STOVER & SPITZ LLC
ATTORNEYS AT LAW

PLANNING FOR DIGITAL ASSETS

Will your spouse or anyone else be able to access your email account in the event of your death or incapacity? What about your PayPal®, Shutterfly®, Facebook® and iTunes® accounts? The answer depends upon several factors, including the terms of service agreements with the provider (PayPal, Apple®, etc.), state and federal law, and what you provide in your estate planning documents, including your will and power of attorney.

Colorado has enacted the Revised Uniform Fiduciary Access to Digital Assets Act (the "Digital Assets Act"). The Digital Assets Act governs access to your digital assets by your fiduciaries. Digital assets include email accounts, financial accounts, online photo accounts and social media accounts, just to name a few.

Your estate planning documents can be drafted in a manner that attempts to give your fiduciaries the broadest authority possible to access all of your digital assets. However, there are several considerations you should know regarding access to your digital assets, including the following:

1. Limitations Under Other Laws. Access to certain accounts and information may be illegal under state or federal law even if the Digital Assets Act and your estate planning documents appear to grant access, and even if you give your passwords to your fiduciaries.

2. Terms of Service Agreements. The user agreements for online accounts contain their own terms and conditions, which may restrict or completely prohibit access by your fiduciaries.

3. Online Designations. In some cases, your online accounts will give you the option to name someone to have access to your accounts. If you choose to name someone directly on the online account, that approach may help ensure seamless access to the account. However, in that case, you need to keep track of these designations and update them if circumstances change and you no longer wish to name that person to have access.

4. Access. The Digital Assets Act only addresses access to digital assets. For example, if your fiduciary is granted legal access to your online bank account information then your fiduciary can access your account to view it, but does not necessarily have the legal authority to move funds from the account or change the beneficiary on the account.

5. Maintain a List of Passwords. In order to facilitate access to your digital assets, you may wish to prepare a list of passwords and let your fiduciaries know where to find the list. You may want to keep the list with your original estate planning documents. It's important to keep the list updated and in a secure place. However, before using the passwords, your fiduciary should make sure that the fiduciary has legal authority to do so under the terms of service agreements and applicable laws.

6. Obtaining Access. If your fiduciary does have the legal authority to access your digital assets, that does not necessarily mean the fiduciary can simply log in to your account using your password. For example, the account provider may instead issue the fiduciary a different user name and password.

This article does not contain a complete summary of all considerations applicable to digital assets. Also, the laws may change in the future. We recommend that you consult with us as any questions arise about how to properly handle your digital assets.

Lawyer of the Year Recognition

Jennifer Spitz has been recognized by Best Lawyers® as the 2018 Tax Law "Lawyer of the Year" in Boulder. This award is based upon peer review. Only a single lawyer in each practice area and community is honored with a "Lawyer of the Year" award.

AVOIDING GIFT AND GST TAX ON LIFETIME GIFTS

The Internal Revenue Service demands its pound of flesh not only on the income we earn and certain property left to our heirs, but also from the gifts we make – and takes an even bigger cut through the generation-skipping transfer ("GST") tax if that gift is made to a "skip person ."*

Most taxpayers are already aware of some exceptions to this rule, like the lifetime exclusion and GST exemption amounts (currently set at $5.49 million each) and the annual exclusion ($14,000 per donee in 2017).

However, there are two additional – and important – exceptions to gift and GST tax to be aware of if your generosity cannot be contained within the limits of annual or lifetime exclusion gifting, especially if the total value of your estate exceeds $5.49 million. These exceptions relate to educational expenses and medical care. Amounts paid on behalf of an individual to a medical care provider are not subject to gift or GST tax. In addition, amounts paid on an individual's behalf for his or her education or training are also excluded from gift and GST tax. However, each of these exceptions come with strings attached.

Medical Care

The Internal Revenue Code (the "Code") defines "medical care" broadly. The definition includes diagnosis, cure, treatment, mitigation, and prevention of disease, or amounts paid for the purpose of affecting any bodily structure or function. Under certain circumstances, long term care is also covered. Payment for medical care as defined above is excluded from gift and GST tax only if paid directly to the care provider (e.g., the doctor or medical professional providing the care). Gifts to reimburse beneficiaries for out-of-pocket medical expenses will still be subject to gift and GST tax.

The Code also excludes from gift and GST tax amounts paid for health insurance premiums. The exclusion allows premium payments on the beneficiaries' behalf to be made directly to the insurance company. However, if the beneficiary is later reimbursed by the insurer, that amount would be subject to applicable taxes.

Education

The exception for tuition payments is much narrower. Payments on behalf of a beneficiary "as tuition" to a "qualifying educational organization" for the education or training of that individual are excluded from gift and GST tax. However, "tuition" is narrowly defined: it applies only to direct tuition costs, excluding things like books, supplies, dormitory fees, etc. Further, tuition payments must be made directly to the educational institution to qualify for the exclusion. Amounts paid directly to the beneficiary will be subject to gift and GST tax. Note, too, that not all programs will meet the definition of a "qualifying educational organization." Gifts to a 529 plan are also outside this exception, because the gifts are made to the plan, rather than the educational institution.

It is important to keep careful records of amounts paid to providers, insurers, or schools and colleges on behalf of the beneficiaries, including the dates of any payments, to substantiate their exclusion from gift and GST tax. We can assist you in making gifts expected to qualify for the medical and educational exclusions to ensure that you are complying with applicable gifting, recordkeeping, and reporting requirements.

*While exceptions apply, a "skip person" is generally a person more than one generation below the donor, or, in the case of an unrelated beneficiary, a person 37.5 years younger than the donor.

It is projected that the gift and GST tax annual exclusion will increase to $15,000 in 2018.

TO KEEP OR NOT TO KEEP? DAD JUST LEFT ME (AND MY SIBLINGS) HIS BELOVED FISHING CABIN

It was Dad's dream. You loved it as a child. Perhaps your children still use it occasionally. Now it's yours. The probate lawyer asks if you want to sell it or keep it. What should go into the decision?

1. If you wanted a second home, is this the one you would buy? Is it your dream or your parent's dream? Forget for a moment, if you can, that it is being passed to you from Dad's estate without a purchase price and ask yourself the following questions: is it in a convenient location? Do you like spending time at the property? When was the last time you were there?

2. Would it be cheaper, and potentially more fun, to rent a similar property when and where you want to, allowing you to just walk away at the end of the trip?

3. Can you afford the ongoing expenses of a second home, even if shared with your siblings? You could start by analyzing what your expenses are for your primary residence. Second homes come with much of the same baggage. Be prepared to contribute to at least some of the following expenses: homeowners/liability insurance; HOA dues (in some cases); utilities including gas, electric, water/sewer, and trash removal; interior and exterior maintenance (which may be more costly if the home/cabin is located in a harsh environment, like the Rocky Mountains); yard or property maintenance such as mowing, tree trimming, snow removal and pest control; and finally, property taxes.

4. Do you want to co-own the property with your siblings? As to that question, consider the following:
   - Are your siblings realistic about the costs of ownership and willing to contribute to those costs?
   - Do you get along with your siblings, their spouses and their children?
   - In Colorado (and most states) co-owners all have an equal right to occupancy of the property. This applies even to a co-tenant who owns less than 50% of the joint interest. Each co-tenant does have the duty to contribute proportionally to property taxes and "necessary repairs." This doesn't mean you won't have to collect it from your little sister.

5. Are you happy with the condition and configuration of the property? While co-owners have a duty to contribute to necessary repairs, no co-tenant has the duty to improve the property. In fact, a co-tenant may not make a major change to the property without first securing the permission of the other co-tenants.

Keeping the property might work if you are satisfied with the answers to all of the above questions. A common arrangement for co-ownership of a vacation home is to create a limited liability company ("LLC") to hold the property. The LLC interests would be held in proportion to the interests contributed by the members. If all four siblings were to contribute their equal interest in the cabin to the new LLC, they would each be 25% owners of the LLC.

The LLC would be governed by an Operating Agreement which would describe how the LLC would be managed, when annual meetings would be held and what percentage of the membership interests would be necessary to make decisions. The Operating Agreement should also include transfer restrictions that limit to whom a member can transfer his or her interest. Operating Agreements will typically provide an option to the remaining members to purchase the transferor's interest from the transferring member (or his or her estate) prior to a restricted transfer.

In summary, enter into any co-tenancy arrangement with your eyes open. These arrangements can be very easy to get into, but very difficult to get out of.

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ROLL CALL

In addition to being recognized by Best Lawyers® as the 2018 Tax Law "Lawyer of the Year" in Boulder, **Jennifer Spitz** has again been included in the Best Lawyers in America® in 2018 in the area of Trusts and Estates, and is named in Colorado Super Lawyers®.

Tom Stover gave a presentation to the Boulder/Longmont Chapter of the Colorado Society of CPAs in August. He plans to attend the Fall National Meeting of the American College of Trust and Estate Counsel, where he is an active participant in the Practice Committee. In September, he spent two weeks in Peru where the highlight of the trip was a trek on the Inca Trail to Machu Picchu. Tom and his traveling companions are pictured here.

This publication is intended only to provide general legal information.
The information contained herein should not be acted upon without professional advice related to specific situations.
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