CHAPTER TWELVE

Guardians, Powers of Attorney, and Other Documents

The trust document creates your trust and says who gets what and when as well as who sees to it that your wishes are followed. But it is only one of several documents that together make up your estate plan.

GUARDIANSHIP OF CHILDREN

All states allow a parent to nominate the guardian who will take over the raising of children at the death of the parents. If you are divorced, the surviving parent will typically become the custodian automatically, but we recommend naming a guardian anyway, just in case the other parent is unable or unwilling to act as guardian.

The guardian is the person who takes the place of the parent in raising the child. This person will also be the Social Security payee for survivor's benefits. The conservator is the person who handles the child's money that may not be part of the child's trust funds and is supervised by the courts.

Naming a guardian is typically done by language in a will, though in some states it can also be done by affidavit. The statement is simple, merely stating something like this: "I nominate and appoint Mary Doe of 123 Maple Street, Detroit, Michigan, as guardian of my minor children." Nothing fancy or complicated but legally sufficient when signed and witnessed in a properly drafted will.

Usually we name the person as “conservator” of the children’s money as well, though if the guardian is not the trustee of the children’s money, we would name the trustee as the conservator.

But isn’t the point of this book to use trusts and not wills? Yes. However, in every trust-based estate plan, there is still a will, though it is rarely used to transfer assets and is usually not probated because the trust takes care of all that. The will does have another use.

The will is one way to name a guardian and conservator for your children even if it is not formally probated. Your trust-based estate plan containing a pour-over will takes care of naming guardians for your minor children.

GUARDIANSHIP OF ADULTS

There is a whole section of the court system devoted to adult guardianship. Adults have accidents and strokes, develop Alzheimer’s disease and dementia, or have physical conditions that render them unable to care for themselves. If proper planning has not been done, the person’s family is forced to petition the court for guardianship and conservatorship in order to care for the person.

Court-supervised guardianship and conservatorship is a burdensome problem for the family. While the purpose is to be sure that the person and his finances are properly cared for, the court oversight and reporting requirements are a lot to put family members through. The court hearings, which are periodically required, may take most of a day and typically involve just waiting for your turn in front of the judge. Attorney fees are often required, as are court costs and a court-appointed guardian ad litem (a court-appointed person who is watching out for the interests of the person who needs the guardianship, usually an attorney), who charges the estate as well.

To avoid the court-ordered adult guardianship, all you have to have are two documents in addition to the trust itself. These are part of every well-drawn estate plan.

Durable Power of Attorney

A durable power of attorney is a permission slip entitling someone else to legally sign your name. It gives them the right to sign documents with the same authority and legal effect as if you had signed them yourself. Deeds, checks, tax returns, and any other document that you authorize can be signed by the person who has your power of attorney, who is, in effect, your agent.

Thus, your agent can pay your bills for you and do your business without getting permission from the courts. (Lawyers sometimes call your agent your "attorney-in-fact" even though these agents are not necessarily attorneys.)

There are two basic kinds of powers of attorney: immediate and springing. An immediate power of attorney is effective, valid, and usable the moment it is signed. We use this for those who want someone to help them pay their bills and manage things for them because they need the help right now. Maybe they can do it themselves, but it is more convenient to have someone's help. A son or daughter may run to the bank for an elderly parent who has physical limitations, for example, even though mentally the parent has no diminished capacity.

A springing power of attorney only goes into effect if a certain condition is met. Typically this might be if two physicians certify in writing that the person is incapable, due to physical or mental incapacity, of making reasoned decisions regarding his financial affairs. This is the kind most younger people want since they are healthy and do not want someone else to have the broad authority over their accounts and assets.

The danger of a power of attorney is that it can be misused. Since the agent can sign your name, she can do anything you can do, including sell your real estate, empty your bank accounts, and even borrow money on your credit. Be very careful to whom you give this power.

A power of attorney may be limited as to time or may be limited in scope. It may be convenient to have someone sit in for you on a real estate closing while you attend to other business. That person can sign all the necessary paperwork and receive the sale proceeds with a power of attorney. This type of document could be written to specifically limit the power of attorney to that one transaction, for a limited time period, and then the power of attorney would automatically expire.

In the estate planning area, we typically use very broad powers of attorney. The only restriction is that the agent, in most cases, cannot create or modify a person's will or trust.

A power of attorney can be revoked at any time by the maker by notifying the agent in writing. If this happens, it is a good idea to also contact any financial institutions that the agent may have dealt with to let them know of the revocation of authority and supply them with a new document containing the new agent's name.

One caveat: sometimes powers of attorney will not be honored even if

properly drawn up. While these are legal documents, there is no law at this time in most states that requires a financial institution or anyone else to recognize the authority of the agent. Not honoring powers of attorney is rare, but it does happen and there is no way to force the issue. Legislation has been drafted to overcome this problem, but in most states the problem exists. It is not a bad idea to have your power of attorney redone more often as you get older even if there are no changes. Institutions prefer more recent powers of attorney, and some will not honor those more than a year old.

Medical Power of Attorney

This is the second document needed to protect against court-ordered adult guardianship. Similar to the durable general power of attorney, the medical power of attorney grants to some other person the right to make medical decisions for you if you cannot make them for yourself. This decision-making authority is for such things as consenting to surgery and medical procedures but also extends to decisions on termination or continuation of life support, so picking the person with this power is a serious decision. You should also consider whether the person you are naming is emotionally capable of acting in this capacity. Terminating life support is a heavy burden, and some people just cannot do it, even if that is what the patient wants.

If you have a revocable trust, a durable power of attorney, and a medical power of attorney, it is unlikely that a judge would bother appointing a guardian or conservator, since you have all the help you need in the event of disability. Some of the petitions to appoint a guardian and conservator—the court-promulgated documents—even ask the question of whether such documents already exist.

DEFINING DISABILITY

Disagreements over when a person is actually mentally disabled to the extent that he or she can no longer make reasoned and intelligent decisions regarding legal or financial matters are common. Often children will disagree as to the extent of a parent’s disability. The parent herself my feel she is perfectly capable of continuing to run her own affairs, but the kids don’t think so. These situations lead to family disharmony and often end up being fought out in court. A potentially embarrassing event for the alleged incapacitated, as she is sitting there while the doctors and children testify as to all the things going wrong. And competency hearings are always

expensive, sometimes involving multiple attorneys.

This catastrophe can be easily avoided by proper language in the trust and power of attorney defining how to determine incapacity. You, as the trust owner are telling your heirs that if certain conditions are met, then you voluntarily relinquish control and let your trustees take over.

The conditions are up to you. Here are some ideas. The beauty of using these instructions is that you are the one who decides when incapacity exists. Remember though that a court can always overrule you. We do the best we can to convince them otherwise.

Let the children decide. This option puts a lot of faith in your children that they will do what is in your best interests, not their own. You could state in writing that if the majority of children (or all if you like) agree in writing that you are no longer capable of managing your legal and financial affairs due to mental or physical incapacity, they agree to empower your named trustee (s) to take over. The potential problem with this option is that you may not agree that you are incapable. You would then be in the awkward position of having to try to amend your documents to change that provision and may have to go to court to do so. However, in a tightly knit family where there is harmony and consensus, this may be a good option for you.

Get a medical professional's opinion. State for example that if two licensed psychiatric or medical professionals agree in a written statement that it is their opinion that you are incapable of handling your legal and financial affairs due to mental or physical incapacity, then your trustee may attach those statements to your trust and springing power of attorney and that the successor trustee and attorney-in-fact are now in control of your affairs.

A third option would be you voluntarily agreeing that if a court-ordered guardian and conservator is required, that you want those persons to be the same as you named as your trustee, attorney-in-fact, and medical decision-maker. This would help ensure that someone you do not want acting for you would not be automatically considered for those roles, or worse, that an unknown person, such as a court-appointed attorney charging big fees would not be appointed. A judge can do whatever she wants within reason, but most will want to follow your wishes.

You can of course go ahead and nominate someone to act for you at any time if you think the time has come to let go of the reigns. The potential issue would be whether you were competent when you made that change or if you were being influenced by someone to do something you normally wouldn't

do. Undue influence, if proven, could void your choice. It is a good idea to have a video made of you stating your decision with the reasons why and then have your attorney draw up the paperwork after a private conference with you. The attorney would then be a good witness, if it came to that, as to your competency.

I have had several instances where I was able to forestall an undue influence situation. In one case, a man brought his older “friend” to my office and told me that the man wanted to make a will and leave everything to him. I explained I would have to talk to the older gentleman in private due to attorney confidentiality (not necessarily true, but I suspected what was going on). When I talked to the man, it was clear to me he did not understand what was happening, and he said he didn’t know who the guy was that brought him there. I refused to do anything and contacted the Adult Protective Services office after they left. I am quite sure though that they went down the block to the next attorney’s office and eventually found someone to make a will. (My hope is that when my children come for my car keys, the self-driving car will be ubiquitous and I can drive off somewhere.)

LIVING WILL

If someone is going to make medical decisions for you, he or she will want to know what decisions to make. The living will (which is not a will at all) is a document you sign in which you state your wishes as to the use of life support, feeding tubes, organ donation, medical procedures, and such. While not a legally binding document in most states, it is a good thing to have because it avoids any disagreement among family members as to what you want done in particular situations if you are unable to tell them yourself.

PERSONAL PROPERTY DESIGNATIONS

In a good trust, there will be an addendum (which is just a blank page at the end of your trust, sometimes called Exhibit A) on which you can list particular items of personal property and who is to get each item. You do not have to use the form, but if there are special one-of-a-kind items like wedding rings or Grandpa’s shotgun, having a signed statement by you as to who is supposed to get those items avoids a lot of misunderstanding among the family. These provisions can be written into the trust document itself, but if you want to make a minor change, you would need to go back to the attorney to have an amendment done. With the addendum, you just write what the

item is and who gets it in your own handwriting. So when you buy that new snow blower, you can write in that it goes to your youngest daughter or whomever. Easy.

TRUST CERTIFICATE

This is a document containing a summary of certain parts of your trust language. It may also be called a certificate of trust existence, an abstract of trust, or another title, but the purpose is the same. It is requested by institutions to prove that the trustee has the authority, and the trust has the power, to conduct certain transactions. It may be used by a real estate title insurance company to guarantee that real estate being sold or mortgaged in the trust name is legally sufficient, title-wise. Brokers and bankers may want a copy as evidence of the existence of the trust, its proper name and date, and identification of the trustees and successor trustees. At your death, when your successor trustee shows up at the bank with your death certificate, the banker will know from the trust documents that he is turning over your accounts to the correct person. If you should change successor trustees, be sure to replace the trust certificates at these institutions to reflect the correct names.

Unfortunately, title companies and banks will not accept the original trust certificate made when you created your trust if it is more than 30 days old. They will want a new document and sometimes may even want a copy of the entire trust. They do not need to see your entire trust. The only part they need is the sections naming the trustees and what powers the trustees have relating to transferring assets such as real estate, stock, or deposit accounts. I suggest asking them for a form that would have language acceptable to them and copy that, attaching a photocopy of the relevant portions of your trust. Or have your attorney prepare a trust certificate for you. It shouldn’t cost too much.