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ESTATE PLANNING

I. INTRODUCTION

- A. There are two crises which may be imposed upon us - total disability, and terminal illness. A third we all face - death.
- B. Each crisis often has a heavier impact on our loved ones than on us. The need to prepare for each will often determine whether the crisis is an affliction or an opportunity for growth.

II. LOVE YOUR FAMILY, YOUR FRIENDS, AND YOURSELF ENOUGH TO AVOID:

- A. Rule I - Do not leave a legacy of hate! (A "legacy" is something that is passed down from one person to another, usually at death.)
- B. Rule II - Keep your loved ones out of court!
- C. Though most of us would rather avoid: death, disability and taxes, the best way to avoid the often tragic consequences of a violation of these rules is to be certain to plan now for the crises of disability, terminal illness, and death.

III. WILL

- A. Why you should have a will.
 - 1. Judge decides who will be the administrator of your estate and the guardian of your minor or incapacitated beneficiaries rather than you.
 - 2. Administrator cannot sell real estate without Court approval.
 - 3. A costly and burdensome guardianship must be established for minor or incapacitated beneficiaries. Expensive to appoint (often over \$2,000.00).
 - a. Annual costs - fees to attorneys; premium to bonding company; cost of court proceedings, if required for approval of use of funds;

fee to Commissioner of Accounts (about \$500 a year for small fund).

- b. Limitation on use of principal.
- c. Complicated accounting required yearly of receipts and disbursements.

B. A homemade (Holographic) will is dangerous.

- 1. Ambiguous, unclear language in will promotes expensive and unnecessary law suits to interpret will.
- 2. Your property may pass to people you do not want to be your beneficiaries.
- 3. Do not try to change the will prepared by your attorney by handwritten provisions - may void will.
- 4. Need for a self-proving certificate.

C. Points to discuss with estate attorney.

- 1. Will your estate be subject to federal estate taxes?
- 2. How do you want your children treated if you or your spouse get remarried?
- 3. Should you set up a "Special Needs Trust" for a disabled spouse or child? This type of trust is designed to supplement public benefits without causing the disabled individual to be disqualified for public benefits.
 - a. The spouse of a spouse with special needs plans for the future by providing educational, therapeutic and vocational experiences designed to promote skills and abilities to maximize self-reliance and enjoyment of life. During their lifetime, a spouse directly influence the quality of their spouse's life. Special needs estate planning seeks to plan for your disabled spouse's life when you are no longer in charge. A properly drafted trust can preserve resources but also insure a quality of life for the disabled and give peace of mind, regardless of the size of an estate.
 - b. What is a special needs trust?

- (1). A trust which sets aside assets in a way so as not to interfere with governmental entitlements and benefits. This is an irrevocable, inter-vivos or standby trust which typically receives funds at the death of the parent.
- (2). The trustees are to use the income and possibly the principal of the trust to supplement the benefits and income provided by Medicaid, SSI, and other governmental aid programs.
- (3). The trust income is available for limited purposes ("special needs") to benefit the spouse. At the death of the spouse, the principal will be distributed to a named remainder person, often a child, a grandchild or to a designated charity.
- (4). Some trusts specifically state that the trustee can make no distributions that will make the beneficiary ineligible for public benefits, and in particular, SSI and Medicaid. In most cases, this is an unnecessary and unwise limitation on the discretion of the trustee.
- (5). It is preferable for the trust grantor to only state a preference that the trustee not make distributions that would make the beneficiary ineligible for public benefits, but allow the trustee the discretion to make disqualifying distributions if the trustee sees fit to do so.

c. Why?

- (1). Because the corpus of the trust may have great dollar value, it may be sensible to make distributions to the beneficiary even if it means the loss or reduction of public benefits.
- (2). The trustee may decide to make significant distributions to the beneficiary in one month, causing a temporary disqualification for public benefits. After a period of ineligibility, the beneficiary would again be eligible for public benefits.
- (3). The uncertainty of future eligibility requirements for SSI and Medicaid (as well as other present or future public benefits) argues for granting the trustee the widest possible

latitude in making distributions.

- (4). The beneficiary's condition may improve enough so that he or she is no longer sufficiently disabled to qualify for SSI, Medicaid or other public benefits. (Or the legal standard of disability may change and so make the beneficiary ineligible.)
- (5). Note that granting absolute discretion to the trustee supposes a sophisticated, knowledgeable trustee who will understand the implications of any distributions in light of the eligibility of the beneficiary for public benefits.

4. Who should be your executor?
 - a. At least one should be a Virginia resident.
 - b. Your spouse.
 - c. Your children.
 - d. Your attorney.
 - e. Your bank.

D. You need to have your will reviewed regularly.

1. When you change your state of residence.
2. Every two-five years.
3. When your financial condition changes (inheritance, business success, substantial loss, etc.).
4. Changes in tax law.
5. Changes in family (marriage, divorce, birth, death).
6. When you wish to change your executor or trustee.

E. PROBATE

Probate is the court administration and oversight of your affairs at death. When an individual who owns property and has a will passes away, the probate rules require that the will be submitted to the local court.

1. Advantages of Probate

- a. *Creditor Protection* - When an individual dies with a will, a specific time period is set by the court allowing the deceased person's creditors to make a claim against his or her estate. If the creditor fails to make their claim within the given time period, then the debt is permanently erased. The use of a living trust does not trigger this time period. Thus, the deceased person's debts are never extinguished. This is only a disadvantage for people who do not plan to have their debts paid.
- b. *Cost* - The cost of a living trust is greater than the cost of a will. You also must retitle your assets into the trust. Although retitling your assets may be a time consuming process for you, it greatly simplifies the handling of your affairs for your family members. All of your assets are easily identified and located in the trust.

2. Disadvantages of Probate

- a. *Expenses* - Probate may become expensive depending on the complexities involved in your estate. There are administrative fees due to court involvement. Due to the bureaucratic nature of the court system, processing your estate can take up to one year or even longer.
- b. *Contest* - Unhappy relatives can contest the validity of a will during the probate process.
- c. *Will Is A Public Record* - Since most court files are accessible to the public, your will and your estate will be available for the public's viewing. Thus, anyone can see the value of your estate and the names of your beneficiaries.

F. AVOIDING PROBATE

1. Jointly owned property is a poor answer to certain problems.

- a. The joint owner may appropriate the property to his own use contrary to the wishes of the other joint owner. Can disrupt your estate plan. Property that is owned jointly with another passes without regard to your will. If you hold property jointly with one child that property passes to that one child regardless of what your will says. Also, if you have named one child and they predecease you, the property may be distributed in accordance with the intestate laws which may or may not be what you want.
 - b. Could lead to costly and cumbersome guardianship. By having your funds paid under your will or under a trust, you can provide that if one of your children predeceases you, their share is to be held in trust for their children. You can designate at what age you want your grandchildren to receive the money outright.
 - c. The surviving joint owner may be incapable of proper management of the property due to illness, incapacity or lack of experience.
 - d. Often litigation is required to determine whether right of survivorship was intended.
 - e. When parent places property in joint ownership with child, bad relationships with other children often result.
 - f. Holding property jointly with a spouse can cause estate taxes to be imposed by failing to use one of a married couple's two unified credits.
2. Payable on Death
 3. Living Trusts - The Living Trust is the best tool.

The trust is called a "Living" trust, since it is used during the lifetime of its creators. The trust is "Revocable" to allow it to be changed or terminated at any time by its creator. Property of the creators needs to be transferred to the trust during their lifetime to avoid having the property being subject to the probate process at the death of either of its creators. The "Creators" of the trust may be a married couple or a single person or a spouse acting alone.

Key Advantages

- a. *Avoid substantial probate and administration expenses.* Typical probate and administration expenses may be between five and seven percent of the value of the estate. A substantial amount of these expenses can be avoided through the use of the Living Trust.
- b. *Delays in transfer of assets avoided.* One of the most frustrating problems involved in the probate of a decedent's estate is the length of time that it takes before the assets are transferred to the ultimate beneficiaries. It often takes between one-and-a-half years and three years to settle an estate which requires the filing of a federal estate tax return. When the funded Living Trust is used, the death of the creator does not delay the enjoyment of the trust assets by the creator's survivors because you have in essence probated your estate during your lifetime.
- c. *Disability.* The Living Trust will enable your substitute trustee to take over the management of your affairs, if you become disabled. The substitute trustee could see that all of your needs would be met, if you were unable to do so. You can set forth a plan for the management of your assets for a time when you are not acting as a trustee. You can set forth very specific provisions regarding your assets.
- d. *Privacy of trust assets.* The funded Living Trust is a completely private document. It prevents the public from having any knowledge of the assets contained in the Living Trust. If the assets remain in the names of the creators, and then by will are transferred to the trust, all the assets become a matter of public record because the executor must make an inventory of all the assets in the estate. This inventory is a matter of public record. The Living Trust avoids the necessity of a public inventory of trust assets. The Living Trust insures privacy to your family so that the public will have no idea of what assets are held in the trust.
- e. *Avoids probate in several states.* If a creator of the trust owns property in several different states, the Living Trust avoids the necessity of probating the will in the several different states where real estate is located. Each time the will has to be probated in another state, there are additional administration expenses incurred in the process. Often taxes are required to be paid that otherwise would be totally unnecessary.

- f. *Portability of trust.* In the event that the creator decides to move out of the State of Virginia, this Living Trust can be moved with the creator to any other location desired.
- g. *Will Contests.* Many authorities believe that the use of a Living Trust will help to avoid will contests. The fact that the Living Trust has been in use for some time before the creator dies often makes it more difficult to attack the trust.
- h. Additional estate tax advantage for married couples

IV. WHO NEEDS ESTATE TAX PLANNING?

- A. What is included in determining the size of an estate for federal estate tax purposes?

Any asset you own including your personal property and life insurance.

Putting an account in joint names does not remove the funds from your federal taxable estate.

Although the marital deduction allows married couples to transfer an unlimited amount of assets between themselves tax free, the problem occurs when the second spouse (or surviving spouse) passes away.

The unified credit is available for individuals so that estate taxes can be reduced or eliminated. Presently, this credit permits a person to transfer up to \$5,000,000 tax free during their lifetime or at death. Because each individual can transfer up to \$5,000,000 estate tax free, a married couple may potentially transfer up to \$10,000,000 million without paying any estate tax. Most couples use only one of their credits, increasing the likelihood that the estate of the second spouse to die will be forced to pay estate taxes. For example, if a couple has assets worth 5,500,000 and the husband passes away leaving all of the property to his wife, there is no estate tax due because of the marital deduction. However, when the wife later passes away leaving her \$5,500,000 estate to her children, estate tax will be due. The unified credit will protect \$5,000,000 but the excess \$500,000 will be taxed.

- B. *Credit Shelter Trust* (also referred to as "Family Trust" or "By-Pass Trust"). Used to take the best possible advantage of federal estate tax law. In essence, up to \$5,000,000 from the estate of the first to die would go into the family trust. This would be available to the surviving spouse, as well as children, if needed for

support, health and education. The assets going into the family trust would not be taxed in the estate of the first to die because each spouse is allowed to pass on up to \$5,000,000 tax free. Looking further ahead, these funds would not be considered part of the estate of the surviving spouse and, therefore, would not be subject to estate tax. In that way, the survivor's estate would be significantly reduced, as would the taxes on that estate.

The annual exclusion rule does permit individuals to give away \$13,000 per recipient, per year. Husband and wife can give \$26,000 per donee each calendar year. But instead of relying on the surviving spouse's ability to make gifts, the two unified credits should be used first, and then gifts can be made if further estate tax reduction is needed. As stated above, \$10 million can be protected from estate taxes by using a credit shelter trust.

- C. *Disclaimer Will.* Credit shelter trust could be created in a living trust or in a will. If a will used the tax protection would be achieved but probate would still be necessary. Individuals use this when it is not clear that they will exceed the unified credit amount.
- D. *QTIP Trust.* An effective method to pass property to children, while permitting the surviving spouse to retain the benefits of that property for his or her lifetime and still qualify the property for the marital deduction.
- E. *Life Insurance Trust. To avoid tax on life insurance:*
 - 1. *DO NOT be the owner of the policy.*
 - 2. *DO NOT make your spouse the beneficiary.*
 - 3. *AVOID Three-Year rule on transfer of policy ownership.*

A life insurance trust is a shelter against estate taxation at the death of the insured. Must be irrevocable. The surviving spouse can receive all the income and principal for support, health, education and maintenance. If you transfer an existing policy to a life insurance trust you must survive for three years to allow the proceeds to be excluded from the estate. The advantages of the trust are that the value of the policy is not in the taxable estate and you maintain control over policy & premiums. The disadvantage is that you must create and administer the trust and there must be withdrawal provisions and notices.

V. DURABLE GENERAL POWER OF ATTORNEY - HIGHLY IMPORTANT ALTERNATIVE TO CONSERVATORSHIP

- A. The Total Disability Crisis. The Life Insurance industry tells us that 50% of the

people in our country today will at some time in their life suffer from total disability for 90 days or more. If no pre-crisis planning has been done and the individual is no longer able to care for his or her affairs, many problems must be unnecessarily faced by the family or loved ones of the disabled person.

- B. **When Is A Conservator Needed?** If a mentally or physically disabled person is unable to make the decisions necessary to carry out the responsibilities of living and has done nothing, while competent, to designate a substituted decision maker, often it is necessary to have the court appoint a conservator to make these decisions for the incapacitated person.
- C. **Why Conservatorship Should Be Avoided Whenever Possible.** Substantial, unnecessary costs are incurred in having a court designate a conservator to manage the affairs of a disabled person. If real estate is owned by the disabled and has to be sold, a legal action must be filed seeking the court's permission to sell the real estate. The conservator has many costs to pay such as bond premiums, attorney fees and fees to the Commissioner of Accounts, all of which could have been avoided. Family harmony can be disrupted over which person should be designated the conservator. Often over \$5,000 in unnecessary costs are incurred in a conservatorship, none of which directly benefit the disabled.
- D. **Conservatorship Often Is Demeaning To The Disabled.** Usually the disabled must be declared incompetent by a court before a guardian can be appointed. The incapacitated person may in the process be deprived of the right to make all of life's decisions, even though he or she might be able to carry out certain responsibilities without help. Depriving the individual of the ability to make decisions and to do those things which that disabled person can do, often causes the person to fall into deep depression, which in turn may cause early death or serious illness.
- E. **The General Power Of Attorney Is The Most Important Legal Document An Individual Can Have.** Most people assume that a will is the most important legal document one can have. A General Power of Attorney is equally as important. It authorizes your agent to do practically any act which you could do for yourself.
- F. **Definitions**
 - 1. *Power of Attorney.* A legal document in which you designate another person to act for you.
 - 2. *Principal.* When you have the power of attorney prepared for yourself, you are the Principal.

3. *Agent or Attorney-in-Fact.* The one you designate to act in your behalf is your Agent. The Agent under a Power of Attorney is also known as the Attorney-in-fact. The Agent can be an individual, a bank, or a corporation.
- G. What Does The Word "Durable" In A Power Of Attorney Mean? It is highly important that the Power of Attorney state that its effectiveness will not terminate on the incapacity of the Principal. If this language is not included, the document will be terminated by the incapacity of the Principal.
 - H. Should The Agent Be Authorized To Make Gifts? The Principal may want to allow the Agent to make gifts to certain persons in order to avoid high death taxes or to express the Principal's concern for his loved ones. The specific power to make these gifts should be included in the Power of Attorney with whatever limitations the Principal wishes to impose. This gift giving power may cause serious tax problems to the Agent, if the Agent dies while the Principal is living. Sound legal advice can avoid unexpected tax traps.
 - I. Integrity And Trustworthiness Of The Attorney-In-Fact. The agent must be a responsible, honest, intelligent person, who can be trusted with the often heavy responsibilities of caring for the Principal. Untrustworthy, immature, or irresponsible persons serving as an Agent can do great damage to the estate of the Principal, whether or not disabled.
 - J. Premature Use Of The Power Of Attorney. Sometimes a relative or other person serving as the Agent under a Power of Attorney will begin to use the document before the Principal wants the Agent to act. Before the Principal knows what is happening, the Agent might have taken all responsibility for managing the estate of the Principal away against the wishes of the Principal. Such action is often highly detrimental to the morale and well-being of the Principal. Parker, Pollard & Brown offers an escrow service to its clients where it will retain possession of the power of attorney with a letter of instruction on when it can be used. Typically the escrow letter instructs the law firm to release the power of attorney only if, in the opinion of the law firm, the Principal is incapacitated. The escrow letter may release and indemnify the law firm for the release of the power of attorney. Such an arrangement can often avoid the premature use of the document.
 - K. Need For Experienced Legal Advice In Drafting. A General Power of Attorney is a document filled with pitfalls and potential family disasters, when prepared by one who is not a skilled attorney in estate and taxation law. Forms for this legal instrument can be found in form books or purchased at a stationary store, but the purchaser must beware, since the form may fail to do the job that is needed.

VI. UNDERSTANDING THE LEGAL COMPONENTS OF ADVANCE DIRECTIVES

A. *Definition of an Advance Directive.*

Virginia Code Annotated § 54.1-2982 defines an Advance Directive as “(i) a witnessed written document, voluntarily executed by the declarant in accordance with the requirements of § 54.1-2983, or (ii) a witnessed oral statement, made by the declarant subsequent to the time he is diagnosed as suffering from a terminal condition . . .”

1. The written directive. Virginia Code Annotated § 54.1-2983, requires a written statement by a competent adult “authorizing the providing, withholding or withdrawal of life prolonging procedures in the event such person should have a terminal condition”. If the individual is incapable of making an informed decision, the directive may appoint an agent to make health care decisions for the declarant. The document must be signed in the presence of two witnesses, who are not related by blood or marriage to the declarant, who must also sign.
2. The oral directive. An oral directive may be made if the patient is in a terminal condition and the directive is made before the attending physician and two witnesses.
3. In Virginia the Advance Directive does not need to be notarized. This is not true in all states.

B. *Definition of Declarant.*

An adult who makes an Advance Directive while capable of making and communicating an informed decision.

C. *Definition of the Agent in the Advance Directive.*

An adult appointed by the declarant to make health care decisions for him.

D. ***What Should Declarant Do with the Advance Directive?***

1. The primary care physician is the most important person to have a copy of the Advance Directive. Any other physician should have a copy, when providing care to the patient for a condition that is or may become life threatening.
2. A copy of the Advance Directive should be given to a hospital, nursing home, hospice or home health care provider that is responsible for health care to the patient.
3. The agents under the Advance Directive should each have a copy.
4. The Declarant should discuss his/her wishes related to the Advance Directive with those receiving a copy in order to be certain the Declarant's wishes stated in the Advance Directive will be carried out.
5. Photocopies of Directive. The health care provider or other persons need not have a copy of the directive that has been personally signed by the declarant and witnesses. A photocopy of the document that has been personally signed is sufficient.

E. ***Most Forms Distributed to the Public Give Little Opportunity for the Declarant to Express Personal Views and Values.***

1. Revisions by Attorney. The person seeking to have the Advance Directive form revised, and language inserted not contemplated by the form, may need the assistance of an attorney experienced in the drafting of advanced directives.
2. People Are Very Interested in Advance Directives. The attorney and physician needs to discuss with the individual the various issues that might be included in Advance Directive. Most people are highly interested in the subject of the termination of life support and substituted medical decision making.

F. ***Necessity for the Declarant to Be Incapable of Making an Informed Decision.***

1. The Virginia Advanced Directive can become effective only when the declarant is incapable of making an informed decision.
2. For one to be incapable of making an informed decision under Virginia law, Virginia Code Annotated, § 54.1-2982, the following is required:

- a. The patient must be suffering from a mental illness, mental retardation, or other mental or physical disorder.
 - b. This disorder must preclude communication or impair judgment, so that the patient can not make “an informed decision about providing, withholding or withdrawing a specific medical treatment.
3. The patient's attending physician and a second physician or licensed clinical psychologist, after personal examination of the patient, must certify in writing that the conditions in two preceding paragraphs above do exist prior to giving, withholding or withdrawing treatment pursuant to the Advance Directive. This certification must be redone no less than every 180 days so long as treatment is being administered pursuant to the Advance Directive.

G. *Terminal Condition and Life-Prolonging Procedures.*

1. Terminal Condition Required. In order for an Advance Directive to authorize the "providing, withholding or withdrawal of life prolonging procedures", the patient must be found to be in a "terminal condition".
2. Definition of Terminal Condition. Virginia Code Annotated, §54.1-2982. " * * * a condition caused by injury, disease or illness from which to a reasonable degree of medical probability, a patient cannot recover and (i) the patient's death is imminent or (ii) the patient is in a persistent vegetative state."

H. *The Need to Provide Comfort Care to Patient.*

1. The statute is clear in granting the physician the authority to administer medication to provide "comfort care" and to "alleviate pain".
2. The statutory advance directive states, "This authorization specifically includes the power to consent to the administration of dosages of pain-relieving medication in excess of standard dosages in an amount sufficient to relieve pain, even if such medication carries the risk of addiction or inadvertently hastens my death."

I. ***Must Consider Risks, Benefits, Beliefs, and Values.***

1. The substituted decision maker that is allowed to make the treatment decision must make a good faith effort prior to consenting to the treatment:
 - a. To determine the risks, benefits of, and alternatives to the treatment.
 - b. To determine the religious beliefs and basic values of the patient.
 - c. To inform the patient to the extent possible of the proposed treatment and the fact that someone else is authorized to make a decision regarding such treatment.
2. The decision maker then must also take into consideration any preferences previously expressed by the patient regarding such treatment in so far as it might be known. If unknown, the decision maker must make the decision based on the patient's best interests.

J. ***Effectiveness of the Advance Directive Under State Law Other Than the State Law Where It Was Prepared.***

1. The General Assembly has addressed the problem of the legality of Advance Directives prepared pursuant to the law of a state other than Virginia. The law provides that an Advance Directive executed in another state shall be deemed to be valid in Virginia, if the directive is drawn in compliance with Virginia law or the law of the state where executed.
2. Many states have enacted similar legislation to Virginia.

VII. **SUBSTITUTED MEDICAL DECISION MAKING WHEN NO ADVANCE DIRECTIVE HAS BEEN EXECUTED.**

A. ***Substitute Decision Maker.***

When the patient is incapable of making an informed decision about his medical treatment and has not executed an Advance Directive, the attending physician by complying with the Health Care Decisions Act may provide, withhold or withdraw treatment from the patient upon the authorization of any of the following persons, in the specified order of priority, if the physician is not aware of any available, willing and competent person in a higher class:

1. A court appointed guardian or committee for the patient.
2. The patient's spouse.
3. An adult child of the patient.
4. An adult brother or sister.
5. Any other relative in the descending order of blood relationship.

B. *Disagreement Between Members of One Class.*

When two or more persons listed above in the same class inform the physician that they disagree on the treatment, the physician may rely on the authorization of a majority of the reasonably available members of that class.

VIII. THE MEDICAL CARE PROVIDERS' LEGAL RESPONSIBILITIES.

A. *The Patient Self Determination Act (herein referred to as the "PSDA").*

1. This Act requires certain health care providers receiving funds for services from either Medicare or Medicaid beginning December 1, 1991, to
 - (1) Provide written information must be given to all adult patients on Advance Directives on the termination of life support systems.
 - (2) The patient must be asked if he has executed an Advance Directive and his answer must be documented.

B. *The Reluctant Physician.*

What happens when the physician refuses to comply with the Advance Directive or the treatment decision made by an authorized person?

1. The physician must make a reasonable effort to transfer the patient to another physician. The physician must make the effort to transfer the patient, even if the physician decides the treatment requested is medically or ethically inappropriate.

IX. CERTAIN MEDICAL ORDERS GIVEN BY THE PATIENT'S ATTENDING PHYSICIAN THAT RELATE TO THE ADVANCE DIRECTIVE.

A. *Do Not Resuscitate Orders (DNR or No Code Orders).*

These orders should prevent the administration of cardio-pulmonary resuscitation (CPR) upon cardiac or pulmonary arrest.

1. Erroneous Assumption. Many patients and their families assume that CPR will not be administered, if the patient has executed the typical Advance Directive which does not allow the use of life support systems when one suffers from a terminal illness. This assumption is not necessarily true unless some specific language is included in the Advance Directive prohibiting CPR. To be on the safe side, the attending physician should be directed to enter in the patient's medical records an order stating that there shall be no resuscitation upon a cardiac or pulmonary arrest, when one wishes to be certain that CPR is not to be administered.
2. Do Not Intubate Order. This order prohibits tubes from being inserted in the nose or other body orifices, or surgically implanted into the stomach or the intestines.
3. Do Not Hospitalize Order. If the patient is a resident of a nursing home, an adult home, or some other type of residence for the elderly, it may be decided that hospitalization regardless of medical emergency would be inappropriate. The attending physician's order should under such circumstances prohibit hospitalization.

X. ELDER LAW - AN IMPORTANT NEW LEGAL SPECIALTY

A. What is Elder Law and Why Is It Important?

Elder Law deals with all legal problems that are particularly related to the elderly. Much has been said about how the number of the elderly is growing much faster than any other segment of our population. Government is playing a larger role each year in attempting to meet the needs of older Americans. The senior citizens are becoming more politically active in promoting new protection and service for older Americans. The result of their activity is new legislation and governmental intervention to meet the needs of this important group of people.

B. Elder Law Attorneys Need Specialized Expertise.

Much of the law is so new that little precedent has been established to clarify the meaning of many of the laws and regulations recently adopted in the Elder Law area. There are many traps for the unwary in our present law, which require special expertise from an attorney who wishes to serve the senior's legal needs. For an attorney to serve well these legal needs, special preparation must be made to understand what can be done for the client. The attorney, without this preparation, training and experience, can often be a greater burden than help to the client.

C. Some of the Important Subjects Needing Advice from an Elder Law Attorney.

1. *Avoiding Spousal Impoverishment When One Spouse Enters a Nursing Home.*

The high cost of health care will often quickly deplete the estate of a couple or an individual, when one spouse enters a nursing home. There are many planning techniques that can be used to avoid some of the harsh results which often occur when one spouse is living in the community (the community spouse) and the other spouse is in a nursing home (the institutionalized spouse). The community spouse is the one that is prejudiced most severely when a spend down occurs in the couple's assets in order to pay for the nursing home care.

Contrary to the popular belief Medicare does not ordinarily pay for nursing home or long term health care costs. Medicare is essentially for short term medical cost payment, and only in special cases for short periods of time will it pay any of the cost of a nursing home. Medicaid is the only federally funded program to pay for the ordinary long term health care costs for Americans.

An important strategy to avoid the harsh difficulties caused by the spend down to qualify for Medicaid would be to invest as much of the assets as practicable in property that is exempt from the spend down.

Many persons might want to try to do their planning without legal advice. The nursing home resident could be disqualified from Medicaid benefits unnecessarily. There are state laws that prohibit certain transfers of property to qualify for Medicaid. Substantial penalties may be unnecessarily imposed for violation of these laws. An elder law attorney should be consulted if you or a spouse require long term nursing home care.

2. *Long Term Health Care Insurance.*

3. *Disability Planning.*

4. *Guardianships and Custodianships.*

5. *Issues Related to Nursing Home Care.*

The above are only some of the legal problems faced by the elderly that require the advice of a skilled Elder Law attorney.

D. If you have adult children they should know:

1. Any and all health insurance policies, long term care insurance policies and/or disability policies you may own. They should also have your Medicare information and information on your supplemental policy, if any.
2. Copies of all of the estate planning documents described above.
3. Information on your life insurance policies, including beneficiary designations.
4. The location of your safety deposit box and if you have complete trust in your child they should be listed as a joint owner.
5. A complete list of your assets and liabilities which you can either give to your child and give to your lawyer to be held in your estate planning file in an escrow arrangement.

THINGS TO THINK ABOUT BEFORE YOU VISIT YOUR ATTORNEY

1. Who do you want to leave your personal effects to?
2. Who should serve as executor and trustee?
3. If you have minor children, at what age should they receive money outright?
4. If you and your heir are deceased, who should inherit your property?
5. Who should make financial decisions if you are unable to make those decisions? You should have at least one alternate.
6. Who should make medical decisions if you are unable to make those decisions?

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