

# Western Mass Estate Planning

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## TESTAMENTARY SUPPLEMENTAL NEEDS TRUSTS

If one member of a married couple needs skilled-nursing care while both spouses are alive, most, if not all, of their assets can often be preserved and the nursing home spouse can qualify for MassHealth benefits to contribute to the cost of care. However, once one spouse dies and there is no spouse at home entitled to retain the couple's assets, most of the couple's assets are at risk and must be spent-down before MassHealth will pay for care.

Because married couples typically hold all property jointly, the survivor will automatically inherit the property upon the death of the first spouse. Any assets which are not held jointly or do not designate a beneficiary are subject to the terms of each spouse's Will, which usually leaves all assets outright to the surviving spouse. This is sometimes known as an "I love you" Will. However, when there is a concern about the rising cost of long-term care<sup>1</sup> and preservation of a couple's assets, an "I love you" Will may not be sufficient. One option for additional planning involves a type of trust called a "testamentary supplemental needs trust."

There are very few types of trusts which preserve assets and enable an individual to qualify for federal or state benefits (e.g., Medicaid/MassHealth). One of these is a trust established in a spouse's Last Will and Testament (hence, the name "testamentary"), which is not funded until that spouse dies. When the spouse dies, his or her Will provides that all assets passing through the Will will not be distributed outright to the surviving spouse. Instead, the assets will be held in a *supplemental needs trust* for the benefit of the surviving spouse. The term "supplemental needs" refers to the underlying purpose of the trust, which is to provide for needs above and beyond that which can be met by other benefit sources, such as MassHealth.

If the surviving spouse requires in-home or long-term, skilled-nursing care, the assets held in trust will not be deemed available to pay for that spouse's care. Therefore, the surviving spouse does not need to spend-down these assets and will be eligible for MassHealth benefits much sooner than if those assets were inherited directly through joint ownership or as a designated beneficiary.

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<sup>1</sup> Nursing home care in Massachusetts typically costs between \$13,000-\$16,000 per month.

Examples:

FACTS: Husband and wife have cash of \$200,000, plus a house worth \$300,000. Husband dies, leaving a surviving wife. Wife needs skilled-nursing care.

*Scenario #1 The couple has basic Wills leaving everything to the other. Wife inherits all \$500,000, either via the Will or because she is the joint owner of the assets. To receive MassHealth benefits, she must reduce her cash to \$2,000 and the house will be exposed to a lien from MassHealth for benefits received.*

*Potential risk: \$198,000 cash and entire house.*

*Savings: -0-*

*Scenario #2 Husband has a special Will with testamentary trust; husband owns ½ of the assets in his individual name. Husband dies and his ½ is left in trust. Wife owns \$100,000 in cash and ½ the house. To receive MassHealth benefits, she must spend down to \$2,000 and ½ the house will be exposed to a lien.*

*Potential risk: \$98,000 cash and ½ the house.*

*Savings: \$102,000 cash and ½ the house.*

*Scenario #3 Same as #2, except husband dies with all assets in his name. Wife is immediately eligible for MassHealth benefits.*

*Potential risk: \$-0- and none of the house.*

*Savings: \$200,000 and the entire house.*

Obviously, scenarios #2 and #3 have more favorable results than scenario #1. The "catch" here, of course, is that no one can predict the future. We do not know for certain which spouse will die first. For this reason, a healthy couple may wish to divide their assets equally between them, so that each spouse owns, in his individual name, approximately one-half of the assets. That way, if one spouse were to die suddenly, at least one-half (scenario #2) would be included in the estate of the deceased spouse, and be protected in the *testamentary supplemental needs trust* in the event that the surviving spouse requires long-term, skilled-nursing care.

Ideally, if we knew which spouse were likely to die first, we would move the other half of the assets from the healthy spouse's name into the dying spouse's name. This is so that all of the assets can pass through the probate estate of the deceased spouse and into the *supplemental needs trust* established for the benefit of the surviving spouse. The assets would be available for the surviving spouse's use, but would NOT be counted as available to pay for any nursing home care the surviving spouse may require. Thus, the surviving spouse qualifies sooner for MassHealth long-term care benefits, the assets in trust are available for the surviving spouse's supplemental needs, and any assets remaining on the surviving spouse's death are preserved for the couple's children.

Potential disadvantages: There are three basic potential disadvantages in creating these trusts:

- 1) higher up-front costs, than standard Wills;
- 2) the need for Probate Court proceedings (either twice - upon the death of each spouse, or once, upon the death of the first spouse); and
- 3) the loss of financial control after the first spouse spouse dies (the surviving spouse does not have access to the assets)

The Probate Court process involves a series of paper filings, but Court, legal, and Registry of Deeds recoding fees may total \$2,500 or more; however, it is a necessity for this strategy to work (the trust must be testamentary). With respect to the loss of financial freedom, after one spouse dies, the survivor must work with the designated trustee (e.g., a child) with respect to the money left by the deceased spouse even if the surviving spouse is healthy and not applying for MassHealth. It is, therefore, imperative that each spouse select an appropriate Trustee. Ultimately, this strategy may be put in place and never needed, but, if necessary, has the potential to save a tremendous amount of money.