SUPPLEMENTAL NEEDS TRUSTS:

Protecting Access to Medicaid, SSI and Other Benefits when a Lump Sum is Received

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- Basics – **What is a Supplemental Needs Trust**, types of SNTs
- Using SNTs to eliminate the Medicaid Spend-down –
- **What expenses may be paid by an SNT?**
- **ABLE** accounts – how are they different than SNTs?

PART ONE

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Using SNTs when you Receive a Lump Sum or have Excess Resources
Learn rules on impact of "transferring" the lump sum, spending it or depositing it into an SNT for:

- MEDICAID – differences between "MAGI" and "Non-MAGI" Medicaid
- SSI
- Veteran's Benefits (new penalties on transfers of assets 10/2018)
- SNAP/Food Stamps
- Housing Subsidies (Section 8)

PART 2 – NOV. 15, 2019
11 AM – 12:30

Register at
https://attendee.gotowebinar.com/register/8967985574357260555

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What is a Supplemental Needs Trust (SNT)?

- Supplements public benefits
  - Trust agreement prohibits trustee from spending the trust property in any way that would impair beneficiary's eligibility for public benefits
- Irrevocable
- 3 parties: Donor of funds, Trustee, and Beneficiary
- Beneficiary must be found "disabled," even if age 100!
  - Same definition of "disabled" as used by the Social Security Administration for SSDI/SSI. Rules less strict age 72+
  - If SSA has not yet found you "disabled," the Medicaid agency will make this determination when you submit trust to DSS/HRA for approval. See article on Medicaid disability determinations - http://www.wnylc.com/health/entry/134/ with forms

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3rd Party vs. 1st Party Self-Settled SNT

Medicaid PAYBACK requirement applies to 1st party, not 3rd party trust.

1. **1st party "self-settled" trust** – If you set up your own SNT with your own money, you are both the "donor" and the "beneficiary":

   Any money left in SNT at death must be paid back to State to pay for Medicaid expenses paid during lifetime. With a pooled trust, the money stays in the trust to be used for the benefit of other people with disabilities.
2. **3rd Party Trust** – if a non-legally responsible relative, friend, an Estate or other entity is the "donor" of the money and sets up an SNT, there is NO payback requirement at death. The trust may provide that principal be distributed to other beneficiaries at death.
   - Better for parent of adult disabled child to set up 3rd party trust in will or during parent's lifetime, with no payback requirement, then to leave $$ to child in will. Child may put inherited money into a 1st party self-settled SNT, but will have a payback requirement

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How does an SNT work?

- Donor establishes SNT
  - Executes trust agreement (3rd party or 1st party self-settled), or establishes trust in a will
  - For a pooled SNT, donor and beneficiary can be the same person. Signs "joinder agreement" to join Master Trust.
- Donor transfers income or assets to SNT
  - **Assets**: Personal injury settlement, Inheritance, Excess Savings
  - **Income**: Shelter excess income for Medicaid, to eliminate the "spend-down." Medicaid is SOLE benefit that allows this! Not SSI, SNAP, any other benefit
- Trustee invests and maintains assets
  - Trustee must file tax returns (but not taxable income to beneficiary)
  - Trustee must provide accounting
- Trustee makes expenditures on behalf of beneficiary

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Individual SNTs and Pooled Trusts – What they Have in Common

1. BOTH may be established by the individual, their parent, grandparent, legal guardian, or by court order
   - Before 2016, an individual could not establish their own individual SNT. They had to use a pooled trust unless they had a parent, grandparent, guardian or court order. Special Needs Fairness Act in 21st Century Cures Act changed this so that individual under 65 may establish own SNT or join a pooled trust *
2. BOTH allow deposit of **surplus income** to eliminate the Medicaid Spend-down or **excess assets** or lump sums
   - However, if the individual is age 65+, she MAY ONLY deposit income or assets in A POOLED TRUST. She may not use an individual SNT.
   - There is a myth that only a Pooled Trust may be used to deposit income to eliminate the Medicaid spenddown. Not true.
3. Which expenses may be paid by trust is the same for both types of trusts, but depends on which benefits the individual receives.

*42 U.S.C. 1396p(d)(4)(A); GIS 17 MA/008: Policy Change for Trusts Established for Disabled Individuals Under Age 65 -- PDF

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Individual vs. Pooled SNT - Differences

	Individual SNT (d4a)	Pooled SNT (d4c)
Who is Trustee?	Anyone (family, friend, lawyer, bank)(Allows more flexibility)	Non-profit organization (NYSARC, CDR)
Age limit?	Must be < 65 when $ deposited, but may continue to spend $ after	May be any age when deposit money (but warning re transfer penalties)
Need an attorney?	Yes – trust is individually drafted; trustee must do accountings, administration	No – use trust standard form. Trustee does all administration
Funds remaining at beneficiary's death	Must be paid back to State for cost of Medicaid services provided; if any left, can pass on to remainder beneficiary	Must either be retained by the trustee organization, or paid back to the State (varies with trust)

Summary of Types of SNTs

	1st Party	3rd Party
Individual SNT	YES if < 65	YES
• Use to deposit income for Medicaid	Yes if < 65	NO – if you have a 3rd party trust with assets, and also want to deposit spend-down, you must establish a separate 1st party trust
• Use to deposit assets for all benefits	Yes if < 65	Yes – assets of 3rd party only
Pooled Trust	YES	YES
• Use to deposit income for Medicaid	Yes – all ages	NO
• Use to deposit assets for all benefits	Yes – all ages but warning if 65+ re transfer penalty for NH care or SSI	YES

Using a Power of Attorney to Establish an SNT or Join Pooled Trust

- Since July 2017*, NYC HRA has rejected an SNT (pooled or individual) if established by an agent using a Power of Attorney (POA) signed after 9/2009 if the POA lacks a Statutory Gift Rider. The Rider must specifically authorize the agent to establish a supplemental needs trust.
- In Feb. 2019, NYS Dept. of Health made this policy statewide: https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/19ma04.pdf
- If the individual has capacity to sign a new trust Joinder Agreement, or a new POA, they should do so. If they sign a new POA, the agent must then execute an amended Joinder Agreement under the authority of the new POA. If these are submitted, the trust should be approved retroactively.
- If the individual lacks capacity to sign a new POA or Joinder Agreement directly, a Guardianship may be required.
- In Aug. 2019 **the NYSBA Elder Law Section asked the State to revoke this SGR requirement**. See letter http://www.wnylc.com/health/download708/. Also see NYLJ article by Daniel Fish*

*Links to this article and all federal, State and NYC directives posted in http://www.wnylc.com/health/entry/128/

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Why use a PIT? Medicaid doesn't care about your living expenses – Medicaid budget without pooled trust

Gross monthly income		$1,600.60
Health insurance premiums	Medicare Part B 2020 (Medigap)	- 144.60 - 161.00
Unearned income disregard		- 20.00
Net countable income		***$1,275.00***
Income limit for single		- 859.00
Excess income ("surplus" or Spend-down) Must be used for medical expenses. How to pay rent of $1,000?		**$416.00**

How do Pooled Income Trusts - "PITs" – work?

- An elderly or disabled Medicaid beneficiary makes deposits of their spend-down amount into a PIT every month
- The money deposited in a PIT is excluded from countable income in Medicaid budgeting
  - Excluding the deposit amount eliminates the person's spend-down altogether
  - Eliminating the spend-down activates their Medicaid
- Trustee can use money deposited in the PIT to pay the person's monthly living expenses
- Enrolling in the trust is only Step 1. Next, must submit the trust, many other documents to Medicaid for approval and for Medicaid to re-budget income

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Medicaid budget with pooled income trust

Gross monthly income		$1,600
Health insurance premiums	Medicare Part B 2019 (Medigap)	135.50 - 161
Unearned income disregard		- 20
Net countable income		***$1,283.50***
Income limit for single		- 859
Excess income		**$424.50**
Contribution to Pooled Trust		**-$424.50**
Spend-down		**$ ZER0**

How much income to deposit into a PIT?

Add $135.50* extra (Part B premium) for MSP

- An extra perk of the PIT is it can make you eligible for the **Medicare Savings Program (MSP)**, in which NY State pays the Medicare Part B premium
- So, by using the PIT, you can get a $135.50/mo. raise to your Social Security, in addition to eliminating your Medicaid spend-down
- In most cases, this will more than cover the monthly fee charged by the PIT
- In example, you would **INCREASE the contribution** to the pooled trust from $424.50 **+ $135.50** = $560.
- The Medicare Part B premium would no longer be a deduction from income.
- **Part B premium will increase in 2020 to $144.60**
- See budget:

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*$144.60 in 2020

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Medicaid budget with pooled income trust + extra deposit for Medicare Savings Program

Gross monthly income		$1,600
Health insurance premiums	(Medigap)	- 161
Unearned income disregard		- 20
Net countable income		***$1,419***
Income limit for single		- 859
Excess income		**$560**
Contribution to Pooled Trust		**-$560**
Spend-down		**$ ZER0**

How much income to deposit into a pooled trust? More Strategies

1. Add $135.50 for Medicare Savings Program ($144.60 2020)
2. If rent/maintenance more than the spend-down, may be better to increase deposit so Trust can pay full rent. Otherwise you must pay balance of rent separately, so rent split in 2 payments.
3. Put a little extra in to cover the COLA increase for next year's income (1.6% SSA 2020). Otherwise at Medicaid renewal next year, you'll have a small spend-down, and need to increase PIT deposit. Can be a hassle.
4. Don't let principal accumulate! Don't deposit more than you spend. If client goes into Nursing Home permanently, income deposited into trust after age 65 that was not spent may now be considered a "transfer of assets" subject to transfer penalty. NYS GIS08-MA-20 - Transfers to Pooled Trusts by Disabled Individuals Age 65 and Over

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Setting up a Pooled Trust – 2 STEPS

1. **Enroll in Pooled Trust - sign "Joinder Agreement"**
   - Pay enrollment fees – vary by trust
   - If use a Power of Attorney dated 9/2009 or later, be sure includes a Statutory Gift Rider authorizing establishment of an SNT. See slide 10.
   - Each trust has requirements
   - Trust will mail back letter of approval
2. **Submit Trust to local Medicaid agency with request to re-budget**
   - Include letter of approval from Trustee and complete copy of "master trust" and joinder agreement
   - Need "Verification of Deposits" (VOD) of spend-down into trust
   - Need proof of disability. If < 65, use SSA award letter. If > 65, need DOH Forms 486 and 1151.
   - Need HIPPA releases, counties vary on forms required.

*https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/19ma04.pdf

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Web resources on setting up a pooled incme trust

- **How to use pooled trust to eliminate spend-down**
  - **Step by Step Guide** - http://wnylc.com/health/entry/44/
  - **Outline for Advocates**- http://wnylc.com/health/download/4/
- **Disability Determinations** - http://wnylc.com/health/entry/134/
- **List of Pooled Trusts** - http://wnylc.com/health/entry/4/
- **Legal Authorities** - http://wnylc.com/health/entry/128/

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Rules are different for Medicaid, SSI, and other benefits.

If expense payment counts as "income" an SNT may not be useful

WHAT EXPENSES MAY BE PAID BY AN SNT?

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What may SNT Trustee Pay for?

- Trustee cannot give beneficiary cash!
- Trust expenditures must be **primarily for the benefit of the beneficiary**
  - Can't make gifts to others
  - Can't pay expenses for others – with some exceptions discussed below
  - May reimburse someone else for paying beneficiary's expenses - each pooled trust has rules for this
- Trustee must make "third-party" payments
  - Pay rent to landlord, roommate
  - Pay bills directly to vendor (ConEdison, Time Warner, Visa, etc.)
- How expenditures affect public benefits depends on the specific program in question (SSI vs. Medicaid, etc)

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What may trust pay for? (basics)

	TA/HASA	SSI	Non-MAGI Medicaid	SNAP
CASH:	**NEVER!** SNT MAY NEVER GIVE CASH to BENEFICIARY, including gift or debit cards, unless restricted.			
SHELTER: Rent/mortgage /maintenance, property taxes, heating fuel, gas, electricity, water, sewer, garbage removal	**NO** – counts as income (may not supplement benefits provided for in the TA standard of need)	**YES but will re-duce SSI** by lesser of $257 (1/3 FBR) or actual cost	**YES** if direct pay to landlord/ supplier or credit card	**YES but** can't deduct excess shelter/medical expenses from income if trust pays them.
FOOD (bills, restaurant)				
Clothing, Cable, phone, cell phone, internet, transportation		**YES** – won't reduce SSI.		

Longer chart – see handout

Non-MAGI Medicaid

Do payments from the SNT count as income?

- **Non-MAGI Medicaid is** for people age 65+ OR < 65 and are disabled and have Medicare. They have stricter rules than people who get Medicaid under the Affordable Care Act who have MAGI Medicaid.
- **Bills paid by SNT on behalf of beneficiary** are <u>not</u> countable income for Medicaid purposes, regardless of type of expense. Trust may pay rent, mortgage, maintenance, all utilities, food.
- This is because Medicaid does not count **in-kind income** at all unless from legally responsible relatives. This means trustee or adult child can pay rent directly to landlord – this is not counted as income.
  - Spouse is a "legally responsible relative" for spouse even if separated.
  - Parent is "legally responsible relative" for a minor age child.
  - Children are never legally responsible for their parents in NYS.
- Medicaid is more liberal than SSI (next slide).

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SSI -- What May Trust pay for? SSI is Stricter than Medicaid

- Payments made by the trust to third parties (landlord, utility, grocery store, credit card company) for **food** or **shelter** are considered **In-kind Support and Maintenance (ISM)** and will reduce SSI by the lower of (1) the actual value or (2) maximum of one-third of monthly Federal Benefit Rate (FBR) (1/3 of $771 = $257)(2019)
  - Shelter includes rent, mortgage, maintenance, property taxes, heating fuel, gas, electricity, water, sewer, garbage removal
  - Food includes credit card charges for groceries, restaurants
  - Reduction may be worth accepting if rent is very high, say $1,500 – it's worth a $257 reduction in SSI check, if there is enough principal in SNT to subsidize the rent for the future.

Allowed trust payments without reducing SSI; also OK for non-MAGI Medicaid

- Trust **may** pay for cable, phone, cell phone, internet, travel, local transportation, entertainment, education, and clothing. An account could be set up with a car service that would bill the trust monthly.
- Credit card OK if NO arrears carried. Trust will scrutinize bill to make sure no gifts for 3rd parties, no charges for food (restaurant, groceries) or shelter.
- Pre-payment of burial expenses is OK thru a funeral agreement. (May enter into a monthly payment agreement with funeral home, which trust can pay). See http://www.wnylc.com/health/entry/36/
- Trust **MAY NOT PAY** funeral expense after beneficiary dies! So pay them before!

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"Sole Benefit Rule" – 2018 updates – for both SSI and Non-MAGI Medicaid

- The SSA POMS manual was updated in 2018 to clarify that **expenditures for which others receive a collateral benefit are OK** if they primarily benefit the beneficiary.
- **Trust may buy house or TV** even though others live there, watch the TV. Special rules for cars.
- The trust may pay a third party for **companion services** for a disabled beneficiary or a minor disabled child, and for incidental expenses of the companion. May not require that aide be certified. Family may be paid as companion.
- Travel expenses of 3rd party to visit beneficiary allowed.
- See cites in SNT Outline pp. 27-28

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ABLE Accounts

https://www.mynyable.org/home.html
https://www.ablenrc.org/employers/what-is-able/

- Federal law established as an alternative to SNTs.
- Must have been **disabled before age 26**
- May be set up by beneficiary for themselves, or by a parent or legal guardian on person's behalf
- MAXIMUM account balance = $100,000.
- Maximum deposit per year is $15,000 (2019 = IRS gift tax exclusion), combined from any sources – client, family, trust/estate, 3rd party
  - PLUS an account holder who is **employed** may deposit EARNED income up to the Federal Poverty Line (FPL) ($12,140 2019)
- Principal + interest **exempt as resource for Temporary Assistance, SNAP, SSI, & Medicaid**
- Nominal fees

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ABLE Accounts – may pay "Qualified Disability Expenses"

- Education
- Health and wellness
- **Housing***
- Transportation
- Legal fees
- Financial management
- Employment training and support
- Assistive technology
- Personal support services
- Oversight and monitoring
- Funeral/ burial expenses
- *If use for non-qualified expenses – taxable and tax penalty*

*** This is a key difference between ABLE accounts and SNTs for SSI recipients**

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ABLE Account vs. SNT – some differences

	SNT	ABLE
Who can use	Anyone with a "disability" of any age, but if age 65+, must use pooled trust.	Only those **disabled before age 26.**
Payback Medicaid at death?	Yes –for all expenses Medicaid paid in lifetime	Yes but only for costs paid since date the account was established.
May SNT pay rent, shelter?	SSI – if client receives SSI, trust payment of rent considered "income" – benefit reduced by one-third Federal Benefit Rate	SSI – ABLE account may pay rent and not reduce SSI. So parent/3rd party may contribute to ABLE account which pays rent. Or may transfer $ from SNT to ABLE account to pay rent with no adverse impact on SSI.
Maximum	No maximum	$100,000 maximum
Maximum deposit/year	No maximum	$15,000 year combined from all sources (2019) + account holder's earned income up to FPL

Public Assistance/ HASA (AIDS/HIV) Are trust expenditures income?

- **Trust may not supplement benefits provided for in the standard of need –** rent, utilities, travel, food, clothing, phone, recreation and entertainment – all count as income
- **Income earmarked for some specific purposes NOT counted as income,** because deemed NOT to supplement benefits provided for in the TA standard of need. OTDA 01-INF-08.
  These are NOT COUNTED AS INCOME
  - education or medical expenses (private health insurance premium, medical expenses not covered by Medicaid or health insurance), child care costs,
  - expenses of disabled beneficiary such as housekeeping, aides, social workers, therapists, and vocational rehabilitation aides, and legal expenses.
- **TIP: Draft SNT to ensure that expenditures by the SNT are earmarked for allowed purposes** listed above, so would not count as income.
- **TIP: Use ABLE account** instead if disabled before age 26.

2001 OTDA 01-INF-08; 18 N.Y.C.R.R. § 352.16(a).

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SNAP/ Food Stamps – Expenditures by Trust

- Vendor in-kind payments by SNT for rent, utilities, etc. don't count as income.
  - But if SNT paying rent or other expense that would otherwise be deductible from income, can't use that income deduction. OTDA 01-INF-8.
- Direct payments to household (as opposed to vendor payments) **do count as income** if reimbursing for normal living expenses (food, shelter, clothing). Id.
- Direct payments to household OK if reimbursing for past or future actual expenses and are not a gain or benefit to the household

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Section 8 – What can Trust pay for? Is it Countable as Income?

- Regulations don't specify what trust may or may not pay for, but do say that "temporary, non-recurring or sporadic income" (including gifts) are NOT income.
  - **Trust should pay non-recurring** expenses, not regular recurring expenses.
- Withdrawal of the principal, not earnings, of family assets is not "income." 24 C.F.R. § 5.609(b). *DeCambre* 1st Circuit 2016 decision (not binding in 2nd Circuit)(held withdrawal of trust assets from personal injury settlement not income, since settlement wasn't countable as income in 1st place) cite in outline

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PART 2: Using Supplemental Needs Trusts for a Lump Sum

1. Impact on Medicaid – 2 types of Medicaid
2. Impact on SSI
3. Impact on other benefits

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Focus on People with Medicaid Only, Not SSI

1. MAGI vs. Non-MAGI Medicaid
2. Institutional Medicaid

MEDICAID & LUMP SUMS

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Too Much Income or Assets for Medicaid?

- Elderly or disabled Medicaid applicants/recipients face both an **income** and an **asset** test to qualify for coverage

2019	Single	Couple
Income	$879/mo	$1267/mo
(after deduct from gross income $20, health insurance premiums, and, if you or spouse works - $65 + half of remaining monthly *earned* income)		
Assets	$15,450	$22,800

- The amount of income over the limit is the "surplus" or "Spend-down." One must pay for Medical expenses until the cost equals the "surplus" or "pay-in" the surplus to Medicaid.
- A Pooled Trust can be used to deposit:
  - **Surplus income** – and eliminate the "surplus" AND/OR
  - **Excess assets** above the Medicaid limit

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Strategies to Eliminate Spend-down
Could Client be MAGI?

- Before you assume that the strict Medicaid limits on INCOME and ASSETS apply to you, ask if you may qualify for MAGI Medicaid under the Affordable Care Act.
- WHO CAN BE MAGI:
  - **< 65 and not on Medicare**, including those on SSD in 24-month waiting period for Medicare
  - Any age and have Medicare, even 65+, **if caretaker relative for a minor child**, grandchild, or other relative (< 18 or < 19 if in school full time)

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Medicaid Eligibility Categories

MAGI

- **All Children and Adults under age 65 -- if not on Medicare --** including early retirees before age 65

Choice of MAGI or Non-MAGI

- **Certified Disabled, under 65 and <u>not yet on</u> Medicare**, including children
  - E.g., On SSI but then receive a lump sum / PI settlement. If forego SSI can keep $$ and get MAGI Medicaid until age 65 or get Medicare
- Age 65+ or on Medicare and a "**parent/caretaker relative**" of a child, grandchild or other relative under 18 or 19 if full-time student.

Non-MAGI

- **Aged 65+** and not a parent/caretaker relative.
- **On Medicare** and not a parent/caretaker relative
- **Receive SSI** (lower asset limits $2000/$3000)

"MAGI" Medicaid – Favorable Rules

1. MAGI Medicaid has **NO ASSET LIMIT**. A lump sum received in the past and saved does not impact current eligibility.
2. MAGI uses federal income tax rules for Adjusted Gross Income, but slightly Modified. These **don't count as income**:
   - Gift or inheritance
   - Personal injury settlement – whether lump sum or structured settlement
   - Veteran's benefits
   - Workers Comp –monthly benefit and lump sum
3. **Higher income limits** – 1 - $1,437 vs. $859
   2 - $1,945 vs $1,267

MAGI Medicaid

12-month continuous eligibility

- 12-months continuous eligibility from the time MAGI Medicaid is authorized (or renewed). A lump sum or other increased income received during those 12 months ***will not affect eligibility***.
- At the next renewal, eligibility will be based on the then current income. The lump sum will, by then, be a resource, and resources don't count.
- **Exception –When turn 65**, cuts off 12-month eligibility, cannot keep MAGI Medicaid. Must transfer to non-MAGI Medicaid. GIS 15 MA/022 - Continuous Coverage for MAGI Individuals
- **Exception - LOTTERY** – pro-rated over a number of months up to 10 years, depending on amount received – so could bar eligibility for subsequent years. See NHELP guide (cites in SNT outline n 35).

NY Soc. Serv. L. § 366 (c)(4)(c); NYS DOH 2013 ADM-03

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MAGI Medicaid and Lump Sums

- **These ARE COUNTED as income** –
  - **Housing Buyout** - probably taxable as ordinary income or capital gain (this is not tax advice!) so would count as MAGI income -- see https://www.brickunderground.com/blog/2014/10/buyout_tax_ask_an_expert
  - **Lottery** – 2018 changes (bad) – see Outline – lottery winnings > $80,000 are pro-rated and deemed to be income in 2 or more months – as many as 10 years if high award.. So would disqualify recipient from MAGI Medicaid.
  - **Some lawsuit awards can be taxable** – lost wages, contract, discrimination/employment, business, punitive damages.
  - **Interest and dividends** on savings
- **Even if settlement is counted as income, most of the above** are **income only in the month received**. So when the client renews the following year, it would no longer be "income" and not affect Medicaid eligibility. Exception – lottery.
- **TIP**: If type of settlement IS countable income, make it a one-time payout, not structured settlement over several years.

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MAGI Medicaid

Lump Sum Strategy – Plan Ahead!

- Is client close to turning 65?
  - **If close to 65**, even though lump sum won't terminate MAGI Medicaid, needs to do asset planning before turns age 65 and switches to Non-MAGI Medicaid

    ➔ **SNT**!!!
- Is client <65 and close to obtaining Medicare?
  - **If <65 and receives SSD, and close to receiving Medicare** (after 24 months), 12-month continuous coverage still applies. But at end of 12 months, will transition to non-MAGI Medicaid so must do asset planning ➔ **SNT**!!!
- Does client have Medicare and child close to 18?
  - When child/ relative turns 18, or 19 if in school, client will transition to non-MAGI Medicaid ➔ **SNT**!!!

If not close to 65 or getting Medicare, or kid far from 18, can keep lump sum and won't affect eligibility.

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"NON-MAGI" MEDICAID & LUMP SUMS

- **WHO** – Disabled/Aged 65+/ Blind (DAB) with Medicare & do not live with/take care of a child/other relative < 18/ < 19 in school
- A lawsuit settlement or other lump sum is **income in the month received**. If still in one's possession **in the next month, will count as a resource** against resource limits.
- What to do with a lump sum depends on:

1. **AGE** – whether < 65 or age 65+
2. **DISABILITY – if under 65**, is person disabled? Receive Medicare?
3. May need **Institutional Medicaid** in next 5 years?
4. **Caretaker relative? Even if 65+ or has** Medicare, may be "MAGI" – no asset limits

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What to do with Lump sum – Community NON-MAGI Medicaid

1. **Save** – up to resource limit ($15,450 - 1 $22,800 couple
2. **Transfer of the lump sum has NO TRANSFER PENALTY for Community Medicaid**. Includes MLTC, Assisted Living Program, all home care, waivers.
   - However, if enter a nursing home in next 5 years, a non-exempt transfer will trigger a transfer penalty. Medicaid won't pay for nursing home care for 1 month for every $12,139* transferred in 5 years before admitted to NH.
   - Need proof $ transferred. Otherwise they assume money withdrawn from your account is under your mattress.
3. **Spend the rest** down –
   - **buy exempt resources**: -- Funeral agreement, pre-pay mortgage, burial plot

*Rate in NYC. Penalty rate for other regions in 2019 https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/19ma01.pdf

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What to do with lump sum

TRANSFER LUMP SUM

Use transfers that are EXEMPT from transfer penalty if possible.. to

- **spouse**, who can do "spousal refusal" or, if client using MLTC, spouse (if not on Medicaid) can keep up to $74,820 with Spousal Impoverishment protections
- **child** who is certified blind or disabled (even if 65+)
- **If < 65 and disabled** – **transfer to one's own SNT -** has no transfer penalty – individual or pooled.
- **If 65+** - **Transfer into a pooled SNT** will have no transfer penalty for **community Medicaid**, but:
  - If needs Nursing Home care in next 5 years, transfer will trigger a **penalty**. Not advisable if risky.
  - **MAY transfer to an SNT for someone ELSE who is < 65 and disabled** – need not be one's own child!

Transfer to family/others that are not exempt transfers are OK for Community Medicaid, but you risk being denied Medicaid if need it for Nursing Home care in 5 years. This program not covering other Medicaid planning strategies

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NON-MAGI MEDICAID

Spending Down Lump Sum

If spend on one's own expenses, not as a gift for someone else, this is not an uncompensated transfer, so NO transfer penalty if you enter a nursing home in the next 5 years:

1. Pre-pay for funeral agreement for self, spouse, kids, and certain other family members, buy burial space(s). See fact sheet at http://www.wnylc.com/health/entry/36/
2. Pay down mortgage
3. Pay back BONA FIDE loans, credit card debt.
4. Home improvement, buy stuff, computer, TV, travel.
5. Pre-pay rent, utility bills (even a year's rent!)

- **Keep receipts!** Will need if enter nursing home in next 5 years, may need to show $ isn't under mattress!

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Duty to Report Lump Sum

- Medicaid, SSI and most other benefits impose a duty to report receipt of a lump sum to the agency.
- WHEN: SSI changes must be reported by the **10th of the month FOLLOWING the month of the receipt** of the income or other change.
  - Medicaid uses the same rule for DAB (Disabled/Aged/Blind)
  - Rule gives you a chance to bring assets under the limits by the end of the month of receipt, and preserve eligibility for the next month. So limits liability to ONE month of receipt.

20 CFR 416.701-416.714, POMS SI 02301.005

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Timing strategy – COMMUNITY MEDICAID

- Act fast. Goal is to **preserve future eligibility** and **limit liability for past ineligibility**. Here's scenario:
- **January** - Bob receives payout $. Not eligible for Medicaid because it creates **excess income**. Ideally, he takes action to bring his resources down to the Medicaid limit (Spend, save, and/or transfer) by:
- **February 1st.** If his **resources** are under limit by 1st minute of Feb. 1st (midnight of 1/31), he is eligible for Medicaid in February and it cannot be discontinued. DSS unlikely to sue for cost of Medicaid for being ineligible for just one month – January.
- **March 1st** – If it takes another month to bring resources down, still limiting potential liability to 2 months. DSS still unlikely to sue for costs of Medicaid for just 2 months – Jan. and Feb.
- **Any later month** – if client comes to you, paralyzed from fear from having a settlement check – do **DAMAGE CONTROL** – spend/transfer it down ASAP so eligible by the following month

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More on strategy – Community Medicaid

- **Not All or Nothing** - can put some of the lump sum into an SNT but transfer or spend the rest. Don't want to put more in SNT than expect to spend during lifetime – balance stays in trust after death or repays Medicaid.
- EX. Bob receives $50,000 inheritance in January. **He is 62** and receives SSD (not SSI). He only has $3000 in savings.
  - $ is INCOME in month received, so he is not eligible in January. But not required to report it until Feb. 10th.
  - If he still has it in February, it is an ASSET.

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See funeral agreement info at http://www.wnylc.com/health/entry/36/

Strategy Example – Community Medicaid

- Bob receives $50,000 in January. **He is 62** and receives SSD (not SSI). He only has $3000 in savings. By end of Jan or Feb. he:
- $12,000 – used to bring savings up to the $15,450 asset limit.
  - It's OK if his monthly SSD brings his balance above that each month, as long as at the end of the month it's below the limit.
- $10,000 - pre-pay funeral for himself and his daughter.
- $ 6,000 – he spends on travel and stuff for his home, computer.
- $22,000 – he puts into an SNT.

If he was 65+ -must use a pooled trust not SNT. Since transfer into a pooled trust would trigger a Transfer Penalty if he needed nursing home care in 5 years, he might pre-pay rent, utilities instead – would not be a transfer.

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See funeral agreement info at http://www.wnylc.com/health/entry/36/

What if Don't Reduce Assets Right Away

- Bob received lump sum in January, but doesn't bring his assets down to the limit until June.
  - If his assets were under the limits as of May 30th, then he was eligible on June 1st. When he reports the lump sum in June, Medicaid cannot be discontinued because he is eligible.
  - Medicaid can only refer case to its Lien & Recovery unit for possible suit to repay cost of care in months he had excess income or assets (Jan – May). May threaten to recover, but DSS can't enforce without lawsuit (no administrative "overpayments.") Not likely to sue for short period.

20 CFR 416.701-416.714, POMS SI 02301.005

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If lump sum causes excess assets for Medicaid --

Consider Medicare Savings Programs (MSP)

- Pays Medicare Part B premium ($144.60/mo 2020) and for lowest income people (QMB) also pays Medicare coinsurance and deductibles.
- Automatically gives Extra Help for Part D.
- NO ASSET LIMIT!
- A lump sum counts as income in month received, but so what.. If saved → no asset limit
- **TIP**: Does client really need Medicaid? YES if they need home care. But if they don't, MSP may be enough plus
- Buy a Medigap policy with the new savings.
- See http://www.wnylc.com/health/3/

Strategies for Lump Sums & SNTs

SUPPLEMENTAL SECURITY INCOME (SSI)

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Lump Sums and SSI – Transfer Penalty

- **Transfer penalty** – Unlike Community Non-MAGI Medicaid, transfers of assets that are not "exempt" trigger a harsh transfer penalty, which can cause suspension of SSI for up to 36 months.
- **Exceptions – no transfer penalty if:**

1. Transfer into one's own SNT (pooled or individual) ***if under age 65 + disabled.***
   - **WARNING**! Transfers into a pooled trust if **age 65+** has harsh transfer penalty. Explained on next slide.
2. Transfer into SNT for another Disabled Individual < 65 or
3. Transfer to one's Disabled Child of any age (not necessarily in an SNT)

SSI transfer penalty & strategies

- Penalty period is from **1 to 36 months** depending on amount of uncompensated transfer. POMS SI 01150.110, .111
- Divide amount transferred by SSI benefit rate applicable to individual. Includes state supplement.
  - $8,580 transferred -- divide by

    $ 858 (2019 SSI rate for individual living alone) =

    10 months penalty – disqualified from SSI
- Maximum penalty 36 months for transfer of **$30,888** (2019).

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SSI transfer strategies if 65+ or < 65 and don't want to use SNT

- If lump sum is significantly over $30,888, it may be worth accepting transfer penalty and living on the lump sum during the 3 years.
- After 3 years, reapply for SSI.
- Must show where $ went – whether transferred or spent. (Otherwise they think under the mattress).

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SSI: Strategy for Age 65+ and Lump Sum

- **Example**: Sally is age 66, has SSI. PI award =**$100,000**.
- Transfers $50,000 into pooled SNT.
- Spend down $50,000 over the next 3 years. Her SSI is cut off and she loses $30,888 income she would have received. But her net benefit was $70,000.
  - Pre-pay funeral agreement for herself, can buy burial plots for certain family (less liberal than Medicaid)
- She buys Medigap policy and applies for Medicare Savings Program – gives up Medicaid.
- Can apply for Medicaid once assets < $15,450
- At end of 3 years, reapply for SSI – document deposit into SNT and how balance spent. Transfer penalty expired. Has SNT to use to supplement SSI.
- **What if she can't give Medicaid up for 3 years?**

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SSI Strategy – keeping Medicaid - Stenson

- Though cut off SSI for assets > $2000, or because she transferred assets, can keep Community Medicaid if assets < $15,450, even if transferred excess assets..
- She transfers $60,000 into pooled trust, keeps $15,450, spends the rest (about $25,000) immediately on:
  - $10,000 on home improvement, furniture, travel, computer
  - $12,000 on funeral agreement for herself, burial plots for siblings, kids
  - $ 3,000 – pre-pay rent, utilities
- When her SSI is cut off, she will receive ***Stenson**** **notices** to reapply for Medicaid, showing her resources are now under $15,450. Medicaid won't be cut off unless/until determined ineligible. WARNING: Glitches happen!
- No transfer penalty for community Medicaid. Nursing Home transfer penalty if enter NH in 5 years.

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**Stenson* cites and info at http://www.wnylc.com/health/entry/85/

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NEW asset limits and transfer penalties - 2018

VETERAN’S PENSION

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Veteran’s Pension – NEW 2018!

- This benefit was always for low INCOME, but **now has ASSET test too**.
- INCOME limits – eff. Dec. 1, 2018 --
  - o Single $13,535 per year ($1,127/mo.)
  - o One Dependent $17,724 per year ($1,477/mo)
  - o Higher if need Aid & Attendance
  - o Can supplement SSI
- **Asset limit** 2019 $127,061 (**2020 $129,094**) (same as max CSRA for spousal impoverishment rules)
  - *Sum* of claimant’s + spouse’s assets + annual income

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Veteran's pension – Asset Exclusions

- EXCLUDE:

1. Primary residence (with up to 2 acres land; excess land counts toward asset limit)
   - Home exempt even if living in nursing home or other care facility, or with a family member for care
   - Mortgage can't be deducted from other assets
2. Car, appliances, personal effects consistent with "reasonable way of life."

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Veteran's benefits – Excess assets

1. If assets exceed the limits –
   - **may spend down** assets for fair market value,
   - but **not transfer**.

   Eligible on date bring under asset limit. Otherwise must reapply.
2. If assets exceed limits, benefits discontinued effective last day of same calendar year, unless spend it down in same calendar year.

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Veteran's pension – Transfers of assets

- Transfers of assets EXCEEDING resource limit on and after October 18, 2018 subject to transfer penalty – maximum length 5 years
  - Divide excess assets transferred by **$2,230 = No. months penalty**
- Lookback is 36 months preceding filing original pension claim or a new pension claim after a period of non-entitlement.

up

VA pension – Exceptions to Transfer Penalty

- Only TWO exceptions –
  1. **Transfer result of fraud or unfair business practice** related to marketing or sale of annuity or financial products in order to get VA pension
  2. Veteran or spouse transfers money to**trust for a child incapable of self-support –**
     - **NO exception for transfer to own SNT!!**
- **Return of assets will reduce penalty, like Medicaid.**

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SNAP/ FOOD STAMPS

Food Stamps ("SNAP")

- **Is a lump sum income**? State Food Stamp Source Book* at p. 276 expressly **exempts** "NON-RECURRING LUMP SUM PAYMENTS ." This includes but is not limited to the following:
  a. Income tax refunds, rebates or credits,
  b. Retroactive lump sum Social Security, SSI, TA, Railroad Retirement benefits, or other payments, or
  c. Retroactive lump-sum insurance settlements.
- While FSSB doesn't specify other lump sum sources – lottery wins, lawsuit settlements, inheritance, the "including but not limited to" language should prevail.
- *http://otda.ny.gov/programs/snap/SNAPSB.pdf

Food Stamps – Resource limit

- **If household has someone age 60+ or disabled:**
  - **NO RESOURCE LIMIT** as long as gross monthly income < **200% of Federal Poverty Line** (2019 $2,082/mo. single, $2,820/mo. couple)
- If > age 60 and income > 200% FPL –
  - RESOURCE LIMIT is $3,250.
- If < age 60 & no member is disabled–
  - RESOURCE LIMIT IS $2,000.
- IF resource limit applies – SNT should be exempt.
- 7 C.F.R. § 273.8(e)(8)(i) - (iv); OTDA Food Stamp Source Book at pp. 363 -364; http://otda.ny.gov/policy/directives/2001/INF/01_INF-08.pdf at 5.

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Food Stamps – Transfer Penalty

- **If no resource limit applies** because age 60+ or disabled and income < 200% FPL, there should be no transfer penalty for transferring a resource – whether into an SNT or otherwise.
- **If resource limit DOES apply**, there is a penalty for "knowing" transfer 3 months before application or after approval. Up to 1 year disqualification, depending on amount transferred. $5000 in resources above resource limit = 1 year penalty. $250 above limit = 1 month penalty, etc.
  - **TIP**: Lookback is only 3 months before application. If transfer assets wait > 3 months to apply for FS.

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1. SCRIE/DRIE RENT EXEMPTION
2. Section 8, Public Housing

HOUSING SUBSIDIES

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SCRIE/DRIE Rent Increase Exemption

- Freezes rent if age 62+ or disabled and income < $50,000
- NYC pays rent increases thru property tax abatement to landlord.
- **Not counted as income** --
- Gifts, inheritances, from non-legally responsible relatives **don't count**. 9 NYCRR 2202; http://www.nyc.gov/html/dof/downloads/pdf/brochures/scriedriebrochure.pdf
- Personal injury damages award, HEAP, income tax refunds (in FAQ online)
- **Counted as income** –
- Other lawsuit settlements, lottery wins, capital gains from sale of stock, trust income
- **No asset limit,** no lookback or transfer penalty if lump sum→ into an SNT.
- **Is SNT's payment of expenses income?** State reg is silent. May be exempt as "gifts" – above? Not clear.

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SCRIE/DRIE relief for lump sum income

- Application and renewal are based on income in **prior year.** Renewals are done every 2 years - must report prior year income, including any lump sum received the preceding year.
- SCRIE/DRIE can be terminated the year after receipt of the lump sum, if brings income > $50,000, or because rent is < one-third of the household income.
- May reapply the next year. If then eligible, **tax abatement amount will revert to the old level**, as if the rent exemption had not expired. SCRIE/DRIE is essentially suspended for 1 year – in which the tenant must pay the full rent. Reinstated if reapplies the next year.

RPTL § 467-b(2)(3).

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SCRIE/DRIE example

- 2019 – Lu settles discrimination suit - $50,000 received. Has DRIE – frozen rent is $800, actual rent is $1200
- 2020 – bi-annual DRIE renewal. Lu must report lawsuit settlement received in 2019 – is over income for DRIE – DRIE terminated. Must pay actual rent.
- 2021 - May reapply. Income now below limits. **Tax abatement amount will revert to the old level**, as if the rent exemption had not expired.

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Section 8 and Public Housing - General

- Both Section 8 and Public Housing provide a **rent subsidy**
- Generally rent is set at 30% of family's net countable income.
- Calculation of rent is a complicated formula, taking into account medical expenses, age, disability, etc.
- **ASSETS** – there is no asset limit, but if assets exceed a threshold, interest on the excess amount will be imputed as ***income***.
  - Threshold now $5000, will eventually increase to $100,000

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Section 8 – Income 24 CFR 5.609(c)

- "**Lump sum additions to family assets" don't count as income** -- so no penalty for keeping or transferring:
- inheritances,
- temporary, nonrecurring or sporadic income (including gifts)(NYCHA defines as including one-time lottery win, retro unemployment/TA check)
- Insurance payments (health and accident, workers comp)
- reimbursement for medical expenses,
- retro SSD/SSI (but if saved counts as asset),
- settlement for personal or property losses, tax refunds, capital gains

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Section 8, Public Housing – Eligibility

- **NO ASSET TEST**! But - For assets in excess of $5,000 **income** is imputed and counted in rent calculation.
- Count larger of:
  1. actual income generated by the asset or
  2. "imputed" income at annual rate of **.06%**
- If income generated gets high enough, rental subsidy is reduced to zero.
- TRUST assets exempt if not in control of tenant. Trust income not counted. 24 C.F.R. § 5.603(b)(2).
- 24 C.F.R. § 5.609(b)(3); §5.603(b)(3) and Public Housing Occupancy Guidebook ("PHOG") p. 121-122, http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf).

Section 8 – Asset Limit & Transfer Penalty

- No current asset limit but 2016 HOTMA law sets $100,000 limit, but no regulations yet so not in effect (will exempt irrevocable trusts, IRAs, etc.)
- Though no current asset limit:
  1. If assets > $5000, count greater of actual interest or imputed income @ .06% of excess amount
  2. If transfer assets > $5,000 = Transfer Penalty:

     For 2 years after transfer, actual income or .06% asset (imputed income) is imputed to increase rent. Includes transfers to an SNT, but not transfer of exempt income

See outline -Housing Opportunity Through Modernization Act

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THE END

- See comprehensive manual on "Supplemental Needs Trusts -- Impact on Medicaid, SSI and Other Public Benefits – With Rules about Strategies for Handling Lump Sums for Various Benefits" by the New York Legal Assistance Group, Evelyn Frank Legal Resources Program, last updated Jan. 2019. Check this link for updated versions -- http://www.wnylc.com/health/entry/5/
- More at http://www.wnylc.com/health/14/

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ABOUT NYLAG

The New York Legal Assistance Group (NYLAG) is a leading non-profit that provides free civil legal services, financial counseling, and engages in policy advocacy efforts to help people experiencing poverty.

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