

potential need for future long-term care, the timeline of such need for care, and engage in a thorough discussion related to their goals and objectives for their assets both during their lifetime and upon their passing. Once assets are funded into a Medicaid asset protection trust, they should not be accessed for the benefit of the grantor. Therefore, careful consideration must be given regarding what assets to place into a MAPT and how such assets will be managed both in the near future as well as the long term.

Clients must also give careful consideration to the five-year lookback rule imposed by Medicaid. This is a period of time during which any assets that have been transferred for less than fair market value are subject to a penalty imposed by the state Medicaid agency, therefore creating a period of time in which Medicaid coverage is not available and the client/Medicaid applicant must therefore privately pay for long-term care services. Because there is no consideration for the transfer to a trust, these transfers to a MAPT are considered a gift, and are therefore subject to the five-year lookback rule.

Accordingly, if clients are uncertain regarding their health or ability to stay out of a

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nursing home for at least five years after establishing a MAPT, then this type of trust may not be the best option for them. Even if it is determined that a MAPT is not the best fit, there are still last-minute options that can be employed with proper planning and legal advice which will allow clients to save at least a portion of their otherwise available assets and still become qualified for Medicaid services.

If a client has determined that establishing a MAPT is in their best interest, then consulting with an experienced and knowledgeable elder law attorney is essential to ensure the trust is appropriately drafted and funded so

that it meets the requirements of both the state and federal rules.

What significant laws and regulations should be considered as part of this process?

Trusts are subject to a plethora of laws and regulations, including, but certainly not limited to, state and federal laws regarding establishing and administering trusts, IRS rules and regulations regarding taxation of trusts, and state-specific tax laws regarding gifting, estate and inheritance taxes. However, as it relates to Medicaid asset protection trusts, the most important laws and regulations to be considered are those established by the United States Department of Health and Human Services, Centers for Medicare & Medicaid Services, as well as the specific state agency charged with administering and enforcing the Medicaid rules and regulations - which in Rhode Island is the Department of Human Services, Office of Health and Human Services.

Because Medicaid is a federal program mandated to the states, which the states can legislate around, both the federal and state laws and regulations must be considered carefully when engaging in Medicaid planning, including establishing and funding MAPTs. Without the appropriate terms and conditions as required by such laws and regulations, a trust could, on its face, seem to provide asset protection, but not actually accomplish such purpose when evaluated by the

state agency. We often see clients who believe they have irrevocable Medicaid Asset Protection Trusts but, upon review, are missing many key provisions required by the state and federal government. As a result, the protection initially sought may be lost.

Are there any significant pitfalls that can occur when setting up a trust? How might these be circumvented or best prepared for before they arise?

While setting up a trust can feel complicated and overwhelming, working with an experienced estate planning and elder law attorney can make all the difference. Common pitfalls that arise when setting up a trust include not thinking through all of the possible scenarios, including the "what-ifs", and "if this, then that", as well as not giving adequate consideration to the individuals designated as trustee and the powers of the trustee. Additionally, and arguably most importantly, the biggest downfall we see with trusts is that clients do not always understand how to correctly fund them and retitle assets or update beneficiary designations to make sure the trusts are effective and accomplish their goals. Without proper funding, a trust is only an expensive piece of paper. Correct trust funding can provide asset protection, tax avoidance and a streamlined process for survivors, as well as probate avoidance.

Under what circumstances might you recommend a Medicaid asset protection trust to a client? What might cause you to advise against this?

A trust of some sort is recommended for most clients who own real estate and have goals of providing for their loved

ones in a meaningful way. However, what type of trust is appropriate differs depending upon the client's specific situation, including their goals, assets, care needs, and overall health.

In general, trusts are a helpful tool to avoid probate and ensure assets pass without significant delay or difficulty upon one's death. Revocable trusts maintain power in the grantor to manage their own assets and affairs. As a result, while they provide probate avoidance, they do not protect assets for long-term care planning and Medicaid purposes.

On the other hand, a Medicaid Asset Protection Trust includes the benefits of probate avoidance that a revocable trust includes, but also has the added benefit of protecting assets from Medicaid liens after the expiration of five years from the time the trust was established and funded. The detriment, however, is that in order to ensure maximum asset protection, MAPTs must be irrevocable, and the grantor should not be the trustee. Therefore, the grantor must have a trusted family member or friend whom they are comfortable appointing as trustee to manage the assets in the way the grantor has directed through the trust.

Therefore, a MAPT is not right for everyone. Specifically, in situations where it is not clear that the grantor has a period of at least five years before the need for long-term care is likely to arise, either because of age or health condition, then an irrevocable asset protection trust may not be the best option. Additionally, if the grantor does not have a trusted person whom they can designate as trustee to manage the trust in lieu of the grantor, then this type of trust may not be the best way for the client to accomplish their goals.

Trust planning is complex and there are many types of trusts available. The correct type of trust depends upon a number of factors, and the same planning techniques are not appropriate for everyone.



Samantha McCarthy founded McCarthy Law with a goal of making a meaningful impact in the lives of others. Currently residing in Smithfield, Rhode Island, and licensed to practice law in both Rhode Island and Massachusetts state courts, she has been recognized by the Feinstein Center for Pro Bono & Experiential Education for her extensive public interest legal work and commitment to public service. She prides herself on being approachable and compassionate, and believes in developing relationships with her clients that allow both parties to grow and learn.

McCarthy Law LLC is an estate planning and elder law firm that assists clients with the creation of estate plans, advice on elder care issues, and aid with long-term care and Medicaid planning. The firm's goal is to build relationships with clients where they feel listened to, understood and cared for.

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