

## Who Will Manage My Affairs When I Become Incapacitated?

BY BEN KINIRY, ESQ.

Some things are worth repeating and one of them is how much I love Trusts. Following is an article years ago, but is worth repeating as you may have missed it the in the first go round.

In October I was speaking to a group of other professionals at the Greater Concord Chamber of Commerce regarding the use of trusts, when the rather accurate title of this article flowed out of me. It was then that I decided to educate you about the mysterious world of Trusts.

To understand trusts, we need to look back at the root of trusts. While attending the University of Connecticut School of Law, I assisted professor Robert Whitman, an expert in Trust law, with an article to be titled "Reducing the Need for Formal Trust & Estates Litigation," which discussed, in part, how trust law differs from contract law.

Professor Whitman's explanation to me at the outset of my research went something like this: Hundreds of years ago in Britain, if the husband/father/property owner had to go off to war, he would entrust his family and property to another man.



This other man was *entrusted with the greatest of responsibilities and was expected to perform at the highest of standards*. In modern terms, the property would be said to be HELD IN TRUST. Professor Whitman's primary argument was, and likely still is, that Trusts are different from other contracts because the duty to the holder of the property is a significantly higher standard. In simplistic terms, compare a contract to paint your house with the facts state above, enough said.

Now at the risk of upsetting Professor Whitman, a trust looks very much like a contract in that it is a writing representing the terms of an agreement among various parties.

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There are three basic parties to a trust. The person who transfers property into the trust (generally the person having the trust created) is known as the "grantor" or "donor." The "trustee" holds legal title or interest and is responsible for managing, investing, and distributing the assets or property of the trust. The Trustee holds the property for the benefit of the "beneficiary." The beneficiary holds an equitable or beneficial interest and is the person who ultimately benefits from the creation of the trust.

What is the purpose of a trust? Believe it or not potential clients sometimes say "I want a trust, my neighbor has one and I want one!" My response is "what

do you want the trust to accomplish?" Then there is that moment of silence... What you need to know is that a trust is designed to meet a goal or goals. When clients inform me of their goal(s) or what they are most concerned about, often the solution involves setting up a trust with terms to meet the goals and concerns. You will also want to understand that the trust terms, dictated by your stated goals, may continue after your (grantor's) incapacity and death.

So what will a trust do for you and your family? Depending on your situation, there can be several goals accomplished by establishing a trust. The most well-known benefit is

(con't. p. 20)

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**THE WHEEL IS BACK WITH GREAT PRIZES!**

**(Laboe & Tasker con't. from p. 3)**

avoiding the process known as probate. Certain trusts can also result in tax advantages both for the grantor and/or the beneficiary like income or estate tax savings, gaining a step-up in basis and the IRA Trusts discussed last month. Also, they may be used to protect property from creditors, to help the grantor qualify for Medicaid, or simply to provide for someone else to manage and invest property for the grantor and the named beneficiaries (generally has to do with control).

A **revocable** trust is sometimes referred to as a "living" or "inter vivos" trust. Such a trust is created during the life of the grantor rather than through a will. With a revocable trust, the grantor maintains complete control over the trust and may amend, revoke, or terminate the trust at any time. So, the grantor is able to reap the benefits of the trust arrangement while maintaining the ability to change the trust at any time prior to death. The disadvantage of a revocable trust is that the trust assets are countable to the grantor for purposes of determining Medicaid eligibility and does not provide protection against creditors or in the event of a divorce. The typical living trust terminates upon the death of the grantor and any property in the trust prior to the grantor's death passes to the beneficiaries by the terms of the trust without requiring going through the probate court process. This can save time, money and stress for the beneficiaries.

An **irrevocable** trust is created during the life of the grantor, who thereafter may not change or amend the trust. Any property placed into the trust may only be distributed by the trustee as provided for in the trust instrument itself. For instance, the grantor can provide that he or she

will receive income earned on the trust property. An irrevocable trust that provides for the grantor to retain the right to income only is a popular tool for Medicaid planning.

A **testamentary** trust is a trust created by a Last Will & Testament. Such a trust has no power or effect until the will of the grantor is probated upon his or her death. Although a testamentary trust will not avoid the need for probate and will become a

public document (trust are not a public document) as it is a part of the will, it can be useful in accomplishing other estate planning goals. For instance, the testamentary trust can be used to provide funds for the surviving spouse in a form that should neither be considered available nor have to be spent down if he or she should seek Medicaid eligibility to pay for long-term care (see special needs trust discussion following).

A **special needs** trust can be created by the grantor during life or as part of a will. Its purpose is to enable the grantor to provide for the continuing care of a disabled spouse, child, relative or friend. The beneficiary of a well-drafted special needs trust will have access to the trust assets for purposes other than those provided by public benefits programs. Thereby, the beneficiary will not lose eligibility for benefits such as supplemental security Income, Medicaid, and low-income housing. As discussed in a previous article, there are various types of special needs trusts.

Some **other trusts** used to aid clients on a regular basis are: for a child who will spend his/her inheritance faster than you can say "I wish I had set up a trust" (**spendthrift trust**), purpose of taking care of an animal you love (**pet trust**), benefitting a child addicted to drugs and alcohol (**substance abuse trust**), setting aside money for your grandchildren's educational expenses (**education trust**), **family compound or water front property trust**, and many, many more.

Think of the trustee as an extension of yourself. You want to block your assets from being utilized for things you don't agree with, however, you would like your assets to be distributed for the better good of yourself and your loved ones, as dictated by you, even after you incapacitated or in the eventuality of your death.

I encourage you to sit down with us and to tell us your goals and concerns and as a result you may very well see how a trust may be able to help you and your loved ones. What you learn may feel a lot like magic or maybe just give you goose bumps.

The information provided in this article does not constitute legal advice.

## *The Bow Young at Heart Club* meets the 2<sup>nd</sup> and 4<sup>th</sup> Wednesday



each month at 11:30 am at the Bow Community Building on Bow Center Road. Members and guests should bring a brown bag lunch. Beverage and dessert will be provided.

Annual dues are \$15 for residents and \$25 for non-residents.

### UPCOMING PROGRAMS

April 25, Pot Luck Luncheon

May 9, Linda Johnson, "For the Love of NH Loons"

May 23 A visit from Roxy, Bow's Police Dog

### 2018 TRIPS – MARK YOUR CALENDAR!

Contact Carol Walter 753-8000

**JUNE 6** - \$90.00 each - A Jazz and Blues Cruise w/ Buffet Lunch and Entertainment featuring Jeff Barnhart's Riverside Ramblers on board the M/S Mt. Washington.

**AUGUST 23** - \$90.00 each - A trip to the Winnepesaukee Playhouse to see "Ghost the Musical" w/ Lunch at Canoe Restaurant & Tavern

**SEPTEMBER 13** - \$77.00 - A trip to Nubble Lighthouse w/ lunch and live Entertainment at Foster's Clambake and a stop at When Pigs Fly Bakery.

**OCTOBER 18, 2018** - \$90.00 - All Aboard the Conway Scenic Railroad for a 21 mile 1 ¾ hour roundtrip to Bartlett w/ lunch at the White Mountain Hotel and Resort

**DECEMBER 6, 2018** - \$77.00 - Christmas with the Stars featuring Don Who and Cil Bee with a deluxe luncheon buffet at the Indian Head Resort.

Faye Johnson, Publicity -603-228-8149



It was a lucky day for Isabel Sinclair (left) at our March Game Day. She won 3 individual games of BINGO, as well as sharing the grand prize coverall with her friend Irene Muir (right).

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