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## Special Needs Trusts In PA: Medical Assistance

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**Today We Will Discuss:**

- A Primer on Benefits
- Special Needs Trusts and Medicaid
- Establishing an SNT
- Distribution Issues

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**Overview of Public Benefits**

- Supplemental Security Income (SSI)
- Social Security Disability Insurance (SSDI)
- Medicaid
- Medicaid Long-Term Care Benefits (Waiver)

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 **SSI**

- Administered by SSA (Federal Government).
- Who Qualifies: Individuals who are aged (at least 65 years of age), blind, or disabled and are financially eligible.
- Limited Resources =
  - \$2,000 – individual
  - Maximum Benefit (per month) **\$750.00 – individual.**
  - Allowable income is very limited.
- A “needs based” government benefit (which means you must qualify medically and financially).

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 **SSDI** 

- Administered by SSA.
- Who Qualifies: workers and certain family members, who are “insured,” having accumulated a sufficient number of work credits and who cannot engage in Substantial Gainful Activity.
- What about Disabled Adult children? **Key benefit.**
- Resource Limit – NONE!
- Benefit – varies based on work history and amount paid in.

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 **Medicaid** 

- Administered by State Medicaid Agency.
- Automatically enrolled upon receiving SSI in “1634” states, such as PA. **Key Benefit.**
- Who Qualifies: Individuals who are aged (at least 65 years old), blind or disabled and who are financially eligible.
- Income & Resource Limits – same as SSI.
- A “needs based” government benefit.
- Medicaid is medical insurance.

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### Medicaid Long-Term Care (Waiver) Benefits

- MA-LTC is different from Medicaid. It pays for the nursing home care in addition to the medical insurance. Also known as the “nursing home grant.”
- Waiver provides funding for services to help individuals with disabilities live in their home and communities, rather than in an institutional setting.
- The name of the program derives from the federal government “waiving” the MA requirement that an individual require institutional care.
- Each waiver has its own eligibility requirements based on age and level of care requirements.
- Each program provides its own specific set of services.
- Income limit is \$2,250.00 gross per month (2018 limit).

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### Medicaid Waiver Programs

- Aging Waiver (over age 60) (OLTL)
- Attendant Care/Act 150 (physical disability) (OLTL)
- Autism Waiver (OID)
- COMM-CARE Waiver (traumatic brain injury) (OLTL)
- Consolidated Waiver (intellectual disability) (OID)
- Independence Waiver (physical disability) (OLTL)
- Infants, Toddlers & Families Waiver (OCDEL)
- LIFE (PACE Program)
- OBRA Waiver (developmental disability) (OLTL)
- Person/Family Directed Support Waiver (intellectual disability) (OID)

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### Why should your client receive Medicaid?



- Financial: Nursing facility care can cost over \$10,000.00 per month.
- Health: Traditional Medical insurance, including Medicare, is not as expansive as Medicaid.
- Community Environment: Waiver-type services are occasionally difficult to obtain and also very expensive.
- Spend-down: Spend all excess resources and qualify for Medicaid.

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 **Individuals Want an SNT  
Because They Need Benefits**

- Individuals with a long-term disability (such as intellectual disability) or individuals who become disabled due to a traumatic event.
- Who receive money unexpectedly or due to poor planning by a third-party.
  - Personal Injury or Medical Malpractice
  - Outright Inheritance through estate
  - Defective Trust
  - Beneficiary of annuity or retirement

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 **Excludable Resources** 

- A person qualifies for needs based public benefits only if he or she has limited income and resources (i.e., cash, stocks, bank accounts, CDs, etc.).
- Generally, a person may retain certain tangible resources that will not disqualify for purposes of public benefits and everything else is spent-down.
- Excludable Resource examples:
  - Principal Residence.
  - One Vehicle.
  - Pre-paid funeral (or irrevocable burial reserve up to certain amount) and burial plot.
  - Tangible items such as clothing, jewelry, furniture, personal effects.

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 **How does the SNT impact  
Medical Assistance**

- It doesn't! It shouldn't!
- The SNT is not counted as a resource if properly drafted and funded.
- The SNT is a tool to shelter assets (income and resources) of the disabled beneficiary.
- Department of Human Services reviews all SNTs. 62 P.S. § 1414. SSA reviews Trust to determine if available. What are they looking for?

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### Components of an SNT

- An irrevocable Trust established for an individual under age 65;
- Who is disabled;
- Established by guardian, court, parent, grandparent, or the individual;
- Provides a payback to the State for Medical Assistance.

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### Age 65 and Disability



- 65<sup>th</sup> Birthday is the cut-off date. Cannot establish an SNT afterwards.
- Cannot fund an SNT after age 65.
- However, structured settlement or irrevocably assigned income stream may continue after 65th Birthday if irrevocably assigned before age 65.
- Cannot assign ERISA pensions or most benefits.
- Why does irrevocable assignment matter??
- Support payments, military SBP annuity, pensions.
- Must be disabled at time SNT is established, even if not receiving benefits.

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### Establishing the Trust

- Parent, Grandparent, Court, or Guardian.
- Prior to the 21<sup>st</sup> Century Cures Act (SNT Fairness Act), a capacitated adult could not establish his or her own SNT.
- Capacitated adult can establish his or her own SNT.
- An improperly established SNT may be considered available. Usually an issue for SSI since the DHS reviews and approves SNTs by State law.
- SSI loss of benefits, loss of Medicaid, and overpayment.

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### Trust Established by Courts and Guardians



- An old problem: Prior to the 21<sup>st</sup> Century Cures Act (SNT Fairness Act), only a court could establish an SNT for a capacitated adult who did not have an available parent or grandparent.
- The court is not permitted to settle a Trust under the PA Uniform Trust Act.
- Court would “Approve” a Trust. The Trust would be rejected by the SSA and, several years later, would collect overpaid benefits.

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### Trust Established by Courts and Guardians, cont’d

- Solution: the court order must state “approved and established” by the court.
- Also, the SNT should reference the order.
- If going to court, have funds directed into the SNT.
- If the Guardian is establishing the SNT, you will need to petition to transfer the incapacitated Ward’s principal.
- Philadelphia, Bucks, Montgomery, Chester, Erie, and Dauphin Counties all require court approval to distribute SNT principal for an incapacitated person or minor.

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### Trust Established by Parents and Grandparents

- SSI POMS requires a “seed” Trust.
- Draper v. Colvin, 779 F.3d 556 (2015).
- Court held parents did not properly “seed” the Trust with their own funds.
- Trust was established by parents in role as Agents under a Power of Attorney.
- Therefore, violated rule that individual could not establish own Trust (prior to SNT Fairness Act).
- \$5.00 Rule. (Schedule A, \$5.00 bill, bank account).
- All Self-Funded SNTs established after November 6, 2006 must be seeded. DHS does not care.

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### Trust Established by Individual

- If Individual has capacity, can establish his or her own Trust.
- Agent under POA can also establish the Trust.
- The Power must give the Agent authority to establish and fund a Trust.

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### DHS Review of SNTs

- DHS reviews all Self-Funded Special Needs Trusts.
- All liens must be satisfied prior to funding. 62 P.S. § 1414.
- Key requirements:
  - Payback up to total Medical Assistance paid during lifetime or to the remainder in trust.
  - Pro rata payback to States.
  - burial reserve and the “stinking body” rule.
  - principal restriction in some counties.
  - Sole benefit distributions.

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### DHS - Enforcement through the Courts

- The SSA will disqualify the Beneficiary for SSI and require a payback of benefits.
- The DHS will surcharge the Trustee for inappropriate expenditures. Litigation normally revolves around the meaning of “sole benefit.”
- Exception to rule – the Trustee can disqualify the beneficiary for Medical Assistance if distribute cash directly to him or her or if beneficiary conserves funds in his or her own name.
- Distributions should be documented, for sole benefit, and paid on behalf of the beneficiary.

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### Petitions for Distribution

- Notice should be given to the DHS.
- The terms of the SNT will dictate when you are in court.
- You will likely be in court for any distribution from principal for a minor or incapacitated beneficiary.
- Typical petitions include budgets, caregiver payments, purchase of house, repairs to a third-party owned home, purchase of auto, and vacations.

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### Petitions - Purchase of Homes



- SNT may own principal residence of beneficiary.
  - No vacation homes.
- Obtain Approval of Court and State Medicaid Agency **even if principal is not restricted.**
- Check the terms of the SNT.
- The house should be titled in the name of the Trust (tenants in common if jointly owned).
  - Cannot evade payback if owned by Trust.
  - Consider having Beneficiary own home in own name if not using SNT funds.

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### Purchase of Homes – DHS Objections

- Expect adults in the home to contribute to the cost and upkeep of the home. DHS will object if they cannot contribute.
- The residence is not for the sole benefit of the disabled beneficiary. Purchases for larger homes.
- The cost of the residence is disproportional to the assets in the SNT. Can the SNT afford the house?
- The Court may dismiss a petition to purchase a home.
- Further, the cost of litigation can rapidly drain vital SNT funds.

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**Petitions - Purchase of the Auto** 

- You generally want to get court approval based on the amount of money being expended.
- A handicapped accessible van may cost \$75,000.00.
- The DHS will object to petitions for luxury vehicles.
- Make sure your petition makes provisions for the payment of insurance, expenses, and repairs.

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**Purchase of the Auto, cont'd**

- Title to the auto should be in the name of an adult family member who is a licensed driver.
- If the titled owner is the SNT, then the SNT will have to pay for a corporate auto insurance policy.
- Execute a promissory note in the name of the SNT and record it on the title certificate.
- This will also prevent the family member from selling the van and keeping the proceeds.

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**Questions?**

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