

The Polner Abrahams Report

The Source For Intelligent Estate and Elder Law Planning

Courtesy of The Law Office of Beth Polner Abrahams

Volume 3 Issue 3

The 3rd Party SNT: Gifting To Persons with Disabilities

In my two previous issues*, I discussed two essential planning tools for families with disabled loved ones and for those adults who experience the onset of a disabling disorder such as multiple sclerosis or traumatic brain injury. The testamentary SNT (created under a will or other 'after death' instrument) springs to life at your passing and protects an inheritance from claims by Medicaid, preserving government benefits.

The pay back SNT created with the funds of the disabled person under age 65 permits the disabled individual to receive government benefits such as Medicaid and SSI, but preserves assets accumulated during their lifetime greater than \$2,000. Assets remaining in the pay back trust at the end of the disabled individual's lifetime are paid over to Medicaid.

What if family members want to make gifts to a disabled family member or friend? And, what if those gifts will financially disqualify the disabled loved from receiving SSI and/or Medicaid?

The answer is a Gifting SNT, also called a 3rd Party SNT, because the cash or other gifts that fund the trust were first owned by someone other than the disabled person or by a legally responsible relative such as a parent of a minor child or spouse.

The Gifting SNT may be created by any person except the disabled person (even if competent to do so) or the spouse of the disabled person. The trust must conform to the same laws as those SNTs created in wills, but with additional Internal Revenue Code requirements.

An important advantage of the Gifting SNT is that gifts may be made for the benefit of disabled persons over age 65 and under age 18 (except by parents of a disabled child/children under 18).

Example of How the Gifting SNT Works

An aunt and uncle establish the SNT with an attorney. The aunt and uncle may serve as Trustee or another individual may serve – such as a parent or other adult sibling. The aunt and uncle, or other relatives, make the contributions or gifts to the Trustee. The Trustee 'accepts' the gift and deposits it into the SNT account at a bank, brokerage or other

Welcome to the latest issue of my quarterly newsletter. Each



edition addresses concerns of the elderly and disabled, their families and guardians. Please email your comments to Info@bpaElderLaw.com.

Attention Special Education APAs! At no charge, I will gladly visit schools and non-profit organizations to provide an introduction to 17A Guardianship proceedings and the value of Special Needs Trusts. Call (516) 741-9175 to schedule a presentation.

300 Garden City Plaza, Suite 404, Garden City, is adjacent to the Roosevelt Field Mall. For directions, please visit our website or telephone our office.

* Download previous newsletter editions at www.bpaElderLaw.com and www.bpaSNTLaw.com

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financial institution. The SNT is administered in the same way as all SNTs to supplement, but not supplant or replace, government assistance the disabled beneficiary is receiving.

The type of the property used to fund the trust or used for gifting is not limited — it may be cash, stocks, mutual funds, etc.

What About Tax Consequences?

Generally, a taxable gift arises with the complete and irrevocable transfer of property to or for the benefit of another. This is so whether the gift is made outright by the donor or into a trust, such as an irrevocable SNT. The type of property transferred or gifted is generally not relevant to the gift taxation.

There is no New York State gift tax. There is a federal gift tax for cumulative lifetime gifts that exceed \$1 million and a federal gift tax filing requirement (Form 709) for gifts exceeding the annual exclusion of \$12,000. The annual exclusion for gifts increases each year, since it is tied to cost of living adjustments.

The rules about annual exclusions change when the gift is made to the Trustee of any trust, including the SNT. The trust must be drafted carefully to preserve both the annual exclusion — if essential for a family member and his or her own estate tax planning — and not run afoul of the Internal Revenue Code. This legal requirement, known as the 'Crummey' rules (after a case of that name), means notification of certain withdrawal rights for non-disabled, actual remainder beneficiaries of the Gifting SNT. In the absence of these key provisions, the IRS will not permit any annual exclusion from gift taxes for

family members making lifetime gifts to the trust. This needs to be discussed when my office drafts the legal documents for the Gifting SNT since estate tax planning may be an important consideration for other family members who will be contributing to the trust.

When Is the Gifting SNT Appropriate?

The Gifting SNT is a wonderful way to make birthday or holiday gifts to the disabled loved one, or to include the disabled family member in annual exclusion gifting. When done properly, the gifts made into the trust will not disqualify the disabled person from receiving Medicaid nor SSI, and the trust can be used to pay for things that might not otherwise be affordable, such as a computer with specialized software or therapies not paid for by Medicaid.

Since all funds for this Gifting SNT originate with family or other friends, at the end of the disabled person's life, there will be no pay back to Medicaid. However, a remainder beneficiary must be specified, such as other family members and/or a charitable organization. To learn more about establishing a Gifting SNT, please contact my office.

Next issue: Pooled Supplemental Needs Trusts for persons over and under age 65.

Medicaid Update

Community spouse resource allowance increased to \$104,400. Minimum spousal income allowance for spouses with loved ones receiving Medicaid in a nursing home, on Lombardi Medicaid or in the Traumatic Brain Injured Medicaid program, increased to \$2,610. The budgeting is effective through July 2008. Levels for income and resources for the Medicaid applicant/recipient have not yet been adjusted. If you must apply for Medicaid for a family member, please contact my office for the most up-to-date information on your rights.

Important Updates

Transfer Penalties Ended for Certain Medicaid Programs

On Sept. 24, 2007, the NYS Department of Health (Medicaid) clarified a mistake in its waived Medicaid programs. Those programs for community-based services and home care — Nursing Home Without Walls or the Lombardi program; comprehensive services for traumatic brain-injured (TBI) persons, called the TBI Waiver; and programs under OMRDD for retarded and developmentally disabled persons — had been administered since 1993 using transfer of asset penalties and a 36-month look back (60 months for trusts) to establish eligibility.

The Department of Health announced in its GIS 07 MA/018 that a re-reading of the federal laws required an immediate correction to its policy.

Effective immediately, there is no transfer of asset penalties for income or resources. As with the community Medicaid home care program, transfers made in month #1 allow eligibility to be established in month #2.

- It is expected that 3 months of financial statements will be required with other general eligibility documents (birth, citizenship, marital status, residence, etc.)
- Spousal budgeting is retained for couples when one spouse requires services under a Medicaid waiver program
- Spousal refusal remains available for the non-applying spouse

This policy clarification has a significant impact for persons under age 65 who are disabled, established a pay back SNT for their income to shelter income from the traditional spend down requirement, or had been denied the opportunity

to shelter their income in a pay back SNT because of receipt of these waived Medicaid services.

Since last February, many local Medicaid offices have sent notices changing income budgets from a zero spend down for the cost of care to the traditional Medicaid spend down for income exceeding certain limits.

It is expected that with this correction and clarification, disabled persons will be able to continue their contribution of income to their pay back SNT without a spend down contribution to Medicaid. If you have received a notice from Medicaid challenging or changing your income budget for waived services, contact my office for assistance and advocacy.

Depositing Income to the Pay Back SNT During the Month

Another important change in the law was enacted in August 2007 by the NYS Legislature over concerns that no Medicaid was received for an entire month when the Trustee could not make income deposits exactly on the 1st of each month to pay back SNTs and pooled trusts administered by nonprofits. To address that situation, Social Services Law was amended. Income contributed to the SNT during a month, even if not direct deposited to the SNT or deposited on the 1st of the month, will not disqualify the individual from Medicaid eligibility for that month. This is good news for Medicaid-eligible individuals who use pooled trusts to shelter income, including seniors over age 65 who must deal with inherent postal delays when mailing their income to the pooled trust organization each month.

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End-of-Life Decision-Making and the Health Care Decisions Act

A July 2007 amendment to the Surrogate's Court Procedure's Act Section 1750b extends the authority of certain family members to make end-of-life decisions for their mentally retarded loved one. In 2003, the ability of persons appointed as 17A guardians to make decisions to withdraw or withhold life sustaining treatment was legally enacted.

The law applies to persons who are adjudicated under 17A of the SCPA to be mentally retarded or developmentally disabled with impairments of intellectual reasoning and/or adaptive behavior similar to MR. Since then, the courts have

struggled to answer the question of how to manage end-of-life decision-making for such persons who do not have 17A guardians.

This amendment directs the Commissioner of OMRDD to establish a priority list of family members (similar to the Do Not Resuscitate law) authorized to make these serious decisions. The new law also states that the non-guardian family member must have had ongoing and significant involvement in the person's life and, if possible, be able to ascertain or provide information as to the person's wishes regarding end-of-life decision-making, moral and religious beliefs. Once certified as being able to make the end-of-life decisions, the guidelines set forth in the Health Care Decisions Act of 2003 and 2005 must be followed.

The law is effective in January 2008.

DOES YOUR ORGANIZATION NEED MORE COPIES OF THIS NEWSLETTER?

Call my office at (516) 741-9175 and we will arrange to mail additional copies at no charge.

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Law Office of Beth Polner Abrahams

300 Garden City Plaza, Suite 404
Garden City, New York 11530

Dedicated to providing quality, caring
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Handling all aspects of estate and tax
planning, elder law and representation
of incapacitated and disabled persons
in guardianship proceedings.

Telephone: (516) 741-9175

Fax: (516) 741-9444

Websites: www.bpaElderLaw.com &
www.bpaSNTLaw.com

Email: Info@bpaElderLaw.com