The Estate Planner

March/April 2015

Second trip down the aisle?

Update your estate plan to reflect your second marriage

21st century estate planning accounts for digital assets

Planning for aging parents

5 tips for the sandwich generation

Estate Planning Red Flag

You're not making direct payments of tuition and medical expenses

Weston Hurd LLP
Attorneys at Law

Cleveland ▪ Columbus ▪ Beachwood

The Tower At Erieview
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114-1862
tel 216.241.6602 • fax 216.621.8369

10 West Broad Street, Suite 2400
Columbus, Ohio 43215-3469
tel 614.280.0200 • fax 614.280.0204

24100 Chagrin Boulevard, Suite 200
Beachwood, Ohio 44122-5535
tel 216.241.6602 • fax 216.621.8369

www.westonhurd.com

Second trip down the aisle?

Update your estate plan to reflect your second marriage

If you're in a second marriage, or planning another trip down the aisle, estate planning can be complicated. You probably want to provide for your current spouse but not inadvertently benefit your former spouse. And if you have children from each marriage, juggling their interests can be a challenge.

Take inventory

Start by reviewing your current plan. Have you updated your will, trusts and beneficiary designations to name your current spouse? Keep in mind, though, that the terms of your divorce may require you to retain your former spouse as beneficiary of certain pension plans or retirement accounts.

> *If you leave your wealth to your current spouse outright, there's nothing to prevent him or her from spending it all, effectively disinheriting your children.*

Next, assess your financial situation and think about how you want to provide for various family members. For example, do you want to provide for all children equally? Will you favor biological children over stepchildren? Are children from the first marriage significantly older than children from the second marriage? If so, their needs likely will be different. For example, if children from the first marriage are college age, they may need more financial support than children from the current marriage. On the other hand, if your older children are financially independent adults, they may need less help than your younger children.

Be sure to discuss your plans with your current spouse and with your children from both marriages. If you decide to treat family members unequally, it's important to explain your reasoning to avoid hurt feelings or disputes over your estate.

Use trusts

Trusts generally avoid probate, so your assets can be distributed quickly and efficiently. Trusts offer flexibility to determine how and when your wealth will be shared with your beneficiaries. For example, you might establish one trust for your current spouse and his or her children and a separate trust for your children from your previous marriage.

If you leave your wealth to your current spouse outright, there's nothing to prevent him or her from spending it all or leaving it to a new spouse, effectively disinheriting your children. To avoid this result, you can design a trust that provides income for your current spouse while preserving the principal for your children.

Trusts are particularly valuable if your children from a previous marriage are minors. Generally, if you leave assets to minors outright, they must be held in a conservatorship until the children reach the age of majority. It's likely that your former spouse will be appointed conservator, gaining control over your wealth. Even though your former spouse will be obligated to act in your children's best interests and will be supervised by a court, he or she will have considerable discretion over how your assets are invested and used.

To avoid this situation, consider establishing trusts for the benefit of your minor children. That way, a trustee of your choosing will manage the assets and control distributions to or on behalf of your children.

Consider the tax ramifications

A generous tax exemption (currently $5.43 million) eliminates gift and estate taxes for many families. But if your estate is large enough to make estate taxes a concern, multiple marriages present some challenges.

An important planning tool for affluent couples is the marital deduction, which allows one spouse to transfer an unlimited amount of wealth to the other tax-free. Generally, to take advantage of the marital deduction, you must leave assets to your spouse outright. As noted above, however, there's no guarantee that your current spouse will provide for your children from a previous marriage.

One effective strategy for meeting this challenge is to set up a qualified terminable interest property (QTIP) trust. This is an irrevocable trust that pays out all of its current income (at least annually) to your spouse and meets certain other requirements. It allows you to enjoy the benefits of the marital deduction and provide for your current spouse, while still preserving the principal of the trust for your children from a previous marriage or your current marriage (or other beneficiaries).

When you establish a QTIP trust, the marital deduction shields the trust assets from estate taxes.

ILIT creates instant wealth

If you wish to take advantage of the marital deduction but also provide immediate benefits for your children from a previous marriage, consider an irrevocable life insurance trust (ILIT). Designed exclusively to hold an insurance policy on your life, an ILIT provides instant wealth for your children while allowing you to leave other assets to your spouse. In most cases, the insurance proceeds bypass your taxable estate, while the assets you leave to your spouse qualify for the marital deduction.

When your spouse dies, the assets are included in his or her estate and may be taxable depending on the size of his or her unused exemption.

Because your children won't receive their inheritance until your current spouse dies, a QTIP trust may not be the best choice if your spouse is significantly younger than you. Under those circumstances, consider other tools, such as an irrevocable life insurance trust (ILIT). (See "ILIT creates instant wealth" above.)

Plan with care

Remarrying can complicate estate planning, especially when there are children from both marriages. To avoid unintended consequences, work with your advisor to ensure your plan reflects your wishes. ✤

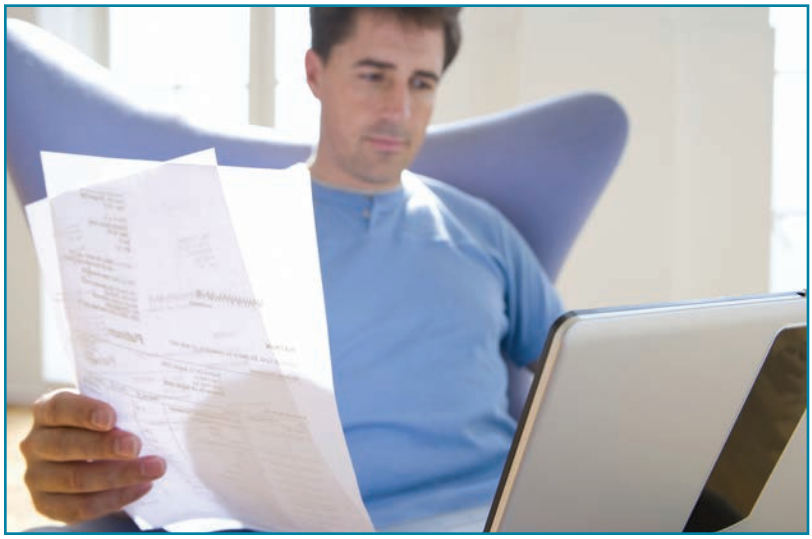
21st Century Estate Planning Accounts for Digital Assets

Do you possess digital assets? If you have online bank and brokerage accounts or keep your music and photos stored on your home computer or "the cloud," the answer is "yes." Thus, you need to account for digital assets in your estate plan. If you haven't done so, your heirs or other representatives may not be able to access these assets without going to court and, in some cases, may not even know that they exist.

Identifying and Unlocking Digital Assets

Traditionally, when a loved one dies, family members go through his or her home to look for personal and business documents, including tax returns, bank and brokerage account statements, stock certificates, contracts, insurance policies, loan agreements, and so on. They may also collect photo albums, safe deposit box keys, correspondence and other valuable items.

Today, however, many of these items may not exist in "hard copy" form. Unless your estate plan addresses these digital assets, how will your family know where to find them or how to gain access?



Suppose, for example, that you opened a brokerage account online and elected to receive all of your statements electronically. Typically, the institution sends you an e-mail — which you may or may not save — alerting you that the current statement is available online. You log on to the institution's website and view the statement, which you may or may not download to your computer.

If something were to happen to you, would your family or executor know that this account exists? Perhaps you save all of your statements and correspondence related to the account on your computer. But would your representatives know where to look? And if your computer is password protected, how would they get in?

Even if your family knows about a digital asset, they'll also need to know the username and password to access it. If they don't have that information, they'll have to get a court order to access the asset, which can be a time-consuming process — and delays can cause irreparable damage, particularly when a business is involved. If your representatives lack access to your business e-mail account, for example, important requests from customers might be ignored, resulting in lost business.

Granting Immediate Access to Digital Assets

The first step in accounting for digital assets is to conduct an inventory, including any computers, servers, handheld devices, websites or other places where these assets are stored. Next, talk with your estate planning advisor about strategies for ensuring that your representatives have immediate access to these assets in the event something happens to you.

Although you might want to provide in your will for the disposition of certain digital assets, a will isn't the place to list passwords or other confidential information. For one thing, a will is a public document. For another, amending the will each time you change a password would be expensive and time consuming.

> *Even if your family knows about a digital asset, they'll also need to know the username and password to access it.*

One solution is writing an informal letter to your executor or personal representative that lists important accounts, website addresses, usernames and passwords. The letter can be stored in a safe deposit box, with a trusted advisor or in some other secure place. However, the problem with this approach is that you'll need to update the list each time you open or close an account or change your password, a process that's cumbersome and easily neglected.

A better solution is to establish a master password that gives the representative access to a list of passwords for all your important accounts, either on your computer or through a Web-based "password vault."

It should come as no surprise that several companies now offer online services for passing on digital assets to your loved ones. Popular services include:

- PasswordBox,
- Entrustet,
- AssetLock™,
- VitalLock,
- Digital Beyond, and
- Deathswitch.

Each service establishes procedures for releasing passwords and other information about digital assets to a designated beneficiary in the event you die or become incapacitated. Some require a death certificate or other confirmation, while others send you periodic e-mails and release information to your designated representative in the event you fail to respond.

Addressing who'll receive the assets

In addition to identifying digital assets and giving family members access to them, your estate plan must address ownership issues involving these assets. Consider working with your estate planning advisor to create a trust that provides the trustee with the authority to manage digital assets and transfer them to your beneficiaries according to your wishes. ✤

Planning for aging parents

5 tips for the sandwich generation

The "sandwich generation" is a large segment of the population. These are people who find themselves caring for both their children and their parents at the same time. As a result, estate planning — which traditionally focuses on providing for one's children — has expanded in many cases to include one's aging parents as well.

Including your parents as beneficiaries of your estate plan raises a number of complex issues. As you discuss these issues with your advisor, here are five tips to consider:

1. Plan for long-term care (LTC). The annual cost of LTC — which may include assisted living facilities, nursing homes or home health care — can reach well into six figures. These expenses aren't covered by traditional health insurance policies or Social Security, and Medicare provides little, if any, assistance. To prevent LTC expenses from devouring your parents' resources, work with them to develop a plan for funding their health care needs through LTC insurance or other investments.

You can pay an unlimited amount of medical expenses on your parents' behalf, without tax consequences, so long as you make the payments directly to medical providers.

2. Make gifts. One of the simplest ways to help your parents is to make cash gifts to them. If gift and estate taxes are a concern, you can take advantage of the annual gift tax exclusion, which

allows you to give each parent up to $14,000 per year without triggering taxes or using any of your $5.43 million gift and estate tax exemption.

3. Pay medical expenses. You can pay an unlimited amount of medical expenses on your parents' behalf, without tax consequences, so long as you make the payments directly to medical providers. (See "Estate Planning Red Flag" on page 7.)

4. Set up trusts. There are many trust-based strategies you can use to assist your parents. For example, in the event you predecease your parents, your estate plan might establish a trust for their benefit, with any remaining assets passing to your children when your parents die. Another option is to set up trusts during your lifetime that leverage your $5.43 million exemption. Properly designed, these trusts can remove assets — together with all future appreciation in their value — from your taxable estate. They can provide income to your parents during their lives, eventually passing to your children free of gift and estate taxes.

5. Buy your parents' home. If your parents have built up significant equity in their home, consider buying it and leasing it back to them. This arrangement allows your parents to tap

their home equity without moving out while providing you with valuable tax deductions for mortgage interest, depreciation, maintenance and other expenses. To avoid negative tax consequences, be sure to pay a fair price for the home (supported by a qualified appraisal) and charge your parents fair-market rent.

As you review these and other options for assisting your aging parents, try not to overdo it. If you give your parents too much, these assets could end up back in your estate and potentially exposed to gift or estate taxes. Also, keep in mind that certain gifts could disqualify your parents from certain federal or state government benefits. ✤

Estate Planning Red Flag

You're not making direct payments of tuition and medical expenses

Now that the gift and estate tax exemption has risen to $5.43 million in 2015, you may be less concerned about these taxes. But if you don't take advantage of the exemption for direct payments of tuition and medical expenses, you're missing a valuable opportunity to reduce your potential gift and estate tax exposure down the road.

The exemption allows you to pay tuition and medical expenses on behalf of your children or other loved ones without incurring gift tax and without using up any of your exemption amount. This may not seem like much if your net worth is well under the current exemption amount. But what if your wealth grows beyond the exemption amount in the coming years and decades? What if lawmakers decide to reduce the amount? Either way, your estate could end up with a hefty tax bill, leaving less for your family.

You may already be making $14,000 per recipient annual exclusion gifts to your children, grandchildren or other loved ones, which can help minimize your estate, but you should also consider paying some or all of their tuition and medical expenses. Unlike the annual exclusion, there's no limit on the amount of tuition or medical expenses you can pay tax-free. It's a powerful technique for transferring wealth gift-tax-free while also reducing the size of your estate.

A few caveats: This strategy works only if you make payments *directly* to a qualifying educational institution or medical provider — advancing the funds to a loved one or reimbursing previously paid expenses doesn't count. The exemption covers tuition at all grade levels, but not payments for room and board, books, supplies, or other nontuition expenses. And it doesn't apply to medical expenses reimbursed by insurance.

Weston Hurd LLP
Attorneys at Law

Angela G. Carlin is the Co-Chair of Weston Hurd's Estate, Trust and Probate Practice Group. She focuses her practice on estate, trust and probate administration and litigation, and tax matters. Angela is the author of the Merrick-Rippner Probate Law publication which is the recognized authority in Ohio on probate law. She received the Nettie Cronise Lutes Award from the Ohio State Bar Association in 1996 as the Outstanding Woman Lawyer and for many years, she has been named as an *Ohio Super Lawyer* by Law & Politics Media, Inc. and a *Leading Lawyer* by Inside Business Magazine.

Karen A. Davey focuses her practice on estates, trust and probate administration. She also handles litigation in probate related matters, such as will contests, trust contests, and power-of-attorney disputes.

Jerrold L. Goldstein focuses his practice on estate planning, probate and corporate law. Jerry is also Co-Chair of Weston Hurd's Estate, Trust and Probate Practice Group. He represents clients in a wide variety of matters involving probate administration, probate litigation, estate and income tax compliance, wills and trusts, business formation, contract negotiations, and commercial real estate.

Gary W. Johnson advises clients on matters involving commercial litigation, business entities creation and maintenance, land use, construction law, zoning, estate planning and probate. Gary has been recognized as an *Ohio Super Lawyer* in the area of Business Litigation by Law & Politics Media, Inc.

Eugene (Gene) A. Kratus advises individuals in the areas of tax, business and estate planning and counsels privately-owned businesses and their owners on corporate, tax, mergers, acquisitions and business succession issues. His estate planning practice includes implementing various estate planning techniques, ranging from modest By-Pass Trusts to the implementation of sophisticated planning with family limited partnerships, family limited liability companies, charitable trusts and private foundations.

Samuel J. Lauricia III focuses his practice on tax planning, at both the Federal and state level, involving corporate, partnership, individual and gift tax issues, succession planning and general corporate transactions, contracts, mergers and acquisitions. Sam has been recognized as an *Ohio Rising Star* in the area of Taxation by Law & Politics Media, Inc.

Shawn W. Maestle is the Chair of Weston Hurd's Appellate section and a member of the firm's Litigation section. He focuses his practice in the areas of appellate, estate planning and probate litigation.

Teresa G. Santin is an Associate with Weston Hurd LLP. She focuses her practice on matters involving business, employment, estate planning, real estate, and white collar litigation.

Joseph B. Swartz focuses his practice on estate planning, estate administration, trust administration, and income tax for individuals, estates and trusts. Joe served as chair of the Ohio State Bar Association's Labor and Employment Law section for 2010-2012 and he has been recognized as an *Ohio Super Lawyer* for Labor and Employment by Law & Politics Media, Inc.

MOVING FORWARD WITH ABLE ACCOUNTS

By Jerrold L. Goldstein

Several months ago, I wrote of the enactment of the "Achieving a Better Life Experience" or "ABLE" legislation on December 19, 2014 by the United States Congress, which enables the creation of tax-favored accounts for individuals with disabilities.

The ABLE account legislation enacted as section 529A of the Internal Revenue Code, authorized accounts patterned after 529 College Savings Plans but with a more limited scope and significantly greater restrictions. The creation of an ABLE account program in any state requires the adoption of conforming state legislation to resolve a number of legal, contractual and investment option issues in order to permit financial institutions to make the accounts available to consumers. Such legislation is essential due to the law's mandate that the designated beneficiary of an ABLE account must be a resident of the state in which the account is established.

Within the past three months there have been two developments in the ABLE account area worth noting. First, the creation of ABLE accounts was authorized by the State of Virginia and second, the Internal Revenue Service issued a Notice providing advance notification of a limiting provision to be included in the proposed regulations to be issued under section 529A of the Internal Revenue Code.

Virginia was the first state to authorize the establishment of ABLE accounts when its governor signed the required enabling legislation in March of this year. In addition, the legislatures of West Virginia and Utah have sent ABLE bills to their governors. Enabling legislation was introduced in the Ohio Senate by Senators John Eklund and Shannon Jones on April 15, 2015 and in the Ohio House of Representatives by Representatives Jonathan Dever and Margaret Conditt on the same day. Similar legislation is under consideration in Alabama, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont and Washington.

Even after the legislation is approved, however, state governments and the financial industry will require some time to set up the new offerings before the accounts will really be available to consumers. Current estimates are possibly late this year but more realistically it will likely be 2016 before people with disabilities can open these accounts.

In Notice 2015-18 issued March 10, 2015, the Internal Revenue Service confirmed that the Treasury Department and the Internal Revenue Service were working on section 529A guidance (the law requires regulations or other guidance by June 19, 2015) but noted that they anticipated that ABLE account programs may be in operation in some states before such guidance can be issued. The Treasury Department and the Internal Revenue Service recognize that many families with children and other relatives who meet section 529A's disability definition and the statute's requirement that the disability have occurred before age 26 are understandably eager to establish nest eggs that are not only tax-free but also, by statute, disregarded (up to a balance of $100,000) for purposes of determining the beneficiary's financial eligibility for federal disability benefits. The Treasury Department and the IRS are concerned that a lack of guidance might discourage states from enacting enabling legislation. Notice 2015-18, assures both the states and individuals that ABLE account programs can be established before formal guidance is issued despite uncertainty over how the Treasury Department and Internal Revenue Service will interpret certain provisions of section 529A. States and individuals will not fail to receive the benefits of section 529A merely because the enabling legislation or account documents do not fully comport with the guidance when issued.

In the Notice, the Internal Revenue Service assured taxpayers that transition relief will be provided to permit any necessary changes to state programs and that consumers will be provided sufficient time to effect those changes once final guidance is issued.

The Treasury Department specifically advised that guidance, when issued, may differ in various ways from the regulations promulgated with respect to section 529 plans. Particularly, guidance will provide that the owner of the account is the designated beneficiary notwithstanding that another person has signature authority over the account. With respect to an ABLE account where the designated beneficiary is not the person with signature authority over the account, the person with signature authority over the account may neither have nor acquire any beneficial interest in the account and must administer that account for the benefit of the designated beneficiary.

If you have questions about ABLE accounts, please contact your Weston Hurd lawyer.