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Estate Planning
Special Needs Planning

Newsletter



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Living Trusts and Powers of Attorney

There are several legal instruments that you can use in arranging your affairs. While most people are familiar with a will to provide for distribution of assets after their death, you can also create a living trust and/or use powers of attorney to manage your estate.

Living Trusts

A trust is a legal arrangement where a grantor assigns a trustee to hold the grantor's property for the benefit of others. If the grantor creates a trust before his/her death, it is known as an *inter vivos*, or living, trust. A living trust can be irrevocable or revocable, which allows the grantor to revoke or change the terms of the trust during his or her lifetime.

There are several advantages in creating a living trust. A grantor can create a trust and appoint himself as the trustee. This allows the grantor to hold the property for his benefit during his lifetime and maintain complete control over the assets transferred into the trust. The grantor can also name beneficiaries in the trust who will receive the property upon his death. In this way, the trust can take the place of a will, and distribute assets without going through probate. In addition, when a person uses a living trust to distribute property after his death, the distribution plan can be kept private. This is in contrast to a will, which is a matter of public record.

A trust can also allow for a successor trustee, as designated in the trust, to assume control of the trust in the event that the grantor/trustee becomes incapacitated due to illness, such as Alzheimer's Disease or dementia. In these instances, a trust can direct the trustee to use the assets for the benefit of the grantor.

William J. Kovatch, Jr., Attorney at Law, PLLC provides elder law services. The practice of elder law includes the representation of the elderly and the disabled in connection with:

- estate planning (wills and trusts)
- estate administration
- the application for public benefits such as Medicaid
- advance medical directives
- the creation of powers of attorney
- guardianship
- conservatorship,
- disability planning
- long-term care planning.

William J. Kovatch, Jr. is a member of the National Academy of Elder Law Attorneys, and admitted to practice law in:

- The District of Columbia
- New Jersey
- New York
- Pennsylvania
- Virginia

However, it is always a good idea to have a will in addition to the trust, just in case the grantor has other property that had not been transferred to the trust. In many cases, a grantor can create a living trust and a “pour-over” will. This kind of will leaves all of the property to the trust, so that the trustee can distribute the property in accordance with the grantor’s wishes.

Powers of Attorney

A power of attorney is a document where one person, called the principal, gives another person, called an agent, the legal right to act on his behalf. Powers of attorney can be general or limited. The key to the power of attorney is that the principal continues to own all of his property. The agent never has legal title, but can only act in the principal’s place. However, a power of attorney, while it can be enforceable if the principal is incapacitated, terminates at time of the principal’s death.

There are several types of powers of attorney. A general power of attorney grants the agent with the legal power to do anything the principal can do. A limited power of attorney assigns the agent with a specific transaction and only during a specific time. A durable power of attorney can direct an agent to act for the principal if and when the principal is incapacitated. Whether a general, limited or durable, the power of attorney must clearly state the extent of the agent’s authority.

While a power of attorney gives the agent the right to act in the principal’s place, having a power of attorney in place does not necessarily mean that third parties will recognize the agent’s authority. For example, certain institutions, such as banks or brokerage houses, may not accept a power of attorney. In order to make sure that the power of attorney is effective, it is a good practice for the principal to contact the institution beforehand to make sure it will accept a power of attorney.

While a power of attorney can be an effective tool, there are some limitations. The power of attorney does not survive the principal’s death. As a result, it cannot transfer title to property after the death of the principal. In order for a principal to direct the distribution of their assets after his death, he would still need either a trust or a will to direct how his property is distributed to the beneficiaries.

When it comes to living trusts and powers of attorney, you don’t need to have either one or the other: You can use both in your estate plan. For example, if a person does not transfer all of his or her assets into a living trust, a durable power of attorney can be a good back-up to make sure that an agent is appointed to manage the assets not held in trust during any period of the grantor’s incapacity. Likewise, using a living trust with a power of attorney and a pour-over will can be a good strategy to avoid probate as much as possible, while ensuring that a person has provided for the distribution of all of the assets he or she owns.■

Upcoming Speaking Engagements

“Estate Planning Basics”

Saturday, April 18, 2009 starting at 10:00am

Bethany Lutheran Church, 2501 Beacon Hill Road, Alexandria, VA 22306

This newsletter is for informational purposes only, and not meant to constitute legal advice. Quality legal advice requires a thorough look at the facts and circumstances surrounding your situation.