NYLAG New York Legal Assistance Group

Supplemental Needs Trust Webinar

Q&A and Corrections from Part 1, Nov. 6, 2019

This is NOT legal advice. It is general information only and not about any particular case. Some statements here are opinions of Valerie Bogart on best practices.

A. ABLE accounts – additions/corrections to slide 26

- Annual deposit limit in 2019 is $15,000 not $14,000. This amount is tied to the IRS gift tax exclusion, so may go up every year.
- If the account holder is employed, they may deposit EARNED income up to the Federal Poverty Line ($12,140 2019) *UNLESS* their employer is contributing to a retirement plan e.g. 401(a), 403(a) or (b), 457(b).
- Good website - **https://www.ablenrc.org/employers/what-is-able/**
- Thanks to Lynn Decker at CIDNY for these corrections and resources.

Q&A on ABLE:

Question	Answer
1. Can you create the ABLE account at any point as long as person was disabled before age 26?	YES
2. The NY ABLE Website states the maximum deposit yearly is $15,000. Is that incorrect?	No – it is correct. Our slide was outdated with $14,000 maximum. But note above re if account holder is working, then may contribute more from wages unless employer contributing to a retirement plan.
3. is the $100,000 maximum account balance at any one time. Can you go down from $100,000 to $94,000 and then add additional $6,000 so long as don't go over $14,000 deposit in any one year?	Yes – but it's now a $15,000 deposit limit.

B. Special Budgeting Rules That May Eliminate the Spend-down, Avoiding Need for a Pooled Income Trust/Individual SNT for excess income – Q&A

TIP: Before using a Pooled Income Trust to eliminate the spend-down, see whether client can use an alternative special budgeting method, which may ELIMINATE her spend-down entirely!! A flow chart that guides you through these methods is in this article - Special Medicaid Income Rules That May Eliminate Your "Spend-down" or "Surplus Income" - http://www.wnylc.com/health/entry/222/

1. **SSI-Related Earned Income Disregard**. **If client or their spouse is working**, , the first $65 of gross earned income plus half of the remaining gross income doesn't count at all! This is the **Earned Income Disregard**. This disregard is from the SSI program, but is used for any Medicaid recipient who is age 65+ or disabled or blind (Disabled-Aged-Blind or "DAB").

   EXAMPLE: Client receives Social Security Retirement or Disability $500/month and works part time earning $1000/month gross. His budget is:

   $500 Unearned income – Social Security

   $1000 gross earned income
   \- 65 earned income disregard
   935
   \- 467 - ½ of remaining earned income - earned income disregard

   \+ **468 Countable Earned income**

   \- 20 General income disregard

   $948 NET COUNTABLE MEDICAID INCOME

   \- 859 Medicaid income level for one if age 65+

   189 Spend-down if age 65+ (much less than without Earned Income Disregard!). May put in pooled trust. See next question if client UNDER 65 and working.

2. **QUESTION: If a person under 65 with disabilities wants to work, but needs Medicaid to maintain personal care eligibility (needed in order to work), can she put the excess income from the job for the month into a first party SNT**?

   YES – but if under 65 not only subtract Earned Income Disregard but also use the higher income limits in the **Medicaid Buy-In for Working People with Disabilities (MBI-WPD)**. So she may not need a Pooled Trust/1st party SNT. See links in BOX 4 in HRA chart. http://www.wnylc.com/health/entry/222/. If she still has income over the MBI-WPD limit, then yes, she may use a pooled trust or 1st party SNT to deposit excess income. See GIS 15 MA/013 - MBI-WPD Disability Certification and Exception Trusts PDF.

Example: Same Social Security and earned income as in example above, but CLIENT **UNDER AGE 65, Disabled and WORKING – use same budget above but final calculation is different:**

$ 948 NET COUNTABLE MEDICAID INCOME

\- <u>2,603 Medicaid income level for one if under 65 and disabled and working*</u>

\- 0 - NO Spend-down. Fully eligible for MBI-WPD . Income could be much higher and still be fully eligible for Medicaid with MBI-WPD.

2. **DAC or Disabled Adult Child Eligibility for Medicaid -** If an individual starts off on SSI, and then switches to SSDI as a result of receiving DAC, is that person exempt from spend-down (i.e., where the "excess income" is caused by the initial receipt of SSDI/DAC benefits)?

   ANSWER: YES but... must meet requirements -- see **HEADING 4** in the article on Special Budgeting Rules - http://www.wnylc.com/health/entry/222/. The individual must have been disabled before age 22, be at least age 18, must have lost SSI because started receiving DAC Social Security (receives Social Security based on parent's wage history because parent died or retired) AND must have countable financial resources under $2,000.

   Note that the resource limit of $2000 is much lower than for regular Medicaid. If the individual's resources are too high, they can spend them down or put them into exempt resources (funeral agreement, burial fund, etc) and then qualify for DAC Medicaid.

3. **Question: Does this work the same way when a person has a higher income limit for Medicaid? For example, they live in Congregate Care Level 3 so their spend down is any income about $1465?**

   The question refers to the higher Congregate Care limits that are based on the SSI chart. 2019 chart at https://otda.ny.gov/policy/directives/2018/INF/18-INF-15-Attachment-1.pdf. The Congregate Care Level 3 limit applies to the Medicaid Assisted Living Program as well as adult homes and other programs listed on that chart.

   YES. For example, if an individual living in a Medicaid Assisted Living Program (ALP) has Social Security income of $1765, the spend-down is $300, the amount over $1465, which they may place into a pooled trust or individual SNT (if under 65). However, note that they do not get to keep the $1765. That amount is paid to the facility for room and board. The facility should set aside from this a Personal Needs Allowance of $204/month for the member to use. (See chart for amounts). See more about paying for ALPs at http://www.wnylc.com/health/entry/150/#payment.

C. Medicare Savings Program and Pooled trust/individual SNT

1. Can a pooled trust/individual SNT be used to deposit income to qualify for a Medicare Savings Program (MSP)?

YES. See GIS 19 MA/04 – Clarification of Policy for Treatment of Income Placed in Medicaid Exception Trusts https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/19ma04.pdf, which states:

"…If when determining Medicaid eligibility, the consumer is eligible for the Medicare Savings Program after exempting the amount deposited into an exception trust, the LDSS should inform the consumer that the amount deposited monthly into the trust may have to increase to avoid a spenddown."

This statement in the GIS policy is the same as Slide 14 in the Powerpoint. Since enrolling in an MSP will increase the spend-down by $135.50, put an extra $135.50 **($144.60 2020)** into the Trust right from the beginning. That way the spend-down will be reduced to ZERO even though it would otherwise increase by $135.50 **($144.60 2020)**, AND the client will be in the MSP program and save $135.50/month. **($144.60 2020).**

The individual may choose NOT to have Medicaid and only deposit enough in the trust to qualify for QI-1, the MSP program with the highest income limit. In QI-1, their Medicare Part B premium will be paid plus they'll get Extra Help with Medicare Part D. (income limit 2019 $1,406 – Single $1,903 – Couple. See more about Medicare Savings Programs at http://www.wnylc.com/health/entry/99/.

2. Does, the client have to opt out of Social Security taking the $135.50 out automatically, before the client adds an additional $135.50 to the trust? (2020 going up $144.60/mo).

NO. When the local DSS/HRA enrolls the client into the MSP program, they make computer entries that stop Social Security from withholding the $135.50. This can take a while, and client should receive retroactive reimbursement for the Part B premiums withheld in the meantime.

D. Timing of Submitting Trust to Medicaid with Application, or later with Request to Re-budget Spend-down and approve MSP.

1. CLASS ACTION SETTLEMENT IN NYC REQUIRING HRA to process Medicaid applications filed with a Pooled Trust/Individual SNT in 90 days.

In March 2019, a federal class action called *Garcia v. Banks* reached a [settlement](http://www.wnylc.com/health/download/697/) [1] that requires NYC HRA to approve Medicaid applications in 90 days if the application involves making a finding that the applicant is "disabled." HRA must make a finding of disability when anyone age 65+ requests approval of a pooled trust to shelter income to eliminate the spend-down. While 90 days may still seem like a long time, HRA was taking much longer to approve pooled trusts. However, the court order only requires the 90-day limit if the trust is submitted with the Medicaid application, not if the trust is submitted separately after the Medicaid application is filed. Therefore it is advisable to enroll in the pooled trust first, then submit the trust package with the Medicaid application. In the cover letter, ask HRA to approve the trust initially with a spend-down in order to expedite it, and allow the individual to enroll in an MLTC plan or otherwise access Medicaid services with a spenddown, while HRA finishes processing the pooled trust and re-budgets the case later after 90 days.
The Garcia settlement applies only in NYC, but the regulation requiring processing of applications with a disability determination in 90 days is federal and can be cited statewide. 42 C.F.R. Sec. 435.911.

Contact for violations of 90 day requirement (only if trust submitted WITH Medicaid/MSP application: Garcia Class Counsel -- Nina Keilin ninakeilin@aol.com Aytan Bellin <Aytan.Bellin@bellinlaw.com>

2. **QUESTION:** When is a good time to deposit the addt'l MSP $135.50? **($144.60 in 2020**)? When my clients apply for Medicaid and MSP together with a pooled trust, they are initially approved with a spend-down and denied the MSP, because income is too high, during the months it takes for Medicaid to approve the pooled trust & disability forms.

   ANSWER: The Garcia settlement discussed above requires that HRA approve the Medicaid application and trust in 90 days. This would include

[1] Settlement posted at http://www.wnylc.com/health/download/697/. See more at http://www.wnylc.com/health/entry/175/.

the MSP. It sounds like HRA is doing the right thing as said in the discussion re Garcia settlement above – initially approving Medicaid with a spenddown and denying the MSP because, without the trust approved, there is excess income. It's still best to add in the extra $135.50 deposit from the beginning, if client can afford it, because approval of the QMB MSP will be retroactive to the month after the month in which the Medicaid/MSP application was filed. 18 NYCRR §360-7.8(b)(5). QMB – one of the 3 MSP programs – is for an individual whose income is under 100% FPL eligible, which is anyone with no spend-down, once the trust is approved. See MSP article at http://www.wnylc.com/health/entry/99/. Client will get reimbursed for the Part B premium back to the month after the application month. Now you have ammunition to push HRA to complete approval of the whole package in 90 days.

3. **QUESTION**: **What is the turnaround time for a rebudgeting using a Pooled Income Trust?**

   ANSWER: If the trust was submitted *after* the Medicaid application was approved, the rules are not totally clear on the deadline for LDSS to process it. Arguably, if federal regulations say that the agency must process a Medicaid *application* involving a disability determination in 90 days (See and discussion Garcia above), then 90 days should be the outside limit. (Had the individual reapplied, 90 days would be the deadline). A good advocacy tip is to start inquiring with the local DSS about the status after 30 days. If it is not approved after 45 days, request a fair hearing for failure to process. Once OTDA issues a fair hearing ID number, one can reach out to the Fair Hearing liaisons at HRA to try to resolve the case while the hearing is pending. Contact:

   Marcell Miller
   Advocate Liaison and Evidence Request Unit Supervisor
   OLA MICSA Fair Hearing Office)
   111 Livingston St 4th Fl, Brooklyn N.Y. 11201
   Fax : 718-722-7392
   millermar@dss.nyc.gov

   Nadine Lopez-Flores – supervisor, contact her after Marcell
   OLA MICSA Fair Hearing Divisional Director
   111 Livingston St 4th Fl, Brooklyn, NY 11201
   718 722-7392-fax lopez-floresn@dss.nyc.gov

4. **How does the client pay for services in the interim while sending the spend-down to the trust, but is still being billed for the spend-down?**

   How the client can deposit the spend-down while the trust is pending, but still owe the spend-down to providers, is challenging. For HRA/DSS to approve the trust, they require Verification of Deposits of the monthly spenddown into the trust. That means the client will not have the money to pay the spend-down separately to the MLTC plan or home care agency, if they are receiving Immediate Need personal care or CDPAP.

   The advocate can advise the MLTC plan, home care agencies or other providers that the client will not pay the spend-down but that a trust is pending. Ensure them that you will monitor to make sure it is approved retroactively, and that you will inform the plan or provider when the trust is approved so that they can then bill Medicaid for the spend-down. Meanwhile, even though the trust isn't yet approved by Medicaid, it can pay the client's rent and other bills.

E. Procedures for Submitting Pooled Trust/HRA to LDSS/HRA

This training does not cover every detail of submitting a pooled trust. See these articles for more information and links to forms - http://www.wnylc.com/health/entry/134 and http://www.wnylc.com/health/entry/44//. Some questions are answered below. We may schedule another webinar on these procedures.

1. **Question: What if the applicant is under age 65 and receives Social Security Disability, or is over 65 but received Social Security Disability before turning 65? Do they need to submit all of the proof of disability?**

   Answer: No. People receiving SSD under age 65 should submit an award letter. If they received SSD before turning 65, they can call the SSA and ask for verification that they received SSD until turning 65, when the benefit was changed to Social Security Retirement. This shows that the SSD was not terminated based on the individual not being disabled.

   In these cases, the DSS/HRA is not required to make a determination of disability. The deadline for them to process the Medicaid application and approve the trust is just 45 days, not 90 days. 42 C.F.R. Sec. 435.911.

2. **Question: How and where should I submit the trust with a request to rebudget Medicaid for someone already on Medicaid?**

   See this article for the required forms re disability, etc. http://www.wnylc.com/health/entry/44/ Each county might have their own procedures and forms in addition to the State-required forms.

   In NYC, it's suggested to use **Form MAP 751-K** if Medicaid already active (download at http://www.wnylc.com/health/download/638/). Use the third box called ASK MEDICAL ASSISTANCE PROGRAM STAFF TO ADVISE YOU IF DOCUMENTATION IS REQUIRED and write in that requesting rebudget of Medicaid with pooled trust, and approval of MSP if that's the case. Client must sign and date the form in the space indicated. This form doesn't replace a good cover letter or all the required forms – it's essentially a transmittal form/ cover sheet.

   Where to submit trust In NYC –

   HOME CARE CASES - where client seeking or has MLTC or Immediate Need or CASA personal care or CDPAP, or a NHTDW or TBI waiver, the Medicaid app and trust documents must be filed at:

   - Home Care Services Program, Medicaid Unit, 785 Atlantic Avenue, 7th Floor, Brooklyn, NY 11238 TEL: (929) 221-0849

   NON-HOME CARE CASES - Medicaid application may be filed in "regular" Medicaid offices -- https://www1.nyc.gov/site/hra/locations/medicaid-locations.page --
   Recommended to submit trust at:

   - MICSA Central Spend-Down / Pooled Trust unit
     785 Atlantic Ave., 5th floor, Brooklyn NY 11238

- Contact Eileen Fraser-Smith fraser-smithe@hra.nyc.gov
  TEL (929) 221-0868/69 Fax (718) 636-7720
- *DO NOT FILE TRUSTS FOR ANY MLTC/ IMMEDIATE NEED CASES IN THESE OFFICES!*

   If trust long delayed, request a fair hearing re delay and advocate while it's pending to settle hearing with approval of trust. See fair hearing contacts p. 6 above.

3. **QUESTION**: For a disability trust where the medical document the doctor completes goes to the local social security office does the last visit with the doctor have to be within 30 days?

   Answer: No document goes to the local social security office. It is submitted to the Medicaid office at the addresses above in NYC, or local DSS in other counties. You are apparently referring to the DSS-486T, "Medical Report for Determination of Disability." There is no specific requirement that the last visit was within 30 days – you are thinking of the M11q Physician's order form. However, a 2013 HRA directive require that the doctor include medical records for the last 12 months with the form. See Jan 2013 Medicaid alert - http://www.wnylc.com/health/download/402/ So if the client has not seen the doctor in more than a month, DSS may object that there are no records for the last month.

F. Medicaid/SSI RESOURCE Limits and Pooled Trusts/Individual SNTs

Some questions showed confusion about the Medicaid rules for RESOURCES and which resources are exempt. This training did not cover this complex area. For basic information on the resource rules see this fact sheet - http://www.wnylc.com/health/entry/144/. Some questions were:

1. Can a person who owns a co-op apartment or private house be eligible for pool trust?

A pooled trust doesn't change the ELIGIBILITY rules for what resources one may own. Those rules are governed by the program you are seeking. In both SSI and Medicaid, one may own a home, whether co-op or private house. There are no separate resource eligibility rules for pooled trusts.

NOTE HOWEVER that Medicaid has a Home Equity Limit, but only if you are using Medicaid for home care, such as MLTC or Immediate Need services. The 2019 equity limit is $**878,000**. There are exceptions. There is NO limit on home equity if the applicant is married, or has a minor or disabled child. A mortgage or home equity loan reduces the home equity amount. See Medicaid fact sheet - http://www.wnylc.com/health/entry/144/. The State announces the new equity limit each year in a State GIS with other new Medicaid limits. HRA always lists it in its helpful Income and Resource level chart, posted at http://www.wnylc.com/health/entry/15/ direct link at http://www.wnylc.com/health/download/314/ - SEE BOX 17.

2. **If a person paid off funeral and burial arrangements, do they need a document showing the amount they've paid off?**

   YES - If one is reducing excess resources by pre-paying for a funeral agreement, then the funeral agreement must also be a receipt to show that the amount was actually paid. The recipient has a duty to show that their resources are under the allowed limits. If they withdrew $5000 from the bank just before application filed, or while the application is pending, they must show where it went. See more on funeral agreements in this fact sheet. http://www.wnylc.com/health/entry/36/. Just a funeral agreement that does not reflect any payment would not help reduce one's excess resources.

3. **Does cash value from a life insurance policy count as income?**

   No. Cash value counts as a resource. See the fact sheet on funeral agreements and life insurance – link in the above question.

G. Questions about Trust Administration

1. **Can a child have a pooled trust?**

   This is a complicated question. First, if want to use a trust to eliminate the spend-down, there are different ways of counting a child's income than for adults. The MAGI Medicaid rules are very different than the non-MAGI rules for those age 65+ or disabled with Medicare. Under MAGI rules, a child's Social Security income does not count for MAGI eligibility, but the parents' income and, in some cases, of others in the household, does count. There are no asset limits for MAGI, and the income limits are higher. So – don't assume you know whether a child has a "spend-down." Contact a Navigator to see if the child is eligible under MAGI rules. See https://info.nystateofhealth.ny.gov/IPANavigatorSiteLocations. For more about MAGI see http://www.wnylc.com/health/entry/195/ and http://www.wnylc.com/health/entry/193/.

If not MAGI-eligible, child may be eligible for SSI-related Medicaid, using regular non-MAGI income and asset limits. A parent's income is deemed available to a child until age 18.

There are also **Medicaid waivers for children with disabilities**, under which a parents' income may not count. This training does not cover this type of eligibility. The state has recently changed the way these waivers are administered. See 19ADM–02 – Consolidated Children´s Waiver and Medicaid Case Processing Requirements (PDF) Attachment (PDF)

For a supplemental needs trust for assets, since parents are legally responsible for children under 21, parents may not set up a 3rd party trust for their own child under 21. EPTL 7-1.12 (c)(1), Soc. Serv. Law § 101. A 1st party self-settled trust may be set up with the child's own assets, as happens with personal injury settlements, etc. A parent, grandparent, guardian or court order would establish the trust in that situation, since a child is not legally permitted to enter a contract. The funds, however, are the child's, and there is a payback requirement.

2. **Can monies be transferred from one pooled income trust to another?**

In my view, while a pooled trust must be irrevocable, changing the trustee by transferring funds to a different pooled trust does not "revoke" the trust. Whether one may do this would depend on the terms of the Master Trust and policies and procedures of the trust. The new trust may still require payment of enrollment fees, etc. That is all governed under the terms of the trust and the trustee may have discretion to waive or reduce fees.

3. **If a parent establishes a 3rd party trust for an adult child, may the trust be an individual SNT instead of a pooled income trust, if the child is age 65+?**

Yes. A person who establishes a 1st party self-settled trust who is over age 65 MUST use a pooled trust, and not an individual SNT. But a 3rd party trust may be an individual SNT. This is true whether the 3rd party trust is established as a testamentary trust in a will, or whether the trust is established while the donor is still alive (inter vivos trust).

a. **If using an individual SNT as a 3rd party trust, can the trustee be a bank instead of a person?**

Yes, a corporate trust such as a bank may be used, but because of their fees may not be an option as trustee unless the assets is very high – over $250,000 or even over $1 million.   This is why many people use pooled trusts even if they may use an individual SNT. There may be other options, ie for trustee to retain a consultant to help with financial management, trust administration, investments, etc. See e.g.

- https://www.specialneedsalliance.org/blog/using-private-trustees-to-administer-special-needs-trusts-2/ and
- https://www.nysba.org/Journal/2019/Mar/Administration_of_Special_Needs_Trusts/
- https://tinyurl.com/SNT-Trustee-Handbook-SNA
- http://www.centersweb.com/services/

H. Expenses Trust May Pay

1. May trust pay for medical expenses not paid for by Medicaid, such as brand name drugs not covered or certain medical devices?

For prescription drugs, if client has Medicare, drugs are obtained by a Medicare Part D drug plan, or Medicare Advantage plan, not by Medicaid. If client has Medicaid only without Medicare, most likely she is enrolled in a Medicaid managed care plan, which is responsible for authorizing and paying for prescription drugs. For both Medicare Part D and Medicaid managed care plans, there may be appeals to challenge a denial of a brand name drug. So when you say a brand name drug is not paid for by Medicaid, you need to know more about how the client is supposed to access drugs.

See info on **Medicare Part D** - http://www.wnylc.com/health/entry/10/
See Info on Medicaid pharmacy benefit for people not on Medicare - http://www.wnylc.com/health/entry/91/.

All that said, a trust may not pay expenses eligible for Medicaid payment. Different pooled trusts may interpret this limitation differently – ie. whether the trust requires a denial letter for the item from a Medicaid managed care or MLTC plan, etc.

While I hadn't thought of this before, since Medicaid longer pays for prescription drugs for someone on Medicare, except for over the counter and a few other drugs "excluded" from Medicare Part D, perhaps a trust would pay for a drug denied by a Part D plan because it is not on its formulary or has strict prior approval requirements. See references above re **Part D.** But you should pursue alternatives, like changing Part D plans in the limited times during the year when allowed, or appealing denial of the drug. Again, see info on Part D above re Special Enrollment Periods in which a Medicaid or EPIC recipient may change plans outside of the limited Annual Enrollment Period.
http://www.wnylc.com/health/entry/10/

Same for supplies. MLTC plans are required to authorize and pay for medical supplies for their members. If the plan is not doing this, one can appeal as for denial of any other MLTC service. See http://www.wnylc.com/health/entry/184/.

Call ICAN Ombudsprogram for questions or help with problems about MLTC. Phone: 844-614-8800

- TTY Relay Service: 711 Website: icannys.org ican@cssny.org

I. Miscellaneous questions

1. Does a pooled trust affect someone on SS Disability, as opposed to SSI?

Eligibility for Social Security Disability or Retirement benefits and Medicare is not based on financial need. So a pooled trust does not affect eligibility for SSDI or SS Retirement benefits or Medicare. However, if the SSDI recipient wants Medicaid or Medicare Savings Program, then she may need a pooled trust for those programs if the amount of SSDI is too high.

2. **How about SCRIE? If a trust pays one's rent, how does the Department of Finance view the trust's payment to landlord?**

   SCRIE eligibility is based on the full income of the household, as defined for SCRIE (not addressing all of the SCRIE income rules here – see VOLS NY publication https://volsprobono.org/advocates-guide-scrie). If the SCRIE recipient deposits the Medicaid spend-down into a pooled trust, it does not reduce the countable income for SCRIE. Payment by the trust of the rent will not impact SCRIE eligibility. SCRIE has already counted the tenant's full income, ignoring the fact that some income was placed into a pooled trust. While the statute does not specifically say so, it is our view that the SCRIE program would not count that income twice.

3. **Why is there a transfer penalty for going into a nursing home?**

   In federal law, there is a transfer penalty if one has transferred assets in the 5 years before being admitted to a nursing home and applying for Medicaid to cover the nursing home care. The reason for the penalty, which has been in federal law in some form for over thirty years, is to deter people from transferring assets to avoid paying for nursing home care, which is very expensive. There are exceptions to the penalty, covered in Part 2. See Slide 43.

For more information see NYHealthAccess.org
http://www.wnylc.com/health/

For questions, emails to eflrp@nylag.org sent ONLY on Mondays and Wednesdays 10- 2 PM will be answered, subject to staff availability.

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