

IN THIS ISSUE

How Digital Assets Fit Into Your Estate Plan	1
Filial Duty: Adult Children on the Hook for the Nursing Home Bills of Their Parents	2 & 3
Our Annual New Year's Review Checklist	2
The New Tax Law	3
Win a Dinner for Two	4
Free Workshops	4
Special Events Schedule	4
Welcome Our Newest Staff Member	4

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CALDWELL LAW

ESTATE PLANNING & SETTLEMENT

Taking good care of tomorrow...

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How Digital Assets Fit Into Your Estate Plan

With the ever-growing convenience of online banking, paperless credit card statements and social media sites such as Twitter and Facebook, incorporating digital assets into your planning is critical. As helpful as these forms of property are, there is tension between the need for privacy and security during one's lifetime and the need for access to them during incapacity and at death.

Consumer protection laws exist in all 50 states and at the federal level. They safeguard against fraud and identity theft and penalize unauthorized access. Although a few states have enacted statutes to assist in the settlement of digital estates, the law is unsettled. Currently, *"none of the state laws [clarify] the authority of fiduciaries to access electronic data in [a] person's online accounts and digital property without fear of penalties under consumer protection law."*¹ And while the Uniform Law Commission (ULC) has appointed a Drafting Committee to address the issue of Fiduciary Access to Digital Assets, it will be many years before there is a consistent and reliable means of navigating the "Digital Jungle."

There are two main categories of digital assets: online accounts with user names and passwords, and files stored on mobile hardware such as CDs, DVDs, USB devices, in a computer or server, or online. On-line accounts are generally governed by "Terms of Service" (TOS) agreements specific to each provider. TOS agreements often restrict use to the user and do not allow a user's agent, executor

or beneficiary access to the accounts. Some agreements terminate at the user's death.

There is no consistent means of transferring authority or ownership to a fiduciary. For example, Microsoft's Hotmail makes a portion of the account's record available through a "Next of Kin Process." Yahoo's TOS makes it clear accounts are not the property of the estate. And yet Yahoo will respect a person's wishes *if* consent and account details, including the password, are given in an estate plan.

To start organizing your digital estate we suggest identifying and inventorying all of your digital assets. The inventory should include digital files on hardware (such as flash drives, hard drives, CDs, DVDs, iPods, etc.), software, and online accounts. Include instructions with the inventory: Who can your fiduciary share your digital assets with? Do you want your internet website accounts closed down or to remain open? Naming a co-fiduciary specifically charged with dealing with your digital life may make sense.³

We Can Help You Plan For Your Digital Assets

You have the power to help your agent, trustee, or executor avoid delays and additional costs. Some digital assets may have significant sentimental value that could be at risk of loss. Planning for these assets is critical. Keeping up-to-date with this is likely to require periodic reviews and updates. Caldwell Law is prepared to guide you through this process, guarding your assets, whether digital or traditional. If you would like a copy of **Digital Audit: Passwords & Digital Property**, please contact us, we will be happy to send you one.

2012), available at:
www.digitalpassing.com.

² Scott R. Zucker, *Consider Digital Estate Planning Services: What are Digital Assets?* (January 2012), available at www.estateplanninginfoblog.com

³ Dennis Kennedy, *Estate Planning for Your Digital Assets*. (March 2012), available at: www.apps.americanbar.org

¹ Jim Lamm, *Digital Passing: Estate Planning for Passwords and Digital Property* (March 30,

Filial Duty: Adult Children on the Hook for the Nursing Home Bills of Their Parents

Nursing home costs continue to rise. In the Upper Valley, the cost of nursing home care ranges from \$7,500 to \$11,000 per month. It doesn't take long to incur a significant debt. What if there is no money to pay the bill? Or there is a delay in payment from a third party, such as long-term care insurance, Medicare or Medicaid? The nursing home gets stuck without getting paid for its services.

Forbes has pointed out that 29 states, *including New Hampshire and Vermont*, have "filial responsibility" laws. These laws hold adult children responsible for the financial support of their indigent parents. Although rarely enforced, courts in other states have recently held children responsible for paying their parent's outstanding medical and nursing home bills.

In a case cited by *Forbes*, the Pennsylvania Superior Court held a son liable for his mother's nursing home bill under that state's "filial responsibility" law. In that case, the mother was injured in a car accident and was admitted to a nursing home following her rehabilitation. While she there she applied for Medicaid. After accumulating a bill of over \$90,000, she left the nursing home and moved to Greece, without paying it. The nursing home brought suit against the son, and the Court held the son responsible for paying based solely on the fact that he was his mother's child.

In *New York Congregational Nursing Center v. Gilchrist*, the court held an attorney-in-fact may be liable for her mother's outstanding nursing home bill. She admitted her step-mother to a nursing home and signed the admissions agreement as "designated representative." In the agreement, she agreed to pay her step-mother's nursing home bills using proceeds from the sale of her step-mother's real estate. The step-daughter, acting as agent for her step-mother, sold the property and gave the nursing home half the proceeds. She then told the nursing home there was no more money.

The nursing home sued the step-daughter, claiming she was required to pay 100 percent of the sale proceeds to the nursing home. The step-daughter argued she should not be personally responsible for the bill. Both parties moved for summary judgment, and the Court denied the motions, stating there was a question of fact as to whether the step-daughter's sale of the real estate in her capacity as attorney-in-fact made her responsible for paying the nursing home bill. The case was resolved with no published opinion.

...continued on next page

Client Update Programs

If you are a **Lifeplan™** client, watch your mailbox for our letter regarding your 2013 renewal and the schedule of upcoming client update programs.

Caldwell Law's Annual New Year's Review Checklist

We want all of our clients to be able to answer *yes* to the following four questions:

1. Do I have an estate plan?
2. Do I understand my estate plan?
3. Does my plan say what I want it to say?
4. Are *all* of my assets titled (owned) in a manner that is consistent with the goals of my plan?

If you are unable to comfortably answer yes to these questions, we recommend setting up a time to review your plan, or consider attending one of our three free monthly classes on estate planning. Please see the Education Page on our website for the class schedule.

In addition, any of the following events could result in a need to change your estate plan:

1. Death of a spouse or partner.
2. Birth of a child or other beneficiary.
3. Divorce.
4. Divorce of a beneficiary.
5. Marriage.
6. Retirement.
7. Real estate purchased; how should it be titled?
8. Anticipation of substantial inheritance; how should it be inherited?
9. Substantial increase or decrease in wealth.
10. New investment account(s) opened – how should it/they be titled?
11. Life insurance purchased; how should it be titled?
12. Turning 70 years of age; time to start taking withdrawals from IRAs.
13. Change of beneficiary for a pension or profit-sharing plan in which you were enrolled.
14. Participation in a new pension or profit-sharing plan.
15. Moving to a new state.
16. Permanent disability of a family member.
17. Assuming financial responsibility for a family member.
18. Execution of substantial financial guarantees for third parties.
19. Ownership of real property in a state other than your state of residence (especially if the other state has its own estate tax).
20. Establishment or dissolution of a business.
21. Beneficiaries with special needs.
22. Beneficiaries with substance abuse problems.
23. Incapacity.

If your thinking has changed, if you have new ideas, or if any of the events listed here have occurred, we recommend that you review your plan to make sure it still meets your goals and provides for your beneficiaries in the manner you hope.

The New Tax Law

Congress avoided the so-called fiscal cliff by passing the American Taxpayer Relief Act of 2012 (2012 Tax Act), signed into law on January 2, 2013. The 2012 Tax Act makes important revisions to the tax code that will affect estate planning for the foreseeable future:

- The federal gift, estate, and generation-skipping transfer tax (GST) exemptions were made permanent. They will remain at \$5 million per person, adjusted annually for inflation. In 2012, the exemption was \$5,120,000. The amount for 2013 is expected to be \$5,250,000. Creating certainty is good news for all of us; for more than ten years we have been planning without knowing what future exemptions would be.
- Married couples can take advantage of these higher exemptions and transfer up to \$10+ million through lifetime gifting and at death. With proper planning, these amounts can be structured so as to be exempt from transfer taxes and other risks indefinitely.
- The tax rate on estates larger than the exempt amounts increased from 35 to 40 percent.

The “portability” provision of the 2010 Tax Act was made permanent. Portability allows the unused estate tax exemption of the first spouse to die to transfer to the surviving spouse, without having to set up a trust specifically for this purpose. Portability does not apply to the GST. For couples wishing to take advantage of both GST exemptions and provide asset protection for the surviving spouse, there are still many benefits to using trusts.

Separate from the new tax law, the amount for annual tax-free gifts has increased from \$13,000 to \$14,000, meaning you can give up to \$14,000 *per beneficiary, per year* free of federal gift, estate, and GST tax, in addition to the \$5 million gift and estate tax exemption. By making annual tax-free transfers *while you are alive*, you can transfer significant wealth to your children, grandchildren, and others, thereby reducing your taxable estate.

The IRA Charitable Rollover, the law permitting donors age 70½ or older to transfer up to \$100,000 from their IRAs directly to qualified charities without having to pay federal income taxes on the funds transferred, has been reinstated for 2013.

For most people, the 2012 Tax Act has removed the emphasis on federal estate tax planning and put it back on the primary reason for estate planning: taking care of ourselves and our families the way we want. This includes:

- Protecting you, your family, and your assets in the event of incapacity and the need for nursing home care;
- Ensuring your assets are distributed the way you want;
- Protecting your legacy from irresponsible spending, a beneficiary’s creditors, and from being part of a beneficiary’s divorce proceedings;

- Providing for a loved one with special needs without losing valuable government benefits; and
- Helping protect assets from creditors and lawsuits.

The 2012 Tax Act included several income tax rate increases for people earning more than \$400,000 (\$450,000 for married couples filing jointly). Combined with the additional income tax rate increases resulting from the healthcare bill (for instance, the Medicare surtax of 3.8 percent on investment income for Adjusted Gross Incomes in excess of \$200,000 for single filers and \$250,000 for joint filers), income tax planning is now more important than ever.

If you are married and you established a trust for the benefit of your surviving spouse, and the primary purpose of your trust planning was to minimize or eliminate transfer taxes, and you are confident your estate will **not** be subject to *federal or state estate taxes*, and you are not interested in other types of asset protection, you may want to consider revising your plan by eliminating the trust provisions for your surviving spouse.

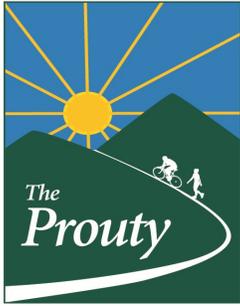
Filial Duty (continued)

Faced with unpaid bills, nursing homes are becoming more aggressive in their efforts to collect. To help you avoid unpaid nursing home bills, here are some planning tips to consider:

- Plan for your long-term care *early*. The earlier you plan, the more planning opportunities are available.
- Make sure you have an effective durable general power of attorney in place. Review your choice of agent(s) annually.
- Agents, when completing your principal’s application for care, *read the fine print*. You may be assuming liability you are not aware of.
- If appropriate, *apply for Medicaid as soon as possible*. If you are informed that you Medicare coverage is ending, you will be responsible for 100 percent of the nursing home cost. If you have limited resources, seek advice about applying for Medicaid benefits.
- Even after you are found eligible for Medicaid, you must pay your monthly patient share, which Medicaid recipients are responsible for.

1. Krooks, Bernard A., *Filial Responsibility Law Makes Son Liable for Mother's Nursing Home Bill*, FORBES MAGAZINE, May 2012.
2. See NH RSA 167:2 and 15 VSA § 202-03.
3. The case is *Health Care & Retirement Corporation of America v. John Pittas*, 2012 PA Super 96 (May 7, 2012).

**Free Workshops Practically Every Week in 2013 —
Tell your friends and relatives about this valuable
resource. Visit our website for dates, times
and topics or call the office.**



Caldwell Law is a proud sponsor of the **32nd Annual Prouty 2013 Bike Ride & Challenge Walk** on July 13th and 14th. We are sponsoring a team in memory of Tim's sister who died from cancer in 2011. You can make a difference in the fight against cancer. To donate and/or participate, visit our website or call the office.

Welcome Our New Staff Member



Brenda L. Johnson joined Caldwell Law in December 2012. She is assisting us with estate settlement and probate matters. With over 20 years of experience in law, she is a great addition. Her email address is:

brenda@estateandelderlawgroup.com



2013 Special Events Schedule

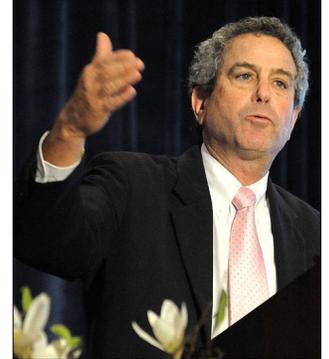
We host and participate in a number of special events throughout the year. We cordially invite you to check out our website to learn more about these events. The following special events are now being planned for this year:

- Annual Client Meeting – May 14, 2013
- Prouty Bike and Walk-a-Thon – July 13 and 14, 2013
- Hood Museum Lecture and Reception – October 2013

Win a Dinner for Two

Caldwell Law bags have been used for years, in many creative ways. We love hearing about how people use these bags. Enter our contest by submitting a photo of

your favorite use of a Caldwell Law bag. **You may win a dinner for two at the Canoe Club in Hanover.** For details, visit our website and click on the Photo Contest toggle.



Ira Byock, MD, Director of Palliative Care at Dartmouth-Hitchcock Medical Center, Speaker at 2013 Annual Client Meeting

Have you moved? Changed your phone number or email address? Email your updated information to alicia@estateandelderlawgroup.com or call Alicia at (603) 643-7577.



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Think of us as your family lawyer, the one you call before anyone else. If you or someone you know needs legal advice, call us. If we can't take care of what you need, we will find someone we know and respect to handle it. We have a network of excellent professionals.