Estate Planning for You and Your Family

By Michael Toobin

Proper estate planning allows you to plan for yourself and your loved ones without giving up control of your affairs. The two main objectives are to receive maximum benefits for property ownership during one's lifetime and to plan for the orderly disposition of assets with a minimum of taxation. Your plan should give what you own *to whom* you want to receive it, *the way* you want them to receive it, and *when* you want them to receive it. Finally, it should save every tax dollar, professional fee and court cost that is legally possible to save.

Navigating the Terminology

In order to understand various estate planning techniques, knowledge of basic documentation is necessary. These documents include a testamentary will, a revocable living trust, a durable power of attorney, and a medical directive, which may or may not include "living will" language.

Both the testamentary will and the revocable living trust can provide the following benefits: control of property, instructions for the care of your loved ones upon your death, instructions for the disposition of your property upon your death, protective trusts for children and grandchildren, and estate tax planning. There are a number of disadvantages of a will that are not associated with a living trust. These include the fact that all property passing through a will goes through probate, which is the government-controlled administration of your estate. Specific costs and procedures are involved, as well as time delays in distributing property. Wills are fully public and open to inspection by anyone. Furthermore, wills do not provide instructions for the care of you or your loved ones in the event of your disability.

Living trusts, on the other hand, avoid probate, are private and do provide instructions for your care and that of your loved ones in the event of your disability. This is because you place the property in the trust while you are alive and so it begins working and continues to work during your lifetime and then upon your death.

A durable power of attorney allows your named agent to handle many of your financial affairs in the event you are unable to do so. Since it is "durable", it survives your disability. It permits your agent to do many things on your behalf, including withdrawing funds from bank accounts, signing contracts, selling or buying property, and filing tax returns.

A medical directive is a document in which you can name an agent to make medical decisions on your behalf. Basically, the agent is given the power and authority to consent to such medical care and treatment that you would choose and decline such care and treatment that you would choose if you were able to act for yourself. This would include the employment of medical personnel, admission and/or discharge from medical facilities and inspection of medical records.

Finally, a "living will" is a natural death declaration. It deals with the situation in which you have a terminal medical condition from which there can be no recovery and death is imminent. It allows you to direct that no artificial life-prolonging procedures be administered, except for those deemed necessary to provide comfort or alleviate pain.

Many families have a member who has special needs. This may be a child with a mental or physical disability, a spouse who recently suffered a stroke, or a parent experiencing memory loss. If this person is receiving, or may be entitled to receive, governmental benefits, special estate planning steps must be taken. This person's share of your estate must be protected. One way to do this is to place this interest into a trust that will protect it from governmental attachment and will not preclude the receipt of government benefits.

For many of us, life insurance makes up a large percentage of our estate. Proceeds from these policies are part of your taxable estate if you own the policies when you die or it is payable to your estate. This can be avoided by creating an Irrevocable Life Insurance Trust and having the trustee own the policies. Premiums are usually paid from gifts you make to the trust beneficiaries who can be your spouse, your children or whomever you prefer.

Special Needs Trusts

We all have a desire to provide for our loved ones. We do this by gift giving during our lifetimes or by a bequest at our deaths. However, there are many factors to consider when planning for family members who have special needs.

One of the most basic vehicles for property distribution is a Special Needs Trust (SNT). There are a number of ways an SNT can be created, however the two most often utilized are the third-party trust and the self-created trust. Since this is a general discussion, it is not intended to be a thorough presentation of all issues concerning SNT's, nor is it intended to address issues concerning eligibility rules for public benefits or the public benefits themselves.

A third-party trust is created by a grantor who wants to

provide for a beneficiary who has special needs without having those assets cause the beneficiary to be disqualified from receiving public benefits. The trust assets may supplement public benefits but must not be intended to replace these benefits. Therefore, the trustee of the trust must have the sole discretion as to the use or distribution of the trust assets. Legally, the assets must be unavailable to the beneficiary. In other words, the beneficiary cannot compel the distribution of the principal or the income of the assets. The discretion of the trustee to make payments for the benefit of the beneficiary must be total and nonreviewable. No person or entity, including a judge, should have the power or authority to substitute his or her judgment for the discretionary decisions made by the trustee.

Furthermore, the trust cannot be used for the basic support of the beneficiary. In fact, the trust assets must only be available for the special needs of the beneficiary. These are usually defined as assets used to maintain the beneficiary's happiness, comfort and luxuries of life when these items are not provided by public benefits. Language may state the assets may be used to best enable the beneficiary to lead as normal, comfortable, dignified, and fulfilling a life as possible.

SNT's can be established during the lifetime of the grantor, or they can be found in the grantor's will or Revocable Living Trust. If done during the lifetime of the grantor, the vehicle used is normally an irrevocable trust.

When the SNT is placed in a testamentary document (will or living trust), it is part of the general distribution plan of the grantor. Whether to use a will or a living trust is a decision to be made by the grantor. However, there are a number of factors to consider when choosing between a will or a living trust. Again, this issue cannot be adequately treated in this article. However, please be aware that there are distinctions and they should be discussed with the person who prepares your estate planning documents.

An SNT usually contains provisions dealing with the termination of the trust. This can be accomplished during the lifetime of the beneficiary or at his or her death. For example, what if the beneficiary's interest in the trust disqualifies the beneficiary from receiving public benefits? Or what if the beneficiary ceases to be deemed "disabled"? Furthermore, provisions should be included to distribute the remaining trust assets after the beneficiary dies.

Legislation that Makes a Difference

As people age they sometimes have the need to receive government benefits such as Medicaid. However, programs such as Medicaid were (and still are) known as means-tested benefits. In other words, these benefits are available to people with minimal income and minimal assets or resources. If a person possesses assets over a certain amount, that person would be ineligible to receive these benefits. Historically, individuals attempted to create discretionary trusts using their own funds without losing their entitlement to public assistance. They tried to shelter these assets in this type of trust vehicle. However, this technique worked very infrequently. Case law usually found that these self-created discretionary trusts remained available to the trustmakers and, therefore, remained available to the trustmakers creditors, including the government. Therefore, the assets in these trusts were countable assets for government benefit purposes. This was true in many cases, but there was no uniform national policy or law dealing with these trusts. All this changed in 1993 when Congress passed the Omnibus Budget Reconciliation Act (OBRA 1993). Under this legislation, assets in certain trusts were deemed to be protected as noncountable assets for government benefit purposes. This was especially true for disabled persons who had financial needs beyond essential medical care. OBRA permitted the retention of resources of a disabled person in a trust without those assets disqualifying the person from receiving government benefits such as Medicaid.

Payback vs Pay-to

There are two trusts that can be used with the disabled person's assets. One is a "payback trust" and the other is a pooled or "pay-to trust". With a "pay-to trust" when the beneficiary dies the remaining assets may be distributed to the nonprofit association that managed the assets. If the trustmaker does not want the assets going to this association, then the assets will be used to reimburse the state for the funds provided to the beneficiary for medical care during the beneficiary's lifetime.

The "payback trust" is the more commonly used trust. Here too, the state may reimburse itself from the remaining assets in the trust in an amount equal to the medical benefits the state has provided during the beneficiary's lifetime. This OBRA trust can be created by the beneficiary, his or her parents, grandparents, legal guardian or a court (in many cases the funds are the result of a successful personal injury lawsuit). Under the legislation, the beneficiary must be under the age of sixty-five years and be disabled under federal law definition. It is a wonderful vehicle to shelter the beneficiary's assets so that he or she can receive government benefits.

In both trust situations, the assets must be placed in a special needs trust. That is, the trust assets may supplement public benefits but must not be intended to replace these benefits. The trust mechanism would, therefore, be similar to the third-party created special needs trust discussed earlier (see Special Needs Trusts on previous page), and the same criteria stated above would apply.

It is extremely important that the grantor seek professional assistance in the preparation of an SNT. The advisor must obtain adequate information regarding the beneficiary's special needs and the public benefits that are being received or may be received in the future. Finally, and equally important, the grantor's wishes and desires need to be expressed to the advisor. Only then can a proper estate plan be formulated for the benefit of the special needs beneficiary. ■

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