

### **WHAT IS A “MAPT” AND DO I NEED ONE?**

A “Medicaid Asset Protection Trust” (a “MAPT”) is a very specialized irrevocable (irreversible) trust that is designed to help you **“keep your ducats in your bucket!”**

Simply put, when a Medicaid recipient dies, the state seeks reimbursement from their estate for the funds spent on long-term care for the person. This can be for in-home care, community-based care, such as adult day care and assisted living services, or nursing home care.

Such reimbursement is called “estate recovery.” The state gets cash from your estate by placing a lien on your assets, including your primary residence, after your death. **To be clear, estate recovery does not occur when a Medicaid recipient is still living, nor does it apply to services received prior to turning age 55.**

The state of New Jersey will delay recovery if there is a surviving spouse, a surviving child under the age of 21, or if a child is blind or permanently and totally disabled (per Social Security standards). In that case, the state will postpone placing a lien on the estate assets until the surviving spouse/child dies or the child turns 21.

Properly structured and correctly implemented, MAPTs can exclude your assets from being considered when it comes to qualifying for Medicaid, prevent them from having to be consumed by medical expenses, and keep them from being subject to estate recovery when you pass away.

In New Jersey, the healthy spouse can be held liable for necessary expenses of the ailing spouse such as medical care, and all of the couple’s assets will count towards Medicaid eligibility. For the year 2021, to be eligible for Medicaid your “countable assets” must be \$2,000 or less and you must receive a monthly income of \$2,382 or less in order to qualify for Medicaid. As of January 2021, the healthy spouse can retain joint assets as follows: \$26,076, or 50% of the total joint assets, up to \$130,380, whichever is greater. Any assets in excess of that amount are counted.

### **WHAT ASSETS ARE EXEMPT/NON-COUNTABLE FOR MEDICAID ELIGIBILITY PURPOSES?**

- Your primary residence--but only for so long as you reside there. If you have to enter into a long-term care facility permanently (six months or more is presumed to be permanent), then you no longer reside there, so it is no longer your primary residence and thus will be counted and ultimately subject to estate recovery.
- One automobile.
- Personal effects and household goods, including wedding and engagement rings.
- Medical equipment.
- Reasonable pre-paid funeral and burial expenses.
- 401Ks and IRAs (but income will count towards eligibility unless in a proper MAPT).
- Term life insurance.
- Whole life insurance with a maximum face value of \$2,500.

### **WHY CAN'T I SIMPLY GIFT MY ASSETS TO MY LOVED ONES BEFORE I PASS AWAY?**

By using one or more MAPTs (or certain other types of trusts) instead of gifting directly to your loved ones, you can protect your assets from creditors--yours and theirs. Your gift might wind up being split as part of a child's divorce. Creditors of your children might seize such assets. Having a well thought-out plan, one with legal accountability, can help to avoid hard feelings and disputes within your family.

Also, there are tax advantages by using MAPTs as an alternative to outright gifting. For example, you can retain your personal exclusion on capital gains on the sale of a primary residence (\$250,000 for an individual; \$500,000 for a married couple) and the tax basis in your assets will be "stepped up" upon your death, meaning your loved ones won't have to pay capital gains on the appreciated value of your home, gains that they will get to keep because they won't be subject to estate recovery!

When you put your home into a primary residence MAPT, you can still live in your home for the rest of your life. You can even cause the trust to sell it and purchase a replacement home in the event you want to move!

### **WHAT TYPES OF MAPTs ARE THERE?**

The easiest MAPT to set up is a primary residence trust. Another MAPT, an "income only trust", can be used for income-generating assets. If you don't need the income from assets to be put in trust, you can go with a "fully funded" MAPT to hold anything but IRAs, such as rental properties and intangible assets such as stock portfolios.

Whether an asset is highly appreciated (low tax basis/original purchase price after depreciation vs. high fair market value) or has a high tax basis (an expensive automobile worth roughly what was paid for it) will also factor into the decision on what type of trust to use.

When coming up with a MAPT strategy, the two biggest considerations are (1) income/capital gains taxes and (2) estate taxes/inclusion in your estate (needed to obtain a "step up" in tax basis upon your death).

If you want the income and gains to be attributed to you (and taxes thereupon paid by you), it is important that your MAPT be a "grantor trust". Further, it is important that your MAPT be structured so that you can easily convert it to a "non-grantor trust" (which happens automatically upon your death but that you may want to happen sooner, like after the five-year lookback period).

### **WHAT ARE SOME OF THE DRAWBACKS OF USING A MAPT?**

First, you need to be proactive when using a MAPT. This is not a last-minute, crisis management tool. When you put your assets into a MAPT, you start the clock running on a five-year lookback period--anything you give away (which includes assets put into a MAPT) in the five years prior to applying for Medicaid is considered when it comes to eligibility and estate recovery.

There are strategies to consider if you think you have less than five years before you need Medicaid, such as the "half a loaf" strategy—gifting half your assets and buying a Medicaid-compliant annuity with the other half, but such strategies are very complex and are not covered in this memo.

### **WHO DOES WHAT IN A TRUST?**

A trust has three roles:

- The “grantor”—the person putting the assets into the trust initially.
- The “trustee(s)”—the person(s) who control and distribute the trust income and principal.
- The “beneficiary(ies)”—the person/people who get to benefit from the assets.

Beneficiaries may only have the right to enjoy (receive) the income generated by the trust (interest earned on a bank account/certificate of deposit, dividends paid on stock, or net rental income paid for a rental property), or they might have the right to both income and principal.

Also, it is important to understand that MAPTs are irrevocable. Once signed, you cannot change the terms of the trust without the consent of the grantor, trustee(s), and beneficiary(ies).

To exclude an asset from being counted by Medicaid, you must no longer own it or control it. Therefore, it is very important that you (or your spouse) never have access to the principal of the MAPT, directly or indirectly. Unless it is a specialized income-only trust, you should not be a beneficiary of your MAPT at all. Typically, your children (and their children if your child were to pass away) are the beneficiaries of your MAPT.

### **WHO SHOULD BE THE TRUSTEE(S) OF MY MAPT?**

Since you also cannot control the assets, you absolutely should not be a trustee of your MAPT. Typically, one or more adult children are named, but doing so can present some problems.

First, if you have more than one child, who you name (or don't name) as a trustee can cause conflict within your family. Additionally, when it comes to administering and distributing the trust assets, both while you're still healthy, competent, and alive, and after you become ill, incapacitated, or pass away, family dynamics can be an issue.

There are other drawbacks to having a child (or other family member) serve as the only trustee. Because they are an “interested party”—one who is “related or subordinate to” you—the trust will not provide as much asset protection because it is presumed that such a person can be compelled to make distributions. In other words, they are not truly independent and thus Medicaid (and other creditors) may use that to attack the trust's protection.

Who constitutes a “related or subordinate party”? Your spouse, parents, children, siblings, and employees. Such a person is “presumed to be subservient in respect of the exercise or nonexercise of the powers conferred upon [them] unless such party is shown not to be subservient by a preponderance of the evidence.” In other words, unless your child has a long and documented history of not listening to you...I know, it sounds like it wouldn't be that hard, but you'd be surprised!

Additionally, there could be issues with creditors of your child trying to reach the trust assets based upon the fact that the child is both the trustee and the beneficiary of the MAPT. A properly drafted MAPT will allow the child to appoint an “independent special trustee” to act instead--but then your child needs to find a corporate fiduciary or other independent individual willing to step in and take over as the trustee, and they need to find one before it is too late if a creditor issue arises.

For these reasons, you may want to consider having an independent trustee, either in lieu of an adult child as trustee, or as a co-trustee along with your child. The independent co-trustee can make any distribution to any beneficiary without any adverse tax consequences. Perhaps your child is the “administrator trustee,” charged with managing the assets, and you have an independent “distribution trustee,” charged with writing checks and otherwise making distributions. For maximum protection, you can give all discretion regarding distributions to such an independent trustee. Finally, instead of bifurcating the duties, you might consider requiring both trustees to sign checks and approval distributions, but this can be logistically challenging.

Sluder Law Firm can draft all your estate planning documents, including one or more MAPT, plus act as an independent co-trustee if you wish. We can meet with you after normal business hours, on weekends, and we can even travel to your home if traveling to our office or meeting by video is inconvenient.

Contact us today to discuss your estate planning needs and to learn even more about how to keep your ducats in your bucket!

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