GV News
Question for December, 2012 Article

This article will appear in this newspaper as a public service. It is not intended as legal advice, and will address only general propositions. If you have a question about a matter which affects you, you should contact an attorney.

New Conservatorship Laws. Another reason to consider a trust.

Q: What if I become incapacitated and unable to handle my financial affairs?

A. If you have executed a valid financial power of attorney, the agent under the power of attorney should be able to handle many of your financial affairs for you in the event you become incapacitated. When dealing with such assets, the agent under the power of attorney would have a legal responsibility to use them only for your benefit. Note that the person named as the agent has no responsibility to serve in that capacity. If that person chooses not to act as your agent or is not able to do so, then the person named as backup agent, if any, would act as agent. Usually a valid financial power of attorney is all that you need for someone to handle your affairs in the event you become incapacitated, especially if your asset situation is not very complicated.

If you have established a revocable trust, and have transferred substantially all of your assets to the trust, then the person named as backup trustee would handle the trust assets in the event you become incapacitated. The authority of a trustee is questioned far less frequently than the power of an agent under a power of attorney. This can be very important when you are dealing with financial institutions and title companies; I have experienced occasions when banks have been reluctant to honor powers of attorney, even though they are legally valid.

If you do not have either a financial power of attorney or a trust in place (with substantially all of your assets transferred to the trust), then someone will need to petition the court to become appointed as your conservator if you become incapacitated. This is a costly process and has become much more costly due to laws that have come into effect in the past year. A conservator has always had to petition the court to become appointed. As part of the process, an attorney needs to be appointed to represent the incapacitated person as well. An investigator needs to be appointed by the court to assess the situation and determine if the person petitioning to be conservator is appropriate and if the situation warrants a conservatorship. Once a person is appointed as conservator, the conservator must provide annual accountings to the court. This usually requires the assistance of an attorney. There can be a lot of legal costs involved in a conservatorship.

In addition, as of September 1, 2012, conservators have increased financial reporting requirements. They now need to include budgets, sustainability reporting and have a new, more detailed annual accounting format. The overall purpose of these changes is to provide more meaningful financial information in order to better inform the court and the interested parties of about the sustainability of the ward's assets over their life expectancy. These are things that a good

conservator would take into consideration already, but now they are mandated by state law, and need to be submitted to the Court. The result of that is much higher costs in the year-to-year administration of a conservatorship.

The obvious way to avoid these costs would be to get a financial power of attorney or a trust in place. As mentioned before, the trust is the safest option, although in most cases a financial power of attorney will suffice. As always you should talk to a qualified advisor or attorney about your particular situation.

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