

Western Mass Estate Planning

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Avoiding Probate and Preserving Assets from Long-Term Care Expenses

All assets titled in the name of a stand-alone trust (in place of Wills) will avoid the expense and delay of the Probate Court process at the death of each spouse, but, if one spouse needs long-term care (in-home, assisted-living or skilled-nursing):

- The assets titled in the name of the trust will need to be removed from the trust and placed into the well spouse's individual name in order to qualify the sick spouse for MassHealth (Medicaid) benefits – the assets cannot continue to be titled in the sick spouse's name or in the name of the trust. The well spouse's Will (rather than the trust) would control distribution of the assets at his or her death.
- If the well spouse predeceases the sick spouse, with all of the assets in his or her name and a Will which leaves everything to the sick spouse (a standard Will), the assets will be deemed available to pay for the surviving spouse's long-term care expenses and will need to be spent-down before MassHealth will pay/continuing paying for care

Federal Medicaid regulations permit the well spouse to protect the assets from the sick spouse's medical expenses by executing a Will which provides that, if the well spouse dies first, the assets (everything the couple owns!) will not pass directly to the surviving spouse. Instead, the assets will be held in trust by a third party for the benefit of the surviving spouse, thereby making them non-countable for MassHealth purposes and preserving them for the couple's children or other intended beneficiaries. This type of trust (within a Will) is called a "Testamentary Supplemental Needs Trust." Although this strategy requires probate proceedings upon the death of the spouse holding all of the assets, it allows us to preserve the assets from the survivor's potential long-term care expenses. MassHealth (Medicaid) will disregard assets left to a spouse in a Will (but, oddly, not those left to a spouse in an avoid-probate trust). The Trustee has complete control over the assets, but they continue to be available to supplement any MassHealth benefits the spouse is receiving (distributions may be made to enhance the spouse's life, so long as they are not paid directly to the spouse).

To provide maximum estate plan flexibility, spouses may choose to execute both a trust and Wills containing Supplemental Needs Trusts. The trust is funded initially, since we are more certain about death and the Probate Court process than we are about either spouse needing care. If neither spouse needs care or the couple does not apply for MassHealth benefits, the couple will be able to benefit from avoiding the probate process at the death of each spouse.

However, in the event that one spouse experiences sudden or declining health issues, and it appears that long-term care may be necessary, the couple may wish to revise their plan. Depending upon the circumstances, we may choose (or need) to remove all of the assets from the trust and, instead, title them in the name of just one spouse (whether it is the "sick" spouse or the "healthy" spouse will depend upon several factors, including prognosis). The couple may be able to preserve all of their assets. If, however, the plan does not play itself out as we anticipated and the surviving spouse ends up holding all of the assets in his or her individual name, we can, again, place them back into trust, ensuring that they will avoid the Probate Court process.