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## Protecting Family Trust Assets from a Beneficiary's Divorce

By Ronald F. Driscoll | August 12, 2019

Family Law Divorce Division of Assets

Are your Trust Assets Protected from Your Beneficiary's Divorce?

*Estate planning attorney Ronald F. Driscoll explores the challenges associated with creating “divorce-proof trusts” in Massachusetts.*



In recent years, Massachusetts courts have announced a series of important decisions concerning the [vulnerability of family-style trusts](#) in [divorce](#) actions brought by the spouses of trust beneficiaries. The question is such cases often focus on whether assets placed in a family trust can be [assigned directly to a beneficiary's spouse](#) in a divorce. Or, if a direct assignment of trust assets to the spouse is not available, such cases often

focus on whether the non-beneficiary spouse will receive [a larger share of jointly held “marital assets”](#) to offset the trust assets held for the beneficiary spouse.

The result of these recent cases is that Massachusetts has made it increasingly challenging for family trusts to protect trust assets in the event of a beneficiary's divorce. Although trust assets *can* be protected from assignment in a beneficiary's divorce, achieving complete protection requires placing limits on the beneficiary's rights that can have significant downsides. Accordingly, creators of family trusts whose beneficiaries live in Massachusetts must weigh the value of divorce protection against some of the real downsides associated with creating a “divorce-proof trust”.

A large group of trusts (whether created in Massachusetts or other states) are directly impacted by [recent court rulings](#). The basic result is that the trust assets that have been directed by the trust maker to a beneficiary of an irrevocable trust have become increasingly exposed to the discretion of a Probate Court Judge presiding over the [division of assets](#) in a Massachusetts beneficiary's divorce. The judge must consider the [14 factors as detailed in MGL 208 Section 34](#) when deciding the marital assets that are to be divided. Massachusetts courts' recent decisions include a more aggressive view of how assets held in trust impact the final division of assets.

## *What do we Mean When we say Trust Assets are “Vulnerable” in Massachusetts Divorce?*

There are two principal ways that family trust assets are “vulnerable” in the divorce of a Massachusetts beneficiary:

**1. Direct Assignment** – When we say that trust assets are vulnerable to “direct assignment” in a Massachusetts divorce, this means that a judge [may directly assign](#) a portion of the beneficiary's spouse's interest in trust to the spouse in a divorce. Thus, if one spouse is legally entitled to \$1 million in trust assets, a judge may assign \$500K (or some other amount) directly to the other spouse as part of the final division of assets.

**2. Offset from Marital Assets** – Recent court decisions, including the recently-decided [Levitan v. Rosen \(2019\)](#), have identified trust assets that are not subject to direct assignment in a divorce, but can be used to “offset” the beneficiary's spouse's share of the marital assets. Take, for example, a couple in which one spouse holds a beneficial interest in trust that is worth \$1 million, while the two spouses also jointly own a home that is worth \$1 million. The judge may assign 100% of the trust asset to the beneficiary spouse, and then “offset” the value of the trust asset by assigning 100% of the value of the marital home to the other spouse – leaving both spouses with \$1 million in assets each.

Protecting trust assets from “direct assignment” in a Massachusetts divorce is relatively simple. Protecting trust assets from being used as an “offset from marital assets” in a divorce requires more restrictive trust language that can limit flexibility and negatively impact the rights of other beneficiaries (such as those who live in other states) under the trust.

## Consider Geography: Do all of your Beneficiaries Live in Massachusetts?

Before digging into the details of divorce-proof trusts in Massachusetts, family trust makers (also known as trust Settlers) must consider geography. Where do your children/beneficiaries live? Does at least one beneficiary live in Massachusetts? Do any beneficiaries live in other states?

The geographic question is important because divorce is a function of *state law*. This means that two different states can reach **very different conclusions** regarding whether assets held by a particular trust are vulnerable in the event of a beneficiary's divorce. For example, if a beneficiary lives in a so-called "**community property state**", the beneficiary's state's laws are more likely (although not guaranteed) to offer greater protections for trust assets in a divorce. In contrast, if at least one beneficiary lives in a so-called "equitable division" state, like Massachusetts, trust language that offers sufficient protection in another state may be vulnerable to direct assignment and/or a marital offset here in Massachusetts.

When beneficiaries live in different states, this can raise difficult questions for trust makers. Should you create separate trusts with language that is specifically tailored to each beneficiary's state? Should you choose more restrictive language – for example, to maximize divorce protection in Massachusetts – even though this language could impact the interests of beneficiaries in other states? Should you re-write the trust when beneficiaries move states?

## Who Are the Key Players in a Family Trust?

I want to provide a brief review of the principles underpinning the interactions between trust assets and divorce in Massachusetts. The first step is understanding the names/titles of individuals in the world of trusts.

In the beginning we have the Settlor (i.e. trust maker), most likely a parent or grandparent possessing **family wealth** who in good faith and with a strong family duty has established an estate plan for the benefit of his/her family. Next in line we have the beneficiaries of the trust, usually the children or grandchildren of the Settlor, who are the recipients of the trust assets in accordance with the instructions established by the Settlor inside the terms of the trust document. Next we have the "remaindermen", who are in line to receive the trust assets if the beneficiaries die, or some other event occurs that triggers the passing of assets to another generation. The person (or

persons) who oversees or manages the operation of the trust and directs the trusts assets in accord with the Settlor's instructions is the Trustee.

Lastly, on the other side of the divorce proceeding is the spouse of a trust beneficiary. The spouse is a party to a [divorce](#) that is pending in a Massachusetts Probate and Family Court. In his or her divorce case, the non-beneficiary spouse is seeking a favorable [division of marital assets](#) that (ideally) maximizes his or her share of the assets available in a divorce. The spouse's [divorce attorney](#) will carefully scrutinize the language of any trust in which the other spouse holds a beneficial interest.

(It is worth noting that even if the trust assets are completely protected from direct assignment or an offset from marital assets, the trust is *still* likely to be scrutinized by the spouse's attorney for its potential impact on child support, alimony and/or the [likelihood that the beneficial spouse will receive future assets or income from the trust.](#))

## Trust Assets in Massachusetts Divorce Actions

The [relationship between trusts and divorce](#) is a big subject. We have necessarily limited the scope of this blog to focus on the issues that a Settlor (trust maker) should consider (or reconsider) when establishing an estate plan for his or her family in light of the law surrounding divorce and trusts in Massachusetts.

The Basic Estate Plan: A parent (Settlor) has established a somewhat standard credit shelter trust to protect his estate from excess taxation and has set up a set of instructions for the Trustee to direct and control the flow and expenditure of the trust assets for the benefit of the Settlor's children while he is alive and after his death. The Settlor parent (who may be a resident of Massachusetts or another state) is concerned that one of his children resides in Massachusetts with a spouse in a marriage that appears destined for divorce (or perhaps is just a concerned parent who wants the assets that he has worked so hard for during his life to remain within his family). The parent has another unmarried child who is a beneficiary of the trust and lives in Texas.

Our hypothetical parent faces two questions: (1.) How can he protect the trust assets destined to be distributed to his child in Massachusetts? (2.) How big an impact will the trust provisions offering Massachusetts protection have on the rights of the unmarried beneficiary who lives in Texas? In the sections below, we explore how the parent can protect trust assets in the event of the

Massachusetts child's divorce. In the last section, we will discuss how added protections for Massachusetts may impact the rights of the unmarried Texas beneficiary.

## Revocable vs. Irrevocable Trusts: A Quick Primer on What Makes an Asset

In order to create the kind of credit shelter in the description above, the parent likely needed to create an **irrevocable trust**. A revocable trust is a trust in which the Settlor reserves the right to amend or revoke the trust. It can be compared to an incomplete gift, where the gift giver can take back the gift at any time, or a typical last will and testament, which an individual can amend or revoke at any time before their death. With some exceptions, a revocable trust is generally treated like a future inheritance – i.e. as a “**mere expectancy interest**” – in a divorce action, meaning the revocable trust assets cannot be divided as an asset.

An irrevocable trust is one that cannot be amended or revoked. The operation of a credit shelter trust is normally irrevocable following the Settlor's death. While alive, the Settlor often has a reserved personal power to amend or revoke any terms of the trust. After the death of the Settlor, however, this power to amend or revoke the trust is null and void, as the power was personal to the Settlor. At the moment of death, the elimination of this reserved personal power causes the revocable trust to become an irrevocable trust and all of the language and terms of the trust are now permanent. (See the Power to Decant section below for an exception to the post-death state of permanency.)

In the Massachusetts divorce context, a revocable trust created by a family member generally **cannot** be directly assigned to a spouse in a divorce, nor can the value of the spouse's potential interest in the revocable trust be used as a direct offset in the division of marital assets. (To be clear, a revocable trust created by the spouse himself or herself is still subject to division. In the context of this blog, a “revocable trust” refers to a trust created by a third party family member, with the divorcing spouse as mere beneficiary.)

Massachusetts law generally considers interests in revocable trusts to be “**mere expectancy interests**”, much like the interest in a parent's last will and testament prior to the parent's death. Because the Settlor can change his or her mind – i.e. revoke the trust, remove the beneficiary from the trust, etc. – such assets are considered too uncertain to be treated as an asset in a divorce.

That said, any large potential inheritance that a spouse may receive (whether it is a revocable trust, ordinary last will and testament, etc.) can have an indirect impact on the division of assets in a divorce. Among the statutory factors that a Massachusetts court **must consider when determining alimony and the division of assets** is the “opportunity of each party for future acquisition of capital assets and income”. A court can weigh the likelihood that one spouse will receive a large inheritance in the future when determining alimony and the division of assets in a divorce. What the court cannot do in cases involving “**mere expectancy interests**”, however, is treat “potential” assets, such as an interest in a revocable trust controlled by a third party, as an asset subject to current division. The possibility of a future inheritance is one of 14 mandatory factors that a court must consider, including factors such as the “length of the marriage”, which are likely to have a greater impact than the potential to acquire future assets.

Returning to the blog at hand, our hypothetical includes an irrevocable trust – i.e. the kind of trust that can be subject to assignment or marital offset in Massachusetts if the Settlor does not take steps to “divorce-proof” the trust.

## **How to Determine if a Family Trust is Vulnerable in a Massachusetts Divorce**

The first step that a concerned parent needs to take is to review the exact language of any established trust and the detailed fact situation present in trust architecture.

### **Ascertainable Standard vs Trustee Discretion**

The first question to answer is whether the trust includes an “ascertainable standard”. This question centers on whether the Trustee has *complete* discretion to distribute income or assets to beneficiaries (or decline to do so), or whether there is at least some legal requirement that the Trustee make such distributions. Courts have found that an “ascertainable standard” (i.e. legal requirement) exists for a Trustee when a trust’s terms *require* the Trustee to distribute trust assets to support a beneficiary’s needs for health, education, support or maintenance and even to simply maintain the quality of life that the beneficiary is accustomed to living.

In contrast, a trust that empowers the Trustee with total and absolute discretion to distribute income or assets to beneficiaries as the Trustee alone



sees fit, without any specific criteria or obligations, is less likely to have an ascertainable standard.

Another way to understand the “ascertainable standard” issue is to ask the following question: if the beneficiary spouse demanded payment from the Trustee on some basis, would the Trustee be legally obligated to make the distribution? If the answer is yes, then a Massachusetts court would likely view the spouse’s interest as an asset subject to division in a divorce. Conversely, if the Trustee could simply say “no” to the beneficiary’s spouse’s theoretical demand, it is more likely that an ascertainable standard does not exist.

Massachusetts Divorce-Proofing Remedy: Remove the “ascertainable standard” language from the trust by providing the Trustee maximum discretion and eliminating any language that could be construed as requiring the Trustee to make specific expenditures on behalf of a beneficiary. Subject to some exceptions, the general rule is this: the greater the beneficiary’s right to demand payments from the Trustee, the more vulnerable the trust assets are in a divorce. Removing “ascertainable standard” language is a helpful tool for divorcing proofing a trust.

### **Open vs. Closed Class of Beneficiaries**

Even without an ascertainable standard, trust assets may be vulnerable in a divorce. The question is whether the beneficiaries to the trust constitute an “open” or “closed” group of individuals? What we mean here is this: Does the trust identify a specific and limited number of living beneficiaries? Or does the trust include unknown or unborn beneficiaries? Returning to our hypothetical family: Does the trust identify *only* the child residing in Massachusetts and the child in Texas as the *only* two beneficiaries? If so, the beneficiary class is likely “closed.” Or does the trust include the child in Massachusetts and the child in Texas – *and their children, including future/unborn children* – as beneficiaries? In the latter case, the beneficiary class is likely “open”.

If the class of beneficiaries is closed – i.e. does not name any grandchildren as beneficiaries – then the lack of an “ascertainable standard” may not stop a Massachusetts court from treating the trust as an asset in a divorce. Here’s the reasoning: even if the trust does not legally require a Trustee to make distributions to a particular beneficiary, our courts have determined that a beneficiary who is part of a “closed” class may *still* be entitled to roughly his or her share of the trust assets.

Confused? Let's return to our hypothetical involving Massachusetts/Texas beneficiaries to flesh it out. Imagine that the trust includes no ascertainable standard and provides the Trustee with maximum discretion to distribute trust income and assets to the two named beneficiaries as the Trustee sees fit. In short, Massachusetts courts have held that even if the Trustee is not obligated to make any specific payments to the beneficiaries, the overall purpose of the trust is still pretty clear: it is meant to benefit these two individuals. Thus, a Massachusetts court may find that 50% of the trust assets ultimately belong to each beneficiary for evaluation on a divorce proceeding, even if the Trustee has full control over the trust assets.

In contrast, a trust with an "open class" simply means that new beneficiaries could be born, making it impossible to know exactly how many trust beneficiaries may arise during the lifetime of the trust. Thus, a trust that defines a beneficiary as "my daughter, Susie, and her legal heirs" is defined as open. Indeed, under the law, Susie will be considered a potential source of additional heirs even when she is 80 years old – since Susie could adopt a new "legal heir" just before she dies.

(Note on grandchildren: If the trust names only *living* grandchildren as beneficiaries – i.e. the language does not include future/unborn grandchildren – the beneficiary class is technically "closed". However, even if the beneficiary class is "closed", the including named grandchildren as beneficiaries offers its own kind of divorce-proofing protection. The inclusion of the extra grandchildren creates ambiguity about the true purpose of the trust, making it harder for a Probate Court judge to say definitively what the divorcing spouse's interest in the trust may be. This is an evolving area of Massachusetts law that bears watching.)

*Massachusetts Divorce-Proofing Remedy:* Update the Trust to create an "open class" of beneficiaries by expanding beneficiaries to include the beneficiaries' children or legal heirs. Creating an open class can have major drawbacks, which are further explored below, but it offers strong protection in the divorce-proofing context.

### **Spendthrift Clause: The Clearest Form of Protection**

Out of all the protections available to trust Settlers, the "slam dunk" of the group is a spendthrift clause. The spendthrift clause prevents a Trustee from paying out trust benefits or assets to a beneficiary's creditors, any individual or company that brings a lawsuit against the beneficiary, and (yes) a beneficiary's spouse seeking a divorce. In short, the spendthrift clause says



that any share of the beneficiary's assets/income that is assigned to a third party by a court is automatically canceled and kept by the trust.

In the Massachusetts divorce context, a spendthrift clause plays a key – but limited – role. A family trust that includes a spendthrift clause is generally protected from *direct assignment* of trust property to the spouse in the event of a divorce. Critically, a spendthrift clause will not prevent a Massachusetts court from performing an offset from the remaining marital property (i.e. non trust property) in consideration of the beneficiary spouse's interest in the trust. (See: Offset from Marital Property above).

In addition to protecting trust property from direct assignment in a divorce, spendthrift clauses have the added benefit of protecting beneficiaries who reside outside of Massachusetts. Moreover, unlike eliminating “ascertainable standard” language or creating an “open class” of beneficiaries, the simple addition of a spendthrift clause is unlikely to have unintended consequences on beneficial rights.

Massachusetts Divorce-Proofing Remedy: Add a spendthrift clause ASAP, unless there is a specific reason not to.

### **Settlor Intent: What Did the Trust Maker Mean?**

Another factor to consider is what is the primary purpose of the trust (or simply the “intent” of the Settlor in establishing the trust). The exact named beneficiary class is important to establish who should benefit from a distribution of the trust assets. Did the Settlor intend for benefits to flow to the children, grandchildren or some other group of beneficiaries? What level of certainty should a Settlor insert into the trust language to ensure distributions in accordance with his or her wishes?

In opposition to the ascertainable standard detailed above, the Settlor can require that the Trustee use his sole discretion in deciding and making distributions to a beneficiary or a class of beneficiaries. The Settlor is placing his faith in the ability of his named Trustee to make appropriate decision concerning the distribution or withholding of assets to or from the beneficiary. Here it should be noted that using a sibling or other relative as a Trustee should be examined very carefully as the Probate Judge may decide that a sibling would make decisions regarding the distribution in an unfair manner and thus cause the trust assets to be included as a marital asset to be divided. A professional independent Trustee who will adhere to the Settlor's stated intent and trust language is a sound and reasonable alternative.

One way that Settlor's intent has come up in recent cases focuses on grandchildren. Specifically, courts have focused on whether grandchildren are treated as beneficiaries or remaindermen. As noted above, a remainderman is the individual(s) to whom a beneficiary's trust interest will pass if the beneficiary dies while the trust remains in effect. In many cases, the remaindermen will include the beneficiary's children (e.g. the Settlor's grandchildren). However, Massachusetts courts have held that a remainderman's interests are weaker than those of named beneficiary. Thus, instead of treating the grandchildren as mere remaindermen, the Settlor *could* create an "open class" by treating the grandchildren as beneficiaries.

Why does it matter if grandchildren are treated as beneficiaries or remaindermen? It comes down to this: A Trustee is under no obligation to protect or preserve assets for the benefit of mere remaindermen. A Trustee's duty flows to the named beneficiaries. If a trust names a beneficiary's children as remaindermen, the Trustee is not expected to set aside any trust assets for the specific benefit of those remaindermen, or otherwise worry about how making a distribution will negatively impact the remainder interest of the remaindermen. In contrast, if those very same grandchildren are named as *beneficiaries*, as part of an open class, then the Trustee must consider the rights of the grandchildren (both born and unborn) when making distributions to any beneficiary.

Massachusetts courts try to determine the Settlor's intent when he or she created the trust when making determining if trust assets are subject to division in a divorce. If the only two beneficiaries are the children of the Settlor, the Court is more likely to find that the main purpose of the trust was to provide support for those two children, and that the beneficiary spouse's interest can be assigned a value and treated as an asset in a divorce.

*Massachusetts Divorce-Proofing Remedy:* Carefully scrutinize trust language to ensure that beneficiaries are defined as an "open class" and that no single beneficiary's interest can be defined from the surrounding language of the trust.

### **Power to Decant: Creating a Separate Trust for a Divorcing Beneficiary**

There are many other factors that are considered by the Probate Judge in deciding the [division of marital assets](#) and the [awarding and calculation of alimony](#) or [child support](#), but the basic language and stated intent of the trusts is something that you as a Settlor can control. One other factor that may

assist the Trustee in the operation of an irrevocable trust, following the Settlor's death, is to provide the Trustee with the power "decant" the assets from the established trust to another irrevocable trust with language more favorable to the one or more beneficiaries.

The Commonwealth of Massachusetts does not currently have a "Decanting Statute", but as long as the Trustee has discretion over the distribution of the income and principal, the courts have generally allowed a Trustee to decant trust property into a new trust. A major advantage of "decanting" assets from trust into another trust is simply this: A Trustee with the power to "decant" can create a separate trust that applies only to the divorcing beneficiary, and which offers specific divorce-proofing protections for that beneficiary, without impacting the rights of other beneficiaries.

Is there a downside to decanting? Two words: complexity and cost. While decanting the interest of the divorcing beneficiary into a separate trust can provide greater protection for a divorcing beneficiary, it can also sometimes create more problems than it's worth. Potential problems can include: Is it practical to separate trust assets into separate trusts? Will creating a separate trust create conflict between beneficiaries? Will decanting a separate trust during a divorce cause the Trustee and trust itself to be targeted by the beneficiary's spouse (and that spouse's attorneys)? Is it really worth the cost of preparing a decanted trust that might be subject to litigation?

*Massachusetts Divorce-Proofing Remedy:* Consider granting the Trustee the power to decant after exploring the potential downsides of decanting, including cost and complexity. If you are inclined to offer the power to decant, consider including some specificity about how the Trustee can or should decant the property, including considerations such as liquid vs. illiquid assets, and whether the trust should specifically provide for decanting in the event of a beneficiary's divorce.

## How Can Divorce-Proofing a Trust Impact Other Beneficiaries?

As noted above, the various tools available to trust Settlers to "divorce-proof" trust assets can have an impact on the rights of beneficiaries who are not going through a divorce. For example, eliminating an "ascertainable standard" means that the Trustee *alone* decides the reasons why beneficiaries get distributions. This could be problematic if you, as the Settlor, are most interested in ensuring that the trust is used to pay for your child's

college education, or cover medical expenses if needed, or cover the costs of a specific activity. By eliminating the ascertainable standard, the Trustee has complete freedom – and no specific guidance from you – on how and when to distribute income and assets.

Similarly, creating an “open class” of beneficiaries is no small matter. A Trustee who is managing assets for an “open class” of beneficiaries must constantly consider both the interests of the current beneficiaries and the future needs of grandchildren and even unborn grandchildren who are part of an open class. (Said another way: the interests of currently living beneficiaries must now *compete* with the interests of younger or even unborn beneficiaries.) In general, creating an open class will require the Trustee to be less generous to the current generation of beneficiaries, often resulting in *substantially* fewer financial benefits for the Settlor’s children or other named beneficiaries, as the Trustee socks away trust assets for the next generation.

Similarly, decanting provisions can have drawbacks. Providing the Trustee with the power to decant the trust in the event of a divorce can create unanticipated consequences, including family conflict among beneficiaries, major legal costs, and exposure to litigation. Indeed, a Trustee who chooses to decant the interest of a divorcing beneficiary may be viewed as “declaring war” on the beneficiary’s spouse, drawing the trust directly into the divorce in expensive and stressful ways.

Of all of the divorce-proofing measures discussed above, the least disruptive – and most likely to help all beneficiaries, not just those going through a divorce – is the inclusion of a spendthrift clause. The spendthrift clause largely accomplishes the first and most important task in divorce-proofing the trust: In general, the clause protects trust assets from being directly assigned to the spouse in a divorce. In addition, the clause offers useful benefits to other beneficiaries who may face lawsuits or other forms of collection actions which the clause protects against.

In determining how much divorce-related protection you want over trust assets, it is important to consider the impact that “divorce proofing” steps have over all beneficiaries, not just the married Massachusetts beneficiary who may get divorced. For these other beneficiaries, Settlers must consider whether the “cure is worse than the disease” in terms of modifying the basic terms of the trust to protect a single beneficiary at the expense of other beneficiaries.

## Divorce-Proofing a Family Trust Involves Complex Choices

So if you are a parent or grandparent creating a trust (or reconsidering a trust you already made) featuring least one married beneficiary living in Massachusetts, you should work with your estate planning attorney to consider how divorce-proof you want your trust to be, and the impact that divorce-proofing can have on other beneficiaries.

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