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Planning for Life, Planning for Legacies. What's Your Legacy?

Issue 07 Winter 2015/2016

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The Mathematics of Portability - What it Means to You

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

Portability represents the single biggest change in the estate tax laws since the implementation of the unlimited marital deduction in 1981. Understanding the mathematical import of Portability as the numbers relate to you and your estate plan could have huge financial implications for your heirs - an impact just as significant, if not more so, than any previous tax planning routinely done (marital deduction planning) prior to the advent of Portability. What is Portability? It is the ability of a surviving spouse to utilize the unused estate tax exemption of his or her deceased spouse by filing a timely federal estate tax return (Form 706). Practically speaking, the personal representative (executor) of the deceased spouse's estate chooses whether to utilize the estate tax exclusion amount of the deceased spouse ($5,450,000 in 2016) in the decedent spouse's estate, or transfer the deceased spouse's unused exclusion amount (DSUE) to the surviving spouse. For estates equal to or exceeding the exclusion amount, there is no forgiveness and therefore no extension of time allowed to file the federal estate tax return. However, for estates valued at less than the exclusion amount, an extension of time may be allowed. The basic exclusion amount is indexed for inflation and is scheduled to increase to $6 million by 2020, assuming no change in the current laws. However, the DSUE is not indexed for inflation and its value is frozen upon election.

Portability is, first and foremost, about taxes - about an analysis of estate tax versus income tax implications. Portability concerns itself with the more human elements of planning (i.e. spousal control, spendthrift protection, bloodline control, etc.) only to the extent that these considerations are consequential to the numerical tax analysis of the Portability concept.

Portability was designed for married couples with estates of $5 million or less, and for married couples with estates of two exclusion amounts or less, all of whom wish to simplify the planning process, minimize tax reporting, lower the cost of administration, and streamline tax election concerns. However, for couples with combined estates exceeding two exclusion amounts ($10,900,000 in 2016), mathematical analysis indicates that the traditional estate tax planning additional advantages begin to outweigh and eclipse the income tax and other 'advantages" of Portability (discussed below).

Portability-type planning involves several choices, most of which include leaving assets to your surviving spouse in a manner that qualifies for the unlimited marital deduction (the ability for married couples to leave assets to the surviving spouse with no tax, with the consequence that those assets are then taxed in the estate of the surviving spouse), thereby achieving a step up in basis (new cost basis) not only in the death of the first spouse, but also on the death of the second spouse - a double cost basis adjustment and avoidance of income tax upon receipt by your heirs (except for retirement assets, savings bonds, and other items of income in respect to a decedent). This means that couples can leave unprecedented amounts to each other and to their beneficiaries estate tax free, and to the maximum extent possible, income tax free.

It is important to note that in the Portability versus traditional planning analysis, even where all due diligence is performed in the

The Mathematics of Portability - What it Means to You (continued)

planning process, mathematical outcomes are ultimately dependent on how long the surviving spouse lives and the future rate of return on assets.

There are several approaches to planning in light of Portability, including the following: (1) leave everything (100%) to the surviving spouse; (2) leave everything (100%) to a bypass trust (a trust controlled by the deceased spouse and taxed in the deceased spouse's estate; (3) leave everything (100%) to a bypass trust but with the ability of a special fiduciary such as a trust protector or independent special trustee to grant a general power of appointment so that assets can pass by marital deduction if necessary or desirable; (4) leave everything (100%) to a QTIP trust or a Clayton QTIP trust; (5) leave everything (100%) to the surviving spouse where he or she then makes a large gift for purposes of immediately utilizing the DSUE amount (the DSUE, if elected, is used first prior to the surviving spouse's basic exclusion amount); or (6) an approach combining one or more of the above. While all the above methods allow the surviving spouse to transfer or "port" their deceased spouse's DSUE, the bypass trust approaches (numbers 2 and 3) are not true Portability-type plans due to the fact that any assets trapped in a bypass trust and not ultimately passing to the surviving spouse by marital deduction receive only one step up in basis (cost basis adjustment) at the death of the first spouse, the gain within the bypass trust being later subject to income taxation at the death of the surviving spouse. It is also important to note that the Generation Skipping Transfer Tax exemption of the deceased spouse does not "port" in a Portability-type plan, and must be taken into consideration.

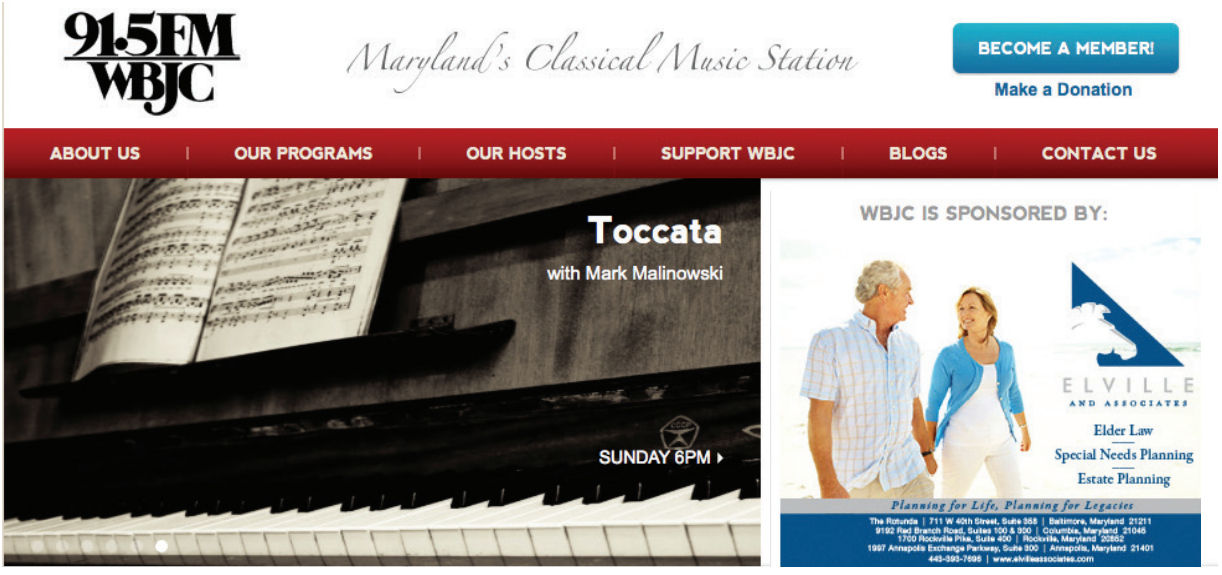
In practical terms, Portability planning is about a married couple deciding on the best way to deal with the transfer of assets from one spouse to the other at the death of the first spouse. Unless the spouses wish to exercise a higher level of control over the transferred assets in further trust for the benefit of the survivor to include remarriage restrictions; or, alternatively, the spouses desire that the transferred assets be held in trust not only for the benefit of the surviving spouse, but also for the benefits of descendants; or unless the combined taxable estate of both spouses exceeds two basic exclusion amounts, then one of the "purely" Portability-type planning options outlined above would be appropriate.

Maryland will adopt Portability in 2019 when it adopts the current federal estate tax structure. Until then, many Maryland residents will continue some form of bypass trust planning to deal with Maryland estate planning, as Maryland remains one of the only states in the U.S. with a state estate tax and an inheritance tax. With a combined income tax rate of 29.55%, Maryland is one of the states with a disparity between the federal estate tax rate of 40% and state long-term capital gains rates, making the decision to avoid estate tax instead of income tax easy assuming the estate exceeds $10,900,000. However, with 99.4% of estates not subject to federal estate tax (according to 2013) statistics), making the decision to defer and avoid income taxes to the maximum extent possible through Portability planning is likely a worthwhile and important endeavor.

It is important to understand the mathematics of Portability. An understanding of your tax planning objective(s) is key – are you planning to avoid estate tax or income tax to the maximum extent possible? Or do other non-tax planning issues take precedence? Any planning focus is fine – so long as you know which one you have and why you are doing it.

On the Radio

Elville & Associates is a corporate sponsor of WBJC 91.5 FM. Please listen for our announcements and view our web ads on wbjc.com.





The Elville Center for the Creative Arts Celebrates Its One-Year Anniversary

Jeffrey D. Stauffer, Director – Elville Center for the Creative Arts

The Elville Center for the Creative Arts, a 501(c)(3) non-profit corporation, celebrated its one-year anniversary in June, and in its first year the Elville Center partnered with local and regional businesses such as Music & Arts, 91.5 FM WBJC, The Columbia Orchestra, and local schools to provide musical instruments, musical instruments rentals, music lessons and participation in music-related activities to and for children of all ages throughout Maryland.

Generous donors have provided instruments ranging from clarinets and violins, flutes and cellos, trumpets and guitars, keyboards and saxophones, and even a rare Hawaiian ukulele and African flute. The Elville Center then transports these instruments to its Severna Park Music & Arts partner and pays for their refurbishment so students receive and instrument that the Elville Center is proud to deliver and the students are excited to play.

The charity's first year was one of significant growth and many successes, and many played a part in helping it work towards accomplishing its mission. Stephen R. Elville, President and Founder of the Elville Center, noted, "We celebrate the Elville Center's one-year anniversary with many people and organizations to thank - first and foremost our generous and wonderful donors who care so much about music and the promotion of music for the benefit of children. We also thank WBJC, without whose gracious and unwavering support the Center would not have accomplished its initial work over the past 12 months, and would still be seeking to find its voice. Special thanks goes out to Scott Schimpf and his incredible staff at Music and Arts Severna Park (Ben, Dayle, and others), for their enthusiastic promotion of the Center, and their awesome work in refurbishing our instruments, as well as their professionalism and advice concerning our purchase of new instruments. Lastly, I thank and recognize our partner schools, volunteers, and all those whose thoughts, ideas, and well wishes have made a huge difference in getting the Elville Center off the ground."

In March, the Elville Center partnered with The Columbia Orchestra to sponsor the purchase of 30 tickets for children to attend its popular Young People's Concert Series. In between the performances, students were given the opportunity to participate in a musical instrument petting zoo where they could touch and try to play the various instruments. The Elville Center is also sponsoring an upcoming Columbia Orchestra Young People's Concert to be held at The Jim Rouse Theatre for the Performing Arts in Columbia.

This past spring, the Elville Center developed a partnership with Wiley H. Bates Middle School, an Annapolis school that integrates the arts in each area of its curriculum, a teaching technique that provides unique learning experiences for its students. Numerous supplies and musical instrument donations have taken place with more to come.

Maximus VanDerbeek, Band Director at Bates, has been thrilled with the partnership, saying, "The Bates Middle School is a program which serves the needs of a financially challenged local community. Many of these students need support in order to play music in band with expenses such as reeds, mouthpieces, instruments, sheet music, and more. In a timely manner, The Elville Center has stepped in and provided outstanding support to our program to make band and the joy of music possible for our community."

In summer news, the Elville Center began working with The Bridges Program, a program that began in 2006 to address the need for string education in Baltimore City Schools following significant budget cuts to funding for arts in the schools. Over the past nine years The Bridges Program has offered a very high level of instruction to over 1,200 students, and this year the program is expanding to serve 300 students at seven schools. The Elville Center is working diligently to offer The Bridges Program additional harps, cellos, violins, supplies and other needs the teachers and students in this growing program require.

The Elville Center for the Creative Arts Celebrates Its One-Year Anniversary (continued)

This December, The Elville Center forged a relationship with New Era Academy, a school serving grades 6 – 12 in Baltimore. Shortly after our initial meeting with Music Director Jeannine Thomas, the Elville Center was able to fulfill important needs to the school's music program by delivering a new Fender bass guitar, an Onkyo sound system with speakers, and refurbished instruments to the school. Within the next month, a fully-refurbished Teakwood upright piano will be delivered to New Era as well, generously donated to the Elville Center by a family referred to the charity by Music & Arts of Severna Park.

"I am more than pleased and thankful for our progress over this past year, and am pleasantly surprised at the new opportunities that have presented themselves," said Mr. Elville. "Without a doubt, the need for instruments, accessories, music-related activities, and access to all such things that were once taken for granted in schools and at home is dramatic and critical. The need for children to be involved with music has not changed - unfortunately our society has. Over the next 12 months and in the years to come, it is my hope that our charity's donations, both monetary and instrument-related, will continue to increase so that we can meet needs and carry out our mission on the broadest of scales."

In addition to individual and corporate donations, Elville and Associates contributes its own corporate funds to the Elville Center. It is the hope of Mr. Elville that this charitable initiative will continue to capture the imaginations and enthusiasm of our clients, business partners, and the community at large and will continue to grow in scope, culminating in the fulfillment of many dreams and a continuation of the music.

With new opportunities to meet the musical needs of children being discovered at a rapid pace, along with musical instruments donations, the Elville Center for the Creative Arts is seeking monetary donations to meet these expanding needs. If you are interested in the Elville Center for the Creative Arts and would like to learn more, or if you would like to make a donation or pledge, please contact Jeffrey Stauffer, Director, at 443-393-7696 or via email at jeff@elvillecenter.org. Instrument and monetary donations and pledges may also be made through the Elville Center's website at www.elvillecenter.org. Personal meetings with Stephen Elville or Jeff Stauffer for discussion about the Elville Center are available upon request.

Waypoint Trust Group

Matthew F. Penater, J.D., LL.M.

Elville and Associates, P.C. announces the launch of its Waypoint Trust Group. Waypoint Trust Group is a division within Elville and Associates, P.C., which is dedicated to providing trustee services and legal representation to trustees. The legal services provided to trustees include: preparation of required trust accountings; distribution of terminating trusts; preparation of trust income tax returns; modification/ termination of trusts through Court action; record keeping and document organization; family office services; and general legal counsel for trustees. In addition to providing legal services to trustees, Waypoint Trust Group's attorneys are available to serve as trustee, co-trustee, and/or trust protector, in those situations where naming a friend or family member is not appropriate and naming a large financial institution may not be warranted. The attorneys within Waypoint are committed to providing the highest level of representation in the area of trust administration.

Navigating Social Security Disability

Barrett R. King, J.D.

Social Security Disability Insurance "pays benefits to you and certain members of your family if you are 'insured,' meaning that you worked long enough and paid Social Security taxes."[1] In order to have worked "long enough," you must have forty 'credits'. One credit is earned for every $1,220 in wages or self-employment income up to a maximum of four credits per year. In addition, twenty of your total credits must have been earned in the last ten years before you become disabled. Benefits are available for widows and for disabled children who cannot or will not earn credits on their own and such individuals may 'piggyback' on the credits of working spouses or parents. For purposes of this article, however, we will focus on a worker that applies for benefits.

"Disability" comes with its own definition for purposes of receiving Social Security benefits. You are considered disabled for Social Security purposes if you (1) cannot do work that you did before, (2) cannot adjust to other work, and (3) your disability has or will last at least one year. If you possess enough credits and you feel you meet these criteria for disability, you may apply to the Social Security Administration for Disability Insurance.

In 2014, the Washington Post published an article by David A. Fahrenthold titled "The Biggest Backlog In the Federal Government."[2] The story highlighted the fact that nearly (and, as of this writing, more than) one million applications at one office for Social Security Disability were pending review.[3] In addition, Fahrenthold explained, applicants for disability benefits are waiting an average of 435 days for a decision on their application.[4] And this is after the cases have been denied at the application stage (twice, as readers will see) and are waiting for a judge to hear the applicants' plea their cause.

In representing many clients who are approaching retirement or who have disabled children who qualify for various public benefits, this writer has gained a wealth of knowledge about navigating Social Security and it was only a matter of time before the opportunity arose to help a client pursue disability benefits. Over the years, the firm has assisted dozens if not hundreds of individuals through the process of seeking disability benefits from Social Security. Unfortunately, much of what the Washington Post article says is true. Routinely, cases languish in the various stages of the process for over a year and, in more than one example, exceed two or even three years before resolution.

What we have found is that clients are much better served by hiring an attorney to help them apply from the beginning. Many clients come to us after their initial application is denied. Nine times out of ten, we find that the client overstated their ability to perform certain tasks (via a form called the Disability Report which is filed with the application) such as basic chores and personal care. Simply put, no one likes to admit that they cannot do things like dress themselves, clean, cut grass, cook, or even leave the house without assistance. It is our nature to want to be independent and self-sufficient. Faced with admitting the reality – in writing, no less – applicants will tell Social Security they need "just a little help" or that they "can do a little bit of laundry with no problem."

You are not getting any awards from Social Security for slogging through these tasks despite pain or limitation, so why are you not being perfectly honest about it? If you were once able to prepare an elaborate meal for a party of eight but are now limited to preparing a sandwich on your own before you have to sit down, tell Social Security. The award you are after is the benefit of the insurance you have paid for over your working years, so relay the facts in the way that best explains what your injury or sickness has done to you. The only way the examiner can understand your experience is if you describe it accurately. The medical records only tell what others perceive. Your application is your chance to tell the subjective truth.

Many times, even if you file an application that appears to show that you are disabled, the application is denied because Social Security believes you were hurt or are sick, but that you can return to work or that you can perform a job different than the one you left. These cases go through several levels of appeal, the first being the Request for Reconsideration. This is the stage where most cases are referred to us for help.

The Request for Reconsideration is, at its most simple, a second look at your first application along with any updated information you provide. The review is not much different than the initial application, though Social Security may send you to a doctor of their choosing for an examination.

If your application fails at this stage, you can request a hearing in front of an Administrative Law Judge ("ALJ"). There are more than 1,400 ALJs who hear these appeals. Appeals are heard either by video conference (where the applicant sits in a room with a court reporter while the judge is present on a video screen from a remote location) or by in-person hearing, the latter usually occurring if the applicant lives in or near a major metropolitan area. From there, applicants who are denied have one more option: the Appeals Council, which adds another year of waiting to the whole process.

Clients who become disabled and go through this process are often waiting for a decision with no other source of income. This is a major reason why we recommend clients work with an attorney from the outset, so that your best foot is put forward in the hope of obtaining a favorable decision sooner rather than much, much later.

[1] http://www.ssa.gov/disability/
[2] http://www.washingtonpost.com/sf/national/2014/10/18/the-biggest-backlog-in-the-federal-government/
[3] http://www.washingtonpost.com/wp-srv/special/national/breaking-points/#backlog
[4] *Id.*

Lifetime and Testamentary Bequests to a Non-Citizen Spouse: How to Plan Without the Unlimited Marital Deduction

Verena Meiser, J.D.

Most married couples wish to share assets with each other; they buy gifts for each other, take joint title to their homes and have joint bank accounts.
At death, most spouses leave their assets to their surviving spouse, either outright or in trust, to ensure the survivor is financially taken care of. Due to a tax law provision known as the "marital deduction," estate and gift tax rules place no restrictions on such transfers when they take place between two spouses who are United States citizens. However, the marital deduction is not available for transfers to a non-citizen spouse. Thus, affected couples need to be aware of certain estate and gift tax rules that apply to them. This article looks at the implications of these tax rules for outright gifts, the acquisition of jointly held property, both real and personal, and ways in which the citizen spouse can provide for the surviving non-citizen spouse upon death.

Gifts

Federal tax law establishes an annual threshold amount above which the value of gifts made to a non-citizen spouse needs to be reported to the Internal Revenue Service. This amount is known as the annual exclusion amount for gifts to a non-citizen spouse. It applies to gifts of present interests where the amount in excess of the annual exclusion would be eligible for the marital deduction if the gift was made to a citizen spouse. A present interest gift is one that the recipient can immediately exercise full control over, in contrast to a gift of a future interest, such as a beneficial interest in trust, that the recipient cannot exercise full control over until it is distributed to the recipient. In 2016, the annual exclusion amount is $148,000. The Internal Revenue Service adjusts this value for inflation on an annual basis.

Joint Property

When a couple including a non-citizen spouse acquires joint property, the method of determining the size of the resulting gift differs for real property, such as the family home, and for personal property.

Thus, when such a couple purchases real property, as husband and wife, the improvements they make to the property and the mortgage payments they make that increase their equity in the property, are not treated as gifts at the time of the purchase. However, upon the sale of the real property, when their joint tenancy ends, a gift from the citizen spouse to the non-citizen spouse results, if the citizen spouse contributed more than one-half of the purchase price, the value of improvements and the increase in equity resulting from mortgage payments. For an illustration of how the gift is calculated, see Examples (1) and (2) of Reg §25.2523(i)-2.1 If the gift exceeds the annual gift exclusion in effect for the year of the sale of the property, it needs to be reported to the Internal Revenue Service. Special rules apply if the couple uses the proceeds from the sale of their home to acquire a new home.

In contrast, a couple's joint acquisition of personal property with a known fair market value will immediately result in a gift to the non-citizen spouse if the value of that spouse's one-half interest in the property exceeds that spouse's contribution to the purchase, improvement or debt reduction associated with the purchase of the property. In the case of jointly held property where the value of the non-citizen spouse's interest can only be determined by taking into consideration the donor's life expectancy, for example in the case of a second-to-die life insurance policy with cash value, the size of the gift is calculated actuarially using life expectancy tables.

Transfers Upon Death

Upon death, transfers to a surviving U.S. citizen spouse are eligible for the marital deduction, and the portion of these assets that remains at the surviving spouse's death will be included in the surviving spouse's taxable estate. Thus, upon the death of the first spouse, the government has the expectation to be able to subject all or a portion of the transferred property to estate tax at the later time of the surviving spouse's death. However, if the surviving spouse is not a U.S. citizen, the possibility exists that he or she may leave the country and take the inheritance abroad, beyond the jurisdiction of the Internal Revenue Service or local tax authorities. To ensure that all property left for the benefit of a surviving non-citizen spouse will eventually be included in a taxable estate, the federal government devised a special type of trust for the benefit of a non-citizen spouse that subjects all withdrawals of principal from the trust to the estate tax as part of the deceased citizen's taxable estate. Such a trust is known as a qualified domestic trust ("QDOT"). The QDOT merely postpones the payment of estate tax on the assets left in trust.

A trustee administering a QDOT has to file a special addendum to the deceased spouse's estate tax return (a 706-QDT) every year to report the distributions to the surviving spouse and include payment for such tax.

Maryland does not recognize QDOTs. How does that impact estate tax planning for Marylanders who are married to non-citizens?

The estate plan for a spouse who will leave assets valued at less than the Maryland estate tax exemption to a non-citizen spouse needs no special adjustments, since estate tax will

be avoided upon the citizen spouse's death as a result of the application of the estate tax exemption available to the estate of the decedent spouse. However, since Maryland does not recognize QDOTs, the planning for transfers from a citizen to a non-citizen in excess of the Maryland estate tax exemption will require payment of Maryland estate tax upon the death of the citizen spouse. Thus, the couple needs to take a careful look at their financial plan to ensure that assets are available for the payment of the Maryland estate tax.

Such transfers upon death to a non-citizen spouse in excess of the Maryland estate tax exemption fall into two categories, those below the federal estate tax exemption and those above the federal estate tax exemption. Transfers below the federal estate tax exemption could be made outright or in trust, since they would be exempt from federal estate tax and any Maryland estate tax will be due irrespective of the method of transfer.

When transfers exceed the federal estate tax exemption, the citizen spouse's estate plan needs to include a QDOT for the amount exceeding the federal exemption to avoid payment of federal estate tax at the time of the citizen spouse's death. The QDOT offers a certain benefits for the surviving spouse. Even though the surviving spouse will have to pay estate tax on withdrawals of principal from the QDOT, the trust provides asset protection from the survivor's creditors and preserves the availability of principal and income to him or her. Assets in the QDOT can appreciate in value, and should the surviving spouse ever encounter a hardship situation, an exemption under the tax law would allow for the withdrawal of principal from the trust free of estate tax. Upon the surviving spouse's death, any assets remaining in the QDOT continue to be subject to estate tax as part of the decedent citizen spouse's estate and payment of any estate tax due will have to be made at such time. The balance of the trust property will be distributed in accordance with the provisions of the QDOT and could be distributed to children or other family members.

Note that portability of the deceased spouse's unused federal estate tax exemption is not available to non-citizens. Thus, some of the new planning techniques for citizen couples cannot be used for those married to a non-citizen.

Retirement Assets for the Benefit of a Non-Citizen Spouse

Generally, a beneficiary's rights to certain retirement accounts and annuities is assignable. Thus, if the decedent citizen spouse named the non-citizen spouse as primary beneficiary of a retirement account, instead of naming the QDOT as primary beneficiary, the surviving non-citizen spouse can assign his or her beneficiary rights to a QDOT to postpone payment of any federal estate tax that may be due upon the death of the citizen spouse until such time that minimum distributions are made to the surviving spouse.

Distributions from traditional retirement plans that would have been taxable as income to the plan participant, had the plan participant lived to receive the withdrawals, are taxable as "income with respect of the decedent" when made to a QDOT. Thus, a Roth IRA or Roth 401(k) is a desirable type of retirement account to leave for a non-citizen spouse, as it will not add the burden of income taxation on top of the estate taxation of the plan distributions.

Conclusion

Couples including a non-citizen should seek the advice of an estate planning attorney to discuss the impact of the estate and gift tax rules for transfers to the non-citizen spouse. In particular, those with estates in excess of the federal estate tax exemption should consider the use of a QDOT as part of their estate plan.

Endnotes:

1. Reg §25.2523(i)-2 example illustrating how the gift upon the sale of the home is calculated is as follows: "Example (1). In 1992, A, a United States citizen, furnished $200,000 and A's spouse B, a resident alien, furnished $50,000 for the purchase and subsequent improvement of real property held by them as tenants by the entirety. The property is sold in 1998 for $300,000. A receives $225,000 and B receives $75,000 of the sales proceeds. The termination results in a gift of $15,000 by A to B, computed as follows:

$200,000
(consideration furnished by A)
_____X $300,000 = $240,000 (proceeds of termination attributed to A)

$250,000
(proceeds of total consideration furnished termination by both spouses)
$240,000 - $225,000 (proceeds received by A) = $15,000 gift by A to B."

2. "Example (2). In 1986, A purchased real property for $300,000 and took title in the names of A and B, A's spouse, as joint tenants. Under section 2511 and §25.2511-1(h) of the regulations, A was treated as making a gift of one-half of the value of the property ($150,000) to B. In 1995, the real property is sold for $400,000, and B receives the entire proceeds for sale. For purposes of determining the amount of the gift on termination of the tenancy under the principles of section 2515 and the regulations thereunder, the amount treated as a gift to B on creation of the tenancy under section 2511 is treated as B's contribution towards the purchase of the property. Accordingly, the termination of the tenancy results in a gift of $200,000 from A to B determined as follows:

$150,000
(consideration furnished by A)
_____ X $400,000 = $200,000 (proceeds of termination attributed to A)

$300,000
(proceeds of total consideration deemed termination furnished by both spouses)

$200,000 – 0 (proceeds received by A) = $200,000 gift by A to B.

Ensuring Trust Terms Are Drafted To Maximize Income Tax Savings

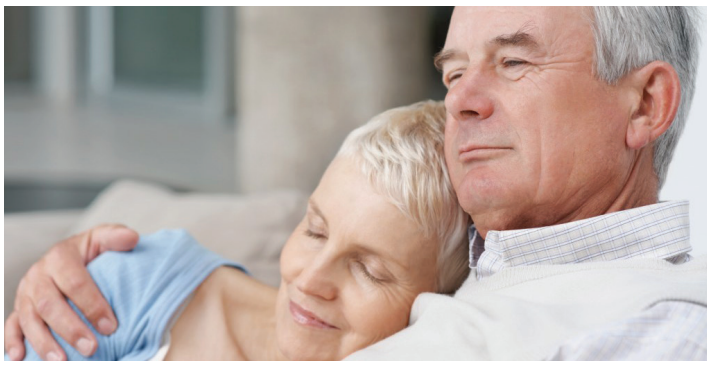
Matthew F. Penater, J.D., LL.M.

For those of us who have established a trust, are a beneficiary of a trust, or are considering implementing a trust into our estate plan, the recent changes in trust income tax rates warrants our attention. If a trust is in existence, a review of the trust terms is recommended for the reasons outlined in this article. For trust accounting purposes, a trust consist of two components: Principal and Income. Simply put, Principal consists of the assets used to fund the trust, and Income consists of earnings on those assets (dividends, interest, etc.). However, an important deviation from this concept is the treatment of capital gain on the sale of assets – this is considered Principal, even though under the Internal Revenue Code, it is taxable income. So, we have taxable income in the form of capital gain, which is Principal, and taxable income in the form of dividends/interest, which is Income. These are the conceptual inconsistencies that send a non-professional trustee into a tail-spin.

The vast majority of trusts in existence are drafted in a way that results in the following:

- If Income (dividends/interest) is distributed to a beneficiary during any given year, that beneficiary must report that Income on the beneficiary's individual income tax return in that year and then personally pay the income tax thereon; and
- If Principal (which could include capital gain) is distributed to a beneficiary during any given year, that beneficiary DOES NOT report that capital gain on his or her individual income tax return – instead, the trust reports the capital gain on the trust's income tax return and pays the income tax thereon from the assets of the trust.

The foregoing result is due to several factors, including the language of the trust and the Internal Revenue Code. This result worked fine as generally speaking, there was no more



income tax being paid by the trust than would have been paid by the beneficiary. However, the changes to the tax treatment of trusts resulting from the American Taxpayer Relief Act of 2012 has caused trusts to start paying much higher rates of tax in most cases. I promised myself I would keep this article simple and generally non-technical. So, without getting into the nitty-gritty, I can summarize the tax effect as follows: a married individual will pay the highest capital gain rate of 23.8% capital gains (which includes net investment income tax) once that married couple's combined income reaches $466,950 for 2016; a trust will pay that same 23.8% capital gains rate once the trust has taxable income of only $12,400 for 2016. This means in general, capital gain taxed within a trust will be subject to substantially more income tax than if that same capital gain were passed out to a beneficiary and taxed to that beneficiary.

The problem is that most trusts today are not drafted to allow for the trustee to pass out the capital gain to the beneficiary, in the trustee's discretion. There are Income Tax Regulations which provide for mechanisms on how to pass the capital gain out to a beneficiary if the terms of the trust do not address it, but those Regulations are complex and can be difficult to satisfy. The best solution is to give a trustee the discretion to allocate capital gain to a beneficiary within the trust document. The tax savings can be significant. A review of existing trust documents is the first place to start.

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Elder Law Corner – The Planning Continuum - As Time Goes By

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

Clients and the public at large are confused about the intersection of estate planning and elder law. At first glance, this appears straight-forward and not a problem. After all, when people need estate planning services, they go talk to an estate planning lawyer about that; and when people need elder law services, they go talk to an elder law attorney, right? Well, not exactly so, at least not always. Many clients who sit across the conference room table from me intuitively know that their need for pure estate planning services is overshadowed, or at least colored, by concerns about their longevity, aging and aging in place, health and healthcare costs, the cost of long-term care, financial security, housing, financial planning, income, understanding public benefits, asset preservation, and more. Along these lines, it is not uncommon for a planned "traditional estate planning" discussion to evolve into a full scale elder law consultation. The analogy of a 1,000 piece jigsaw puzzle, each piece dumped onto the kitchen table awaiting assembly, comes to mind, and is probably not unlike the confusion many clients are experiencing at that very time. In this limited article, I will attempt to simplify and summarize how best to think about the planning continuum and thereby bring some clarity (and hopefully some peace of mind) to this worrisome and oftentimes wearisome subject.

First and foremost, elder care-related concerns have their origin in crisis situations, or otherwise, where a client's goals are driven by pre-crisis planning concerns, such as asset protection or looming disability. I would categorize these two driving forces - crisis and pre-crisis planning, as representing the primary thrust and purpose of elder law from the client's perspective, whether consciously or unconsciously perceived by the client, with the latter category proactively pursued by clients themselves as a systematic part of the planning process. The good news about these two major categories is that once involved in either, individuals and families know, or eventually discover, with professional representation and guidance, the nature of what they are dealing with, and the crisis issues are resolved; or, as the case may be, the pre-crisis plan is implemented. In this process, fear and the unknown are replaced by confidence and knowledge through education and resolution; confusion, myth, and misconception are replaced by facts, foundational concepts, and viable choices – these are the natural outcomes of the process.

But outside the contexts of defined crisis and pre-crisis situations is the vast ocean of conventional estate planning and a hugely aging population. For those who feel they are adrift, the following five step checklist may serve as a map, planning GPS, or plain-old sanity check:

(1) Knowledge is power – there is no substitute for client education. Since most attorneys do not provide a client-education-centric approach, you will have to be proactive in seeking the knowledge you need. Proactivity is essential.

(2) If you are over sixty years of age, ask your attorney how aging will affect your conventional estate planning, including disability and incapacity issues, and how your planning may need to evolve in the coming years. Remember that knowledge is not only power, it can allay fear and unnecessary anxiety about the future.

(3) Remember that planning is not just about documents, it is about building a platform, practically and legally, for the future. As you age, your concern should not be about whether you have documents – rather, it should be whether your documents, and your understanding of them, along with the knowledge and understanding of your fiduciaries, and along with the funding of your plan, and your financial planning and tax advice, have established a sufficient staging for the future and all it may have in store.

(4) Robust powers of attorney and a well-concieved advance medical directive are the most powerful tools in your aging toolbox. Your planning platform for the future is only as good as these documents and your selection of fiduciaries.

(5) Maintenance and follow-up is essential to your continuum of planning. No reasonable person would (or should) believe in a planning process that is static, especially in our continuously changing world. Estate and elder law plans should be updated at least every two years. A commitment to this process alone will ensure that you have done everything possible (taken every reasonable step possible) to deal with your now-conventional estate planning, and how it may need to evolve as time goes by. If you are working with an attorney, financial planner, or CPA who does not facilitate this essential process, you should seek to replace them immediately.

In a nutshell, today's estate planning client needs to view and understand that real planning represents a continuum of planning. The difference between conventional estate planning and elder law planning is nothing more than a continuous recognition of life changes and how those changes necessitate adjustments in our planning documents, cause us to reevaluate our goals, and require due diligence and education for our trusted fiduciaries. Where yesterday we may have been concerned about the accumulation of assets, providing security for family members through life insurance, and providing for guardians for minor children; and only recently we had accumulated assets, watched children leave home, participated in the raising of grandchildren, and enjoyed the fulfillment of career; today we may have other concerns driven by anticipated longevity, health needs, experience with aging parents, the desire to leave a legacy notwithstanding potential long-term care costs, the pressures of being part of the sandwich generation, concerns about supporting dependent adult children, and much more. In light of all this, don't worry or succumb to fear. Instead, focus on what you can do – understand the need for a continuum of planning and not just the continuum of care, and begin by focusing on the five bullet points outlined above.

Upcoming Events And Speaking Engagements

Please visit our website, www.elvilleassociates.com/news-events, for frequent updates on our events and speaking engagements.

Workshop – Planning for Digital Assets
Tuesday, February 2nd, 2:00 p.m. – 3:30 p.m.
Riderwood Village, 3140 Gracefield Road, Silver Spring, Maryland 20904
www.ericksonliving.com/riderwood

Elville and Associates Presents: The Advisors Forum
Wednesday, February 3rd, 12:30 p.m. – 2:00 p.m.
Historic Oakland Manor, 5430 Vantage Point Road, Columbia, Maryland 21044
www.historic-oakland.com

Workshop – Planning for a Loved One With Special Needs
Thursday, February 4th, 6:30 p.m. – 8:30 p.m.
The Harbour School – Annapolis, 1277 Green Holly Drive, Annapolis, Maryland 21409
www.harbourschool.org

Retirement, Social Security & Estate Planning Workshop
In Partnership with Timmick Financial Group (timmickfinancial.com)
Monday – Wednesday, February 8th – 10th, 7 p.m. – 9 p.m.
Monday – Estate Planning Essentials / Tuesday – Retirement Planning / Wednesday – Savvy Social Security Planning
Historic Oakland Manor, 5430 Vantage Point Road, Columbia, Maryland 21044
www.historic-oakland.com

Dinner – Topics in Contemporary Estate Planning
Thursday, February 11th, 6:30 p.m. – 8:30 p.m.
In Partnership with First Command Financial Services (www.firstcommand.com)
J.KING'S Restaurant, 329 Gambrills Road, Gambrills, MD 21054

Luncheon – "Planning for a Loved One With Special Needs"
Thursday, February 11th, 11:30 a.m. – 1:30 p.m.
Baltimore Washington Financial Advisors – 5950 Symphony Woods Road, Suite 600, Columbia, Maryland 21044
www.bwfa.com

Workshop – Estate Planning
Wednesday, March 9th, 10:00 a.m. – 11:30 a.m.
Fusco Financial Associates, Inc., 505 Baltimore Avenue, Towson, Maryland 21204

Workshop – Topics in Contemporary Estate Planning for 2016
Tuesday, March 15th, 11:00 a.m. – 12:30 p.m.
Riderwood Village, 3140 Gracefield Road, Silver Spring, Maryland 20904
www.ericksonliving.com/Riderwood

Howard County Transitions Symposium Presentation - "Understanding Guardianship and the Alternatives"
Saturday, March 19th, Two sessions: 1:15 p.m. – 2:45 p.m. or 3:00 p.m. – 4:00 p.m.
Cedar Lane School, 11630 Scaggsville Road, Fulton, Maryland 20759
www.Howardcountymd.gov

Workshop – Estate Planning Essentials
Tuesday, April 5th, 6:30 p.m. – 7:30 p.m.
Navy Federal Brokerage Services (www.navyfederal.org)
12244 Rockville Pike, Rockville, Maryland 20852

Workshop – Advance Medical Directives and Estate Planning 101 – How to Get Started with Your Estate Plan
Wednesday, April 6th, 1:00 p.m. – 2:30 p.m.
Lake Shore Plaza Shopping Center, 4103 Mountain Branch Road, Pasadena, Maryland 21122
www.aacounty.org

Workshop – Estate Planning Essentials
Thursday, April 7th, 6:30 p.m. – 7:30 p.m.
Navy Federal Brokerage Services (www.navyfederal.org)
104 Ellington Boulevard, Gaithersburg, Maryland 20850

Estate Planning Essentials Workshop
Wednesday, April 13th, 7:00 p.m. – 8:30 p.m.
Mountain Road Community Library – 4730 Mountain Road, Pasadena, Maryland 21122
www.aacpl.net/location/mountainroad

Seminar – VA Aid and Attendance
Thursday, April 16th, 1:20 p.m. – 2:20 p.m.
Anne Arundel County's Caregivers Conference (www.aacounty.org)
The Hotel at Arundel Preserve, 7795 Arundel Mills Boulevard, Hanover, Maryland 21076

Elder Law and Estate Planning Essentials Workshop
Thursday, April 21st, 7:00 p.m. – 8:30 p.m.
Howard County Public Library, Savage Branch – 9525 Durness Lane, Laurel, Maryland 20723
http://hclibrary.org/locations/savage-branch

Workshop – Estate Planning Essentials
Thursday, April 28th, 7:00 p.m. – 8:30 p.m.
Town Center Community Association
Historic Oakland Manor, 5430 Vantage Point Road, Columbia, Maryland 21044
www.historic-oakland.com

8th Annual Active Aging Expo Speaking Engagement – "Topics in Contemporary Estate Planning"
Monday, May 2nd, 9:00 a.m. – 2:00 p.m., Mr. Elville will be speaking from 12:30 p.m. – 1:00 p.m.
Activity Center at Bohrer Park, 506 S. Frederick Avenue, Gaithersburg, Maryland 20877
www.gaithersburgmd.gov

Luncheon – Estate Planning Workshop (topic TBD)
Friday, May 13th, 11:30 a.m. – 1:30 p.m.
Baltimore Washington Financial Advisors – 5950 Symphony Woods Road, Suite 600, Columbia, Maryland 21044
www.bwfa.com

Workshop – Estate Planning for Retirement Benefits
Tuesday, May 24th, 1:00 p.m. – 2:30 p.m.
Holiday Park Senior Center, 3950 Ferrara Drive, Wheaton, Maryland 20906
www.holidaypark.us

Luncheon – Estate Planning Workshop (topic TBD)
Thursday, August 18th, 11:30 a.m. – 1:30 p.m.
Baltimore Washington Financial Advisors – 5950 Symphony Woods Road, Suite 600, Columbia, Maryland 21044
www.bwfa.com

Workshop – Estate Planning Essentials
Thursday, October 20th, 7:00 p.m. – 8:30 p.m.
Town Center Community Association
Historic Oakland Manor, 5430 Vantage Point Road, Columbia, Maryland 21044
www.historic-oakland.com

Luncheon – Estate Planning Workshop (topic TBD)
Tuesday, December 6th, 2016, 11:30 a.m. – 1:30 p.m.
Baltimore Washington Financial Advisors – 5950 Symphony Woods Road, Suite 600, Columbia, Maryland 21044
www.bwfa.com

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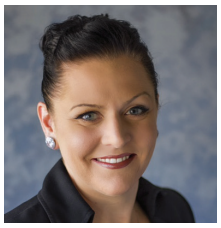

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Ten Things to Look for in an Estate Planning, Elder Law or Special Needs Planning Attorney

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

ELVILLE AND ASSOCIATES

1. Provides warm, empathetic approach and caring environment.

2. Attorney is a counselor and not just a technician.

3. Clients are provided with a unique estate planning or elder care planning experience and not just a transaction.

4. Provides an interactive planning process in partnership with the client and with emphasis on client goals (not a paternalistic approach).

5. Ensures financial advisor/C.P.A. friendly 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 planning process and discourages procrastination.

7. Trust funding – planning attorney and firm's funding coordinator oversee and ensure proper funding of all estate and elder law plans (client not abandoned with unfunded plan).

8. Client education and understanding – to the extent possible, attorney ensures that client understands their planning documents and choices.

9. Follow-up – maintains ongoing contact with clients via annual continuing education and maintenance & updating programs to encourage clients to meet with attorney bi-anually, and facilitates client-attorney contact throughout the years via quarterly newsletter and other notifications.

10. Value-added services – provides client access to latest in on-line document storage, and all available contemporary solutions for "complete" estate planning.

Elville and Associates' Purpose Statements

VISION STATEMENT

To become the leading estate planning, elder law and special needs planning firm in Maryland through the relentless pursuit of and adherence to the fundamental firm values of educating and counseling clients and constant recognition that the firm exists to exceed our clients' expectations; 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.

PHILOSOPHY STATEMENT

Elville and Associates engages clients in a multi-step educational process to ensure that estate, elder law and special needs planning works from inception, throughout lifetime, and at death. Clients are encouraged to take advantage of the Planning Team Concept for leading-edge, customized planning. The education of clients and their families through counseling and superior legal-technical knowledge is the practical mission of Elville and Associates.

Elville and Associates Membership Organizations

ACADEMY OF SPECIAL NEEDS PLANNERS

NATIONAL NETWORK OF ESTATE PLANNING ATTORNEYS

ElderLawAnswers

The Arc
For people with intellectual and developmental disabilities

Your Success. Our Commitment.
ELDERCOUNSEL
Excellence in Elder Law and Special Needs

AVAPP Academy of VA Pension Planners

FPA FINANCIAL PLANNING ASSOCIATION OF MARYLAND

ADVOCATES TRUST SERVICES

WealthCounsel
Practice Excellence.

NAMI Maryland
National Alliance on Mental Illness

AICPA
American Institute of CPAs

NAELA
National Academy of Elder Law Attorneys, Inc.

Maryland Association of Adult Day Services
MAADS

Services Offered By Elville and Associates

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 Controversy
- State of Maryland Tax Controversy
- Personal and Business Tax Planning
- Business Law
- Business Succession Planning
- Charitable Giving and Philanthropy

ELDER LAW

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

SPECIAL NEEDS PLANNING

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

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