

# The Western New York Coalition Pooled Trusts

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## SUPPLEMENTAL NEEDS TRUSTS

### I. Supplemental Needs Trusts in General

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

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

**1.** *Age* of disabled person - whether under 65 or age 65 or over;

**2.** *Whose money* is used to establish trust - funds of the disabled person in a "self-settled" trust, or the funds of a third party, such as parent, in a "third-party" trust;

3. *Type of benefit* - Whether SNT is established to protect solely Medicaid benefits or also SSI benefits.

C. General Terminology:

1. "Beneficiary" - the disabled person for whose benefit the trust is set up. The beneficiary must be a "person with a severe and chronic or persistent disability," even if he or she is over age 65. The beneficiary must receive government benefits or be expected to receive them in the future.

2. "Grantor" or "Settlor" - a third party who establishes and funds a trust for a disabled beneficiary. This may be a parent, friend, party in a lawsuit, a deceased person whose will establishes the trust, etc. These trusts are called a "third-party trust".

3. "Trustee" - Every trust appoints a person, organization, or corporate entity to administer the trust. Duties include investing and managing the funds in the trust, and making expenditures on behalf of the beneficiary according to the rules included in the trust.

4. "Self-settled" trust - a trust established by the disabled person with his or her own money - often from an inheritance or a lawsuit. Distinguished from a "third party trust," established by a parent, other relative, or friend using the donor's own money.

D. Law and regulations:

1. MEDICAID - 42 U.S.C. § 1396p(d)(4)(A) and (d)(4)(c)(copy is appendix at end of this outline), NY SSL 366.2(b)(2), 96 ADM-8 with addendum (copy in separate Appendix p. 8)

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

3. Social Security Program Operations Manual System (POMS) at SI 01120.200 - .203.

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

## II. "Self-Settled" SNTs - Using Individual's Own Money

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

B. DISABILITY - The beneficiary must be "disabled" within the meaning of the Social Security disability laws, no matter how old he or she is. Persons over age 65 may need to have disability determined by the SSA (for people on SSI) or Medicaid Program for the trust to be approved. Special rules for determining disability for people over age 65 are in Social Security

Ruling No. SSR 2003-03- di-01. However, Medicaid or SSA may want to make their own determination.

**C. THERE ARE 2 KINDS OF SELF-SETTLED TRUSTS -**

**1.** An Individual SNT is a trust drafted particularly for one beneficiary, appointing a trustee to manage the trust and make disbursements. The trustee might be a family member, friend, an attorney, or a bank. 42 U.S.C. § 1396p (d)(4)(a) - often called a "D-4-A" trust (language of law in appendix at end of outline).

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

**D. MORE ON INDIVIDUAL TRUSTS**

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

**2. WHO MAY ESTABLISH 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.

**a.** If the individual has a living parent or grandparent, and has mental capacity, no court involvement is required. The parent or grandparent need not be the trustee - just has to sign the trust document. NOTE, if individual lacks mental capacity, however, the parent or grandparent may need to become guardian in order to have authority to transfer the individual's funds into the SNT.

**b.** If the individual has a legal guardian, the guardianship order may need to be amended to authorize establishment of a trust.

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

**3. PAYBACK TO STATE at DEATH** - The SNT must specify that the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual.

**a.** Since there still may be funds left in the Trust after Medicaid is paid back, the trust must also name a remainder beneficiary(ies) -

this is required for SSI. For Medicaid, New York says that in order for the trust to be for the "sole benefit" of the disabled beneficiary, the beneficiary's estate should be named as the remainder. One way around this issue is to name the remainder beneficiaries as "those individuals who would be the distributees of the Beneficiary if the Beneficiary died intestate", or language to that effect.

#### **4. TRANSFER OF ASSETS PENALTY**

##### **a. SSI – NO PENALTY UNDER AGE 65**

Placing one's assets into an SNT is an EXCEPTION to the usual penalty on transferring assets that otherwise disqualifies any SSI applicant or recipient from SSI for a period of up to 3 years. If an SSI recipient receives a lump sum and is under age 65, an SNT is the perfect solution. Transfers into an SNT by individuals age 65 *or over* WILL incur the transfer penalty.

##### **b. MEDICAID**

**i.** There is no transfer penalty for liability for community-based Medicaid.

**ii.** For institutional Medicaid, there is no penalty if individual is under age when assets are transferred. However, a penalty of up to *five* years is imposed for transfers at age 65 and after. The 5-year look-back applies to transfers into trusts, as opposed to the 3-year look-back that applies to other transfers.

#### **E. More on POOLED TRUSTS - 42 U.S.C. § 1396p(d)(4)(c)**

**1.** A pooled trust is a trust that is established and managed by a non-profit association. A separate account is maintained "for the sole benefit of" the disabled beneficiary. *Legal Services for the Elderly and People Inc. have a pooled trust in Buffalo. It is called the Western New York Coalition Pooled Trust .*

**2.** AGE - A disabled individual of ANY age may use a pooled trust- it is one of two options for people under age 65, but the ONLY option for people age 65 or over.

**3.** TRANSFER PENALTY - Though individuals *age 65* or over may place assets into a pooled SNT, a penalty on transferring assets is imposed. *This penalty applies only if the individual is transferring his/her own money.*

**a.** This SSI penalty applies to disqualify 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). EXAMPLE: Individual living alone transfers

\$6,390 - disqualified from receiving SSI for 10 months.  
Maximum disqualification is 3 years.

**b.** There is no transfer penalty for eligibility for community-based Medicaid for persons of any age, and for institutional Medicaid for persons *under* age 65.

**c.** However, a penalty of up to five years (*depending upon the amount transferred*) is imposed for eligibility for Medicaid for institutional care (or Lombardi Program) for transfers into trust *by persons age 65 or over*.

**4. WHO MAY ENROLL IN TRUST ON INDIVIDUAL'S BEHALF-** Unlike an individual trust, a pooled trust is established by one uniform "master trust." The individual joins through a joinder or enrollment agreement.

**a.** Unlike an individual trust, this agreement may be signed by the **DISABLED INDIVIDUAL** him or herself. S/he must have mental capacity to sign the forms to enroll in the trust.

**b.** Alternately, the agreement may be signed by **PARENT, GRANDPARENT, LEGAL GUARDIAN** of the individual, or a **COURT**. If signed by a parent or grandparent, they must have "legal authority to act with respect to the assets " 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.

**i.** A standard power of attorney form does NOT have language authorizing the POA to establish a trust. If not in the POA, a new POA should be executed with this language if possible.

**5. PAYBACK TO NON-PROFIT OR STATE AT DEATH -** The SNT may provide that funds remaining upon death be retained by the trust, to be used for the benefit of other beneficiaries who are disabled. To the extent funds do not remain in this way, the SNT must provide that remaining funds be paid back to the State up to the amount of total medical assistance paid on behalf of the individual. Some trusts permit a beneficiary to designate heirs to receive the remainder, if any, after Medicaid's claim. Only limited expenses may be paid after death.

### **III. THIRD-PARTY TRUST**

(Funds from someone other than the client)

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

**B.** 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.

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

**D.** Extra benefit for parent - Parent who transfers assets into an SNT for the benefit of a disabled child of any age has no transfer of asset penalty that is otherwise imposed for the parent's OWN Medicaid eligibility for long-term care services. This type of transfer is one of the exceptions to the transfer penalty. 42 U.S.C. § 1396p(c)(2)(B)(iii); N.Y. Soc. Serv. L. § 366 subd. 5(d)(3)(ii)(C). Also, no SSI transfer penalty for transferor. POMS SI 01150.121.

#### **IV. SNT AS "RESOURCE" and EXPENSES that may be paid by the Trust without Counting as "INCOME"**

**A.** SNT AS RESOURCE - All money in the SNT - whether an individual SNT or a "pooled" SNT is *not* considered a resource of the beneficiary. This is true for Medicaid and SSI.

**B.** SNT distributions as INCOME generally - Payments must be for the benefit of the disabled individual - NOT for family members or friends. Payments that are designed to benefit the beneficiary, but incidentally benefit a third party may be permissible, such as traveling companions of the beneficiary, or travel expenses for a close family member to visit the beneficiary.

**C.** Payment of Funeral and Other Expenses After Beneficiary Dies - POMS at SI 01120.203.B.3.b (revised 2004)

**1.** **Funeral expenses** - Trustee may pay for a *pre-paid* funeral agreement while the disabled beneficiary is *alive*. Clients are encouraged to pay for these arrangements before enrolling in the Trust, or request a payment from the Trust for a burial agreement during the client's life.

**2.** Trust may pay taxes due because of death of beneficiary, fees for administration of trust estate such as accounting to a court, etc. before reimbursing Medicaid.

**3.** After death, trust may NOT pay debts owed to third parties, such as paying off a mortgage, credit card debts, etc.

**D.** Allowed Trust Expenditures - Medicaid- only

**1.** The trustee may make direct payments to third parties that provide goods and services to the beneficiary. Such in-kind payments are not considered "income" for Medicaid purposes, regardless of what the payments are for. 18 NYCRR § 360-4.3(E). Payments may include rent, clothing, food, etc.

2. 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.
3. CASH - given to the beneficiary by the trustee, however, would be considered "income" so may not be given.

**E.** Allowed Trust Expenditures - Client receives SSI

1. Payments made by the trust to third parties for FOOD or SHELTER are considered "unearned income" and will generally reduce SSI payments by a maximum of one-third of the monthly Federal benefit amount plus \$20. 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). 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 paying that and accepting a one-third reduction in the monthly SSI amount.

SHELTER expenses include rent, mortgage, property taxes, heating fuel, gas, electricity, water, sewer, and garbage removal. POMS SI 835.465

**NOTE :** Condominium fees in themselves are not household costs. However, condominium fees may include charges which are household costs (e.g., garbage removal). To the extent that such charges are identifiable, use them in the computation of inside and outside ISM. INSURANCE - "Only property insurance required by the mortgage holder in order to receive the mortgage is considered a household cost.

INSURANCE (property, fire, theft, etc.) held at the owner's or renter's option is not a household cost." POMS SI § 835.465

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

4. SSI rules on trusts can be found in the Social Security Program Operations Manual System (POMS) at SI 01120.200 - .203. [Back to top](#)

## F. SETTING UP THE TRUST

1. How the trust is set up depends on the same factors outlined above for asset trusts - the client's age, mental status, etc.

a. 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.

i. As set forth above at pp. 2 *et seq* , if the client has a parent, grandparent, or legal guardian to "establish" the trust, this is the simplest way - the trust need only be drafted and executed, then submitted to and approved by HRA. 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.

ii. If the client has no parent, grandparent, or legal guardian, then EITHER a court proceeding is necessary to establish an individual SNT, OR

iii. Client may enroll in a POOLED trust as long as she has mental capacity to do so - *with no court involvement*.

## 2. HOW TO JOIN THE WESTERN NEW YORK COALITION POOLED TRUST

a. In order to join the Western New York Coalition Pooled Trust, the beneficiary and/or his/her family, must meet with one of the agency trustees. At this intake meeting, the agency trustee will assess the beneficiary's needs, answer questions and provide a copy of the trust document, fee schedule and joinder agreement. However, the agency trustee is not acting as the beneficiary's attorney and cannot give legal advice. To set up an intake meeting, please call: Kathy Kanaley, Legal Services for the Elderly, Disabled or Disadvantaged of Western New York, Inc. at 716-853-3087 or Tracey Kosmoski., at People Inc. 716-817-7484.

b. After the intake meeting, the Management Committee of the Western New York Coalition Trust will meet to decide whether or not to accept the beneficiary into the trust.

c. Once accepted, the beneficiary's attorney will be notified and advised as to the procedure for making deposits and requests for distributions. Once the initial deposit is made, the beneficiary will

receive a confirmation letter, as well as copies of the "check request distribution form".

### **Further Important Information for Attorneys**

Each client who is interested in using our Pooled Supplemental Needs Trust must be interviewed by our social worker and approved by the management committee. We do not provide guardian services and, if your client lacks capacity, he will need an appointed representative. We also require that all individuals who are interested in utilizing our trust have their own independent counsel to review and explain the legal documents we require them to sign.

Once funds are placed into our Pooled Supplemental Needs Trust, the existence of those funds will not impact your clients SSI or Medicaid. However, if funds are deemed available to your client prior to deposit into our trust, your client may be ineligible for SSI and Medicaid for each month she had access to the funds. This could occur even if you place the funds in your attorney trust account, pending deposit into our pooled supplemental needs trust.

For example, if you settle a case in January and the funds remain in your attorney client account until your client decides to utilize our trust in June, she may be deemed to have received an SSI overpayment for the months of January through and including May.

To lessen the likelihood of this occurring, please add language to the Settlement Order that directs payment to be made only to the Western New York Coalition Trust One for the benefit of your client. Without such language your client could receive a notice of overpayment for SSI benefits for any time she had access to the funds, prior to their deposit into our Pooled Supplemental Needs Trust. When drafting a will for a family member who wishes to utilize our third part trust for a disabled person, please reference the Western New York Coalition Friends and Family Trust. For further information, please call Karen L. Nicolson, Esq. at (716) 853-3087 or Tracy Harrienger, Esq. at (716) 817-7458.

### **APPENDIX - APPLICABLE LAW**

#### **FEDERAL MEDICAID STATUTE:**

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

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

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

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

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

- The trust is established and managed by a non-profit association.
- A separate account is maintained for each beneficiary of the trust; but for purposes of investment and management of funds, the trust pools these accounts.
- Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c (a)(3)] by the parent, grandparent, or legal guardian of such individuals, **by such individuals** , or by a court.
- To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this title [ 42 USCS §§ 1396 ET SEQ.].

### **SSI STATUTE**

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

### **#26 KN Supplemental Need Trust Training Outline**

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