

CAPPILLINO
ROTHSCHILD
& EGAN LLP
ATTORNEYS AT LAW

7 BROAD STREET
PAWLING, NEW YORK

109 MILL STREET
POUGHKEEPSIE, NEW YORK

TEL. (845) 855-5444

SPECIAL NEEDS PLANNING

MARIST COLLEGE – CENTER FOR LIFETIME STUDY
ESTATE AND HEALTHCARE ISSUES FOR SENIORS
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PRESENTED BY: SHANE J. EGAN, ESQ. AND ELIZABETH A. CAPPILLINO, ESQ.

Importance of Estate Planning & Financial Planning

- **General considerations:**
 - Wills, trusts, health care proxies, powers of attorney with gifting powers, beneficiary designations, nominating guardians for minor children, letter of intent
- Planning is even more important to protect those benefits of family members or loved ones who are receiving government assistance

Letter of Intent

- Letter of Intent/Letter of Instruction
- Not a formal legal document, usually prepared by the parent or caregiver
- Important information for future caregivers of an individual with special needs – to ease the transition if parent/caregiver is no longer there to provide care
 - Family history, contact information
 - Functional abilities
 - Medical information (list of care providers and contact information, medications and advice for administering)
 - Educational information
 - Activities, likes and dislikes

Guardianship

- Procedure through Court to appoint someone to have the authority to make health care and/or financial decisions for person with disability

Special Needs Trust

- Special/Supplemental Needs Trust (“SNTs”)
- To supplement any benefits a disabled individual may receive from government programs
- Enables the beneficiary to remain eligible for government benefits while protecting assets
 - Looking mostly at SSI and Medicaid

Entitlements

- **Medicaid**
 - Means-tested, based on financial and medical eligibility
- **Medicare**
 - National health insurance program
- **Supplemental Security Income (SSI)**
 - Needs based program for people with disabilities who have limited income and resources
 - Monthly stipend to assist in payments for food and shelter
- **Social Security Disability Insurance (SSDI)**
 - Not means-tested, requires recent work

SNTs, Generally

- **Non-availability of assets**
 - Drafted to ensure the assets in the trust are not “available” to benefit program
- **Discretionary**
 - Leaves trustee with flexibility and restricts their discretion only where distribution would impact beneficiary’s benefit eligibility
 - Can be drafted to give the trustees the authority to make such a decision if it would still be in beneficiary’s best interest

Court Involvement

- Many SNTs are drafted as private agreement between settlor and trustee and are not subject to court review or approval of state agency
 - Third Party SNTs (discussed later)
- In some contexts, Court approval will be required
 - If trust is created through guardianship proceeding or there is no party available to create the trust
- Process
 - Application, notices, annual reporting

Types of Trusts



Lifetime vs. Testamentary



First Party SNT vs. Third Party SNT

First Party vs. Third Party Trusts

First Party SNT

Source of Funds:	Disabled individual's funds (prior to age 65)
Established by:	Parent, Grandparent, Guardian, Court, Individual
Distribution Upon Death:	Subject to Medicaid payback

Third Party SNT

Source of Funds:	Any funds except beneficiary's own funds
Established by:	Anyone other than the beneficiary of the trust
Distribution Upon Death:	Not subject to Medicaid payback

First Party Trusts

- Common first party SNT scenarios:
 - Personal injury settlement or award
 - Inheritance or gift
 - Recently disabled adult

First Party Trusts, con't.

- Essentially creatures of federal Medicaid statute and the requirements that have been incorporated in **New York Estates, Powers & Trusts Law Section 7-1.12:**
- “Supplemental needs trust” means a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability (the "beneficiary") which conforms to all of the following criteria:
 - (i) The trust document clearly evidences the creator's intent to **supplement, not supplant, impair or diminish, government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving**, except as provided in clause (ii) of this subparagraph;
 - (ii) The trust document **prohibits the trustee from expending or distributing trust assets in any way which may supplant, impair or diminish government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving**; provided, however, that the trustee may be authorized to make such distributions to third parties to meet the beneficiary's needs for food, clothing, shelter or health care but only if the trustee determines (A) that the beneficiary's basic needs will be better met if such distribution is made, and (B) that it is in the beneficiary's best interests to suffer the consequent effect, if any, on the beneficiary's eligibility for or receipt of government benefits or assistance...”

First Party Trusts, con't.

Requirements:

- Individual is disabled (as defined in Social Security Law)
- Established by parent, grandparent or legal guardian of the beneficiary or by court order (or, in certain circumstances, by the individual)
- Includes “payback” provision providing that upon beneficiary’s death, Medicaid is repaid for any medical assistance provided during beneficiary’s lifetime

First Party Trusts, con't.

Termination of First Party SNT:

- Upon termination of the trust, the trustee may pay:
 - Reasonable administrative expenses
 - Taxes
- Trustee must then pay State Medicaid program for assistance provided during beneficiary's lifetime
 - Medicaid's claim is superior to funeral expenses and pre-existing debts
- If assets remain in the trust, they are distributed to any remainder beneficiaries pursuant to the terms of the trust

Third Party Trusts

- Gift, inheritance
- Used in an estate plan to preserve government benefit eligibility for family member with a disability

Third Party Trusts, con't.

- **No payback required**
 - The remainder can be distributed pursuant to grantor's wishes
- **Main requirement**
 - Distribution language should be sufficient to prevent assets from being considered "available"

Who can / should be Trustee?

- Capable and reliable family member
- Bank or financial services organization
- Some not-for-profit organizations
- Some combination thereof



Duties of Trustee



Generally:

- Collect assets and fund trust
- Managing assets
- Inform and account
 - **Keep complete financial records; income and expenditures**
- Apply for federal tax ID, file annual income tax returns
- Authority to hire professionals (may require court approval)
 - Accountant, attorney, financial planner/investment advisor

Additional Regulations for Administering First Party SNT



Regulations issued by Department of Health:

- Notify appropriate local Social Services of creation and/or funding of SNT established for benefit of applicant/recipient of Medicaid
- If assets exceed \$1M, proof of bonding (unless waived by Court) to local Social Services
- Notification to Social Services in advance of any transaction involving transfers from the trust for less than fair market value AND any transaction tending to “substantially deplete” the principal of a trust valued at more than \$100,000
 - “Substantial depletion” is between 5% - 15% of trust depending on total trust value
- Notify Social Services of death of the beneficiary
- Any additional requirements based on trust provisions

Trustee Decisions Impacting Entitlements



- Trustee should know the rules of the benefit programs that support the beneficiary of the trust
 - Federal and state rules and regulations are often changing; trustee (and advisory team) should stay informed of changes
- Trustee's decisions might impact the beneficiary's entitlement to other benefits that they are currently receiving or may receive in the future
 - Not just Medicaid and SSI; beneficiary may qualify for assistance in housing, food and heat, or receive disability benefits based on work history

Trustee Disbursements



- **Housing/Shelter and Food**
 - SSI benefits reduced if food or shelter expenses are paid by the trust, including mortgage payments, insurance premiums if required by mortgage company, real estate taxes, rent, heating fuel, gas, electric, water, sewer and garbage removal
 - Medicaid benefits are not reduced by such trust payments
- **Home owned by SNT: Not countable for SSI or Medicaid**
 - **HOWEVER:** a home purchased by the trust will be considered in-kind support that reduces SSI benefits by 1/3 in the month of purchase

Appropriate Disbursements



Other household expenses
(phone, cable, internet,
cleaning service, lawn
service)



Clothing



Household furnishings and
other personal property



Travel and entertainment



Credit card*



Educational expenses*



Medical expenses*

Additional Disbursements

- **Insurance**
 - Car can be owned by trust with insurance purchased and maintained by the trust
 - Homeowner's insurance may be paid by the trust, but may result in SSI benefit reductions. Renter's insurance will not affect SSI benefits.
- **Pre-paid funeral account**
 - May be pre-paid while beneficiary is alive, but funeral cannot be paid for from trust once beneficiary has passed if sufficient funds will not remain for Medicaid payback
- **Cash and gifts**
 - Cash spending money reduces dollar-for-dollar SSI benefits. Gifts to others on behalf of the beneficiary generally should not be made from the trust.
- **Final expenses upon death**

ABLE Accounts

- **Achieving a Better Life Experience Act of 2014**
 - Allows individuals with disabilities to have savings account to support education, health and other disability related needs
- **Balance under \$100,000 excluded from SSI resource limit**

Other Considerations



Non-Probate Assets

Ensuring beneficiary designations (life insurance, IRAs, etc.) are in line with other planning vehicles



Your own Medicaid or SSI Benefits

We've discussed funding trust to protect benefits of individual with disability, but should also consider impact on one's own benefit eligibility



Other estate planning documents

Advance directives, powers of attorney



Guardians/Guardianships

Having a plan in place for who will be able to legally advocate for disabled child



Tax

Interplay of income tax and estate tax and planning



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