

## **Planning for Disability with a Living Trust**

**By Richard J. Shapiro, J.D.**

People often think of estate planning only in the context of “death planning.” However, failing to account for the possibility that someday you may need help managing your personal and financial affairs might prove to be a huge mistake. If no one is vested with legal authority to handle your affairs in the event of your incapacity, your loved one’s might be forced to file a petition for Guardianship in Supreme or Surrogate’s Court. Guardianships are time consuming, expensive, and cumbersome, as court-appointed Guardians are required to file annual accountings with the court.

One of the major advantages of a Living Trust as compared with a Will is that a Will is effective only upon the Testator’s death, and thus is of no value if the Testator becomes disabled during his or her lifetime. In contrast, a Living Trust is a contractual agreement that becomes effective as soon as it is executed. The Trust will typically provide that one or more *successor Trustees* are authorized and directed to administer the Trustmaker’s financial and personal affairs in the event of the Trustmaker’s disability. Note that the successor Trustees have control over only those assets actually owned by the Living Trust, highlighting the importance of transferring the Trustmaker’s assets to the Trust during his or her lifetime.

An important consideration in a Living Trust design is the mechanism for determining *when* the Trustmaker is in fact disabled. Many “boilerplate” trust documents provide that the Trustmaker is deemed disabled when a doctor, or maybe two doctors, make such a determination. Given the option, however, many people prefer having their spouse, adult children, or other loved-ones participate in such a critical determination. A Living Trust can include a “disability panel” comprised of one or more medical professionals as well as a combination of family members or friends. The disability panel may be given authority to make a determination of the Trustmaker’s disability by unanimous vote, by a majority, or any other method as determined by the Trustmaker.

Once the disability panel has made a determination that the Trustmaker is disabled, the successor Trustees will be authorized by the terms of the Trust to take control of the Trustmaker’s personal and financial affairs. Many Trusts will provide that the successor Trustees are to simply provide for the Trustmaker’s “general welfare,” or words of a similar nature. Such an open-ended approach gives the successor trustees little guidance, and gives little insight into the Trustmaker’s true feelings. Also, such generic language

gives the successor Trustees no authority to use trust assets to provide for the well-being of the Trustmaker's spouse, children or other beneficiaries.

Well-designed Living Trusts will provide the successor Trustees with detailed disability instructions that are customized to meet the Trustmaker's goals and objectives. Such provisions might include the Trustmaker's preference for living arrangements, their favorite hobbies and activities, preference for religious or spiritual practices, instructions regarding the care of pets, and a description of other beneficiaries whom the Trustees are authorized to provide for out of the trust assets.

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