

Testamentary Trusts and Asset Protection

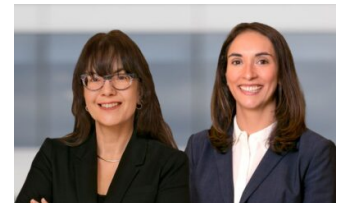
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A “living trust” is any kind of trust that is created by an individual and which remains in existence during the individual’s lifetime. Some examples of living trusts are Revocable Trusts, Irrevocable Trusts and Special Needs Trusts. However, a Testamentary Trust is different; it is not a “living trust.” In fact, the Testamentary Trust is not in effect until after the trust creator’s death. Also, unlike a living trust, a Testamentary Trust does not avoid probate.

A Testamentary Trust is not a separately existing document like a living trust; it is instead written inside the Will. Therefore, because it is contained within a Will, a Testamentary Trust does not come into existence until the Will creator dies, and the Will is approved by the Probate Court. At that time, the Testamentary Trust becomes effective, and the Trustee can begin work.

We recommend the use of Testamentary Trusts often in our practice for a married couple with asset protection concerns. For example, we frequently see the situation where one spouse needs to enter a nursing home and apply for MassHealth soon, while the other spouse is still healthy and living at home. In such cases, we do not have the time to wait out the five-year lookback required to use an irrevocable trust to protect the primary residence.

Instead, the healthy spouse will use the nursing home spouse’s Durable Power of Attorney to transfer the home to him/herself and then prepare a new Will containing the Testamentary Trust, stating that any assets in the healthy spouse’s sole name at death will not be inherited by the nursing home spouse outright, but instead will be transferred to the Trustee of the Testamentary Trust. The Trustee can use those assets for goods and services that improve the quality of the nursing home spouse’s life, but



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not for any needs covered by a public benefit (such as MassHealth). When the nursing home spouse dies, the trust assets pass to the couple's beneficiaries and avoid MassHealth estate recovery.

Most importantly, the Testamentary Trust avoids the catastrophic situation where outright distribution of the inheritance terminates the nursing home spouse's MassHealth eligibility due to pushing that individual over the \$2,000 MassHealth asset limit. Instead, the nursing home spouse can retain MassHealth eligibility while the inherited assets in the trust are available to be spent on needs that enhance the quality of their life.