

GRAY & FELDMAN LLP

625 Panorama Trail Suite 1240 Rochester, NY 14625
tel. 585.218.8620 fax 585.218.8600 e-mail ggray@gfrllp.com website www.gfrllp.com

ELEMENTS OF SUPPLEMENTAL NEEDS TRUSTS

A supplemental needs trust ("SNT") is a trust established for the benefit of a person with a disability (the "Beneficiary") which *does not* jeopardize his or her eligibility for means-tested governmental benefits, such as Medicaid and Supplemental Security Income ("SSI"). The use and purpose of a SNT is to provide funds to the person with a disability for items which *supplement* but do not *supplant* any means tested government benefits. Most importantly, the property and assets in a SNT are disregarded as a resource of the Beneficiary for purposes of determining his or her eligibility for means tested government benefits.

A SNT is just one of numerous types of trusts which share common core elements. A trust is a three party arrangement whereby the first party, called the "Beneficiary," benefits from property and assets managed by a second party, called the "Trustee," under an agreement established by a third party, called the "Grantor." The agreement which establishes the SNT must be in writing and identify these three essential parties.

Medicaid and SSI are means tested government benefits, which mean that the resources and income of the applicant must be below a certain dollar amount in order for the applicant to be eligible for the government benefit. For 2016, a person with a disability must have income below \$825.00/month and resources less than \$14,850 in order to qualify for Medicaid benefits in New York. The resource limit for an individual to qualify for SSI is much lower: \$2,000.00. Properly structured, the assets and property contained in a SNT *is not* considered an available resource of the applicant for either Medicaid or SSI. It is for this reason that SNTs are so useful and popular.

A first-party SNT is established by a parent, grandparent or guardian of a person with a disability or by a Court on behalf of the person with a disability. A person with a disability cannot establish his/her own first-party SNT, even though it is his or her own money used to fund the trust. There is legislation introduced in Congress which will allow a person with a disability who is otherwise competent to establish

his or her own first party SNT, but it has not yet been enacted into law.

To be eligible for status as a first party SNT, the trust must be established for the benefit a person with a disability *under* the age of 65. Once the first-party SNT is established it is funded by the Beneficiary's own property and assets, such as: (i) a personal injury award; (ii) an award of back Social Security Disability Insurance ("SSDI") or SSI; or (iii) an inheritance paid directly to the person with a disability

A first-party SNT must provide that the amount remaining in the SNT at the death of the Beneficiary will be paid to the State up to an amount equal to the total Medicaid paid on behalf of the Beneficiary. It is for this reason that a first-party SNT is also called "pay-back trust."

It should be noted that authorization of a parent or grandparent by Federal Statute to *create* a first-party SNT does not give them authority to *transfer* the Beneficiary's property into the first-party SNT. If the person with a disability is otherwise competent, he/she must transfer the property into the trust. If he/she is not competent, then a Guardian or the Court must transfer the property into the trust.

Another valuable use of a first-party SNT is as a "spend-down" trust. If the monthly income of an individual with a disability exceeds the income limit of means testate government benefits, he/she loses those benefits. Sometimes through pension payments, SSDI or employment, the monthly income of a person with a disability may exceed this income limit. While loss of the monetary amount may prove a hardship, loss of the other benefits of Medicaid, such as health insurance, participation in health programs or placement in a group home, may prove life altering. If faced with too much monthly income, a person with a disability can create a first-party SNT which is funded with the excess monthly income. The excess income contributed to the "spend-down" trust can be used to purchase goods and services which benefit the person with a disability.

Like all SNT's, a third-party SNT is established for the benefit of a person with a disability to provide for the Beneficiary without affecting his/her entitlement to means tested governmental benefits. A third-party SNT established during the lifetime of the Grantor is known as an *inter-vivos* SNT; while a testamentary SNT is created by the Grantor's Last Will and Testament to be effective at the death of the Grantor.

Once established, the third party SNT is funded by the property and assets gifted to the SNT by a person *other* than the Beneficiary, such as a parent, grandparent, interested friend or relative.

Unlike the first-party SNT, a third-party SNT may provide that the assets and property that remain in the SNT at the death of the Beneficiary can pass to *anyone* the Grantor chooses and is not required to "pay-back" the State(s). This is an important distinction between the two types of SNT's, and it places a premium on planning for gifts to a person with a disability.

A pooled SNT benefits persons with a disability whether under or over the age of 65. The provisions of the pooled SNT are set forth in a "master" trust agreement prepared and signed by the not-for-profit organization. A separate sub-account is established for each Beneficiary, but the property and assets of all the sub-accounts are pooled into one fund for investment and management purposes. By analogy, a pooled SNT is like a bank that holds the assets of individual account holders. The sub-account is established by the signing of a "participation agreement" by a parent, a grandparent, a guardian, a court or the individual beneficiary.

Assets of a parent, a grandparent or the beneficiary himself/herself can be transferred to a pooled SNT. However funded, amounts which remain in the pooled SNT at the death of the beneficiary are paid to the State to reimburse it for Medicaid payments to the extent they are not retained by the not-for-profit agency sponsoring the pooled SNT. This can be contrasted with the provisions of a third-party SNT which, for example, is funded with a gift from a grandparent. If the grandparent opens a pooled SNT account, then the grandparent loses the ability to select a residuary beneficiary of his/her choosing. If on the other hand, the grandparent creates a third-party SNT and funds it with the gift, the grandparent may select who will receive what remains in the SNT at the death of the grandchild.

Pooled SNT's are established *solely* for the benefit of the beneficiary which will place more restrictions on distributions than may be applied by a third-party SNT. For example, the pooled SNT may prohibit payment to a family member for home care of the Beneficiary; whereas, a third-party SNT may allow distributions for such purposes. Additionally, there may be restrictions on payments for certain expenditures, such as tobacco, alcohol, fire arms, criminal fines or restitution. It is for this reason that a person with a disability or his/her parent or grandparent should make inquiry of the not-for-profit sponsor about its policy on distributions *before* the participation agreement is signed and the trust is funded.

Another useful purpose a pooled SNT serves is to act as a "spend down" trust to hold income earned in excess of the income limits of means tested government benefits. Because the excess income is likely to be depleted from the trust periodically, a pooled SNT's funding and fee structure make it a more feasible alternative to a first-party SNT.

The following is a sampling of the expenditures which can be made by the SNT. The payments should be made directly to the merchant selling the goods or providing the service. Payments must not be made to the Beneficiary. .

- Household appliances
- Cable TV, internet services
- Clothing
- Clubs and club dues
- Computer hardware and software
- Courses or classes, including supplies
- Elective surgery
- Furniture, home furnishings
- Housecleaning/maid services
- Insurance (automobile and home)
- Musical instruments and lessons
- Over-the-counter medications
- Pet and pet supplies and veterinary services
- Health care supplies and services not covered by Medicaid
- Sporting goods/equipment/uniforms
- Telephone service, (including land line, cell phone and pager)
- Therapy (physical, occupational, speech) not covered by Medicaid
- Tickets to concerts or sporting events
- Transportation (automobile, bicycle, moped, gas, taxi and bus passes)
- Vacations