

2009

## ESTATE PLANNING OPTIONS

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## BETTY GARRETT WOOD, J.D.

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 new firm, which is now known as Clark, Stakem, Wood & Patten, P.C. Betty continues her areas of concentration - estate planning, elder law and business planning. She has over twenty-eight years of experience in these areas of the law.

Betty is a member of the National Academy of Elder Law Attorneys and a member of the Oklahoma City Estate Planning Council. She has been active in the Alzheimer's Association since 1989. She served as Chairperson of the Board of Directors of the Alzheimer's Association, Oklahoma/Arkansas Chapter. She is 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.

Betty is a frequent speaker to civic and professional groups on the topics of estate planning, probate, elder law (including Alzheimer's disease) and related matters.

Clark, Stakem, Wood & Patten, P.C. handles a wide range of matters from estate planning to civil litigation 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, estate planning, organizations, elder law, probate, guardianship, commercial and securities litigation and taxation.

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## I. GENERAL ESTATE PLANNING

### DURABLE POWER - REQUIRES PREPLANNING - ASSET AND 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.

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. 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. Effective September 1, 1992, a durable power which is signed before two witnesses is entitled to a presumption of validity by third parties who are asked to cooperate with the attorney-in-fact under the durable power. If you signed a durable power prior to September, 1992, without witnesses, it may be advisable for you to have your attorney review your durable power.

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.

Effective November 1, 1998, a new Oklahoma statutory form of power of attorney is available. This statutory form of power of attorney is durable and with it a person may designate another to make decisions for him or her regarding property or assets. A person who wishes to use this new statutory form has several options to choose within the form, such as the types of specific powers which he or she may desire to give to another. It is important a person understand the broad scope of the power before choosing it. The form does not spell out the broad powers given to the attorney-in-fact or agent; those are set out only in the statutes. Also, this statutory form does not govern decisions regarding the person such as health and medical decisions. Presumably, this form was enacted so that persons could take advantage of the durable power without consulting an attorney and avoid the expense.

The Department of Human Services has available free of charge to the public a Durable Power of Attorney form which deals only with powers regarding the person, such as health care. DHS also has available Do Not Resuscitate form and instructions and Advance Directive for Health Care and instructions without charge by calling toll free 1-877-283-4113 or if in the OKC area 962-1721.

TRUST - REQUIRES PREPLANNING  
- ASSET DECISIONS ONLY

If a person has created a revocable trust during his lifetime for his own 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 setting out the terms of the trust, such as who the trust should 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 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  
- ASSET 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 ward, meaning that a conservator has no power to make decisions regarding health care or medical treatment. A ward is the person for whom a conservator or guardian is appointed.

GUARDIANSHIP - NO PREPLANNING  
- ASSET AND HEALTH CARE DECISIONS

Once a person becomes incapacitated, if there has been no advance planning, 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 or trust created by the incapacitated person while he or she still had capacity, a guardianship may be necessary. An interested person such as a spouse or adult child may petition the court to be appointed as guardian of the person, property or both of the incapacitated person. 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 such decisions. The attending physician and one other physician determine when the ability to make 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 whether he or she wishes to take advantage of this opportunity under Oklahoma law to make their wishes known in a legal 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 wishes to have either or both life-sustaining procedures and artificial administration of food and water, withheld or withdrawn in these circumstances, it is advisable to sign an ADHC. Whatever your wishes are in this regard, make them known to your family and physicians.

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.

The U.S. Congress passed the Patient Self-Determination Amendments in 1990 requiring hospitals and other institutional providers of health care services to offer to Medicare and Medicaid patients written information about their rights under state law to sign advance directives or living wills.

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

DNR - NO PREPLANNING IF OTHER STEPS TAKEN  
- CPR ONLY

Every person is presumed to consent to the administration of 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, a health care proxy under an ADHC or a guardian of the person may sign a DNR for another.

## 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 irrevocable. 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.

(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. 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 settlor's 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.

### 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.

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 estate tax releases may prudently postpone complete distributions.

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

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.

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

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.

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 remains effective after death).

#### 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). 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 their personal representative (or executor), which is the person to be in charge of the deceased person's affairs.

### 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 them for the benefit of the beneficiaries designated by the creator of the trust or distributes them to the beneficiaries under the terms of the trust agreement.

Removing these life insurance proceeds from the estate of the insured 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 rely on Medicaid long term care benefits to provide whatever long term care, if any, is needed and whose income and/or assets are sufficient to make the payment of premiums, there are long term care insurance policies 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 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.

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

- A. 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?
- B. How does the policy define disability? Some policies contain very narrow definitions of disability, so that benefits are difficult to obtain.
- C. 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."
- D. 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.
- E. 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?

- F. 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.
- G. 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).
- H. 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.