

# THE MACLEAN LAW FIRM, P.C.

~ Estates ~ Trusts ~ Wills ~ Probate ~ Administration ~ Litigation ~ Estate Planning ~  
~ Business Succession ~ Private Client Services ~ Elder Law ~



~ Protect Your Family and Assets During Your Lifetime and Afterward  
~ Ensure the Fulfillment of Your Wishes for Your Family and Business  
~ Provide for the Efficient Administration of Your Estate  
~ Enforce Your Rights as Beneficiary  
~ Fulfill Your Fiduciary Duties as Executor and Trustee

100 PARK AVENUE, 20<sup>TH</sup> FLOOR, NEW YORK, NY 10017  
INFO@MACLEAN-LAW.COM

T. (212) 682-1555  
WWW.MACLEAN-LAW.COM

F. (212) 682-6999

---

## NEWSLETTER ~ JUNE 2009

### In This Issue

- **Disability, Medicaid Eligibility and Protecting Insurance and Litigation Awards**
- **President Obama Extends FDIC Coverage**
- **NY Statutory Short Form General Power of Attorney and Major Gifts Rider Update**
- **Another Estate Tax Reform Bill**

**Disability, Medicaid Eligibility and Protecting Insurance and Litigation Awards** – Healthcare affordability is increasingly a challenge for many, often more so for those who are disabled. This is particularly true when the disability is sudden – such as from an automobile accident or other unexpected medical injury – and you or a loved one find yourself no longer insurable. Public benefits like Supplemental Security Income (“SSI”) or Medicaid may often be the only option available to maintain one’s quality of life.

Despite the fact that we pay into these need-based government programs during our working lives, there are strict income and

asset eligibility criteria that require virtual poverty in order to qualify for these programs. A significant award from insurance or litigation for an automobile accident or incident of medical malpractice – money that is supposed to compensate you for your pain and suffering – will often disqualify you from SSI and Medicaid.

And, even when someone has spent down their assets in order to qualify for Medicaid, upon their death Medicaid will often make a claim against the estate for reimbursement of the payments made on behalf of the decedent during his or her lifetime. This is sometimes called an estate recovery action.

One way of protecting an award from insurance or litigation while maintaining eligibility for public health benefits is the use of trusts.

**Medicaid Eligibility for a Disabled Person using a d4A Trust** - A large settlement benefiting a disabled person would usually disqualify the person from receiving public health benefits. Social Security Act Section 1396p(d)(4)(A),

however, permits the creation of a trust to hold the disabled person's assets in a qualified disability trust and still keep public benefits. This kind of trust is named after its enacting statute and is called a "d4A trust".

The disabled person must be under 65 and the trust must be established by a parent, grandparent or legal guardian of the disabled person, or a court. For the trust to qualify as a d4A trust, it must provide two specific provisions: (1) a "supplemental" benefits provision that restricts the income paid to the beneficiary to that of general medical or financial needs; and (2) a "payback" provision that authorizes the trust to repay the public health agencies upon the beneficiary's death.

d4A trusts are often used in situations where an individual becomes disabled from an accident and recovers a hefty financial settlement. The settlement award is placed in the d4A trust and provides for the disabled beneficiary through its "supplemental" benefits provision, thereby allowing the benefits from the d4A trust to supplement any SSI or Medicaid benefits provided for the disabled beneficiary. Because the individual can still receive public health benefits, the trust must provide stringent guidelines for the distributions of the supplemental benefits.

The biggest disadvantage to the d4A trust, however, is the required "payback" provision which provides for reimbursement to Medicaid or public assistance agencies upon the disabled person's death.

**MAPTs and Protecting Assets** - What if we want to protect assets and potentially limit the amount of "payback" to the government upon the disabled person's death? One option is to gift or transfer assets into a Medicaid Asset Protection Trust ("MAPT"). A MAPT is an irrevocable trust designed to preserve the trust principal for

the disabled person's chosen beneficiaries (i.e. not Medicaid), while using the income to support the disabled person by supplementing the public health benefits they may apply for in the future. Because the gift to the trust will result in a period of ineligibility, a MAPT is generally most suitable for individuals that are not currently receiving public assistance benefits, have reliable beneficiaries and will not need to apply for Medicaid benefits in the next 60 months.

**60-Month Look-Back Period** - Why 60 months? Because when an individual applies for Medicaid, Medicaid will include assets transferred to trusts within the past 60 months when determining the individual's eligibility for benefits (41 months currently for other transfers, increasing to 60 months by January 2011). The inclusion of these gift transfers may disqualify the individual from receiving Medicaid if his or her available assets are greater than the threshold maximum amount, which can vary from county to county and state to state.

**Reliable Beneficiaries** - Having reliable beneficiaries is an essential element to creating a MAPT because the disabled person should not be named as a beneficiary of the trust. If the disabled person is a beneficiary of the principal then the trust will be an available resource for Medicaid. Often MAPTs provide for income only to the disabled person, but the income can be deemed an available resource. To fully exempt both principal and income, the Trustee should have no discretion to distribute income to the disabled person and should be able to demonstrate that the gift to the trust was a completed gift.

Therefore, the trust must have beneficiaries who will accept distributions from the trust and who will spend them for the disabled person's benefit simply because

it's the right thing to do. Multiple reliable beneficiaries will allow the Trustee flexibility in making distributions. This is extremely important because the distributions from the trust will be subject to the creditors of the beneficiaries receiving them, potentially have income tax consequences to the beneficiaries (which can be covered by further distributions from the trust), and can be countable resources in the event any of the beneficiaries also need need-based public health benefits. With multiple reliable beneficiaries, the Trustee can take into account the changing circumstances of the beneficiaries' lives with minimal impact on the support provided to the disabled person.

**Limiting Estate Recovery** - The greatest advantage to creating a MAPT is to limit the amount of "pay back" to the government that a typical d4A trust is statutorily required to make. One way of limiting the amount of payback is to reduce the amount of the estate's asset pool upon the disabled person's death. A MAPT achieves this by removing assets from the estate and doing so without a "pay back" requirement.

Remember, however, that MAPTs are most advantageous when the individual meets the three criteria set out above: that he or she (1) is not currently receiving Medicaid or SSI benefits; (2) has multiple reliable people to name as beneficiaries; and (3) will not need Medicaid benefits in the next 60 months or can privately pay for medical costs without public assistance for that period.

\*\*\*\*\*

**FDIC Update** - On May 20, 2009, President Obama signed the Helping Families Save Their Homes Act of 2009

(Senate Bill 896). Among other things, the Act extends the \$250,000 deposit insurance limit through December 31, 2013, and extends the length of time the FDIC has to restore the Deposit Insurance Fund from five to eight years.

This extension does not affect the Transaction Account Guarantee provided by the FDIC's Temporary Liquidity Guarantee. The Transaction Account Guarantee, which provides an unlimited guarantee of funds held in noninterest bearing transaction accounts, is still scheduled to expire on December 31, 2009.

The standard insurance amount of \$250,000 per depositor is in effect through December 31, 2013. On January 1, 2014, the standard insurance amount will return to \$100,000 per depositor for all account categories except IRAs and other certain retirement accounts, which will remain at \$250,000 per depositor.

For now, basic FDIC Deposit Insurance Coverage Limits are as follows:

- ⤴ Single Accounts (owned by one person): \$250,000 per owner
- ⤴ Joint Accounts (two or more persons): \$250,000 per co-owner
- ⤴ IRAs and certain other retirement accounts: \$250,000 per owner
- ⤴ Revocable Trust Accounts: \$250,000 per owner per beneficiary up to 5 beneficiaries (more coverage is available

with 6 or more beneficiaries subject to specific limitations and requirements)

- ▲ Corporation, Partnership and Unincorporated Association Accounts: \$250,000 per Corporation, partnership or unincorporated association
- ▲ Irrevocable Trust Accounts: \$250,000 for the non-contingent, ascertainable interest of each beneficiary
- ▲ Employee Benefit Plan Accounts: \$250,000 for the non-contingent, ascertainable interest of each participant
- ▲ Government Accounts: \$250,000 per official custodian
- ▲ Non-Interest Bearing Transaction Accounts: Unlimited coverage – only at participating FDIC-insured banks and savings associations. Unlimited deposit insurance coverage is available through December 31, 2009, for non-interest bearing transaction accounts at institutions participating in FDIC's Temporary Liquidity Guarantee Program.

For additional information or if you have questions about FDIC coverage limits and requirements, visit [www.myFDICinsurance.gov](http://www.myFDICinsurance.gov), call toll-free 1-877-ASK-FDIC or ask a representative at your bank.

\*\*\*\*\*

**The Latest in Possible Further Revisions to the NY Statutory Short Form General Power of Attorney and Major Gifts Rider Legislation** – In April we reported on the new Power of Attorney legislation, which is effective on September 1, 2009. This legislation mandates extensive changes to the form and substance of powers

of attorney under New York law. We urge you to become familiar with the new rules, requirements, duties and responsibilities (and to update your POAs accordingly, once the new law is effective and finalized).

As with so much legislation, the law has a few “imperfections” and in May the Trusts and Estates Law Section identified them and joined the process of making recommendations to the legislature and Governor on certain amendments. These include actual and constructive notice provisions concerning revocation of prior powers of attorney, exceptions for “customary” gifts, the definition of the word “major” in the Statutory Major Gifts Rider, the requirement (or not) of two agents and whether all POAs must use the exact language of the statute in order to be valid. Also, please note that the Blumberg form that has been published and is currently available does not address the pending amendments. With the legislative chamber doors locked in Albany, we don't know if the legislature will fix and finalize the legislation before September 1<sup>st</sup>, but we will be watching. Stay tuned.

**Another Estate Tax Reform Bill** – The U.S. Senate Finance Committee chairman introduced a tax reform bill in March of this year outlining significant changes to the estate, gift and generation skipping transfer (“GST”) taxes.

Among the changes, the bill seeks to: (1) increase the gift tax exemption amount and the maximum valuation reduction for farm and business realty to \$3.5 million; (2) index the applicable exclusion amount, gift tax exemption, GST exemption, and the maximum valuation reduction for farm and business realty for inflation, effective post-2010; and (3) make the first to die spouse's unused applicable exclusion amount

available to the surviving spouse (the “portability option”).

The bill also makes estate, gift and GST taxes permanent in addition to other current tax law provisions including the capital gains and dividends tax rates; the \$3.5 million applicable exclusion amount; and the 45% top estate, gift and GST tax bracket.

Our take on this: Review your goals and major concerns; initiate (or update) estate and financial plans accordingly; stay flexible - use revocable or amendable techniques where possible and appropriate to your goals and concerns; take advantage of historically low interest rates and lower real property and portfolio values to transfer control of assets to loved ones and reduce estate and gift taxes.

\*\*\*\*\*

For more information, please contact us at 212-682-1555 or by e-mail at [info@maclean-law.com](mailto:info@maclean-law.com).

**Disclosure Pursuant to IRS Circular 230  
Disclosure - Best Practices for Tax Advisors:**

Any tax advice contained in this communication is not intended or written to be used, and may not be used, for the purpose of avoiding tax penalties in promoting, marketing or recommending any transaction or matter addressed in this communication. If you would like a written opinion on one or more Federal tax issues addressed above upon which you may rely for the purpose of avoiding penalties, please contact us.

**Disclosure Pursuant to Ethics Rules for Attorneys in New York State: Attorney Advertising.** Prior results do not guarantee a similar outcome. We are not providing you with information because we have targeted you as needing our services for a particular matter and we are not soliciting you for any particular matter or assignment. We are providing this

information to make you aware of information we consider valuable as well as relevant to the type and quality of legal services we provide.