AN ESTATE PLANNING PRIMER

Estate planning is the continuing process by which a cohesive plan is established and maintained to build and transfer wealth. An estate planning attorney works with other financial professionals to assure that the plan is effective.

ESTATE PLANNING GOALS

- To maximize what you have built up in your lifetime.
- To protect against costly guardianship proceedings in the event of your disability.
- To minimize the difficulty and expense of transferring your property upon your death.
- To assure the transfer of inheritances to the proper beneficiaries in a manner best suited to the particular circumstances of the beneficiaries involved.

WHEN TO REVIEW AN ESTATE PLAN

You should review and revise an estate plan when:

- Having a new child or grandchild.
- Getting married or divorced.
- Experiencing a substantial change in net worth.
- Changing jobs or retiring.
- Selling your business or losing a partner.
- Moving to another state.
- Tax laws change.
ELEMENTS OF AN ESTATE PLAN

Wills

It is very important that wills are carefully drawn and cover all contingencies relating to the passage of property.

Without a will, probate property can pass to undesired beneficiaries, estate costs can increase and estate-draining disputes can occur. Potential problems include:

- If the deceased is survived by a spouse and children, property will be divided between the surviving spouse and children as provided by state law.
- Even if property passes as desired, there will be significant extra surety bond costs.
- Conflicts can occur as to who should administer the estate.
- Parties can die in an unexpected order or the survivor can die quickly, resulting in an unintended passage of property.
- Minor beneficiaries will require costly guardianships which could have been avoided.

Guardians

The parents of a minor can designate, in their wills, who they want to be appointed as guardian of their minor children on their deaths, and adults can designate who they wish to have appointed as their guardian if that becomes necessary because of incapacity.

- An individual guardian must maintain a surety bond on which a premium must be paid annually.
- The guardian must report all income and expenditures to the court.
- All records are public.
- The guardian is restricted to specified investments.
- Guardianship of property can be avoided through revocable trusts and powers of attorney for property.

Living Wills and Powers of Attorney for Health Care

Living wills are declarations of intent to the attending physician that if, in the judgment of the physician, death is imminent, death delaying medical or surgical procedures should be withdrawn except for the administration of medication, sustenance and medical procedures which provide comfort care.
Powers of attorney for health care are documents designating an agent to act on behalf of an individual to make decisions regarding personal care, medical treatment, hospitalization and health care and authorizing the agent to have access to medical records. A specific provision is included allowing the individual to indicate to the agent a preference regarding the withholding or removal of life-sustaining treatment. The agent can be any person, including a close relative or friend, but cannot be the attending physician.

**Revocable Trusts**

Revocable trusts, also known as Living Trusts or Declarations of Trust, are self-declarations of trust which the creator of the trust (the “grantor”) retains the right to amend or revoke. They can include all of the provisions of a will regarding estate distribution without the need for probate to make them effective. Revocable trusts provide all of the benefits of joint tenancy ownership without the risks and disadvantages.

**Benefits in the event of a disability:**

- Provide immediate access to funds.
- Avoid the need for costly court guardianship proceedings.
- Assure that the designated person or persons will be responsible for the management of financial and business matters.
- Maintain privacy.

**Benefits upon death:**

- Provide for the orderly passage of property.
- Avoid probate proceedings.
- Preserve privacy regarding disposition of the trust estate.
- Allow for continuity of management.

**Life Insurance**

Life insurance can provide valuable liquidity in many estates. When buying or holding life insurance, it is important to be certain that:

- Beneficiary designations are current.
- There are proper trust provisions for any minor beneficiaries.
- If necessary to reduce or avoid estate taxes, a life insurance trust or other transfer of ownership of the life insurance has been considered.
Powers of Attorney for Property

Powers of attorney for property authorize a designated person, such as a close relative or friend, to transact business and financial affairs as an agent. This can specifically include the transfer to a revocable trust of assets which were not previously placed in the trust and can be exercised during incapacity. This helps to assure the benefits of the revocable trust.

Joint Tenancy

This is a form of co-ownership under which the transfer of property to the survivor is not subject to probate. An example is joint tenancy with rights of survivorship on a savings account.

Generally the use of joint tenancy is discouraged in favor of a revocable trust and power of attorney for property, except for specific circumstances in which the negative aspects have been ruled out.

The advantages are:

- Vest title immediately in the survivor or survivors at the death of one co-owner.
- Avoid probate.
- In the event of illness, provide access to the account by the other tenant(s).

The disadvantages are:

- Adverse capital gains tax consequences can result upon the death of a co-owner.
- The joint tenancy property is subject to the claims of creditors of either joint tenant.
- The person who establishes the joint tenancy gives up sole control.
- If the joint tenancy was only created for convenience - for example, so that the joint tenant can make deposits or withdrawals - the surviving joint tenant may not be the proper beneficiary.
FEDERAL AND ILLINOIS ESTATE TAXES

The federal government and the state of Illinois assess taxes on estates when they are passed to the beneficiaries. The value of the estate for these purposes includes all assets, including:

- The fair market value of residences.
- Accrued retirement benefits.
- Proceeds of life insurance policies.
- Joint tenancy accounts.
- Securities, cash, personal effects, brokerage and bank accounts.
- Any other business or investment interests.

Basic Provisions

- $5,120,000 is the current Federal “applicable exclusion amount” which can be applied (i) for gifts made during life, to exempt from gift tax liability property transfers of up to $5,120,000 and (ii) upon death, to exempt from estate tax liability property transfers also up to $5,120,000.
- Any portion of the $5,120,000 gift tax applicable exclusion amount used during life will reduce the $5,120,000 estate tax applicable exclusion amount that will be available upon death.
- Taxable estates in excess of $5,120,000 will be taxed at a rate of 35%.
- An election can be made on the estate tax return of the first spouse to die to add any remaining applicable exclusion amount unused as of the death of the first spouse to the applicable exclusion amount available for use by the surviving spouse.
- Illinois has its own estate tax. Taxable estates greater than $3,500,000 in 2012 ($4,000,000 in 2013 and beyond) are subject to Illinois estate tax on the amount in excess of $3,500,000 at rates between 8% and 16%.
- Illinois does not impose a gift tax.
- There is an unlimited marital deduction and an unlimited charitable deduction for both Illinois and Federal estate tax purposes.
- As the law is currently written, in 2013, without additional legislative action, the Federal applicable exclusion amount for both gift and estate tax purposes will be reduced to $1,000,000. Taxable estates and gifts in excess of $1,000,000 will be taxed at graduated rates with a top estate and gift tax rate of 55%.
Reduction of Estate Taxes

There are many techniques available for the reduction or elimination of estate taxes which can be matched to the particular circumstances of the individual.

An individual may:

- Create a trust for the benefit of the surviving spouse which will "shelter" the deceased spouse's credit equivalent amount from inclusion in the survivor's estate while assuring that all assets are available for the needs of the surviving spouse.

- Establish an irrevocable life insurance trust.

  This can completely eliminate the policy proceeds from the estate of the insured and the estate of the surviving spouse.

- Make gifts of up to $13,000 per recipient each year under the annual gift tax exemption of the Internal Revenue Code.

  If the beneficiary is a minor or not a proper recipient of an outright gift, the gifts could be made in trust for his or her benefit (i.e. a “Crummey” Trust). When properly prepared, the donor can retain specific controls over the gifted property.

  The annual gift tax exempt amount is often used with irrevocable life insurance trusts. The use of the trust keeps the policy proceeds out of the insured's estate and annual gifts to the trust are used to pay the premiums.

- Create a Qualified Personal Residence Trust.

  This is a special type of gift trust which enables the donor to transfer the ultimate ownership of his or her home at an estate and gift tax "discount" of 60% or more.

- Make charitable gift or create a Charitable Remainder Trust or Charitable Gift Annuity.

  Lifetime gifts outright to qualified charities can provide both an immediate income tax deduction as well as removing the gifts from the estate for estate tax purposes. Gifts at death to charities are exempt from estate taxes.

  Charitable remainder trusts or charitable gift annuities if made during one's lifetime can provide the benefits of a current income tax deduction and removal of the gifts from the estate for estate tax purposes, as well as a source of cash income for one or more lives and a significant deferral of capital gains taxes. Such gifts if instead made at death can reduce estate taxes while proving a source of cash income to one or more beneficiaries.
ESTATE PLANNING PROBLEMS

The Inadvertent Joint Tenancy

Adverse results can occur when putting property into joint tenancy. Problems can arise, for example, when a neighbor or a niece or nephew is put on an account as a joint tenant for convenience or if only one or two of several children are put on an account. Other possible problems include:

- Having the "wrong" party die first.
- Passing the property to an unintended beneficiary.
- Not having the property available in the event of disability.

The Second Marriage Dilemma

Consider the creation of a marital trust which assures that property will pass to the intended beneficiaries and not to the "second husband," "second wife" or to step-children.

Liquidity

It is necessary to make sure that there is sufficient cash to cover costs without jeopardizing assets. Consideration should be given to:

- determining the availability of cash to pay taxes and to meet the immediate needs of beneficiaries.
- avoiding a "forced sale" of assets.
- the purchase of life insurance to create the necessary liquidity.

Employee Benefits

Beneficiary designations must be reviewed to be certain they are current and are coordinated with other provisions of the estate plan.

Caring for Elderly/Educating Children

- Consider annual gifts of $13,000 and direct payments of tuition or medical expenses which are allowed in addition to this amount.
- Create Crummey Trusts.
- Consider execution of a special trust to provide protection from Medicaid "spenddown" requirements.
GLOSSARY

Administrator - Person responsible for administering an intestate estate or a testate estate if the deceased's will has not named an executor. The administrator is duly qualified and legally appointed and performs under the supervision of a court. See Executor.

Charitable Remainder Trust - A trust under which the trustee pays income to one or more beneficiaries for a term of years or for their lifetimes and the balance of which is paid at the end of that period to one or more qualified charities.

Charitable Gift Annuity - A direct arrangement with a qualified charity to pay a fixed amount of income to one or more persons for a term of years or for their lifetimes in exchange for a gift to that charity.

Crummey Trust - A type of trust, named for the court case which first confirmed its legality, which permits gifts to be made for the benefit of a minor or other beneficiary who cannot or should not properly receive an outright gift.

Executor - Person, named in the deceased's will, to carry out the directions in that will for disposing of the estate. Also called personal representative. See Administrator.

Guardian - Person appointed by the court to be responsible for the affairs of someone unable to do so for himself or herself, such as a minor or an adult who cannot manage his or her affairs because of age or infirmity.

Intestate - Death without a will.

Irrevocable Life Insurance Trust - A trust under which the trustee purchases an insurance policy or to whom an insurance policy is given. Upon the death of the insured, the proceeds of the policy are paid directly to the trustee for investment and distribution to designated beneficiaries in the manner and at such time as directed when the trust was set up. Under the proper circumstances, the insurance proceeds can completely avoid taxation in the estate of the insured.

Living Trust - See Revocable Trust.

Living Will - A declaration of an individual's wishes authorizing the attending physician to provide only medication, sustenance and medical procedures which provide comfort care if the physician determines that death is imminent.

Joint Tenancy - Form of co-ownership under which transfer to a survivor or survivors is not subject to probate - for example, joint tenancy with rights of survivorship. There are often adverse tax or estate planning consequences as a result of this form of ownership.

Personal Representative - See Executor.
Power of Attorney - An instrument authorizing someone to act as a person's agent for medical or property matters.

Probate - The court process of transferring assets which are in a deceased individual's sole name to the proper beneficiaries, after the payment of debts and other legal obligations. When there is a will, probate establishes the validity of the will and makes sure its provisions are honored. When there is no will, probate determines the proper beneficiaries under state law and the person responsible for administering the estate.

Revocable Trust - A trust which permits an individual to retain control of trust assets while providing for their management in the event of the individual's disability and their proper disposition upon the individual's death. Such assets are not subject to guardianship proceedings or probate.

Surety Bond - Also known as a performance bond. A document guaranteeing performance of a contract or obligation. A surety bond is generally required of a court-appointed guardian or administrator at estate expense.

Testate - Death with a will.

Trust - Title to property, real or personal, held by one person for the benefit of another.

Trustee - Person named under a trust to carry out its purposes. With careful planning, a family member can act as trustee as can a trusted friend or professional or an authorized corporation, such as a bank.

Will - A document in which a person states his or her wishes for the disposition of property after his or her death. A will can also designate the appointment of guardians for minor children.
PROFILES

JOEL S. ROTHMAN

Joel S. Rothman focuses his practice in the areas of estate planning, probate and trust administration. He has extensive experience in personal and family tax planning and succession planning for entrepreneurs, professionals, executives, retirees and closely held businesses.

Joel is a graduate of the Northwestern University School of Law. He is a past Chairman of Division I of the Trust Law Committee of the Chicago Bar Association and is a member of the Chicago Estate Planning Council, the Section on Trusts and Estates of the Illinois State Bar Association and the Section of Real Property, Probate and Trust Law of the American Bar Association. Joel also serves as a director of national and local charitable organizations.

ASSOCIATES

Christopher R. Fleck

Christopher R. Fleck is a graduate of DePauw University, Cum Laude, and Valparaiso University School of Law, Magna Cum Laude, where he was the Executive Managing Editor of the Law Review. He is a member of the Chicago Bar Association, the Young Lawyers Section Estate Planning Committee and Tax Law Committee and a member of the CBA Asset Protection, Probate Practice, Trust Law and Federal Taxation Practice Committees. Christopher concentrates his practice in the areas of estate planning, probate, and trust administration. He is also a member of the Illinois State Bar Association.

Burt C. Binenfeld

Burt C. Binenfeld is a graduate of the University of Notre Dame and the Sandra Day O'Connor College of Law at Arizona State University, Cum Laude, where he served as Executive Editor for Jurimetrics, The Journal of Law, Science, and Technology. Burt holds an LL.M. in Taxation from the New York University School of Law. He is a member of the Chicago Bar Association and a member of the Taxation and Trusts and Estates Sections of both the Illinois State Bar and the American Bar Associations. He was formerly a Tax Manager for WTAS LLC. Burt concentrates his practice in the areas of estate planning, probate, and estate and trust administration.
OF COUNSEL

Mark T. Neil

Mark T. Neil, a graduate of Shimer College and the Northwestern University School of Law. He served as law clerk to Honorable Howard C. Ryan, Chief Justice of the Illinois Supreme Court. Mark has been a member of the Executive Committee of the Trust Law Committee of the Chicago Bar Association. He has had significant experience representing and counseling trustees and executors through his role as Trust Counsel at Harris Trust and Savings Bank and Director of Trust Services at Cole Taylor Bank. Mark concentrates his practice in the areas of estate planning, probate, trust administration and business succession planning.

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Roberta G. Evans is a graduate with honor and distinction in Government of the University of Connecticut and the University of Chicago Law School. She is a member of the Illinois State Bar Association and a member of the Probate Practice and Trust Law Committees of the Chicago Bar Association. She is also a member of the M-Team of Metropolitan Family Services-Elder Abuse Department, a member of the Chicago Council of Lawyers, and a member of the Decalogue Society of Lawyers. Roberta is licensed to practice law in Illinois. Her present practice is concentrated in the areas of estate planning and estate administration, including trust management to individuals and owners of closely-held or family businesses.
Michel Winkelstein

Michel Winkelstein is a graduate of the State University of New York at Buffalo and the John Marshall Law School. He is a member of the Illinois State Bar Association and of the Chicago Bar Association and is an active participant with Chicago Volunteer Legal Services. Michel is licensed to practice law in Illinois and the United States Court for the Northern District of Illinois and is a member of the Federal Trial Bar. His present practice is concentrated in the areas of real estate and consumer and small business debtor bankruptcy.

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Stuart A. Cohn is a graduate of the University of Chicago School of Law and also holds a Masters degree in Business Administration from the University of Chicago, a Masters degree in taxation from DePaul University, and a Certified Public Accountant Certificate. He concentrates his practice in the areas of general corporate law, income taxation, real estate and employee benefits.

We listen to our clients’ needs and develop practical solutions.