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Standby Trust: Protecting Your Property against Incapacity





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What is a standby trust?

A standby trust is a separate legal entity that you create to own property for you (like a house, boat, or mutual fund shares). It is a tool you can use to give your trustee (the person you name to run the trust) the power to manage your property if you become incapacitated.

A standby trust is a type of living trust except that your property is not transferred to the trust at the time you create it, although some states require that at least a token amount of your property be transferred at this time. The trust stands idle until it is needed. If incapacity strikes, your property may be transferred to the trust (this is called funding the trust) by your attorney-in-fact, through the power granted to him or her by a durable power of attorney (DPOA) and used according to the terms of the trust. When the standby trust is funded, the trustee takes immediate control of your property to use it for your care and support, or in whatever way you have directed by the terms of the trust.

Tip: A standby trust may be preferable to a living trust if you do not want to change title to your property while you are still living and not incapacitated.

Tip: You should execute a durable power of attorney when you create your standby trust. Be sure your DPOA includes a provision that authorizes your attorney-in-fact to transfer your property to the trust.

Caution: A standby trust may not be available in your state. Check with an attorney to find out if your state permits a standby trust.

What are the advantages of a standby trust?

Avoids the need for guardianship because the trustee takes over upon incapacity

Your trustee takes immediate control of your financial affairs as soon as you become unable to do so for yourself.

Allows you to control your property until you become incapacitated

You continue to handle your own affairs until you become incapacitated. Your property does not transfer to the trust, nor does authority pass to the trustee, until it is necessary.

Allows you to name someone who is qualified to manage your property

A trustee should have honesty, integrity, and sound business judgment. Your trustee may need expertise if you have a business interest, real estate, or a large portfolio of stocks or securities. You name the person you want and trust to manage your financial affairs if you can't do so for yourself.

May serve your estate planning objectives

The property in trust can pass at your death to your designated beneficiaries (e.g., family members, charity) or can be held in continuing trust for the benefit of your chosen beneficiaries.

Is a standby trust right for you?

May be expensive

A standby trust is available to anyone as long as it is allowed in that state. Some states allow a standby trust to be unfunded when created, while other states require that at least token funding (\$10, for example) be made at this time. However, the cost of creating and managing a trust can be high. It may not make sense to go through the bother and expense unless the value of your property is significant.

May thwart your goal to avoid probate



If one of your goals is to avoid probate, a standby trust may work against you. If you die suddenly instead of after a period of incapacity, the trust remains unfunded and your property remains in your probate estate.

What does a standby trust need to say to be effective?

Your standby trust must be designed to protect your property and provide for your support during a period of incapacity. Among other things, your standby trust should contain the following provisions.

That income is to be distributed to or for your benefit

Although you may understand that this is the purpose of the standby trust, be sure to specifically direct the successor trustee to take care of you while you need it.

That gift-giving authorization is granted, if desired

This power may be important because it allows the successor trustee to continue your estate tax planning (for example, by taking advantage of the annual gift tax exclusion or by Medicaid planning).

That management of any business interest be delegated to family members or other qualified persons

This specific direction will ensure that your business will be delegated to someone you trust to carry it on for you.

Example

Example(s): Hal made a killing in the stock market a few years ago and invested his profit in real estate and bonds. He is still able to manage his money but is worried that this ability will diminish over time. He has no family and wants to make sure that he'll be well taken care of if he should become incapacitated. Although he plans to leave his property to charity at his death and would like to keep his assets out of probate, it is more important to him to be able to easily manage his affairs right now. He does not want to take the time and trouble to change the title to his property.

Example(s): Hal consults his attorney and is advised that a standby trust is permitted in his state. His attorney draws up a will that leaves Hal's estate to charity. His attorney also sets up a standby trust and draws up a durable power of attorney. Hal names his attorney as trustee and gives him the power to fund the trust. Hal specifically directs his attorney, as trustee, to provide for his support and care, if he should become incapacitated. He also directs that any remaining property in the trust be distributed to charity after his death.

Example(s): A few months later, Hal is hospitalized and slips into a coma. His attorney transfers Hal's property to the standby trust and uses it for Hal's care. Hal is kept as comfortable as possible until he passes away several weeks later. Hal's attorney then distributes the remaining property to the charity as directed by the terms of the trust.

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