



Who Will Protect Your Child from You?

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This article will address one specialized aspect of planning for your child with special needs. This specialized aspect follows but does not replace the extremely important preliminary aspect of creating wills and typical special needs trusts. The focus here is on planning for your potential incapacity and the steps needed to protect your child at that point.

Planning for Your Own Incapacity

Did you ever consider that you may need to protect your child's potential legacy from yourself if you decline mentally? Probably not. Most people do not consider that they could one day lose their ability to manage their financial affairs and could begin doing irrational things that could endanger their child's financial well-being.

Experts tell us that one in seven people over the age of seventy has dementia, a figure that rises to 37.4% by age ninety. Will you be one of those unfortunate people? If so, the nest egg you have saved all these years to provide for your child may be at risk.

Unfortunately, a not-so-small army of scoundrels prey upon individuals who are elderly, have a disability, or whose judgment is impaired. Once a person is known to be vulnerable, the marauders are nearly impossible to keep away. Some unscrupulous people sell lists containing the addresses, phone numbers, and email addresses of potential victims. Some go so far as to marry their mark.

No matter how well you protect your child today, dementia can change your behavior and capabilities dramatically. You should have no doubt that if you become vulnerable, the unscrupulous will likely target you. Who will protect your child in the early stages of your decline when family members may hesitate to interfere in your life or be unaware of subtle changes in your behavior that may cause a financial catastrophe? Your traditional estate plan that includes the use of trusts can provide enormous benefits after your death, but it

leaves a gap while you are alive. So, if you should one day detect even a mild loss of mental capacity, think hard about taking extra steps to protect your child's legacy.

A Possible Solution: The Gatekeeper Trust

How can you best protect your child from your own potential loss of mental capacity? Your first thought may be that your power of attorney naming a competent relative will resolve this potential problem if it develops. Unfortunately, that assumption would be incorrect. When you grant someone a power of attorney or proxy, you are not giving up your powers, but only sharing them with the person you designate as your agent. You can still do whatever you want with your money, so others can still take advantage of you. In addition, a power of attorney is revocable, and the name of your agent changeable at your whim.

Fortunately, you can protect your assets, and thus your child's legacy, by establishing a trust while you are alive and transferring a portion of your assets to it. One option would be to set up a trust that is irrevocable, name a bank or trusted family member as trustee, and completely give up control of the assets you transfer to that trust while continuing to be its beneficiary.

However, you may not want the limitations inherent in an [irrevocable trust](#). If you want flexibility, including the ability to change who will be entitled to your money at your death, but you also want to assure that your decisions will be made only while you are competent, consider creating a "gatekeeper trust." (This is not an official name but is descriptive of how the trust works.) This type of trust can best be explained with an example, based on an actual case.

Mrs. Hill's Story

Mrs. Hill was an elderly woman who remarried late in life. Several years later she realized she was in the early stages of Alzheimer's. She had a daughter with special needs and a son with financial problems coupled with a sense of entitlement. Mrs. Hill wanted to protect her children, particularly her daughter, but she was concerned about her husband, who was suffering cognitive decline and had been badgering her about not treating him fairly. Her husband would not be able to care for her much longer, therefore she planned to move in with her son and his family.

Mrs. Hill brought her banker to an appointment with an elder law attorney. She told the attorney that she wanted to be assured that her assets would be protected for her and her children, especially her daughter with special needs, but that she had no desire to make any substantial gifts while she was alive. She feared that her husband would take advantage of her, and she embarrassingly confessed that she had recently bought him a

new car when they dropped into a dealer's showroom just to look around. Furthermore, whatever plan she decided on now, she wanted the flexibility to change from time to time.

The attorney proposed the following plan: Mrs. Hill would establish a revocable trust that she could amend or revoke at any time. She was the initial beneficiary for life, and her children were to be beneficiaries upon her death. She would transfer all of her non-retirement account assets to this trust. The bank would serve as trustee and control the assets, until and unless she decided otherwise. However, she realized the day would soon come when she would not be able to make rational decisions, so she wanted some procedure in place to protect against her bad judgment.

Her attorney inserted a provision into the trust for a "gatekeeper." Under this gatekeeper provision, Mrs. Hill could amend the trust only with the consent of the gatekeeper, which would be the bank. The trust language specified that the gatekeeper must consent to any amendment she proposed, so long as Mrs. Hill had sufficient mental capacity to understand and make changes to her trust document and was not being coerced by someone else, like her husband or son.

After the trust document was executed, Mrs. Hill, with the help of a bank officer and her attorney, transferred the bulk of her assets, including her home, to this trust. She retained her checking account and a small savings account outside of her trust but designated the trust as the payable-on-death beneficiary of these accounts.

Several months after Mrs. Hill signed her gatekeeper trust, her husband, who was not aware of the trust, took her to his own attorney. At his direction, Mrs. Hill, whose mental condition had worsened, signed a new will that named her husband as sole beneficiary of her estate.

Mrs. Hill's condition eventually declined to the point that she moved in with her son and his family. While the son and his family were good caregivers, his sense of entitlement quickly surfaced. He requested that the trust pay for a large addition to his home, including an entertainment center; allegedly for his mother's use, which the trustee refused on the basis that the current living arrangements were entirely adequate for Mrs. Hill. The son then took the trust instrument to an attorney and asked about having his mother revoke the trust, which she was now willing to do simply because her son was requesting it. However, the attorney advised that the bank would first have to approve the revocation. The son, who realized that the bank would not approve a revocation of the trust at this point, was thus prevented from exploiting his mother.

Eventually, Mrs. Hill entered a nursing home with an Alzheimer's unit, and the bank used the trust to supplement her care and that of her daughter. Her son, meanwhile, was forced to do the honorable thing; wait for his inheritance.

After Mrs. Hill's death, her husband came forth with the will that purported to leave her entire estate to him. He was disappointed to learn that most of Mrs. Hill's assets had already been transferred to her trust, so little remained in her non-trust estate for him to inherit.

This plan worked to protect both Mrs. Hill and her daughter from Mrs. Hill's husband, her son, and, yes, from Mrs. Hill herself, when she lost her judgment and the ability to make her own rational decisions.

Conclusion

Is a gatekeeper trust appropriate for you? Because you have read this article all the way through, probably not. But keep the concept in mind for the future should you ever feel yourself sliding into a decline that may rob you of your judgment, for then you may indeed need someone to protect your child from you. When you feel the time is approaching, don't hesitate—do it with time to spare.

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