ESTATE PLANNING OPTIONS

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Betty was born and raised in Oklahoma City, graduating from Putnam City High School (the original) in 1969. She attended the University of Oklahoma, obtaining a Bachelor`s Degree in 1973 and a Juris Doctorate in 1980. While in law school at OU, she was a member of the Dean`s Honor Roll and a member of the Board of Editors of the Oklahoma Law Review. Her article, "Estate Planning: Validity of Inter Vivos Transfers Which Reduce or Defeat the Surviving Spouse's Statutory Share" was published in the Oklahoma Law Review in 1979. Also while a law student, she clerked part-time for Justice Marian P. Opala of the Oklahoma Supreme Court.

Betty began her private practice of the law in 1981 with Fagin, Hewett, Mathews & Fagin, where she concentrated her practice in the areas of estate planning, elder law, business planning, probate, tax and employee benefit plans.

In 1987, she, along with other attorneys from the Fagin firm formed a firm, which is now known as Clark, Wood & Patten, P.C. Betty continues her areas of concentration - estate planning, wealth transfer, elder law, probate, guardianship and business planning. She has over thirty-four years of experience in these areas of the law.

Betty is a member of the National Academy of Elder Law Attorneys and the Oklahoma City Estate Planning Council. She was active in the Alzheimer`s Association from 1989 until 2007. She served as Chairperson of the Board of Directors of the Alzheimer`s Association, Oklahoma/Arkansas Chapter from 2003 to 2005. She has been a guest columnist for The Oklahoman. She served as a member of the Oklahoma Attorney General`s Task Force to Improve End-of-life Care in Oklahoma. She is currently serving as a member of the Hospice Foundation of Oklahoma.

Clark, Wood & Patten, P.C. handles matters for clients from estate planning to public utilities regulatory work. The attorneys at the firm have over one hundred years of combined experience in the sale and purchase of businesses, business regulation and organization, estate planning, wills, trusts, elder law, probate, guardianship and taxation.

TABLE OF CONTENTS

ESTATE PLANNING OPTIONS

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I. GENERAL ESTATE PLANNING

DURABLE POWER - REQUIRES PREPLANNING
- PROPERTY (ASSET & INCOME) & HEALTH CARE DECISIONS

It is advisable for every adult to have a durable power of attorney (except in those rare situations where there is no one the adult believes he can trust to carry out these duties for him). A durable power is a written document in which an adult may appoint an "attorney-in-fact" to represent him in the event of his incapacity. An attorney-in-fact is a person who has the legal authority to act on another's behalf and may be any adult, such as a spouse, a trusted friend or business associate. An attorney-in-fact does NOT have to be an attorney-at-law.

A general power of attorney is no longer valid when the person appointing becomes incapacitated, but a durable power remains valid. Under Oklahoma law, a power of attorney is durable if it contains certain language regarding the person's intention that the power remain valid even through incapacity.

Oklahoma law recognizes a "springing" durable power which means that you may sign a durable power document today which does not take effect unless and until you need it (when you are no longer able to make decisions). You may also sign a durable power which takes effect immediately. A durable power ceases to be effective upon death of the person appointing.

You may give your attorney-in-fact broad or limited powers to act on your behalf. For example, you may give the power to pay your bills, buy and sell property, borrow or lend money, make gifts, create a trust, make decisions regarding your person and/or other powers. All powers given by you must be exercised on your behalf and in your best interests, but there is no court to supervise your attorney-in-fact. Therefore, it is important to appoint a person or persons you trust.

It is advisable for everyone (young or old) to consider a durable power of attorney to help avoid a potential expensive and burdensome guardianship. If you already have signed a durable power of attorney or are appointed as an agent under someone else's durable power, you should have the document reviewed by your attorney.

If a durable power of attorney is to govern real estate or mineral interests, it is important to have all signatures on the durable power acknowledged and to include the legal descriptions in the durable power document.

TRUST - **REQUIRES PREPLANNING**
- ASSET & INCOME DECISIONS ONLY

If a person has created a revocable trust during her lifetime for her benefit, the trustee of the trust may make decisions on behalf of the beneficiary as to the assets held by the trustee. A trust is generally created by the preparation and signing of a written document (called a trust agreement) setting out the terms of the trust, such as who the trust is to benefit (referred to as beneficiaries), how the assets of the trust (referred to as trust estate) should be managed and distributed and who should carry out these terms (referred to as trustee). The trustee of a trust has no power to make decisions regarding a beneficiary`s person (such as health or medical decisions). The trustee`s authority to make decisions with regard to assets and income held in the trust estate does not cease upon death of the beneficiary, as it does with a durable power, conservatorship and guardianship. There is more discussion about trusts below.

CONSERVATORSHIP - **NO PREPLANNING**
- PROPERTY (ASSET & INCOME) DECISIONS ONLY

An individual with capacity to consent but who is unable to manage his property due to physical disability only may consent to the appointment by the court of a conservator to manage his property. A conservator has no authority over the person of the individual (referred to as a ward), meaning that a conservator has no power to make decisions regarding health care or medical treatment of the ward. A ward is the person for whom a conservator or guardian is appointed.

GUARDIANSHIP - **NO PREPLANNING**
- PROPERTY (ASSET & INCOME) & HEALTH CARE DECISIONS

Once a person becomes incapacitated, if there has been no advance planning (such as a durable power of attorney), a guardianship is the only valid method for obtaining the legal authority to act on the incapacitated person's behalf.

If there is no valid durable power of attorney signed by the incapacitated person before he or she became so, a guardianship may be necessary. A guardianship may also be necessary if all the persons previously designated by the incapacitated person are unable or unwilling to serve under the durable power. If a person has created and funded a trust, then the successor trustee named in the trust agreement will be able to manage the trust assets for the benefit of the incapacitated person, but will not, in the capacity as trustee, possess the legal authority to make health care decisions for the incapacitated person. An interested person such

as a spouse, adult child or trusted non-relative, may petition the court to be appointed as guardian of the person, property or both of the incapacitated person.

Guardian of the property (or estate) is legally authorized to make decisions regarding the management of the assets and income of the incapacitated person. Guardian of the person is legally authorized to make medical and health care decisions for the incapacitated person; however, if there is no Advance Directive for Health Care signed by the incapacitated person BEFORE his incapacity, a guardian of the person may not be able without a court order to withhold or withdraw life-sustaining treatment and/or artificially administered food and water, in the event of terminal condition, persistent unconsciousness or end-stage condition.

Current guardianship laws provide for greater accountability by the guardians and protection of the rights of prospective wards. However, compliance with these laws make guardianship an expensive, emotionally traumatic and time-consuming experience, which should be avoided if possible by the use of a durable power.

ADVANCE DIRECTIVE FOR HEALTH CARE - REQUIRES PREPLANNING
- HEALTH CARE DECISIONS ONLY

In May, 2006, the Oklahoma Advance Directive for Health Care form (commonly known as a living will) was amended to include an additional situation in which a person may, in advance, express their wishes regarding end-of-life care. With an Advance Directive for Health Care ("ADHC"), a person may appoint another to make health care decisions when the appointing person is no longer able to make or communicate such decisions. The attending physician and one other physician determine when the ability to make or communicate such decisions is not present.

With an ADHC, a person may set out his or her wishes with regard to end-of-life care, including but not limited to, the withholding or withdrawal of life-sustaining procedures and/or artificial administration of food and water in the event of a diagnosis of a terminal condition, persistently unconscious or end-stage condition (such as Alzheimer`s disease).

Each individual should decide for themselves in advance whether to take advantage of this opportunity under Oklahoma law to make their wishes known in a legally effective way by signing an Advance Directive for Health Care ("ADHC"). This is purely a personal decision on the part of each individual. If an individual has made the personal decision that she would not want life-sustaining procedures and/or artificial administration of food and water, if to provide these would only prolong the process of dying or if there were no hope of recovery, it is now imperative that you

sign and complete an ADHC. Legislation was enacted recently in Oklahoma which may interfere with physicians` standard medical practice in some end-of-life cases. So, it is more important than ever that every Oklahoman use an ADHC to make their wishes known (whatever they may be), and share it with their physician(s) and family.

The Act also clarifies that you may designate another to be your health care proxy in the event that you can no longer make health care decisions. A health care proxy must make decisions based on your known intentions, personal views and best interests. If evidence of your wishes is sufficient, your wishes control. If not, the decisions shall be based on the reasonable judgment of your health care proxy as to your values and wishes.

The ADHC must be substantially in the form set out in the Act to be legally valid. The ADHC must be signed by the individual before two disinterested witnesses. The ADHC must be followed by your attending physician or you must be referred to a physician who will follow the ADHC.

Life-sustaining procedures are defined in the Act as any medical procedure or intervention, including but not limited to the artificial administration of nutrition and hydration if the individual has specifically authorized the withholding and withdrawal of artificially administered nutrition and hydration, that, when administered to a qualified patient, will serve only to prolong the process of dying or to maintain the patient in a condition of persistent unconsciousness. Life-sustaining treatment shall not include the administration of medication or the performance of any medical treatment deemed necessary to alleviate pain nor the normal consumption of food and water.

Advance Directives are available from me free of charge or from the Department of Human Services at (405) 962-1721 or 1-877-283-4113, and many other sources.

<u>DNR</u> - NO PREPLANNING IF OTHER STEPS TAKEN
- CPR ONLY

Every person is presumed to consent to the administration of cardio-pulmonary resuscitation ("CPR") in the event of cardiac or respiratory arrest, unless a DNR form has been signed or another statutory exception exists. An attorney-in-fact with health care powers under a durable power document or a health care proxy under an ADHC may sign a DNR on behalf of a patient IF it is known that the patient under the then present circumstances would not have consented to CPR. Generally, a DNR is not signed as part of the estate plan process, but discussing a person`s wishes relating to end-of-life care is (for purposes of signing an ADHC).

II. WILL VERSUS TRUST

Inter Vivos Trusts (Living Trusts)

Inter vivos or living trusts are created by a person (called a trustor or settlor) during lifetime and may be revocable, or less often, irrevocable. Revocable living trusts are very popular and can be a useful tool in avoiding a probate court procedure at death and a guardianship procedure as to property (assets and income) in the event of incapacity, as to those assets transferred to the trust during lifetime. These materials discuss only the revocable inter vivos trust.

Decisions to be made with a revocable inter vivos (living) trust

(a) Selection of trustees - A settlor may be the sole trustee of the trust, may serve as trustee with another person or entity (such as a bank or trust company) or may appoint another person or entity to be trustee. It is advisable to designate successor trustee(s) in the trust agreement to serve when the initial trustee is no longer able or willing to serve.

(b) Selection of beneficiaries - A settlor may be the sole beneficiary of the trust during lifetime or may direct the trustee to distribute income and/or principal of the trust to others, as well as settlor, such as to the settlor`s spouse. A settlor may designate who the beneficiaries of the trust will be upon the settlor's death or may give another the power to appoint the trust property.

(c) Directions as to distribution or accumulation of trust income and principal - A settlor may direct the trustee to distribute all or any part of the income or principal of the trust or to accumulate income. These directions may include specific directions, such as making distributions when beneficiaries reach a certain age or finish college. The settlor may give the trustee discretion to distribute when the trustee believes it to be in the best interest of the beneficiary.

(d) Funding - A settlor may transfer all or any part of his or her assets to the trustee to be held under the terms of the trust agreement. However, those assets not transferred to the trustee will not be governed by the trust agreement and the benefits of having a trust may be lost as to those assets not transferred. However, the ownership of retirement plan accounts must stay in an individual`s name, but the individual owner may designate beneficiary(ies) to receive the benefit of the retirement account upon death of the individual.

Advantages of a revocable inter vivos trust:

Avoidance of guardianship in the event of settlor's incapacity and avoidance of probate at settlor's death, as to those assets transferred to the trust.

Relief of the burden of management of the settlor's assets if a third party is appointed as trustee.

Retention of control and enjoyment of trust assets by settlor.

Maintenance of privacy, assuming no lawsuit is filed with a court regarding the trust, such as a claim by a beneficiary of breach of duty by the trustee.

Somewhat speedier disposition and distribution of assets upon death with a trust as compared to a probate, except when receipt of federal estate tax release may prudently postpone complete and final distributions.

No court approval is required for sale or mortgage of trust assets as is required in a guardianship or probate proceeding.

Generally less expense than a conservatorship or guardianship.

More likely to get settlor's estate in order during lifetime.

Easier to amend than a will in some cases.

Disadvantages of a revocable inter vivos trust:

Present costs of creating the trust and transferring assets to it are generally higher than using a will.

Contrary to popular belief, the same estate and income tax savings available with a revocable living trust are available with a will.

Possible continuing expenses and/or burdens of administering the trust, including the potential requirement of an additional income tax return preparation and filing for the trust (upon death of settlor).

Lack of procedure to cut off presentment of claims by interested parties to a trust upon the death of settlor, as is provided in a probate.

More expensive than a durable power of attorney (but trust remains effective after death).

Perceived loss of simplicity with a trust (more paperwork than with a will)

Last Will and Testament

You may choose to use a will, instead of a revocable living trust, as the main governing document of your estate plan. If you do this, your will will govern only those assets which are held in your name only or as a tenant in common with another at your death. Assets held in joint tenancy with right of survivorship or which pass by designation of beneficiary (such as a life insurance policy or retirement benefits) are not generally governed by a will (unless the estate or the executor of the estate is designated as the beneficiary or no beneficiary is designated).

In order to be effective, a will must be filed with the court at death and a "probate proceeding" commenced. A person may use a will to name the recipients of his or her estate and to designate his or her personal representative (or executor), which is the person to be in charge of the deceased person`s affairs.

Even if you choose to use a revocable living trust as your main estate plan document, it is advisable to have a will prepared for you to designate your trust as the sole beneficiary of your estate, in the unlikely event a probate is necessary at death due to an asset being held in your name only or as a tenant in common, instead of being held in the trust.

III. MORE SOPHISTICATED OPTIONS

Irrevocable Life Insurance Trusts (ILIT)

During their lifetime a person may create an irrevocable trust to own (and apply for) insurance policies on his or her life. If done properly, the proceeds of the life insurance policy(ies) at death will not be includable in the estate of the insured for estate tax purposes. Anyone, excluding the creator of the trust, may be the beneficiary of this kind of trust. With an ILIT, the Trust owns the policy and designates itself as the beneficiary of the policy. Upon death of the insured, the Trustee collects the proceeds and holds, administers and distributes them for the benefit of the beneficiaries designated by the creator of the trust or distributes them directly to the beneficiaries under the terms of the trust agreement.

Removing these life insurance proceeds from the estate of the insured (for federal estate tax purposes) means significant savings in federal estate tax on the insured`s estate, adds liquidity to the insured`s estate plan and provides flexibility in administering the insured`s estate for survivors.

Family Limited Liability Company

Many families are choosing a family limited liability company (FLLC) to hold and manage all their business and investment interests. FLLCs can:

1. enhance future creditor protection;
2. resolve any disputes that may arise among the family to preserve family harmony and avoid litigation expense and problems;
3. control family assets;
4. consolidate fractional interests in family assets;
5. increase family wealth;
6. establish a method by which annual gifts may be made between members of the family without fractionalizing family assets;
7. continue the ownership of family assets and restrict the right of non-family members to acquire interests in family assets;
8. prevent a family member's interest in the FLLC being transferred because of a failed marriage;
9. provide flexibility in business planning not available through trusts, corporations, or other business entities;
10. facilitate the administration and reduce the cost associated with a family member's disability or probating a family member's estate; and
11. promote the family's knowledge of and communication about family assets.

Whether a FLLC is right for any client is a decision that should be made only after all advantages and disadvantages have been thoroughly discussed. Besides all the above advantages, FLLCs may also provide estate tax savings, if properly structured and operated.

IV. LONG TERM CARE INSURANCE

For those who do not want to dissipate their estates or rely on Veterans` or Medicaid long term care benefits to provide whatever long term care, if any, may be needed in future and whose income and/or assets are sufficient to make the payment of premiums, long term care insurance policies are available from various companies. There are usually offered several different types and levels of benefits, so that the premium cost can be controlled somewhat by your choices.

It is important, of course, to choose a company which is stable and will more likely be around to pay the benefits you are counting on and paying for. It is also important to choose an insurance agent you have trust and confidence in to guide you through the maze of choices you have with long term care insurance,

including whether it is right for you. It is also important to ask about the insurance company`s rating as to the ease or difficulty insureds experience in collecting benefits.

A few of the factors to keep in mind when you are considering the purchase of a long term care insurance policy include:

1. **Does the policy pay benefits only for long term care in a nursing facility or does it pay benefits for home health care also? If it does pay benefits for home health costs, does it pay at the same rate as for nursing facility costs or does it pay, for example, only 50% benefit at a setting other than a nursing facility?**

2. **How does the policy define disability? Some policies contain very narrow definitions of disability, so that benefits are difficult to obtain.**

3. **Always beware of any agent or professional who pushes you to close a sale. Take time to think over any major decision and discuss it with a trusted family member, friend or your attorney. Any agent or professional who has your best interest at heart will not pressure you or hurry you. Stable insurance companies do not usually have "limited offers."**

4. **How long do you want the benefits to be payable? Obviously, unlimited benefits will result in higher premiums. You may usually choose 2, 3, 4 and 5 year benefit periods.**

5. **Do you want a daily or monthly benefit? Are the premiums level? Is there a spousal discount? Will your agent be available to service the account and does the agent have experience with long term care concerns?**

6. **There are riders available on most policies which can tailor the policy benefits to you. For example, you can have a provision which allows you to stop the payment of premiums if you become disabled and are receiving benefits.**

7. **Benefits received under policies issued after 1996 by chronically or terminally ill insured persons will generally be excludable from income as payments from a health insurance contract for sickness (IRC Section 7702B).**

8. **Free consulting regarding long term care insurance policies is available by calling Senior Counseling, a division of the State Insurance Department, at 1-800-763-2828 or (405) 521-6628. They have a free brochure**

available. You may wish to call (816) 842-3600 to obtain a copy of A Shopper`s Guide to Long-Term Care Insurance published by the National Association of Insurance Commissioners, telephone (816) 842-3600. The Insurance Department, P.O. Box 534008, Oklahoma City, Oklahoma, 73152-3408, 1-800-522-0071 or (405) 521-2828, is responsible for providing information to the public about insurance and enforcing the insurance laws. They publish a free directory that includes financial information for all insurance providers licensed in Oklahoma.