Trusts and Other Ways to Prepare for Impairment

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As Baby Boomers and their parents age, many of us increase our concern for how we can lessen the burden upon our families as we enter the twilight years. While we cannot avoid aging and its effects, we can plan for it and make it easier for family members to meet our needs in the future.

Living Trusts

While many people have Last Wills and Testaments, "Wills," sometimes containing Testamentary Trusts (trusts that do not come into being until someone dies), more and more people are considering creating Living Trusts as a means of managing their affairs through the end of life.

The Living Trusts that we recommend in such circumstances are created to own and manage property during the Settlor's (the person creating the trust) lifetime. Such trusts are "revocable," which means that they can be terminated at any time and the property returned to the ownership of the Settlor. Since they are revocable, there is probably no potential tax savings in using them, but there are numerous other advantages.

In addition to creating the Living Trust, the Settlor must transfer all of his or her property to the Trust, including investment accounts, automobiles, and real property. Usually the property is then titled in the name of the Settlor as Trustee, since the Settlor will usually name him or herself as the initial trustee. If the Settlor becomes incompetent or just grows tired of taking care of his or her financial affairs, the successor trustee named in the trust takes over. Usually this is accomplished by a simple resignation and appointment signed by the Settlor. The successor trustee can then mange the assets and pay the Settlor's bills without really missing a beat.

A Living Trust requires no financial inventories or accountings with a court. The trustee is a fiduciary and must put the financial interests of the beneficiary first before his or her own. If there is not a suitable family member to perform this task, then a bank or trust company can be appointed to this task and can be counted on to perform all the functions professionally for a modest fee. It is generally not considered a good practice to name your lawyer as your trustee, as a lawyer's best function for his or her clients is managing paper and not money.

Upon the death of the Settlor, the trust property will pass to the beneficiaries named by the Settlor in the trust when it was established, just as if it had been written in a Will. However, the property will pass without having the expense and delay of a probate proceeding.

When preparing a Living Trust, the lawyers of Woner, Glenn, Reeder & Girard, P.A. recommend that the family consider certain other related documents to assure the orderly disposition of affairs of the Settlor. Just in case some assets are not transferred to the trust due to oversight or some other reason, we recommend what is called a "Pour-Over Will." That is a simple Will that transfers all property upon death to the trust for administration. A probate proceeding may be necessary to administer this, so the best policy is trying to get all property titled in the trust in the first place, but it is considered good practice to execute such a document.

Oftentimes it is a good idea to create a Power of Attorney for stand-by purposes, again to deal with assets that the Settlor did not transfer to the Living Trust. It is also good to have a Power of Attorney for Health Care Decisions, naming a spouse and at least one other person as a "back-up" to the spouse to help make health care decisions when the Settlor is unable to do so. The Center for Practical Bioethics publishes excellent forms for Durable Power of Attorney for Health Care Decisions and Health Care Directives. They also produce an excellent workbook entitled "Caring Conversations" that can be very helpful for families of terminally ill patients, if the patient has previously completed the workbook. These forms can be found on the link, https://www.practicalbioethics.org/resources/caring-conversations#form

Power of Attorney

As long as someone is legally competent, he or she can execute a Last Will and Testament and a Power of Attorney ("POA"). A POA is most convenient and generally will allow the attorney-in-fact (the agent of the Principal) to conduct the business affairs of the Principal including signing and endorsing checks. However, such instruments must be used with caution as "beauty is in the eyes of the beholder." That is, banks or title companies do not necessarily have to accept them. They will often look at the totality of the circumstances and evaluate whether following the POA will expose the institution to unnecessary risk or liability.

Conservatorships and Guardianships

If a person has not executed a trust and is unable or unwilling to execute a Power of Attorney, family members can utilize the court system to help protect the individual and

manage his or her financial affairs. Conservatorships are designed to manage the assets, income and expenses of the Conservatee or Ward. However, if the proposed Conservatee does not voluntarily consent to this arrangement, this can become an adversary proceeding in which the mental competency of the proposed Conservatee is at issue. Doctors must be found who are willing to testify as to the competency of the proposed Conservatee. Conservators manage the assets of the Conservatee, Guardians mange the "person." This means that the Guardian has the authority to provide consents and make decisions in the best interest of the individual. Often the Guardian and Conservator are the same person appointed in the same proceeding.

These proceedings do provide accountability that sometimes does not occur with Living Trusts or persons holding a Power of Attorney. That means that the court appointed fiduciary (Guardian or Conservator) must provide annual reports and accountings to the Court that the judge must approve. While defalcation (theft from the estate) sometimes does occur, there is usually a bond to help protect the estate and criminal sanctions that may reduce the allure of such misdeeds. A bank or trust company can greatly reduce the chance of any such occurrence.

A good fiduciary, whether he or she is holding the position of Trustee, Power-of-Attorney, Guardian or Conservator, must be honest and competent above all else. The fiduciary may obtain investment advice from another source and obtain other professional services when necessary. However, if there is any doubt whatsoever concerning the integrity of the proposed fiduciary, efforts should be made to find and hire an appropriate financial institution or trust company that will provide these services in a professional and competent manner. While prices for professional fiduciaries may vary, generally this cost is minimal for the service and the peace of mind that such an institution can provide.

Conclusion

Generally, Guardianships and Conservatorships are to be avoided, particularly when the proposed Conservatee or Ward will not voluntarily cooperate. However, they are tools to be utilized for the best interests of the individual when there is no reasonable alternative. When the individual is competent and cooperative, there are several alternatives that will safely provide peace of mind and protection for individuals when the time arises, provided some planning and action is taken when it is possible.