

# SPECIAL REPORT

## Estate, Asset Protection and Financial Planning

Estate planning is a process by which you plan for the management of your affairs and disposition of your property if you are or become disabled or upon your death. Asset protection planning is the process that you use to protect your assets and gifts to your beneficiaries from the claims of third parties including creditors or former spouses. Financial planning is the process by which you plan to provide for your own support and that of your dependents during your lifetime and accumulate an inheritance for your dependents.

There is a 58% probability that you will suffer a disability of 90 days or more during your lifetime, during which you will require assistance with the management of your property and personal affairs. There is a 43% probability that you will require nursing home care that will have a devastating impact on your life savings and on your financial plan. During retirement there is a 50% probability that you will incur at least \$100,000 of uninsured health care expenses and at least \$100,000 of unfunded long-term care expenses. You will be virtually assured of inflation during your retirement, which may result in the cost of the goods and services that you purchase rising, while your income remains constant. Many people will spend 25% of their life in retirement, and find that they do not have the funds to enjoy retirement the

way they had envisioned. Additionally, America is a litigious society with 50% of marriages ending in a divorce. Death is a certainty. It is not uncommon for a couple to be simultaneously saving for their retirement while assisting their parents and their children. You have an obligation to not only provide support to your minor or disabled children but, if they are in necessitous circumstances, to also provide support to your parents. These added expenses and support obligations can wreak havoc on your finances. These facts and statistics justify the need for most of our clients to adopt and implement a comprehensive estate, asset protection, and financial plan.

A complete estate, asset protection, and financial plan should address your needs as well as the needs of your spouse, children and grandchildren, parents, life partners and business associates. The planning process requires you to consider a wide range of legal, financial, emotional, and logistical issues. The failure to plan, and to take into account the needs of your family, will cause you or your family to incur unnecessary expense, taxes, effort, delay, and stress, and may cause you to run out of money during your lifetime, spend your children's inheritance, and rely on your children or other family members for financial assistance (i.e. leave your children or family a negative inheritance).

## ESTATE PLANNING

### DISABILITY

When planning for disability, you should consider two separate matters:

#### **1. Management of your property and personal affairs during a period of disability.**

Guardianship and Conservatorship - If you fail to plan, a court may appoint a guardian or conservator for you, or both, after a formal legal proceeding. A guardian is responsible for making decisions regarding the personal affairs of an incapacitated person, such as support, health care, education, and residence. A conservator is responsible for managing the estate and financial affairs of an incapacitated person. In many cases, the court will appoint the same person as both the guardian and conservator of the incapacitated person.

The appointment process is lengthy, expensive, and often embarrassing. It invites the prospect for disputes over who will be appointed as the guardian and conservator. After their appointment, both the guardian and the conservator of the incapacitated person must file annual reports and accountings.

Joint Bank Account - Many people use a joint bank account as their disability plan. The co-owner of the account will deposit your income into the account and pay your bills. A joint bank account can be very helpful if you become disabled. However, a joint bank account is, at best, an incomplete plan. The co-owner does not have the authority to perform many acts, including filing your income tax returns or selling your real property. Additionally, the co-owner will own the account at your death, and if the co-owner has marital or creditor problems, the co-owner's spouse or creditors may seek to seize the assets in the account.

Trust Agreement - A trust is an effective means of managing assets for an incapacitated beneficiary. The trust is separate legal entity. One person (the "trustee") holds property, usually real estate or investments, for the benefit of another (the "beneficiary"). The person who gives the property for the trust is known as the "donor" or "grantor." The trustee holds legal title to and is responsible for managing, investing, and distributing the trust property for the benefit of the beneficiary. A trust may have more than one trustee or beneficiary.

Depending on your situation, establishing a trust offers several advantages. The most well known advantage is the avoidance of probate. That is, at the death of the donor, any property held in the trust prior to the donor's death passes immediately to or in further trust for the benefit of the beneficiaries by the terms of the trust without requiring probate. This can save time and money for the beneficiaries. Certain trusts can also result in tax advantages for both the donor and the beneficiary, or they may be used to protect property from creditors or help the grantor qualify for Medicaid. Trusts are private documents, and only those with a direct interest in the trust need to know of trust assets and distribution. If well-drafted and funded with assets, another advantage of a trust is its effectiveness as a means of managing the assets for the benefit of an incapacitated beneficiary.

There are many types of trusts, some of the more common of which are discussed below:

- A *Revocable Living Trust* (RLT) is sometimes referred to as a "living" or "inter vivos" trust. A RLT is created by a trust agreement between the donor and trustee and the transfer of asset to the trustee during the life of the donor. The donor is frequently the initial trustee of the RLT. With a RLT, the donor maintains complete control over the trust and may amend, revoke, or terminate the trust at any time. Upon the donor's disability, a successor trustee will administer

the trust assets and make distributions for the donor's benefit. Upon the donor's death, the successor trustee will distribute or retain the trust assets as provided in the trust agreement. The donor is thus able to reap the benefits of the trust arrangement and the avoidance of probate administration for the trust assets while maintaining the ability to change the trust at any time prior to death. A revocable trust has several disadvantages: 1) funding the trust can be expensive and time consuming, 2) the trust is subject to the grantor's creditors, 3) the trust assets are countable resources for determining the grantor's Medicaid eligibility, and 4) the trust assets are included in the grantor's estate for estate tax purposes.

- An *Irrevocable Trust* is created during the life of the donor, who thereafter may not change or amend the trust. The trustee will administer and distribute any property placed into the trust as provided in the trust instrument itself. However, the donor can be a beneficiary of the trust. For instance, the grantor can provide that he or she will receive income earned on the trust property. Irrevocable trusts are frequently used to 1) own life insurance policies when the insured does not wish the policy included in his or her taxable estate for estate tax purposes and 2) protect the grantor's home from long term care expenses.
- A *Pet Trust* is a trust created by a donor to provide instructions and funds for the care of his or her pets. Frequently, the elderly will have pets who have become their "children." The client will want to provide for their care during his or her disability, or after his or her death. The Pet trust will contain instructions concerning care of the pets, and the management of funds to pay for their care and burial.
- A *Testamentary Trust* is a trust created by a Will. A testamentary trust is not created until the donor dies and his or her Will is probated.

Although a testamentary trust will not avoid the need for probate and will become a public document because it is a part of the will, it can be useful in accomplishing other estate planning goals. For instance, the testamentary trust can be used to reduce estate taxes on the death of a spouse or to provide for the care of a minor, inexperienced, spendthrift or disabled child or other beneficiary.

- A *Spendthrift Trust* is a trust created by a donor or grantor within his or her will or by trust agreement to protect a gift to a spouse, child, grandchild or other beneficiary. The Trust will name a trustee to administer and invest trust assets and make distribution decisions. The assets in the trust will be exempt from claims by the beneficiary's creditors and from marital claims. The beneficiary can serve as a co-trustee but should not serve as the sole trustee of the trust. The term of the trust can last for the beneficiary's lifetime or for a set period of time (for example, until the beneficiary reaches age 65).
- A *Dynasty Trust* is a trust created by a donor or grantor within his or her will or by trust agreement for the benefit of his or her descendants. The trust has no termination date and continues from one generation to another.
- A *Defective Grantor Trust* is an irrevocable trust that is not included in the grantor's estate for estate tax purposes but the trust's income is taxable to the grantor for income tax purposes. Therefore, the value of the trust will be increased by the amount of the tax paid by the grantor and the tax payment is not treated as an additional gift to the trust beneficiaries.
- A *Supplemental Needs Trust* can be created by the donor during his or her life or can be

created by will. Its purpose is to enable the donor to provide for the continuing care of a disabled spouse, child, relative or friend. The beneficiary of a well-drafted special/supplemental needs trust will have access to the trust assets for purposes other than those provided by public benefits programs. Additionally, the beneficiary will not lose eligibility for needs-based benefits, such as Supplemental Security Income (“SSI”), Medicaid, or low-income housing.

- A *d(4)(A) Special Needs Trust* is a trust created by a parent, guardian or court on behalf of a disabled person, under the age of 65 years, with the disabled person’s resources. The trust is not a resource for SSI or Medicaid eligibility. The funding of the trust will not use a period of ineligibility for needs-based public benefits. The trust funds can be used, during the recipient’s lifetime, to supplement the recipient’s public benefits; however, at the recipient’s death, the trust funds must be used to repay the state for any Medicaid benefits provided to the recipient during his or her lifetime.
- A *d(4)(C) Special Needs Trust* is a trust created by 1) a parent, guardian or court on behalf of a disabled person or 2) the disabled person with the disabled person’s resources. The trust must be established by a nonprofit corporation. The trust is not a resource for SSI or Medicaid eligibility. The funding of the trust will not cause a period of ineligibility for needs-based public benefits. The trust funds can be used, during the recipient’s lifetime, to supplement the recipient’s public benefits; however, at the recipient’s death, the trust funds must 1) be used to repay the state for any Medicaid benefits provided to the recipient during his or her lifetime, or 2) be retained in trust for the benefit of other disabled persons.

General Durable Power of Attorney – Virtually every disability plan should include a general durable power of attorney. With this document, you

appoint an agent to manage your property and affairs. You should select the agent carefully. The agent will have a great deal of authority to act on your behalf. The durable power of attorney should name a successor agent to serve if the primary agent fails or ceases to serve. The durable power of attorney may be drafted to be effective immediately or to be effective only if you become disabled. The durable power of attorney is not a form, and there is no one power of attorney that is appropriate for all people. The power of attorney should be drafted to meet your specific needs and circumstances. Since powers of attorney are creatures of state law, it is important that you insure your power of attorney complies with the laws of each state in which you reside and own property.

Whether you use a joint account, power of attorney, a trust, or both a power of attorney and trust, the selection of the joint account owner, agent, or trustee is the most important decision you will make. Even a good disability plan will be frustrated by poor management. You should insure that the person you select is honest, willing to devote the necessary time, will respect your plan and wishes, and has the necessary skills and expertise to assist you. Oast & Hook can assist you in preparing the necessary documents and in selecting an appropriate person to implement your disability plan. Where appropriate, Oast & Hook serves as a trustee or an agent for its clients.

## **2. Health Care Decision-Making**

Advance Medical Directive (AMD) - Your health care decision-making is a second concern if you suffer a disability. In addition to planning for the management of your property, you should provide for your health care decision making in the event that you become disabled. You have the right to make your own health care decisions, including the right to refuse health care. If you are disabled, your health care representative may make health care decisions for you; however, the state has the right to regulate the manner in which they make those decisions, including the evidence your health care

representative must produce to make decisions for you.

Virginia has adopted an Advance Health Care Directive Act. This Act authorizes you to: 1) appoint an agent to make health care decisions for you if you are disabled, 2) give instructions concerning your health care if you are dying, and 3) authorize health care providers to keep your family informed. Because AMDs are also creatures of state law, your AMD should comply with the laws of each state in which you reside. You should also provide your regular physician and your agent with a copy of your AMD and insure that it is available if needed. You should discuss your wishes with your family. Additionally, you should carry an AMD card with you in your purse or wallet which provides notice to medical personnel that you have executed an AMD and provides the names and contact information of your designated agents.

Every estate and financial plan should contain an AMD. None of us want to see our family and loved ones involved in expensive and adversarial litigation in order to carry out our wishes. However, the lack of such a directive has resulted in litigation for many families (for example, litigation has resulted in several nationally known cases involving Terry Schivo and Nancy Cruzan). Oast & Hook assists its clients in: 1) developing a customized AMD that documents your preferences, 2) selecting an appropriate agent to implement those preferences and 3) registering your AMD so it will be available when and if needed.

## **DEATH**

Estate planning for death centers on planning for the transfer of your assets to your beneficiaries in the most efficient manner and at the lowest possible cost.

Wealth Transfer Taxes - The federal government has a unified gift and estate tax. These taxes provide for an unlimited marital and charitable

deduction. The gift tax has an annual exclusion of \$13,000 (in 2009) per year per donee and an unlimited tuition and medical expense exclusion. Each taxpayer may transfer a total of \$3.5 million (in 2009) on death without the payment of federal estate tax. Of that amount, \$1 million can be transferred during a person's lifetime without the payment of gift tax. To the extent that the \$1 million is used during your lifetime, it comes off the \$3.5 million exemption upon death. Transfers in excess of \$1 million during your lifetime or \$3.5 million are taxed at a rate beginning at 45%.

A federal estate tax is imposed on all of the property and assets that you own at the time of your death. These assets include your share of jointly-owned property, life insurance, and retirement plan assets. For the estates of those who die in the years 2009 through 2011 and thereafter, the tax rates and annual estate tax exclusion amounts are as follows:

Year	Rate	Exclusion
2009	45%	\$3.5 million
2010		Repealed
2011 & thereafter	37%	\$1 million

Additionally, the federal government imposes a generation skipping transfer tax upon gifts to grandchildren or other beneficiaries who are two generations below your age when the gifts in the aggregate exceed your federal exclusion listed above. It is likely that Congress will reconsider the existing wealth transfer tax laws (i.e. generation skipping, estate and gift taxes) before 2010.

Virginia's probate tax is \$1.33 per \$1,000 of probate assets. Many of your assets, however, will not be included in your probate estate. For example, life insurance, IRA accounts, or annuities payable to a named beneficiary are not included in your probate estate. Real or personal property owned jointly with the right of survivorship with another person who survives you will not be included in your probate estate. Generally, only assets titled solely in your individual name without a payable on death or beneficiary designation are included in your estate.

Virginia does not have a gift, inheritance or estate tax. If you own real property in another state, however, the other state may impose gift, inheritance, probate, or estate taxes on the property in that state.

Death taxes may be reduced or eliminated through appropriate planning. If you have an estate in excess of the exclusion, you can reduce the estate taxes that your estate will pay through estate planning. The available planning methods include:

- Re-titling jointly owned assets to permit use of both spouse's applicable credit amount,
- Credit shelter trusts,
- Marital trusts,
- Annual exclusion gifts,
- Tuition gifts (including use of 529 plans),
- Payment of medical expenses
- Irrevocable insurance trusts,
- Sales of appreciating assets to grantor trusts,
- Creation of family partnerships or limited liability companies to permit use of discounts in the valuation of your assets,
- Personal residence trusts,
- Charitable gifts including outright gifts, charitable gift annuities, pooled income funds, private foundations, donor advised funds, or charitable trusts.

Oast & Hook can help you 1) determine which of these methods are appropriate for you and 2) implement a sound plan to minimize wealth transfer taxes.

**Disposition of Assets** - You may dispose of your assets at your death by many means, the most common being by a Will. Depending on the types of assets that you own at your death, your Will may have to go through a court supervised probate administration in order for your assets to pass to your beneficiaries. Probate can often be a time consuming and expensive process.

The probate process can be avoided, at least in part, by the use of RLTs (see prior discussion of RLTs in

Disability planning section), proper titling of assets or designations of beneficiary. For example, if title to real estate is held jointly with the right of survivorship, title to the real estate will pass automatically to the surviving joint owner at your death. The same holds true for bank accounts and other assets held jointly with the right of survivorship. Similarly, you can make certain financial and investment accounts "transfer on death" or "payable on death" to named beneficiaries. You can and should also designate specific beneficiaries of your life insurance policies, annuity contracts, 401(k) plan accounts, 403(b) accounts and IRA's. At your death, those assets will automatically pass to these designated beneficiaries or co-owners despite any contrary provisions in your Will or RLT.

Notwithstanding the convenience of probate avoidance techniques, everyone should have a Will for a complete estate plan. A Will is an ideal document to designate a personal representative to settle your affairs, pay your bills, file your tax returns at your death, appoint a guardian for minor children, apportion taxes among your beneficiaries and dispose of your assets not disposed of by other means. In selecting your personal representative, you should consider family members, your friends, your business associates, your bank and your attorney. You should not automatically waive surety on the executor's bond. It is insurance for your family's protection.

Once you have completed your Will and, in some cases, RLT, it is crucial that you review them in connection with your form of ownership of assets and beneficiary designations to ensure that your overall estate plan works as you wish.

You should consult us to determine: 1) which method of disposing of your assets is appropriate for you and your family and 2) who is the appropriate person to serve as your executor or trustee to settle your final affairs at death. In some cases, a designation of beneficiary form and a simple Will are all that are needed to dispose of

your assets upon your death. However, in other cases, a more detailed plan is needed. For example, a trust is normally considered for minor or disabled beneficiaries. Many estate plans will use several methods of transferring assets. In all cases, the choice of the person who will settle your affairs, whether as an executor or trustee, is the most important decision you will make. Oast & Hook can help guide you through this planning process and where appropriate serve as your executor or trustee.

### **Estate Planning for Same Sex Couples**

Same sex couples present different estate and financial planning issues from traditional married couples. Under federal law same sex couples may not marry. However, there are over 1,000 federal statutes in which marital status affects eligibility for federal benefits. For example, a same sex couple can not use the Married Filing Joint Returns income tax table, but must file separate returns using the tax table for single individuals. Virginia law forbids marriage by same sex couples and the creation of contracts or legal status that would convey to same sex couples the same rights that marriage would grant. Therefore, in Virginia a same sex couple may not enter into a Domestic Partnership agreement. Additionally, default legal rules (for example, preferences for guardian, conservator and estate administrator) will frequently be contrary to the couple's wishes. As a result, formal estate planning is critical for same sex couples. Because of legal, religious and societal issues (including hostile family members), same sex couples face a real threat to the execution of their wishes. Therefore, it is critical for same sex couples to execute detailed and legally enforceable instructions concerning the management of their financial and health care in the event of disability and the disposition of their assets and remains in the event of death. In addition, same sex couples must confront the impact of federal and state taxation. For example, the unlimited marital deduction is not available to them. Therefore, the couple faces the potential of significant death taxes on the first of them to die and the need for liquidity to pay those taxes.

### **ASSET PROTECTION PLANNING**

Asset protection is the arranging of assets in a way that will preserve as much value as possible for an individual and his family in the face of creditor or third party attack. The process of asset protection begins by taking inventory of your assets and liabilities. Consequently, it is often done in conjunction with estate and financial planning.

For asset protection planning, Oast & Hook uses many planning tools, such as trusts (including spendthrift and asset protection trusts), family limited partnerships (FLP), limited liability companies (LLC) and various split interest arrangements, many of which can be configured as annuities. For example, we recommend that clients who own rental real property or business interests use FLPs, LLCs or corporations to limit their personal liability. In addition, we will frequently recommend that clients who are employed fully utilize their Qualified Retirement Plans which are exempt from claims of creditors. For married couples, we recommend ownership of assets as Tenants by the Entireties. The assets owned in this manner are exempt from the claims of individual creditors. Only creditors of both spouses can reach these assets. We frequently recommend using spendthrift discretionary trusts to protect gifts made to children or parents. These trusts can be used not only to maintain the beneficiary's eligibility for needs based assistance (i.e. Medicaid, SSI ... etc) but to additionally protect the gifts from the beneficiary's creditors and marital claims.

Clients frequently ask Oast & Hook attorneys about self-settled asset protection trusts. Generally, a self-settled irrevocable spendthrift trust (i.e., a trust where the grantor is also a beneficiary) is not effective for asset protection purposes. Foreign countries, such as Nevis or the Cayman Islands, have increasingly adopted legislation that authorizes self-settled asset protection trusts (foreign asset protection trusts) as a way of attracting trust administration and related business. The costs of establishing these trusts are high and

the grantor and other beneficiaries do not have the protection of US law in disputes with the trustee. In addition the US government imposes strict tax reporting requirements on foreign trusts. In some cases, a US court has entered an order in a divorce and collection proceeding against the grantor of the foreign asset protection. The grantor's failure to make the ordered payment has been held to be contempt of court and has led to imprisonment. Alaska, Delaware and other states have attempted to attract similar clients by authorizing self-settled asset protection trusts (domestic asset protection trusts) in contravention of long-standing U.S. law. The effectiveness of the domestic asset protection trusts is not certain. Additionally, the asset protection provisions of domestic asset protection trusts may be ineffective in bankruptcy. The Bankruptcy Code now provides that the creation of a self-settled asset protection trust is a category of a possible fraudulent transfer that is subject to a 10-year statute of limitations.

Where one of our clients is about to enter into a second marriage, we will frequently recommend a marital agreement defining the rights of both parties in the assets and income of the other during the marriage and in the event of divorce or death. You should consider including in the premarital agreement a provision requiring your new spouse to purchase and pay the premiums on a long-term care insurance policy. The marital agreement becomes the foundation of the client's asset protect plan from claims by his or her spouse.

Many of our clients do not have sufficient income and assets to pay for their long-term care. In the elder law context, Oast & Hook uses trusts, annuities, non negotiable promissory notes, and other techniques to protect the client from impoverishment and qualify him or her for long-term care benefits.

In addition, we will frequently recommend that our clients purchase various insurance policies, including:

- Long-term Care Insurance (LTCI): The LTCI policy will help protect your assets from the long-term care expenses. Since you are responsible not only for your support and the support of your spouse, but also for your parents in necessitous circumstances, you should consider assisting them with the purchase and payment of premiums on a long-term care insurance policy.
- Personal Liability Umbrella Insurance Policies: A Personal Liability Umbrella insurance policy is designed to give added liability protection above and beyond the limits on homeowners, auto, and watercraft personal insurance policies. If requested, the Umbrella policy can also increase the limits of your Uninsured Motorist coverage. We recommend Personal Liability Umbrella insurance policies for most of our clients with coverage limits equal to the client's net worth.
- Disability Income Insurance: For many of our clients, the ability to earn a living is their most important asset. If you are under the age of 65, Oast & Hook suggests that you purchase disability income insurance to insure against a loss of earnings if you become disabled. To insure that the benefits under the disability income policy are tax free, you should pay the premiums from your taxable income.

Health Insurance: Taking into account health care costs, the Center for Retirement Research at Boston College estimates that 60% of older workers are at risk of being unable to maintain their standard of living in retirement. This percentage is considerably higher (67%) without rational planning or if long-term care expenses are considered. Despite the passage of Medicare Part D (prescription drug coverage), Fidelity Investments estimates that a couple retiring in 2008 at age 65 will need \$215,000 to pay uninsured health care costs such as Medicare & health insurance premiums, deductibles and co-

pays. Since 2002 this cost has risen at an average rate of 5.8% per year (compared to projected inflation of 2.8%). The total cost is even higher if long term care costs are included or if you retire early. Having sufficient health insurance is critical for protecting your retirement savings. What can you do to avoid having health care costs reduce your standard of living?

- Check your employer's retiree health insurance benefits. In 2002 one-third of Medicare's beneficiaries had employer sponsored supplemental coverage. Keep in mind these benefits can change,
- Remain working with an employer who has group health insurance coverage at least until age 65 (Medicare coverage age) and potentially longer,
- Purchase LTCI,
- If you retire prior to age 65, obtain coverage using COBRA or HIPAA. However, this coverage can be expensive,
- Adopt a healthier lifestyle, and
- Increase the amount contributed to retirement and savings plans.

Over their lifetime many of our clients will have 1) accumulated too many accounts, investments and insurance policies for them to manage effectively and 2) maintained poor and incomplete financial records. Frequently, our clients will have moved and left investment accounts located near their prior residence. As a result upon their death or incapacity there is a significant risk of lost of some of these assets. Various government agencies are currently holding over \$32.8 billion dollars of unclaimed assets. To protect against the lost of your assets, Oast & Hook recommends that you and your family:

- consolidate and deposit investments and savings into as few investment accounts as necessary;
- store insurance policies (life, health, long-term care, disability, auto and property & casualty), prepaid burial arrangements, annuity contracts, certificates of deposit and investment certificates in a safe deposit box or locked fire

proof safe;

- contact financial institutions that hold assets at least annually;
- Maintain up-to-date financial records including the location of all safe deposit boxes;
- Maintain an up-to-date list of the contact information for family, beneficiaries, and advisors; and
- Keep family informed as to the location of your records, legal documents and safe deposit box.

If you own or own an interest in a small business you should insure that the business has a business succession plan. The purpose of the plan is to insure an orderly and efficient transition of the ownership of the business upon certain triggering events (including the owner's divorce, retirement, disability or death) at the lowest possible tax cost. The plan should guarantee a buyer for the departing owner at a defined price and prevent the sale to an unwelcome party. Waiting too long or the failure to adopt a business succession plan can be very expensive:

- Financial costs: estate, gift and income taxes; additional life insurance premiums; and legal & accounting costs.
- Non-financial costs: interfamily and interbusiness disputes with the potential for the destruction of the business

Oast & Hook can help you develop and implement an asset protection plan to address the concerns and threats that you or your family will likely confront.

## FINANCIAL PLANNING

America is aging. From 2005 to 2020, the population of those age 65 or older, and the population of those age 85 or older will increase by almost one-half (48% and 43% respectively), and the youngest seniors, age 65 to 74, will increase by 70%. The growth of the over age 65 population is due to the baby boomers aging, but the growth of the 85+ seniors is largely due to

increased longevity. The Center for Retirement Research at Boston College estimates that 60% of older workers are at risk of being unable to maintain their standard of living in retirement. As people live longer in retirement, good financial planning both before retirement and post retirement becomes more important than ever to accomplish their objectives. Frequently, these objectives include:

- Obtaining and paying for appropriate medical and long-term care
- Avoiding running out of money during your lifetime while maintaining an appropriate standard of living
- Preserving your autonomy
- Remaining in your home or obtaining other appropriate living arrangements
- Leaving a legacy to your spouse, children or other beneficiary

### **Long-term Care Planning**

As you age, the probability that you will need long-term care increases. After age 65, an American has more than a 70% chance of needing some form of long-term care.

What is long-term care? It includes a variety of services and supports to meet health or personal care needs over an extended period of time. Long-term care is intended to maintain health status while acute care aims to improve or correct a medical condition.

How much care will be needed? On average a person 65+ will need some long-term care for three years. Twenty percent (20%) of persons 65+ will need long-term care for over five years. Women need care longer (on average 3.7 years) than men (on average 2.2 years).

Who are the providers of long-term care?

**Family caregivers** provide the most care. Obtaining care from family caregivers, however, is not cost or stress free. Frequently, the caregiver loses wages, pension benefits, or Social Security benefits. In some cases the family must supplement the senior's

income. Children can be required by court order to provide support to their parents who are in necessitous circumstances. Additionally, the caregiver will frequently incur stress trying to assist their family member while fulfilling their other family, personal and business obligations. In some cases it will cause disagreements among children when one child perceives he or she is doing more than others, one child perceives that another has more "power" or when only one child is receiving compensation for providing services. Children who assist their parents are frequently referred to as the Sandwich Generation since they are providing care for their parents, supporting themselves, and assisting their children. Appropriate planning is very important when using family caregivers.

**Homecare** services provide home health aides or licensed nurses to assist a senior remain in his or her home. These services cost on average \$18.50 per hour for home health aids from a licensed agency. Some clients prefer to employ home health aids directly at a lower hourly cost. This perceived savings, however, may evaporate as they comply with relevant employment and tax laws. If you directly employ a home health aid, the terms of the agreement should be committed to writing and signed. When you directly employ a home health aide, Oast & Hook can help you prepare the employment agreement and comply with the relevant laws.

**Adult day care centers** provide part-time care in a group setting. Most centers operate 10 - 12 hours per day and provide meals, social/recreational outings, and general supervision. Adult day care centers operate under a social model and/or a health care model. The average cost is about \$56 per day.

**Assisted living facilities (ALF)** provide assistance with the activities in a community setting. The cost of ALFs vary but on average cost \$3000 per month.

**Continuing Care Retirement Communities (CCRC)** provide several levels of care, independent living, assisted living and nursing care, in one location. Frequently, the resident must enter the CCRC able to live in the independent living unit. As the resident requires more care, he or she moves to the appropriate unit. Typically a CCRC charge a one time entrance fee (frequently several hundred thousand dollars which may or may not be refundable) and a monthly fee.

**Nursing homes** offer a wide range of services, including 24 hour per day nursing care. Nursing homes on average cost \$6000 per month for a private room.

For persons privately paying for care, it is wise to have Oast & Hook review and explain the agreements relating to the care before signing them. For example, do they contain personal guaranties that must be signed by family members or arbitration agreements? Many persons, however, are unable to pay these costs out of their income and therefore must spend their savings, frequently to the point of exhausting their savings. Other private payment options include long-term care insurance, reverse mortgages and use of your life insurance.

*Long-term care insurance (LTCI)* is an insurance product that pays for long-term care. It is a complex form of insurance. The following matters concerning these policies should be carefully reviewed: premiums, elimination periods, triggering events, facilities (i.e. in home, assisted living facility or nursing home) covered, inflation coverage, and the financial strength of the issuing company. Recently, a new type of LTCI policy was created, called a partnership LTCI policy. If the owner otherwise qualifies for long-term care benefits, he or she can retain assets equal to the amount of benefits paid out by his or her partnership LTCI policy. We recommend that clients over the age of 60 years consider LTCI policies. Oast & Hook can help you determine if you need a LTCI policy and select the right policy. If you do purchase LTCI, you should buy enough coverage to meet your anticipated needs, and you should consider home care coverage so that

you will not feel compelled to move into a nursing home.

A *reverse mortgage* is a loan against your home that you do not have to pay back for as long as you live there. It can be paid to you all at once, as a regular monthly advance, or at times and in amounts that you choose. The loan amounts can be used to pay for long-term care expenses. You pay the money back plus interest when you die, sell your home, or permanently move out of your home. The borrower must be at least 62 years of age and must occupy the residence as his or principal residence. The reverse mortgage, however, will have a high upfront cost that makes it inappropriate unless you intend to remain in your home for an extended period of time.

*Life insurance* is a source of cash to pay for your long-term care. There are several options to obtain cash from your life insurance:

- First if you own whole life insurance, you can borrow against the policy. The loan proceeds are tax free but the loan amount and interest will be deducted from the death benefits at your death.
- The second option for whole life insurance is to surrender the policy for its cash value. After surrendering the policy, you will not have to pay additional premiums and the receipt of the cash value of the policy is income tax free to the extent of the premiums you have paid. However, keep in mind the death benefits under the policy will be lost.
- For the third option, you can sell your policy to a third party. If you have a terminal condition, this is called a viatical settlement and the sales proceeds are tax free. If you do not have a terminal condition, this is called a life settlement and the proceeds of sale in excess of the premiums you have paid are taxable. In both cases, the purchaser will pay future premiums and receive the death benefits.
- The last option is accelerated death

benefits. Accelerated death benefits are a policy provision (contained in some term and whole life policies) that permits a policy holder who requires long-term care to withdraw a portion of the death benefits during his or her lifetime. The withdrawals are tax free but the amount of the withdrawals is deducted from the death benefits.

What are the other options for the payment of your long-term care?

**Medicare and Medicare Supplemental insurance policies** pay for a limited amount of skilled nursing facility care if you have been in a hospital for 3 days during the preceding 30 days. Medicare pays for the first 20 days of skilled nursing home care in full and in part for up to an additional 80 days. Most Medicare supplemental policies will pay the copayment for the additional 80 days. Medicare and Medicare Supplemental insurance policies do not pay for custodial or intermediate care.

**The Department of Veterans Affairs** provides several benefits for long-term care for veterans. The Improved Disability Pension is available for veterans who do not have a service-connected disability. The benefit is also available for widows and widowers of such eligible veterans. The application for this benefit will be denied if the applicant's income exceeds published income limits that are annually adjusted. However, the costs of home health care, assisted living facilities or nursing homes will reduce countable income. Additionally, the applicant may not have resources deemed sufficient to pay for their own care. The VA uses an age analysis, but it is commonly believed that an applicant may retain about \$80,000 in resources. There are no penalties for transferring assets to qualify for these benefits. There are two special allowances that may increase the improved disability pension. The first allowance is the Housebound allowance. The applicant must either have a disability rating of 100% disability and must be confined to his or her home or have a disability rating of 100% and an additional disability with a rating of at least 60% but with no requirement

to be housebound. The second special allowance is Aid & Attendance for a veteran or eligible widow(er) who is living in a nursing home, or who needs assistance with activities of daily living at home or in an assisted living facility. In addition to these non-service-connected benefits, the VA will pay for nursing home care for veterans with severe (about 70%) service-connected disabilities.

**Medicaid** is an additional payment option that many senior citizens rely upon. Medicaid is a state administered welfare program that pays for long-term in-home care and nursing home care. In addition to these services, the Medicaid program provides the PACE program, which provides community-based services to the elderly in an adult day care center. These services include primary medical and specialty care, nursing, social services, personal care, in-home supportive services, rehabilitative therapies, meals and nutritional care, and transportation.

There are strict income and resource limitations on the qualification for Medicaid benefits. There are penalties for some gifts made within five years of applying for Medicaid assistance. With proper planning, however, it is possible to avoid impoverishment, protect your home and qualify for Medicaid long-term care assistance. Because of the high cost, many families rely on Medicaid to pay for long-term care. Oast & Hook can assist you or a family member in obtaining Medicaid eligibility while preserving assets and can assist with the preparation of the necessary applications. We publish a guide to Medicaid eligibility in Virginia. You may obtain a copy on our webpage, [www.oasthook.com](http://www.oasthook.com).

When you have aging parents, how do you begin the process of assisting them with their estate, asset protection and financial planning? Begin by having a series of frank conversations ("family meetings") with your parents. If you have siblings, we recommend, with your parents' permission, including them in the family meetings to avoid misunderstandings and to minimize the likelihood of family controversy. If siblings can not

personally attend, you should suggest that they participate by speaker phone. A single family meeting will frequently be counter productive since trying to do too much too fast may be overwhelming. Therefore, we recommend a series of meetings with each meeting to address a different set of questions. Where there are differences of opinion among family members, frequently having a professional, such as Oast & Hook, assist with the planning and conduct of the meetings will be helpful.

These conversations with your parents should include a discussion of the following:

- What are their financial resources and sources of income?
- Where are their financial resources and records (including financial statements, deeds, tax returns ... etc) located?
- Who are their advisors (attorney, tax return preparer, investment advisor, insurance agent ... etc)?
- Do they have any debts?
- Do they have sufficient income and/or resources to pay for their long-term care?
- How they wish to dispose of their property?
- Is their home still an appropriate place for them to live?
- When their home is no longer appropriate, where do they want to live?
- How will they obtain necessary care?
- What are their end-of-life health care preferences?
- Have they made their funeral and burial decisions?
- Who do they wish to assist them with the management of their affairs? Is that person willing and able to provide the necessary assistance?
- Do they have appropriate legal documents (i.e. power of attorney, advance medical directive, will ... etc) and where are they located?

Oast & Hook has two Certified Elder Law Attorneys (CELA) and a CERTIFIED FINANCIAL

PLANNER™ professional (CFP®) who can help you develop an appropriate plan that incorporates the appropriate options for the payment of long-term care and the preservation of assets. In addition, we can help you apply for appropriate benefits or represent you if you must appeal a denial of needed benefits.

## **INCOME TAX PLANNING**

The income tax cuts of the recent past were supposed to lift economic growth (which they did) faster than federal spending (which they did not). It was not even close. The resulting increase in federal debt and under funded federal entitlements such as Social Security and Medicare make it probable that income tax rates will increase.

Therefore, income tax planning will become even more important in the future. However, income tax planning and return preparation is complex. It is especially complex for persons (and their families) that are nearing retirement, are retired, or are receiving long term care. In addition to complexity, the rules frequently change.

Examples of this complexity include:

- Alternative Minimum Tax – For retirees whose principal source of income are dividends or capital gains, the Alternative Minimum tax may impose a higher rate of tax than the regular income tax rates.
- Additional Standard Deduction - A taxpayer who is 65 before the close of his tax year is entitled to an additional standard deduction for the elderly.
- Minimum Required Distributions – Beginning on April 1 of the year after you turn 70 ½, you must begin distributions from traditional IRA accounts. An exception to this rule for Qualified Retirement Plans applies if you are not an owner, have not retired, and are still working.
- Withdrawing Retirement Funds Early – Large retirement account balances remaining in your name at your death may be subject to

both estate and income taxes. You should weigh the tax effects of withdrawing retirement funds early.

- Deduction for Long-term Care – Taxpayers that meet the definition of “chronically ill” may deduct, as a medical expense, the cost of obtaining necessary long-term care services.
- Entrance Fees to CCRC – Residents of a Continuing Care Retirement Community (CCRC) may deduct as a medical expense a portion of the one-time entry fee and ongoing payments for independent living units and assisted living units that guarantee occupants eventual access to skilled-nursing units. However, following the Tax Relief and Health Care Act of 2006, many CCRC’s are structuring their continuing care contracts as loans with graduated refund features. This approach allows the CCRC to postpone the reporting of income but thwarts the residents’ efforts to deduct a portion of the fee as a medical expense.
- Long-term Care Insurance – Benefits, subject to per day limits, under qualified LTCI policies are not subject to income tax. Premiums paid for LTCI are deductible up to specified dollar limits and subject to the overall floor for medical expenses, i.e. 7.5% of AGI.
- Taxation of Social Security Benefits – Depending on your “Modified Adjusted Gross Income,” a portion of Social Security benefits may be taxable for income tax purposes.
- Credit for the Elderly and the Disabled – Taxpayers with limited income who are over age 65 or who are disabled may be eligible for a tax credit.
- Accelerated Death Benefits or Viatical Settlement - Any lifetime payments received under a life insurance contract on the life of a person who is either terminally or chronically ill are excluded from gross income. A similar exclusion applies to the sale or assignment of a life insurance contract to a person who regularly buys or takes assignments of such contracts and meets other qualifying standards.
- Dependency Exemption – Frequently, a child will help care for his or her parent. The child

may be able to claim the parent as his or her dependent, thus qualifying for an exemption. To qualify, (a) the child must provide more than 50% of the parent's support costs, (b) the parent must not have gross income in excess of the exemption amount, (c) the parent must not file a joint return for the year, and (d) the parent must be a U.S. citizen or a resident of the U.S., Canada, or Mexico. If the support test ((a), above) can only be met by a group (several children, for example, combining to support a parent), a “multiple support” form can be filed to grant one of the group the exemption, subject to certain conditions.

- Medical Expenses for care of a parent - If your parent qualifies as your dependent, you can include any medical expenses you incur for him or her along with your own when determining your medical deduction. If he or she doesn't qualify as your dependent only because of the gross income or joint return test, you can still include these medical costs with your own. The costs of qualified long-term care services required and eligible long-term care insurance premiums are included in the definition of deductible medical expenses.
- Tax Effective Support of Parents - For 2008 through 2010, people in the two lowest tax brackets, 10% and 15%, will not be liable for any tax on long-term capital gains. When your parents are in a low tax bracket, it may be advantageous to give an appreciated security to your parent rather than selling it, paying the capital gains, and using the proceeds to help your parent. Be careful, however, the gain does not push your parent into a higher tax bracket.

These are only a few examples of the complex income tax rules confronting the elderly, disabled and their families. Oast & Hook can assist the elderly, disabled and their families with income tax planning and return preparation.

## INVESTMENT PLANNING

Oast & Hook is frequently asked to assist our clients with financial planning for their retirement or the payment of their long-term care. Unfortunately, we often find that our clients have made significant mistakes in their investment planning. These mistakes jeopardize our clients' ability to provide for their support during retirement, pay for necessary long-term care and to leave inheritances to their children. In some cases, the client may run out of money needed for the client's support because of the investment mistakes.

To avoid investment errors, Oast & Hook recommends that our clients:

- Put your investment and financial plan in writing. This writing is frequently called a financial plan or investment policy statement. Although a professional advisor can assist you with this responsibility, you should not delegate the actual decision making to the professional. In making investment decisions you should not deviate from your stated goals and objectives due to emotions, however, you should annually review and revise your plan as necessary due to changes in your circumstances.
- Obtain investment advice from "fee-based" advisors rather than from "commission-based" advisors. Commissions create conflicts of interest because a commission-based advisor is compensated for making money from you rather than for you. Oast & Hook recommends that financial and investment advice from a CFP® professional on a fee basis.
- Do not rely on your emotions. It will lead you to sell at market lows and invest at market highs.
- Save. Save. Save. In 2004 the savings rate for Americans was only 1% to 1.6% of disposable income. In 2005, the savings rate was a negative (i.e. they consumed more than what they made). Most Americans will not have a defined benefit pension. They must rely on their savings to fund retirement, pay uninsured medical expenses and pay for long-term care. However, it is likely that investment returns will be more modest than we have experienced in the last 25 years. Therefore, you must save a significant portion of your disposable net income to fund these expenses.
- Do not speculate. When you play the market or day-trade, you are gambling on your ability to beat the pros. You will lose.
- Do not invest primarily for "tax reasons." Tax shelters are frequently poor investments.
- Do not consider your home as an investment. Think of it as a place where you and your family live.
- Reduce investment risk and increase returns by allocating investments among different asset classes such as large cap stocks, small cap stocks, REITs, foreign stocks, and bonds. During the next 20 years, it is likely that the US share of the global economy will be cut in half. Therefore, a significant portion of your investments should be in international investments.
- Monitor investment performance on a quarterly basis and re-balance to your investment allocation annually.
- Increase investment returns by controlling investment expenses and taxes. To accomplish these objectives, we frequently recommend that our clients consider using index or passively managed mutual funds.
- Understand inflation risk. Historically, inflation runs approximately 3% per year. In some periods it is lower. Too many individuals invest all of their savings in fixed income securities (Certificates of Deposit, Savings Bonds, Municipal Bonds, Money Market accounts, ... etc). After the payment of taxes on the interest income and factoring in inflation, there is little or no investment return on these vehicles. Therefore, you should consider allocating a portion of your savings to equities which historically have done better in keeping up with inflation.
- Avoid excessive withdrawal rates from your savings. As a rule of thumb, to avoid running

out of savings during your life, assuming a balanced portfolio of stocks and bonds, you should limit annual withdrawals to about 4% of your savings valued annually. A better solution is to meet with a CFP® and develop an appropriate withdrawal percentage as part of a financial plan based on your investment risk tolerance, investment asset allocation, and cash flow needs. This financial plan should be reviewed on an annual basis or sooner if your circumstances change.

To assist our clients with financial and investment planning, we have formed Oast & Hook Financial Services, LLC, a Registered Investment Advisor and financial planning firm which is separate from Oast & Hook, PC, which provides legal services.

### **PERIODIC REVIEW**

Estate, asset protection and financial plans do not last forever. Most people should initially implement their plans at an early age and then review their plans at least annually (i.e. plan early and often).

In addition, you should review your plan every time there has been a significant change in circumstances for you or your family. For example, you should review your estate and financial plan:

- upon your marriage,
- upon the birth of a child,
- when your children become adults,
- upon your divorce,
- upon your retirement,
- upon the death of a spouse, family member or beneficiary,
- if your spouse, family member or beneficiary suffers a disability,
- if you, your spouse or other family member requires long term care,
- when there has been a significant change in your income or assets,
- when there has been a significant change in the income or assets of a family member,
- when you move to another state, or

- when your children or other family member marry.

Many clients fail to revise their estate, asset protection and financial plans upon their divorce or prior to a second marriage. This can lead to unintended, if not disastrous, results. Timely estate planning can avoid many problems. For example, a premarital agreement before a second marriage can provide for your new spouse and protect your children's inheritance. You should contact us whenever any of these events occur.

You should also review your estate, asset protection and financial plans every time you are aware of a significant change in the laws. We prepare annual summaries of significant changes in the laws applicable to estate planning, and also address such changes in our weekly newsletter, the *Oast & Hook News*. Please call Oast & Hook at 757-399-7506 or leave us a message on our website, [www.oasthook.com](http://www.oasthook.com), if you would like a copy of the annual summary or subscribe to the newsletter.

### **CONCLUSION**

The failure to implement an effective comprehensive estate, asset protection and financial plan can wreak havoc on the client's and the client's family's finances and cause unnecessary stress and expenditures of time and money. Oast & Hook specializes in assisting its clients in estate, asset protection and financial planning for the benefit of the client and his or her family.

**Oast & Hook, P.C.**  
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