Matters to be Considered in Estate Planning

I. What does your family need to know?

A. Information regarding your estate and financial affairs

⇒ Title documents – Real property deeds and vehicle titles – title will have to be transferred.

⇒ Insurance policies – claims will have to be made and owners/beneficiaries changed.

⇒ Payment records – creditor claims will have to be confirmed

⇒ Investment and deposit accounts – title and signature cards will have to be changed and cash may be needed to pay bills and beneficiaries.

⇒ Wills, trusts, powers of attorney – these documents will be used to effect a smooth transition for family members.

⇒ Income tax records - a final income tax return will have to be prepared.

B. Information regarding your desires

⇒ To whom do you want to transfer your property? – by will, trust or gift.

⇒ What are your wishes for your medical care? – by Medical Power of Attorney, Medical Directive and Anatomical Gift

II. What are your choices in transferring your property?

A. How do you transfer your property …

⇒ during your lifetime ?

(1) Excluded gifts

(a) Annual exclusion gifts - $11,000 per donor per donee per year

(b) Education expense gifts – direct payment of tuition to school

(c) Medical expense gifts – direct payment for medical care to provider

(2) Transfers to an Irrevocable Trust

(3) Taxable gifts

⇒ at your death?

(1) Will – probate assets

(2) Contract designations - non probate assets

(a) survivorship accounts

(b) retirement plan benefits

(c) insurance benefits

(3) Revocable trust/living trust

B. When should you transfer your property?

⇒ Why transfer now?

(1) A transfer of property out of your estate now decreases the value of the estate.

(2) A transfer by gift is more tax-efficient than an estate transfer.

(a) Gift tax is assessed on the value of the gift and paid by the donor, from the remainder of the estate.

(b) Estate tax is assessed on the value of the estate and is paid from the assets of the estate. Therefore, estate tax is assessed on the assets used to pay the tax itself. The transferee receives less because tax is paid on the entire transfer including the amount of the tax.

(3) The property transferred will appreciate in value over the remainder of your life outside of your estate.

- ⇒ Why not transfer now?
  - (1) You want to keep control of your assets.
  - (2) You need the assets and cash flow to live on.
  - (3) The transferred property will not receive a step up in basis at your death.
  - (4) The transfer may make you eligible for medicaid for a period of time.

III. What if you become incapacitated? How can you provide for substitute decision making?

- A. For decisions on medical care and organ and tissue donations the appropriate documents are
  - (1) Medical Power of Attorney
  - (2) Medical Directive
  - (3) Anatomical Gift
- B. For financial decisions the usual document is a Durable Power of Attorney.
  - ⇒ The Durable Power of Attorney Act requires, among other things, that the instrument contain words showing the principal's intent that the authority conferred on the attorney in fact or agent shall be exercised notwithstanding the principal's subsequent disability or incapacity.
  - ⇒ All powers of attorney terminate at your death.
  - ⇒ A Power of Attorney is inadequate because it terminates upon your incapacity.
- C. A Court will appoint substitute decision-makers if you fail to plan ahead.
  - ⇒ Guardian of your property
  - ⇒ Guardian of your person
  - ⇒ These could be the same person.
- D. A Living Will/Revocable Trust will provide a substitute decision maker, the Trustee, for financial decisions.
  - ⇒ It won't be effective as to any property not transferred to it.
  - ⇒ Most people don't like having to deal with another entity, the trust.
  - ⇒ Termination of the trust depends upon its terms.

IV. Do you want anything particular for your funeral arrangements?

V. Who should be your executor?

- A. Your spouse is not always the best choice.
- B. Joint executors, even if they are your children, may complicate the proceedings.

VI. What circumstances create special problems?

- A. You have beneficiaries who are either minors or incapacitated. They will be unable to manage whatever property is given them. Provision needs to me made for a guardian or trustee.
- B. You are a physician. Does your executor understand the responsibility for disposing of your medical records and drugs?
- C. You have out of state assets. Out of state assets are subject to the laws of the state where they are located and may require a special process to change title. This is called an ancillary administration although there are now abbreviated procedures in most states.
- D. You have property acquired while living in multiple domiciles. The law of the state where you resided when the property was acquired governs property rights and interests, and property laws vary widely from state to state.

E. Your spouse is not a citizen of the United States. The deduction from your estate for property transferred to a surviving spouse (called the marital deduction) is not available to the estate of a decedent whose spouse is not a citizen.

VII. Taxation

A. What taxes are applicable?
   - ⇒ Income tax. There will be both a final income tax return and an income tax return for your estate.
   - ⇒ Gift tax. There may be a gift tax return for any gifts.
   - ⇒ Estate tax. Both the return and the tax payment are due nine months after your death.
   - ⇒ State Inheritance tax.
   - ⇒ Generation Skipping tax. Tax on transfers to persons in a generation more than one below yours.

B. Who is responsible for filing the return and paying the taxes?
   - ⇒ The Executor.

C. Where does the money come from?
   - ⇒ Your estate, provided you have planned for it.
   - ⇒ Otherwise, the beneficiaries will have to pay it.