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WHAT YOU NEED TO KNOW ABOUT INCAPACITY, DEATH AND TRUSTS

By Jeremy C. Johnson

Nothing in life is to be feared. It is only to be understood. –Marie Curie (1867-1934)

We routinely get the question, “What should my spouse or children do with regards to my trust if I become incapacitated or die?” Every family situation and trust instrument is unique. As such, the specific details of the answer to this question can vary greatly. However, there are common threads that run through most families and trust instruments to which almost everyone can relate. The purpose of this article is not to describe in detail all the aspects of trust administration at incapacity or death; but rather, to provide you with a basic framework so that you can quickly achieve a sense of comfort and ownership of the trust administration process.

Incapacity of a Trustmaker

When a Trustmaker becomes incapacitated, it is usually necessary to transition control of the trust to a new Trustee. We often refer to this new person (or entity as the case may be) as the Disability Trustee. Each attorney drafts their trust instruments with their own flair and variations on this issue. As such, I will speak specifically to the disability provisions used in trusts drafted by our firm.

The primary disability mechanism in JGB trust instruments provides that the Trustmaker will be deemed incapacitated if two licensed physicians have determined that the Trustmaker is unable to effectively manage his/her property and financial affairs. This mechanism allows for the transfer of the Trustee ‘baton’ to occur without the involvement of an open hearing with the court resulting and a public declaration of incapacity of the Trustmaker. Indeed, our disability mechanism has been designed to maintain the privacy of the Trustmaker and his/her family as much as possible.

Practically, what should happen is that the Trustmaker's designated successor Disability Trustee, as named in the trust instrument, should inform the Trustmaker's JGB attorney of the Trustmaker's incapacity. Then, the JGB attorney will coordinate with the named Disability Trustee, Trustmaker's physicians the necessary written certification of incapacity. Finally, the JGB attorney will produce a new 'Certification/Affidavit of Trust' showing the change of Trustee and empowering the Disability Trustee to take financial control of trust assets.

Death of the First Spouse

For the survivor, the death of the first spouse is often a time of varied emotions and experiences. We frequently observe the fluctuating transition of the surviving spouse from numbness to intense, paralyzing emotion and back. Fear of the unknown with regard to how the couple's trust should be administered at the time of the first spouse's death only exacerbates and amplifies this experience. In order to stave off as much of this unpleasantness as possible, the surviving spouse should educate themselves on the provisions of their trust so that they can achieve a sense of control over the assets and the process.

Practically speaking, even with a trust there is work that must be completed at the death of the first spouse. If all of the funding was completed correctly prior to the death; then, probate should be avoided. However, the surviving spouse will still need to identify and value the assets of the trust. This will allow for any applicable adjustments in tax basis in the assets moving forward. In addition, if the trust plan contains any federal estate tax planning components, the emergence and funding of the exemption subtrusts will now need to be facilitated. Finally, the surviving spouse should have their estate planning documents reviewed and updated as necessary to reflect the loss of the first spouse. The surviving spouse will need to have new Certification/Affidavit(s) of Trust crafted for them to accurately reflect the continued lifecycle of the trust instrument during the survivor's lifetime.

Death of the Second Spouse

At the death of the surviving spouse, those people that the Trustmaker(s) chose to be the successor Death Trustee(s) will now need to implement the trust administration process. Again, there will be an asset identification and valuation process. Final debts, taxes and expenses will be dealt with. Then the Death Trustee will be responsible for distributing the trust assets to the named beneficiaries, or continuing the trust in its respective subtrust shares for the beneficiaries, as the case may be depending on how the Trustmakers' had the trust originally drafted. A federal Estate Tax Return may be required, depending on the value of the gross estate. There will also be final personal (and possibly fiduciary) income tax returns to be filed. If there are any assets outside of the trust, the Death Trustee will need to determine if a probate is required. As we have discussed at each prior point in the trust's evolution through this total process from creation, to incapacity, to first death, to second death; new

Certification/Affidavit(s) of Trust will need to be generated to prove the authority of the new Trustee and certify the continued existence of the trust instrument.

Getting it Wrong

“Do I really have to do all of this stuff?” The answer is an unequivocal ‘maybe.’ Remember, each family and trust instrument is unique. What can be said with certainty is that there is very little opportunity to go back after the fact and fix something that was not completed correctly during any prior single part of this evolutionary lifecycle of the trust instrument, once we move into another lifecycle period. A trust plan is conceptually comprised of two parts for the purposes of attaining the client’s originally stated goals. The first part is the creation of the documents based on the goals and objectives of the client. The second, and often overlooked part, is the appropriate implementation of the trust instrument at each point along the trust’s lifecycle. Each of these periods relies on the work completed by the Trustee in the prior periods, in order to successfully meet the goals and objectives of the Trustmakers. Just like in building a house, you cannot successfully complete the second floor of the home if all you have built is the basement. The home also requires the successful inclusion of the first floor structure.

Doing it Right

Successful trust administration has many variations. However, one common thread is meeting with your JGB attorney prior to the commencement of taking any ‘trust settlement’ actions. Certain decisions and actions/inactions can be irrevocable. As such, it is critical that you meet with your JGB attorney to be certain that you are on the right path with regard to the administration of your trust at an incapacity or death. Be certain to educate your successor Trustee(s) on your relationship with your JGB attorney and instruct them to initiate contact with your JGB attorney if you should fall to incapacity or pass away. Show them what your JGB trust binder looks like and where you keep it in your home. Your JGB attorney will explain the trust administration process to the successor Trustee and clearly discuss the various levels of support that JGB can provide during the process.

Investment in the Process

Price is what you pay, value is what you get. Anything worth having, whether it is a material item or it is professional advice and assistance, is going to require an investment of capital. The attorneys of JGB will clearly outline the fee schedule for proposed trust administration services at each point in a trust’s lifecycle before any action is taken or obligation is assumed. Drawing on the homebuilding analogy again; you wouldn’t spend time, effort and funds to build a beautiful home only to then just let it immediately fall into disrepair. The attorneys of JGB can work with you and your family throughout the lifecycle of your trust, so that it too does not fall into disrepair. Encourage your successor Trustee(s) to embrace the relationship you have

cultivated with your JGB attorney so that your goals and objectives can be met, even after you are unable to tend to them yourself.

Conclusion

Successful trust administration is as much of a critical component of your estate plan as is the drafting and execution of the original trust instrument. Plan and implementation; both are necessary elements to meet your stated estate planning goals and objectives. Neither component by itself will be the engine of success in the transition of your estate. Trust the attorneys of JGB to assist you and your family at each point along this journey.



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About the Author:

Jeremy Johnson is an experienced problem solver who helps individuals and businesses achieve and protect their goals of prosperity, stability and growth through appropriate planning. Jeremy takes great pride in making sure that his work for clients is always reliable, correct, and on time.

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