

# LEGACY

*Looking Forward. Thinking Ahead.*

A NEWSLETTER FROM THE TRUST & ESTATE DEPARTMENT OF FLETCHER TILTON





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# MESSAGE FROM FRED MISILO

## CHAIR, TRUST & ESTATE DEPARTMENT



Welcome to the Inaugural Edition of LEGACY, a quarterly publication of the FT Trust and Estate Department. Our intention in creating this resource is to provide usable and understandable information on timely and important issues in the areas of estate planning; retirement planning; asset protection; tax planning; trust and estate administration; administration of charitable foundations and trusts; special needs planning; and elder law.

When we first conceived of this publication, we were in the pre-COVID 19 environment. Now, our world is so different. The future is uncertain. In times of crisis, we may engage in catastrophic thinking, that is, imagining all the bad things that could happen to you and your loved ones in this crisis. We are

here to help you and your families plan through this crisis in a thoughtful and objective manner. Each of the attorneys in the FT Trust and Estate Department has the capacity to meet with you virtually. We can, of course, review and make the necessary changes to your estate plans during this time. Most of all, we're here to listen and respond to your concerns.

Each edition of LEGACY will contain contributions from across the practice areas of the FT Trust and Estate Department. In this edition, you will find articles ranging from a detailed description of estate planning options and techniques, a practical and succinct overview of planning for nursing home care costs and strategies to protect assets, and an article highlighting the diverse and common issues confronting families in the 21st century when developing their estate plans.

I hope you enjoy this inaugural edition of LEGACY. If you have any questions on the information contained in this edition, don't hesitate to contact the author or me (fmisilo@fletchertilton.com). Finally, I'm interested in learning what areas of interest or concern you have to help make LEGACY a valuable resource for you and your family in the future.

Best regards,

Fred Misilo, Chair  
Fletcher Tilton Trust and Estate Department  
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## When Worlds Collide – The Intersection of Traditional Estate Planning With the Protection of Assets From Nursing Home Costs

by Michael T. Lahti, Esq. | 508-459-8212 | mlahti@fletchertilton.com



A good general definition of estate planning might be “getting what you have (your estate), to whom you want (your loved ones), when you want (now, upon death, or after death), efficiently (reducing taxation, avoiding probate, protecting assets), while keeping control to the extent possible.” That’s simple enough. What is not so simple is how aspects of the planning can change depending on one’s situation and goals. Very often, what seems quite ordinary has layers of issues

that need to be peeled away to arrive at the appropriate strategy. Often what one might consider regular estate planning conflicts with what needs to be done to protect assets. This article follows a relatively normal estate planning situation. It then amplifies how trying to protect assets from nursing home spend-downs might affect the common goals of tax reduction and probate avoidance while keeping control.

To begin, we will assume we have a Massachusetts family with an “estate” of \$2 million that consists of:

- a house worth \$600,000
- brokerage accounts of \$400,000
- IRAs totaling \$600,000
- term life insurance of \$400,000

When the clients’ children were young, the parents completed simple “I love you” type estate plans that left everything to each other, and then to their children. Now that their children and assets have grown, they want to have their estate plan reviewed and updated, if needed.

During the interview, the clients expressed their desire to make things pass from them to their children as efficiently as possible, and said they want their children to have their respective shares from the parents immediately. We will assume everyone in the family gets along, is responsible and trustworthy, and is healthy. This family might benefit significantly from typical estate planning, discussed below:

### TYPICAL REVOCABLE LIVING TRUST PLANNING

#### Revocable (Living<sup>1</sup>) Trust Planning for Estate Taxation

Without further planning, when the surviving client is deceased, there would be an “estate” tax due to Massachusetts in the amount of \$99,600.<sup>2</sup> Fortunately, this tax exposure could be totally eliminated with the use of revocable trusts that contain “Credit Shelter Trusts”<sup>3</sup> which, when properly implemented, allow the use of both spouses’ \$1 million Massachusetts estate tax exemption to shelter estate taxes.

<sup>1</sup>In this article the term “Living” indicates the trust was created during the person’s lifetime, in contrast to the term “Testamentary,” which indicates the trust was created upon death.

<sup>2</sup>If our couple lived in Rhode Island, the exposure would be reduced to \$30,085, and if they lived and owned the property in Florida, their exposure would be \$0.

<sup>3</sup>Sometimes called “Family” Trusts or A-B Trusts.

### **Revocable (Living) Trust Planning for Probate Avoidance**

Revocable living trusts would keep our clients “out of probate” upon their deaths. Appropriate assets could be titled into trust ownership, and would consequently avoid probate.<sup>4</sup> Avoiding probate allows assets to pass quickly, privately, and at a lower cost.

### **Revocable (Living) Trust Planning for Income Taxation**

Revocable living trusts would allow our clients’ assets they placed into their revocable trusts to receive a new income tax “basis” upon death. This can be extremely helpful: for instance, if one has a property that was purchased for a low price, and it has grown substantially since the time of purchase, then, upon death such property will get a new stepped-up basis to the fair market value of the property as of the date of death. After the first spouse’s death, assets that continue upon trust for the benefit of the surviving spouse typically can, if desired, be distributed out of the trust back to the surviving spouse to obtain another stepped-up basis upon his or her death.<sup>5</sup> (The decision of whether to do this subsequent transfer requires careful consideration of what estate and income taxes might have to be paid.)



Furthermore, revocable trusts are “grantor trusts.” A grantor trust is a trust in which the person creating the trust is considered to be the “owner” of the trust for income tax purposes. Grantor trust status is significant if the trust is to hold one’s primary residence. If the house is sold, the grantor trust status preserves the favorable capital gains tax treatment upon sale.<sup>6</sup>

### **Revocable (Living) Trust Planning for Control**

Revocable living trusts would allow our clients to have complete control of assets inside the trust.

After the death of the first client, his or her trust would continue for the benefit of the surviving spouse. Without jeopardizing the tax-protective qualities, this continuing trust could be written so that the surviving spouse controls it: that spouse has the ability to choose investments, has income generated, has the ability to take supportive principal distributions, and can even change the distribution of the assets upon his or her subsequent death.

## **IRREVOCABLE LIVING TRUST PLANNING**

But what if our clients were not so healthy? What if, during the meeting, they told us that one has a debilitating chronic illness and wants to shelter assets from devastating health

<sup>4</sup>Avoiding probate simply means that assets pass upon death without court supervision.

<sup>5</sup>Of course, assets placed back into the surviving spouse’s name would be subject to possible estate taxation, so this would need to be appropriately analyzed and quantified prior to distributing assets from an otherwise tax-protected Credit Shelter Trust.

<sup>6</sup>Per person, \$250,000 capital gains tax exclusion.

care expenditures? Asset protection requires different planning techniques that can be implemented with, or in lieu of, traditional trust planning. Let’s look at some of these strategies and see how they affect planning.

### **Irrevocable (Living) Trust Planning**

Our clients could use irrevocable living trusts to protect assets. Each state has its own nuances as to how such trusts must be prepared, and as a result, such trusts need to be carefully drafted. For our clients, such trusts could be used to protect their real estate from being spent down for nursing home care.<sup>7</sup> Our clients could retain the “income” from their property placed in an irrevocable living trust. (So, for instance, if their residence is placed in an irrevocable trust they can still live in it.) Assets put into an adequately crafted irrevocable living trust five years before a nursing home admission will not have to be spent down for care. Because medical costs can be devastating, irrevocable living trust planning has become widely used in estate planning.

### **Irrevocable (Living) Trust Planning for Estate Taxation**

Our clients could use irrevocable living trusts for estate tax planning. For instance, an irrevocable living trust could be created by one spouse who reserves an income right for both spouses. When the first spouse deceases, the surviving spouse can benefit from the income interest in the irrevocable living trust. *Yet, the property remains excluded from the surviving spouse’s estate* for estate tax purposes. In this way, an irrevocable living trust can be drafted to accomplish some of the estate tax objectives discussed above. An irrevocable living trust can be dovetailed with the use of a revocable living trust – assets that the client wants control over are placed in a revocable living trust. In contrast, assets to be protected are placed in the irrevocable living trust.

### **Irrevocable (Living) Trust Planning for Probate Avoidance**

Irrevocable living trusts would keep our clients “out of probate” upon their deaths. Appropriate assets could be titled into trust ownership and would consequently avoid probate.<sup>8</sup> Avoiding probate allows assets to pass quickly, privately, and at a lower cost.

### **Irrevocable (Living) Trust Planning for Income Taxation**

Irrevocable living trusts could allow the assets that our clients placed into their irrevocable trusts to receive a new income tax “basis” upon death. As discussed above, this can be extremely helpful.

Furthermore, irrevocable trusts are often structured as “grantor trusts.” As discussed above, this can be important if the trust is to hold one’s primary residence. If the house is sold, the “grantor trust” status preserves the favorable capital gains tax treatment upon sale.<sup>9</sup>

### **Irrevocable (Living) Trust Planning for Control**

There is much confusion over “control” with respect to irrevocable trusts, and the topic deserves discussion. The fact that the trust is irrevocable *does not mean* that one gives up all rights. Actually, quite the opposite is true, as irrevocable trusts designed to protect property from nursing home expenditures typically reserve the “income” for the person creating the trust. Income can be the “use” of the property, rents, dividends, and interest.

<sup>7</sup>Irrevocable living trust planning is not limited to just real estate. Often clients will contribute assets that they do not need to live on into an irrevocable living trust that they consider to be “low-lying fruit” that might otherwise be spent down on nursing home care.

<sup>8</sup>Avoiding probate simply means that assets pass upon death without court supervision.

<sup>9</sup>Per person, \$250,000 capital gains tax exclusion.

(Consider this: If one has a typical “buy and hold” portfolio and does not intend to spend the principal, then this asset could be put into an irrevocable trust --and protected-- while income is retained. Similarly, if one has a house in an irrevocable trust, the house can be protected concurrently with one’s reserved rights to live in the house.)

The house can be sold when held in an irrevocable trust,<sup>10</sup> and, nothing prevents assets from being distributed out of the irrevocable trust to others (typically children and grandchildren), so assets can be distributed from the trust to such others as distributions from the trust (without triggering another five-year “lookback” period for gifts that would have resulted if gifts were made by the parents individually).<sup>11</sup>

## TESTAMENTARY TRUST PLANNING

### Testamentary Trust Planning

But what if our clients were so sick that there was serious doubt that both could stay healthy for another five years to make it beyond the “Lookback” period for nursing home purposes? Absent the irrevocable trust, is there another strategy our clients might consider? A Will containing a “Testamentary Trust” might be considered.

A “Testamentary Trust” is a trust created from within the language of a Will and which comes into existence *after* death. It’s the counterpart to the “living” trust, in that instead of *avoiding* probate, assets *intentionally pass through the probate process*, so that the Will can set up the assets within the Testamentary Trust.

So, if we usually are trying to avoid probate, why might we intentionally pass assets into the probate process? The answer is asset protection. The Testamentary Trust allows assets that one dies with, that pass under the terms of the Will, and hence devolve into the Testamentary Trust, to be left in a continuing trust for the surviving spouse that is totally protected from nursing home expenditures. The protection is *immediate*, and there is no five-year Lookback Period.<sup>12</sup>

To show the power of this strategy, let’s assume we have a crystal ball, and we know that one of our clients is going to pass away in two weeks. Further assume that the other spouse (the spouse who is to live on) has a chronic illness that has weakened him or her to the point that without the soon-to-be-deceased-spouse’s help, a continuing nursing home stay will occur. With these facts, we might intentionally (1) have the soon-to-be-deceased-spouse sign a Will that creates a Testamentary Trust for the surviving spouse, (2) move assets into the soon-to-be-deceased-spouse’s name, and (3) check to make sure that these newly-moved assets *intentionally* pass through probate.<sup>13</sup> Of course, we do not have a crystal ball, so there is always an element of risk with this planning because we do not know which spouse will die first.

Despite this, the Testamentary Trust plan is powerful and could be a good strategy for our clients on its own, or as a strategy to fall back upon in the event that our clients did

<sup>10</sup>Upon sale, if the irrevocable trust is a “grantor” trust for income tax purposes, then the grantor will report any gain from the sale on his or her personal return as if he or she sold it (thus preserving possible favorable capital gains tax treatment). Furthermore, assets from the sale stay in the trust and continue to be protected within the irrevocable trust. Clients often ask whether the sale of the house inside the irrevocable trust “triggers” a new five-year Lookback Period for nursing home planning purposes. It does not, and the sales proceeds remain protected.

<sup>11</sup>This ability for the trust to distribute assets to others can even be used to terminate the trust (if all assets are distributed to children). The children, if they choose, could then transfer assets back to the parents. This ability to prematurely terminate an irrevocable trust is often loosely called an “escape hatch.”

<sup>12</sup>Of course, one has to die for the protection to take effect.

<sup>13</sup>This means that such assets should not be jointly owned or have a beneficiary listed; we want assets to fall into the decedent’s “estate” so that the Will (and Testamentary Trust) will administer such assets.

not stay nursing-home-free for five years and thus did not make it beyond the five-year Lookback Period.

The Testamentary Trust is fundamentally different from the “living” trusts, discussed above, and its differences are noted below.

### Testamentary Trust Planning for Estate Taxation

Our clients could use Testamentary trusts for estate tax planning. For instance, when one spouse dies, assets that he or she died with could be managed under the terms of the Testamentary Trust for the benefit of the surviving spouse. The trustee (the person in control of the trust), who in this instance should not be the surviving spouse, could be given considerable latitude to make distributions for the surviving spouse’s comfort. Despite the trustee’s ability to make distributions for the benefit of the surviving spouse, the trust assets will not be taxed in the surviving spouse’s estate when he or she subsequently dies.

### Testamentary Trust Planning for Probate Avoidance

The Testamentary Trust is mutually exclusive with probate avoidance. This is a drawback with this type of planning – assets must be probated. That being said, oftentimes the cost and inconvenience of going through probate is far surpassed by the asset protection that Testamentary Trusts provide.

### Testamentary Trust Planning for Income Taxation

When the first spouse dies, assets he or she owns that subsequently are administered by the Testamentary Trust receive a new income tax “basis” upon death.<sup>14</sup> As discussed above, this can be extremely helpful.

### Testamentary Trust Planning for Control

As mentioned above, even though the Testamentary Trust provisions can be quite generous to the surviving spouse, the surviving spouse should not be the “trustee” in charge of the trust. Typically a child or children assume the role of trustee of such a trust and can make distributions from the trust for their parent’s needs. Some clients bristle at the thought of having to “ask” their children for distributions. For other clients, it’s of little concern.

## CONCLUSION

Sometimes the clients with modest estates have the greatest number of choices to make. It’s always nice if probate can be avoided, thereby reducing costs and time when a client dies. In states like Massachusetts and Rhode Island, where the estate tax thresholds are so low, planning to minimize estate taxes is essential. Capital gains can be expensive, and strategies to reduce income taxation are important too. And, lastly, it is always important, if possible, to keep control of assets. This maelstrom of issues is enough to make one’s head spin and is why an experienced practitioner who knows taxation and elder law issues is so important. Should you have any questions, please do not hesitate to contact us. **FT**

<sup>14</sup>But not IRAs, 401k assets, 403b assets, and other “retirement” assets that have not been taxed for income tax purposes.

## 21st Century Estate Planning – It’s Not As Easy As You Think

by Frederick M. Misilo, Jr., Esq. | 508-459-8059 | [fmisilo@fletcherilton.com](mailto:fmisilo@fletcherilton.com)



If you are a member of the Baby Boomer generation, you probably watched “Leave it to Beaver” or “Andy Griffith”. These TV programs painted an idealized view of family life, even for a single Dad such as Sheriff Taylor. The reality then and now is that such portrayals of family life were a fantasy for most Americans.

I’ve spent the last thirty years working with families in trust and estate work. From this experience, I’ve observed a multitude of stresses and concerns people confront when planning for their legal and financial future and for the orderly transfer of property upon their passing. Individuals have become increasingly aware of their own longevity and concerned about the possibility of outliving their money or of the high cost of long term care. It is common to ask, “What steps can I take to plan for the possibility of long term care?” Also, as their children have matured into adulthood, many parents are mindful of the relatively high rate of divorce in our society and wonder whether their adult children will be among the 50% whose marriages end in divorce. They wonder, “Will the inheritance I pass on to my adult children eventually be distributed to a former son-in-law or daughter-in-law?” More than any earlier generation, young adults are carrying more debt than previous generations. According to a 2018 Northwestern Mutual study,\* a majority of households headed by persons ages 25 – 34 are living paycheck to paycheck and have an average of \$36,000 in debt, exclusive of mortgage debt. Many parents may feel an obligation to assist their adult children financially in times of need. They wonder, “If I do assist, will I do so at my own financial peril?” Another planning challenge parents face is when a son or daughter needs financial supervision and support such as when a child has a developmental disability or mental health challenge. Parents whose children will need continued support and assistance over the course of their lifetime have multiple planning challenges. They ponder, “How will my adult child with a disability be supported when I’m no longer here?”

Fortunately, these questions and many others like them have answers. Contemporary estate planning is a collaborative process between the client with complex needs and a team of attorneys who have the knowledge and experience to craft an individualized estate plan. While many people have an estate plan, these plans were often developed many years ago when family dynamics and financial considerations were entirely different from what they are today. Relatively recent legal rulings regarding the use of trusts for asset protection purposes make a review of old estate plans a worthwhile exercise. For example, irrevocable, income-only trusts provide a viable option if one is concerned about future long-term care costs. In the context of protecting an inheritance in an adult child’s divorce, a fully discretionary trust for the benefit of that adult child may be an excellent option to consider. When faced with the challenge of planning for an adult child with a life-long disability, one needs to consider such critical issues such as selection of a Trustee of a supplemental needs trust and determining the amount of funding this type of trust should have.

Estate planning in the 21st century is not a simple process. Has your estate plan kept up with your life and the law? Reviewing your existing estate plan on a regular basis can help you answer that question. **FT**

\*See [news.northwesternmutual.com/planning-and-progress-2018](https://news.northwesternmutual.com/planning-and-progress-2018)

## Protecting Your Assets

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Lauren Miller

Mary Proulx

Estate planning clients frequently state that one of their estate planning goals is to “protect assets.” However, when asked what specifically they want to protect their assets from, they often have only a vague idea. Here are six examples of life events where proper planning can help meet these goals:

**1. Protect from family disputes.** Relying on verbal expressions of wishes or informal written instructions from family members or friends can be a recipe for confusion and litigation. If you wish to avoid disputes among your beneficiaries upon your passing, you should establish a comprehensive, written estate plan that carefully articulates their wishes.

**2. Protect from liability.** For example, if you own rental or commercial real estate and are worried about being sued by tenants or others, the following options offer different levels of protection:

- A. Setting up a Limited Liability Company (commonly known as an LLC);
- B. Transferring the property to an appropriate trust
- C. Purchasing appropriate property and liability insurance coverage

**3. Protect from beneficiaries’ creditors.** Instead of leaving assets outright to a child or other beneficiary, creating a trust that will hold an inheritance for the beneficiary’s lifetime can protect your assets from being used for unintended purposes in the event the child or other beneficiary gets divorced or sued, has creditors, or is financially irresponsible. This type of trust can be particularly important if the beneficiary is a minor or young adult, and/or is disabled.

**4. Protect from long-term care costs – advance planning.** This is a very common concern that is raised as people approach retirement age and beyond. Assets can be



protected from long-term care costs by establishing and funding an appropriate type of trust or through a carefully-coordinated gifting plan. Most of the planning options must be completed at least five years prior to applying for MassHealth, a needs-based public benefit program that can pay for long-term care costs.

**5. Protect from long-term care costs – crisis planning.** Although advance planning is optimal, there are some last-minute options that apply in certain limited circumstances. For example, an elder may transfer his or her home to a blind, disabled or minor

child; to a child who meets the criteria of a “caretaker child;” to a sibling who has an ownership interest in the home and has lived there for at least one year; or to transfer assets to a special needs trust for the sole benefit of the disabled beneficiary.

**6. Protect from disabled beneficiaries’ care costs.** If a beneficiary has a disability and receives (or is expected to receive) public benefits, then leaving assets outright to that beneficiary can have unintended negative consequences. The receipt of assets may disqualify the beneficiary from the public benefits programs on which they rely, thereby running the risk of their inheritance being used to pay for benefits or services that would otherwise be provided by the government. By establishing a Supplemental Needs Trust to hold that beneficiary’s inheritance, assets can be protected so they can be used to supplement the beneficiary’s public benefits, and the beneficiary can avoid the stress and cost of losing public benefits.

These are just a few examples of how proper planning can protect your assets. Making the effort to establish a robust estate plan can give you peace of mind that your loved ones will be protected and your hard-earned assets will be spent the way you intended. **FT**

## FIRM NEWS

### MICHAEL T. LAHTI, ESQ. ELECTED DIRECTOR OF THE FIRM



Fletcher Tilton is pleased to announce that Attorney Michael T. Lahti has been elected as a Director-Owner of the firm. Attorney Lahti joined Fletcher Tilton in 2017. “Michael brings extraordinary depth and expertise to our Trust and Estate Department ranging from sophisticated estate planning, elder law and special needs planning. Over the past three years, Michael has demonstrated extraordinary diligence, accomplishment and commitment to client service which Fletcher Tilton values greatly.”, said Frederick M.

Misilo, Jr., President of Fletcher Tilton and Chair of the Trust & Estate Department. In 2019, Lahti was appointed Chair of the Elder Law Practice Group. Prior to joining Fletcher Tilton, Lahti was an owner of the regional law firm, Lahti, Lahti & O’Neil of Providence and Cape Cod.

Lahti is a Certified Elder Law Attorney, a designation received from the National Elder Law Foundation. He is a member of the Massachusetts, Rhode Island and Florida Bars. He holds an LL.M. in Estate Planning from the University of Miami School of Law, a law degree from John Marshall School of Law where he also received a certificate in Estate Planning and Personal Financial Planning from the school’s Graduate Tax Department. Lahti graduated from Ripon College, Ripon, Wisconsin with a double major in Economics and Business Management.

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## UPCOMING SEMINARS/WEBINARS\*

*\*All seminars through June 30, 2020 will be offered as webinars.  
If we are able to offer a face-to-face option as well, we will let you know.*

### Estate Planning with attorney Michael Lahti

Tues., May 26, 2020 | WEBINAR | 10:00 a.m.  
Tues., July 28, 2020 | 10:00 a.m. & 1:00 p.m. | Warwick, RI  
Tues., August 11, 2020 | 10:00 a.m. & 1:00 p.m. | Attleboro, MA  
Tues., September 1, 2020 | 10:00 a.m. & 1:00 p.m. | Bristol, RI  
Tues., September 22, 2020 | 10:00 a.m. & 1:00 p.m. | Lincoln, RI

### Special Needs & Elder Law Update for CPAs & CFP Professionals® - *Webinar* with attorneys Frederick Misilo, Jr., Theresa Varnet and Michael Lahti - 3.0 CE Credits | \$75

Tues., May 12, 2020 | 8:00 a.m.

### Sophisticated Estate Planning for CPAs, Financial Advisors and CFP Professionals® with attorneys Dennis Gorman, Mike Duffy, Dani Ruran and Collin Weiss - 4.0 CE Credits | \$100

Thur., June 4, 2020 | 12:30 p.m. | Worcester, MA\*  
Thur., June 18, 2020 | 8:00 a.m. | Framingham, MA\*

### Estate Planning for MA-FL Snowbirds with attorneys Frederick Misilo, Jr. and Michael Lahti

Tues., August 25, 2020 | 8:30 a.m. | Hyannis, MA

### Housing & Supported Decision-Making with attorneys Frederick Misilo, Jr., Theresa Varnet and Meredith Greene

Sat., September 19, 2020 | 8:00 a.m. | Marlborough, MA

### How to Administer a Special Needs Trust with Fletcher Tilton’s Special Needs Practice Group

Sat., November 7, 2020 | 8:00 a.m. | Marlborough, MA

**For details and registration, visit [FletcherTilton.com/seminars-events](https://www.fletcherilton.com/seminars-events)**

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