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MMPPH is extremely proud to announce that Judy S. Bae of our office has been appointed to a judgeship in the San Diego County Superior Court by Governor Gavin Newsom. Judy has been an associate at Miller, Monson, Peshel, Polacek & Hoshaw since 2005. She earned a Juris Doctor degree from the University of San Diego School of Law, and has been practicing in the area of trust/probate litigation. Judy will fill the vacancy created by the retirement of Judge Charles R. Gill. Congratulations Judy!

IN THIS ISSUE

DIGITAL ASSETS: ESTATE PLANNING AND TRUST ADMINISTRATION, IN BRIEF

By Katie Lepore, CPA, J.D., LL.M., Taxation

The world is becoming increasingly more digital, but the California Probate Code does not seem to be keeping pace. How should attorneys plan for their clients' digital assets in their estates, and how should clients ensure their digital assets are effectively transferred as they desire? There is no uniform definition for a "digital asset," but Section 871 of the California Probate Code defines it as an "electronic record in which an individual has a right or an interest."

Therefore, this definition is inclusive of everything from clients' personal email accounts, their Wells Fargo bank login (where they likely have e-statements sent to their personal email account), their Facebook and Twitter social media presence, electronic wallets or crypto-currency, PayPal, and much more. For some clients, these digital assets can be worth a significant amount of money. For instance, take the example of an author who stores a manuscript in progress in a cloud account, or Kylie Jenner who reportedly is paid over $1 million for each sponsored post on her Instagram page.[1] While not all clients have the fame of Kylie Jenner, *Forbes* reports that the highest grossing YouTube channel yielding over $22

[1] https://www.cnbc.com/2018/07/31/kylie-jenner-makes-1-million-per-paid-instagram-post-hopper-hq-says.html

million a year belongs to a seven-year-old boy who reviews toys for other parents and children.[2]

The value inherent in these assets is one thing, which begs the question of whether a client who does not effectively transfer his or her digital assets to a living trust could be subject to California probate if the digital assets are valued at over $166,250. A second more practical question arises regarding how to effectively terminate and close these accounts after someone has died. Every day people are signing up and making usernames and passwords for more and more online sites. If one stops to think about how many online accounts he or she may have, the amount can be staggering.

This can be an overwhelming and difficult task for a fiduciary, especially thinking of all the personal information that can be stored in these online accounts, such as photos and credit card numbers. Furthermore, gaining access to these accounts might be essential to fully administering the decedent's estate to determine what bank accounts the decedent may have owned which send only e-statements to the client, or the names and contact information for family and friends which is now only stored in a digital email contact list or cell phone.

While there are no hard and fast clear rules or best practices yet established, this article attempts to lay out some of the law surrounding this ever-evolving area and what steps attorneys and clients alike may wish to take to effectively and securely transfer these assets and information.

Stored Communications Act

There are two major federal laws that govern digital assets and custodians. "Custodians" generally refers to the online service providers who house or have custody of a user's digital assets. Think of a custodian as Google for a Gmail account, Facebook for a user's Facebook page, or Morgan Stanley for the decedent's investment account.

The Stored Communications Act ("SCA") (18 USC 2701), enacted as part of the Electronic Communications Privacy Act of 1986, has played a large role in the treatment of digital assets and made custodians and fiduciaries reluctant to access the digital assets of a deceased person. The SCA places restrictions on custodians by prohibiting sharing electronic communications with those who are not entitled to it; custodians can only share the stored information with the lawful consent of the owner.

Computer Fraud and Abuse Act

The Computer Fraud and Abuse Act (18 USC 1030) ("CFAA") was enacted in 1986 and deters hackers by imposing criminal sanctions on anyone who accesses a digital asset without authorization. Something as simple as entering the password to an online account that is not your own without the account holder's express consent could subject a person to sanctions under CFAA. The California Comprehensive Computer Data Access and Fraud Act has similar sanctions.

RUFADAA

In 2015, the Uniform Law Commission (ULC) published the Revised Fiduciary Access to Digital Assets Act, known as RUFADAA. Close to 41 states have enacted RUFADAA[3], but California enacted Cal-RUFADAA, which differs from the ULC's version in too many respects for California to be considered as having adopted the uniform Act. Cal-RUFADAA started as AB-691, signed into law by Governor Jerry Brown on September 24, 2016 and is now codified in Sections 870-884 of the California Probate Code. This article will focus on Cal-RUFADAA; readers in other jurisdictions should consult the proper version for their state.

[2] https://www.cbsnews.com/news/top-10-highest-paid-youtube-stars-of-2018-forbes/

[3] http://www.ncsl.org/research/telecommunications-and-information-technology/access-to-digital-assets-of-decedents.aspx

Cal-RUFADAA aims to confirm the right of fiduciaries to access digital assets, or at least to receive information about digital assets, after the user's death. It was enacted in part to clarify when a user specifically authorizes consent to access his or her digital assets so as to not run afoul of the SCA or CFAA.

One of the major ways in which Cal-RUFADAA differs from the uniform version is that Cal-RUFADAA only applies to: fiduciaries acting under a Will, personal representatives acting for a decedent, and trustees acting under a trust. Fiduciaries acting under a power of attorney and conservators were removed from the uniform version. This seems to suggest that the California legislature specifically wanted the Act to apply only to digital assets of deceased persons.

<u>Ways to Access Digital Assets</u>

Both RUFADAA and Cal-RUFADAA use a three-tier system to grant access to digital assets. The first of these tiers is a so-called "online tool", which is a service provided directly by a custodian of a digital asset, separate from their terms of service. The terms of service are basically the contract between the user and the custodian providing the online platform (think of the pop-ups that require the "I agree" box to be checked before moving forward). Very few providers offer an online tool, but it essentially is an electronic document within an online platform giving directions to the custodian for the user's wishes in certain circumstances. Most notably, Facebook offers a "Legacy Contact" and Google offers an "Inactive Account Manager."

Facebook's Legacy Contact allows a user's account to either be "memorialized" or deleted upon death. The account will only be deleted if the user indicates that is his/her desire upon death. For memorialized accounts, the user may identify someone who can post or update pictures, but not fully log into the user's account. Google's Inactive Account Manager provides for the designated party to download select account information. Additionally, a user can set a particular period of time before an "inactivity plan" is triggered. Once triggered, Google will notify the designated party(ies) that he or she may download the account information. Users can choose which Google accounts to provide information about including Gmail, Youtube, contacts, GoogleDrive, etc. Alternatively, users can choose to have their account deleted after a period of time elapses without activity.

The second tier granting access to digital assets is a written document which explicitly grants access. Such document can be an estate planning document such as a Will, trust, power of attorney, or even a directive explicitly used for this purpose. It is important to note that text messages and emails qualify as a written record, and a power of attorney document is sufficient to grant access to digital assets after a user's life has ended, despite the power of attorney being effective only during his or her life (this may have been an oversight that was not removed from the ULC version).

The third and final tier used to grant access to digital assets is the custodian's terms of service (the pop-up "I agree" button). Every custodian's terms of service agreement is different and many may not address the user's account after his or her death. Still other terms of service agreements may automatically terminate the user's account upon his or her death.

Practical Applications

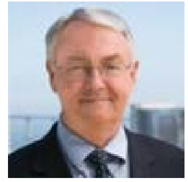
Unless custodians offer an online tool, estate planners should be cognizant of these issues and properly plan for the transfer and administration of a client's digital assets. Clients who use Google services or Facebook could be counseled that online tools exist for these major players in the digital age. Due to the nature of a Will becoming a matter of public record, a separate directive or a trust may be a better vehicle to specifically give powers over digital assets. It would likely be wise to include such authority in a Power of Attorney document as well, even though Cal-RUFADAA does not currently include Powers of Attorney.

A document to transfer ownership of these assets to the client's living trust may also prove useful, especially if there is no other way to transfer ownership formally or if the assets have significant value. For instance, transferring a digital wallet or the digital key to Bitcoin via a document kept with the client's estate planning documents could make the trust administration run much more smoothly. It would also be very useful if clients provide the attorney or successor trustee with information about any valuable accounts, such as a bank account or mortgage where all statements are only sent electronically (especially if the decedent's email password is unknown).

With passwords changing and new accounts being created frequently, it is unlikely that clients would be able, even if willing, to maintain a list of their online accounts and passwords. At a minimum, perhaps clients can store the password to their personal computer with a trusted person or their attorney since access to the computer itself may provide access to several websites where personal log-on information is stored. It would also be incredibly helpful to know the password to the client's phone since so much is stored on phones these days including contact lists, photos, banking applications, and social media. There are password managers available, such as LastPass or 1Password, though clients may need to be diligent in updating the manager as they change passwords on other sites.

Conclusion

The legal framework governing digital assets is largely unwritten at this point. In a world where electronic Wills may soon be accepted and business is increasingly transacted online, properly transferring a client's digital assets through an estate plan becomes ever more important. Clients and estate planners alike should be cognizant of this increased need and work to achieve the client's goals for a smooth transition of digital assets after death or incapacity.



INHERITED IRAs: What Beneficiaries Need to Know

by Bradford N. Dewan, J.D., MBA

It is very important for an IRA owner to make sure the beneficiaries he or she has listed on the IRA beneficiary designation form are aware of being listed as a beneficiary. Once an individual has learned that he or she has been listed as a beneficiary of an IRA, then that individual can begin learning what the benefits and challenges are of the inherited IRA upon the death of the IRA owner. Surviving spouses have some leeway and a number of options to consider, but a nonspouse beneficiary needs to understand when certain actions need to be taken and that there are limited options available to a nonspouse beneficiary. Importantly, if a nonspouse beneficiary makes a mistake, this will likely trigger a huge tax bill and forego the opportunity for a lifetime of tax-deferred growth. Thus a nonspouse beneficiary must be aware of the common mistakes described below in order to avoid the adverse consequences.

Failing to Take Required Distributions

Owners of traditional IRAs do not have to start taking required minimum distributions ("RMDs") until reaching the age of 70-1/2. In contrast, nonspouse beneficiaries of any age who want to "stretch" the IRA distributions over their own life expectancies must start taking the RMDs in the year following the year the IRA owner died. Heirs, the named beneficiaries, will have to pay tax on the distributions of the deductible contributions and earnings from a traditional IRA.

Also, while Roth IRA owners never have to take RMDs, nonspouse beneficiaries must do so as described above. However, the RMDs for a nonspouse beneficiary and any other withdrawals from the inherited Roth IRA are still tax free.

Not taking an RMD results in a 50% penalty on the amount that should have been withdrawn for the year. If a nonspouse beneficiary fails to take the RMD from the inherited IRA, the penalty may be avoided by emptying the inherited IRA within five years of the owner's death (if the owner died before having to start taking the RMDs). However, depending on the size of the inherited IRA and the age of the nonspouse beneficiary, it might be more advantageous to pay the penalty and thus be allowed to take the RMDs over the remaining life expectancy of the nonspouse beneficiary under the IRS life expectancy tables rather than to completely liquidate the account and pay a large tax bill simply to avoid the penalty.

Besides the beneficiary's own RMDs, it is important to note that if the IRA owner died after starting the RMDs but had not yet taken the full RMD for the year in which he or she died, the balance of the RMD not taken by the IRA owner must be withdrawn from that account by the beneficiary(ies) by the end of that year in which the death occurred. Failure by the beneficiary to take the balance of the IRA owner's RMD in the year of death will result in the 50% penalty being imposed on the beneficiary(ies) and not on the estate of the IRA owner.

Titling the Inherited IRA Improperly

Nonspouse beneficiaries cannot roll an inherited IRA into their own IRA. Instead, a separate new account must be established with a title that includes the decedent's name and the fact that the account is for a beneficiary. For example, upon John Doe's death, his IRA account, in coordination with the IRA custodian, could be retitled to "John Doe (deceased) IRA for the benefit of Jane Doe." If John Doe's IRA is to be split among two or more beneficiaries, each new inherited IRA must be properly retitled. Once John Doe's IRA has been retitled with respect to an inherited IRA for each beneficiary, each beneficiary, again working with the IRA custodian, can then name successor beneficiaries.

Failing to Divide IRA Among Beneficiaries

It is very important that the beneficiaries of an IRA be advised that, upon the death of the IRA owner, the IRA needs to be split among the inherited IRAs, one for each beneficiary, by December 31st of the year after the year the IRA owner died, especially if there is a wide age difference between the beneficiaries. If the IRA is not split by that date, the age of the oldest beneficiary will be used to calculate the RMDs for all of the beneficiaries, which could significantly shorten for the youngest beneficiary(ies) the number of years the funds in the inherited IRAs can grow tax deferred.

As an example, the IRA owner lists as the beneficiaries his 75-year-old sister, a 50-year-old son and a 20-year-old grandchild. If the inherited IRAs are not created by December 31 of the year following the year the IRA owner dies, all three of the beneficiaries will have to calculate their RMDs based on the 75-year-old's life expectancy. In contrast, if the inherited IRAs are created (and the RMDs for that year for each inherited IRA are distributed) by December 31 of the year following the year the IRA owner dies, each beneficiary/owner of an inherited IRA can use his or her own life expectancy to calculate and receive the RMDs. Since the RMD depends on age, the younger the beneficiaries are, the less they have to take out each year. Thus if the 20-year-old grandchild had timely created the inherited IRA, the RMDs for that grandchild would be based on a 63.0 life expectancy. In contrast, under the IRS single life table, the life expectancy of a 75-year-old is 13.4 years. In addition, by creating the separate inherited IRAs, each beneficiary will have the authority and discretion on how to invest the funds in his or her respective inherited IRA.

Not Paying off the Non-individual Beneficiaries Before the Final Determination Date

IRAs with multiple beneficiaries that include a charity or other non-individual entity must pay out that entity's share of the IRA by September 30th of the year following the IRA owner's death (the "Final Determination Date"). If that share isn't paid out in full by that September 30th date and the decedent's IRA has not been divided, the rest of the beneficiaries cannot take the RMDs over their respective life expectancies. They will have to empty the decedent's IRA within five years if the IRA owner died before his required beginning date for taking distributions. If the owner died after that date, the beneficiaries must take the annual RMDs based on the deceased's life expectancy determined in the year of death pursuant to the IRS life expectancy tables. This is based on the rule in the Treasury Regulations that if one of the beneficiaries on the Final Determination Date is not an individual (i.e. a "designated beneficiary") then there are no "designated beneficiaries" and thus no ability to stretch out the RMDs.

If a trust has been named a beneficiary, then the trustee of that trust must send a copy of the trust document to the IRA custodian by October 31 of the year following the year the IRA owner died. Otherwise, the trust (or technically the beneficiaries of the trust if all the beneficiaries of the trust are individuals) will not be considered a "designated beneficiary" under the trust rules in the applicable Treasury Regulations and the same payout rules that applied in the previous scenario with the charity will apply.

The above discussion describes some of the adverse consequences if a beneficiary of an IRA is not fully aware of the rules affecting IRAs upon the death of the IRA owner. Feel free to contact the author with any questions.

FEDERAL TAX UPDATE
By DeEtte L. Loeffler, J.D., LL.M., Taxation

Two New Bills Would Reduce Estate Tax Exclusion. Two new bills were introduced on September 12, 2019 that would reduce the exclusion from the federal estate tax to 2017 levels ($5 million indexed for inflation to perhaps $5.7 million) to fund other causes. H.R. 4321, the *Grants for Eliminating the Toxic Hazard of Lead in Our Towns (GET THE LEAD OUT) Act*, was introduced by Rep. Tim Ryan (D-Ohio). It would fund removal of lead pipes in housing. S. 2471, *Degrees, Not Debt Act of 2019*, was reintroduced by Senator Martin Heinrich (D-NM), and it would fund higher education. The bill previously died in committee in 2018. Both bills are early in the legislative process.

Challenge to SALT Deduction Cap Dismissed. In September, the US District Court for the Southern District of New York dismissed a challenge by New York, Connecticut, Maryland and New Jersey to the federal $10,000 limit on the itemized deduction for state and local taxes (SALT) on federal income tax returns. The states had argued in part that the cap was coercive to states which impose high taxes because its impact on taxpayers would force those states to reduce their own taxes and would suppress property values resulting in reduced state transfer taxes. The court determined that the cap is not unconstitutional both because the federal government's ability to levy taxes is "exhaustive" (citing *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 12 (1916)), and because the cap did not meaningfully constrain the states' ability to exercise their own sovereign taxing powers. For the full decision, go to *New York v. Mnuchin*, No. 18-CV-6427 (JPO) (S.D.N.Y. Sept. 30, 2019) at http://www.nysd.uscourts.gov/rulings.

Opt-in for Identity Protection with IRS. California taxpayers (and those in 18 other states and the District of Columbia) can now elect to obtain an Identity Protection Personal Identification Number (IP PIN) from the IRS. This pin is intended to provide an additional layer of protection for taxpayers concerned that their Social Security numbers may have been compromised by online breaches. The program is designed for those who are not known victims of identity theft. Once the taxpayer opts into the program, he or she will receive an IP PIN yearly. The new pin must be included on any tax return filed electronically and will need to be used going forward. For more information, go to: https://www.irs.gov/identity-theft-fraud-scams/get-an-identity-protection-pin.

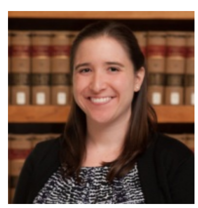
Additional Protections for Taxpayers; New Requirement for PTINs. Starting with the 2020 tax filing season, the IRS is requiring tax return preparers (such as enrolled agents, CPAs and attorneys) to have and maintain a written information security plan on how they will protect taxpayer information. The plan must comply with the requirements of the Federal Trade Commission's "Safeguard Rule." Return preparers must confirm they have such a plan in order to renew their Preparer Tax Identification Numbers (PTIN) this fall. For information on what the plan must include, *see* https://www.ftc.gov/tips-advice/business-center/guidance/financial-institutions-customer-information-complying.

New Guidance Relating to Cryptocurrency. On October 9, the IRS issued Revenue Ruling 2019-24 and updated the FAQs on its website relating to transactions involving virtual currency. This is intended to help taxpayers better understand the requirements for crypto-currency and the treatment of hard forks.

IRS Issues Final Regulations for Real Estate 199A Safe Harbor. On September 24, the IRS issued final regulations in Revenue Procedure 2019-38 which finalize the safe harbor for the Section 199A pass-through deduction with regard to rental real estate. The safe harbor was originally introduced in Notice 2019-07. The new Rev. Proc. largely mirrors the pro-posed rules already issued, though it does clarify that mixed-use property that contains both residential and commercial uses may be treated either as a single rental enterprise or as separate residential and commercial interests. See our **March 2019 Newsletter** for additional information.

ABLE Account Owners May Contribute Up to $12,140. The IRS has published proposed reliance regulations for disabled taxpayers who are working and wish to contribute to their 529 ABLE accounts. ABLE accounts are similar to a 529 Plan but allow the owner to use the funds for purposes in addition to education, such as housing, without incurring a tax, and they are capped at $100,000 (except with regard to approved owner contributions). The Tax Cuts and Jobs Act permits working ABLE owners to contribute the lesser of (i) their annual earnings or (ii) the poverty line amount for a single person household for the previous year as defined in IRC Section 673 ($12,140 in 2019). The taxpayer is not eligible to contribute to an ABLE account if a contribution has been made to another pension plan or annuity for that tax year. Taxpayers may rely on these proposed regulations until the final ones are published.

Bernie Sanders Proposes Tax on House Flippers. On his campaign website, Senator Bernie Sanders (I-VT) has proposed a 25% House Flipping tax on those who sell a non-owner-occupied property at a gain within 5 years of purchase. This "Housing For All" plan also imposes a 2% tax on the property value of any vacant homes to encourage owners to make them available for rent.



STATE TAX NEWS

By Katie Lepore, CPA, J.D., LL.M., Taxation

San Diego County Offering Plans for Granny Flats. San Diego County is offering pre-approved floor plans for granny-flats, or "accessory dwelling units" (ADUs), for either 600, 800 or 1,200 square feet in an effort to encourage homeowners to build a granny flat and reduce the housing shortage. Three permit-ready plans are already posted, and additional plans are supposed to be forthcoming soon. The County also waived $15,000 in permit and development fees through January of 2024 for granny flats earlier this year. The floor plans are available at http://www.sandiegocounty.gov/ADU.

Several New Housing Laws. On October 9, Governor Newsom signed 18 bills into law with the intent to encourage and jumpstart the development and building of new housing in the state. Among these bills are SB113, which provides $331 million in state funds to be used for legal aid for tenants to fight unjust evictions and to help homeowners with borrower relief. SB 330, as detailed in our **September Newsletter**, establishes a housing "crisis" and removes some administrative barriers to building new housing. There are also five separate new laws to encourage development of ADUs. A full list of the 18 housing related bills with short descriptions can be found at the following link:
https://www.gov.ca.gov/2019/10/09/governor-gavin-newsom-signs-18-bills-to-boost-housing-production/

California Cities Could Open Public Banks. Governor Newsom signed AB 857 on October 2, 2019, which would allow cities in California to open public banks using taxpayer funds. Local agencies could apply to the Department of Business Oversight to create a public bank only after obtaining voter approval, preparing a business plan, and evaluating whether creating a bank would be financially feasible. Proponents say this would allow public interest projects, like low income housing, to receive funding without the formal requirements of a for-profit bank in terms of profitability and return on investment. Opponents feel that risking taxpayer money to make uncertain investments is not sound business.

California Consumer Privacy Act Active Soon. As a reminder, the California Consumer Privacy Act of 2018, signed into law as AB 375 by Governor Jerry Brown on June 28, 2018 will be effective beginning January 1, 2020. Consumers will be able to request a business "to disclose the categories and specific pieces of personal information that it collects about the consumer, the categories of sources from which that information is collected, the business purposes for collecting or selling the information, and the categories of 3rd parties with which the information is shared."

Attorney Fee Increases Become Law. Governor Newsom signed SB 176 on October 9, formally approving attorney licensing fees to increase to $544 in the year 2020. This is the first increase since 1999.

AREAS OF PRACTICE

ESTATE PLANNING
& ADMINISTRATION
WILLS & TRUSTS
ESTATE & GIFT TAX PLANNING
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ESTATE/GIFT TAX DISCOUNT PLANNING
CHARITABLE GIFT PLANNING
PROBATE & TRUST ADMINISTRATION
ESTATE & GIFT TAX RETURNS
PRE-MARITAL AGREEMENTS

VALUATION SERVICES
BUSINESS APPRAISAL SERVICES/DISCOUNT OPINIONS
VALUATIONS FOR ESTATE AND GIFT TAX PURPOSES

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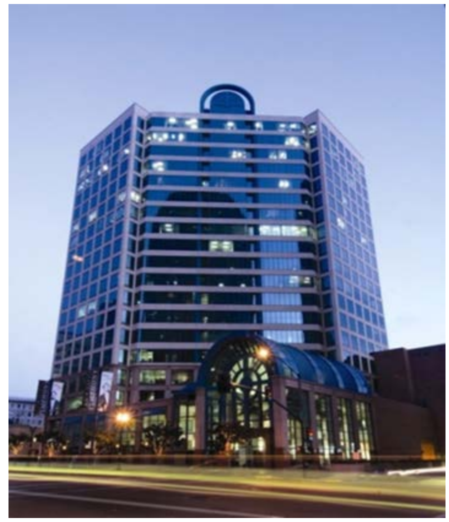
PENSION, PROFIT SHARING, & 401(k) PLANS
LONG & SHORT TERM DISABILITY MATTERS



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