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Estate planning in a digital world

Today, virtually everyone owns (or licenses) digital assets, from email and social media accounts to digital photos and videos to online banking and brokerage accounts. Unlike traditional, physical assets, digital assets leave little or no "paper trail."

Unless your estate plan specifically provides for them, it may be difficult for your family to access these assets — or even know that they exist. Here are steps you can take to ensure your digital assets are known and accounted for properly.

Take inventory

The first step is to take inventory of these assets, which include, but are not limited to, the following:

- Email accounts,
- Social media accounts,
- Digital photo, video, music and book collections,
- Online banking and brokerage accounts,
- Payment services, such as PayPal or Venmo,
- Cryptocurrency or nonfungible tokens (NFTs),
- Online betting accounts,
- Blog or website content and domain names,
- Online video channels, such as YouTube, that produce advertising revenue, and
- Online reward programs and points, such as credit card rewards or frequent flyer miles.

Make a comprehensive list of all your digital assets, together with website addresses, usernames, passwords, and account numbers. For those stored on computers, external hard drives, smartphones, tablets or other devices, be sure to provide instructions for accessing them, particularly if they're password protected or encrypted. Store the list in a secure location and be sure your family knows where to find it. Consider using an online password management solution to simplify the process.

Keep in mind that many sites use two-factor authentication for added security. To log on to these sites, in addition to username and password, users will need a one-time code sent via text, email or an authentication app. To ensure your representatives have access to these sites, you'll also need to be sure they have any passwords or PINs needed to obtain one-time codes.

Authorize access

Providing your representatives with login credentials to access your digital assets is critical, but it's not enough. They'll also need legal consent to gain entrance to and manage your accounts.

Absent such consent, they may violate federal or state data privacy laws or, in the case of financial accounts, may even be guilty of theft or misappropriation. It's unlikely that the authorities would prosecute your representatives for unauthorized

Should you create a digital asset protection trust?

A recent byproduct of the digital age is the digital asset trust, sometimes referred to as a digital asset protection trust or digital asset revocable trust. Digital asset trusts are relatively new and untested in the courts, but they have the potential to be an effective tool for consolidating the management and disposition of digital assets. These trusts, which are usually revocable, allow you to transfer ownership of digital assets to the trust or, in the case of licenses, grant authority to the trustee to access and manage the assets.

Digital asset trusts are particularly valuable if you wish to place restrictions on how and with whom digital assets are shared to protect your privacy or the privacy of your loved ones. The trust can provide detailed instructions to the trustee regarding which assets or content will be shared with which beneficiaries — and which accounts will be deleted — after your death.

access to your accounts, but it's advisable to ensure they have explicit authority rather than rely on their possession of your login credentials.

Revised Uniform Fiduciary Access to Digital Assets Act

For digital assets that you own, such as cryptocurrency or bank and investment accounts, your estate plan can provide for the transfer of assets to your heirs. But many types of digital assets — including email and social media accounts, as well as certain music and book collections — are licensed rather than owned. These assets generally are governed by terms of service agreements (TOSAs), which typically provide that the license is nontransferable and terminates on your death.

Fortunately, there are laws that govern access to digital assets in the event of your death or incapacity. Most states have adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which provides a three-tier framework for accessing and managing your digital assets:

1. The act gives priority to providers' online tools for handling the accounts of customers who die or become incapacitated. For example, Google provides an "inactive account manager," which allows you to designate someone to access and manage your account. Similarly, Facebook allows users to determine whether their accounts will be deleted or memorialized when they die and to designate a "legacy contact" to maintain their memorial pages.
2. If the online provider doesn't offer such tools, or if you don't use them, then access to digital assets is governed by provisions in your will, trust, power of attorney or other estate planning document.
3. If you don't grant authority to your representatives in your estate plan, then access to digital assets is governed by the provider's TOSA.

To ensure that your loved ones have access to your digital assets, use providers' online tools or include explicit authority in your estate plan.

Turn to your advisor

If you rely on providers' TOSAs, there's a risk that these assets will be lost forever. Keep in mind that legal authority alone isn't enough: You must also give your representatives detailed instructions, together with login credentials, for any assets you wish them to access. Contact your estate planning advisor for help addressing your digital assets in your estate plan. ■

Contributing to a 401(k) plan

Traditional or Roth?

Most employers' 401(k) plans give you the option of making contributions on a pre-tax (traditional) or after-tax (Roth) basis. So, how do you decide which is right for you? The answer depends on several factors, including your current and expected future tax circumstances and your estate planning goals.

What's the difference?

The difference between a traditional and Roth 401(k) is essentially the same as the difference between traditional and Roth IRAs: It comes down to the way they're taxed. Contributions to traditional 401(k) plans are made with pre-tax dollars — that is, they're deductible. Funds grow on a tax-deferred basis and both contributions and earnings are taxable when they're withdrawn. Contributions to a Roth 401(k) plan are made with after-tax dollars — that is, they're nondeductible. But qualified withdrawals of both contributions and earnings are tax-free.

One difference between traditional and Roth 401(k)s is the timing of income taxes.

Unlike a Roth IRA, however, you can participate in a Roth 401(k) plan regardless of your income. You're ineligible to contribute to a Roth IRA if your modified adjusted gross income exceeds certain thresholds (in 2023, $153,000 for single filers and $228,000 for joint filers).

Salary deferral limits for traditional and Roth 401(k) plans are the same: currently, $22,500 plus an additional $7,500 in catch-up contributions if you'll be 50 or older by the end of the year. The limits on combined employee and employer contributions are $66,000 and $73,500, respectively (up to 100% of compensation).

Distribution rules for traditional and Roth 401(k) plans are also similar. Penalty-free withdrawals (tax- and penalty-free withdrawals for Roth plans) are available when you reach age 59½, die or become disabled (with limited exceptions). In addition, for a Roth 401(k), the account must be at least five years old.

Another important difference between the two types of plans is that traditional 401(k) accounts are subject to required minimum distribution (RMD) rules when you reach a certain age. Specifically, age 73 for those who turn 72 this year or after, increasing to age 75 for those who reach that milestone after 2032. Currently, Roth 401(k) accounts must make RMDs, but under the SECURE 2.0 Act, that requirement will be eliminated starting in 2024. SECURE 2.0 also allows plans to offer matching contributions as Roth contributions.

Which to use?

The main differences between traditional and Roth 401(k)s are the timing of income taxes and, starting next year, the ability to keep funds in a Roth account indefinitely. From a tax perspective, with a Roth 401(k) you pay tax at the time of your contributions, while traditional 401(k) funds are taxed when you withdraw them. Mathematically speaking, that means the best choice depends on whether you'll be in a higher or lower tax bracket after you retire.

If you're a high earner and expect to be in a lower bracket when you retire, you're better off with the upfront tax break offered by a traditional 401(k). If

you expect to be in a higher tax bracket in retirement (for example, if you're early in your career and expect your income to grow substantially in the future, or you believe Congress will raise taxes down the road), then consider a Roth plan and pay the tax now.

Taxes aren't the only factor, however. It's also important to consider the estate planning implications. The elimination of RMDs for Roth 401(k)s make them a powerful estate planning tool. So long as you don't need the funds for living expenses, you can leave them in the account, growing on a tax-free basis, for life. So long as the account is at least five years old, your heirs will be able to withdraw the funds tax-free.

With a traditional 401(k), the RMD rules will force you to draw down the account, regardless of whether you need the funds, leaving less for your heirs. Plus, withdrawals by your heirs will be taxable and, under current rules, nonspousal beneficiaries generally must withdraw the funds within 10 years.

Weigh your options

If your employer offers a choice between a traditional and Roth 401(k) plan, weigh your options carefully based on your tax circumstances and estate planning goals. If you're uncertain about which to choose, consider splitting your contributions between the two options. ▮

Decisions, decisions

Naming a successor fiduciary is important to an estate plan

Having a backup plan is never a bad idea. Indeed, the same line of thinking applies to your estate plan. Specifically, it's important to name a successor fiduciary. This person can step in and take over if your executor or a trustee is no longer able to perform their duties.

Definition of a fiduciary

A fiduciary is an individual (or entity) authorized to act on your behalf regarding a range of financial and legal matters. He or she must put your best interests, and those of your family, first. Thus, a fiduciary has an ethical and legal obligation to act

in good faith. This responsibility extends to the operation of trusts and estates.

A *successor* fiduciary is someone who assumes the role of fiduciary if your original fiduciary must step aside for whatever reason. This can also apply to a trustee who manages assets "poured over" from an estate into a trust.

If you don't make the necessary provisions, a successor fiduciary may have to be appointed by a court. Thus, it's best to name one in your will or trust documents. Typically, this person is a relative, family friend or a trusted financial professional. In some cases, the successor fiduciary is a financial institution.

Attributes that make a good fiduciary

The attributes valued in selecting an initial fiduciary are basically the same for a successor fiduciary. Some relevant characteristics are sound judgment and experience, knowledge of family history, investment expertise, a sense of impartiality, and recordkeeping abilities. Avoid naming anyone with potential conflicts of interest.

In any event, don't just dump this into the lap of someone who isn't expecting it or won't be able to meet your expectations. The job comes with some strings attached. Depending on the circumstances, a successor fiduciary may face difficult decisions involving beneficiaries and might have to contend with intrafamily disputes.

Duties of a fiduciary

One of the key duties of a fiduciary is preparing an account summary of assets, income and expenses. The fiduciary must maintain accurate records and make informed decisions. Transparency is essential. In some cases, the account summary may have to be presented in court, where interested parties can either agree to it or object.

After the account summary has been approved, beneficiaries can no longer contest the financial decisions made by the fiduciary during the applicable period. Nevertheless, a successor fiduciary can still be held responsible for various transgressions. For example, if a successor subsequently discovers mistakes, fraud or "manifest errors" under the predecessor's watch, the successor should move to reopen the account. Otherwise, the successor could be held liable for any losses.

> ***If you don't make the necessary provisions, a successor fiduciary may have to be appointed by a court.***

If a successor fiduciary discovers misconduct by a predecessor fiduciary, a claim may be made on the predecessor's bond. The bond is a tool for ensuring that the fiduciary fulfills his or her duties to the beneficiaries. A beneficiary or a successor fiduciary

can seek damages from the bonding company if losses are attributable to fiduciary misconduct.

Finally, a successor fiduciary must be aware of the statute of limitations regarding certain transactions. Generally, for errors or misconduct by a predecessor, the statute of limitations begins to run when a successor fiduciary knows — or should have known — about a potential breach.

Make an informed choice

There's no question that when you're developing your estate plan, there are several important decisions to make. While appointing a successor fiduciary may not be top of mind, it remains a key appointment. Talk to your estate planning advisor if you have questions regarding the role of a fiduciary. ▮

ESTATE PLANNING RED FLAG

You're considering a self-directed IRA

An IRA can be a valuable tool in your retirement and estate planning arsenal, but what if you're not satisfied with its performance? One option is to set up a "self-directed" IRA.

Unlike traditional IRAs, which typically offer a limited menu of stocks, bonds and mutual funds, self-directed IRAs can hold a variety of alternative investments that offer the potential to earn higher returns, such as real estate, closely held business interests, commodities and precious metals. They can't hold certain assets, however, including S corporation stock, insurance contracts and collectibles (such as art or coin collections).

From an estate planning perspective, self-directed IRAs have considerable appeal. Imagine transferring real estate or closely held stock with substantial earnings potential to a traditional or Roth IRA and allowing it to grow on a tax-deferred or tax-free basis for the benefit of your heirs.

Before acting, it's critical to understand the significant risks and tax traps involved with self-directed IRAs. For example:

- The prohibited transaction rules restrict dealings between an IRA and disqualified persons, including you, close family members, businesses that you control and your advisors. This makes it difficult, if not impossible, for you or your family to manage, work for, or have financial dealings with business or real estate interests held by the IRA without undoing the IRA's tax benefits and triggering penalties.
- IRAs that invest in operating companies may generate unrelated business income taxes, which are payable currently out of an IRA's funds.
- IRAs that invest in debt-financed property may generate unrelated debt-financed income, creating a current tax liability.

If you're considering a self-directed IRA, consult with your tax and estate planning advisors to help you steer clear of the tax traps and minimize your risk.

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Selling Your Business?
Don't Forget about the Impact on Your Estate

Too many business owners forget and it can be a costly lapse. The good news is that we're available as soon as you begin thinking about selling—and even before.

Many successful business owners, including professionals, know they eventually want to sell or otherwise move on from what is often their life's work. But what's the best way to do it?

Fundamental to walking away from your "baby" is understanding why you are thinking of selling. Not only will that affect the process and the people you use to help you. It will also affect the size of the return on all the blood, sweat, and tears you've experienced to reach this point.

Trust and estate planning strategies can add value in the sale price. But in a quest to get the highest price, owners too often neglect to make the most of many of these critical value-adding strategies. And, of course, the process of actually selling a business can be so consuming that other important considerations get crowded out. We can help to ensure that your trust and estate planning goals get the attention they deserve.

The reason you're selling drives exit planning. For example, if you're retiring, income will be a primary consideration and the issues can be more complex than they might first appear. When you're working, you're drawing income and you can figure that into the sale price. But what about insurance and other benefits the business has been paying for? As an owner, you already know those costs can be substantial.

Maybe you've accomplished all you had hoped to accomplish in this business and want to move on to launch another one. Maybe you want to ensure the continuation of all the hard work—and principles—that fuel your company or professional practice by involving your children or other family members. Maybe you just want to take some time off to think about what's next.

Clearly, there are income taxes related to the sale itself. But there are also other costs that may be incurred depending on how you want to distribute the sale proceeds and who you wish to benefit. There are essentially three possibilities—family, worthy causes, and, as always, the government.

The basic advice for selling is to begin early. Serial entrepreneurs might begin as soon as they hang out an "Open for Business" sign. They build a business based on their exit plan and even the next business they have in mind. Even though that might not be you, getting started sooner rather than later can be critical to achieving the best outcomes. What does that mean? Too often owners believe a twelve-month head start is sufficient. We believe a three-to-five-year window is more appropriate. That's right. It can take that long to put together a team, clearly consider your goals, find the right buyer or buyers, negotiate the terms, and close the deal.

Some commonly used approaches used for trust and estate planning are a straight gift of business interests, a grantor retained annuity trust (GRAT), and selling to an intentionally defective grantor trust (IDGT). As you might imagine, each has its pros and cons depending, again, on your specific situation. And not all is what it seems. For instance, here "defective" relates to income taxes, not estate taxes, in which case it turns out to be "effective."

So, please give us a call if you're even just contemplating a sale. We're always available to talk. And we can help you get the best return for all the long days (and nights) you've put in to make your business or practice the best it can be.