ESTATE PLANNING

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I. THE IMPORTANCE OF ESTATE PLANNING

The ultimate goal of estate planning is to provide for the management and transfer of your property in the event of your death or incapacity, at the smallest financial and emotional cost to your family. A properly structured estate plan allows you to choose your beneficiaries, provide for the management of your assets, avoid probate and eliminate or reduce taxes. Without careful planning, your property may pass to unintended beneficiaries, may be reduced in value by unnecessary taxes or unsound investments, may be without adequate investment oversight or may be unavailable to you and your family in the event of your illness or incapacity. All of these potential problems may cause financial insecurity or bitterness during your lifetime or after death.

Estate planning also addresses such questions as who should own property and what property to own, whether it should be owned jointly or separately, whether trusts are needed for management, control or tax savings, and whether lifetime gifts should be made.

The Goals of proper estate planning are as follows:

1. To avoid or eliminate all death taxes
2. To avoid or eliminate the probate process and court proceedings
3. To put your family in control of your assets at death
4. To protect your family's inheritance from the claims of creditors and in-laws.

The primary tools for accomplishing these objectives are:

a. Will or Living Trust to provide for disposition of your assets
b. Beneficiary designation forms and ownership forms
c. Durable Financial power of attorney
d. Health Care Power of attorney

Almost everyone is in need of all of the above. Professional advice is necessary to customize the planning to the individual to accomplish their objectives.

This booklet reviews the basics of estate planning and should help you to assess whether your current plan adequately provides for your family.

II. PROVIDING FOR THE MANAGEMENT OF YOUR PROPERTY IN THE EVENT OF ILLNESS OR INCAPACITY.

A. DURABLE POWER OF ATTORNEY.

Many clients find that they can adequately provide for asset management in cases of illness or incapacity through signing a Durable Power of Attorney. This document enables a near relative to manage your assets in the event you are no longer capable of doing so. It avoids the costly and time-consuming process of having a Guardian appointed and management by the courts in the event of your illness or incapacity.

B. LIVING TRUST.

Another method of managing your assets and affairs, which also avoids probate, in the event of your illness or incapacity, is through the use of a “Living Trust” A Living Trust is a flexible arrangement in which you transfer assets to yourself, another individual or a trust company, as "Trustee". The Trustee invests, manages and disposes of the assets for your benefit and, after your death, for the benefit of the beneficiaries you designate in the written trust agreement. You can retain complete control of your investments (by acting as your own trustee), or completely delegate financial management to a professional Trustee. You can change the trust agreement or terminate the trust at any time. This can avoid the expense and delay of obtaining a court-appointed guardian to manage your assets.

III. PROVIDING FOR THE TRANSFER OF YOUR PROPERTY AT DEATH. AVOIDING PROBATE.

At your death, your property will be transferred in one of two ways. Certain assets, sometimes refereed to as nonprobate assets, will be distributed without reference to your Will and without supervision by the Probate Court. Nonprobate assets include:

1. Assets owned jointly with right of survivorship which will pass to the surviving joint owner.
2. Assets which pass to your named beneficiaries by virtue of a payable on death (POD) clause (Bank or Credit Union checking, savings, CD’s, etc.) or a transferable on death (TOD) clause (Security or brokerage accounts)
3. Assets held in trusts which will pass according to the trust agreement.
4. Life insurance and Annuity proceeds which will be paid to the beneficiaries you designate in the policy or beneficiary form.
5. Pension, profit-sharing, deferred compensation or other corporate death benefits, and Individual Retirement Accounts, which will be paid to the beneficiaries you designate in the beneficiary form.

With careful use of the above techniques and drawing a Will which coordinates with the disposition of your nonprobate assets, you can completely avoid probate. The probate costs in North Carolina can be as much as $6,000.00. You can even create trusts under the will for minors and others which can be funded after death without going through the probate process.

Your other assets will be distributed under the supervision of the Probate Court in accordance with your Will, or if you do not have a Will, as provided by North Carolina law. For example, if you are a North Carolina resident and are survived by a spouse and two children, but you do not have a Will, your spouse will receive the first $30,000 of personal property (if the children are also your spouse's children), plus one-third of the balance of your probate (does not apply to nonprobate assets) estate. Your children will receive the remainder of the probate estate.

If you truly wish to avoid probate, drawing a will or trust is only 40% of the work. Sixty percent (60%) of the work is examining each and every asset you own and determining the best way to get that asset where you want it to go without probate. A Will is NOT a panacea for all estate situations. In fact it is a very inefficient vehicle for passing one's personal property in most cases.

IV. ESTATE AND GIFT TAXES.

The federal government imposes a gift tax on lifetime gifts and an estate tax on transfers at death. The estate tax is based on the market value of your property the time of your death. The property subject to taxation at death includes such assets as real estate, cash, securities, partnership interests, personal and group insurance, individual retirement accounts, pension and profit-sharing plans, deferred compensation and stock options.

For 2015, we have a new Federal Estate Tax. The American Taxpayer Relief Act is now law and was enacted December 31, 2012.

Estate tax exemption. The Act sets the estate tax exemption amount at $5 million (indexed for inflation—the amount is $5,430,000 for 2015) per person and a top rate of 40% for 2015 and beyond. The Act allows the executor of a deceased spouse's estate to transfer any unused estate tax exemption to the surviving spouse (for decedents dying after 2010). Accordingly, a married couple can transfer up to $10.86 million of wealth without generating a federal estate tax. You should review your estate planning documents to ensure that any formulas contained in your documents which transfer certain amounts to certain individuals or trusts based on the estate tax exemption still make sense for you given this significant increase in the estate tax exemption.

The estate planning process is likely to focus on reducing or eliminating these taxes. This may be accomplished by taking maximum advantage of deductions and credits which include: (1) the "unified credit" or "applicable exclusion" which exempts a specified amount of your estate from tax ($5,430,000 as of January 1, 2015), and (2) the "unlimited marital deduction" which permits married couples to postpone the tax until the survivor's death (see section V).

North Carolina no longer levies an inheritance tax. As of January 1, 1999, the inheritance tax is repealed for persons dying on or after that date. North Carolina also repealed the Estate Tax in 2014.

IRS levies a gift tax on property passing during the lifetime of an individual. Unlimited tax-free gifts are permitted between spouses. In addition, there is a $14,000 per year per donee exclusion (which is indexed for inflation after 1997) for federal gift taxes. The law allows for unlimited gifts for educational and medical purposes but the money has to go directly to the educational institution or medical facility or provider. If you exceed the $14,000 limit, you may use up to $5,430,000 of the federal unified credit to avoid federal tax. North Carolina has repealed its gift tax effective January 1, 2009. The federal tax rates are the same for gifts and estate taxes.

V. TAX PLANNING FOR MARRIED COUPLES

A. THE BENEFITS OF A TAX-EFFICIENT ESTATE PLAN.

If you leave all your assets to your spouse either outright or in a qualifying "marital trust," the "marital deduction" may permit all federal estate tax to be postponed until your spouse's death.

Any assets remaining at your spouse's death will be taxed as part of his or her estate, however, since the marital deduction defers rather than eliminates the federal tax.

If the combined estates of you and your spouse exceed the amount excluded from estate tax ($5,430,000 for 2015), then some planning is required. Formerly use of a simple estate plan leaving everything to your spouse would cause unnecessary taxes to be paid at his or her death, reducing the eventual inheritance of your children. Today the surviving spouse can elect to use the exclusion amount that was unused by the deceased spouse; the surviving spouse can either use the $5,430,000 at the death of the first to die or the entire $10,860,000 at the death of the surviving spouse. In most cases this means that there is no need for an "estate tax-sheltered trust" for the surviving spouse. (Although you may want to shelter such amounts from the claims of creditors or future spouses of the surviving spouse).

For example, suppose a husband and wife have combined assets worth $10,860,000. The husband dies with a simple Will or Living Trust leaving his entire estate to his wife who elects to postpone the use of his $5.43 million exclusion. In order to do this, she must file a Federal Estate Tax Return with IRS showing the amount of the unused exclusion within 9 months of the date of his death. His wife then dies with a taxable estate of $10,860,000. No Federal or NC tax is imposed, leaving the children with net inheritance of $10,860,000.

Federal taxes can also be eliminated if the husband's Will or Living Trust if the husband instead leaves the amount exempt from estate tax ($5,430,000) to an estate tax-sheltered and asset protected trust for the benefit of his wife, and the balance of his estate directly to his wife. At the wife's death, her taxable estate will be limited to the $5,430,000 of assets which she owned outright, and that amount will pass tax-free to the children. The $5,430,000 held in the estate tax-sheltered trust will not be subject to tax as part of the wife's estate. In addition, any growth which occurred in the tax-sheltered trust would pass tax free.

By taking advantage of the exclusion available to each of their estates, the husband and wife will be able to transfer $10,860,000 tax-free to their children. In fact, the amount passing tax-free to their children will be even greater if the value of the estate sheltered trust appreciates between the death of the husband and the death of the wife, since the principal of that trust will not be taxable as part of the wife's estate, regardless of its value.

B. DESIGNING THE ESTATE TAX-SHELTERED TRUST.

The only requirement to avoid taxation of the estate tax-sheltered trust at your spouse's death is that he or she cannot be given an unlimited right to withdraw the principal of the trust. Subject to that restriction, however, the trust can be as liberal as you want. Your spouse can be given the entire net income of the trust and any principal needed to support his or her lifestyle, as well as a right to withdraw 5 percent of the trust principal every year without regard to need. Your spouse also may be given the right to determine who will receive the trust funds at his or her death, although you may prefer to limit the right to select the trust beneficiaries from among a designated class such as children.

Depending on the terms of the trust, it is possible for your spouse to be the sole Trustee. Otherwise, a co-Trustee can be named in your Will or Living Trust or selected by your spouse after your death to assist with the management of the trust funds. Your family can also be given the right to replace a Trustee at any time. If an independent co-Trustee is appointed, the co-Trustee can be given the right to terminate the trust at any time and distribute the remaining trust funds to your spouse. In addition, the co-Trustee may be permitted to pay any income not needed by your spouse directly to or for the benefit of your children or grandchildren.

C. DISCLAIMER TO PRESERVE OPTIONS.

If at the time you sign your Will or Living Trust, you are uncertain whether the potential tax savings will justify the creation of an estate tax-sheltered trust, the estate is not currently large enough to trigger a tax but may be at the time of your death, or if you would prefer to let your spouse make the decision to create an estate tax sheltered and asset protected trust after your death, complete flexibility can be accomplished through the use of a disclaimer or renunciation. The law allows you to refuse all or any portion of property left to you at death. When you “disclaim” you are treated as if you predeceased the person leaving you the property. Your Will or Living Trust leaves all property to the surviving spouse but further provides that if the surviving spouse disclaims assets, they would then pass to the estate tax sheltered or asset protected trust. Even though you disclaimed the asset, the trust permits you to receive income and principal from the trust during your life. This voluntary decision to put property into the tax sheltered or asset protected trust must be made within nine (9) months of your death.

D. IS THERE A NEED FOR A MARITAL TRUST?

In order to postpone all U.S. estate tax until your spouse's death, the balance of your estate in excess of the amount exempt from the estate tax (the "marital share") must be left either outright to your spouse or in a qualifying marital trust. Although there is no federal estate tax reason to leave the marital share in trust, you may prefer a trust (1) to assist your spouse with the management of the trust assets, or (2) to make certain that the property passes to your children at your spouse's death. The latter reason may be particularly important if you have children by a prior marriage. If the marital share is left in trust, your spouse must receive all the net income, and may have access to as much principal as you specify. If properly structured, the trust principal will be exempt from claims of creditors or future spouses.

VI. PLANNING FOR YOUR CHILDREN'S INHERITANCE.

If you leave property to your children or grandchildren, and do not arrange for the property to be held in a trust or by a custodian under the North Carolina Uniform Transfers to Minors Act, each child who has attained age eighteen will be entitled to receive his or her inheritance outright. If the child is less than eighteen, a guardian will be appointed by the Probate Court to manage the child's property until that time. The guardian will be entitled to reasonable compensation and will be required to account to the court for approval of his or her actions.

To avoid the necessity and cost of a court-appointed guardian, you should provide for the child's inheritance to be held in trust or by a custodian under the North Carolina Uniform Transfers to Minors Act (UTMA). A trust will be preferable if you want to ensure that your child will not receive a substantial inheritance outright at an early age (age 21 in the case of a custodial account under the UTMA) when he or she may not be ready to manage the funds or spend them wisely. A Trustee can be named to manage the trust funds and distribute them to the child as needed, until the child reaches the age selected by you for outright receipt of his or her inheritance.

Some parents prefer a single family trust for all children, with the Trustee authorized to distribute the funds among the children as needed until the youngest attains a designated age. Others prefer to establish a separate trust for each child, to last until the child attains a designated age or the Trustee decides that the child is ready to receive the funds outright.

VII. ASSET PROTECTION

Most, if not all, clients wish to protect the assets that they have accumulated over their lifetime from the claims of others: Creditors, bankruptcy, divorce, etc. Unfortunately, none of us know what may happen in the future. We may wish to protect our spouse from an unwise marriage after our deaths; we may wish to protect our children until they are old enough and mature enough to handle their inheritance.

These goals can be accomplished by the use of trusts. Trusts can be established after our deaths that can provide for the health, education, maintenance and support of our loved ones during the remainder of their lives. Such a trust, if properly drafted, is completely free from the claims of creditors or spouses after our death. Your family can even serve as their own trustees of such a trust. Imagine leaving your assets to your family in such a way that it is totally available to them whenever they have a need, and completely "Bullet Proof" from others. These trusts will not be subject to probate.

VIII. LIFETIME GIFTS.

If there is a possibility that your estate will be subject to federal estate tax even after you adopt an estate plan that takes full advantage of the available credits and deductions, the tax may be substantially reduced through lifetime giving. The most attractive gifts are assets that have a low current value, but are likely to appreciate in value or generate substantial income during your lifetime. A gift of such assets will avoid estate tax on both the appreciation in value and future income.

Lifetime gifts are subject to a federal "gift tax" which is imposed at the same tax rate as the estate tax. However, you are entitled to give up to $14,000 annually to each of as many persons as you like without paying gift tax or having to file a gift tax return. A program designed to take advantage of this "annual exclusion" from gift tax can be very effective. For instance, if you are married and have two children and four grandchildren, you and your spouse together can give $28,000 annually to each of the six younger family members, or a total of $168,000 annually. Even if your gifts exceed the available annual exclusions, no tax must be paid until your cumulative lifetime gifts exceed the amount exempt from estate tax ($5,430,000 or $10,860,000 for a married couple in 2015. Such gifts will, however, reduce the amount that can be transferred tax-free at your death since they will use up the exclusion that would otherwise be available to your estate.

If you prefer to retain some control over the assets given away, an irrevocable "Estate Reduction Trust" can be established for the beneficiaries. In some cases you may be a Trustee of the trust, and can continue to make the decisions involved in managing the assets. You can also give your spouse a lifetime interest in such a trust.

IX. LIFE INSURANCE TRUSTS.

Certain economic characteristics of life insurance make it ideally suited for gift giving. Many life insurance policies (especially group term insurance) have little or no value during your lifetime. Accordingly, the gift of a life insurance policy often has no gift tax consequence. Moreover, because term insurance does not have a cash value, a lifetime gift of term insurance has no impact on your current financial situation.

If you or your spouse own your insurance, federal estate tax on the insurance can only be postponed until the surviving spouse's death. If you transfer ownership of the policy to the Trustee of an irrevocable Life Insurance Trust and live three years after doing so, the proceeds will not be taxed in either your or your spouse's estate.

Insurance planning can play a major role in maximizing the value of your life insurance. By placing insurance policies in trust, the full value of such insurance can be made available to your surviving spouse and to the next generation undiminished by federal estate taxes, regardless of how large the balance of your estate may be.

X. SELECTION OF PERSONAL REPRESENTATIVES, TRUSTEES AND GUARDIANS.

While the need for a professional Personal Representative (the North Carolina term for "Executor") or Trustee will depend in large part on the complexity of your personal and financial circumstances, it is important to realize that the benefits of a well-structured estate plan can easily be jeopardized unless your Personal Representatives and Trustees not only have good judgment in nonfinancial and family matters, but also have the good sense to hire competent professionals with training and experience to make complex economic and tax decisions.

Since we plan estates to totally avoid probate, the Executor will have a simple job. After your death the Executor will merely have to record the will at the Courthouse and pay a fee of $30.00. In addition, the Executor files a tax certification form that certifies the size of the estate for tax purposes. That’s it for the Courts. Once the death certificate is obtained either the surviving spouse or the Trustee collects and invests your assets, pays the final bills, makes distributions to your family as needed, files the required tax returns, and makes the appropriate tax elections and decisions. Since there are many options available to reduce taxes, the period during the time that the final duties are accomplished provides a unique opportunity to achieve substantial tax savings for the estate and its beneficiaries. The surviving spouse or Trustee should either have the professional expertise to make the right decisions, or the wisdom to retain and follow the advice of an attorney or other professional who specializes in estate administration.

The surviving spouse or Trustee should also have access to the investment expertise needed to take your place as the "manager" of the family's resources.

If you have minor children, your Will should name Guardians for your children in case both you and your spouse die while they are minors. While the Trustee will manage your children's inheritance and provide funds for their expenses, it will be the Guardians who fulfill your role as parents and make personal decisions concerning the development and welfare of your children.

XI. EMPLOYEE BENEFITS AS PART OF YOUR ESTATE PLAN.

Your employee benefits will be paid at your death to the beneficiaries specified by the plan or named by you. In light of recent changes in the tax laws, it is very important to coordinate payment of these benefits with your overall estate plan. For instance, the beneficiary of your retirement plan in the event of your death may have been selected based on advice that is no longer current or in fact which can create substantial income tax problems. You and your spouse can wait until you are 70 ½ before you are required to take “Minimum Required Distributions” (MRD). If the surviving spouse is the beneficiary, they can “rollover” the retirement plan to a new IRA and postpone the MRD until they are 70 ½. Children and other beneficiaries cannot postpone the MRD’s; they have to start taking the MRD’s the year following the death of the participant. It then becomes crucial that they have the flexibility to spread out (“stretch”) the income taxes over their lifetime. If you are not VERY careful you could force the beneficiary to take all in a lump sum or over a period not exceeding 5 years. Even worse, if you have NO beneficiary, then it goes through probate and forces the beneficiaries of your probate estate to take it out in no more that 5 years.

XII. HEALTH CARE POWER OF ATTORNEY AND DECLARATION OF DESIRE FOR A NATURAL DEATH.

While alert competent adults are able to exercise their rights to make health care decisions, problems arise when an individual becomes unconscious, incompetent, or otherwise unable to make such decisions. Advance health care directives are the legal documents in which you give written instructions about your health care if, in the future, you cannot speak for yourself. North Carolina and many other states have recently enacted laws that encourage physicians and hospitals to follow the wishes of a patient who has signed a “Health Care Power of Attorney” and "Living Will" Declaration expressing his or her wishes regarding treatment and the cessation of that treatment. If you are concerned about this subject, you may wish to consider executing such documents. A Health Care Power of Attorney allows you to appoint someone to act as your health care agent to make health care decisions for you should it be determined by your physician that you are no longer able to make these decisions for yourself. The current forms for Health Care Power of attorney do NOT require the physician to determine that your are “terminally ill”, “suffering severe dementia” or “permanently in a coma”. Your chosen representative, typically a family member, can decide when there is no reasonable expectation of quality of life and can withhold, withdraw or stop any and all treatment. You may also give instructions on such things as organ donation, burial arrangements, and other directives. A Living Will is a legal document in which you can declare your desire that under certain conditions your life not be prolonged by extraordinary or artificial means. Unfortunately, the Living Will does require the physician to determine if such conditions exist allowing the cessation of treatment. Therefore, in my opinion, the Health Care Power of Attorney is far superior in meeting the wishes of the family. The documents should follow the form adopted by the North Carolina legislature and be delivered to your hospital, family physician and your closest relatives. North Carolina recently adopted new forms for both the Health Care POA and the Living Will.

XIII. GENERATION-SKIPPING TAX PLANNING.

If you leave your estate to your children, it will be subject to estate tax at your death and, to the extent it is not consumed during their lifetime, to a second estate tax at their deaths. Many people have tried to avoid this second estate tax by leaving all or a portion of their estates directly to their grandchildren or in trust for the lifetimes of their children. Unfortunately, such transfers may be subject to the generation-skipping transfer tax. For instance, if you leave your entire estate directly to your grandchildren, it will be subject to both estate tax and generation-skipping tax at your death. Careful planning can minimize the burden of this "double taxation". Each person is granted an exemption of up to $5.0 Million for property passing to grandchildren. If you are subject to this tax, the rate is a flat 40% in addition to the estate or gift tax.

XIV. CHARITABLE GIFTS.

If you make substantial gifts to charity each year or intend to do so at your death, you may be interested in establishing a charitable lead trust, charitable remainder trust, private foundation or other vehicle for charitable giving. Such a step can increase or accelerate the income and estate tax deductions available to you. Creating such trusts can allow income tax deductions now even though you are getting the benefit of the assets until your death.

XV. MARITAL AGREEMENTS.

Marriage gives your spouse an economic interest in your future income and accumulated wealth. The extent of your spouse's interest in your property will remain within your control only if you enter into an agreement which clearly fixes the rights of each spouse. Marriage also gives your spouse the right to a portion of your assets at your death, which can be limited by an agreement executed either before or after your marriage. An agreement which fixes your financial obligations in the event of a divorce or death may be especially important if you have children from a prior marriage or assets which you wish to see pass intact to specific beneficiaries.

XVI. YOUR ESTATE PLAN.

This booklet contains a very general discussion of the basics of estate planning. We caution you that an estate plan must be personalized to your objectives and financial situation. This requires a comprehensive review by a qualified estate planner.