

SPECIAL NEEDS PLANNING: THE SPECIAL/SUPPLEMENTAL NEEDS TRUST

presented by
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WHAT IS SPECIAL NEEDS PLANNING?

1. Planning for needs of individual with disability
2. Individual with disability is **competent/incompetent**
3. Individual is under 65/over 65
4. Need Government Benefits (SSI, Medicaid)

Two Issues Facing Families

1. Who will care for my loved one when I die?
2. How do I maintain quality of my loved one's life?

Solutions

1. Guardianship:
 - a. Article 81 of MHL
 - b. Article 17A of SCPA
2. Supplemental/Special Needs Trusts

Government Benefits

1. Needs Based:
 - a) Supplemental Security Income (SSI)
 - Income under \$797.00
 - Assets: under \$2,000.00
 - b) Medicaid
 - Income: under \$820.00
 - Assets: under \$14,400.00

Government Benefits cont.

2. As of Right:
 - Social Security Disability
 - Social Security Disabled Child Benefits
 - Medicare
3. Other Programs
 - Food Stamps
 - Section 8 Housing
 - HEAP

Types of SNTs

- First Party SNT
- Third Party SNT
- Sole Benefit Trust
- Pooled Trust
 - First Party
 - Third Party

Third Party SNTs

- Any person may establish an SNT for the benefit of a person with disabilities.
- "Grantor's purpose in establishing this Trust is to enhance the quality of life of Lauren ("BENEFICIARY"), who is a person with a severe, permanent disability, beyond what she might otherwise have because of her dependence on government benefits. This Trust is created expressly for Lauren's supplemental care, maintenance, support and education in addition to the benefits she otherwise receives or may receive from or be funded by any local, state or federal government, or from any private agencies, any of which provides or funds services or benefits to developmentally disabled, incapacitated or disabled persons, or from any private insurance carriers covering Beneficiary. This Trust is intended to conform to New York EPTL 7-1.12."

Third Party SNTs (cont)

- Funds come from a third party. State in the trust the source of the funds so everyone knows they are not property of the beneficiary.
- EPTL 7-1.6 that permits a court to invade principal does not apply to SNTs established pursuant to 7-1.12
- THERE IS NO PAYBACK TO MEDICAID AT THE DEATH OF THE BENEFICIARY.

THIRD PARTY SNTs (cont)

- Spouses cannot create an inter vivos SNT for one another.
- A spouse cannot obviate their obligation of support by establishing an SNT.
- Parents cannot use SNT funds for support of a child with a disability.
- Parents can establish SNTs if their child does not receive benefits or if the child receives waived Medicaid benefits.

THIRD PARTY SNTs (cont)

- May provide for termination prior to death
- Spousal testamentary trusts are permitted.
- Testamentary or Inter Vivos

FIRST PARTY SNTs: Guardian Appointed

- Self-Settled Medicaid Payback Trusts
- May only be established by a parent, grandparent, legal guardian or court if beneficiary is incompetent
- In Article 81 guardianship, request the power to establish the trust in application
- In Article 17A guardianship, many courts require the appointment of the guardian prior to the application

FIRST PARTY SNTs (cont)

- In both cases an annual report will be require accounting for use of funds
- In many Surrogate's Courts you can file a budget with the accounting asking permission to use funds on an "as needed basis"
- Notice Social Security (SSI), Medicaid District, and Attorney General with citation

FIRST PARTY SNTs: Beneficiary with Capacity

- Parent/grandparent is available to establish SNT:
- State: This trust is created by Jane as parent of Joe, an individual with a persistent, severe, chronic disability,"
- Provide notice to Medicaid District and Social Security (SSI)
- Provide annual accountings to beneficiary and Medicaid District

FIRST PARTY SNTs: Beneficiary with Capacity

- If no parent is available, a special proceeding can be commenced in either Supreme Court or Surrogate's Court
- POMS state:
 - that a Payback SNT cannot be terminated prior to the death of the beneficiary unless Medicaid is totally reimbursed and

FIRST PARTY SNTs: Beneficiary with Capacity

- Beneficiary cannot direct that the trust be terminated, and
- Beneficiary solely retains assets remaining after Payback]

Termination of SNT Upon Death of Beneficiary

- POMS state that the following can be paid prior to reimbursement:
 - taxes due from the trust
 - Reasonable administration expenses (accountings, completing and filing documents, etc.)
- Reimbursement to the State for Medicaid must take place prior to payment of taxes due from the beneficiary's estate.

Termination of SNT Upon Death of Beneficiary

- The following cannot be paid after death of beneficiary:
 - Funeral expenses
 - Debts owed to third parties
 - Inheritance taxes due
 - Payments to remainder beneficiaries

SOLE BENEFIT TRUST

- A Medicaid applicant can fund a trust for a person with a disability under 65 with his/her assets and qualify for Medicaid the next day
- The SNT assets must be used for the sole benefit of the beneficiary.
- It must provide a payout over the life expectancy of the beneficiary or a payback to Medicaid upon the death of the beneficiary.

Pooled Supplemental Needs Trusts

- A pooled trust is
 - a trust established and managed by a non-profit association wherein
 - (a) a separate account is maintained for each beneficiary of the trust, but for the purposes of investment and management of funds, the trust pools these accounts,
 - (b) the accounts in the trust are established solely for the benefit of the individuals who are disabled.

Drafting SNTs

- State clearly where the funds deposited in the trust are from so a Medicaid Payback and SNT 3 are clearly distinguishable upfront
- State that it is a supplemental needs trust and that the beneficiary is disabled and the disability,
- Trustee has total and unfettered discretion with respect to distributions of principal and income

Drafting (cont)

- In Payback SNT better to make it a broadly discretionary trust as opposed to stating specific types of distributions.
- NYS statute provides that the trustee can use trust assets even if it will affect government benefits if it is in the best interest of the beneficiary, use statutory language

Drafting (cont)

- SNT3s can provide that grantor can appoint/remove trustee
- SNT 3 can provide that trustee can transfer assets to a pooled trust at any time.
- Payback SNT can provide that a Court can appoint a pooled trust as trustee upon resignation/death of trustee

Drafting (cont)

- Payback trust can only be established by a person under 65, if person is an older individual (but under 65), state age in preamble.
- Payback trust for a disabled person must be "ordered by a court"—not approved by a Court.
- Include language that all Medicaid assistance from all states will be paid upon death of beneficiary on a pro rata basis.

SNT Administration

- Trustee is subject to the Prudent Investor Rule
- Trustee must familiarize himself/herself with government benefit rules: SSI, Medicaid, etc.
- Trustee should learn the needs and desires of the individual with disabilities and attempt to meet those needs
- Funds in the trust should be used, not hoarded.

Administration (cont)

- Examples of permissible expenditures
 - Education
 - Health insurance
 - Life insurance on a primary caregiver
 - Entertainment
 - Vacations
 - Clothing
 - Dental care, physical therapy, massages, etc.

Administration (cont)

- Car/van
- Travel expenses
- Television, computer or other electronics
- Prepaid funeral

ADMINISTRATION (cont)

- Trustee:
 - Files or provides annual accountings
 - Insures that government benefits are obtained/maintained where in best interest of Beneficiary
 - Invests assets and insures funds are available for expenditures
 - Spends the funds on the beneficiary taking into account beneficiary's desires

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Saundra M. Gumerove, the mother of a daughter with special needs, focuses her law practice to helping those with disabilities. Guardianship, Life Planning, Special Needs Trusts, Estate Planning, Special Education, or Government Benefits, Sandy is there to assist. Prior to opening her private practice Sandy was counsel for a money center bank and served as General Counsel for a national commercial finance company. Having practiced in the area of special needs for over twenty years, Sandy further serves the disability community as a Vice President of the Board of Nassau AHRC, a member of the NYSARC Board of Governors, a member of the NYSARC Executive Committee, Treasurer of the Brookville School for Children, and by authoring articles of interest to the disability community. Sandy also often speaks on subjects of interest to the disability community.
