

The Hot, New Product to Sell to Your Clients: Medicaid Trusts

By Louis W. Pierro, Esq.

Asset protection planning has become a focal point for Trust and Estates attorneys, surpassing estate tax planning in many practices. Asset Protection Trusts (APT's) take their names from being Domestic (DAPT's) or Foreign (FAPT's), but the largest market for asset protection planning is the middle class, with health care creditors posing the greatest risk. The most used APT is designed to qualify the Grantor for Medicaid, and is referred to as a Medicaid Asset Protection Trust (MAPT).

In 1993, major federal legislation changed the rules regarding trust funds used by Medicaid applicants and recipients. Irrevocable, "income only" trusts, which also qualify as grantor trusts, are the sanctioned vehicle used to protect the property of persons seeking Medicaid benefits, to help defer the ruinous costs of long-term health care. (Minnesota appears to be the only state that does not follow the federal law.) Assets held in other forms, including joint tenancy and revocable trusts, can be transferred into an irrevocable income-only trust for this purpose, subject to a 60-month "look-back" for institutional care in most states, and a penalty period based on the value of transferred assets. California is the only state that has not implemented OBRA '93, but most practitioners believe that change is imminent.

The MAPT provides that income may be distributed to the Grantor, but that trust principal will never be distributed to the Grantor under any circumstances.^[1] OBRA '93 ^[2] was construed so that only the income from the trust would be countable to a Medicaid applicant, and the principal would be excluded from any calculation of resources.

Drafting a Medicaid trust is one of the first and most lucrative additions to your practice that you should consider. Estate planners have the skill set already in place, and with a basic



knowledge of Medicaid can convert those skills to dollars. Resources placed in a MAPT are not included in the determination of governmental benefits, while sound drafting can provide maximum flexibility and tax advantages. If the trust provides that any portion of trust principal can be paid to the Grantor, even for a limited purpose, then the entire trust principal will be construed as available to the Grantor, therefore included in the calculation of resources. If the principal is substantial, benefits will be denied until the resources are exhausted, and a new application filed.

The following list of "common" drafting factors should be thoroughly evaluated by the attorney drafting a Medicaid trust:

Income Beneficiary:

- Distributions (Discretionary v. Mandatory)
- Grantor Trust Status Over Income and Principal
- Residential Real Property Considerations
- Spousal Considerations

Principal Distributions (During Life):

- Gifts by the Trustee (to children or third parties)
- Power of Appointment Issues
- Selecting the Appropriate Trustee

Principal Distribution (After Death):

- Exercising Powers of Appointment
- Accounting Provisions
- Continued Trusts for Spouses
- Continued Trusts for Beneficiaries

Coordinating the Medicaid Trust with the Will is critical, and provides additional planning opportunities.

Because the use of a grantor trust for Medicaid purposes is a very powerful tool, Congress placed strict limitations which mandate meticulous planning to ensure success. Currently, in 49 states (not California) a sixty (60) month “look-back period” is imposed upon transfers to an irrevocable trust, which, depending upon the value of assets placed in trust may render the Grantor ineligible for Medicaid during the entire five (5) year period. Therefore, in order to avoid inclusion for Medicaid purposes of property held by an irrevocable income-only trust, planning is required in advance of five (5) years prior to application.^[3] There are, however, additional provisions that can be included in a Medicaid asset protection trust in case crisis planning is necessary before the look-back period expires. Such provisions will be discussed during the upcoming webinar.

^[1] It should be noted, that in some jurisdictions, even income distributions are inadvisable, given the strict income limitations placed upon applicants.

^[2] Omnibus Budget Reconciliation Act of 1993, P.L. 103-66 (OBRA '93).

^[3] Trust income can also be attributable to the grantor. Whether they are made or not, discretionary income distributions payable to the grantor will be presumed to be completely available to the grantor. This attributable income can likewise eliminate Medicaid eligibility. See 18 NYCRR § 360-4.5(b)(1).

ABOUT THE AUTHOR

Louis W. Pierro is the founder and principal of Pierro, Schaeffer & Connor, LLC, and concentrates his law practice in the areas of Estate Planning, Estate and Trust Administration, Business Succession Planning, Elder Law and Special Needs Planning. Mr. Pierro has been selected to the *Best Lawyers in America*, the *Best Lawyers in New York*, *Super Lawyers* of the



Hudson Valley, Top 25 Lawyers in Upstate New York, NY Times Top Attorneys in NY, and he has maintained an *AV Preeminent* rating from the Martindale-Hubbell since 2001. In addition, Mr. Pierro is Best Lawyers 2014 Lawyer of the Year in Elder Law for the Capital Region. He served as an adjunct professor at Siena College, where he lectured on Estate Planning from 1987-1995, and has lectured extensively on Estate Planning and Elder Law to professional groups across the country.

Mr. Pierro has served as Chair of the Estate Planning Committee, and Committee on Taxation of the Trusts & Estates Section, and the Elder Law Section, of the NYS Bar Association, and he is currently a member of the Elder Law Section Executive Committee. He is founder and Director of Elder Counsel, a national organization of Elder Law and Special Needs law firms, which provides proprietary document drafting software and education to over 800 member firms in all 50 states. He is also President & CEO of Advocates Planning Group LLC, an attorney membership organization dedicated to providing a range of support services to attorneys who prepare and maintain sophisticated trust plans for clients, with a focus on Delaware law. He is currently a member of the National Academy of Elder Law Attorneys; the American Bar Association, Probate and Trust Section; the NYS Bar Association Trusts and Estates and Elder Law Sections; and the Albany County Bar Association (Chair, Elder Law Committee 1993-1998). He has served as a Director of the Estate Planning Council of Eastern New York, Inc.; Senior Services of Albany, Inc.; Alzheimer's Association of Northeast New York, Colonie Youth Center and McAuley Residence.

A graduate of Lehigh University and Albany Law School, Mr. Pierro was admitted to the New York State Bar in January of 1984, and is licensed to practice in all New York State Courts, the US Supreme Court and the Second Circuit Court of Appeals.

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