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ELVILLE AND ASSOCIATES

MAIN OFFICE
9192 RED BRANCH ROAD, SUITE 300
COLUMBIA, MARYLAND 21045

ROCKVILLE OFFICE
1700 ROCKVILLE PIKE, SUITE 400
ROCKVILLE, MARYLAND 20852

EASTERN SHORE OFFICE
116 SOUTH PINEY ROAD, SUITE 204
CHESTER, MARYLAND 21619

PHONE: 443-393-7696
FAX: 443-393-7697
www.elvilleassociates.com

Maryland's New MOLST: What is it?

By Stephen R. Elville, J.D., LL.M.

Many clients have expressed to me that they consider their Advance Medical Directive to be the most important of all their legal documents. Whether or not this is the case for you, it is clear that Advance Medical Directives are of tremendous importance to the individuals who take the time to thoughtfully consider the choices available to them under Maryland law and to their loved ones who will ultimately depend upon those choices as a guideline for carrying out important, if not critical, health care decisions. With the recent introduction of MOLST, individual health care decision making can now be even more personalized and definitive. In the following paragraphs, I will outline the highlights of what has recently been disseminated to the elder law and estate planning bar about MOLST by the Maryland Office of Health Care Quality and Maryland Attorney General's office.

Acronyms can be troubling and are often also humorous. This one, MOLST, is somewhere in the middle of those extremes. MOLST stands for **"Medical Orders for Life Sustaining Treatment"** and is soon to become a household name. The MOLST form represents actual written medical orders by a physician or nurse practitioner specifically concerning life-sustaining treatments. As per Maryland's Office of Health Care Quality, MOLST is "a portable and enduring medical order form that contains orders about cardiopulmonary arrest and other life-sustaining treatments. This order form will increase the likelihood that a patient's wishes to receive or decline care are honored throughout the health care system." MOLST is not an Advance Medical Directive and is not a form prepared by an individual in the normal course of events, such as during the signing of a Trust, Will, Powers of Attorney, and so forth. Rather, the MOLST form is strictly a physician's directive/doctor's order.

MOLST became law as of October 1, 2011 and the MOLST form can be used now (MOLST forms are now available). However, the MOLST Regulations are still pending. So the full implementation of Maryland MOLST is a work in progress. I recommend viewing this cloud as one with a silver lining in that this interim period can be used to study and better understand MOLST, its intended uses, and the many questions that have arisen regarding the interplay between MOLST and the Advance Medical Directive.

According to the Attorney General, the MOLST statute was enacted to improve compliance with patient's wishes for their care and reduce system errors. The MOLST form replaces the former Life-Sustaining Treatment Options (LSTO) form, a voluntary form that was a limited patient preference document and not a physician's medical order. MOLST will also replace Emergency Medical Services "Do Not Resuscitate" (EMS/DNR) orders. As per the Attorney General, existing EMS/DNR orders will continue to be valid. Rather than being limited to a nursing home setting, the MOLST form will be valid in all health care settings and programs. As of October 1, 2011, MOLST must be completed for all persons admitted to nursing homes, assisted living programs, hospices, home health agencies, and dialysis centers. MOLST must also be completed for patients being transferred from a hospital to any of the foregoing settings or another hospital. However, participation in the completion of a MOLST form by a patient is voluntary.

Maryland's New MOLST: What is it? (continued)

To minimize confusion, it is important to understand the following basic concepts about MOLST: (1) For any person who is incapacitated and cannot make their own health care decisions, MOLST does not change who has legal authority to make health care decisions for such person; (2) MOLST does not change a person's Advance Medical Directive; (3) the MOLST form is kept in a patient's active medical records; (4) when a patient is transferred to another health care facility, the MOLST form must physically accompany the patient. The MOLST form may also be sent electronically or by facsimile; (5) the MOLST form is portable and is accepted universally by facilities; and (6) the MOLST form is still valid even if the physician or nurse practitioner who signs the MOLST is not on a particular facility's staff.

By using a MOLST form, an individual, their authorized representative, and their physician or nurse practitioner can direct medical orders for cardiopulmonary resuscitation (CPR), artificial ventilation, blood transfusions, hospital transfers, medical workups, antibiotics, artificially administered fluids and nutrition, dialysis, and other orders for life-sustaining procedures. To ensure that the MOLST form accurately reflects the individual's wishes, any patient for whom a MOLST form is completed must receive the original or a copy of the MOLST form within forty-eight (48) hours after completion. A MOLST form must be consistent with the known decisions of the patient or authorized decision maker and any known advance directive if the patient is incapacitated.

As mentioned above, use of the MOLST form does not obviate the need for an Advance Medical Directive. As per the Attorney General, "if a patient is no longer able to make their own decisions, an advance directive speaks for them in those situation that they discussed in the living will portion of the advance directive." Further, "if a patient made a decision based on informed consent that was communicated to their physician or nurse practitioner and resulted in a medical order, that decision and implementing medical order would supersede instructions contained in an advance directive concerning a hypothetical treatment decision." For example, if a patient's Advance Medical Directive indicates that in the event the patient is in a true end of life condition and is not able to make health care decisions that no life-sustaining procedures should be administered, and subsequently if, after giving informed consent the patient agrees to the use of a life-sustaining procedure and that directive is implemented into an order on a MOLST form, and subsequently if the patient becomes incapacitated or otherwise loses the ability to make health care decisions, the patient's informed consent to the use of life-sustaining treatment will continue in effect after the patient's incapacity and the MOLST form will supersede the Advance Medical Directive in that instance. The reasoning behind this is that the MOLST order form is intended to relate to the current medical condition of the patient and not to hypothetical, open-ended treatment preferences indicated on the Advance Directive that do not related to the patient's current condition and situation.

The pending MOLST regulations contain several requirements for MOLST form review. As per the proposed regulations, the MOLST form must be reviewed (a) annually, (b) by the receiving facility upon patient transfer, (c) upon patient discharge, (d) when there is a substantial change in the patient's health, (e) when a patient becomes incapacitated, or (f) when the patient or authorized decision maker changes their wishes.

If you are interested in more information about MOLST or if you would like a MOLST form, please contact our office. We will be discussing more about MOLST in the coming months in further articles, at client update meetings, and at our upcoming client education events.

UNDERSTANDING MARYLAND'S NEW STATUTORY POWERS OF ATTORNEY

By Stephen R. Elville, J.D., LL.M.

Many clients are confused about their need for the new statutory power of attorney and what it means. In this brief article, we will clarify everything that our clients need to know about this issue, including practical approaches to using the document.

What is a Maryland statutory power of attorney? Simply put, it is a form that is codified in the laws of Maryland (the Maryland General and Limited Power of Attorney Act) that for the first time in the history of Maryland law does the following major things: (1) clearly sets forth the responsibilities that your agent (your chosen trusted fiduciary) has to you, the principal (the person giving the power or authority to your agent); (2) provides authority for a list of "interested persons" to petition the Circuit Court concerning the power of attorney document or the conduct of an agent; (3) enforces the power of attorney's acceptance by third parties; and (4) provides for third party liability in the event of non-acceptance, including attorney's fees and court costs.

As mentioned in my letter to our clients last fall, for decades, powers of attorney in Maryland were largely unregulated - evidenced by an absence of statutory provisions in the Annotated Code of Maryland. Subsequently, among many

Understanding Maryland's New Statutory Powers of Attorney (Continued)

other problems, banks, brokerage firms, insurance companies, and other financial institutions could refuse to accept or deal with the power of attorney document, thereby leaving the then-disabled person (the principal) who gave his or her power of attorney to his or her appointed agent without any mechanism to privately manage their financial affairs, without significant means of recourse, and potentially subject to a guardianship proceeding. Further, all of the protections mentioned above were absent and we routinely recommended that as a practical matter, all power of attorney documents should be updated at least every seven to eight years to avoid any issues concerning staleness and non-acceptance.

Now, thanks to the efforts of many attorneys in the Estates & Trusts Section of the Maryland Bar, Maryland's new power of attorney laws provide for the ability of individuals to appoint their chosen agent(s) with the confidence that a properly executed statutory power of attorney may not be refused by a third party without (a) such third party being subject to a court order enforcing the acceptance of the power of attorney, and (b) such third party being liable for attorney's fees and costs incurred in such an action to mandate the acceptance of the power of attorney. All powers of attorney validly executed under the new law in Maryland are now enforceable, even powers of attorney other than statutory powers of attorney, except that attorney's fees and costs are not recoverable in an action to enforce a non-statutory power of attorney.

There is much confusion surrounding the actual statutory power of attorney forms and how they should be used. The new law provides for two (2) statutory forms, the statutory "short" form and the statutory "long" form. The "short" form is exactly that, a brief and compact form that provides for expeditious execution and implementation while providing for a significant amount of powers contemplated as those reasonably necessary for an agent's use. The "short" form requires no client input other than personal contact information for principal and agent, limited special instructions (if any), and execution with the same formalities as a will with acknowledgement before a notary public. The "long" form is significantly more complex and requires a great deal of client input, including consideration of a plethora of optional powers.

What does this mean to our clients? In simple terms, this: as your elder law and estate planning attorneys, we are cognizant of your need for adequate and appropriate powers that should be contained within power of attorney documents so that all future contingencies can be anticipated. Therefore, we have chosen to utilize the new statutory power of attorney forms in the most advantageous way. My philosophy about this is best explained as follows. I many times ask clients, "if you are going into the future, and I think that we would all agree that the future is largely unknown, or asked another way, if you are going into a war, would it be advisable to have all of your tools and weapons available to you, or would you only want to have a limited number of tools and weapons available to you? The answer is, of course, that assuming you could carry all of your tools and weapons, you would want to have all of them with you. Fortunately, with your leading edge, optimized power of attorney documents, you can carry everything that you need into the future with you.

I recommend that all clients utilize two (2) power of attorney documents. The first is the statutory "short" form – this document should be used as a baseline power of attorney document so that clients can avail themselves of all the advantages of the new statutory power of attorney laws. By having the statutory "short" form in place, this document will be the first power of attorney to be utilized by your agent. The second is what we will refer to as a "supplemental" power of attorney. The "supplemental" power of attorney, while containing many of the same or similar powers contained in the statutory "short" form, also contains several "enhanced" powers designed for optimal estate and elder law planning. While a few of these "enhanced" powers are also contained in the statutory "long" form, the key to effective estate and elder law planning is drafting and design. With this being the case, the two power of attorney structure is superior to the use of the "long" form since that form cannot be appropriately customized for advanced estate and elder law planning purposes. For most of our clients, the "supplemental" power of attorney document will be substantially the same document that was previously executed by them, with one exception. Because power of attorney documents commonly contain provisions that revoke all prior powers of attorney, the supplemental power of attorney must contain provisions do not revoke the statutory power of attorney so that both power of attorney documents can be used in conjunction. Depending on future events, the statutory "short" form may be the only power of attorney document necessary. The "supplemental" power of attorney document should only be used by your agent should the powers contained in the statutory "short" form fail to address the situation your agent is dealing with at that future time.

In conclusion, Maryland's new statutory power of attorney laws represent a much needed and substantial improvement to our state's laws governing the use and effect of powers of attorney. These laws provide sweeping new protections for mass public usage of these important power of attorney documents. For estate and elder law planning, the statutory forms can be used in conjunction with privately drafted "supplemental" power of attorney documents to accomplish the best and most enhanced planning possible. If you have not yet updated your power of attorney documents, please call our office to set a time to meet with me or one of our other three attorneys. Doing so is easy and convenient, and will put you in a position of strength to deal with incapacity and avoid guardianship to the greatest extent possible for many years to come.

FINANCIAL LITERACY FOR SURVIVING SPOUSES AND HEIRS

Barrett R. King, J.D.

Often in a family, one person is responsible for overseeing all aspects of finances, from where accounts are held and how those accounts are titled to making sure that bills are paid. He or she may be the primary earner in the family, the one with the most availability or patience to handle such matters, or maybe he or she is the person who has "always done it." In our office, the trouble comes when that person, who we'll call the 'manager' for purposes of this article, becomes incapacitated or passes away.

In many cases (though certainly not always), the manager is a family patriarch such as a husband or father. Whoever it might be, the knowledge of when the mortgage payment is due or when certain tax decisions must be made may die with the manager. Overwhelmed with grief and consoling other family members, the surviving spouse, partner, children, and other family will be overwhelmed with something else: uncovering the paper trail (or, in today's digital world, the online trail) of family finances.

In our practice, when retained to assist the surviving family members in administering the manager's estate, we frequently find ourselves playing anthropologist, detective, or forensics expert as we search through account records, old insurance policies, land records, and a vast expanse of other records to figure out which accounts still exist, which policies are still valid, which banks or insurance companies have been bought by whom, and so on.

So, as a 'manager,' what are you to do? First and foremost, keep accurate records of your assets. Purchase, if you do not already have one, a fire-safe cabinet or box to contain your important records. Make sure someone knows where you keep this box and where the keys are stored. Keep a written record, updated every six months, of your accounts and insurance (including User ID and password for online access). If you own real estate, keep the deeds in this box. As estate planning attorneys, we would be remiss if we did not remind you to keep your estate planning documents in this same safe place.

Sounds simple, doesn't it? Imagine the frustration of your guardian or survivor who does not have this information at their fingertips. Some online accounts become locked after several failed login attempts. Financial institutions will generally not speak with someone who is not an account holder unless that person is a guardian, personal representative of your estate, or trustee of your trust. And what about unclaimed insurance policies? A New York Times article published in February (http://nyti.ms/rRv2H4) reports over $400 million in unclaimed insurance in New York alone since 2000. Insurance companies have no obligation to pay on a policy until a claim is made; if your family does not know a policy exists, they will not make a claim.

If you are one of those who has never been involved in the financial management in your household, and your manager is still capable of managing, encourage him or her to take the steps described above. If you find yourself thrust into the role of becoming manager after the death or incapacity of another, you should not attempt to figure it all out yourself. Caring for a sick loved one or grieving the loss is enough of a burden to bear without trying to uncover or unravel a complex mystery of financial management. Consult with a trusted advisor, be it a financial planner, attorney or accountant.

The FINRA Investor Education Foundation has produced reports that show women tend to have lower rates of financial literacy than men (http://bit.ly/ssS92w). Certainly this is not a blanket rule to apply in all cases; however, when Social Security life tables show that women have a greater life expectancy than men (http://1.usa.gov/u99fbq), the case can be made that wealth preservation can suffer if a widowed female partner outlives the other, as women tend to pay higher interest rates on debt service than do men, and the elderly are often prey to scam artists, resources can quickly dwindle when a survivor is left to his or her own in financial and estate management.

Effective estate planning now can mitigate exposure to the concerns presented in this article. Appointing trust protectors, fiduciary advisors and others to serve in various capacities can protect an aging individual who may suffer from capacity issues and can protect the manager's survivor who is, simply put, used to leaving the details to someone else. This should not be seen as an attempt to discourage anyone from increasing financial awareness. Resources abound, from individual attention with an advisor to websites for advice, for improving understanding of asset management. The key point to take from this article is for managers to plan so that matters can be easily attended to upon his or her passing, and for those who rely on a manager to take a part in the process to protect the estate from various potential issues that often come with costly consequences.

As estate planning and elder law attorneys, our goal is to inspire you to be proactive in all aspects of your estate. Ensuring the ease of administering your plan and the awareness of what assets must be administered is probably the "missing link" in the planning process.

In the modern era, many of us are receiving our account statements electronically and not by mail. Who has access to the email account in which you receive those statements? If the answer is "I don't know, or "No one," consider a Maintenance Plan with our firm, whereby we will review with you on an annual or bi-annual basis the 'big picture' to make sure that not only are your estate planning documents still doing what you want them to do, but that your estate will be more easily and fully administered by

those who you nominate to handle the task. By reviewing your regular statements, tax returns, and other documents, we can ensure that accounts and policies are not overlooked and that your loved ones are not consumed with the details of tidying your estate.

WHEN "HOME FOR THE HOLIDAYS" REVEALS INCREASING FRAILTY & NEEDS

Cathy Lonas, RN, BSN, MSBA
Advocate 360, LLC
Geriatric Care Management

"I knew when she asked me for help in the kitchen something was very wrong," said a daughter-in-law after the family came together for Thanksgiving. "When we got married 30 years ago my husband warned me. Stay out of her kitchen! His mother took great pride in cooking for family and friends and did not want any interference. And now, she was lost in the very room that had given her so much pleasure. She could not remember the steps of tasks and recipes that were routine."

It's not unusual for families to report similar stories after the holidays. As we come together and spend more time with our older loved ones, we find that their reports of "I'm fine" have not been very accurate. As a Registered Nurse and Geriatric Care Manager (GCM), I often hear:

"She had not eaten the meals I cooked and put in her refrigerator last week."

"It looks like Dad is wearing the same clothes every day based on the dried stains on his shirt."

"We found past due bills everywhere. There were notices from the power company about stopping service. There were dividend checks in kitchen drawers."

Whether from increased frailty or cognitive decline, it's hard to see our older loved ones in need of help. They've fought hard to try to maintain their independence and not tell us how hard things have become. But, does this "independence" come with a price? Are they safe? When is it time to ask for help?

In circumstances like these, the services of a GCM may be helpful. Geriatric care management services include assessments of the home that can help identify risk factors. Placement considerations are also addressed. Can mom and dad stay in their home if they have some help from a caregiver? If so, how do you choose the right agency? The right caregiver? Or, if home is no longer an option, is it time to transition to long term care such as assisted living or skilled nursing care?

Geriatric care management services are custom-designed to identify the resources needed to meet your loved ones' needs in addition to giving you the peace-of-mind that you are providing the best care for them at all levels.

INTENTIONALLY DEFECTIVE GRANTOR TRUST (IDGT)

Helen Whelan, J.D., LL.M.

An Intentionally Defective Grantor Trust (IDGT) is an irrevocable trust where the grantor, by virtue of retaining certain powers, is taxed on the trust's income.[1] A sale to an IDGT can be an ideal way to transfer business interests from a parent to a child. This technique can be used to pass wealth to future generations, including appreciation, while the parents continue to maintain control over the business during their lifetime.

The sale to an IDGT is structured so that the grantor (presumably a parent) sells appreciating business interests to an irrevocable trust in exchange for a promissory note. This will remove the value of the transferred asset from the parent's estate for gift and estate tax purposes. However, the grantor is still the owner of the trust for purposes of income tax. The parent essentially makes a tax free gift to the beneficiary (child) through the payment of income taxes on behalf of the trust.

The transaction is initiated when the grantor forms an irrevocable trust designating his or her children as the beneficiaries. The grantor typically gifts 10% of the value of the company's interests (intended to be sold to the IDGT) in cash or other property to the IDGT. The gift will serve as "seed" money. Alternatively a beneficiary can personally guarantee an equivalent

Intentionally Defective Grantor Trust (IDGT) (Continued)

amount. The grantor than sells business interests that are expected to appreciate over time, to the trust and takes back a promissory note. If the business interests consist of stock of an S corporation, the stock can be divided into voting and non-voting shares, with the non-voting shares being sold to the trust. The grantor will retain the voting shares and therefore control of the business. The grantor receives regular payments on the note from the business income generated from the trust assets.[2] The grantor pays income tax on the income and principal attributed to the trust.[3] However, interest on the note received by the grantor is not subject to income tax. The grantor will also be entitled to any deductions and credits applicable to the trust estate.[4] Once the note is paid in full the grantor releases the power that caused the irrevocable trust to be a grantor trust.

Forming the IDGT:

The grantor forms an irrevocable trust, which is considered "defective" because the grantor retains some type of control over the beneficial enjoyment of the trust estate (e.g. business interests. The grantor's children (and usually their descendents) are the beneficiaries.[5] There are certain powers retained by the grantor that cause him/her to remain the owner of the trust, without causing the trust estate to be included in the grantor's taxable estate at death. These powers include the ability of a non-adverse party (i) to substitute assets under IRC §675, (iii) to control investment of trust funds under IRC §675 (but power should not be held by grantor), or (iv) to "sprinkle" income under IRC §677.[6]

The "seed" money and/or beneficiary guarantee:

The grantor gifts cash or other property to the trust in an amount equivalent to not less than 10% of the value of the business interests being sold to the trust. Ten percent is usually the minimum amount of "seed money" respected by the IRS.[7] However, seed money is considered a taxable gift to the trust. Seed money provides a means to pay the note in the event the business interests do not generate enough income to cover the note payments. A personal guarantee by the beneficiary in an amount equivalent to the seed money is an additional or alternative technique used in place of the grantor's gift to the trust. The beneficiary's personal guarantee will also help to prevent inclusion of the trust assets in the grantor's taxable estate under §2036(a)(1).[8] The beneficiary guarantor must be able to demonstrate that he or she is financially capable of backing the guarantee so that it is not just an illusory gesture.[9]

Sale of the business interests:

The grantor sells the business interests to the IDGT and takes back a promissory note in an amount equal to the assets' fair market value, less any seed money used as a downpayment. The interest rate of the note should be consistent with the AFR (applicable federal rate).[10] It will be imperative that the note be a true debt instrument. Payments on the note should be made without regard to trust income. Typically the term of the note is approximately nine years so that the mid-term applicable federal rates (AFR) are applied. The note should be a recourse promissory note that could be satisfied with any assets in the trust (e.g. including seed money, if applicable). Another benefit to this transaction is that the grantor can retain control of the business. If the business interests consist of S corporation stock, that stock can be recapitalized into voting and non-voting stock; the voting stock equal to 1% and the non-voting stock equal to 99%.[11] By selling the non-voting stock to the IDGT, the grantor retains the voting stock and therefore control over the business. In order to avoid inclusion under § 2703, the sale should be treated as an arms length transaction between unrelated parties. The stock should be valued at fair market value; however, it should reflect a discount for the non-voting stock.

Grantor pays Income Tax:

Note payments are paid by the income generated from the business interests in the trust. As mentioned above, because the trust is structured as a grantor trust, the grantor pays income taxes on the trust income. However, there is no income tax on the portion of the note payment constituting interest. Additionally, for estate tax purposes, the trust assets are outside of the grantor's taxable estate. The grantor's estate is further depleted by its payment of the income tax, which is essentially a non-taxable gift to the beneficiaries.[12] Because the trust does not pay the income tax, trust assets remain intact and continue to appreciate. The grantor also receives the benefit of any credits and deductions attributable to the trust income.

Payment of Note and Release of Grantor Power:

Once the trust has paid the note in full, the grantor can release the power (as enumerated above) that caused the grantor to be the owner of the trust. The trust will then become a separate taxpayer. However, since the business assets (and any accumulated appreciation) are already within the trust there is no gift tax. Additionally, the assets comprising the trust estate are completely removed from the grantor's taxable estate.

If the grantor dies before the note is paid in full, the unpaid portion of the note will be included in the grantor's estate. The grantor's estate would also recognize any deferred gain associated with the unpaid portion of the note. However, in such event, the grantor would be no worse off than if he or she never effected the transaction. A significant benefit occurs when the appreciation of the trust estate exceeds the interest paid on the note.

Income tax benefits:

The income tax benefits to this transaction include:

(1) Interest paid or accrued on the note should not be included in the grantor's gross income since the trust and the taxpayer (grantor) are considered to be the same person;[13]

(2) The basis of assets in the trust represents the value transferred; [14]

(3) No income tax is due on assets sold to the IDGT;

(4) No capital gain is recognized upon the transfer of assets to the trust; [15]

(5) No capital gain is recognized on distributions made in kind from the trust to the grantor; and [16]

(6) As long as the trust does not mandate that the grantor be reimbursed for the income taxes paid on behalf of the IDGT, the grantor may be reimbursed from the IDGT, so long as the terms of the IDGT provide that the reimbursement is discretionary. [17]

One of the primary purposes of utilizing this type of transaction is that if structured properly, none of the assets (and their subsequent appreciation) sold to the IDGT are included in the grantor's taxable estate.

Formalities need to be strictly observed so that Chapter 14, IRC §§ 2701 and 2702 do not apply to transfers in trust for family members. On its face, this transaction may appear to violate those sections. However, it is important to note that these sections only apply to equity interests and not to debt.[18] Additionally, the single class exception under IRC § 2701 applies since the non-lapsing differences in voting rights are disregarded in determining whether there is more than one class of stock.[19] Thus, even though as little as 1% of the business interests remain under the grantor's control, that 1% wields 100% of the voting power.

Another key point is that even if all the requirements in the previous paragraph are satisfied, a note will not be subject to IRC § 2701 to the extent it represents a qualified payment right.[20] An additional threat to this type of transaction is IRC § 2036, which will pull the trust estate, and all subsequent appreciation, back into grantor's taxable estate. In order to stay clear of § 2036, the grantor must take back a bona fide debt instrument and all formalities must be observed so that the grantor no longer has an interest in the property.

In *Fidelity-Philadelphia Trust Co. v. Smith*[21], the Supreme Court held that a retained right to payments is bona fide debt if:

(1) the amount of the payment is not based on the amount of income produced by the trust;

(2) the obligation is not chargeable to the transferred property; and

(3) the promise is a personal obligation of the transferee.[22]

If structured correctly, the benefits of using this type of structure are:

(1) The ability to pass business interests from parent to child, including subsequent appreciation;

(2) The parent's ability to remain in control, since he or she can retain the voting interests; and

(3) The grantor (parent) pays income taxes, thereby leaving assets within the trust to grow tax free and further reduce the parent's taxable estate.

Although this transaction is not directly supported by the IRS, there are sufficient rulings and case law that support its use.

This is a general summary of a sales transaction to an IDGT, an advanced technique used to reduce estate tax. However, as described, the IDGT used in this context is an advanced estate planning tool that should only be implemented after a careful review of the overall estate plan. Creation of an IDGT must be meticulously structured and should not be attempted without the proper tax advice and assistance of legal counsel.

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[1] Sometimes referred to as an Intentionally Defective Irrevocable Trust (IDIT).

[2] As subsequently addressed in this article, the note payments should not be based on the amount of income generated by the trust.

[3] IRC § 674

[4] IRC § 671

[5] There are GST issues to consider if grandchildren are included as a beneficiary.

[6] See Streng, et al, "Estate Planning," 800-2nd Tax Mgmt. (BNA) Estates, Gifts, and Trusts, at A-107

[7] If the trust was funded after December 31, 2010, and is anticipated to be a dynasty trust then GST should be allocated to the seed money.

[8] Ltr Rul. 9515039.

[9] See Hatcher, Jr. and Manigault, 'Using Beneficiary Guarantees in Defective Grantor Trusts,' 92 J. Tax'n 152 (Mar. 2000).

[10] IRC § 7872 interest rate

[11] Having more than one class of stock in an S corporation can destroy the S corporation status. However, under IRC § 1361(c)(4) differences in voting rights do not constitute more than one class of stock.

[12] Rev Rul. 2004-64, 2004-27 I.R.B. 7, 2004-2 C.B. 7

[13] Rev. Rul. 85-13

[14] PLR 9535026

[15] PLR 9535026

[16] Rev Rule 85-13

[17] Rev Rul. 2004-64, 2004-27 I.R.B. 7, 2004-2 C.B. 7

[18] Regs. §§ 25.2701-2(b)(1) and 25.2701-2(b)(3)

[19] Reg. § 25.2701-1(c)(3)

[20] § 2701(a)(3)(A), § 2701(c)(3)(A), and Reg. § 25.2701- 2(b)(6)

[21] 356 U.S. 274, 1 AFTR2d 2151 (S.Ct., 1958)

[22] Keebler & Melcher, "Structuring IDGT Sales to Avoid Sections 2701, 2702, and 2036," 32 Est. Plan. 19 (Oct. 2005)

FIRM NEWS

INTRODUCING CATHY LONAS, RN, BSN, MSBA

Elville & Associates is proud to announce its professional association with Cathy Lonas, RN, BSN, MSBA, Geriatric Care Manager. Since Cathy's introduction to Mr. Elville she has since become an integral part of our Planning Team. Cathy brings a wide range of talents and abilities to our clients, along with an extraordinary passion and energy for helping others. This personal and professional skill set is now a powerful part of Elville & Associates' solution-oriented approach to elder and estate planning. We are proud of the elevated level of practice and client service we are able to attain by making Cathy's information and services known and available to our clients.

OUR FUNDING COORDINATOR – MARY GUAY KRAMER

Funding is an integral part of the planning process, whether in a traditional estate plan or in an elder law planning situation. A failure in the funding process can and will many times lead to total plan failure. Assets that are not properly designated and/or re-titled may be disposed of in ways that are contrary to the planned disposition of the assets and may therefore fail to utilize the estate tax laws that can minimize death taxes. Lead Attorney Stephen R. Elville's executive assistant, Mary Guay Kramer, is Elville & Associates' Funding Coordinator. As Funding Coordinator, Mary's mission is to ensure that every estate and elder law plan is fully funded. Mary's well-known talents for organization and efficiency make her uniquely situated to the funding process and the client follow-up that results in plans that ultimately work as originally intended. Whether you have a long-standing plan or recently implemented the planning process, it is always a good idea to review your plan funding. Please call Mary any time a funding question arises and always keep in mind that we are committed to making sure that your estate or elder law plan is properly funded.

INTRODUCING ROSE ANN SCHULER

Mrs. Schuler came to Elville & Associates in February, 2011, after spending over 20 years in the background investigation industry. She currently works as a paralegal and also supports the firm administratively. Mrs. Schuler also assists Mrs. Elville in the daily management of the firm's main office in Columbia, Maryland.

INTRODUCING DEBORAH ELVILLE

Mrs. Elville has been a part of Elville & Associates since its inception. She currently heads the firm's billing department and also works with Rose Ann Shuler in the daily management of the firm's main office in Columbia, Maryland.

INTRODUCING PATRICIA TAIT

Ms. Tait recently joined us at Elville & Associates as our Media and Public Relations Director. She has almost 20 years of experience in Marketing, Advertising and Public Relations working with Fortune 500 companies as well as many small and medium-sized businesses. Patti started her career at the PR filrm, Porter Novelli in Washington, DC, then went on to start her own Marketing and Design company.

MEET OUR ATTORNEYS

STEPHEN R. ELVILLE, J.D., LL.M.

Practice Areas: Estate Planning, Elder Law, Asset Protection, Estate Administration, Taxation

Practice Focus: Mr. Elville works with individuals and families to provide a unique attorney-client experience and peace of mind solutions to the challenges they face with estate, asset protection, and tax planning issues, and with disability and long-term care planning issues. Mr. Elville has extensive experience in working with clients involved in crisis situations. He also brings a unique and personalized approach to pre-crisis planning. Mr. Elville routinely handles client issues in the following areas: wills, trusts, estate tax planning, powers of attorney, living wills/advance medical directives, Medicaid asset protection trusts, Medicaid planning and qualification, estate administration, fiduciary representation, nursing home selection, guardianships, special needs planning for children and adults, Social Security Disability Income (SSDI), Supplemental Security, Income (SSI), and IRS tax controversy.

Education: LL.M., University of Baltimore, cum laude; J.D., University of Baltimore School of Law, cum laude; B.A., University of Baltimore, summa cum laude

Professional Activities and Achievements: Mr. Elville is a member of the National Association of Elder Law Attorneys (NAELA), Elder Counsel, Wealth Counsel, the Advisor's Forum, and the National Network of Estate Planning Attorneys. He is the past Chair of the Howard County Bar Association Estates & Trusts and Elder Law Sections and is the past President of the Coalition of Geriatric Services (COGS). Mr. Elville currently serves as a member of the Maryland State Bar Association Elder Law Section Council and the Charitable Gift Planning Advisory Committee for Anne Arundel Medical Center (CGPAC). Mr. Elville is a frequent guest lecturer for the National Business Institute and has formerly advised the Genworth Network. He has lectured at Villa Julie College. His articles have appeared in The Business Monthly.

BARRETT R. KING, J.D.

Practice Areas: Estate Planning, Elder Law, Estate/Trust Administration, Fiduciary (Estate/Trust) Litigation, Business Law, Tax Litigation

Practice Focus: Mr. King regularly assists clients in preparing wills, trusts, powers of attorney, living wills/advance directives, business planning, estate administration, fiduciary representation, and a host of other areas. He also represents clients in the Orphans' Court and the District and Circuit Courts of Maryland in will contests, business disputes, guardianships, and estate and trust litigation. Mr. King also defends clients in tax controversies involving Maryland and federal tax authorities.

Education: J.D., University of Baltimore School of Law, cum laude; B.A., Salisbury University, Dean's List, Alumni Hall of Fame

Professional Activities and Achievements: Admitted to the United States Supreme Court Bar. Mr. King was recently appointed to the Board of Directors of The Women's Law Center of Maryland, Inc. the first male ever appointed to that Board.

HELEN M. WHELAN, J.D., LL.M.

Ms. Whelan's practice focuses on estate and tax planning, estate and trust administration and elder law. Ms. Whelan received her J.D. from Catholic University, Columbus School of Law in 1995 and her LL.M. in Taxation from Georgetown Law with a Certificate in Estate Planning in 2011.

Practice Areas: Estate Planning, Estate and Trust Administration, Elderlaw, Taxation

Education: Georgetown University Law Center (LL.M. in Taxation and Estate Planning Certificate); Catholic University of America, Columbus School of Law, JD; University of Maryland University College, BS; Certified Public Accountant, DC (Inactive)

Professional Activities and Achievements: Received her LL.M. in taxation (Master of Laws in Taxation), with a certificate in Estate Planning from Georgetown University Law School (June 2011)

CLIENT ADVISORY COMMITTEE

Elville & Associates is forming a Client Advisory Committee. This Committee will be comprised of a small group of clients who will be asked to consider and advise the firm concerning various client relations and client service issues, including the Client Continuing Education and Update Program, the firm's annual education event, the firm's succession plan, and more. If you would like to be involved in the work of Client Advisory Committee, please call Mary Guay Kramer at 443-393-7696

NEW TELEPHONE NUMBERS

As part of our constant effort to improve our systems and processes, we have installed a new state of the art communications system. As part of this upgrade, Elville & Associates now has a new series of telephone numbers.

THE NEW TELEPHONE NUMBERS FOR ELVILLE & ASSOCIATES ARE AS FOLLOWS:

(443) 393-7696 (Main Number)
(443) 393-7697 (Facsimile)
(443) 741-3446 (Baltimore calling area)
(301) 272-8874 (Montgomery Co/DC/Northern Va. Calling area)
(410) 246-0715 (Downtown Baltimore calling area)

Thank you in advance for notifying us of any change(s) in your contact information.

NEXT EDITION

- In the next edition of the "Benefactor", Mr. Elville will introduce the Elville Legacy System, and Elville & Associates' Client Continuing Education and Update Program, including what clients need to know about plans that work.
- Announcement of the launch of Elville and Associated redesigned website.

WATCH FOR OUR NEW WEBSITE LAUNCHING FEBRUARY 2012

Ten Things To Look For In An ESTATE PLANNING ATTORNEY

by Stephen R. Elville, J.D., LL.M.

1. Provides warm, friendly approach and caring environment.
2. Attorney is a counselor and not just a technician.
3. Clients are provided with a unique estate planning experience and not just a transaction.
4. Provides an interactive estate planning process in partnership with the client and emphasis on your goals (not a paternalistic approach).
5. Ensures financial advisor friendly and C.P.A. approach with goal of inclusive total team effort, works in good faith with Financial Advisor and/or C.P.A. to implement all appropriate solutions in best interests of the client.
6. Timely and structured process - encourages clients to complete the estate planning process and discourages procrastination.
7. Trust funding - estate planning attorney oversees and ensures proper funding of all trusts (client not abandoned with unfunded trust).
8. Client understanding - to the extent possible, attorney ensures that client understands their estate planning documents and choices.
9. Follow-up - maintains constant contact with clients via annual maintenance program (to encourage clients to meet with attorney at least once per year and/or facilitate client- attorney contact throughout the year), quarterly newsletter, and other notifications.
10. Value-added services - provides client access to latest in on-line document storage, CD document storage, and all available long-term care product recommendations for "bullet proof"estate planning.

VISION & MISSION STATEMENTS

VISION STATEMENT

To become the leading estate planning and elder law firm in Maryland through the relentless pursuit of and adherence to the fundamental firm values of education and counseling clients and constant recognition that the firm only exists to the extent that we satify our clients; in an environment that encourages and facilitates constant learning, improvement, and professional advancement for all employees, and where all members of the firm are respected and encouraged to utilize and develop their own unique talents and abilities.

MISSION STATEMENT

To provide practical solutions to our clients' problems through counseling, education, and superior legal technical knowledge.

SERVICES OFFERED BY ELVILLE AND ASSOCIATES

ELDER LAW

- Medical Assistance
- Veterans Benefits
- Long Term Care Planning
- Nursing Home Selection
- Assisted Living Issues
- Medicaid Asset Protection
- Guardianship
- Social Security
- Senior Housing

ESTATE PLANNING AND TAXATION

- Wills
- Trusts
- Powers of Attorney
- Advance Medical Directives
- Estate Administration (Probate)
- Trust Administration
- Fiduciary Representation
- Estate Tax Planning
- Asset Protection
- IRS Tax Controversary
- State of Maryland Tax Controversary

SPECIAL NEEDS PLANNING

- Special Needs Trusts
- Pooled Trusts
- Public Benefit Preservation
- SupplementalSecurity Income (SSI)
- Social Security Disability (SSDI)
- Funding of Tort Recoveries
- Financial and other Planning for Special Needs Children and Adults
- Health Care Decision Making

ELVILLE
AND ASSOCIATES

9192 RED BRANCH ROAD | SUITE 300
COLUMBIA, MARYLAND 21045