

# SNTs: Preserving government benefits for the disabled

Special and Supplemental Needs Trusts (SNTs) are designed to protect the assets of individuals with physical and/or mental disabilities while still allowing such persons to be eligible for government benefits. The trust assets are used to enhance the beneficiary's quality of life. The law surrounding the creation of SNTs is complex and administration of the trust requires specialized knowledge.

Planning for the financial and emotional care of people with disabilities has become the an integral part of the practice of Elder and Estates and Trust Planning lawyers through enactment of the federal Omnibus Budget Reconciliation Act of 1993 (OBRA '93) and New York Estates Powers and Trusts Law §7-1.12 (EPTL). Personal Injury attorneys must structure settlements so that beneficiaries are not disqualified from eligibility for means-tested benefits such as Supplemental Security Income (SSI) and Medicaid and should consult with an attorney with expertise in planning for individuals with disabilities.

The terms "special" and "supplemental" are often used interchangeably. In New York, "special" most often refers to trusts that are established with the funds of the person (a first party trust), while "supplemental" refers to trusts established with the assets of any third party other than the beneficiary, usually a parent or grandparent. Every SNT however, must include language to the effect that the assets are meant to supplement, not supplant, any government benefits, that the trust's assets should never be directly accessible to the disabled person and that the trustee should have exclusive management of both income and principal.

Another key factor which can never be overlooked, is that the beneficiary of the SNT may not serve as the trustee of the SNT whether it is a first party or a third

party trust.

Supplemental Needs Trusts are also useful to establish a system of lifetime advocacy for the beneficiary. An SNT might still be a good planning device even if the beneficiary does not have unusually high medical expenses, or if the parents establishing the SNT have sufficient assets so that means-tested benefits such as SSI and Medicaid are unnecessary. Besides SSI and Medicaid, there are also numerous government programs including community-based housing, food stamps and vocational development that the individual with disabilities might need access to even if the person does not need financial and medical assistance at that time. The adult child with disabilities might need fiscal and case management, especially if incapable of handling his or her own finances. Frequently, an individual with a mental illness will cycle between meeting the definition of disabled for the purpose of government benefits, and being able to support his or herself.

## The Perfect Storm

The Centers for Disease Control and Prevention (CDC) found that 1 in 160 8-year-old Americans has some form of autism.<sup>1</sup> According to the National Institute of Mental Health, an estimated 6% of Americans ages 18 and older, or 1 in 17, suffer from a serious mental illness, the leading cause of disability in the U.S. for ages 15-44.<sup>2</sup> The CDC estimates that at least 5.3 million Americans currently have a long-term or lifelong need for help to perform activities of daily living as a result of a Traumatic Brain Injury.<sup>3</sup>

Furthermore, although the rate of disability has not

changed, the absolute number of persons with a disability is increasing because of a rise in the at-risk population – those 65 and older.

Alarming, this means that there are an increasing number of young adults with disabilities previously taken care of by parents who are now disabled themselves. Many of the non-elderly individuals with disabilities will lose their caregivers and support systems.



Ellen Victor

Fortunately, along with this trend toward an increase in the number of younger clients with disabilities who are being supported by older parents with disabilities, there has been an expansion of the laws enabling attorneys working with the population of people with disabilities to help such families plan for the future. At the same time, the economic reality of diminishing funds available to help clients with disabilities is a warning to legal practitioners to carefully craft these trusts so that the beneficiary does not lose the public benefits that underlie the purpose of the Special Needs Trust.

## Types of Supplemental/Special Needs Trusts

All SNTs in New York are designed to make distributions for the benefit of a beneficiary to supplement public benefits without jeopardizing the beneficiary's eligibility for governmental assistance and programs. Currently, to qualify for SSI (and SSI based Medicaid eligibility), an individual cannot have resources of more than \$2,000 in countable assets. (In New York an individual who is diagnosed as disabled can also qualify for

## SPECIAL NEEDS TRUSTS ...

Continued From Page 3

community based Medicaid if their non-exempt assets are valued at \$13,800 or less, this person would not qualify for SSI but would qualify for the Medicaid benefit.) Current federal maximum monthly SSI benefit payable to an individual is \$674.<sup>4</sup> NY adds money to the federal payment, increasing this amount to a maximum monthly payment of \$761.<sup>5</sup> It is almost impossible that \$761/month could procure housing on Long Island, and also cover food and clothing. While this amount can be supplemented with food stamps, there are options available to allow an individual with disabilities to live above the poverty level while having access to Medicaid and other government programs. The trust can and should be drafted as a discretionary trust so that the trustee has the option to reduce needs-based benefits in favor of the comfort of the individual with disabilities.

- Self-settled or first-party SNTs are funded with the individual's own assets. The person must be under age 65, certified as disabled and the SNT can only be established by a parent, grandparent, guardian or court order. Frequently these funds are a result of a personal injury lawsuit, or an inheritance left directly to the individual. Self-settled SNT's must be irrevocable. There is a payback requirement, wherein upon the death of the person any monies expended by New York for the total medical assistance paid on behalf of the individual with disabilities must be paid back to the state. This payback is made before the payment of funeral expenses.

- Third-party SNTs may be established by provisions in a will or trust, or as stand-alone inter vivos trusts, with a

pour-over provision in the grantor's will or the will of another.

- Stand-alone trusts allow family members to contribute by gift or devise.

- A third party SNT can be established in a revocable or irrevocable Trust. There is no payback requirement for this type of SNT.

- Third-party sole benefit SNTs are established for a disabled person, usually a child or grandchild, where a donor seeks Medicaid eligibility for him or herself. In this case, the donor is seeking to avoid the transfer of assets penalty by transferring assets to a individual with disabilities under the age of 65 for the disabled person's sole benefit. This type of SNT has become more important since the Deficit Reduction Act of 2005 which imposed a longer look-back period and other asset transfer penalties. There is controversy as to whether these trusts must pay out to the estate of the person with disabilities on that person's death. This is an important consideration and if it is a requirement, it may allow for an estate recovery for Medicaid benefits paid for the 10 years prior to death of a deceased beneficiary over the age of 55.

- Another alternative is a Pooled Income Trust, run by a nonprofit organization. The assets are pooled for investment and management purposes, but each beneficiary has an individual account. Additionally, there is no age restriction for a pooled trust and it can be established by the beneficiary who has been certified as disabled. Once the beneficiary dies, the balance is either retained by the nonprofit organization or paid back to New York Medicaid, depending upon if the trust is a first-party or third-party SNT. In some trusts, the balance can be devised to an individual beneficiary. Administrative costs are much lower than corporate trustees and are more cost effective for smaller trusts.



THE LAW OFFICE OF ELLEN A. VICTOR

(516) 223-4800

ELLEN A. VICTOR

25 Merrick Avenue • Merrick NY 11566  
www.ellenvictor.com • evictorlaw@gmail.com

Business Formation • Contracts • Estate Planning  
Residential and Commercial Real Estate

## Funding a Third-Party Supplemental/Special Needs Trust

In addition to the parent's or grandparents' existing assets being used as a funding source for a third party supplemental needs trust, a common technique is to purchase a life insurance policy to fund the SNT. Where funding is a particular problem, the least expensive option is a term policy known as a "second-to-die" or survivorship policy.

Care must be taken funding SNTs with qualified plans such as IRAs. In order to stretch out payments, the SNT must be qualified as a designated beneficiary by naming individuals as remainder beneficiaries. Additionally, if the SNT retains income from qualified plans, that income may be taxed at the higher rate of the trust instead of the beneficiary's presumably lower tax rate.

## Choosing a Trustee

One of the most difficult problems for the drafter and grantor of the SNT is choosing the proper trustee. The trustee of the SNT must fulfill the typical fiduciary duties including complying with the terms of the trust agreement, keeping detailed records, providing the beneficiaries and/or representatives with accountings, ensuring the taxes are properly paid and investing the assets in compliance with the Prudent Investor Act. The SNT trustee must also:

- Understand notification requirements for the Social Security Administration and the state or county Medicaid Agency;
- Be familiar with the rules that govern Social Security, SSI, Medicare and Medicaid, Section 8, the Office of Mental Health and the Office of Mental Retardation and Developmental Disabilities. It may be a breach of duty to fail to preserve eligibility for government programs;
- Manage the needs of the individual with disabilities. If the beneficiary is unable to care for him/herself, the trustee is responsible for overseeing the care and needs of the disabled person. This may involve hiring care managers or keeping in contact with case managers; and;
- Provide for the well-being of the individual with disabilities. These individuals may outlive their family support and become subject to abuse and neglect in hospitals and other institutions.

Choosing a family member will may not result in proper administration of SNTs unless the family trustee has access to advisors including accountants, investment advisors, attorneys and care managers. A corporate trustee could be named as co-trustee and function as financial fiduciary. If the corporate trustee is sole trustee, a trust protector

can be appointed to oversee the corporate trustee and should be given the right to replace that corporate trustee, there are some decisions that impart a fiduciary duty on a trust protector which warrant a discussion with the individual prior to appointment.

## Final Thoughts – The Special Needs Trust as Advocate

Besides protecting government benefits and supplementing those benefits, the SNT can be drafted to include caretaking provisions for the individual with disabilities. A third-party trust can express the intent of the grantor in how best to supplement the beneficiary's funds, including provisions for residential living, supported social, religious or cultural activities, and options to pay for family visits and gifts.

Additionally, the SNT could provide for hiring a care manager, to be supervised by the trustee or the trust protector. This would ensure that once the parents are unable to provide emotional support, someone would be able to function in their stead. The caretaker can help the disabled person to remain independent and free from abuse and neglect.

Finally, parents or guardians should include a Letter of Intent, including practical information about the person's routines, likes and dislikes, previous treatments, names of doctors, therapists, and any other information which would help a future caregiver care for the individual with disabilities. This letter should be reviewed and updated on a regular basis.

Properly drafted and administered Supplemental/Special Needs Trusts along with the Letter of Intent will allow the trustee to advocate for the individual with disabilities and protect both the beneficiary's public benefits and quality of life.

**Ellen Victor's practice focuses on Estate, Business and Special Needs Planning and is located in Merrick, New York. Ms. Victor can be reached at (516) 223-4800 or through her website at [www.ellenvictor.com](http://www.ellenvictor.com) where she often blogs about special needs trusts.**

1. Department of Health and Human Services Centers for Disease and Control Prevention, "Autism Spectrum Disorders Overview," <<http://www.cdc.gov/ncbddd/autism/overview.htm>>
2. National Institute of Mental Health, "Statistics," <<http://www.nimh.nih.gov/health/topics/statistics/index.shtml>>
3. Department of Health and Human Services Centers for Disease and Control Prevention, "Facts About Traumatic Brain Injury," <[http://www.cdc.gov/ncipc/tbi/FactSheets/Facts\\_About\\_TBI.pdf](http://www.cdc.gov/ncipc/tbi/FactSheets/Facts_About_TBI.pdf)>
4. Social Security Online, "SSI Federal Payment Amounts," 2009 <<http://www.ssa.gov/OACT/COLA/SSI.html>>
5. Social Security Online, "Supplemental Security Income (SSI) in New York," SSA Publication No. 05-11146, January 2009, <<http://www.ssa.gov/pubs/11146.html>>