

Using a testamentary supplemental needs trust to protect assets from the cost of nursing home care

What is a testamentary supplemental needs trust?

A trust is a written agreement between the person(s) who creates the trust and the person who administers the trust as to how any property owned by the trust may be used. A testamentary trust is any trust created by the terms of a person's Will. A supplemental needs trust (SNT) is a trust created for the benefit of a disabled person who is receiving, or may in the future receive, needs-based government benefits. Assets held by a testamentary SNT generally are not considered to be owned by the beneficiary of the trust. Therefore, if the beneficiary of the trust applies for Medicaid (MassHealth) the trust assets should not count.

What are needs-based government benefits?

Needs-based government benefits include Medicaid (MassHealth in Massachusetts), Social Security Supplemental Income (SSI), and some types of public housing, etc. These are benefits that a person must apply to receive. To qualify, the applicant is required to meet certain income and asset limits. For example, if a person is in a nursing home and desires for Medicaid to pay for the cost of their nursing home care the person needs to apply for Medicaid and be approved. To be approved, the person must have less than \$2,000 in "countable" assets. Countable assets include all assets except for a house, a car, a pre-paid funeral, \$1,500 burial account, and \$1,500 whole life policy. A further discussion of MassHealth qualification and further planning strategies is complex and beyond the

scope of this article.

How does this strategy work?

Each family is unique and therefore, this is a general discussion. Since each family's plan is likely to be slightly different, this example is to be considered for illustrative purposes only. One example might be each spouse executes a Will containing a testamentary SNT for the benefit of the other spouse. The couple's assets would then be allocated in a particular manner. Upon the death of a spouse, any property owned by the spouse passes via that deceased spouse's Last Will and Testament to a testamentary SNT for the benefit of the surviving spouse. Once the property is in the testamentary SNT, the property no longer counts as an asset of the surviving spouse. Thus, the property is protected if the surviving spouse needs nursing home care in the future or is already in the nursing home.

What is the main drawback of this strategy?

This strategy only works if a testamentary SNT is used. Using a testamentary trust means that a probate must be opened, and the trust will be subject to oversight by the county probate court. This oversight adds cost and complexity. Additionally, this strategy does not protect assets if both spouses enter a nursing home for long term care with neither having passed away.

When is this strategy appropriate?

Again, each situation is unique and therefore, must be evaluated on its own facts and circumstances. But, generally, this strategy may be considered if both spouses are elderly and protecting assets in some other way would create a penalty period (a period of ineligibility of MassHealth). Using this strategy does not create any penalty as no gifts were made.

When will this strategy not work?

While there are other times that this strategy may not work beyond what is described in this article, this strategy is unlikely to work if the first spouse to die has received Medicaid benefits (either at home or in a nursing home). Another unlikely successful situation is if both spouses enter a nursing home and apply for Medicaid together. In that situation, the assets of the family would need to be reduced to \$2,000 in countable assets along with the home prior to the Medicaid application to be eligible for benefits.

Conclusion:

As you can see, this type of planning is extremely complex and is not suitable in all cases. If you have a loved one whose assets you would like to protect from the cost of long-term care but it appears that you cannot delay Medicaid application for five years, you should see an elder law attorney as soon as possible. This and other strategies may be able to help your family.

Do you have a suggestion for a future article topic for Attorney Walecka? Reach out to him directly with a question or topic you think would be helpful to readers.

The information contained in this article is not intended to make you an expert on estate planning nor is this article intended to replace the need for the advice of a professional. Rather, this article is simply intended to provide a basic understanding of why estate planning is important for everybody and a basic understanding of some of the more common estate planning tools. This article does not constitute legal advice.