

SPECIAL NEEDS TRUSTS SUPPLEMENTAL NEEDS TRUSTS (SNT)

THE BASICS

WHAT IS THE PURPOSE OF AN SNT?

SNTs are used to make personal or family funds available to an individual who is disabled and receiving support, maintenance, or health care benefits under a needs-based governmental program (most commonly Supplemental Security Income [SSI] and Medicaid), without diminishing the assistance or benefits received from the governmental program.

SOME TERMINOLOGY:

THE BENEFICIARY: the individual who is disabled, for whom the SNT was set up

THE SETTLOR: the person who set up the SNT and whose assets were used to fund it

THE TRUSTEE: the person who manages the SNT and disburses funds from it

ASSETS OF THE INDIVIDUAL: income due to the Beneficiary during their lifetime, or property actually owned by the Beneficiary; assets of a person other than the Beneficiary (or the Beneficiary's spouse) that are directly used to fund the SNT without ever having been owned by the Beneficiary are not assets of the individual

WHO CAN BE THE BENEFICIARY OF AN SNT?

The Beneficiary must be an individual who is disabled. Under the Federal Social Security Act (which applies only if the SNT is established using assets of the individual), to be "disabled" the individual must be

- 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/can be expected to last for a continuous period of at least 12 months

New York State Estates Powers and Trusts Law (EPTL) §7.12 has a slightly different definition of who may be the Beneficiary. It provides that the Beneficiary must be a person with a severe and chronic or persistent disability, that is, a person

- with mental illness, developmental disability, or other physical or mental impairment
- whose disability is expected to, or does, give rise to a long-term need for specialized health, mental health, developmental disabilities, social, or other related services
- who may need to rely on government benefits or assistance

The two definitions are not generally functionally distinct.

WHAT CAN THE FUNDS IN THE SNT BE USED FOR?

As a fundamental principal, funds from the SNT are used to supplement government benefits; they should not be used to supplant, impair or diminish those benefits. However, the EPTL permits SNTs to be established in a way that allows—under very specific circumstances and with important limitations—the use of funds from the SNT for food, clothing, shelter, or health care. Such use may, however, result in a reduction or loss of government assistance or benefits.

WHAT HAPPENS WHEN THE BENEFICIARY DIES?

First-party SNT: The assets left in the SNT when the Beneficiary dies must first be used to pay to New York State the value of all medical assistance paid on behalf of the Beneficiary; any remaining assets can then be distributed pursuant to the terms of the Trust document.

Third-party SNT: The assets left in the SNT when the Beneficiary dies, because they were never assets of the individual but only assets of the trust, can be distributed pursuant to the terms of the Trust document.

Pooled Asset SNT: Part or all of the assets may be retained by the SNT for the benefit of all other beneficiaries of the Pooled Asset SNT. To the extent the assets are not retained by the SNT, and are assets of the individual, the value of all medical assistance paid on behalf of the Beneficiary must be paid to the State, and any remaining assets can be distributed as directed when the assets were added to the pool, in accordance with the terms of the SNT. If the assets were assets of the individual, they can be distributed as directed by the Settlor in accordance with the terms of the SNT.

WHAT IF THE BENEFICIARY MOVES TO A DIFFERENT STATE?

Although SSI and Medicaid are Federal programs, they are jointly managed (and funded) by Federal and State governments; different states have different provisions concerning SNTs. If the individual who is disabled moves to another state and applies for benefits there—either as a first time applicant, or as a continuation of benefits already being received—it would be a good idea to have an attorney in the new state take a look at the trust document.

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THE THREE TYPES OF SNTs: FIRST-PARTY, THIRD-PARTY, & POOLED ASSET

FIRST-PARTY SNTs

Established by the Beneficiary, while under the age of 65

In some cases, the actual establishment of the SNT will be effected by the Beneficiary's parent, grandparent, legal guardian, or a Court, using assets of the individual

The terms of the SNT are established, and the Trustee is appointed, by a trust document

It is important to select a willing Trustee, who will have the Beneficiary's best interests at heart, and who will be able to communicate with the Beneficiary.

The Trustee sets up account in the name of the SNT with a financial institution (bank or brokerage)

The Trustee must be bonded if the SNT corpus is \$1,000,000 or more, and proof of that bonding provided to the Department of Social Services

The Trustee's duties must be performed strictly in accordance with the terms of the trust document

The duties include: overseeing the investment of the funds; preparing an annual accounting and providing information concerning the income to the person responsible for filing the Beneficiary's income tax returns; disbursing money from the SNT corpus for purposes that will not vitiate the SNT's protection; and notifying the Department of Social Services of the creation or funding of the SNT, the death of the Beneficiary, any transactions tending to substantially deplete the principal of the SNT (if the corpus exceeds \$100,000), and any transactions involving transfers from the principal for less than fair market value

On the death of the Beneficiary, the Trustee winds up the SNT

The State must first be paid, from the assets remaining in the SNT, the value of all medical assistance paid on behalf of the Beneficiary; any balance remaining after that reimbursement can be distributed to the remainder beneficiaries of the SNT.

THIRD-PARTY SNTs

- Established for the benefit of a person with a severe and chronic or persistent disability
- By someone other than the Beneficiary or the Beneficiary's spouse
- The document establishing the SNT must clearly evidence the Settlor's intent to supplement, not supplant, impair, or diminish, government benefits or assistance which the Beneficiary may be receiving, or otherwise eligible to receive
- The document establishing the trust must prohibit the Trustee from expending or distributing trust assets in any way which may supplant, impair, or diminish governmental benefits or assistance
 - However, the trust document *may* authorize the Trustee to make payments to third parties to meet the Beneficiary's needs for food, clothing, shelter, or health care
 - IF and ONLY if
 - the Trustee determines both that
 - the Beneficiary's basic needs will be better met if such payment is made
 - AND
 - it is in the Beneficiary's best interests to suffer any effect on the Beneficiary's eligibility for or receipt of benefits or assistance that may result
 - If the trust document authorizes payments to third parties, and the mere existence of that authority would result in the Beneficiary's loss of (or denial for) benefits or assistance

under any government program even if the authority is never exercised, the trust will cease to be treated as an SNT *unless* the trust document also contains a provision expressly nullifying the authority to make such payments under such circumstances.

- The Beneficiary is given no power to assign, encumber, direct, distribute or authorize distributions

Section 7-1.12 includes sample language that can be used in drafting the SNT—and which, if used, helps to ensure that the drafter properly captured the intent of that Section.

The process for establishing and managing a third-party SNT is much the same as that for establishing and managing a first-party SNT, with these important differences:

- ★ The SNT may be created or funded through the Settlor's will
- ★ A Federal Tax ID number (FEIN, for Federal Employer ID Number) must be obtained for the SNT; this can be done through the IRS website
- ★ There are no bonding requirements specific to such SNTs, but general bonding requirements may apply, particularly if the SNT is created by will
- ★ There are no requirements to notify DSS
- ★ The entire balance remaining in the SNT at the Beneficiary's death are paid to the persons identified by the Settlor in the Trust document

Applicable to both first-party and third-party SNTS

Like the trustee of any trust, the Trustee of an SNT is entitled to compensation in the form of commissions, payable out of the corpus of the SNT, unless the trust document explicitly provides otherwise; the trust document can provide for the payment of hourly rates, instead, or can place other limits on the compensation.

POOLED ASSET SUPPLEMENTAL NEEDS TRUSTS

The Trust is established by a non-profit association, which manages the Trust

Only individuals who are disabled (as defined above) are eligible to be Beneficiaries of the pooled trust

There is a separate agreement signed on behalf of each individual Beneficiary, by which the trust assets for that Beneficiary are added to the trust corpus and the Trustee is given direction concerning how the Beneficiary's funds are to be used

Each such individual Beneficiary's assets are considered a separate trust account, but they are treated as a single corpus for investment and management purposes

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