

## **I. INTRODUCTION**

In planning for an individual with a disability who has accumulated resources or is anticipated to receive them, one is quick to conclude that a “special needs trust” is in order. The concern is not only with providing a means of protection and management of the assets for the beneficiary, who may be incapacitated, but presumably more so, their continued financial eligibility for needs-based governmental assistance.

Many make the mistake of assuming all governmental assistance programs are based on financial need and for those programs that are, neglecting to consider the specific resource and income eligibility requirements of the program when considering the advisability of a special needs trust (hereinafter “SNT”). Even a general understanding of specific resource and income eligibility requirements may not suffice when it comes to a particular program’s treatment of trusts, namely, SNTs, and distributions therefrom. As such, an analysis as to the specific governmental assistance programs that are at issue, their respective financial eligibility requirements, and how a SNT and its distributions will be treated must be conducted to answer the threshold question-to SNT or not to SNT?

If it is decided to proceed with the establishment of a SNT, then a comprehensive understanding about how the SNT may be administered and its implications for the various governmental assistance programs for which the beneficiary is eligible is important. Competing rules regarding treatment of SNTs and their distributions may require a prioritization of benefits and a decision to forego some of them.

It is with the above in mind that we will discuss and turn our focus to SNTs and benefits other than the usual suspects-Supplemental Security Income (hereinafter “SSI”) and Medicaid. Where one benefit exists, so does another in most instances. A beneficiary with a disability who

is “indigent” or financially needy, may not only be eligible for needs-based governmental assistance programs for the disabled, but also for those who are not disabled but “just” indigent. They come with the territory-Supplemental Nutrition Assistance Program (hereinafter “NA” known as “SNAP” and formerly known as “food stamps”), Temporary Aid to Needy Families (hereinafter “TANF”), and federal subsidized housing. Other programs certainly exist but the foregoing will be the focus of this discussion. Note, when the difference between a first-party or self-settled SNT<sup>1</sup> is important, i.e., the relevant law and/or regulations treat the SNT and its distributions distinctly, this will be highlighted and discussed as well.

## **II. SSI AND MEDICAID**

Although our discussion will focus on “those other pesky benefits,” we must begin with the benefits presumably of greatest importance and value to the beneficiary-SSI and Medicaid-and keep these in mind when evaluating whether a SNT can be administered in such a manner so as to maintain eligibility for these benefits along with others. For SSI-states,<sup>2</sup> an individual who is eligible for and receives at least \$1 in SSI, is categorically or automatically eligible for Medicaid. However, for those who seek to qualify for long term care services through Medicaid, additional eligibility requirements must be met. In those instances, administration of a SNT may not be compatible as between SSI and Medicaid and a choice must be made regarding which of the two benefits to focus on and maintain. The conflict between SSI and Medicaid typically arises due to variances in state law as to how distributions are treated, not only whether they constitute income but also whether they are permissible or allowable.

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<sup>1</sup> First party or self-settled SNT refers to a SNT established pursuant to 42 U.S.C. § 1396pd(4)(A) (aka “disabled under age 65” SNT) or (C) (aka “pooled SNT”).

<sup>2</sup> See POMS SI 01715.010.A.3; see also POMS SI 01715.005.

Financial eligibility for SSI and Medicaid has resource and income limits and, as such, the establishment of a SNT can in and of itself potentially impact a beneficiary's eligibility and benefits just as distributions made by a SNT can do so. It bears repeating the importance of evaluating the need for and advisability of a SNT for a beneficiary who is SSI-eligible and ensuring it is properly established. A SNT that is not properly established is not easily remediated at a later date and may already have implications for a beneficiary's eligibility and benefits, such as resulting in an overpayment of benefits. As for administration of a SNT, distributions may also impact a beneficiary's eligibility and benefits but adjustments can typically be made to minimize or avoid future disruption to benefits unless the distributions are such that they implicate the treatment of the SNT as an excluded or non-countable resource.

**1. Resource Eligibility**

***a. First Party or Self-Settled SNTs***

When it comes to SNTs and how they and their establishment are treated for SSI and Medicaid purposes, the law mirrors each other.<sup>3</sup> Although the law mirrors each other, SSI and Medicaid regulation and policy do not as it relates to the specific requirements to establish a first party or self-settled SNT and what language or provisions may specifically be required by each program. At times, SSI and Medicaid regulations and policy can be at odds. For example:

- Thanks to The Special Needs Trust Fairness Act<sup>4</sup>, a competent adult is permitted to establish his or her own SNT; however, the establishment of a SNT by a parent, grandparent or guardian still presents a dilemma for SSI purposes in that they

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<sup>3</sup> See 42 U.S.C. §1382b(c)(1)(C)(ii)(IV) enacted as part of The Foster Care Independence Act of 1999 which explicitly references the Medicaid trust exceptions in 42 U.S.C. § 1396p(d)(4).

<sup>4</sup> This Act was part of the 21<sup>st</sup> Century Cures Act, specifically (P.L. 114-255). Section 5007 of this law contains the "Fairness in Medicaid Supplemental Needs Trusts," which adds two words ("the individual") to the classification of individuals who can establish a first party special needs trust.

cannot do so in the capacity as agent yet they must have authority delegated to them or via a court order to transfer the assets of the beneficiary to the SNT.<sup>5</sup>

- For purposes of the Medicaid payback requirement, SSI does not consider Medicaid a residual or contingent beneficiary but rather a creditor and, as such, reimbursement to Medicaid is payment of a debt unless the trust instrument reflects a clear intent that the state be considered a beneficiary.<sup>6</sup> Some states prescribe that Medicaid is a beneficiary by statute, requiring such designation in the trust instrument.<sup>7</sup> Consider also the discussion below regarding revocability of the SNT and whether the preference may be to designate Medicaid the residual or contingent beneficiary.

A SNT that satisfies the requirements under federal law, namely, 42 U.S.C. § 1396p(d)(4), must also qualify as a non-countable resource, i.e., one that is not considered available for SSI purposes. Proclaiming the trust to be irrevocable in the instrument itself is not sufficient. Irrevocability is dependent on the beneficiary not having the legal authority to direct, revoke or terminate the trust and make the assets available to meet his or her support needs.<sup>8</sup> However, designation of Medicaid as the residual or contingent beneficiary may preclude the SNT from being treated as presumptively revocable.<sup>9</sup>

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<sup>5</sup> See POMS SI 011203.B.1 and SI 011023.B.9.

<sup>6</sup> See *id.* @ SI 011203.B.10 and SI 011200.D.3.

<sup>7</sup> E.g., A.R.S. § 36-2934.01.A.1.

<sup>8</sup> POMS SI 01120.200.D.2.

<sup>9</sup> *Id.* @ SI 01120.200.B.2.

***b. Third Party SNTs***

Some states prescribe treatment of a third party SNT by statute whereas for SSI purposes, third party SNTs are treated distinctly not by law but primarily policy. For SSI purposes, the primary requirement that ensures a third party SNT is not treated as revocable and, hence, an available resource-the beneficiary may not have authority to direct, revoke or terminate the SNT and to provide for his or her support needs.<sup>10</sup> For Medicaid purposes, generally, a third party trust will not constitute an available resource if someone other than the beneficiary serves as trustee and the trustee has sole and absolute discretion to make distributions as set forth in the trust instrument.

**2. Income Eligibility**

Whether a first party/self-settled or third party SNT, SSI treats trust distributions similarly. SSI considers both earned and unearned income and SNT distributions potentially qualify as unearned income. SSI defines “income” as “any item an individual receives in cash or in kind that can be used to meet his or her need for food or shelter.”<sup>11</sup> So, obviously, cash distributions from a trust to the beneficiary or someone on behalf of the beneficiary constitute income. Cash distributions have the potential impact of reducing the SSI benefit dollar for dollar after the first \$20.<sup>12</sup> Medicaid also treats cash distributions as income and, again, if an SSI-state, will define income as SSI does.

What about SNT distributions made directly to a third party to pay the expenses of the beneficiary? From an income standpoint, such distributions have no impact except for SSI purposes if they are “in-kind income.” If “in-kind income,” the distribution will reduce the SSI

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<sup>10</sup> *Supra* note 8.

<sup>11</sup> SI POMS 00810.005.A.1.

<sup>12</sup> The first \$20.00 of unearned income other than in-kind income is disregarded. SI POMS 00810.420.A.1.

benefit either by one-third or one-third plus \$20 depending on the living arrangement.<sup>13</sup> Note, the foregoing can be avoided in many states by distributing from a SNT to an Achieving a Better Life Experience (hereinafter “ABLE”)<sup>14</sup> account and having that account pay the support expenses of the beneficiary. This is beyond the scope of this discussion but worth mentioning and addressed in other sessions.

For many beneficiaries, a reduction in SSI benefits is acceptable as the trade-off may be significant, e.g., the SNT pays the beneficiary’s rent of \$1,000 per month in exchange for a reduction in SSI benefits of about \$265. Moreover, the benefit of most value and concern may be Medicaid and, again, as long as the beneficiary receives \$1 in SSI benefits, he or she remains categorically eligible for Medicaid.<sup>15</sup>

Other distributions, although not considered income, may be problematic and put the SNT and its exemption status at risk. Both the Center for Medicare and Medicaid Services and SSI require that 42 U.S.C. § 1396p(d)(4)(A) trusts be for the *sole benefit* of the disabled beneficiary. The SI POMS has interpreted the foregoing in such a manner that any provision that provides benefits to individuals or entities other than the beneficiary, with the exception of payments to third parties for goods and services provided to the beneficiary, will result in disqualification from the special needs trust exception.<sup>16</sup> In addition to the “sole benefit rule,” Medicaid may prescribe what distributions are permissible or allowable thereby limiting or restricting SNT distributions.

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<sup>13</sup> See POMS SI 00835.200 and SI 00835.300.

<sup>14</sup> 26 U.S.C. § 529A.

<sup>15</sup> *Supra* note 2.

<sup>16</sup> See POMS SI 01120.201.F.3 and SI 01120.201.F.4.

### **III. THOSE OTHER PESKY BENEFITS-TANF, SNAP & SUBSIDIZED HOUSING**

As mentioned in the introductory discussion, it is common for an individual with a disability who is also indigent to not only be eligible for governmental assistance based on his or her disability but also his or her indigency and indigency alone. This discussion will focus on three benefit programs that surface most frequently-TANF, SNAP and subsidized housing.

That is not to say that other benefits may not be implicated and, as such, it is incumbent on the practitioner to do a comprehensive review of all benefits for which the client or the individual for whom the client is engaged in planning is eligible. The person eligible for and receiving benefits may not know all of the benefits for which he or she is eligible. All he or she may know is that she is receiving assistance from varying sources and that he or she is fearful of losing them. So, some forensic work may need to be done to identify the specific benefits for which the individual is eligible.

Not to minimize the value of any of the benefits for which an individual may be eligible, particularly when that individual is without other resources, but some are not worth the trouble once resources become available, e.g., utility assistance, phone assistance, WIC (Women, Infants & Children). Rather than be perfunctory or dismissive about such benefits, quantify and put them in context for the individual as it relates to the resources that will now be available to them in a SNT or otherwise and how the SNT may be able to provide for them.

#### **A. TANF**

TANF provides assistance and work opportunities to needy families and is administered locally by the states but is overseen by The Office of Family Assistance (“OFA”), which is located in the United States Department of Health and Human Services, Administration for Children and

Families. Because TANF is administered on a local level, the eligibility requirements vary substantially from state to state.

TANF is temporary in nature and, as such, this should be factored into the cost-benefit analysis of whether a SNT will potentially impact eligibility for such benefits. Albeit temporary, TANF can be provided for up to sixty (60) cumulative months,<sup>17</sup> not necessarily consecutive, and extended with limited exception.<sup>18</sup> States have the discretion to limit TANF to less than sixty (60) months.

To qualify for TANF, an individual must be 18 years of age or younger and the head of his or her household, pregnant or have a child under 18 years of age and be unemployed or underemployed and have low or very low income.<sup>19</sup> The disability of a parent or a dependent child is a factor in determining whether the individual and his/her household qualify as “needy.”

Because the rules vary substantially from one state to the next, this discussion will speak generally and draws in part from the author’s state of residence, Arizona, and its TANF program known as Cash Assistance.<sup>20</sup>

## **1. Resource Eligibility**

TANF does have a resource limit and it generally treats an inheritance, gift, insurance, settlement, or other lump sum payment-often the sources of what fund a SNT-as a countable or available resource. TANF also has transfer penalties for transferring or selling a resource or income without fair consideration for purposes of qualifying for assistance. As such, funding assets to a

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<sup>17</sup> See 42 U.S.C. § 408(a)(7)(B); *see also* 45 C.F.R. 264.1(a).

<sup>18</sup> See 42 U.S.C. § 408(a)(7)(D); *see also* 45 C.F.R. 264.1(b).

<sup>19</sup> Go to [Temporary Assistance for Needy Families | Benefits.gov](https://www.benefits.gov/Temporary-Assistance-for-Needy-Families).

<sup>20</sup> Go to [FAA1.A Background and Introduction \(azdes.gov\)](#) for Arizona’s Cash and Nutrition Assistance Policy (CNAP) Manual.

SNT may be problematic in those instances where the transferor of the assets is a TANF recipient unless an argument can be made that the beneficiary received fair consideration and/or did not fund the SNT with the intent to qualify or remain eligible for TANF.

## **2. Income Eligibility**

As previously mentioned, the TANF income limits vary greatly from state to state. TANF does, however, consider both earned and unearned income. Because TANF has a low to very low income limit, cash distributions from a SNT or any type of trust is inadvisable. Generally, vendor payments, i.e., trust distributions made directly to a third party for the beneficiary's expenses, will not be considered unearned income and, as such, should not disqualify or impact the amount of a beneficiary's assistance.

### **B. SNAP**

SNAP and TANF often go hand in hand, as do SNAP and SSI. In fact, broad-based categorical eligibility is a policy that allows households that qualify for TANF to also qualify for SNAP. TANF and SNAP are often considered together and some states permit an application for both benefits at the same time. As is the case with TANF, SNAP is subject to individual state rules. Unlike TANF, the variance among states regarding income standards for purposes of SNAP eligibility is not as great. For SNAP purposes, households with elderly or disabled members, including households in which all members receive SSI or TANF, are categorically eligible<sup>21</sup>.

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<sup>21</sup> See 7 U.S.C. § 2014(a); see also 7 C.F.R. § 273.2(j)(2).

## 1. Resource Eligibility

The applicable SNAP resource limit for a household is \$2,250 in countable resources or \$3,500 if at least one member of the household is age 60 or older, or is disabled.<sup>22</sup> The resources of a member of the household who is eligible for and receives TANF and/or SSI are not considered.<sup>23</sup> So, the good news is that a SNT for which the beneficiary is SSI and/or TANF-eligible will not be a resource that interferes with SNAP eligibility. It may, however, do so for the disabled beneficiary who is not eligible for SSI or TANF.

So how is a SNT treated for SNAP resource eligibility purposes? At the crux of the issue of whether a SNT will be a resource that disqualifies a household from SNAP eligibility is whether the SNT is “available” to the household to provide for their support needs much like the question of availability for SSI eligibility purposes. Again, the determination of “availability” will vary from state to state, but as is the case with SSI, it is typically a function of control and access—who is the trustee, whether the terms of the trust allow for a member of the household to access the funds for support needs, who has the power to revoke or terminate the trust, whether other restrictions exist such as by court order.<sup>24</sup> Of concern, however, is the potential for the funding of a first party or self-settled SNT to be penalized as a transfer without fair compensation.<sup>25</sup>

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<sup>22</sup> *See id.* at § 2014(g)(1)(A); *see also* 7 C.F.R. § 273.8(b).

<sup>23</sup> *See* 42 U.S.C. § 2014(j); *see also* 7 C.F.R. § 273.8(e)(17).

<sup>24</sup> *See* 7 C.F.R. § 273.8(e)(8).

<sup>25</sup> *See id.* at § 273.8(h).

## 2. Income Eligibility

SNAP requires that the household satisfy the gross or net income test<sup>26</sup>. For households with an elderly or disabled member, the net income test applies, i.e., income after allowable deductions.<sup>27</sup> SNAP considers both earned and unearned income, including disability benefits such as SSI.

Given the consideration of unearned income, SNT distributions can potentially constitute income that impact eligibility or the amount of the benefit. SNAP appears to mimic TANF in that cash distributions from a SNT will be considered unearned income to the household whereas vendor payments will not even if made to pay the support expenses of the household.<sup>28</sup> So, again, a major distinction between SNAP and SSI insofar as SNT distributions are concerned.

### C. Subsidized Housing<sup>29</sup>

Unlike all of the other benefits that have been discussed—SSI, Medicaid, TANF, SNAP—subsidized housing is not an entitlement. Eligibility in and of itself does not entitle an individual to low-cost housing. Rather, eligibility qualifies him or her for a subsidy if and when he or she is accepted as a tenant. Make that a big “IF” in that waiting lists may exist, availability of vouchers and projects may be limited, and rejection for tenancy-related issues may occur. So, for the individual who presently resides in a subsidized living arrangement or who may very well have

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<sup>26</sup> The gross income test is 130 percent of poverty whereas the net income test is 100 percent of the poverty. *See* 7 U.S.C. § 2014(c); *see also* 7 C.F.R. § 273.9(a). An example of a potentially relevant deduction is medical expenses for elderly or disabled members that are more than \$35 for the month if not paid by insurance or a third party.

<sup>27</sup> *See* 7 U.S.C. § 2014(c)(2); *see also* 7 C.F.R. § 273.9(a).

<sup>28</sup> *See* 7 C.F.R. § 273.9(c)(1)(vii).

<sup>29</sup> A multitude of federal subsidized housing assistance programs, i.e., housing assistance programs or projects overseen by the United States Department of Housing and Urban Development (“HUD”), exist about which the nature and specific eligibility requirements is beyond the scope of this discussion and are the subject of other sessions. Additionally, although the program or project may be overseen by HUD, it is administered publicly or privately at the local level, which gives the administering body much autonomy in its application of the rules and guidance rendered by HUD.

the opportunity to do so in the future, the potential disqualification from such assistance should not be taken lightly.

A threshold consideration is whether the contemplated SNT will have significant assets such that real property can be purchased that would serve as the beneficiary's primary residence if the beneficiary's personal circumstances merit and support such a living arrangement. If the purchase of real property is not a viable option despite the existence of significant assets, alternatively consider whether assuming the full cost of housing will otherwise substantially deplete the SNT over time.

Given the exorbitant cost of housing, specifically, rent and the inadequacy of the SSI benefit in covering not only the cost of rent but other support expenses as intended, the value of subsidized housing—a rental obligation of a mere thirty percent (30%) of an individual's net adjusted income—becomes apparent.

### **1. Resource Eligibility**

Currently, financial eligibility for subsidized housing is income-sensitive only. In other words, no resource or asset limit exists although interest income on assets in excess of \$5,000 is counted.<sup>30</sup> However, the Housing Opportunity Through Modernization Act of 2016<sup>31</sup> (“HOTMA”) for which HUD regulations<sup>32</sup> may soon be implemented would impose a countable asset limit of

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<sup>30</sup> See 24 C.F.R. § 5.603; *see also* Ch. 5 of HUD Handbook 4350.3 REV-1 Par. 507F, pg. 5-27 re: actual income versus imputed income, i.e., which is a percentage of the value of the family assets based on the current passbook savings rate as established by HUD. The interest rate used differs depending on the specific program; however, it was changed in February of 2015 from 2% to 0.06%. *See* Notices H 2014-15 and H 2016-01.

<sup>31</sup> Pub. L. 114-201, 130 Stat. 782, specifically, Sections 102, 103 and 104.

<sup>32</sup> Go to [Federal Register :: Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104](#) for the proposed regulations.

\$100,000 where no such limit has previously existed. Moreover, interest income is imputed on assets transferred for less than fair market value for a period of two (2) years.<sup>33</sup>

Although at present a SNT is not necessary to qualify or maintain an individual's financial eligibility for housing assistance, it soon may be for the disabled beneficiary. In the case of a first party or self-settled SNT, the transfer of assets to the SNT results in income being imputed for a period of two years. Thereafter, and in the case of a third party SNT, the SNT is potentially excluded and not a countable asset as long as no family member has control over distributions.<sup>34</sup> Specific reference is made to the assets of a SNT generally not being accessible to the individual and, therefore, not countable.<sup>35</sup> However, it is not so much income but the way in which SNT distributions are treated for purposes of eligibility and, more importantly, calculation of the rental obligation, that is of most concern.

## **2. Income Eligibility and Rental Obligation**

As discussed above, eligibility for subsidized housing is income-sensitive only, at least for the time being, and is dependent on the family's annual income. Note, however, some assets are included as income upon receipt whereas other assets are not and this, too, may change under the regulations currently pending implementation.<sup>36</sup> As is the case with many governmental assistance programs, annual income includes both earned and unearned income. Unearned income includes in part interest generated by assets. Remember, income is counted for assets greater than \$5,000

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<sup>33</sup> See Ch. 5 of HUD Handbook REV-1 4350.3 § 8.

<sup>34</sup> See 42 U.S.C. § 1437n(e)(2)(C); see also 24 C.F.R. § 5.603(b)(2); see also Ch. 5 HUD Handbook REV-1 4350.3, § 5-7, Subsec. G.1.c.

<sup>35</sup> See Ch. 5 of HUD Handbook REV-1 4350.3 § 5-7, Subsec. G.1.c.

<sup>36</sup> See proposed rule 24 C.F.R. §§ 5.609(b) making exempt from income what has not been, e.g., lump sum additions, insurance payments and settlements, and amount recovered in any civil action or settlement.

and/or assets *transferred* for less than fair market.<sup>37</sup> The counted income is the greater of the actual income from assets or imputed income<sup>38</sup>.

So now that we know what income is considered, what is the applicable income limit to qualify for subsidized housing? Well, it varies as it is dependent on the area in which one resides. But, generally, countable income less than eighty percent (80%) or fifty percent (50%) of the median income of the area qualifies an individual as low or very low income, respectively. Therefore, depending on the amount anticipated to fund a SNT, the imputed income in and of itself may disqualify an individual or prevent an individual from qualifying for subsidized housing.

The very income that counts for eligibility purposes also counts for purposes of calculating the rental obligation. As mentioned earlier, the rental obligation is about thirty percent (30%) of the annual income. Again, actual or imputed income on assets greater than \$5,000 as well as assets transferred to a SNT are part of the equation, the latter for a duration of at least two years. Then what? Then SNT distributions are potentially counted as income.

Current regulations and policy regarding treatment of SNT distributions is murky at best but murky is preferable over the certainty of how SNT distributions will be treated when the proposed regulations to implement HOTMA become effective if in their current form. At present, reference to trusts distributions and their treatment for subsidized housing purposes can be found in various places:

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<sup>37</sup> See *supra* note 31.

<sup>38</sup> *Id.*

- In the definition of “net family assets” where it states “[a]ny income distributed from the trust fund shall be counted when determining annual *income* under § 5.609.”<sup>39</sup> [Emphasis added].
- In a list of items that are countable income that excludes “temporary, nonrecurring or sporadic income (including gifts).”<sup>40</sup>
- In specific reference to SNTs regarding distribution of income if it is ‘paid to the beneficiary regularly’.<sup>41</sup>
- In a list of safe-harbor items that do not count as income such as amounts paid for medical expenses which includes dental care, eyeglasses, costs of service animals, and transportation to receive services.<sup>42</sup>

The above allows for a multi-faceted argument that only distributions of income earned on a SNT, not distributions of the principal of a SNT, paid directly to a beneficiary for other than medical expenses on a regular basis count as income. Most practitioners hang their hat on the exclusion of “temporary, nonrecurring or sporadic” income as a basis to exclude SNT distributions from countable income if not repeated or regular. However, so much is left in the discretion of the administering authority and many are trending toward counting all distributions as income. Unfortunately, the pending regulations implementing HOTMA would codify this trend by eliminating the exclusion for temporary, nonrecurring, or sporadic income (gifts) from annual income and create a new definition of “distribution from a trust” as “any cash payout to the

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<sup>39</sup> 24 C.F.R. § 5.603(b); *see also* DeCambre v. Brookline Housing Authority, 826 F. 3d 1 (1<sup>st</sup> Cir., 2016) holding that only distributions of income earned on SNT assets not distributions of principal count as income.

<sup>40</sup> *Id.* at C.F.R. § 5.609(c).

<sup>41</sup> Ch. 5 HUD Handbook REV-1 4350.3 § 5-7.

<sup>42</sup> *Id.* at 4350.3, § 5-10(D).

beneficiary or any payment to a third-party on behalf of the beneficiary.<sup>43</sup> Only a very narrow exemption for trust distributions for medical expenses of a minor would be in place.<sup>44</sup> Bottom line, “any income distributed from [a] trust fund” shall be considered income!<sup>45</sup>

What else can be done if the regulations are implemented in their current form? Make distributions to an ABLE account as they would not count as income<sup>46</sup> and from the ABLE account, pay the expenses the SNT would otherwise pay.<sup>47</sup>

#### IV. CONCLUSION

We conclude with the original question, “to SNT or not to SNT?” Remember that at least with regards to a first party or self-settled SNT, the beneficiary must be “disabled” as set forth under federal and state law and regulations to qualify for its establishment. That requirement aside, a SNT can be established for any beneficiary who is eligible for and receiving benefits that are based on indigency alone, such as TANF, SNAP and subsidized housing. Does it make sense to establish a SNT when the only benefit at issue is TANF given its temporary nature? No. but in combination with SNAP and/or subsidized housing, maybe.

As discussed, it depends in part on the value of what is anticipated to fund the SNT and whether it is sufficient to replace the benefits that would otherwise be discontinued. It also depends on the plan for trust distributions. As long as distributions of cash are avoided altogether, TANF and/or SNAP eligibility and assistance can likely be maintained.

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<sup>43</sup> Proposed rule 24 C.F.R. § 5.609.

<sup>44</sup> Proposed rule 24 C.F.R. § 5.609(b)(2).

<sup>45</sup> See 42 U.S.C. § 1437n(e)(2)(C); see also 24 C.F.R. § 5.603.

<sup>46</sup> See Pub. L. 113-295, 128 Stat. 4063; see also HUD Guidance issued on April 26, 2019.

<sup>47</sup> See proposed 24 C.F.R. § 5.609(b)(10) exempting amounts paid from ABLE accounts as income.

Of course, the foregoing presumes that the trust is not a countable resource. This is where many of the “ifs” lie when it comes to TANF and SNAP eligibility. The pertinent questions in determining whether the trust will be a countable resource are as follows: (1) Is someone outside of the household going to serve as trustee? (2) Does a household member have the power to revoke or terminate the trust (note, this may not merely be a matter of stating the trust is “irrevocable”)? (3) Do other restrictions to access and availability to meet support needs exist such as by court order? Don’t breathe a sigh of relief just yet because you may have to contend with the challenge that the funding of the trust is a transfer that results in a penalty.

The most significant issues come up with regards to subsidized housing. Again, consider whether sufficient assets will fund the trust such that a home can be purchased and maintained or that the trust can assume the costs of housing for the beneficiary and remain sustainable. The issue with subsidized housing is not so much whether the trust is a countable resource but whether trust distributions are countable income such that the beneficiary is disqualified from such assistance or his or her rental obligation is significantly increased.

Even before the enactment of HOTMA, trustees were challenged with administering a SNT in such a manner that minimizes the treatment of distributions as income. With federal regulations implementing HOTMA on the horizon, it is only a matter of time before we have what may be unwelcome certainty regarding the treatment of most possible all trust distributions as income. With that in mind, a SNT may not be the answer when it comes to subsidized housing even if other benefits such as SSI and Medicaid aren’t at play.

So, is it worth it? It depends. Whatever the case, become familiar with the beneficiary’s circumstances and the plans for or intentions regarding a SNT and its administration. Most importantly, make sure the beneficiary or the one planning for the beneficiary understands the pros

and cons and the uncertainty of maintaining eligibility for these benefits at the outset or as the trust is administered. Remember, knowledge is power!