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PASTERNAK & FIDIS REPORTER

Planning for Digital Assets

By Anne W. Coventry

How much of your life do you live online?

Increasingly, Americans' bank, brokerage, credit card, and utilities statements arrive by email. Recurring expenses are paid automatically without any human action required; we pay other bills with a few clicks and keystrokes. Family photos gather in virtual albums on smartphones and photo sharing websites. We file our tax returns electronically; we may not even keep hard copies. The more tech-savvy folks may even have e-commerce businesses, own the rights to domain names, and write blogs. Whether an individual's online activities have independent financial value or are merely the means of accessing hard assets of financial value, this phenomenon has far-reaching implications for estate planning and administration. As technology advances, the number of individuals affected can only increase.

When someone dies, an administrative process starts into motion. Information must be gathered: Was there a will? Were there any outstanding medical bills or other debts? What kind of assets did the decedent own, where are they, and what are they worth? Are there ongoing costs associated with maintaining the assets? Where can the beneficiaries be found? Will there be any tax due? The traditional approach for handling an estate administration involved sorting through paper files in the decedent's home and office and waiting for the mail carrier to bring the mail. The bills and bank statements would arrive in due course and, eventually, bring answers to many of these questions.

In today's world, this traditional approach is simply no longer adequate; snail-mail will not suffice to alert fiduciaries as to where the decedent kept accounts or what outstanding bills there may be. In addition, fiduciaries have to act quickly to identify and shut down automatic payments of recurring expenses; otherwise they risk personal liability for paying creditors out of order (as well as risking an account to be overdrawn) if the probate estate turns out to be insolvent.

What about online photo albums, social networking accounts, email accounts, and blogs? Even if a personal representative knows where to look, he or she cannot gain access without usernames and passwords, and many online service providers will not release passwords to anyone but the principal, even after his death. The family may lose forever a decedent's email accounts, photos, and other digital media. If she owned a small business, she may have kept important customer, product or payment information stored electronically and it may be impossible to access this

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How Much Financial Disclosure is Adequate for a Valid Premarital Agreement? Too Much is Enough.

by Linda J. Ravdin

Two recent cases, one from Maryland and one from Virginia, point up the importance of financial disclosure in premarital agreements. In each case the challenging spouse launched a multi-faceted, and ultimately unsuccessful, attack on the agreement. Inadequate financial disclosure was but one facet of the attack. Had the financial disclosure been done better, in both cases, the litigation might have ended sooner with less expense to the defending spouse.

In *Stewart v. Stewart,* 76 A.3d 1221 (Md. Ct. Spec. App. 2013), the husband identified his major assets, a farm and a concrete business. However, he did not provide any values. Maryland case law has described a complete list of assets with fair valuations as the gold standard for financial disclosure. The Stewart agreement did not meet this standard, nor did it need to do so in order for the court to uphold the agreement as valid. However, to prevail, the husband had to convince the court that the wife had sufficient informal knowledge of his financial affairs. Whenever an outcome depends upon whom a judge believes, the risk that the truthful party will not be believed is always present. The longer the marriage, the greater the chance that witnesses will forget or die and documentary evidence will disappear.

In *Chaplain v. Chaplain,* 2011 Va. App. Lexis 15, the husband, who was worth about $20 million, did not provide any written financial disclosure. However, the wife learned through her association with him that he owned a 50-unit apartment building, a 150-acre farm and other real estate. There were two appeals in this case. The first resulted from a trial court summary ruling in the husband's favor. The Virginia Court of Appeals reversed the summary ruling. Only after a full trial and a second appeal did the husband prevail. Like *Stewart,* the result in *Chaplain* depended, in part, on whom the judge believed.

There is an important distinction between the amount and form of financial disclosure that courts will tolerate and the best practices that create a higher level of protection for the party who wants the agreement. *Stewart* and *Chaplain* are among the many cases where something less than complete, detailed written disclosure of all assets with current and accurate values, and all sources and amounts of income, was sufficient for a court to uphold an agreement. However, in all cases, a proponent was forced to defend the agreement with all the expense and risk entailed in litigation. Memories fade, files are destroyed or lost, and witnesses die or become incompetent. A case that goes to trial often involves competing factual narratives. When resolution turns on credibility, the trial judge's decision is virtually unreversible on appeal. The proponent who fails to adequately disclose, and document that disclosure, runs the risk that his or her story will be

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Linda J. Ravdin is a partner in the firm's Divorce and Family Law Group. She is the author of *Premarital Agreements: Negotiation and Drafting* (ABA 2011) and TM849-2d *Marital Agreements* (Bloomberg BNA 2012).

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Does The Home-Team Advantage Play in the Courtroom? The Terps Thought So.

Why Business Owners Should Consider Dispute Resolution Before Entering Into Contracts

by Nathan S. Brill

Home court advantage for the athletic department at the University of Maryland usually means avoiding the hardwood of Duke's Cameron Indoor Stadium for the more comfortable confines of College Park's Comcast Center. However, this past summer, a Maryland judge in Prince George's County forced the Terps to do battle, at least for the time being, in a different type of North Carolina court.

Maryland's tiff with the Atlantic Coast Conference (the ACC) is well publicized. In November 2012 Maryland decided to withdraw from the ACC athletic conference, where the school is a charter member, for the Big Ten Conference. Approximately two months prior to the announcement, the ACC adopted a revised withdrawal provision that the Conference contends requires the Terps to pay approximately $52 million in withdrawal fees, or three times the Conference's annual operating budget. All ACC members, with the exception of Maryland, voted in favor of this increased withdrawal penalty.

Immediately following Maryland's announcement, the ACC sought a court order validating the exit fee provision through a lawsuit filed in the Guilford County Superior Court, in Greensboro, North Carolina. In response, the University of Maryland filed a separate action in the Circuit Court for Prince George's County, Maryland, alleging illegal, retaliatory and anti-competitive conduct on the part of the ACC. Suddenly, the fight for home court advantage took on a new meaning.

Judges and jurors are, of course, supposed to be non-biased, but the litigation strategy was clear. As sports attorney Michael McCann noted in *Sports Illustrated*, North Carolina judges are selected in non-partisan elections and Maryland judges, while initially appointed by the governor, are later subject to non-partisan retention elections. Jurors are pulled from within the presiding court's jurisdiction.

Putting aside concerns about the trier of fact's allegiances, a particular forum's procedural rules may also create a perceived advantage for one side. For example, one party's counsel might be more familiar with a certain jurisdiction's operating nuances. Moreover, certain jurisdictions' procedural rules are so unique that they have the capability to change the dynamics of litigation. For example, the United States District Court for the Eastern District of Virginia's 'rocket docket' favors the well prepared plaintiff at the expense of parties needing additional time to prepare for trial. Substantive law also varies between jurisdictions and adds complexity when considering ramifications of a particular forum.

Where a Case Will Be Heard and How it Will Be Decided

Clients are advised when entering into a contract to plan for an exit from the contract; in other words, to consider where and how a potential future dispute will be resolved. A forum selection clause of a contract decides where a dispute will be heard. A choice-of-law provision decides which state's substantive law will govern the dispute. Substantive law refers to the legal standards by which a case will be decided.

Parties to a contract may choose the substantive law that will govern the contract as well as the forum where a dispute will be heard. Generally, a forum-selection clause is valid and enforceable. The party resisting a forum-selection clause has to convince a judge it is unreasonable. A clause may be unreasonable if (i) it was induced by fraud or overreaching, (ii) the contractually selected forum is so unfair and inconvenient as, for all practical purposes, to deprive a party of a remedy or of its day in court, or (iii) enforcement would contravene a strong public policy of the state where the action is filed.

In Maryland, and in most other jurisdictions, parties to a contract may chose which state's substantive law governs, unless the state of the law selected has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice. In enforcing such a choice-of-law clause, courts also consider whether application of the chosen law would be contrary to a fundamental policy of the forum state. Both forum selection and choice-of-law clauses are readily enforced and the exceptions are narrowly applied.

The ACC's constituent documents lacked both an applicable forum selection and a choice-of-law provision. Without a contractual agreement as to where the parties' dispute would be heard and which state's law would apply, the Prince George's County Court applied common law doctrines and ultimately halted proceedings in Maryland pending the conclusion of the North Carolina litigation.

A Race to the Courthouse

The Prince George's County judge

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A Wider Circle – CNN Hero Award Winner

Broadcast giant CNN named the Silver Spring-based non-profit A Wider Circle and its founder Mark Bergel as a winner of its Hero Award that highlights the good work of ordinary people who are changing the world in extraordinary ways. The organization was founded in 2001 with the mission to to help children and adults who are challenged by homelessness, poverty, and related social issues. Pasternak & Fidis attorney **Alex Tanouye,** who serves on the Board of Directors of A Wider Circle, said "Mark's unrelenting work toward ending poverty serves as an example of what is possible, and I am proud that Pasternak & Fidis continues to be a strong supporter of A Wider Circle's work in our community."

How Much Financial Disclosure is Adequate *—continued from page 2*

disbelieved even if true. The best opportunity to reduce this risk is before the agreement is signed.

Adequate financial disclosure is just as important to an economically disadvantaged party. The purpose of financial disclosure is to allow a party to make an informed decision about whether to sign a premarital agreement waiving marital rights that would otherwise accrue or to negotiate for more favorable terms. It is difficult to negotiate in the absence of adequate information. Therefore, his or her lawyer will need to insist on a complete financial disclosure statement before starting negotiations.

Mechanics and Content of Financial Disclosure

A written, itemized list of major assets and liabilities and their values, as well as amounts and sources of income is the best evidence of adequate disclosure. A detailed written disclosure provides a record of what was disclosed that survives death, loss of memory, destruction of files, or a change of heart. A detailed disclosure will only protect the proponent, however, if it is available when the dispute arises; if the agreement states that a disclosure is attached but it has become lost by the time the dispute arises, validity will be greatly compromised.

Disclosure Regarding Closely Held Business

Disclosure of an interest in a closely held business presents a special challenge. The value of the business may not be readily ascertainable. There is no requirement for a formal appraisal. However, an owner who fails to provide meaningful disclosure of known data does so at his or her own peril. He or she could provide the gross revenues of the business, the number of employees, his or her percentage interest, salary or other compensation received from the business, and the like. It is a mistake for the owner to assume that the other party's knowledge of the existence of the business is tantamount to an understanding of its value. The owner's statement as to value should be appropriately qualified. When the value is stated at book value it is especially important that the disclosure include an acknowledgment that actual value may be higher.

The business owner should discuss with his or her lawyer any recent appraisals of the business, or of any major assets of the business, such as a building, a recent loan application or application for key person insurance, any purchase offers or plans for an initial public offering, and whether the owner has stated a value on a personal net worth statement. In a lawsuit about validity, the challenging party will be able to obtain these documents in discovery. Therefore, the disclosure for the premarital agreement should not conflict with other statements of value or should disclose the other statements and, if appropriate, explain any difference.

Counsel for the owner must consider the quantity and quality of information to provide. The owner's financial advisor or CPA will often be helpful in formulating a disclosure statement that will strike a reasonable balance between the need for disclosure to insure validity and the interest of the business owner in the confidentiality of the business' records and business information.

Disclosure of Future Inheritance

A party is under no obligation to disclose his or her family's wealth, and, in some cases, may not be able to do so. However, when a party has a reasonable expectation of a substantial future inheritance, it will often be in that party's interest to make some disclosure. When a party has vested interests, such as beneficiary rights in an irrevocable trust, he or she should disclose the essential terms of the interest and its approximate value.

Addressing Privacy Concerns in the Disclosure of Financial Data

Many parties prefer that their financial data be kept confidential. There may be particular matters, such as business information, that is especially sensitive. A party may have concerns about the disclosure of financial information to a new spouse's adult children or other family members, or in a court proceeding between a new spouse and his or her former spouse. The agreement can include a confidentiality provision that prohibits each party from disclosing the other's financial information to a third party, with an exception for his or her lawyer or other professional advisors, or in response to a court order. It can also provide for the right to seek a court order, in the event of future litigation, to protect this information.

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Does The Home-Team Advantage Play in the Courtroom? —continued from page 3

determined Maryland law governed the university's damages claim against the ACC. It applied the principle of *lex loci delicti*, the "law of the place," which provides that the substantive law of the state where the wrong occurred governs. Where a wrong occurs in more than one state, the court looks to where the last relevant event occurred. However, which state's substantive law applies does not resolve the question of forum, or which state's courts will decide. The courts of North Carolina can apply Maryland law and vice versa.

The Maryland judge decided the Terps' litigation would proceed in North Carolina. The court considered factors such as increased costs, harassment by repeated suits involving the same subject matter, possible inconsistent judgments, the North Carolina court's investment of judicial efforts, and the likelihood of obtaining complete relief there. The Maryland court found a potential for increased costs to both parties and the potential for inconsistent judgments if litigation proceeded in both forums. However, because the North Carolina action was at the preliminary stages, the Maryland court stayed, rather than dismissed, the Maryland suit pending the resolution of the North Carolina action. Most observers expect the entirety of the dispute to settle during the pendency of the North Carolina litigation, meaning the Maryland judge's ruling effectively forces Maryland to litigate in North Carolina.

Although it did not expressly rely on a race to the courthouse analysis, the Prince George's County judge acknowledged Maryland precedent that gives preference to the court where the first lawsuit was filed. The stated reasons for the decision -- increased cost, multiple inconsistent judgments and redundant litigation -- are all premised on the first case having been filed in an appropriate court of another state. It is a reality of multi-state transactions that where there is no forum selection clause governing the dispute, the party who files first often is able to select the state, and sometimes even the county, in which to litigate a claim.

History of Multiple Court Systems

More than 200 years of American history is at work in the Terps' attempt to litigate in a Maryland court and the ACC's wish to have the matter decided in North Carolina. Prior to independence, the colonies were sovereign entities with their own constitutions and court systems. In fact, the Maryland courts trace their origin to 1658. After American independence, under the Articles of Confederation, the states retained a virtual monopoly on judicial power. The Constitution allowed for the expansion of the federal court system. Elaborate rules determine what types of lawsuits can be brought in a federal court, and which federal court. Unlike judges in many state courts, who may have to raise money to be elected, federal judges receive a lifetime appointment. Some litigants may prefer a federal court. With parallel court systems, variations in law among the states and between state law and federal law, multi-state business transactions, and the perceived advantage of filing first on home turf, a business involved in a dispute could file or be subject to suit in several possible states or in a federal court.

Applying Lessons from Collegiate Athletics to Your Business

Maryland's recent battles with the ACC are more than a new opportunity for Terp fans to express displeasure at the Tar Heel state. Sophisticated entities were effectively thrust into a race to the courthouse because of the absence of forum selection and choice-of-law provisions in their governing documents. As the Maryland case and the history of the judicial system illustrate, without a prior agreement there are often multiple proper venues to bring suit.

Consideration of dispute resolution at the beginning of a contractual relationship is essential. Otherwise, a small or mid-sized business may be faced with employing local counsel across the country and monitoring for the possibility of a disgruntled party preemptively suing in a state perceived to be unfriendly or inconvenient.

One option to consider is incorporating alternative dispute resolution (ADR), such as mediation or arbitration, into the contract. ADR is a means to resolve a conflict outside of the courtroom. Providing for mandatory mediation prior to either party filing suit creates the potential to resolve the matter without costly and relationship-destroying litigation. Negotiating such a provision provides a logical segue into a conversation about where and how the dispute would be resolved if the parties cannot mend their differences with the assistance of ADR techniques.

Pasternak & Fidis Sponsors Round House Theatre's Production of *Two Trains Running*

This spring Pasternak & Fidis is delighted to partner once again with the Bethesda-based Round House Theatre by sponsoring a production of August Wilson's Pulitzer Prize winning play *Two Trains Running*. This is the fifth season that the firm has provided support for the repertory company. Partner Vicki Viramontes-LaFree, expressing the views of the entire firm, said, "We are thrilled to be able to sponsor this engaging and powerful work. Round House Theatre consistently offers some of the most exciting stage performances in the region."

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Maryland Poised to Raise Estate Tax Threshold

Maryland estate tax bill (HB 739 / SB 602) has passed both houses in the Maryland General Assembly (the House on March 7 and the Senate on March 20). Unless vetoed by the Governor, the new law will raise the Maryland estate tax threshold from its current $1 million to $1.5 million for those dying in 2015, $2 million for those dying in 2016, $3 million for those dying in 2017, and $4 million for those dying in 2018. In 2019 and later years, the Maryland estate tax exemption would be tied ("re-coupled") with the federal estate tax exemption. The federal exemption is currently $5.34 million but is indexed for inflation and projected to be $5.9 million by 2019.

When the Maryland and federal exemptions are re-coupled, Maryland residents would be able to take advantage of the portability of estate tax exemption between spouses (the Maryland estate tax threshold is not portable now, as the federal exemption is). The re-coupling would also eliminate a current problem for Maryland residents who have non-citizen spouses: the inability to use a qualified domestic trust (QDOT) to claim the Maryland marital deduction for assets in excess of the Maryland threshold but under the federal exemption amount.

Changes to the estate tax laws and increases in income tax rates combine to make income tax planning for wealth preservation a much more significant factor for many estate plans. Building sufficient flexibility into the estate plan is key; it allows tax-planning decisions to be deferred until the variables--asset values, exemption levels, effective income tax rates, even family circumstances--are known. A number of techniques are available to take advantage of new estate and gift tax laws to minimize income tax over time. Those who made gifts to grantor trusts in prior years in an effort to reduce estate and gift tax may benefit from a review of those arrangements, to determine what income tax savings can now be achieved through further planning. If you postponed a review of an existing estate plan pending the outcome of tax legislation, this may be a good time to update your plan to ensure it is sufficiently flexible to accommodate income tax planning as well as estate and gift tax planning.

If you have questions about the impact of tax law changes on your estate planning, please contact any member of our Estate Planning and Administration Group.

Planning for Digital Assets *—continued from cover page*

vital information. The business may suffer tremendous losses when pending orders go unfilled.

Online storage accounts may help: a service provider will store digital data and release it according to the owner's instructions. In this case, the fiduciary would merely need to know that the principal is a participant in the service (no password required). These sites usually offer state-of-the-art security, but many are hosted by start-up companies with little capital; the company may no longer be in business when you need it (*www.lastwishes.com* has already folded). Google has caught on and offers one solution; its "Inactive Account Manager" allows users to plan in advance for what should be done with their Google accounts when they become inactive (as a result of death or otherwise).

Another alternative is to keep an updated, encrypted electronic file with a list of all passwords. The complex password needed to unlock the encrypted file should be stored separately, in safekeeping. This approach creates a treasure map that will lead the fiduciaries to digital assets.

At a minimum, individuals should include language in estate planning documents that specifically authorizes fiduciaries to access digital assets (perhaps even appointing a special "online executor" to take responsibility to shut down a decedent's email accounts, social media profiles and blogs, or otherwise manage the decedent's online identity) and plan ahead so that their fiduciaries will be able to find usernames and passwords when the time comes.

When someone dies who did not plan ahead for digital assets, sleuthing is necessary. Having access to the email account may provide a key to access other digital data ("lost password" tools allow for resetting passwords via email), and as a last (expensive) resort, the fiduciary can hire a data forensics expert to help. However, before accessing someone else's digital assets, it is important to consider who has the right to view and access that data. ***Having the means to access information (i.e., username and password) is not the same as having the legal right to do so.***

A handful of states (including Virginia, but not Maryland or DC) have already enacted laws granting fiduciaries a right of access to digital data, and over a dozen others are considering doing the same. The Uniform Law Commission (ULC) is currently working on a model act to govern fiduciary access to digital assets. The ULC task force is working closely with internet service providers in an effort to craft a workable law and expects to make considerable progress by summer 2014. However, federal privacy laws (i.e., the Stored Communications Act) and federal anti-hacking laws (i.e., the Computer Fraud and Abuse Act) have a broad reach, and internet service providers zealously protect their users' private information with restrictive terms of service. State law may only do so much to assist and protect fiduciaries, who struggle to balance their fiduciary obligations against the intractable position of internet service providers and even the risk of federal criminal sanctions.

Stay tuned—we expect there will be considerable developments in this area in the next year or so, particularly after the ULC model act is finalized.

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P & F News

Seven firm attorneys have been named to the 2014 edition of *Maryland SuperLawyers*. **Nancy Fax**, **Marcia Fidis** and **Al Pasternak** were all nominated in the Estates and Trusts category. **Linda Ravdin** and **Anne (Jan) White** were named for Family Law. **Morriah Horani** and **Alex Tanouye** were both named as *Maryland SuperLawyer* Rising Stars.

In May, Estate Planning and Administration Group associate **Megan Schaeffer** will deliver a presentation for the U.S. Department of State Foreign Service Institute entitled "Fundamental Aspects of Estate Planning." The presentation will be part of the "Mid-Career Retirement Planning Series" which is designed as a retirement check-up for mid-career employees from the State Department and other U.S. government agencies who are more than 10 years from retirement eligibility.

Linda Ravdin partner in the Divorce and Family Law Group published an article in the *American Journal of Family Law* Spring 2014 issue entitled "The Uniform Premarital and Marital Agreements Act."

Pasternak & Fidis is pleased to welcome **Megan Schaeffer** to the Estate Planning and Administration Group. Megan studied at Saint Mary's College in Notre Dame, Indiana and received her Juris Doctor degree from DePaul University College of Law in Chicago. Prior to joining the firm Megan was an associate in private practice with a D.C. based firm. Her concentration is in estate planning, including the drafting of complex wills, revocable trusts, and special needs trusts as well as estate and trust administration.

Linda Ravdin partner in the Divorce and Family Law Group was a faculty member for a webinar hosted by the American Bar Association in March. The topic was "Innovative Premarital Agreements."

In October 2013, **Linda Ravdin** partner in the Divorce and Family Law Group made presentations on premarital agreements to two groups. In Columbus, Ohio, she spoke to the Ohio Chapter, American Academy of Matrimonial Lawyers, on the topic "Premarital Agreements: Representing the Stronger Party; Representing the Weaker Party." In South Bend, Indiana, she spoke at the 39th Annual Notre Dame Tax and Estate Planning Institute. Her topic was "Prenuptial Agreements and Divorce: A Minefield or a Solution?"

Estate Planning and Administration Group partner **Anne Coventry** is slated to speak at the Judicial Institute in June. The day's program is focused on "Emerging Issues in Estates and Trusts Law." Anne will give an address on the topic of "Fiduciary Access to Digital Assets."

On March 27, **Jan White**, partner in the Divorce and Family Law Group, presented at a D.C. Bar program "You're Out of (Guide) Line!" The program was designed to provide up-to-date approaches and expert methodology on how to handle child support disputes in high income cases.

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Client Alert: Maryland Trust Act

The Maryland General Assembly passed, with amendments, The Maryland Trust Act (HB 83). This Act largely codifies existing Maryland common law of trusts and makes clear the rights of trust beneficiaries and creditors, and the powers and duties of trustees. Unless vetoed by the Governor, the Maryland Trust Act will take effect January 1, 2015. A future edition of this newsletter will summarize the key provisions of the Act, so stay tuned!

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