

Report From Counsel

Insights and Developments in the Law

Winter 2018-2019

Estate Planning for Your Digital Assets and Accounts

Nearly everyone owns some digital assets, like online bank and brokerage accounts, bill-paying services, cloud-based document storage, digital music collections, social media accounts, and domain names. What happens to these assets when you die or if you become incapacitated? Will someone even know the accounts exist? Jason Smolen and Dan Ruttenberg say the answer depends on several factors, including the terms of your service agreements with the custodians of digital assets, applicable laws and the terms of your estate plan. To reduce uncertainty, you should include digital assets in your estate planning.



Jason Smolen

Pass on Passwords

It may be old school, but the simplest way to provide your family or estate executor with access to your digital assets is to leave a list of accounts and login credentials in a safe deposit box or other secure location, advises Smolen. The disadvantage of this approach is that you'll need to revise the list everytime you change your password or add a new account. For this reason, consider storing this information using password management software and providing the master password to your representatives.

Or, you can use an online service designed for digital estate planning, says Ruttenberg. These services store up-to-date information about your digital assets and establish procedures for releasing it to your designated beneficiary after your death or if you become incapacitated.

Know the Law

Although sharing login credentials with your representatives is important, it's no substitute for covering digital assets in your estate plan. For one thing, a third party who accesses your account without formal authorization may violate federal or state privacy laws.



Daniel
Ruttenberg

In addition, many states have laws, such as the Uniform Fiduciary Access to Digital Assets Act (UFADAA), that establish default rules regarding access to digital assets by executors, trustees and other fiduciaries. If those rules are inconsistent with your wishes, you'll want to modify them in your plan. The UFADAA allows people to provide for the disposition of digital assets using online settings offered by the account provider. For example, Facebook enables users to specify whether their accounts will be deleted or memorialized when they die and to

Accolades

Once again, SmolenPlevy is ranked by *U.S. News & World Report* in its "Best Law Firms." SmolenPlevy is recognized for business organizations, family law, trusts and estates and family law mediation. This is the fifth straight year SmolenPlevy has been honored with this achievement. The "Best Law Firms" ranking is the result of a clean sweep by Principals Jason Smolen, Alan Plevy, Daniel Ruttenberg and Kathryn Dickerson — all named in the 2019 edition of "The Best Lawyers in America."

In the Community

SmolenPlevy Principal Dan Ruttenberg, Vice President of Devotion To Children, is proud to announce the 8th Annual Cards 4 Kids was a great success. The event helped raise over \$46,000 for Devotion to Children, which will go toward funding childcare services for economically disadvantaged families in the Washington, D.C. metropolitan area.

Principals Dan Ruttenberg and Kyung (Kathryn) Dickerson attended Devotion To Children's (DTC) 16th Annual Red, Heart & Soul Gala on November 16. At the networking event, public figures, corporate leaders, donors and volunteers united to support DTC. DTC is committed to providing access to high-quality educational and childcare programs for children under age six from economically disadvantaged families.

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How Does a Court Decide Custody?

Child custody is the responsibility for the care, control, and maintenance of a minor child. There are several types of child custody, including physical, legal, sole, and joint custody. Child custody may be decided in a mutual agreement between parents or by a court, usually during a divorce or legal proceeding involving a custody dispute.



Alan Plevy

In instances in which parents come to a mutual understanding on child custody, an agreement can be made that specifies the terms of custody. In other instances, parents may not come to an agreement when deciding child custody and the issue may be brought before a judge to make the decision.

When a parent seeks custody of a child and there is no court order in place, the parent may file a petition for custody or a divorce with the appropriate court. In most instances, a parent will file for custody in the county where the parent and child currently reside. In instances where a court order is in place, the parent must file a motion to amend or modify the prior order. Generally, a parent will file in the court that issued the original court order. In both instances, the moving parent must serve the other party the appropriate legal documentation. A court will then schedule a custody hearing.

Traditionally, when the country was more agrarian, the child most often went with the father. During the early industrial age, the courts tended to favor the mother when making custody decisions, regardless of either parent's fitness to parent a child. In today's courtroom, judges make their decisions

based on what they believe to be in the best interests of the child, while also considering the totality of the circumstances. The court system works on a case-by-case basis, thoroughly considering the specific facts of each case.



Kyung (Kathryn)
Dickerson

There are several factors a judge will take into consideration when deciding a child custody award matter. These factors may include, but are not limited to:

- Age of the child
- The physical and psychological health of the child
- The physical and psychological health of the parents
- Existing relationship between each parent and the child
- The needs of the child giving consideration to each parent's involvement
- Each parent's role in bringing up the child and their ability to meet the

physical, emotional, and intellectual needs of the child

- The willingness of each parent to support and facilitate a child's relationship with the other parent
- Living arrangements
- The child's preference if the court deems the child is of an age, intelligence and experience to state a preference
- History of domestic violence, abuse, or neglect
- Such other factors the court deems appropriate

Child custody disputes are emotional and often complex. If you are a parent who is facing a child custody dispute, it is important that you consult an experienced child custody lawyer who can guide you through the process and protect your legal rights during the proceedings. Please contact Alan Plevy at ablevy@smolenplevy.com or Kyung (Kathryn) Dickerson at kndickerson@smolenplevy.com.

At Your Own Risk: The Pitfalls of DIY Estate Planning

There's no law that says you can't prepare your own estate plan. With an abundance of online services that automate the creation of wills and other documents, it's easy to do. But the pitfalls of do-it-yourself (DIY) estate planning can be many, says Jason Smolen and Dan Ruttenberg.

False Sense of Security

Ruttenberg says the biggest concern about DIY estate planning is that, regardless of whether a DIY plan

is appropriate, the do-it-yourselfer usually believes that he or she has put a responsible estate plan in place. This often-misplaced sense of security can keep someone from seeking the advice of professionals who actually can help establish an estate plan that protects one's self and family.

Dotting the I's and crossing the T's

A common mistake people make with DIY estate planning is to neglect

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the formalities associated with the execution of wills and other documents. Rules vary from state to state regarding the number and type of witnesses who must attest to a will and to what they must attest.

Also, states have different rules about interested parties (that is, beneficiaries) serving as witnesses to a will or trust. Smolen says, in many states, interested parties are ineligible to serve as witnesses. In others, an interested-party witness triggers an increase in the required number of witnesses (from two to three, for example).

Keeping Abreast of Tax Law Changes

Legislative developments during the last several years demonstrate how changes in the tax laws from one year to the next can have a dramatic impact on your estate planning strategies. DIY service providers don't offer legal or tax advice — and provide lengthy

disclaimers to prove it, says Ruttenberg. Thus, they cannot be expected to warn users that tax law changes may adversely affect their plans.

Consider this example: A decade ago, in 2008, George used an online service to generate estate planning documents. At the time, his estate was worth \$4 million and the federal estate tax exemption was \$2 million.

George's plan provided for the creation of a trust for the benefit of his children, funded with the maximum amount that could be transferred free of federal estate tax, with the remainder going to his wife, Ann. If George died in 2008, for example, \$2 million would have gone into the trust and the remaining \$2 million would have gone to Ann.

Suppose, however, that George dies in 2018, when the federal estate tax exemption has increased to over \$11

million and his estate has grown to \$10 million. Under the terms of his plan, the entire \$10 million — all of which can be transferred free of federal estate tax — will pass to the trust, leaving nothing for Ann.

While even a qualified professional couldn't have predicted in 2008 what the estate tax exemption would be at the time of George's death, he or she could have structured a plan that would have provided the flexibility needed to respond to tax law changes.

Don't Try This at Home

These are just a few examples of the many pitfalls associated with DIY estate planning. To help ensure that you achieve your estate planning objectives, contact Jason Smolen at jdsmolen@smolenplevy.com or Dan Ruttenberg at dh Ruttenberg@smolenplevy.com to review your existing plan.

Starting a Business — The Franchise Option

An important step in the small business start-up process is deciding whether or not to go into business at all. Each year, thousands of potential entrepreneurs are faced with this difficult decision. Because of the risk and work involved in starting a new business, many new entrepreneurs choose franchising as an alternative to starting a new, independent business.

One of the biggest mistakes you can make is to thoughtlessly jump into business, so it's important to understand your reasons for going into business, and to determine if owning a business is right for you, advises Jason Smolen and Scott Taylor. If you are concerned about the risk involved in a new, independent business venture, then franchising may

be the best business option for you.

What is Franchising?

A franchise is a legal and commercial relationship between the owner of a trademark, service mark, trade name, or advertising symbol and an individual or group wishing to use that identification in a business. The franchise governs the method of conducting business between the two parties. Generally, a franchisee sells goods or services supplied by the franchisor, or that meet the franchisor's quality standards.

In the simplest form, a franchisor owns the right to the name or trademark and sells that right to a franchisee. This is known as "product/trade name franchising." The more complex form

(but commonly employed) "business format franchising" involves a broader ongoing relationship between the two parties, says Smolen. Business format franchises often provide a full range of services, including site selection, training, product supply, marketing plans, and even assistance in obtaining financing.

What to Consider?

Before investing in a particular franchise system, carefully consider how much money you have to invest, what type of franchise would be best for you, your abilities, and your goals, suggests Taylor. Selecting a franchise, like any other investment, is a risk.

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In the Media

Offices across the U.S. teamed up to buy tickets when the Mega Millions jackpot topped \$1 billion dollars. However, if you actually won, you had a long list of issues to deal with. Newsradio WTOP turned to Principal Dan Ruttenberg on how to deal with the winnings.

When someone sees they're named as executor in a will, they believe it is something they must do. However, that may not be what's best for the person or the estate. #ProbateNavigated asked SmolenPlevy's Marissa Bagasra how to decide whether you should assume the role of executor.

No one wants to think of a time when they can't safely drive, make their own medical decisions, or pay their bills. On *Quorum*, a publication of WMCCAI, Marissa Bagasra said, "If you don't make plans now, you may find yourself under the supervision of a Court-appointed guardian in the future."

Co-founding Principal Alan Plevy explains how divorced parents can keep the peace and reduce stress for the kids during the holidays. Listen online to the popular Life After Divorce podcast.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

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designate a "legacy contact" to maintain their memorial pages.

The Act also allows people to establish rules in their wills, trusts or powers of attorney. If users don't have specific instructions regarding digital assets, the Act allows the account provider's service agreement to override default rules.

Take Inventory

To ensure that your wishes are carried out, take inventory of your digital assets now. Then, contact Jason Smolen at [jdsmlen@smolenplevy.com](mailto:jdsmolen@smolenplevy.com) or Dan Ruttenberg at dhrruttenberg@smolenplevy.com about possibly including these important assets in a formal plan.

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When selecting a franchise, carefully consider a number of factors, such as the demand for the products or services, likely competition, the franchisor's background, and the level of support you will receive.

- **Demand** — Is there a demand for the franchisor's products or services in your community? Is the demand seasonal? For example, lawn and garden care or swimming pool maintenance may be profitable only in the spring or summer. Is there likely to be a continuing demand for the products or services in the future? Is the demand likely to be temporary, such as selling a fad food item? Does the product or service generate repeat business?
- **Competition** — What is the level of competition, nationally and in your community? How many franchises or company-owned outlets does the franchisor have in your area? How wide will your exclusive territory be? How many competing companies sell the same or similar products or services? Are these competing companies well-established, with wide name recognition in your

community? Do they offer the same goods and services at the same or lower price?

- **Your Ability to Operate the Business** — Sometimes, franchise systems fail. Will you be able to operate your outlet, even if the franchisor goes out of business? Will you need the franchisor's ongoing training, advertising, or other assistance to succeed? Will you have access to the same or other suppliers? Could you conduct the business alone if you must lay off personnel to cut costs?

Contact Us

Franchising can be a very complex and intricate form of conducting business. The franchise documents are complicated and must also mesh with state law requirements. As a result, getting informed and contacting an experienced attorney can be vital to your success. Please contact Jason Smolen at jdsmlen@smolenplevy.com or Scott Taylor at swtaylor@smolenplevy.com to help guide you through the process and ensure that your legal rights are protected and help make your decision making as easy as possible.