Digital Assets Raise Estate Planning Questions

More and more, we are conducting our business on the Internet, whether that's online banking, shopping at Amazon and other sites, uploading documents and files to the "cloud," posting videos on YouTube, or communicating with high school classmates via Facebook.

So, what happens to all of our accounts and files when we become incapacitated or pass away? Will our spouses and children have access to them? Where will they find our usernames and passwords? Who can take down our Facebook and LinkedIn pages, or would we prefer that they continue for posterity? And if we've saved photos, videos and other files on the cloud, who should have access to them and how long should they stay out there?

These are questions almost everyone needs to think about today and they often raise difficult security and legal issues. For example, if you become incapacitated and your daughter starts handling your finances online, is she doing so legally? Presumably you've given her your assent to do so, but the bank may not have a durable power of attorney on file with this authorization. As far as the bank knows, you're still the person logging in and paying your bills or shifting your investments. Is this fraud on the bank? Does anyone care as long as your daughter is acting in your best interest?

And what if you pass away and your child, rather than notifying the financial institutions, continues to pay bills online and make distributions to family members? This is clearly contrary to law, but it could be much more convenient than going through the probate process. Is it an instance of no harm, no foul?

States are beginning to grapple with these issues. A few states have enacted laws, giving executors access to online accounts. In addition, every Internet provider has its own rules about access to user accounts, and generally users have agreed to these rules when they first enrolled, whether they actually read the service agreement or not. In April 2013, Google introduced the concept of an Inactive Account Manager who Google users can name to receive notice when a Google user has not accessed her account for a long period of time. The Inactive Account Manager has access to Google accounts designated by the user and can take whatever action is necessary to access them or shut them down.

The legalities aside, here are some steps we can all take to better manage our digital assets:

- **Inventory your digital estate.** Make a list of all of your online accounts, including e-mail, financial accounts, Facebook, Mint, and anywhere else you conduct business online. Include your username and password for each account. Also, include access information for your digital devices, including smartphones and computers.
- **Store the list in a safe place.** There are a number of options for where you and your representatives can store the list, each with its own problems. If you have the list on paper, someone who you don't trust might discover it and gain access. You can keep it in a safe deposit box or give it to your lawyer to hold in her files. In each case, your representative needs to know where it is and how to gain access. If you keep the list online, make sure you do so securely. You can upload the file to Dropbox, giving your representative access, or use one of a number of new services for this purpose. These include: Cirrus Legacy, and SecureSafe.
- **Give access to your personal representatives.** Once you have your inventory, you will need to provide it to the people who will step in if you become incapacitated or

pass away, or let them know how to find it when and if they need to do so. Make sure that they save the information as securely as you have yourself. You might want to simply give them access to one of the services listed above with a username and password that they can remember.

- **Authorizing language.** Make sure the agent under your durable power of attorney and the personal representative named in your will have authority to deal with your online accounts. The Web site DigitalEstateResource.com provides sample language.
- **Update the inventory.** As you open new accounts and services, purchase new devices, and change usernames and passwords, you will have to update your list so that it remains current.

Unfortunately, as the Internet makes our lives easier and quicker, it also makes them more complicated. We all need to take steps to make sure that our loved ones have the necessary access when access becomes necessary.

ela

Estate Planning in the Age of Stepfamilies

More than 4 in 10 Americans have at least one step-relative in their family – either a stepparent, a step or half sibling or a stepchild – according to the Pew Research Center. The National Center for Family and Marriage Research estimates that about one-third of all weddings in America create stepfamilies.

A recent trust case from North Dakota highlights the importance of taking current and potential step-relationships into account when planning your estate. William and Patricia Clairmont created two trusts for their grandson, Matthew. In both trusts, “the brother and sisters” of Matthew were contingent beneficiaries (meaning they would be the trust beneficiaries if Matthew died).

After the trusts were created, the Clairmonts’ daughter, Cindy (Matthew’s mother), divorced Matthew’s father, Greg, and Greg remarried and had two children with a second wife. In March 2011, Matthew died suddenly and unexpectedly at the age of 25 without a wife, children or a will.

Under North Dakota law, Greg’s two children with his second wife were technically “brothers and sisters” of Matthew and, thus, eligible beneficiaries under the trusts. The Clairmonts argued for an interpretation of the trust that would exclude Matthew’s stepsiblings as beneficiaries or, alternatively, for reformation of the trust to include language that only lineal descendants of the Clairmonts could benefit from the trusts.

Ultimately, the North Dakota Supreme Court granted the Clairmonts’ petition to reform the trusts based on evidence that the Clairmonts made a mistake of law by interpreting the phrase “brothers and sisters” to include only full blood siblings and based on testimony by the Clairmonts themselves on their intention to benefit their lineal descendants alone.

Although things turned out well for the Clairmonts in the end, it took much time and money to get there. The case stresses the importance of addressing step-relations in your estate plan whether or not you are already a member of a stepfamily.

To read the May 28, 2013 decision, *In re Matthew Larson Trust Agreement*, click here.

Have You Planned for State Estate and Inheritance Taxes?

Although most people’s estates aren’t large enough to be affected by the federal estate tax, residents in many state have to consider how state taxes may reduce their estates. Several states have their own estate tax, which can affect much smaller estates than the federal estate tax does. In addition, some states impose an inheritance tax on beneficiaries of an estate.

The federal estate tax exemption is currently $5.25 million for an individual, so most estates are exempt. However, 15 states (Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Tennessee, Vermont, and Washington) and the District of Columbia currently have separate state estate taxes, and six states have an inheritance tax (Iowa, Kentucky, Maryland, Nebraska, New Jersey, and Pennsylvania). The numbers change constantly. In recent years, the trend has been for states to eliminate such taxes. For example, Tennessee is currently phasing out its estate tax, which is set to end in 2016.

If you live in one of the states with an estate tax, you need to take the tax into account when planning your estate. While some states (e.g., Delaware and Hawaii) exempt the same amount as federal law, other states' estate taxes can affect much smaller estates. For example, New Jersey taxes estates worth more than $675,000 and Oregon taxes estates of more than $1 million. Most states with an estate tax exempt the first $1 million to $2 million of an estate's value. To find out whether your state has an estate tax and how much it is, click here.

Another state tax to take into account when planning your estate is the inheritance tax. An inheritance tax is a tax on the person receiving an inheritance. Spouses are usually exempt from the tax, and in some states, children are as well. Charitable beneficiaries may also be exempt. Usually, the less closely related the beneficiary, the higher the tax. Even if the beneficiary doesn't live in a state with an inheritance tax, if the person who died resided in an inheritance tax state, the beneficiary can still be taxed. For more information about inheritance taxes, click here.

You have several options for avoiding state estate and inheritance taxes, including creating a trust or gifting money. Talk to your attorney to find out the best solution for you. Because the law is constantly changing, even if you have an estate plan, you should check with your attorney to ensure your plan does not need updating.

ELA

The U.S. Supreme Court Rules Gay Spouse Is Entitled to Estate Tax Refund

The U.S. Supreme Court has ruled that a key provision of the Defense of Marriage Act (DOMA) is unconstitutional, clearing the way for the surviving spouse of a lesbian couple to receive a refund of the taxes she was forced to pay because the federal government did not consider her married to her spouse.

Although the ruling does not create a national constitutional right to same-sex marriage, it does allow same-sex couples in states that legally recognize their marriages to receive a host of federal benefits that were previously denied them, such as being able to inherit from a spouse without paying federal estate tax.

Edith Windsor and Thea Spyer became engaged in 1967 and were married in Canada in 2007, although they lived in New York City. When Ms. Spyer died in 2009, Ms. Windsor had to pay Ms Spyer's estate tax bill because of DOMA, a 1996 law that denies federal recognition of gay marriages. Although New York State considered the couple married, the federal government did not and taxed Ms. Spyer's estate as though the two were not married. Ms. Windsor sued the U.S. government seeking to have DOMA declared unconstitutional and asking for a refund of the more than $363,000 federal estate tax she was forced to pay. As previously reported, a federal court judge from the U.S. District Court for the Southern District of New York ruled that there was no rational basis for DOMA's prohibition on recognizing same-sex marriages.

In a 5-4 decision, the U.S. Supreme Court declared that DOMA is an unconstitutional deprivation of equal liberty under the

Equal Protection Clause of the Fifth Amendment. Noting that states have the power to define and regulate marriage, the Court held that DOMA discriminates against same-sex couples who are legally married in their state. According to the court, “DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”

The ruling will have many implications for same-sex couples with regard to federal estate taxes, gift taxes, Social Security benefits, and IRA beneficiary rollover rules, and more than 1,000 other federal benefits. The decision means that same-sex couples who are legally married must now be treated the same under federal law as married opposite-sex couples, at least in states that recognize same-sex marriage.

Complicating matters is that the case brought to the Supreme Court did not challenge another provision of DOMA that says no state must recognize a same-sex marriage from another state. If a couple married in a state that recognizes same-sex marriage moves to a state that does not, not all federal rights and benefits accorded married couples will apply because some benefits – like Social Security, for example – are contingent on whether the marriage is considered valid in the state where the couple currently lives.

For this to change, Congress will have to pass new laws and/or President Obama will have to change regulations. But in the meantime, Edith Windsor can expect a check from the U.S. Treasury for $363,053 – plus interest.

ELA

Estate Taxation

Lions and tigers and bears . . .
Ever since the estate tax was instituted in 1916, whatever an individual owns has been subject to the federal estate tax upon his or her death – until 2010, that is. The estates of those dying during that year were entirely free from federal taxation because Congress could not reach an agreement extending the federal estate tax in some form. An agreement was finally reached at the end of 2010 that cemented the federal estate tax rules for 2011 and 2012. If Congress fails to act before the end of 2012, the rules for 2013 will revert to the provisions prevailing in 2001. For 2011 and 2012, the tax rate on estates is 35 percent (see chart below).

That said, not all estates will be taxed. First, spouses can leave any amount of property to their spouses, if the spouses are U.S. citizens, free of federal estate tax. Second, the estate tax applies only to individual estates valued at more than $5.12 million ($10.24 million for couples) in 2012 (see chart). The federal government allows you this tax credit for gifts made during your life or for your estate upon your death. Third, gifts to charities are not taxed.

The heirs of those dying in 2010 will have a choice between applying the new rules for 2011 and 2012 or electing to be covered under the rules that applied in 2010 – no estate tax but only a limited step-up in the cost basis of inherited assets. The law for 2011 and 2012 also makes the estate tax exemption “portable” between spouses. This means that if the first spouse to die does not use all of his or her $5 million or $5.12 million exemption, the estate of the surviving spouse may use it. So, for example, John dies in 2011 and passes on $3 million. He has no taxable estate and his wife, Mary, can pass on $7 million (her own $5 million exclusion plus her husband’s unused $2 million exclusion) free of federal tax. (However, to take advantage of this Mary must make an “election” on John’s estate tax return. Check with your attorney.)

Tax Year	Tax Rate	Exemption Equivalent
2009	45%	$3,500,000
2010	N/A or 35%	N/A or $5,000,000
2011	35%	$5,000,000
2012	35%	$5,120,000
2013	55%	$1,000,000

The currently high federal estate tax exemption, coupled with the portability feature, might suggest that “credit shelter trusts” (also called bypass or AB trusts) and other forms of estate tax planning are needless for other than multi-millionaires, but there are still reasons for those of more modest means to do planning, and one of the main ones is *state* taxes. Nearly half the states also have an estate or inheritance tax and in many cases the thresholds are far lower than the current federal one. Many states used to take advantage of what was known as a “sponge” tax, which ultimately didn’t cost your estate. The way this worked was that the states took advantage of a provision in the federal estate tax law permitting a deduction for taxes paid to the state up to certain limits. The states simply took the full amount of what you were allowed to deduct off the federal taxes. However, the allowable state deduction was phased out under the Bush tax cuts enacted in 2001, and it disappeared entirely in 2005. This means that many states are changing their estate tax laws to make up the difference, and more changes at the state level can be expected as state politicians react to the new federal estate tax landscape. These changes may call for a restructuring of your estate plan; check with your attorney.

Making Gifts: The $13,000 Rule

One simple way you can reduce estate taxes or shelter assets in order to achieve Medicaid eligibility is to give some or all of your estate to your children (or anyone else) during their lives in the form of gifts. Certain rules apply, however. There is no actual limit on how much you may give during your lifetime. But if you give any individual more than $13,000 (in 2012), you must file a gift tax return reporting the gift to the IRS. Also, the amount above $13,000 will be counted against a $5 million lifetime tax exclusion for gifts. (This exclusion was $1 million for many years but was raised to $5 million in 2011 and $5.12 million in 2012.) Each dollar of gift above that threshold reduces the amount that can be transferred tax-free in your estate.

The $13,000 figure is an exclusion from the gift tax reporting requirement. You may give $13,000 to each of your children, their spouses, and your grandchildren (or to anyone else you choose) each year without reporting these gifts to the IRS. In addition, if you’re married, your spouse can duplicate these gifts. For example, a married couple with four children can give away up to $104,000 in 2012 with no gift tax implications. In addition, the gifts will not count as taxable income to your children (although the earnings on the gifts if they are invested will be taxed).

ela:dsmod