

The Estate Planning Advisor

Estate Planning Tools For Every Situation

By Mindy Menke, J.D.

There are a variety of tools that an individual may use to pass assets to his or her heirs. When determining which tool is right for an individual, there are many factors to consider, including the size of the estate, who will receive what property and how, and the circumstances and special needs of those beneficiaries.

The first tool is the will. A will is a legal document that sets forth a person's wishes as to who is to receive what part of his or her estate. If a bequest is made to a minor, a typical will requires that gift be held in trust for the minor child until a certain age. In addition, a will designates guardians for minor children, and can include the person's wishes for his or her final arrangements.

A will can create a Supplemental Needs Trust for the benefit of a surviving spouse, or a disabled child. This trust allows the trust beneficiary to remain eligible for government assistance, including Medicaid, without having to spend down assets in order to qualify for those benefits. The assets in the trust, including any income produced by the assets, can be used, for the benefit of the beneficiary as a supplement to any government benefits. This allows for preservation of assets and increased quality of life for the beneficiary seeking governmental benefits. A Supplemental Needs Trust is ideal in a situation where there is likelihood that the surviving spouse may need nursing home care, or in the case of a child with an existing disability.

A credit shelter trust is another estate planning mechanism that can be created via will or a revocable living trust. Upon the client's death, the assets are poured into the trust, and the trustee has the authority to distribute income to the spouse and/or descendants for their health, education, and maintenance. This trust also offers the beneficiary protection against creditors, catastrophic injury, and divorce (i.e. the trust property is not considered marital assets in a divorce proceeding). Any trust beneficiary (usually the spouse) may be given a power of appointment that allows them to designate, via will, trust or other notarized instrument, to whom the remainder of the trust will pass and in what percentages.

Irrevocable Trusts are another common estate and Medicaid planning tool. Assets, typically a home, are transferred to the trust and are considered owned by the trust for Medicaid purposes. The Trustmaker(s) is entitled to income from the trust, to the extent that there is any, and lifetime occupancy of any home owned by the trust. All property tax and capital gains exemptions are also retained. Upon death of the Trustmaker(s), the assets in the Irrevocable Trust can flow into a credit shelter trust for the benefit of designated beneficiaries.

A revocable living trust is another estate planning tool that is used regularly in our practice. This trust is set up during the lifetime of the Trustmaker, with the expectation that virtually all of the Trustmaker's assets (excluding retirement assets) will be retitled in the trust name. Upon the death of a married Trustmaker, the assets in the trust flow into a marital trust, to be used for the benefit of the surviving spouse, and into a family trust (i.e., the credit shelter trust), thereby utilizing all available tax credits and exemptions. Upon the death of the second spouse, all of the assets pass into trust for designated beneficiaries. This process avoids probate and allows for protection against creditors, catastrophic injury, and divorce. It also offers remarriage protections in the event the surviving spouse remarries.

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