

The ABC's Of SNTs (Special Needs Trusts)



By Anthony J. Enea, Esq.*

In my practice, and I suspect in many Elder Law practices, the focus is often upon the needs of a chronically ill elderly person and his or her spouse. It has been well-documented in recent years that millions of “baby boomers” are coming of age, and that their aging will have a significant impact upon our medical and long-term care infrastructure. One aspect of the aging of the baby boomers however, is often overlooked. The baby boomers are the parents of, and care givers for, millions of non-elderly disabled children, and their aging will have an impact on the care and well being of these children. Unfortunately, it appears that little is being done to educate the aging baby boomers as to what steps should be taken to provide for the future care and well being of their non-elderly disabled children.

Special Needs Trusts, also known as Supplemental Needs Trusts (“SNTs”), play an important role in the planning for a disabled child. A SNT “is a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability,”¹ “designed to enhance the quality of disabled individual’s life by providing for special needs without duplicating services covered by Medicaid or destroying Medicaid eligibility.”² They are generally considered the legal centerpiece of a plan for a disabled person.

I. Pre-Drafting Issues and Analysis

When drafting a Supplemental Needs Trust, merely knowing that the beneficiary of the trust is disabled is not enough. It is important that the attorney prepare a checklist of questions and factors for assessment. The following is a sample of the type of inquiry that needs to be made:

- 1) What are the biographical details of the trust beneficiary? The age of the beneficiary is an important factor to consider, especially when drafting a SNT on behalf of the person who will be the beneficiary, known as a Self Settled SNT.
- 2) What is the nature of the disability and level of incapacity of the beneficiary of the trust? Is the incapacity physical or mental? What medications, if any, is the beneficiary taking? Is the medication psychotropic?

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How long has he or she been disabled? Is the illness progressive? How long is the disability anticipated to last? Is the illness medically recognized? Obtain as many details as to the nature of the disability as possible.

3) What are the functional abilities and limitations of the proposed beneficiary? For example:

- (a) Is the beneficiary able to cook, clean, and attend to his or her own personal hygiene? Can the beneficiary handle his or her finances and live independently?;
- (b) Is the beneficiary able to participate in decisions?;
- (c) Is the beneficiary employed? What is the nature of employment? What is his or her salary? Is there a history of employment?; and
- (d) What is the beneficiary 's level of education? Has he or she received any special training?

4) Where is the proposed beneficiary presently residing? What types of housing will the beneficiary need in the future? (*i.e.* group home, institutional, living with family/ renting an apartment) Is the housing federally subsidized?

5) What government benefits, if any, is the beneficiary receiving? Is the beneficiary receiving Supplemental Security Income (SSI), Social Security Disability (SSD) benefits, community Medicaid benefits, or institutional benefits? How long has the beneficiary received these benefits?

6) What are the anticipated future needs of the proposed beneficiary?

7) What are the potential sources of assets? Will the beneficiary receive an inheritance or assistance from family? One should inquire as to whether the trust beneficiary is presently a named beneficiary or a contingent beneficiary in a will or trust.

The above stated are examples of the nature of the analysis that should be made prior to the drafting of a SNT.

The attorney should also make clear certain characteristics of the SNT to the client. It is also important to explain to the client that the SNT is for non-basic needs, and that it is not a trust for basic needs, such as food, clothing, and shelter.³ Further, the client should understand that the purpose of the SNT is to provide for the preservation of funds that are permitted to be made available to a disabled person without affecting his or her eligibility for government benefits such as Medicaid and SSI.⁴ It is also important to explain to the client that the federal statutory standard for determining that the beneficiary of the SNT is a "disabled person."

Under federal law, a disabled person is defined as a person "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."⁵ A person is also considered disabled if he or she is receiving Medicaid or SSD.

II. Three Basic Types of Supplemental Needs Trusts

A. "Third Party SNT"

A Third Party SNT is a trust created and funded by someone other than the dis-

abled beneficiary.⁶ It is generally created by a parent, grandparent, or sibling. The sources of funds used to fund a Third Party SNT are not from the disabled person. A disabled beneficiary's funds should never be used to fund a Third Party SNT. Any individual can fund this type of trust for a disabled beneficiary without affecting the beneficiary's entitlement to government benefits.

It is important to note that the SNT can be *inter vivos* or *testamentary*.⁷ The spouse of a disabled beneficiary or the parent of a minor disabled beneficiary cannot create and fund an "inter-vivos" SNT and receive the protections provided under §7-1.12 of the New York Estates Powers and Trusts Law for government benefits. The spouse or parent, however, can fund and create a "testamentary" trust for the disabled beneficiary.⁸

All too often we tend to think of SNTs as inter vivos trusts; however, their use in testamentary documents, such as a Last Will, should be given consideration.

Section 7-1.12 of the New York Estates Powers and Trusts Law codifies *In re Estate of Escher*.⁹ In *Escher*, the Bronx County Surrogate's Court held that a testamentary trust established by the parents of a disabled daughter which provided that the principal was to be used only "for the payment of expenses necessary for the maintenance and support of ... daughter"¹⁰ was protected from the State's claim of the State for reimbursement of the amount that it had paid on behalf of the daughter.¹¹ The court found that the testator had intended for the principal to be used for the daughter during her lifetime.¹²

It should also be noted that the funding of a Third Party SNT has Medicaid planning benefits for the grantor of the trust. The transfer is considered an exempt transfer and thus, no period of ineligibility is created.¹³

B. "Self Settled SNT or First Party SNT"

Self Settled SNTs are authorized by the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93").¹⁴ These are SNTs funded with a disabled beneficiary's own funds or funds to which he or she is entitled, such as personal injury awards or inheritances. In order for the disabled beneficiary to establish and fund a Self Settled SNT, he or she must establish the following:

- (a) he or she is disabled (proof of SSI or SSD is generally sufficient);
- (b) he or she is under the age of 65 as of the date the assets are transferred to the trust;
- (c) the trust is established for the benefit of the disabled beneficiary by a parent, grandparent, guardian or court. Once established, it may be funded by the disabled beneficiary. If the disabled beneficiary has no parent or grandparent, it will be necessary to obtain a court order, pursuant to Article 81 of the New York Mental Hygiene Law¹⁵ or sections 2101 and 202 of the New York Surrogate's Court Procedure Act ("SCPA").¹⁶

The transfer of a disabled beneficiary's funds to the Self Settled SNT creates no look back period or ineligibility period for Medicaid nursing home benefits, so long as the disabled beneficiary is under the age of sixty-five at the time the gift to the trust is made.

(d) the trust must have a “payback provision.” Upon the death of the disabled beneficiary, all remaining trust principal and accumulated income must be paid back to Medicaid to reimburse Medicaid for all benefits paid to the disabled beneficiary during his or her lifetime. Any funds left over may be paid to the named beneficiary of the trust.

C. When is a Court Order Required to Create and Fund a Self Settled SNT?

When the disabled beneficiary is competent and has a parent or grandparent willing to be the creator of the trust, a Self Settled Trust can be created and funded without a court order; however, if the disabled beneficiary is competent, but does not have a parent or grandparent, a court order is required. On the other hand, when the disabled beneficiary is mentally incapacitated, the beneficiary’s assets or income can be transferred to the SNT only by order of the court, regardless of the existence of a parent or grandparent. The court will order the creation and funding of a Self Settled SNT within either an Article 81 guardianship proceeding under the New York Mental Hygiene Law¹⁷ or an Article 17A proceeding in the Surrogate’s Court.¹⁸ In both types of proceedings, a guardian is appointed by the court when it determines that a person is unable to manage his or her own property and/or make personal and health care decisions for himself or herself. Article 81 of the Mental Hygiene Law addresses the decision-making needs of disabled older adults¹⁹ and Article 17-A of the Surrogate’s Court Procedure Act (SCPA) governs infants and mentally retarded and developmentally disabled persons.²⁰ A SCPA Article 17 guardianship proceeding is more appropriate than a Mental Hygiene Law Article 81 guardianship proceeding when dealing with an infant who is physically disabled;²¹ however, if the matter involves an inheritance or if funds are received by a developmentally disabled or mentally retarded person, then the court order is obtained within a SCPA Article 17A proceeding.²²

D. “Pooled Self Settled SNT”

A Pooled Self Settled SNT is one that must be managed by a Non-profit Association. For example, the United Jewish Appeal (“UJA”) and the New York State Association of Retarded Citizens (“NYSARC”) sponsor such Pooled Trusts for disabled persons.

The funds transferred to the trust are pooled in the trust, but a separate account is established for each individual beneficiary. The beneficiary can be under or over the age of sixty-five; however, if the beneficiary is over the age of sixty-five, there is a penalty period for assets transferred to the Pooled Trust for Medicaid nursing home benefits. These Trusts are usually utilized where there is no family member to act as a trustee or when the beneficiary is over the age of sixty-five.

Depending on the terms of the Pooled Trust, the disabled person may be able to provide how the remaining balance of his or her account is to be distributed upon his or her death; however, this would be subject to a payback to Medicaid.

If the balance on death is retained by the Pooled Trust, then Medicaid is not entitled to a payback of the benefits paid.

Pooled Trusts play an important role when the disabled beneficiary has fixed income that exceeds the monthly amount permitted by the Medicaid home care program. For example, if a Medicaid home care applicant had income in excess of the permitted \$700 per month for the year 2007, he or she was allowed to contribute said excess income to a Pooled Trust. The trust will then pay the disabled beneficiary's household expenses such as mortgage, rent and taxes which he or she would not be allowed by Medicaid to pay. The Pooled Trust in many cases allows the beneficiary to remain at home and still be eligible for Medicaid Home Care.

III. Tax Considerations Relevant to Inter Vivos and Testamentary Third Party SNTs

A testamentary SNT is created out of the decedent's estate and thus, has no gift or special estate tax issues. The assets used to fund the testamentary SNT will be part of the estate of the decedent for estate tax purposes.

If the trust can distribute in favor of a "skip person,"²⁴ there will be Generation Skipping Tax ("GST") considerations. The current exemption is \$2 million per person. In 2010 the GST is set to be repealed, but in 2011 it will revert back to the amount it was before 2001 Tax Act (\$1Million per person). There is a concern as to what the amount of the transfer will be at the time it passes to the skip person. It is important to assess the potential future value, and inquire as to whether the amount going to the skip person will be greater than the GST exemption.

Income generated from the trust principal will be taxable. Since the trust income tax rate is generally higher than the disabled beneficiary's individual tax rate, the trust should be set up as a Grantor Trust. If it is a Grantor Trust, all ordinary income and capital gains will be taxed at the grantor's tax rate. For example, if the grantor of a Third Party SNT retains the right to the enjoyment or possession of the property transferred to the trust, such as a life estate in real property or a life income interest, then the income of the trust will be taxable to the grantor.

Additionally, the retention by the grantor of a "Life Income Interest"²⁴ or a right to alter or amend terms of trust,²⁵ will allow the beneficiary to obtain the property in the trust at a "stepped up basis" upon the death of the grantor. Assuming that there is still an estate tax in existence at the time of death of the grantor, the beneficiary's cost basis in the property for income tax purposes will be the date of death value of the property.

Unless the grantor retains sufficient powers over the trust, there will be a gift tax upon the funding of the Third Party SNT. The funding does not qualify for the \$12,000 per person annual exclusion for gift tax purposes.

It should also be noted that a Testamentary Third Party SNT is entitled to a distribution deduction. If the trustee makes a distribution, the trust is entitled to a distribution deduction and the beneficiary will be required to report a corresponding amount as income.

IV. Tax Considerations for a First Party “Self Settled SNT”

By its nature, a Self Settled SNT qualifies as a Grantor Trust under section 671 of the Internal Revenue Code.²⁶ The income generated from the trust principal should be taxed at the disabled beneficiary’s tax rate. The assets in a Self Settled SNT are included as part of the grantor’s taxable estate for estate tax purposes.

The initial payment to a Self Settled SNT as part of a court settlement is not taxable income to the disabled beneficiary.

If the proceeds of a settlement are used to fund the Self Settled SNT, there should be no gift tax consequence, but if the disabled beneficiary’s funds are used, then there would be a gift tax consequence.

V. General Drafting Considerations for SNTs

The following are some provisions to consider including in an SNT:

- (a) Make specific reference to *In re Estate of Escher* within the body of the trust, and that the trust is intended to comply with *Escher*.²⁷
- (b) Make specific reference to section 7-1.12 of the New York Estates Powers and Trusts Law within the body of the trust, and that the trust is intended to comply with its provisions.
- (c) Utilize the requisite provision that the trust corpus is to be used on behalf of the disabled individual to “supplement,” and “not supplant,” government benefits such as Medicaid and SSI, and that the funds are not to be used for basic needs such as food, clothing and shelter. Despite the aforesaid provision, however, it is still important to give the Trustee the power to make distributions to meet the beneficiary’s basic needs (food, clothing and shelter), even if it will diminish or impair the beneficiary’s receipt of government benefits. This is commonly referred to as the “Notwithstanding Consequent Effect” provision of a SNT.

Third Party Trusts should also provide that the trustee has the full and absolute discretion to pay out principal and income; however, the use of an ascertainable standard such as “for health, education, maintenance or support” should be avoided.

VI. Drafting Considerations for a SNT to be Approved by Court

When requesting that the court approve a SNT, the petition to the court seeking said approval should articulate the following:

- (a) The disabled beneficiary’s life expectancy and life care plans;
- (b) The projected growth of funds; and
- (c) A forecast of how long the funds will last.

With respect to Court Ordered SNTs, the courts have required different drafting requirements.²⁸ In *In re Morales*, the court offered a model SNT to be used in New York City.²⁹ The Department of Social Services must be notified when a Court Ordered Self Settled SNT is being requested.³⁰

In drafting a SNT, it is important to be familiar with the specific disability applicable to the the beneficiary of the trust. For example, the needs of a competent physically disabled non-elderly beneficiary will be different from those of

someone who is mentally incapacitated and physically disabled. The competent physically disabled beneficiary can be actively involved in the decisions concerning the drafting and implementation of a Self Settled SNT and his or her future care plan. For example, he or she can be made a member of an Advisory Committee to the Trustees.

It is also important to know what government benefits program(s) will support the beneficiary. (Will the benefits be institutional or non-institutional?) This will provide the attorney draftsman an idea as to how trust assets can be used, and the specific terms to be contained in the Trust as well as for the preparation of an additional memo to Trustees about their use. For example, a severely developmentally disabled individual residing in a group home may have more predictable needs than an individual suffering from a psychiatric illness who resides in federally subsidized housing and is receiving outpatient mental health services.

An individual suffering from a psychiatric illness who resides in federally subsidized housing will most likely be receiving SSI, and any distributions for food or shelter by the trustee of the SNT will impact the SSI coverage. Conversely, the individual in the group home may be receiving basic community Medicaid without SSI, so the trustee may be free to use trust funds to support a reasonable housing arrangement and provide other necessities that will enhance the beneficiary's ability to reside in the community.

Further it is important to consider the functional level of the beneficiary, his or her ability in an advisory capacity to participate in decisions regarding trust expenditures and management.

VII. Sole Benefits Trust

Finally, I thought it would be important to describe a new special type of SNT that has been gaining increased popularity. Generally, a Sole Benefits Trust ("SBT") is a special type of Third Party Trust. It will not be counted as an available resource to the trust beneficiary for purposes of determining his or her Medicaid and SSI eligibility as long as it is set up as a Third Party SNT. The third party funding an SBT may do so without incurring a transfer penalty for purposes of his or her own eligibility for Medicaid and SSI. A SBT is often used when a plaintiff settling a claim or suit wants to set aside funds from the settlement to provide for a disabled friend, child or grandchild, while still preserving his or her own eligibility for Medicaid or SSI.

A SBT must meet all of the Third Party SNT requirements. It must provide that the beneficiary is the only person who will benefit from the funds in the trust, presently and at any future time. The trust must also provide that the assets in the trust will be spent or distributed in a manner that is "actuarially sound." Assets are to be distributed each year in an amount that is calculated to deplete the trust within the beneficiary's remaining life expectancy.

Notable, a SBT does not have to meet the "actuarially sound" requirement if it is an exempt SNT or Pooled Trust under OBRA '93³¹ and the Foster Care Independence Act of 1999 (FCIA).³² It then, however, would lose its primary advantage over an OBRA '93 and FCIA exempt trust in that it would not need to be created

by a court, parent, grandparent or legal guardian of the beneficiary, and it need not contain a State payback provision. It is recommended that a SBT be actuarially sound in order to maintain its flexibility. It only needs to provide a minimum amount be paid to the beneficiary that will deplete the trust over his or her life expectancy.

A SBT can be funded with a lump sum or annuity, but it must be fully funded before the beneficiary reaches twenty-one years of age. In order to preserve the beneficiary's eligibility for Medicaid or SSI, it is administered in the same manner as a Third Party SNT. It should also be noted that any third party can transfer funds to a Sole Benefits Trust.

In a situation where the beneficiary's ability to qualify for Medicaid or SSI is not a concern, the SBT can be administered to provide for the beneficiary's general health, education, welfare, support, maintenance and comfort, so long as the trust is created for the grantor's blind, disabled or minor child, or for any other disabled individual under the age of sixty-five, and the trust meets the SBT requirements. The grantor's transfer of assets to fund the trust will not subject the Grantor to a transfer penalty for Medicaid.

Where there is a concern about Medicaid or SSI eligibility for the Plaintiff and the beneficiary, neither the Plaintiff, the beneficiary, the spouse of the Plaintiff or beneficiary may act as a Trustee. Otherwise, the assets in the trust would be considered an available resource, and adversely affect their Medicaid and SSI eligibility. If beneficiary's eligibility for Medicaid and SSI is not an issue, the beneficiary and his or her spouse could act as Trustee.

VIII. Tax Considerations for a Sole Benefits Trust

Funding the trust for a beneficiary who has Medicaid and SSI concerns will have gift tax consequences for the grantor. The grantor can not use the \$12,000 per person annual exclusion because the beneficiary is not considered to have a present interest as a result of the restrictions on the beneficiary's ability to control assets or compel distributions.

Conversely, if the beneficiary has no Medicaid or SSI concerns, the attorney draftsman can give the beneficiary the power to compel limited distributions, such as, for example, a five and five power (5,000 or 5% whichever is greater) or even have the beneficiary act as trustee.

Thus, if the beneficiary has a present or immediate interest, the grantor will be able to utilize the \$12,000 per person annual exclusion for gift tax purposes. Another way to avoid a gift tax issue would be to provide the grantor with a limited or special power of appointment. This would make the funding of the trust an incomplete gift for gift tax purposes.

One can also have a Sole Benefits Trust qualify as a Grantor Trust. Assets in trust will later be included in the gross estate of the grantor. Additionally, if a SBT qualifies as a Grantor Trust, the income earned will be taxed at the grantor's income tax rate, not the higher trust rate.

IX. The Effect of a Medicaid Lien on the Funding of a SNT

The U.S. Supreme Court's decision in *Arkansas Department of Health and Human Services v. Ahlborn* dramatically impacted the law on Medicaid liens and the funding of SNTs.³³

Under *Ahlborn*, when a Medicaid recipient receives a personal injury settlement following the payment by Medicaid of medical costs, the Medicaid lien amount is limited to the amount of proceeds meant to compensate the recipient for medical costs, and not for damages for pain and suffering, lost wages and loss of future earnings.³⁴ This rule also applies to the personal injury settlement or award pertaining to a minor. Further, in *Ahlborn*, there was an agreement apportioning the settlement between medical costs and other damages. The Court, however, noted that the result would be the same for a judge-allocated settlement or a jury award "because all such awards typically establish a third party's 'liability' for both 'payment for medical care' and other kinds of damages."³⁵

The rule in New York prior to *Ahlborn* was that a valid Medicaid lien may be enforced against the entire amount of a personal injury settlement, award or verdict before the proceeds are transferred into a SNT.³⁶

X. Conclusion

The use of a properly drafted Special Needs Trust will provide the parents of a non-elderly disabled child with a level of comfort in knowing that they have taken a significant step in assuring the future care and well-being of their child. It is truly the cornerstone of any planning that is done for a disabled person

ENDNOTES

¹ N.Y. EST. POWERS & TRUSTS LAW § 7-1.12(a)(5) (2008).

² *Cricchio v. Pennisi*, 683 N.E.2d 301 (N.Y. 1997).

³ N.Y. EST. POWERS & TRUSTS LAW § 7-1.12(a)(5)(ii) (2008).

⁴ 1993 N.Y. Laws 433, § 1.

⁵ 42 U.S.C. 1382C(a)(3).

⁶ See N.Y. EST. POWERS & TRUSTS LAW § 7-1.12(b) (2008); see also *In re Estate of Escher*, 94 Misc2d 952, 407 N.Y.S.2d 106 (Sur. Ct. Bronx County 1978).

⁷ See N.Y. EST. POWERS & TRUSTS LAW § 7-1.12(a)(5) (2008).

⁸ See *In re Estate of Kamp*, 7 Misc3d 615, 790 N.Y.S.2d 852 (Sur. Ct. Broome County 2005).

⁹ *In re Estate of Escher*, 94 Misc2d 952, 407 N.Y.S.2d 106 (Sur. Ct. Bronx County 1978).

¹⁰ *Id.* at 108.

¹¹ *Id.*

¹² *Id.*

¹³ See 42 U.S.C. § 1382c(a)(3) (2008).

¹⁴ Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 et seq. (1993).

¹⁵ N.Y. MENTAL HYG. LAW art. 81 (2007).

¹⁶ N.Y. SURR. CT. PROC. ACT §§ 2101, 202 (2007).

¹⁷ N.Y. MENTAL HYG. LAW § 81.02 (2008).

¹⁸ N.Y. SURR. CT. PROC. ACT art. 17-A (2008).

¹⁹ See *In re Lavecchia*, 170 Misc2d 211, 650 N.Y.S.2d 955, 957 (Sup. Ct. Rockland County 1996).

²⁰ *Id.*

²¹ *Id.*

²² N.Y. SURR. CT. PROC. ACT art. 17-A (2008).

²³ I.R.C. § 2613 (2008).

²⁴ I.R.C. § 2036 (2008).

²⁵ I.R.C. § 2038 (2008).

²⁶ I.R.C. § 671 (2008).

²⁷ See *In re Estate of Escher*, 94 Misc2d 952, 407 N.Y.S.2d 106 (Sur. Ct. Bronx County 1978).

²⁸ See *DiGennaro v. Cmty. Hosp. of Glen Cove*, 204 A.D.2d 259 (2d Dep't 1994); see also *In re Goldblatt*, 162 Misc2d 88, 618 N.Y.S.2d 959 (Sur. Ct. Nassau County 1994); *In re Morales*, NYLJ, July 28, 1995 (Sup. Ct. Kings County).

²⁹ See *In re Morales*, NYLJ, July 28, 1995 (Sup. Ct. Kings County).

³⁰ See *id.*

³¹ See Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 et seq. (1993).

³² See Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (codified in scattered sections of 42 U.S.C.).

³³ See *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006).

³⁴ *Id.* at 280-82.

³⁵ *Id.* at 282 n.12.

³⁶ See *Cricchio v. Pennisi*, 90 N.Y.2d 296, 683 N.E.2d 301 (N.Y. 1997) (holding that the preexisting Medicaid lien had to be satisfied prior to funding the supplemental needs trust).



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