



# Traps for the Unwary During Special Needs Trust Administration

Incorrect administration of the trust may cause a loss of eligibility for public benefits, which could be devastating to the beneficiary's ongoing care and comfort.

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A special needs trust (SNT) is a type of trust designed to provide a person with a disability with the use of assets to enhance his or her quality of life while at the same time allowing that person to remain eligible for needs-based public benefits. The two primary types of public benefit programs that are protected are Supplemental Security Income (SSI) and Medicaid. The administration of any trust can be difficult because of state probate laws, federal and state tax laws, and the common law on administration of trusts. However, SNT administration requires knowledge of these laws plus the laws governing public benefits. Thus, in order to administer an SNT properly, the trustee must understand all of the normal fiduciary duties, as well as how the administration could affect the beneficiary's eligibility for SSI and Medicaid.

The addition of the public benefit laws can make what is already a difficult job, nearly impossible. As

one justice famously noted, "[t]he Social Security Act is among the most intricate ever drafted by Congress." Its Byzantine construction, as Judge Friendly has observed, makes the Act "almost unintelligible to the uninitiated."<sup>1</sup> This article discusses some common mistakes that frequently arise during SNT administration and ways trustees can avoid these mistakes.

## **Mistake 1: Confusing public benefit programs**

The trustee needs to know what public benefits the SNT benefici-

ary is receiving because the trustee's job differs drastically depending on the type of benefits involved. If the only benefits involved are Social Security Disability Insurance (SSDI), Social Security (SS), and Medicare, which have no resource limits, the administration is much simpler. These programs do not have special rules where SNT disbursements affect ongoing eligibility. Thus, the SNT trustee need follow only the terms of the trust document as to what disbursements are acceptable.

If the SNT beneficiary is receiving SSI or Medicaid, the SNT trustee must follow strict rules during administration. To make matters slightly more difficult, an SNT beneficiary could be receiving SSI, SS, or SSDI; Medicare; and Medicaid. Often, however, it is difficult to determine what benefits are being received. Public benefits recipients, their families, and even many attorneys often confuse the types of public benefits. Confusion

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is quite common between SSI and SSDI because the monthly cash payments come from the same place, the Social Security Administration (SSA). Also, many SNT beneficiaries do not keep correspondence from the SSA, and the SSA will not communicate with an SNT trustee unless he or she has the permission of the public benefits recipient (or the recipient's SSA-appointed representative payee), which may be difficult to obtain. This means that knowing which benefits are being received can be problematic.

One way to determine if the beneficiary is receiving SSI is to find out how much money the beneficiary is receiving. In 2013, the maximum federal SSI an individual can receive is \$710/month.<sup>2</sup> Some states, like California where the cost of living is high, supplement this amount, so be sure to add that amount to the maximum that can be received. Thus, an SNT beneficiary who is receiving less than that is likely to be receiving SSI. Another option for identifying the right benefit is for the SNT trustee to determine when the checks arrive:

- SSI checks arrive on the first of each month.
- SSDI checks typically arrive on the third of the month or may arrive on the Wednesday closest to the recipient's birthday.
- If, however, the person receives both SSI and SSDI, the checks arrive on the third of the month.

**Once the SNT trustee knows the type of public benefits involved, the trustee needs to identify which public benefit laws to follow during administration.**

Once the SNT trustee knows the type of public benefits involved, the trustee needs to identify which public benefit laws to follow during administration. In most cases, the SNT beneficiary is receiving SSI and Medicaid. Most, but not all, states follow the rule that receipt of SSI automatically qualifies the person for Medicaid.<sup>3</sup> Under this scenario, the trustee is responsible for following only the SSI rules and regulations.<sup>4</sup> Much of the time, the trustee needs to worry about only the rules set forth in the SSA's Program Operation Manual System (POMS).<sup>5</sup> In some cases, the SNT beneficiary does not receive SSI but still receives Medicaid under a different eligibility program. In this situation, the trustee must follow the Medicaid rules and regulations, which are found in each state's Medicaid plan and state policies.

In addition to SSI and Medicaid, the SNT trustee should get a complete picture of other public benefits the beneficiary is receiving, like section 8 or Veteran Benefits. An

SNT trustee should understand how the administration of the SNT may affect these benefits. The rules may be unclear, however, or the benefits may be treated differently throughout each state by the different local agencies. Thus, a thorough understanding of the public benefit programs requirements and policies is essential knowledge for the SNT trustee.

### **Mistake 2: Failing to keep current**

Once the trustee has a clear picture of the benefits being received by the beneficiary, the trustee must develop a system to stay current with any changes in the laws on SNT administration. There is a disheartening uncertainty of the public benefit laws and inconsistent application of the ever-changing policies that govern these matters. For example, the SSA has recently been active in changing its policies concerning the early termination of first party SNTs. It has issued new POMS that describe when an early termination is acceptable to the SSA.<sup>6</sup>

The most frustrating SSA position is that an expenditure for certain items or services may be permissible in one year, but not in the next. For example, the SSA recently changed its policy on allowing a trustee to reimburse third parties for purchases made on behalf of the SNT beneficiary. But, even more recently, after discussions with advocates for persons with disabilities, the SSA has tempered its position and will no longer enforce this new policy. Thus, keeping up with the law and changes in policy is essential to proper SNT administration. A helpful website is hosted by the Academy of Special Needs Planners ([www.specialneedsplanners.com](http://www.specialneedsplanners.com)) that will allow a trustee to keep current on these laws. Further, the author's website also has an option

<sup>1</sup> Friedman v. Berger 547 F.2d 724 (CA-2, 1976).

<sup>2</sup> An SSI recipient who is blind or who lives in an apartment without a kitchen, however, could receive a larger monthly check. An SSI-eligible couple receives \$1,066/month.

<sup>3</sup> Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, and Virginia are called "209 States" because SSI and Medicaid eligibility are determined differently. Alaska, Kansas, Nebraska, Nevada, Oregon, and Utah are "SSI Criteria States" which provide Medicaid for SSI recipients but require a separate application for Medicaid benefits. All other states are "1634 States" which grants automatic Medicaid coverage if the individual receives SSI.

<sup>4</sup> 42 USC sections 1381 through 1383f; 20 CFR sections 416.101 through 416.2227.

<sup>5</sup> While the POMS guidelines are not the product of formal rule-making and are not law, the U.S. Supreme Court held that they "warrant respect." Washington State Dep't of Soc. & Health Services v. Guardianship of Keffeler 537 U.S. 371 (2003). Furthermore, representatives at local Social Security district offices turn to POMS for guidance when faced with an SNT or other issues affecting the SSI claimant or beneficiary.

<sup>6</sup> See POMS SI 01120.199.



for signing up for a monthly newsletter that highlights changes in laws and policies.

### **Mistake 3: Confusing the type of special needs trusts**

There are two basic types of special needs trusts:

1. Third-party SNT.
2. First-party SNT.

An SNT trustee has nearly identical duties in administering first-party SNTs and third-party SNTs. Certain important distinctions between the two, however, cause problems for a trustee who does not understand which type of SNT is being administered. The two biggest differences between third- and first-party SNT administration involve these issues:

1. The first-party SNT must be for the "sole benefit" of the beneficiary, while a third-party SNT need not.
2. The first-party SNT must include a payback to each state Medicaid agency where the beneficiary received benefits, while a third-party SNT has no such requirement.

These are discussed in more detail below.

To determine which type of trust the trustee is managing, a trustee must ask a simple question, "Whose money was used to fund the trust?"

- A first-party SNT is funded with the person with a disability's money or assets. This type of SNT typically arises when the beneficiary with a disability has received a litigation recovery or the beneficiary receives an inheritance or gift in his or her own name. A person with a disability who has existing assets is permitted to transfer them to this type of trust as well.

- A third-party SNT is funded with money or assets that belong to another person who is not the beneficiary with a disability. This is typically done through a parent or grandparent's estate plan. However, anyone but the beneficiary with a disability can put money or assets into the trust.

In order to understand the primary differences between the different types of special needs trusts, the SNT trustee should know the legal rules that must be followed in establishing them. The rules that make a third-party SNT a non-countable resource are relatively easy to meet. For SSI purposes, the SSA defines a third-party trust as "a trust established by someone other than the beneficiary as grantor."<sup>7</sup> The SSA defines a grantor as "the individual who provides the trust principal (or corpus)."<sup>8</sup> The regulations impose two basic requirements for third-party SNTs:

1. The beneficiary cannot have authority to revoke the trust.
2. The beneficiary cannot direct the use of trust assets for his or her support and maintenance under the terms of the trust.<sup>9</sup>

Third-party SNTs are typically used for bequeathing or gifting assets to a person with a disability. This type of SNT is more flexible. As a result, these types of third-party SNTs may require more administration because the trust's provisions are not limited by strict statutory laws and may even include multiple beneficiaries. Unlike a first-party SNT, a person does not have to be disabled to benefit from this type of trust. These trusts can be useful when parents are concerned about a child with chronic divorces, creditors, alcoholism or drug abuse, poor money management, or other reasons for concern.

The rules that make a first-party SNT a non-countable resource are more restrictive. A first-party SNT is a federally authorized safe harbor trust that allows an individual with a disability to transfer his or her own assets into the trust without being penalized by SSI and Medicaid. As long as the statutory requirements are met, an individual with a disability can transfer his or her assets into a first-party SNT without penalty. All transfers to any other type of self-settled trust trigger some type of penalty.

The type of first-party SNT that an individual trustee would be responsible for is often called a (d)(4)(A) SNT. The rules for this type of first-party SNT are:

- The beneficiary must be disabled under the SSA's rules.
- The person must be under age 65 when the trust is established.
- The trust must be established by a parent, grandparent, legal guardian, or the court.
- The trust must be for the "sole benefit" of the person with a disability.
- The trust must include a provision that all state Medicaid benefits will be paid back on the death of the beneficiary.<sup>10</sup>

In addition, some probate courts actively supervise these trusts, requiring the submission and approval of annual accounts and a surety bond, which can significantly increase the cost of administration. If the SNT trustee is asked to administer the (d)(4)(A) SNT, he or she should ask for a copy of the court's order establishing the trust. The court's order may have additional requirements that the SNT trustee must follow.

<sup>7</sup> POMS SI 01120.200(B)(17).

<sup>8</sup> POMS SI 01120.200(B)(2).

<sup>9</sup> 42 U.S.C. section 1382b(e)(3)(A); 20 C.F.R. section 416.1201(a)(1); POMS SI 01120.200(D)(2).

<sup>10</sup> 42 U.S.C. section 1396p(d)(4)(A).



**Planning tip.** A common misconception among some SSA eligibility workers is that every (d)(4)(A) SNT must be established by a court. Many (d)(4)(A) SNTs are established by a parent or grandparent for an adult person with a disability who has capacity. The SSA POMS refer to these trusts as "Seed Trusts."<sup>11</sup>

Two other types of first-party SNTs are:

1. *The Miller Trust.* The *Miller Trust* is a trust that is composed of only pension, Social Security, and other income in a state that does not allow income "spend down," or otherwise imposes income caps, typically for access to long-term care Medicaid Assistance.<sup>12</sup> It is known as a *Miller Trust* after a Colorado case at *Miller v Ibarra*.<sup>13</sup>
2. *The pooled SNT, or (d)(4)(C).* An individual SNT trustee is not the trustee of this type of SNT because it must be administered by a non-profit organization. The pooled SNT is a trust that contains the assets of an individual with a disability if (a) the trust is established and managed by a nonprofit corporation, (b) "pools" money together for purposes of investment, but maintains separate accounts for each individual's assets; (c) the accounts are established by a parent, a grandparent, a legal guardian, the individual beneficiary, or the court; and (d) to the extent assets are not retained by the trust, the remaining assets must be used to reimburse the state Medicaid agency.<sup>14</sup>

A list of pooled trusts by state is available on the Academy of Special Needs Planners website, [www.specialneedsanswers.com](http://www.specialneedsanswers.com).

#### **Mistake 4: Misunderstanding "sole benefit" rule**

The SNT trustee's ability to make disbursements to persons other than the beneficiary of an SNT depends on the type of SNT that is being administered and whether the document authorizes it.

- In a third-party SNT, disbursements to others may be authorized, but only if the trust terms allow it. Sometimes, a third-party SNT will permit disbursements for a spouse or child of the beneficiary with a disability. A third-party SNT may also authorize gifts to recognize the beneficiary's family and friends on their birthdays or during holidays. The trust may also include permission to make charitable donations to churches or others. It is not improper for the drafting attorney to include such provisions and allow a trustee to make such payments in a third party SNT.
- A first-party SNT must be used for the "sole benefit" of the primary beneficiary during his or her lifetime. If a distribution provides some benefit to the beneficiary, it is considered to be for the beneficiary's sole benefit.<sup>15</sup> The penalty for violating this rule can be loss of all or some SSI and linked Medicaid benefits. If the beneficiary is receiving only Medicaid, the SNT must still be solely for the beneficiary's benefit.<sup>16</sup> A distribution made as a gift to a third party or charity is not for the sole benefit of the beneficiary, and causes a disruption of benefits.

The harder question is using trust assets to support the beneficiary's minor children or spouse. While possible, the trust would need to be carefully drafted by an experienced SNT attorney.

**Example.** An SNT beneficiary would benefit from having a pool installed at his home. His doctor has said he requires exercise. The pool is the only safe place for this beneficiary. Public or other private pools will not let him attend because of liability concerns surrounding his disability. The family requests that the SNT trustee purchase a pool at the family home. This type of distribution would be treated as for the sole benefit of the beneficiary (in many states) even though other family members may enjoy the pool.

In this example, the SNT trustee may want to place a lien on the home or take a percentage ownership of the home for the purchase price of the pool to protect the beneficiary if the family decides to move later. Best practice would be to have a prescription from a doctor or other documentation in the file in the event the disbursement is ever questioned by SSA or a court. If the SNT is court supervised, obtain permission in advance since a pool is typically a large expense.

#### **Mistake 5: No system to request disbursements**

The most common beneficiary complaint about SNT trustees is lack of communication concerning disbursements. The easiest way to avoid this complaint is to set expectations in the beginning of the administration with a clear procedure on how to request disbursements, what disbursements are appropriate, as well as outlining the procedure and decision-making process for approval of disburse-

<sup>11</sup> POMS SI 01120.203(B)(1)(f).

<sup>12</sup> 42 U.S.C. section 1396p(d)(4)(B).

<sup>13</sup> 746 F. Supp. 19 (DC Colo., 1990).

<sup>14</sup> 42 U.S.C. section 1396p(d)(4)(C).

<sup>15</sup> 42 U.S.C. section 1382b(c)(1)(C)(ii)(IV).

<sup>16</sup> 42 U.S.C. section 1396p(c)(2)(B)(iv).



ment requests. The trustee should meet with the beneficiary, any legal guardians, and trusted friends and family to participate and support the beneficiary. A monthly budget should be established.

The disbursement procedure should outline whether disbursements can be made only during business hours, on weekdays, or after 24 hours from a written request. It is in the trustee's best interest to clearly communicate these policies to the beneficiary or the beneficiary's legal representative. This will aid in reducing friction during the administration.

**Third-party SNTs are typically used for bequeathing or gifting assets to a person with a disability.**

**Practice tip.** The SNT trustee should have a clear record of *all* disbursements. To accomplish this, the SNT trustee should consider purchasing a fax machine or scanner for a beneficiary or his or her legal representative. In this way, disbursement requests can be faxed or scanned and emailed directly to the trustee's office; then the trustee will have a written record of all requests. Government agencies and courts may require proof of disbursements and documents in support at any time during administration.

#### **Mistake 6: Trustee refuses to make distributions**

Too often SNT trustees become overly concerned about the SSI and Medicaid rules and stop making distributions, even those that are perfectly acceptable. A common misconception of SNTs is that they are too restrictive because they can pay for only a small number of items and

services for the beneficiary. The SNT is designed to enhance the quality of life of the person with a disability. Thus, it can pay for any item or service that will do so. Given the large selection of items and services available, the SNT is really a wonderful tool that greatly improves the overall quality of life of persons with disabilities.

The trustee still must understand that certain disbursements (and how they are made) can affect public benefits eligibility. The trustee is thus asked to perform a balancing act between making distributions that do not violate the rules of the applicable benefit programs and providing the beneficiary with goods and services so that he or she enhances the beneficiary's quality of life. The most difficult balancing task an SNT trustee is required to perform is deciding whether a distribution that will reduce (or even eliminate) a beneficiary's government benefits is in the beneficiary's best interest.

In order to properly decide how and when to make distributions from an SNT, the trustee must be familiar with the SSI rules on "income" and "resources." In general, the trustee should pay careful attention to the following issues:

- **Resources.** An SSI and Medicaid recipient is entitled to only \$2,000 in countable resources and an eligible couple, \$3,000.<sup>17</sup> Thus, the trustee should not purchase items that are considered countable resources that will cause the beneficiary to exceed the applicable resource limitation. For example, the SNT trustee should not purchase a second automobile or vacation home in the name of the beneficiary.
- **Income.** A cash distribution to an SSI benefits recipient (or direct reimbursement to the

recipient) by an SNT trustee is counted as "unearned income." The effect to the SNT beneficiary of receiving 'unearned income' is a dollar-for-dollar reduction of SSI benefit less the \$20 (general income exclusion). This is described in more detail below under Mistake 8.

- **In-kind support and maintenance.** A trustee should be careful in providing "food" or "shelter" to an SNT beneficiary. SSI benefits are intended to pay for a person's food and shelter. Hence, if the beneficiary receives food or shelter as a result of payments by the trustee, these payments are considered by the SSA as a type of income called "in-kind support and maintenance" (ISM), which reduces (or possibly eliminates) the beneficiary's SSI payments. However, the SNT trustee who understands this rule can provide a real benefit to the SNT beneficiary as described next.

#### **Mistake 7: Failing to distribute for food or shelter**

A common misunderstanding is that an SNT trustee can never make distributions for the beneficiary's food or shelter needs. If the SNT beneficiary is an SSI recipient, then payment of food or shelter costs may cause a small reduction in the overall SSI check. This is usually an acceptable loss because the cost of food and shelter is so much higher than the highest SSI monthly payment. If the SNT beneficiary is a Medicaid-only recipient, state law and policy should be consulted to determine the effect

<sup>17</sup> 20 C.F.R. section 416.1205(c).

<sup>18</sup> 20 C.F.R. section 416.1130(b).

<sup>19</sup> 20 C.F.R. sections 416.1102 and 1130; POMS SI 01120.200(E)(1)(b).

<sup>20</sup> 20 C.F.R. sections 416.1131 and 416.1133.

<sup>21</sup> 20 C.F.R. section 416.1131(b).



of SNT distributions for food or shelter on Medicaid eligibility.

**How SSI treats payments of food or shelter.** An SSI recipient is expected to pay for all of his or her food and shelter costs out of the monthly SSI check. Under the SSI rules, "shelter" includes rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewerage, and garbage collection services.<sup>18</sup> Food does not include many things bought in a grocery store, such as paper products, soap, personal toiletries, and pet food.

The maximum SSI benefit for 2013 is \$710/month, and usually increases every January. The monthly SSI check is reduced if the SSI recipient receives income. "Income" is referenced in this article as it is defined by the SSA, which differs from the definition used

by the IRS for income tax purposes. As mentioned above, this type of income is called ISM.<sup>19</sup> If the SNT trustee provides ISM to the beneficiary, the beneficiary's SSI benefits is reduced, but not on a dollar-for-dollar basis as with "unearned income." Instead, the SSA has two different formulas for reducing the SSI benefits for a person who receives ISM. The formula used depends on the household and living arrangements of the SSI recipient. The two formulas are:

1. Value of the one-third reduction rule (VTR).
2. Presumed maximum value rule (PMV). It is more common for an SNT trustee to be concerned with PMV because that is the applicable rule when a third party (like an SNT) provides food or shelter to an SSI recipient.

**VTR.** The VTR applies when the benefits recipient lives in another's house throughout a month, receives both food and shelter from inside the household, and does not pay for his or her pro rata share of the cost of the food and shelter expenses for the household. VTR reduces the SSI benefit by one-third of the SSI federal benefit rate (FBR) or \$236.67 (one-third of \$710 in 2013).<sup>20</sup> The VTR applies in full or not at all.<sup>21</sup>

When an individual lives alone, the VTR does not apply because there are no other household members from whom the individual can receive ISM. In this case, any ISM received from outside the household is counted using the PMV rule described below.

**Example.** Robert, an SSI recipient lives in a home with three other

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people. His SSI benefit amount is \$710/month. Food and shelter expenses total \$2,400 for the household. His pro rata share of the food and shelter expenses is \$600. If the SSI recipient pays only \$540 towards expenses, he is not meeting his pro rata share of costs. The SSA will reduce his SSI check by \$236.67 (in year 2013). If the VTR applies, even if the difference between what he paid and his pro rata share is only \$60, Robert is still subject to the full one-third reduction.

**PMV.** The PMV applies whenever the VTR does not.<sup>22</sup> The PMV rule applies when an SNT trustee (or any third party) pays a SSI recipient's food or shelter costs.<sup>23</sup> The effect of these distributions is that the person's SSI benefits are reduced by the lesser of one-third of the federal benefit rate plus the \$20 general income exclusion or the actual value of what was received.<sup>24</sup> In 2013, the PMV is \$256.67 (one-third of the federal benefit rate is \$232.67 plus the \$20 general income exclusion).

**Example.** Beth, an SNT beneficiary and SSI recipient, lives with three roommates and has been able to afford her share of the rent from her SSI check. She wishes to live alone and asks the SNT trustee to pay rent at a new apartment. Her SSI benefit is \$710/month. The SNT trustee agrees to pay for a new apartment that costs \$2,000/month. This payment of the rent reduces Beth's SSI check \$256.67, to \$453.33/month.

**Planning tip.** The loss of \$256.67 from an SSI check is usually acceptable if the SSI recipient will live in a higher quality residence and loses only a small portion of his or her SSI check. However, if the SSI recipient is receiving \$256/month or less in SSI, paying for food or shelter

would eliminate eligibility for SSI altogether. It is important that the SNT trustee knows exactly how much of the SNT beneficiary's monthly check comes from SSI.

People with disabilities commonly live with their family. One method of maximizing benefits, and preventing the one-third ISM reduction, is to have the beneficiary pay the fair market rent for residing in the home. Some families resist this at first, but the rental income is the family's to do with as they wish, such as paying for utilities or using the money to help fund a third-party SNT.

It is important to understand that once the one-third ISM reduction of SSI has been triggered, no further SSI reduction occurs. For example, if the SNT trustee pays \$2,000/month in rent, the beneficiary's check is reduced by \$256.67 as an ISM reduction. If the SNT trustee decides to pay for all of the beneficiary's food as well, at a cost of \$800/month, the SSI check is not reduced further.

#### **Mistake 8: Distributing cash or reimbursing beneficiary**

A common mistake many trustees make is distributing money directly to the SNT beneficiary. Any money the trustee gives to the beneficiary directly is "unearned income" to the beneficiary under the SSI rules. After a set-aside of the first \$20 each month (general income exclusion), these cash payments reduce the SSI recipient's benefits dollar for dollar.<sup>25</sup> In other words, the trustee should never distribute cash directly to a beneficiary who is receiving SSI. The correct procedure is to pay vendors directly for goods and services in order to avoid the dollar-for-dollar reduction.

**Example.** Kirby, an SNT beneficiary is receiving \$710/month of SSI.

Kirby asks for a \$500/month allowance from the SNT because the SSI is insufficient to cover his monthly expenses. The SNT trustee agrees and begins providing \$500/month. The legal effect of this disbursement is that Kirby loses \$480 from his monthly SSI check and will net only \$20 from his SNT.

The better practice would be to have the SNT pay directly some of the monthly expenses (e.g., cable and cell phone fees) that Kirby is paying with his SSI check. That way, Kirby would have more available cash. Also, if Kirby qualifies for a credit card, he can charge expenses on the credit card and have SNT trustee pay the bill.

An issue that sometimes arises after transferring a trusteeship is when an SSI recipient has been receiving cash directly from the prior SNT trustee without penalty. Despite the lack of consequences, this SSI recipient is in violation of the SSI rules. Sometimes, it takes the SSA months (or even years) to uncover these improper disbursements. When the SSA eventually uncovers these disbursements, it will seek recovery of the past SSI checks issued. The SSA calls this an "overpayment." If the SSI recipient does not have the money, the SSA will reduce the monthly SSI check until the overpayment is repaid. Further, the SSA may (in extreme cases) allege fraud against the SSI recipient. The SNT trustee is also in breach of his or her fiduciary duty in this case and subject to penalties. It is simply not worth the risk to provide cash directly to an SSI recipient.

Another similar issue is where the SNT trustee reimburses the person

<sup>22</sup> 20 C.F.R. section 416.1140.

<sup>23</sup> POMS SI 01120.200(E)(1)(b).

<sup>24</sup> 20 C.F.R. section 416.1140.

<sup>25</sup> 20 C.F.R. section 416.1124(c)(12); POMS SI 00810.420 and 01120.200(E)(1)(a).



with a disability for items he or she has purchased, even if the person with a disability purchased otherwise acceptable items. This type of disbursement is also considered by the SSA as “unearned income.”

**Example.** Jody, an SNT beneficiary uses her own money to pay for a \$200 cell phone. She asks the SNT trustee to reimburse her for this payment. If the SNT trustee reimburses Jody for the phone, Jody will lose \$180/month of SSI (after the \$20 set-aside amount). If instead the SNT purchased the cell phone directly, no reduction would occur.

SSI rules also provide that a trustee’s distribution of anything to the beneficiary that is equivalent to cash counts as SSI “unearned income.”

**Example.** An SNT trustee gives Richard, an SNT beneficiary, a gift card (issued by, e.g., Wal-Mart or Visa) worth \$500. It is counted as SSI “unearned income” and reduces Richard’s SSI check by \$480.<sup>26</sup> In contrast, if the card cannot be used to purchase food or shelter items (e.g., it is issued by a store that sells only clothing, books, or electronics), the value of the card is not counted against the beneficiary. In this latter situation, the gift card must also include a legally enforceable prohibition on being sold for cash. If it fails to have this prohibition, the value of the card would still be considered as SSI “unearned income” in the month of receipt.

**Planning point.** A common misunderstanding is that a gift card that can pay for food or shelter is treated as in-kind support and maintenance (ISM), triggering a one-third reduction in SSI. It is treated as “unearned income,” which results in a dollar-for-dollar reduction after

the first \$20. Thus, the SNT trustee should use gift cards only if he or she understands the legal consequences of doing so. Very few gift cards contain the required non-transferability restrictions to not be considered income by SSA.

One way for a trustee to provide an appropriate beneficiary with independence is to allow the beneficiary to make purchases on his or her credit card, forward a copy of the store receipt supporting the purchases, and then the trustee can pay the credit card company directly. If the beneficiary is unable to qualify for a credit card, it is acceptable to have the SNT trustee use SNT funds to secure a credit card on behalf of the beneficiary and issue a card in the beneficiary’s name. This is called a “secured credit card,” and a few banks and institutions issue them.

One caution is that a debit card cannot be used in lieu of a credit card. The distinction is slight, but the payment of a credit card bill is a debt (and therefore acceptable); in contrast, the use of a debit card is the equivalent of cash (and is therefore treated as “unearned income”). Trustees that understand these rules and can confidently use them will be both protecting them-

selves and empowering the beneficiary with a disability.

### **Mistake 9: Failing to maintain excellent records**

All SNT trustees must keep accurate records of each and every SNT transaction. Having complete records is very important when the SNT trustee makes reports to the SNT beneficiary, to a court when required, to the IRS, or to agencies providing the beneficiary’s public benefits.

It is prudent for the SNT trustee to use a computer program such as Quicken or QuickBooks to keep track of disbursements. The SNT trustee should keep receipts of all disbursements as well. The law imposes no time limit on how long records must be kept for SSI purposes. Thus, records must be maintained indefinitely. This is one reason why requiring a beneficiary or his or her legal representatives to make a written request for disbursements is preferred.

**Planning tip.** Recently, the SSA has been demanding SNT trustees to provide several years of records of SNT disbursement requests. In one instance, it asked for 25 years of records. If the SNT trustee is unable to provide these records, the disbursements are presumed to

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<sup>26</sup> POMS SI 00830.522.



have been made inappropriately; as a result, the SNT beneficiary loses his or her eligibility for SSI and may be charged with an SSI overpayment.

### **Mistake 10: SNT termination and priority of disbursements**

When a first-party SNT terminates, the SNT trustee must pay back Medicaid in every state in which the beneficiary received Medicaid assistance before disbursements can be made to the SNT's remainder beneficiaries. Thus, the SNT trustee has to be very careful about how money in the SNT is spent prior to Medicaid being paid back. If an SNT trustee makes an inappropriate disbursement, he or she may be personally liable for breach of fiduciary duty.

**Priority under SSI program.** The SSA has strict rules on what can be disbursed from an SNT before Medicaid receives its payback. Only the following administrative expenses may be paid before reimbursement of Medicaid:

- State and federal taxes due from the trust because of the death of the beneficiary or termination of the trust and transfer of trust assets to the remainder beneficiaries.
- Reasonable fees for administration of the trust estate, such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.<sup>27</sup>

The following disbursements are expressly prohibited from being paid before reimbursement of Medicaid:

- Taxes due from the estate of the beneficiary other than

those arising from inclusion of the trust in the estate.

- Inheritance taxes due for residual beneficiaries.
- Payment of debts owed to third parties.
- Funeral expenses.
- Payments to residual beneficiaries.<sup>28</sup>

A state Medicaid agency may have policies that are more generous than the SSA regulations. For example, the SSI rules expressly prohibit two kinds of expenditures expressly permitted by California's Medi-Cal rules: debts owed to third parties and funeral expenses. Also, an SNT trustee may need to know several state policies, if for example, a beneficiary received Medicaid in multiple states.

**Planning tip.** Within days of an SNT beneficiary's death, the beneficiary's family or friends may call the trustee to ask whether funeral expenses can be paid from the trust. As indicated above, the SSI rules allow the trustee to pay funeral expenses for the deceased beneficiary only after the Medicaid reimbursement is paid. If Medicaid's recovery claims exceed the remainder of trust assets, it is best to contact the state Medicaid agency and seek approval for funeral payments before payment of the Medicaid claims.

The trustee should consider purchasing an irrevocable contract for a Medicaid-compliant pre-paid funeral, which is a typical and appropriate use of SNT assets.<sup>29</sup> If a trust is small, some beneficiaries may not want to spend funds pre-paying for their funeral. In that event, the SNT trustee should have the beneficiary execute a waiver acknowledging that the funeral cannot be paid for until after all of the Medicaid reimbursement claims are resolved.

### **Conclusion**

Administering an SNT is a very important job, which often has a profound impact on the life of persons with disabilities. In most cases, the SNT trustee is providing the beneficiary goods and services that improve his or her quality of life. In some cases, the SNT trustee may be the only person looking to the beneficiary's welfare. Thus, the role of SNT trustee is often a more substantial role than in many other types of trusteeships.

In order to do an excellent job, the SNT trustee must draw on an impressive arsenal of skills to properly manage an SNT. The trustee must be comfortable navigating the multiple layers of rules and policies of various governmental agencies. The trustee must also appreciate the beneficiary's disabilities which may limit the beneficiary's ability to communicate, manage his or her daily life, locate housing, find employment, and become an active citizen in the community. Thus, the SNT trustee is not only entrusted to assist with the financial management of a person with a disability's assets, but may also be called on to assist with the beneficiary's personal development. The SNT trustee may also be called on to advocate for the beneficiary's rights or to protect the beneficiary from discrimination (or from various types of predators).

Thus, the great SNT trustee is a solid financial manager, accountant, record keeper, legal counselor, public benefits advisor, social worker, housing coordinator, civil rights advocate, guardian, and life coach. It is not a job for the timid. ■

<sup>27</sup> POMS SI 01120.203(B)(3)(a).

<sup>28</sup> POMS SI 01120.203(B)(3)(b).

<sup>29</sup> POMS SI 01120.203(B)(3)(c).