- **Beneficiary must be disabled.** Not everyone can use an SNT! The beneficiary must be certified disabled, as defined by the Social Security Administration for purposes of SSI and SSDI eligibility. Those who have not received those benefits may be found disabled by the State Medicaid program using Social Security's standard.

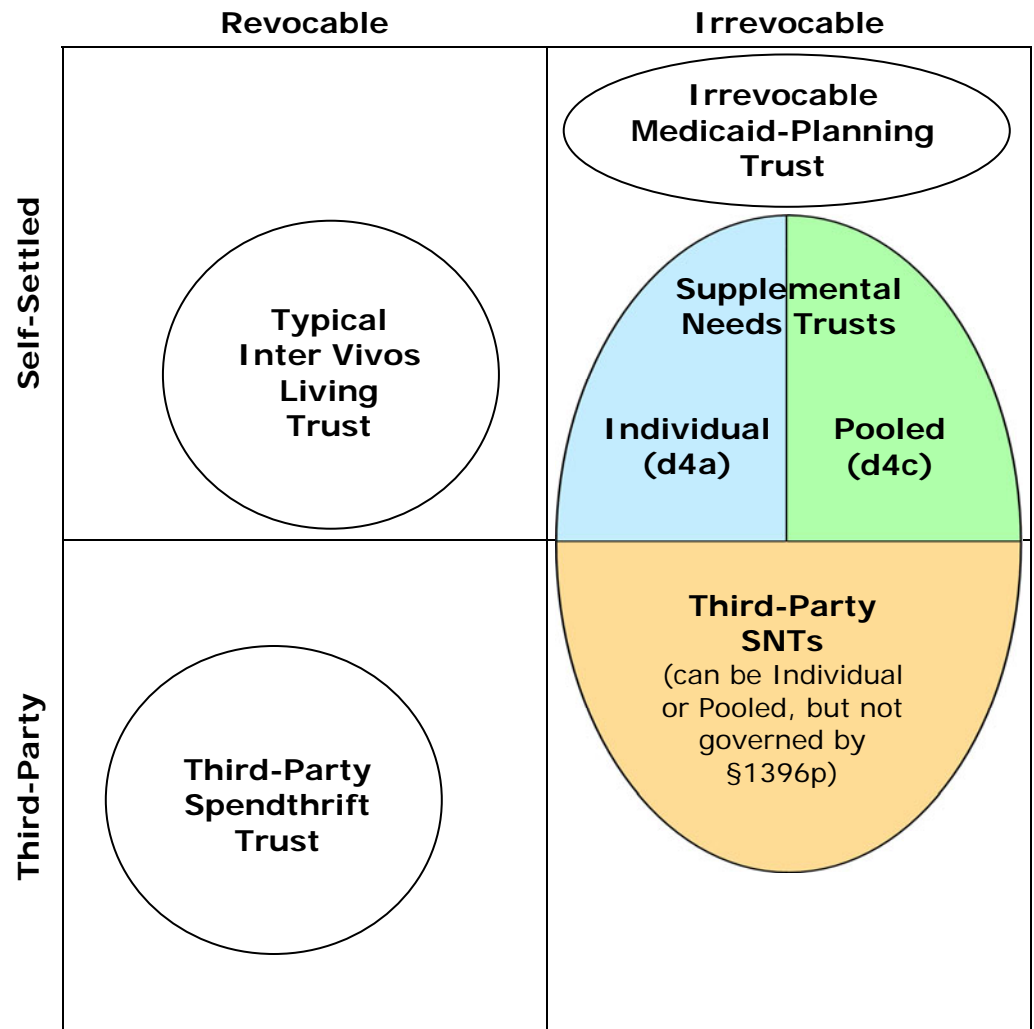
- **Payback to the State upon death.** The State Medicaid program must be made the primary remainderman, to receive the funds remaining in the trust upon death of the beneficiary. For a pooled trust, the non-profit trustee organization may be the remainderman.
- **The Prime Directive.** The trust agreement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

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

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

Trust Venn Diagram

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



Self-Settled SNTs

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

Having Your Cake and Eating It Too

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



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

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

Payback Requirement

Funds left in the trust after the beneficiary dies must be used to pay back Medicaid 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.

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.³ 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 awhile for the state to develop a procedure to determine whether they are disabled. This is discussed more at p.54.

There are 2 kinds of self-settled trusts.

- An **Individual SNT** is a trust drafted particularly for one beneficiary, appointing a trustee to manage the trust and make disbursements. The trustee might be a family member, friend, an attorney, or a bank. These are often called “D4A” trusts after the section of the Federal Medicaid statute relating to them.⁴
- A **Pooled SNT** is established and managed by a non-profit association, which acts as the trustee. A separate account is maintained “for the sole benefit of” the disabled beneficiary.⁵

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

Differences between Individual and Pooled Trusts

Age

Individual Trust

MUST BE UNDER 65 – A 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 65.⁶ 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.

Pooled Trust

A disabled individual of any age may establish and fund an account.⁷ (however, there may be transfer of asset penalties for people age 65+ – see below)

Who May Establish Trust?

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.

- 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

must have legal authority with respect to the individual's assets, which means either a Power of Attorney or guardianship.⁸

- 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.
- If the individual has no parent, grandparent, or guardian, a special court proceeding is required to establish the trust. Notice of the proceeding must be given to the local social services district.

Pooled Trust

Unlike an individual trust, the **joinder 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.

- If the disabled individual lacks capacity, 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"⁹ 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.
- A standard power of attorney form does NOT have specific language authorizing the attorney-in-fact to establish a trust.¹⁰ If not in the POA, a new POA should be executed with this language, if possible. Since the amendments to the POA law in 2009 and 2010, it is also necessary to execute a modified Statutory Gifts Rider to convey the authority to establish and fund trusts, including SNTs.¹¹

Payback To State At Death

Both types of SNT's forbid funds remaining in the trust upon the death of the individual to be distributed to heirs or remaindermen, without first paying back the state for the cost of Medicaid services provided.

Individual Trust

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

Pooled Trust

As an alternative to paying Medicaid back, the Pooled SNT may provide that funds remaining upon death be retained by the trust, 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.

Third-Party Trust

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

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.

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.

Form of Trust

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

Extra Benefit for Parent

A 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 nursing home care. This type of transfer is one of the exceptions to the transfer penalty.¹² There is also no SSI transfer penalty for transferor.¹³

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.¹⁴ However, in Jennings v. Comm'r. Nassau DSS, the Appellate Division of the Second Department rejected this strategy, relying on Wong v. Doar, supra.¹⁵ The Court rejected the ability of a nursing home resident to shelter their income in any type of trust, including an SNT.

How does an SNT affect public benefits?

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

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

A Note on Transfer Penalties

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

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

Medicaid

Who gives it?	New York City Human Resources Administration (HRA), with participation from the New York State Department of Health (DOH) and the Federal Centers for Medicare and Medicaid Services (CMS)
Who gets it?	New Yorkers of limited means
Eligibility	<ul style="list-style-type: none">• Category (Disabled, Aged, Blind, Caretaker of Minor Child, Single/Childless Couples)• Income• Resources• Immigration Status• Residency
What do you get?	Comprehensive health insurance coverage, including long-term care services (home care & nursing home)

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

Is it a Resource?

No, as long as drafted properly to comply with rules in 42 U.S.C. § 1396p(d).¹⁶

Is there a Transfer Penalty?

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.¹⁷ 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.

Age 65 and over

Community Medicaid

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).

There is no transfer penalty for eligibility for community-based Medicaid for persons of any age. This is true for both transfers of income – allowing use of an SNT to eliminate spend-down – and for transfers of assets.

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 (see above).

However, when the transfer penalty rules were made more strict with the Deficit Reduction Act of 2005,¹⁸ it was feared that it would be interpreted to impose a penalty on transfers of excess income into an SNT made on or after February 8, 2006 (the effective date of the Act). Thankfully, the New York State Department of Health clarified that as long as funds deposited into the 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.¹⁹

Here are some examples from the State's directive:

A pooled trust is established for a disabled individual, age 68. For 10 months, the individual deposits his monthly excess income of \$825 into the trust. While in the community, community budgeting applies and the \$825 is exempt as countable income. Then the individual is institutionalized and requires coverage for nursing home care. Under chronic care budgeting, the income deposited into the trust is countable as part of the individual's net available monthly income (NAMI).

Since the individual was over age 65 when the deposits were made into the pooled trust, the income deposits are treated as a transfer ($\$825 \times 10 = \$8,250$).

Situation 1. The individual provides proof that the non-profit association managing the pooled trust paid \$700 monthly for rent and \$125 monthly for household utilities. The total monthly expenses paid by the non-profit association equal the monthly income deposited into the pooled trust. The transfers are, therefore, considered to be compensated transfers.²⁰

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 for People With Developmental Disabilities (OPWDD, formerly the Office of Mental Retardation and Developmental Disabilities, OMRDD), Nursing Home Transition and Diversion (NHTD), and other programs.²¹ 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 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.²²

Although these programs have certain technical similarities to Medicaid coverage of institutional care, there is no transfer penalty for waiver eligibility.²³

Summary of Transfer Penalties in SSI and Medicaid

Program	Category	Is there a penalty for transfer of assets into SNT?	Is there a penalty for transfer of income into an SNT?
SSI	Age 65+	YES – up to 3 year disqualification	Yes – not permitted
	Under 65	NO	Yes – not permitted
Medicaid Age 65+	Nursing Home	YES Depending on amount transferred if SNT is for oneself, but no penalty if SNT is for benefit of another disabled person under age 65.	Under GIS 08-MA-020, deposits of income made into a pooled trust while individual on community Medicaid will not 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, but unwritten DOH policy seems to be allowed for singles but not for married participants.

Are disbursements from SNTs treated as income?

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.

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.²⁴ 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:

Rent

The easiest type of bill to pay via SNT is rent (or maintenance for co-op/condo). NYSARC and many other pooled trustees prefer rent bills for which they can set up automatic payments. This is also more convenient for the beneficiary, who generally does not need to send disbursement requests once the automatic payment system is set up. However, this might not be logistically feasible if the landlord requires inclusion of a payment coupon with the rent check, or if the landlord will not accept payment from a third party. Also, for rent payments, the pooled trustee will initially ask for a copy of the lease verifying 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.

Utilities

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

Credit cards

Many stores now issue store-only credit cards, which can be given to the 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.

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

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

Can income be placed in the trust to reduce countable income?

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.²⁵

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.²⁶

Medicaid Managed Care

Generally, people with an income spend-down are excluded from Medicaid Managed Care. Thus, a Medicaid recipient who has used an SNT to eliminate her spend-down should not be excluded from managed care. This was the holding of a fair hearing decision in which Nassau County attempted to disenroll a Medicaid recipient from Medicaid Managed Care even though she deposited her spend-down into a Supplemental Needs Trust.²⁷ The decision held that if income is deposited into an SNT, there is no spend-down, so the appellant continued to be eligible for Medicaid Managed Care.

Nursing Home

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

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

However, the state recently started applying a rule that says that in chronic care budgeting, all income is to be applied to the cost of care "including income disregarded or considered unavailable for the purpose of determining MA eligibility."²⁸ The State has interpreted this to mean that they include income placed into the Trust.

In Wong v. Doar, the court held that the plaintiff, who was a disabled 54-year-old nursing home resident, could not place his "excess income" from Social Security disability benefits into a trust to reduce his Net Available Monthly Income (NAMI).²⁹ The case involves complex federal regulations on post-eligibility budgeting, which do not allow the same deductions from income that are allowed in the community. In Jennings v. Comm'r. Nassau DSS, the N.Y. Appellate Division 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.³⁰

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 Wong do not permit use of an SNT to eliminate the NAMI.³¹

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

Our interpretation of the available guidance at this time is that all waiver participants should be entitled to shelter excess income using an SNT. The basis for this conclusion is that post-eligibility budgeting for waiver programs allows deduction of all SSI-related income disregards (unlike chronic care budgeting, which does not).³² We hope DOH will clarify its policy so that counties have clear direction.

Supplemental Security Income

Who gives it?	Federal Government – Social Security Administration (SSA)
Who gets it?	Aged, blind, or disabled people with limited income and resources
Eligibility	<ul style="list-style-type: none">• Category – must be 65 or over, or blind, or disabled• Citizenship – must be citizen (with major exceptions)• Residency – not eligible for SSI if residing outside of United States• Income – countable income under \$761/mo. (single, living alone) or \$1,115 (couple, living alone)• Resources – countable resources under \$2,000 (single) or \$3,000 (couple)
What do you get?	Monthly cash income, usually direct-deposited into bank account. In New York, SSI recipients automatically get Medicaid health insurance. In New York, SSI recipients who live alone automatically get Food Stamps through NYSNIP.

Supplemental Security Income (SSI) is a Federal monthly cash income benefit provided to people with very low income and resources who are either aged (65 or over), blind or disabled. It is administered by the Social Security Administration (SSA). The income limit and amount of monthly benefit depend upon the applicant's other income and living arrangement. For a person living alone with no other income, the income limit and monthly benefit amount is \$761/mo. The resource limit is \$2,000. Those who are approved for SSI receive Medicaid automatically in New York State.

The rules governing the SSI program, including the treatment of trusts and SNTs in particular, can be found in the **Program Operations Manual System (POMS)** on the Social Security Administration website at <http://policy.ssa.gov/poms.nsf>.³³

Is it a resource?

Short Answer

No, as long as drafted properly to comply with rules in 42 U.S.C. § 1396p(d)(4) (the Federal Medicaid statute).³⁴

Long Answer

The SSI statute very simply states that “This subsection [providing that ‘the corpus of the trust shall be considered a resource available to the individual’] shall not apply to a trust described in subparagraph (A) or (C) of section 1917(d)(4) [42 USCS § 1396p(d)(4)].”³⁵ The citation referred to is the Medicaid statute establishing Individual and Pooled SNTs.

However, the POMS provides that even though a trust is a Supplemental Needs Trust that complies with § 1396p(d), it still needs to be evaluated to determine if it is an available resource.³⁶ SSI considers a trust to be a countable resource if it is revocable (or if the individual may direct the use of the trust assets for his/her own support and maintenance).³⁷ Under N.Y. law, a trust where the grantor is the sole beneficiary is deemed to be revocable, notwithstanding any language in the trust agreement to the contrary.³⁸ This would seem to make an SNT an available resource for SSI purposes, because it is for the sole benefit of the grantor.

However, a POMS section applicable only to New York and New Jersey clarifies that a trust will not be deemed revocable (and therefore an available resource) if its residual beneficiaries include a named living individual, the term “issue” (if living and the grantor’s issue), and/or the State of New York (or similar language).³⁹ Because all D4A individual SNTs must include the State of New York as the residuary beneficiary in the first position, this clause means that they should be deemed irrevocable and therefore unavailable resources for SSI purposes. Similarly, all D4C pooled SNTs which name the non-profit pooled trustee as the residuary beneficiary should also be deemed irrevocable, because they have a named residual beneficiary.⁴⁰

Is there a Transfer Penalty?

Under age 65

For SSI recipients under age 65, there is no transfer penalty for transfers into an SNT.⁴¹ 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.⁴² If an SSI recipient receives a lump sum and is under age 65, an SNT is the perfect solution.

Age 65 or over

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

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

the amount transferred by the individual's SSI monthly payment rate, including the State supplement).⁴³

EXAMPLE: Individual living alone transfers \$7,610 – disqualified from receiving SSI for 10 months [$\$7,610 \div \761 (2011 NY living alone rate) = 10]. The maximum disqualification period is 3 years.

The penalty may be worth incurring depending on amount transferred. In New York, an individual would be disqualified for no more than three years for transferring \$27,396 or more [$\761×36 months]. If the funds are substantially higher than that figure, it could be worth the penalty to be able to shelter the funds in an SNT.

Are disbursements from SNTs treated as income?

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

Unfortunately, some types of in-kind income are deemed countable for purposes of SSI. Payments made by the 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 \$20.⁴⁴

The federal benefit rate in 2011 is \$674/month, so one-third is a reduction of $\$224/\text{month} + \$20 = \$244$. This reduction may be worth accepting if, for example, the rent or maintenance amount is very high, say \$1,000 – 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 SSI recipient and it won't count as income.⁴⁵

Shelter expenses include rent, mortgage, property taxes, heating fuel, gas, electricity, water, sewer, garbage removal.⁴⁶

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

Homeowner's Insurance – "Only property insurance required by the mortgage holder in order to receive the mortgage is considered a household cost. Insurance (property, fire, theft, etc.) held at the owner's or renter's option is not a household cost."⁴⁷

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

- Cable, telephone, cell phone, and internet service are not shelter costs.
- Payment for travel, local transportation, entertainment expenses, educational expenses, and (since 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.
- Pre-payment of burial expenses is permitted through a funeral agreement.

Cash paid directly from the trust to the beneficiary is unearned income, so would reduce SSI benefits dollar-for-dollar. Therefore, this would usually violate the trustee's prime directive not to impair the beneficiary's eligibility for benefits.

Can income be placed in the trust to reduce countable income?

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

Temporary Assistance

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

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.⁴⁸ There are two major types of Temporary Assistance programs: 1) Family Assistance (“FA”) and 2) Safety Net Assistance (“SNA”).⁴⁹

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.⁵⁰ 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.⁵¹

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.

OTDA addressed some of these issues about SNTs with regard to TA, FS, and HEAP in a 2001 directive.⁵² 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.⁵³

Is the SNT a resource?

The 2001 OTDA Letter (see endnote 53) 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+.⁵⁴ 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.⁵⁵

Is there a transfer or "lump sum" penalty?

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.⁵⁶ 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.

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.⁵⁷

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.

Another exception when the lump sum is less than the resource limit

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.⁵⁸

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.⁵⁹ 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).

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.⁶⁰ 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.⁶¹ 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.⁶²

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.

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.

Food Stamps

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

The 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.⁶³

Is the SNT a resource?

Resource Test In General for Food Stamps

There is NO RESOURCE TEST for Food Stamps as long as the household contains 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).⁶⁴

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.

If there is no elderly or disabled household member, then the resource limit is \$2,000.⁶⁵

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.⁶⁶ 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.⁶⁷

Potential issues raised by the federal regulations include:

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.⁶⁸ NOTE that the 2001 OTDA Letter does not differentiate between types of trustees, simply stating that irrevocable trust funds are excluded.

Source of funds

Under 7 CFR 273.8(e)(8)(iv), a third-party trust established 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."⁶⁹ Since these rules are very different than those for Medicaid, they must be heeded carefully.

Is there a transfer or "lump sum" penalty?

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

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

1. Transfers Not Affecting Eligibility

The following transfers will not affect program eligibility:

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

2. Determining Length of Disqualification

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

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

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

3. Interpretation

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

- a. The transfer occurred in the three month period prior to application and was knowingly for the purpose of qualifying or attempting to qualify for food stamp benefits, or
- b. The transfer occurred after certification and was knowingly for the purpose of continuing to qualify for food stamp benefits. The disqualification period must be applied if the resources are transferred knowingly to prevent the household from exceeding the maximum resource limit.⁷⁰

Comment

Since SNTs are exempt resources, and there is no disqualification penalty for transfers of resources “which would not otherwise affect eligibility,” there should be no transfer of 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.

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.⁷¹
7. 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.⁷²

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."⁷³ Medicaid is the only benefit that allows income to be reduced by the amount that is put into the trust.

Home Energy Assistance Program

Who gives it?	N.Y. State Office of Temporary and Disability Assistance (OTDA)
Who gets it?	Low-income New Yorkers who pay to heat their dwelling
Eligibility	<ul style="list-style-type: none"> • Immigration Status Must be U.S. Citizen or qualified alien; AND • One of the following: <ul style="list-style-type: none"> – Income Gross monthly income must be under \$2,030/mo. for one-person or \$2,654 for two-person household; OR – In receipt of Food Stamps; OR – In receipt of Public Assistance; OR – In receipt of SSI
What do you get?	One-time payment made directly to the vendor supplying heating fuel, or cash benefit to renters available through EBT card.

The Home Energy Assistance Program (HEAP) is an annual grant for low income homeowners or renters to help pay for fuel and utilities. It comes in the form of a cash payment or credit to the household's energy supplier. The amount of the payment or credit depends on the household composition, the energy bills, and the income tier.⁷⁴

HEAP also offers an emergency benefit. Payments to households pursuant to the HEAP Emergency benefit may be disbursed when a household experiences a non-utility fuel emergency or must repair or replace heating equipment or seek emergency shelter because of a heating failure. HEAP Emergency funds are issued on a case-by-case basis and are not issued if a household has available resources to ameliorate the problem.⁷⁵

Is the SNT a resource?

There is no asset limit for HEAP eligibility. Therefore, an SNT does not affect HEAP eligibility. Eligibility for Emergency HEAP does not have an asset limit per se. Instead, determinations for Emergency HEAP eligibility are based on whether the household has the funds to ameliorate the emergency itself. Money that is in an SNT is not considered a resource that is available for amelioration.⁷⁶ Thus, an Emergency HEAP applicant who has an SNT is not expected to raid her SNT to ameliorate the emergency.

Is there a transfer or “lump sum” penalty?

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

Are disbursements from 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.”

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.

Senior Citizen Rent Increase Exemption

Who gives it?	New York City Department Of Finance (DOF) [for rental housing] Department of Housing Preservation and Development (HPD) [for Mitchell-Lama housing]
Who gets it?	Low-income tenants of rent-regulated housing over age 62
Eligibility	<ul style="list-style-type: none">• Type of Housing – Must be one of the following:<ul style="list-style-type: none">– Rent controlled apartment– Rent stabilized apartment– Rent stabilized hotel unit– Mitchell-Lama co-op, Redevelopment Company development, Article XI co-op established under the Private Financing Housing Law, or Federally-assisted co-op• Age – Head of household must be 62 or older• Income – Annual income must be under \$29,000• Proportion of Rent to Income – Rent must exceed one-third of monthly income
What do you get?	Eligible seniors have their rent frozen at the current level, with almost all future increases paid by the city through tax abatements to the landlord

The Senior Citizen Rent Increase Exemption ("SCRIE") exempts 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.⁷⁷ 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 \$29,000.⁷⁸

Is the SNT a resource?

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

Is there a transfer or "lump sum" penalty?

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

Are disbursements from an SNT treated as income?

It remains unclear whether disbursements from an SNT are treated as income for purposes of SCRIE eligibility. The SCRIE definition of “aggregate disposable income” does not specifically include or exclude SNT disbursements.⁷⁹ This regulation does list all compensation and cash retirement and government benefits, interest and dividends, rents, royalties, and alimony and support “... other than gifts and voluntary assistance payments from relatives and friends of members of the household not required to provide maintenance or support...” received by any member of the household, with deductions for payroll taxes, union dues, and court-ordered support.

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

Can income be placed in the trust to reduce countable income?

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.

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.⁸⁰ 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 C.F.R. § 5.609 which defines “income,” and 24 C.F.R. § 5.611 which describes “adjustments” to income. In all these programs, the participating family pays a portion of the rent – generally thirty percent of the household’s income after the adjustments allowed by HUD – and HUD or the local public housing agency (PHA) pays the remaining amount.

Special rules apply to households who receive 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.

Is the SNT a resource?

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

General Rule

For assets in excess of \$5,000 HUD programs count the larger of the actual income generated by the asset or an “imputed” income if the asset is not

generating any actual income (or is generating only a very small amount). HUD instructs the administering housing agencies to use a fixed interest rate, approximately at the level of a passbook savings account interest rate, now set by HUD at an annual rate of 2%.⁸¹ 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.⁸² 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.

Exception – Irrevocable Trusts NOT counted as Assets.

The “Net Family Assets” definition in 24 C.F.R. § 5.603(b)(2), excludes trusts from consideration as assets so long as the trust is not within the control of a household member. This regulation does not differentiate SNTs from other types of irrevocable trusts – all should be exempt as long as not under the control of any household member. Since they are not considered an asset or resource, no income should be imputed based on the principal in the trust.⁸³

Is there a transfer or “lump sum” penalty?

General rule on transfer of assets

If assets are transferred or disposed of for less than fair market value -- including into an SNT or any type of irrevocable trust – Section 8 imposes a two year penalty following the date of the divestiture.⁸⁴ 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).

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.

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 C.F.R. § 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,⁸⁵ 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.⁸⁶ Income distributed “regularly” to the household from the trust is included in Annual Income.⁸⁷

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.⁸⁸
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 family.”⁸⁹ (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.⁹⁰

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

Can income be placed into the trust to reduce countable income?

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.).

Family Health Plus

Who gives it?	New York City Human Resources Administration (HRA), with participation from the New York State Department of Health (DOH)
Who gets it?	Adult New Yorkers with limited income not eligible for Medicaid
Eligibility	<ul style="list-style-type: none">• Category (Caretaker of Minor Child, Single/Childless Couples)• Income• Immigration Status• Residency
What do you get?	Managed care health insurance coverage, NOT including long-term care services (home care & nursing home)

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. 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.⁹¹

All FHPlus enrollees must enroll in a FHPlus managed care plan⁹² 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).⁹³

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

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

Asset limits

Effective January 1, 2010, there is no longer an asset limit for this program.⁹⁴ If there is income or dividends generated by assets, or distributions from a retirement account such as an IRA, these would be counted as income. The principal, however, no longer counts as an asset.

Penalties On Transfers Of Assets

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

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.

Practical Issues with SNTs

Choosing a Trust and Mental Capacity

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, 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).⁹⁵ 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 the local Department of Social Services.

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.

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

Age 65 or over

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

There are over 17 pooled trusts available in New York State.⁹⁶ They are all administered by non-profit organizations serving people with disabilities, and most of them were established with the goal of sheltering excess resources, not income. However, as of this writing, there are six pooled trusts known to the authors that allow beneficiaries to contribute monthly excess income for purposes of Medicaid spend-down:

- Center for Disability Rights, Inc.
<http://www.cdrnys.org>
- Community Living Corporation (CLC)
<http://www.clcpooledtrust.org>
- Future Care Community Pooled Trust
<http://www.futurecareplanning.org/>

- NYSARC, Inc. Trust Services
<http://nysarctrustservices.org>
- The Rose and Maurice Halpern Lifetime Care Foundation at OHEL
<http://www.ohelfamily.org/>
- United Community Services of Boro Park
(718) 854-9300

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

Special rules about assigning income into trust

The Social Security Act prohibits assignment of Social Security income.⁹⁷ 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.⁹⁸ However, in *Reames v. Oklahoma*,⁹⁹ a nursing home resident was barred from placing her Social Security into an SNT to eliminate her monthly spend-down because of the anti-assignment provisions. This decision, which does not directly affect New York and the 2nd Circuit, should be limited to chronic care or nursing home 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.

How much to contribute to SNT

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

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

In general, there are three options for the amount of monthly income to contribute: the exact Medicaid spend-down, more than the spend-down, or less than the spend-down. An additional complicating factor throughout is eligibility for the Medicare Savings Program (MSP), which generally benefits the client but causes his or her spend-down to increase.

Just the Spend-Down

If the goal is simply to contribute the bare minimum necessary to obtain Medicaid without a spend-down, then the client should contribute exactly his or her spend-down amount. This is the amount that will be deducted from countable income after the trust is approved by Medicaid, and it will zero out the client's excess income, causing them to have "full Medicaid."

More than the Spend-Down

In some cases, it will make sense to contribute MORE than the spend-down. For example, if the client's spend-down is \$600/mo. but his rent is \$800/mo., it might make more sense to use the SNT to pay the whole rent, rather than pay part of the rent and require the client to send a second check each month for the balance of the rent. In this case, the client might actually need to contribute more than \$800/mo. because the SNT might charge a monthly fee based upon the size of the contribution. If, for example, the fee was \$60, then the client would need to send \$860/mo. to have enough money left over after the fee to cover the rent bill.

Less than the Spend-Down

The assumption underlying the use of the SNT is that the client cannot afford her monthly living expenses on only \$767/mo. (the allowable Medicaid income limit). But some clients, either due to high income or low living expenses, can afford to pay some amount toward the cost of their care. In these cases, it is prudent to leave the client with a small spend-down.

For example, let's say a client has income of \$3,000/mo. and total monthly living expenses of \$1,500/mo. Before applying for Medicaid, the client was spending \$1,500/mo. of her income on home care, but now Medicaid will cover that. Let's assume that this client's spend-down would be about \$2,000/mo. If the client contributes the whole \$2,000/mo. to the SNT, she will only be spending \$1,500/mo. of that money on living expenses. This means that each month, the balance in the SNT will increase by \$500. It also means that the \$767/mo. the client is allowed to keep would accumulate in her bank account, potentially causing her balance to rise about the resource limit of \$13,800. The growing balance in the SNT is problematic because (a) it could create a transfer penalty for a future nursing home application, and (b) if she dies before spending the funds, they are forfeited to the trustee.¹⁰⁰

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

Effect of the Medicare Savings Program

The Medicare Savings Program (MSP) is a separate benefit provided through the Medicaid program where the State pays the Medicare Part B premiums for low-income individuals. Most Medicare recipients have a monthly premium of about \$96.50 deducted from their Social Security checks. If someone has income below \$1,226/mo., he can get a type of MSP called QI-1, which will cause the State to pay that \$96.50 instead, and cause the client's Social Security check to go up by that same amount.

However, individuals with Medicaid are ineligible for QI-1. Instead, there are two other MSPs – QMB (\$908/mo.) and SLMB (\$1,089/mo.) – which Medicaid recipients *are* eligible for. The catch is that once the State is paying your Medicare premium, it is no longer allowed as a deduction from income for Medicaid purposes. For clients using an SNT, this means they have to increase their contribution to the trust to about \$100/mo. more than the Medicaid-budgeted spend-down amount if they want to get both Full Medicaid and MSP.

Example

Sally is age 67. Her gross Social Security is \$1525.50. Her Medicare Part B premium of \$96.50 is deducted from her check, so she receives \$1429.00. She also pays for a Blue Cross Medigap policy of \$420/quarter or \$140/month. Her spend-down calculation is:

1525.50	Gross Income
– 96.50	Medicare Part B premium
– 20.00	Unearned income disregard
– 140.00	Blue Cross - premium
<hr/>	
256.50	TOTAL DEDUCTIONS
1269.00	Countable net income
– 767.00	Medicaid level for ONE (2011)
<hr/>	
502.00	Spend-down

If Sally joins the trust, and deposits \$502.00 each month into the trust, once Medicaid approves it, she will have NO spend-down.

- This is the minimum she should put into the trust. If she were using NYSARC's Community Trust II (for example), she would have a \$50/mo. fee, which would be deducted from the \$502, leaving \$452/mo. available for disbursements.
- If she puts in an additional \$96.50/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 \$96.50. If she puts this into the trust, she will still have a -0-spend-down.
- 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 SNT simply to enroll in an MSP – not just to save \$96.50/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.¹⁰¹

Strategy Tip

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

Married Couples

Some additional issues arise when the Medicaid applicant seeking to use the SNT is married. This is true even when the spouse does not want Medicaid, because Medicaid deems the income and resources of the non-applicant spouse to be available to the applicant spouse.¹⁰²

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

If only one spouse requires Medicaid, but the non-applicant spouse’s income gives the applicant a spend-down, an SNT may properly be funded by the non-applicant spouse.¹⁰³ Otherwise, the non-applicant spouse would have to do a spousal refusal, and risk being sued by the County.

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

Example: Only one spouse needs Medicaid

Ralph’s income is \$1300/month. He is not disabled and does not need Medicaid. Betty, his wife, has Social Security of \$500/month and needs Medicaid. Her spend down is \$663 (\$1800 combined income less \$1117 income level for 2 less \$20 disregard = \$663). Betty can open an SNT and

deposit \$663 of Ralph's income, to eliminate Betty's spend-down. This is better for her than opening her own trust and putting in all of her own income, since that would still leave a \$163 spend-down.

Example: Both spouses need Medicaid

In the same couple, Ralph now needs Medicaid. Their spend-down is still \$663, but now Ralph would establish an SNT himself since he is disabled and put the same amount of money in – \$663 – to eliminate the spend-down for both of them.

TIP: If both spouses are disabled and need Medicaid, open a SNT 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.

Timing Considerations

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

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

For example, if the applicant needs home care services, the applicant or his/her family might be spending a lot of money for home care during the pendency of the application. In these situations, you would want the fastest possible turnaround of the Medicaid application. Unfortunately, if you establish the SNT before applying for Medicaid, some Medicaid offices will delay approval of the Medicaid application (and thus the provision of home care services) until the SNT and disability documentation are reviewed. This can add an additional delay of three months or more to the process.

As a result, it makes more sense simply to apply for Medicaid with a spend-down as if there were no SNT. Then make a supplemental submission after the Medicaid acceptance with the SNT and disability paperwork, asking Medicaid to rebudget the case with no spend-down. This way, the Medicaid and home care services will be approved within the normal 45-day time-frame, without the additional wait required for a disability determination and legal review of trust documents.

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

Note, however, that this procedure only works when the applicant is seeking long-term care services that can be used to meet the spend-down between the Medicaid acceptance and the SNT acceptance. If the applicant only seeks Medicaid health insurance (either because uninsured, or as secondary coverage to Medicare), then he/she must first enroll in the SNT and then

apply for Medicaid, because otherwise the Medicaid application will be denied due to the lack of medical bills to meet the spend-down.

Another issue is how the applicant will afford to pay the spend-down pending the approval of the SNT. For example, let's say a client applies for Medicaid home care and has a \$1000/mo. spend-down. She simultaneously enrolls in a pooled SNT and begins contributing \$1000/mo. to the SNT. After approval of Medicaid, she begins receiving home care services and also bills from the home care agency for \$1000/mo. She submits her SNT and disability documents to Medicaid, but while she waits an eternity for Medicaid to process these, she must continue sending \$1000/mo. to her SNT. How can she afford to also pay \$1000/mo. to the home care agency for her spend-down?

Paying two spend-downs?

If the type of home care she receives is personal care (aka "home attendant") in NYC or CHHA services, then her home care cannot be terminated due to her inability to pay the spend-down. Thus, one option is simply not to pay the spend-down, and if the agency complains, remind them that they will be able to back-bill Medicaid for this money once the SNT is approved, because the approval should be retroactive to the date the SNT was established.¹⁰⁴

Note that other types of home care programs MAY terminate services due to failure to pay the spend-down. In particular, Managed Long-Term Care (MLTC) plans can do this. This will become a bigger issue as the State begins requiring all dual-eligible home care recipients to enroll in MLTC plans in April 2012.¹⁰⁵ Clients enrolled in MLTC plans should let their plans know that they are enrolling in an SNT to eliminate their spend-down. Hopefully the plan will be patient with them during the pendency of the SNT approval process and not disenroll them!

With MLTC, not paying your spend-down is NOT an option

Submitting the SNT paperwork to Medicaid

Where to Send

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

Regardless of where you submit it, be sure to have proof of delivery and date of delivery. Certified mail is a suitable way of doing this.

What to submit

This is what you must send to Medicaid for approval of the SNT:

- a copy of the fully executed Joinder Agreement (most pooled SNTs require that the beneficiary's signature be notarized),
- the Master Trust Agreement,
- proof that the spend-down amount was sent to the SNT initially and every month to the present (e.g., Verification of Deposits),
- A signed HIPAA release for each medical provider (NYC form posted at <http://wnylc.com/health/download/56>)
- A signed HIPAA release for you, the representative (NYC form posted at <http://wnylc.com/health/download/63/>)
- proof that client is disabled (see below)

Proof of Disability

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

However, an applicant need not be in receipt of those benefits to be eligible to use an SNT, because the N.Y. Medicaid program can make a disability determination, applying the SSA rules. 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/entry/128/>.

- Social Security Bluebook – Listings of Impairments¹⁰⁶
- Medicaid Disability Manual¹⁰⁷
- N.Y. Dep't of Health, Informational Letter: Pooled Trusts & Disability Determinations for Individuals 65 Years of Age & Older, 05 OMM/INF-1 (April 19, 2005), available at <http://tinyurl.com/B7ULA5> and <http://tinyurl.com/CN7GK6>.
 - Says Form M-11q (NYC physician's request for personal care services) is NOT sufficient to establish disability. Instead, the forms DSS-486 and LDSS-1151 must be submitted.

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

<http://ssa.gov/beve>

- Uses special rules for determining disability for people over age 65 from Social Security Ruling No. SSR 03-03p.¹⁰⁸
- NYC has issued instructions clarifying procedure for submitting 486 and 1151 in NYC.¹⁰⁹ Says that the medical release relating to HIV/AIDS is NOT necessary unless applicable to the client.
- As discussed further below, there are special medical-vocational profiles for certain situations which allow you to circumvent some portions of the five-step sequential evaluation process used by Social Security in disability determinations. There are directives from SSA and the N.Y. Dep't of Health that discuss the application of these profiles.¹¹⁰

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

- **Form DSS-486T – Medical Report for Determination of Disability**
Filled out by treating physician. 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 five-step sequential evaluation process is used. Although it can seem quite involved (as it definitely is for those applying for Social Security disability benefits), our experience has been that the disability reviewers in Albany apply this method in a more streamlined fashion, particularly for elderly applicants who are only seeking a disability determination to enable them to use an SNT. However, it is helpful to know how the sequential evaluation works so that you can ensure your client meets the standard.

Sequential Evaluation in a Nutshell

1. Is the individual working?

If the individual is performing substantial gainful activity (SGA), then he cannot be found disabled. Work is generally considered not to be SGA if the individual earns less than \$1,000/mo.¹¹¹

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

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

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

This step is where you check the Bluebook to see if the individual meets a listing.¹¹² If the impairment perfectly fits the diagnostic and severity criteria of a listing, then the individual should be found disabled at step three and is not required to advance through further steps. However, you should never assume that someone will be found disabled on step three. Conversely, just because a person's impairment is not found in the listings does not mean she cannot be found disabled on a subsequent step.

4. Does the individual have the residual functional capacity (RFC) in spite of his/her impairment to return to past relevant work (PRW)?

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

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

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

- **Solely Exertional:** the individual's RFC is evaluated to determine the exertional level to which he/she is limited in light of his/her impairments (e.g., sedentary, light, medium, heavy). Then the medical-vocational guidelines ("The Grids")¹¹³ are used to determine

disability in light of the individual's age, education, and experience.¹¹⁴

- **Solely Non-Exertional:** The Grids cannot be used for non-exertional impairments, such as mental impairments.¹¹⁵ Instead, the agency must consider whether the potential occupational base is limited by a substantial loss of the ability to meet any basic work-related activities. Such activities include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting.¹¹⁶
- **Combination of Exertional and Non-Exertional:** In this case, the Grids will not determine the outcome unless the exertional impairments alone are sufficient to direct a finding of disability based upon the Grids. Otherwise, the non-exertional impairments are considered as above, and the Grids merely provide a framework for decision.¹¹⁷

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

EXAMPLE: Alzheimer's disease is listing 12.02 Organic mental disorders. Note that this listing includes many functional impairments, such as "Marked restriction of activities of daily living;" or "Marked difficulties in maintaining social functioning." Be sure to ask Medicaid to consider not only the Form 486 and 1151 but also the assessments done 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.¹¹⁸ This does not mean DISABILITY is assumed, only that you automatically pass step two of the sequential evaluation once you have established a medically-determinable impairment.

Special Medical-Vocational Profiles

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

- **History of Arduous Unskilled Work**¹¹⁹
 - Not working at SGA level, and
 - No more than a marginal education (6th grade level or less), and
 - Work experience of 35 years or more during which s/he did only arduous unskilled physical labor, and
 - No longer able to do this kind of work because of a severe impairment(s).
- **No Work Experience**¹²⁰
 - Has a severe, medically determinable impairment(s), and
 - Is of advanced age (age 55 or older), and
 - Has a limited education or less (i.e., advancement not beyond 11th grade), and
 - Has no Past Relevant Work experience (i.e., no SGA-level work in the last 15 years).
- **Lifetime Commitment**¹²¹
 - Not working at SGA level, and
 - Have a lifetime commitment (30 years or more) to a field of work that is unskilled, or is skilled or semi-skilled but with no transferable skills, and
 - Can no longer perform this past work because of a severe impairment(s), and
 - Are closely approaching retirement age (age 60 or older), and
 - Have no more than a limited education (i.e., advancement not beyond 11th grade).

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

After Submitting the Documents to Medicaid

Wait and Advocate

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

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

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

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

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

Ongoing Trust Maintenance

Even though the pooled trustee organization takes care of the tax returns and accountings, there is still some ongoing administration for the client or his/her representative.

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

Monthly contributions

You must also make sure that the client submits enough disbursements each month to consume most of the available funds in the trust account. It is bad to allow too much of a balance to accumulate in the trust account, because (a) if there's any left on the client's death, it is forfeited to the trust, and (b) this amount could create a transfer penalty for purposes of nursing home coverage.¹²² It is not a problem to allow a relatively small balance to accumulate (for example, if the client is saving up for a major purchase, or for annual trustee fees).

Monthly disbursements

Remember also that the client's income may fluctuate from year to year, as will the Medicaid income limit. As a result, the spend-down amount may change over time. Thus, at the end of each year, it is a good idea to re-do the calculations discussed at p.48 above, and adjust the monthly contribution to avoid a possible spend-down on recert (unless that is desired).

Adjustments to contribution amount

Watch out for recerts

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

Summary of SNT Rules for Various Benefits

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

Summary of SNT Rules for Various Benefits

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

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

Endnotes

Guide to Online Citations

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

United States Code

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

Code of Federal Regulations

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

Social Security Administration Program Operations Manual System (POMS)

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

N.Y. Social Services Law

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

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

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

Medicaid Reference Guide (MRG)

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

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

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

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

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

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

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

- ¹⁸ For more information on the Deficit Reduction Act, see <http://wnylc.com/health/entry/38/>.
- ¹⁹ N.Y. Dep't of Health, General Information System Message: Transfers to Pooled Trusts for Disabled Individuals Age 65 and Over, GIS 08 MA/020 (July 24, 2008), available at <http://onlineresources.wnyc.net/pb/docs/08ma020.pdf>.
- ²⁰ *Id.*
- ²¹ See article about waivers in NYS at <http://wnylc.com/health/entry/129/>.
Long-Term Home Health Care Program (LTHHCP, aka "Lombardi"): N.Y. Soc. Serv. L. §§ 367-c, 366(6); 10 N.Y.C.R.R. § 505.21; 83 ADM-74; 85 ADM-27 [these old directives are not available online].
Traumatic Brain Injury (TBI) Waiver Program: N.Y. Pub. Health L. § 2740 *et seq.*; 95 LCM-70 (http://onlineresources.wnyc.net/pb/docs/95_lcm-070.pdf), 96 INF-21 (http://onlineresources.wnyc.net/pb/docs/96_inf-21.pdf).
Nursing Home Transition and Diversion Waiver: N.Y. Soc. Serv. L. § 366(6-a); 08 OLTC/ADM-1 (<http://onlineresources.wnyc.net/pb/docs/08oltcadm-1.pdf>); GIS 08 OLTC/003 (<http://onlineresources.wnyc.net/pb/docs/08oltc003.pdf>).
Office of People With Developmental Disabilities (OPWDD) Waiver: N.Y. Soc. Serv. L. § 366(7); 92 INF-33 (http://onlineresources.wnyc.net/pb/docs/92_inf-33.pdf), 92 LCM-170 (http://onlineresources.wnyc.net/pb/docs/92_lcm-170.pdf), 94 LCM-24 (http://onlineresources.wnyc.net/pb/docs/94_lcm-024.pdf), and 94 LCM-137 (http://onlineresources.wnyc.net/pb/docs/94_lcm-137.pdf).
AIDS Home Care Program: N.Y. Soc. Serv. L. § 367-e; 18 N.Y.C.R.R. § 505.21(a)(2).
- ²² N.Y. Soc. Serv. L. § 366.5(e)(1)(vii).
- ²³ N.Y. Dep't of Health, General Information System Message: Transfer of Assets and Medicaid Waiver Applicants/Recipients, GIS 07 MA/018 (September 24, 2007), available at <http://tinyurl.com/CAJF6M>.
- ²⁴ 18 N.Y.C.R.R. § 360-4.3(e).
- ²⁵ In the Matter of Mary O., Fair Hearing Decision No. 3945750N (February 25, 2004), available from Fair Hearing Database at <http://onlineresources.wnyc.net>.
- ²⁶ N.Y. Dep't of Health, Department Release – Transmittal No. 96 ADM-8 (January 3, 1997), available at http://www.health.state.ny.us/health_care/medicaid/publications/docs/adm/departmentrelease1-97.pdf.
- ²⁷ In the Matter of D.C., Fair Hearing Decision No. 4080991J (May 17, 2004), available from Fair Hearing Database at <http://onlineresources.wnyc.net>.
- ²⁸ 42 C.F.R. § 435.832(c); 18 N.Y.C.R.R. § 360.9.
- ²⁹ Wong v. Doar, 571 F.3d 247 (2d Cir. 2009).
- ³⁰ Jennings v. Comm'r. Nassau DSS, 893 N.Y.S.2d 103 (2nd Dept. Jan. 5, 2010).

- ³¹ 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).
- ³² MRG Income at 283 (January 2011).
- ³³ The sections addressing SNTs are at POMS SI 01120.203 (January 29, 2010), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120203>.
- ³⁴ 42 U.S.C. § 1382b(e)(5); SSA POMS SI 01120.203.
- ³⁵ 42 U.S.C. § 1382b(e)(5).
- ³⁶ SSA POMS SI 01120.203(B)(1)(a) (June 16, 2011), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120203> (“A trust which meets the exception to counting the trust under the SSI statutory trust provisions of Section 1613(e) must still be evaluated under the instructions in SI 01120.200 to determine if it is a countable resource.”)
- ³⁷ SSA POMS SI 01120.200(D)(1)(a) (January 13, 2009), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120200>.
- ³⁸ N.Y. Estates, Powers and Trusts Law § 7-1.9 (providing that a trust can be revoked upon written consent of all persons with beneficial interest in trust property, and that a disposition in favor of a class of persons, such as heirs, next of kin, or distributees, does not create a beneficial interest in such persons such that their consent is required for revocation. The upshot: the grantor of such a trust may unilaterally revoke it.)
- ³⁹ SSA POMS SI NY01120.200(B)(1) (April 26, 2005), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120200NY>.
- ⁴⁰ See also SSA POMS SI 01120.201(F)(2) (February 3, 2010), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120201> (a trust may still be deemed for the “sole benefit” of the individual even if the State, the pooled trust organization, or other contingent remaindermen are named).
- ⁴¹ 42 U.S.C. § 1382b(c)(1)(C)(ii)(IV).
- ⁴² 42 U.S.C. § 1382b(c)(1)(A).
- ⁴³ 42 U.S.C. § 1382b(c)(1)(A)(iv).
- ⁴⁴ 42 U.S.C. § 1382(a)(2)(A); 20 C.F.R. § 416.1130(b); Ruppert v. Bowen, 871 F.2d 1172 (2d Cir. 1989). The Federal benefit rate and N.Y. state supplement amounts are updated every year, and are announced by the N.Y. State Office of Temporary and Disability Assistance (OTDA) on their website at <http://otda.ny.gov/policy/directives/2010/>.
- ⁴⁵ Fed. Reg., February 7, 2005 [Volume 70, Number 24], pp. 6340-6345, amending 20 C.F.R. §§ 416.1102, 1003, and other sections.
- ⁴⁶ SSA POMS SI 00835.465 (February 18, 1997), available at <http://policy.ssa.gov/poms.nsf/lnx/0500835465>.

- 47 Id.
- 48 N.Y. Office of Temporary and Disability Assistance (“OTDA”), Temporary Assistance Source Book, available at <http://www.otda.state.ny.us/main/ta/TASB.pdf>.
- 49 N.Y. Soc. Serv. L. § 350-j.
- 50 N.Y. OTDA, General Information System Message: 2003 Emergency Program Income Guidelines for Emergency Safety Net Assistance (ESNA) and Emergency Assistance to Needy Families with Children (EAF), GIS 03 TA/DC005 (February 20, 2003), available at <http://www.wnylc.net/pb/docs/GIS03TA-DC005.pdf>.
- 51 N.Y. Soc. Serv. L. § 350-j; 18 N.Y.C.R.R. Part 372.
- 52 N.Y. Office of Temp. and Disability Assistance, Informational Letter 01-INF-08 (“2001 OTDA Letter,” March 8, 2001), available at http://www.otda.state.ny.us/main/directives/2001/INF/01_INF-08.pdf.
- 53 Id.
- 54 TA Source Book, p. 369.
- 55 TA Source Book, pp. 369-371.
- 56 18 N.Y.C.R.R. § 352.29(h); 2001 OTDA letter p. 3.
- 57 2001 OTDA letter p. 3.
- 58 OTDA, Administrative Directive 03 ADM-10 (November 19, 2003).
- 59 Id. at 3.
- 60 Id. at 3-4.
- 61 2001 OTDA Letter at p. 4.
- 62 2001 OTDA Letter at p. 4; N.Y. E.P.T.L. § 7-1.12; 18 N.Y.C.R.R. § 352.16(a).
- 63 See N.Y. OTDA Food Stamp Source Book, available at <http://otda.ny.gov/main/programs/food-stamps/FSSB.pdf>, and <http://www.nyc.gov/html/hra/html/directory/food.shtml>.
- 64 N.Y. OTDA, Informational Letter: Categorical Eligibility for Food Stamps Q & As, 08 INF-03, available at <http://otda.ny.gov/main/policy/directives/2008/INF/08-INF-03.pdf>. See also 10-INF-07, LDSS-4943 (11/09): “Food Stamp Benefits Categorical Eligibility Desk-Aid” (11/09) available at <http://otda.ny.gov/main/policy/directives/2010/INF/10-INF-07-Attachment-1.pdf>; 10-INF-06 Attachment 1 - LDSS-4314 “FS Benefits Household Composition Desk Guide, available at <http://otda.ny.gov/main/policy/directives/2010/INF/10-INF-06-Attachment-1.pdf>.
- 65 Food Stamp Source Book at 17-3.
- 66 7 C.F.R. § 273.8(e)(8)(i) through (iv).
- 67 7 C.F.R. § 273.8(e)(8)(i) through (iv); OTDA Food Stamp Source Book at pp. 363 - 364; 2001 OTDA Letter at p. 5.

- ⁶⁸ 7 C.F.R. § 273.8(e)(8)(ii).
- ⁶⁹ 2001 OTDA Letter at p. 5.
- ⁷⁰ OTDA Food Stamp Source Book, 17-16 to 17-17.
- ⁷¹ 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.
- ⁷² OTDA Food Stamp Source Book, p. 278 (formatting changes are added for emphasis); see also 2001 OTDA Letter at p. 5.
- ⁷³ OTDA Food Stamp Source Book pp. 266, 278.
- ⁷⁴ N.Y. Soc. Serv. L. § 97; 18 N.Y.C.R.R. § 393.1;
http://www.nyc.gov/html/dfta/html/senior/benefit_guide.shtml#heap.
- ⁷⁵ 18 N.Y.C.R.R. § 393.4(d).
- ⁷⁶ 2001 OTDA Letter p. 5.
- ⁷⁷ 9 N.Y.C.R.R. § 2202.20, available at
<http://www.metcouncil.net/factsheets/9NYCRR2200-2211.html#2202.20>
- ⁷⁸ http://www.nyc.gov/html/dfta/html/scrie/tenant_whocanapply.shtml
- ⁷⁹ 9 N.Y.C.R.R. § 2202.20(d).
- ⁸⁰ 24 C.F.R. § 5.609.
- ⁸¹ 24 C.F.R. § 5.609(b)(3). The current Passbook Savings Rate is 2 percent as determined by HUD. See 24 C.F.R. §5.603(b)(3) and Public Housing Occupancy Guidebook ("PHOG") p. 121-122,
<http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf>.
- ⁸² 24 C.F.R. § 982.445.
- ⁸³ 24 C.F.R. § 5.603(b)(2).
- ⁸⁴ 24 C.F.R. § 5.603.
- ⁸⁵ 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)).
- ⁸⁶ 24 C.F.R. § 5.609(c)(3),(4) and (9).

- ⁸⁷ 24 C.F.R. § 5.603(b)(2); PHOG p. 121.
- ⁸⁸ 24 C.F.R. § 5.609(c)(4).
- ⁸⁹ 24 C.F.R. § 5.609(b).
- ⁹⁰ A California court held that distributions from an SNT were not counted as income despite the plain language of section 5.603(b)2, which says that any income distributed from a trust shall be counted as income, where the sources of the corpus of the SNT were otherwise exempt as income. The trust contained settlement payments from two lawsuits against a former employer. The court held that because sums received as a “settlement for personal or property losses” were excludable from annual income under 24 CFR §5.609(c)(3), they would remain exempt when the principal of the settlements was used to fund distributions from an SNT. Finley v. City of Santa Monica, No. BS 127077 (Cal. Super. Ct. May 25, 2011), available at <http://wnylc.com/health/file/302>.
- ⁹¹ N.Y. Soc. Serv. L. §369-ee(2)(a)(2); 01 OMM/ADM-6 at 11-12.
- ⁹² N.Y. Soc. Serv. L. § 369-ee *et. seq.*; 01 OMM/ADM-6.
- ⁹³ N.Y. Soc. Serv. L. § 369-ee(1)(E); 01 OMM/ADM-6 (Attachment VI describes FHPlus benefit package).
- ⁹⁴ N.Y. Dep’t of Health, Administrative Directive: Elimination of Resource Test for Non-SSI Related Medicaid & Family Health Plus Applicants/Recipients, 10-ADM-01 (January 2010), available at http://www.health.state.ny.us/health_care/medicaid/publications/docs/adm/10adm-1.pdf.
- ⁹⁵ See p. 10, above.
- ⁹⁶ See NYHealthAccess.org, List of Pooled SNTs in New York State, at <http://wnylc.com/health/entry/4/> (updated May 11, 2011).
- ⁹⁷ 42 U.S.C. § 407.
- ⁹⁸ Mason v. Sybinski, 280 F.3d 788 (7th Cir. 2002); Kriegbaum v. Katz, 909 F.2d 70, 73 (2d Cir. 1990); Birdwell v. Concannon, 2 F.3d 1156 (9th Cir. 1993). Thus, Section 407 does not bar the voluntary assignment of funds (e.g., for the purpose of paying for institutional care), Fetterusso v. State of New York, 898 F.2d 322 (2d Cir. 1990). Accord, Johnson v. Wing, 178 F.3d 611 (2d Cir. 1999) (Section 407 does not bar voluntary agreement to pay costs of homeless shelter); Lopez v. Bowman, 302 F.3d 900 (9th Cir. 2002) (Section 407 does not bar voluntary arrangement with bank to apply otherwise exempt funds to overdraft charges). Research is excerpt of letter by Ed Josephson, South Brooklyn Legal Services, to ALJ in fair hearing.
- ⁹⁹ Reames v. Oklahoma, 411 F.3d 1164 (10th Cir. 2005).
- ¹⁰⁰ See p. 16.
- ¹⁰¹ In the Matter of R.T., Fair Hearing No. 4399513P (January 31, 2006), available from Fair Hearing Database at <http://onlineresources.wnyc.net>.

- ¹⁰² MRG Income at 237 (August 1999).
- ¹⁰³ In the Matter of J.T., Fair Hearing No. 4576742M (November 16, 2006), available from Fair Hearing Database at <http://onlineresources.wnyc.net>.
- ¹⁰⁴ We have heard anecdotal evidence that personal care agencies cannot back-bill farther than two years. Even if the SNT doesn't take that long, it can still be difficult to get the correct effective date of the rebudgeting to zero spend-down, and to get the agency to correct their billing records. If the effective date is wrong, then you should request a fair hearing to challenge this.
- ¹⁰⁵ See article on Medicaid Redesign initiatives at <http://wnyc.com/health/news/20/>.
- ¹⁰⁶ 20 C.F.R. Part 404, Subpart P, Appendix 1 ("Blue Book"), available at <http://ssa.gov/disability/professionals/bluebook/>.
- ¹⁰⁷ N.Y. Dep't of Health, Medicaid Disability Manual (December 2010), available at <http://tinyurl.com/PNBO6>.
- ¹⁰⁸ Social Security Administration, Evaluation of Disability and Blindness in Initial Claims for Individuals Aged 65 or Older, SSR 03-3p (November 10, 2003), available at <http://tinyurl.com/OVOCX>.
- ¹⁰⁹ NYC Human Resources Administration, Medicaid Alert: Disability Determinations for Individuals with a Pooled Trust (July 7, 2005), available at <http://wnyc.com/health/file/58>.
- ¹¹⁰ SSA, Medical-Vocational Profiles Showing An Inability To Make An Adjustment To Other Work, SSR 82-63 (August 20, 1980), available at <http://tinyurl.com/6JCVUMH>; N.Y. Dep't of Health, Medicaid Disability Manual at II.D.2.f [page 13] (December 2010), available at <http://tinyurl.com/6K2CWFZ>; N.Y. Dep't of Health, General Information System Message: Additional Special Medical -Vocational Profile for the Medicaid Disability Manual, GIS 06 MA/020 (July 28, 2006), available at <http://tinyurl.com/SXVBL>.
- ¹¹¹ This figure changes annually. See <http://www.ssa.gov/oact/cola/sga.html>.
- ¹¹² See note 108.
- ¹¹³ 20 C.F.R. Part 404, Subpart P, Appendix 2, available at <http://tinyurl.com/2FOTSGW>.
- ¹¹⁴ 20 C.F.R. § 404.1569a(b).
- ¹¹⁵ 20 C.F.R. § 404.1569a(c)(2).
- ¹¹⁶ 20 C.F.R. § 404.1569a(c)(1); SSA, Titles II And XVI: Capability To Do Other Work – The Medical-Vocational Rules As A Framework For Evaluating Solely Nonexertional Impairments, SSR 85-15 (August 20, 1980), available at <http://tinyurl.com/6CB83ZF>.
- ¹¹⁷ 20 C.F.R. § 404.1569a(d).

- ¹¹⁸ Social Security Administration, Evaluation of Disability and Blindness in Initial Claims for Individuals Aged 65 or Older, SSR 03-3p (November 10, 2003), available at <http://tinyurl.com/OVOCX>.
- ¹¹⁹ SSA, Medical-Vocational Profiles Showing An Inability To Make An Adjustment To Other Work, SSR 82-63 (August 20, 1980), available at <http://tinyurl.com/6JCVUMH>; N.Y. Dep't of Health, Medicaid Disability Manual at II.D.2.f.1 [page 13] (December 2010), available at <http://tinyurl.com/6K2CWFZ>.
- ¹²⁰ SSA, Medical-Vocational Profiles Showing An Inability To Make An Adjustment To Other Work, SSR 82-63 (August 20, 1980), available at <http://tinyurl.com/6JCVUMH>; N.Y. Dep't of Health, Medicaid Disability Manual at II.D.2.f.2 [page 13] (December 2010), available at <http://tinyurl.com/6K2CWFZ>.
- ¹²¹ N.Y. Dep't of Health, General Information System Message: Additional Special Medical -Vocational Profile for the Medicaid Disability Manual, GIS 06 MA/020 (July 28, 2006), available at <http://tinyurl.com/SXVBL>; N.Y. Dep't of Health, Medicaid Disability Manual at II.D.2.f(3) [page 13] (December 2010), available at <http://tinyurl.com/6K2CWFZ>;
- ¹²² See p.16.