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**Edited by Ira Zlotnick**

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### In the Spotlight:

**Gideon Rothschild** spoke at the Moses & Singer Family Office Forum, addressing wealth preservation issues and fraudulent transfer statutes. He is a 2013 recipient of the Founder's Award presented by the Society of Trust & Estate Practitioners in recognition of his exceptional and outstanding professional contributions. He was also listed in the Top 100 New York Super Lawyer® list for the 2013 Metro Edition of New York Super Lawyers®.

**Daniel S. Rubin** addressed the International Tax Planning Association's conference in Florence, Italy on *Asset Protection Trusts: Do They Work?*

**Gideon Rothschild** and **Daniel S. Rubin** each presented at the 48<sup>th</sup> Annual Heckerling Institute of Estate Planning in Orlando, Florida January 13-18.

**Carole Bass** was a panelist at the midyear conference of the American Academy of Adoption Attorneys and American Academy of Assisted Reproductive Technology Attorneys. She was also honored as a Five Star Estate Planner by the marketing research firm, Five Star Professional.

Super Lawyers and Martindale Hubbell cited **Carole Bass, Lori Anne Douglass, Gideon Rothschild, Daniel S. Rubin** and **Irving Sitnick** as top-rated Trusts & Estates lawyers.

## Gift, Estate Tax and Asset Protection Planning for the New Year

In light of the recent passage of the American Taxpayer Relief Act ("ATRA") which resulted in the basic exclusion amount for gift and estate tax purposes rising permanently to \$5,000,000 (and indexed for inflation so that the 2014 basic exclusion amount is \$5,340,000 per person), and the permanency of "portability" (which permits the estate of a decedent spouse to elect on a timely filed estate tax return to transfer the decedent spouse's unused exclusion amount to the surviving spouse), many individuals who have estates with less than \$10,680,000 may mistakenly think that their estates no longer require planning. Despite these significant changes in the federal tax law, however, there are still many reasons, both tax and non-tax, for people to continue to do appropriate estate planning and to regularly review those plans.

From a tax perspective, planning remains important because it can:

- minimize state estate taxes

as each of New York, New Jersey and Connecticut, for example, currently impose an estate tax on taxable estates in excess of \$1,000,000, \$675,000 and \$2,000,000, respectively (although Governor Cuomo recently proposed raising the New York estate tax exemption to \$5,250,000 over four years). In addition, neither New York nor New Jersey imposes a gift tax on lifetime gifts. Accordingly, by gifting assets during life instead of transferring them upon death, New York and New Jersey residents have the opportunity to save significant state estate tax (e.g., approximately \$500,000 if a New York resident were to transfer the full \$5,340,000 exemption amount during his or her lifetime) without any federal gift tax being incurred. It should be noted, however, that the New York State Tax Reform and Fairness Commission recently issued its final report and recommended reinstating the New York State gift tax, which could subject gifts above a certain threshold to tax rates similar to those under the New York estate tax regime.

- potentially yield significant estate tax savings, at both the federal and state level, if gifts are made and the property gifted appreciates between the date of the gift and the date of the transferor's death, as such appreciation will not be subject to estate tax.

In addition, given the ongoing discussions in Congress about the possibility of a "grand bargain" between Republicans and Democrats in which Republicans would agree to raise revenue and Democrats would agree to cut spending, it remains possible that the basic exclusion amount could be reduced at some point in the future.

From a non-tax perspective, planning remains important because it can:

- ensure that one's assets pass to the appropriate persons. In New York, for example, if a person is married with children and dies "intestate" (meaning without a valid Will), one-half of the estate will pass to the decedent's spouse and one-half will pass to the decedent's issue, which is not likely to be what most people want and may not be estate tax efficient.
- ensure that one's beneficiaries receive the assets in the most protective manner. For example, if a person dies intestate the shares passing to the spouse and the issue under the laws of intestacy would pass outright instead of in trust which can be problematic

especially for a person in a second marriage or with minor children.

- enable the designation of appropriate health care agents if a person can't make health care decisions on his or her own and enable one to designate appropriate attorneys-in-fact to handle his or her financial matters should a person not be in a position to handle them on his or her own.

In addition, for those who have undertaken planning in the past, we recommend a periodic review of all estate planning documents to ensure that they designate the appropriate beneficiaries, fiduciaries and guardians and do not require any updating in light of changes in the tax law or changes in personal circumstances (i.e., marriage, death, divorce or birth of children or grandchildren). This review should also include a review of all beneficiary designation forms (which govern the disposition of life insurance policies and retirement assets) which oftentimes are not updated even in the event of major life changes.

In sum, despite the recent changes in the tax law, which may make federal estate tax planning seem less crucial for some, estate planning seems vitally important for everyone.

**Estate Planning Considerations for Digital Assets**

In this day and age, it is more likely than not that when we die our estates will be comprised of

both digital and non-digital assets. Digital assets include assets with financial value, such as online financial accounts, domain names, and websites, as well as assets that have practical or sentimental value, such as e-mail accounts, photographs, social media, and electronic communications. Both digital and non-digital assets may be handled through traditional estate planning techniques; however, unlike non-digital assets, digital assets present unique challenges to the ultimate administration of an estate.

One such challenge arises in the marshaling of digital assets. Because digital assets often lack a paper trail, the executor (or other estate fiduciary) may have difficulty obtaining information about a particular digital asset – or even discovering the asset at all. Many of us have web-based financial accounts or manage our finances online, opting to "go paperless" and receive statements via e-mail, without maintaining a physical record of such accounts. If our executors do not have prior knowledge of these accounts, then they may not know to look for them, and they may not be able to access our e-mail accounts to search for evidence of online accounts and some e-mail providers, such as Yahoo, will not grant access to a deceased's e-mail account without a court order, and even then their internal policies may prevent them from granting full access.

Another challenge arises in the management of the estate. If the deceased handled bills and other transactions online, then the executor may have to as

well, at least temporarily. However, online transactions often require usernames and passwords, and if the executor does not have this information, he or she may have to obtain it directly from the company or service provider, which could take some time. In the meantime, bills that the deceased normally paid online could fall into delinquency, causing the estate to incur penalties and late fees, and pre-arranged automatic bill-paying could result in certain creditors being paid in a manner inconsistent with state law. Furthermore, online accounts that are not monitored for a period of time become more vulnerable to identity theft, which could harm the estate as well.

Even prior to death, digital assets can pose significant challenges that may linger long after we are gone and create problems for our loved ones. For example, an adult child who manages the financial affairs of a severely incapacitated parent may expose himself or herself to liability for simply signing into the parent's online financial accounts using the parent's username and password without the express legal authority to do so (such as a durable power of attorney). Moreover, even if the adult child does have legal authority to do so, certain financial institutions and other online entities may have their own policies governing access of a third party's online accounts, and the adult child may face serious repercussions for unwittingly violating these policies.

A good way to avoid the challenges caused by digital

assets is to make sure that fiduciaries can easily obtain the information they will need to find and access these assets. This can be done by creating a digital asset inventory that includes a list of online accounts, usernames, and passwords, as well as specific instructions that may be helpful to a fiduciary attempting to navigate the deceased's "online estate." This inventory can be attached to the estate planning documents, stored in an online storage account, or provided directly to those who may ultimately need it. In order to be useful, however, this inventory must be diligently updated as digital assets are added or deleted and as usernames and passwords are changed.

Below is a list of prompts that provide a roadmap for creating a digital asset inventory:

**Computer and Phone Information**

List all of your personal and professional computers, tablets, notebooks and smart phones and identify the username and password to access each device.

**E-mail Information**

List all of your e-mail addresses, describe what activities the e-mail address is used for (e.g., personal, professional, or to receive unwanted messages) and indicate the password.

**Social Networking Profiles**

List the usernames and passwords to each of your

social networking profiles, such as LinkedIn, Facebook, and Twitter. In the event of your death or disability, should your profile be deleted? If not, who should be responsible for continuing your profile and what would you like for them to do with it?

**Blogs, Webpages, and Domain Names**

List all of your blogs, domain names, and webpages and indicate the registrar/host for each. In the event of your death or disability, should these sites be continued? If so, how and by whom?

**Online Financial Information**

List each bank and brokerage account for which you have online access and indicate your username and password for each account. If you have a PayPal or other online purchasing account, list your username and password.

**Digital Photos**

If you take photos digitally, describe where you store your photos, list any photo sharing websites that you use and indicate your username and password for each site.

**Other Online Accounts/Information**

List any other online accounts or digital information that may be important or valuable. If relevant, describe what you would like to happen to that account or information if you die or become disabled.

**Sensitive Information**

Is there any sensitive information in the online accounts listed above that should be kept secret from some of your family and friends? If so, how should that information be handled and by whom?

Additionally, it is important to coordinate the management of digital assets with the overall estate plan so that those who have access to the digital asset information also have the authority to use this information. This will likely involve not only the execution of a power of attorney or other document granting the necessary authority, but also a review of the internal policies of online entities and any agreements entered into (including "Terms of Use" agreements) with social media and other websites where digital assets are maintained.

**New NY Law Requires Estates to Report Decedent's Firearms**

Under the New York Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013, as of March 16, 2013, each estate that is required to file an asset inventory with the Surrogate's Court must include on such inventory a particularized description of every firearm, shotgun and rifle included in the estate. In addition to filing this firearms list with the Surrogate's Court, a copy must also be filed with the Division of Criminal Justice Services. The firearms inventory is not part of the public court record and will be made available for inspection only to the persons interested in the proceeding and their counsel and to court personnel, unless the court otherwise orders.

As a general matter, under Section 265.20 of the New York State Penal Law, the executor or administrator of a decedent's estate may lawfully possess the decedent's firearms for up to 15 days for the sole purpose of lawfully disposing of the same. If the executor/administrator cannot lawfully dispose of the firearms in that period of time, they must surrender the firearms to an appropriate law enforcement agency for safekeeping for up to a year. During that period the firearms can be transferred upon written request of the executor/administrator to a named individual who is licensed or otherwise lawfully permitted to possess the same.

Moses & Singer's **Trusts and Estates** practice provides a full range of legal services for private clients. In addition to substantial experience in the traditional areas of will and trust drafting, estate administration, and estate and trust litigation, the firm's attorneys utilize the latest techniques to implement effective plans for business succession and tax minimization. The firm is also recognized as a leader in wealth preservation strategies to protect client assets from future creditors and potential litigation exposure.

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The firm's **Matrimonial and Family Law** practice provides private clients with representation in all aspects of marital and family law, ranging from consultations to negotiations and trials, as well as representation in pre-nuptial and post-nuptial agreements and divorce.

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