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ESTATE PLANNING AND ADMINISTRATION

Roxy Araghi
Anne W. Coventry
Oren Goldberg
Stephanie Perry
Christina K. Scopin
Micah G. Snitzer
Adam P. Swaim

DIVORCE AND FAMILY LAW

Linda J. Ravdin
Vicki Viramontes-LaFree
Anne (Jan) White

Linda J. Ravdin, Editor

PASTERNAK & FIDIS, P.C.
7101 Wisconsin Avenue
Suite 1025
Bethesda, Maryland 20814
T 301.656.8850
F 301.656.3053
www.pasternakfidis.com

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Preserving wealth... and relationships

Cryptoassets and Estate Planning

BY ROXY ARAGHI

The value and popularity of cryptoassets – a term that comprises everything from Bitcoin to other cryptocurrencies and includes nonfungible tokens (NFTs) and utility tokens – has grown exponentially in recent years. In November 2021, Bitcoin reached an all-time high of over $65,000. In March 2021, Christie's sold a fully digital, NFT-based work of art for $69.3 million. Many people are paying attention to the increasing value of cryptoassets and are acquiring cryptoassets to hold for their own investment. It is now easier than ever to obtain cryptocurrency through popular apps, such as Venmo or PayPal. The internet has made available step-by-step guides teaching how to acquire NFTs and other tokens. Whether you currently hold any cryptoassets or plan to acquire them in the future, it is crucial to consider how these assets will be managed in the event of your incapacity or disability during your lifetime, and it is necessary to decide, while you are living and able, how you intend for these assets to be distributed upon your death.

Custody. Cryptoassets are accessed through "public keys" and "private keys." A public key is used to receive cryptoassets, and a private key is used to send cryptoassets. Cryptoassets are bearer assets, like cash, meaning that the holder of the private key is presumed to be the owner, just as a person is presumed to be the owner of cash in his or her physical wallet. The private key is held in a "wallet," generally a piece of software stored in one of several ways: (1) on an online exchange, (2) on a hardware wallet, (3) on a mobile wallet, or (4) on a local software wallet. Each of these methods is controlled by a pin or password, or both.

Access. The owner of cryptoassets should draft a memorandum or letter, to accompany their estate planning documents, that specifically outlines the type, location, and means of access to these assets. The memorandum should say where the necessary passwords and pins can be found. Password information and pins should be stored separately from the memorandum itself.

Authority to Handle. In addition, to ensure the assets can be managed by a fiduciary in the event of the owner's incapacity or death, the owner's power of attorney, will, and any trust the owner has established should grant the fiduciary with the express authority to access digital assets and online

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Premarital Agreements and Post-Execution Conduct

BY LINDA J. RAVDIN

Parties to a premarital agreement are free to make decisions during the marriage that alter their financial circumstances so long as they meet their contractual obligations. Post-execution actions can strengthen the validity of the agreement, result in a claim that the agreement has been revoked, or leave the agreement intact but change the economic outcome.

Conduct that Strengthens Validity. The low standards for validity create opportunity for a claim of duress, especially when a proposed agreement is presented close to the wedding or a weaker party does not get legal advice. (These claims rarely succeed.) Contract law acknowledges that a party may ratify a contract, thus waiving a duress claim. Acceptance of the benefits of a contract is generally considered ratification. When the agreement requires a party to make provisions for the other party during the marriage, such as transferring title to a home into joint names or changing a beneficiary designation, he or she should carry out these obligations promptly.

Another method to achieve ratification is a formal ratification document after the wedding. A waiver of survivor benefits under a private qualified retirement plan must be done after the wedding; a premarital waiver is not effective. When a party with a 401(k) gets the spouse to sign such a waiver, arguably, that action ratifies the contract as a whole, though there is little case law on this question.

Another approach to ratification is a formal amendment. The amendment can improve the terms for a weaker party and, as discussed above, allow a stronger party to carry out the terms and for the weaker party to accept the benefits. It will acknowledge the validity of the premarital agreement.

Conduct that Can Create a Claim of Revocation. General contract law permits parties to orally revoke a contract, even when the agreement says it cannot be revoked orally. Virginia cases hold that only a signed revocation is valid. In most states the general rule remains viable. Claims that parties orally revoked a premarital agreement have been litigated multiple times, but rarely succeed.

Among the rare circumstances where a claim of revocation has been taken seriously:

- The party relying on the agreement cannot produce it. Whether this constitutes revocation or merely a party's failure to prove the existence of the agreement, the result is there is no agreement to enforce. A party who relies on a premarital agreement for estate planning or in the event of dissolution must secure it in a safe place.
- In an entertaining New York case, the husband, who would have come out better under the premarital agreement, forgot to mention it until he was on the witness stand at the divorce trial. The court treated the agreement as revoked.
- In another entertaining case from New Jersey, the premarital agreement was quite generous to the husband. He hired a hitman to kill the wealthy wife and got caught. The court strained the legal analysis to hold that the agreement was revoked.
- When parties entitled to retain exclusive rights to their nonmarital property elect to pool and commingle all of their assets, their actions are tantamount to a revocation of the agreement.

Many claims of revocation are based on a change of circumstances or decisions made during the marriage. The flaw in the argument for revocation is that a premarital agreement is designed to apply at the end of the marriage, come what may. For example, a weaker party retires early to travel, makes bad investment decisions, or does not receive an expected inheritance; these do not cause revocation of the contract. Similarly, a wealthy party's change of fortunes, so that a contract has become burdensome, does not constitute revocation. The one circumstance where a court may decide to declare an agreement revoked is where serious domestic violence renders a victim unable to support him- or herself; but there are few examples in the case law and thus little guidance for the practitioner.

Actions that Change a Party's Economic Circumstances without Affecting Validity of the Agreement. A variety of post-marriage events may alter parties' economic circumstances. Nevertheless, they are bound by the contract. One type of premarital agreement provides for parties to maintain exclusive rights to nonmarital property but to share the fruits of their labor. When parties consume marital assets on lifestyle while a wealthy party preserves nonmarital assets the agreement remains enforceable as written. An agreement can anticipate this possibility and make provisions to address it. The party who needs to build a nest egg with the fruits of his/her labor must do so and not expect to rely on the resources of the wealthy party.

Wealthy Party Makes Disadvantageous Decisions and Then Regrets. A wealthy party may choose to be more generous to a spouse during the marriage than the agreement requires, for example, by creating joint

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The Joyful Pursuit of Education for Girls in Washington, D.C.

Since 2016, Managing Partner Stephanie Perry has poured her passion for education for girls into the Washington School for Girls (WSG), a local Catholic all-girls, all-scholarship school located in the Anacostia neighborhood of Washington, D.C.

WSG began as the dream of a group of Washington-based women, members of The National Council of Negro Women, The Religious of Jesus and Mary, and The Society of the Holy Child Jesus. The women who founded these organizations serve as the founding spirits, guiding the mission and purpose of the school. WSG began as an afterschool program. It has since transformed into a school for third through eighth grade with a demanding curriculum that prepares its students for high school and continues to support their education through its graduate support program. Of the more than 300 eighth graders who have graduated, 99% have finished high school.

This year, WSG will celebrate its 25th anniversary, which coincides with the implementation of the school's new strategic plan to build a comprehensive campus and deliver an innovative education program for young girls. To do that it has initiated a capital campaign to ensure the long-term financial sustainability of the school.

As a board member for WSG, Stephanie has helped the school build on its commitment to girls and education through her leadership and as an aspirational and inspirational voice to its students as they seek to find their place in the world. When asked why WSG, Stephanie says: "Education is it. My own life is a testament to the fact that a quality education, especially during the formative years, prepares students for success in pursuing their dreams." ■

Learn more about Washington School for Girls by visiting: www.washingtonschoolforgirls.org

PREMARITAL AGREEMENTS AND POST-EXECUTION CONDUCT

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accounts or survivorship real estate, or by transferring assets to the other party. Premarital agreements acknowledge each party's right to give and receive gifts from the other. Neither is entitled to revoke a gift.

A Party Fails to Maintain Adequate Records. When a premarital agreement provides that a premarital IRA or 401(k), plus growth, is a party's nonmarital property, and that marital contributions, plus growth, are to be shared equally at divorce, the owner must maintain all account statements from the date of marriage forward so as to be able to identify the nonmarital share. If he/she fails to do so, the entire account may be divided equally at divorce.

Spouse Takes Advantage of Ill or Incapacitated Party. A spouse with a financial power of attorney could use it to transfer assets or change a beneficiary designation. Such actions may constitute a breach of fiduciary duty, but there could be substantial litigation expenses to resolve a dispute and it could occur after a death or incapacity. Even without a power of attorney, a spouse could exploit a weak or ill party to revoke a premarital agreement, change the terms, or make excessive asset transfers. The wealthy party should work with his/her estate planning lawyer to devise the best way to handle incapacity.

Weaker Party Makes Disadvantageous Decisions and Then Regrets. A weaker party may make disadvantageous decisions during the marriage. These decisions will not alter the rights and obligations under a premarital agreement. A party who leaves the workforce before building an adequate nest egg, without written assurance that the other party will provide financial security, must live with the consequences. A party who uses separate property income to pay routine expenses while other party pays the mortgage on a solely titled home will be disadvantaged; his/her income will have gone to consumption while the other party builds equity. He/she is not entitled to rely on purported oral promises of the other party to make provisions, such as a more generous will, not required by the written contract.

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Custodial Accounts, 529 College Savings Plans and Divorce

BY VICKI VIRAMONTES-LAFREE

Common options for families to save for their children's education are through custodial accounts and 529 savings plans. When a couple divorces, the treatment of these resources needs attention. A recent unreported case from the Maryland Court of Special Appeals points this up. This article highlights issues that should be addressed as part of a settlement agreement or, if necessary, in court.

UGMA and UTMA Custodial Accounts. There are two types of custodial accounts, UTMA (Uniform Transfers to Minors Act) and UGMA (Uniform Gifts to Minors Act). UTMA accounts have replaced UGMA accounts in most states and the District of Columbia. Each allows for creation of an account for a specific minor child. An UTMA can hold cash, securities, real estate, and other property. Often a parent is the custodian. The assets in the account belong to the child. The child is entitled to the account assets when he or she reaches age 18 or 21. Income in the account is taxable to the child in the year earned.

529s. A 529 plan is an investment account that grows tax-free. Withdrawals are not taxed if used for qualified higher education expenses, or for elementary or secondary school tuition (the latter limited to $10,000 a year).

Key Features of UTMA accounts and 529 Plans.

	529 Plans	Custodial Accounts
Types of Plans/Accounts	• prepaid tuition plan • educational savings account	• UTMA • UGMA
Purpose of the Plan/Account	Savings for education.	Savings for education and other purposes.
How established?	Adult, *e.g.*, parent or grandparent, opens and funds an account or purchases prepaid tuition contract.	Adult, *e.g.*, parent or grandparent, opens and funds an account. Must name a custodian.
Who owns/controls?	Account holder owns and controls; beneficiary has no legal rights to the account.	Child owns; custodian manages until child's majority.
Permitted beneficiary	A child, grandchild, etc.; can be transferred, *e.g.*, from one child to another.	Only a minor; one beneficiary per account. Cannot be transferred to another beneficiary.
Permitted use	Education (elementary and secondary schooling limited to $10,000/year).	Education and other purposes for the benefit of the child (but not to meet parental support obligation, *e.g.*, food, housing).
Income tax treatment	Earnings grow tax-free (federal); not taxed when money used for education.	Earnings taxed to the child in the year earned; no tax on withdrawals.

Considering Accounts for a Child in Settlement Negotiations. In Maryland and Virginia, the legal child support obligation ends when a child reaches age 18 or graduates from high school. A court cannot order a parent to pay for college. In the District of Columbia, the support obligation ends at age 21. A court could order a parent to pay for college, but the child may not finish college before that age. Parties negotiating a marital settlement agreement often wish to include provisions for college expenses. When they do, the terms of settlement should take account of existing custodial or 529 accounts as well as the possibility a parent will create such an account after the divorce.

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CUSTODIAL ACCOUNTS, 529 COLLEGE SAVINGS PLANS AND DIVORCE

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Custodial Accounts and Divorce Settlements

Because the assets of a custodial account belong to the child, a parent or other custodian must manage the account for the benefit of the child, not the custodian. For example, in the 2021 case of *Royzman v. Royzman*, a custodian-father withdrew all funds from his daughter's UTMA account to pay his attorney's fees in the contested custody case. He argued it was in her best interest that he do so. The Maryland Court of Special Appeals disagreed and affirmed the trial judge, who removed the father as custodian, ordered him to reimburse the UTMA and provide a full accounting to the mother. In a 1990 Maryland case, *Brodsky v. Brodsky*, the father agreed as part of a divorce settlement to pay for the daughter's college expenses. To meet his future obligation, he began saving in a custodial account and used these funds to pay for college. In a suit filed by the now-adult daughter, the court ruled the father was wrong to use the UGMA funds. The funds belonged to the daughter; he could not use them to satisfy his own contractual obligation. In both cases, the custodian ran afoul of the law in thinking he could use a child's custodial funds to meet an obligation of the custodian.

Parties negotiating a divorce settlement that will include an obligation for college can avoid what happened in the *Brodsky* case by including terms for existing custodial accounts and accounts a parent may create after divorce. For example:

- A parent is entitled to credit toward his/her college obligation for custodial funds distributed to the child when the custodianship ends (*e.g.*, at age 18 or 21);
- A parent agrees to use existing custodial funds for college until funds are exhausted with the obligation to contribute his/her personal funds to kick in only thereafter;
- Terms to address what happens if a child has no interest in college and wants to use an UTMA account to travel the world or take a gap year;
- Allocation between parents for expenses not covered by custodial funds;
- A parent is entitled to account statements for a child's custodial account held by the other.

529 Plans and Divorce Settlements. A 529 plan could hold upwards of $300,000. It may be funded with a parent's separate property, with marital property funds, or with monies from grandparents that they intend for the child's benefit. Courts in some states have held that a 529 account funded with marital property money and held by a parent is divisible property at divorce. Other courts have held that parents intended the transfer of marital property to a child's 529 account to be a gift to the child and not divisible. Courts in Maryland, Virginia, and the District of Columbia have yet to address this issue. This uncertainty means divorcing parties should negotiate terms for handling a 529 account to carry out their original intent to provide for education and to avoid future litigation. The marital settlement agreement can include the following:

- The account will be used solely to benefit offspring;
- The account holder will make funds available to offspring to pay for college and grad school;
- A parent who agrees to pay for college can meet his/her obligation through use of a 529 created before or after divorce;
- Disposition of funds left over after a child completes his/her education, *e.g.*, for another child of the parties;
- A parent's obligation to pay for college is limited to whatever is available in existing 529s;
- How 529 funds are to be spent, *e.g.*, spread out over 4 years or used until spent down to zero;
- Allocation between parents of expenses not covered by 529s;
- A parent is entitled to account statements held by the other.

Divorcing parents should collaborate with their lawyers to build an agreement that fulfills their shared goal of educating their children and that takes appropriate account of existing savings created for that purpose as well as a parent's post-divorce savings. ■

P&F NEWS

In November 2021, partner **Linda Ravdin** spoke to the Anne Arundel Estate Planning Council on Marital Agreements and Estate Planning for Blended Families.

Partners **Linda Ravdin**, **Jan White**, and **Vicki Viramontes-LaFree** all made *Washingtonian Magazine*'s list of Top Divorce Attorneys in the DC Metropolitan area.

Over the holiday season, the Firm was happy to support **Manna Food Center,** an organization that works to end hunger in Montgomery County.

Congratulations to **Anne Coventry**, **Jan White**, **Linda Ravdin**, and **Stephanie Perry** for being named to the Maryland Super Lawyers list for yet another consecutive year.

We also received accolades from *Best Lawyers:* the Firm as a whole was named as a Tier 1 Best Law Firm in the DC area. The peer-reviewed publication also named several of our attorneys as the best in the area for 2022. In Family Law, **Jan White**, **Linda Ravdin**, and **Vicki Viramontes-LaFree** took top honors. **Linda** and **Vicki** were named as best in Family Law Mediation, while **Jan** was named among the best in Collaborative Law: Family Law. **Anne Coventry**, **Stephanie Perry**, and **Adam Swaim** were named among the best Trust & Estates attorneys in Bethesda. Congratulations to all.

Treatment of Vermont Civil Union as a Marriage for Purposes of Divorce in Maryland

In 2020, in a case called *Sherman v. Rouse*, the Maryland Court of Special Appeals had to decide whether a 2003 Vermont civil union, which pre-dated marriage equality, should be treated the same as a marriage for purposes of granting a divorce and related rights, including spousal support and equitable division of property. One aspect of the problem presented to the trial court was that, unless the parties' legal status could be treated the same as a marriage, the Maryland court would have no authority to dissolve it; and, because the parties were not residents of Vermont, a Vermont court would have no authority to dissolve it either, leaving them in a rather awkward spot. The other aspect of the problem is that, unless the parties' legal status was treated the same as a marriage, there was no basis for equitably dividing the property accumulated during their 15+-year relationship. The Court of Special Appeals held that the Vermont civil union should indeed be treated the same as a marriage for purposes of granting a divorce and adjudicating property division. It seems like hair-splitting, but the Court of Special Appeals did not say a civil union was a marriage; rather, it said that, because the Vermont law creating civil unions specified that parties had the same rights and obligations as parties to a marriage, including the right to a divorce and to share in property at divorce, the Maryland court should respect Vermont law and give the Vermont civil union the same effect in Maryland. ■

CRYPTOASSETS AND ESTATE PLANNING

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accounts, including digital currency and cryptocurrency exchanges. The language in each controlling document should specifically grant permission to the custodian of cryptoassets to provide the fiduciary with access to the owner's cryptoasset accounts, including the content of electronic communications to and from the exchange.

Title. Whether cryptoassets can be held in the owner's revocable living trust depends on how they are stored. If held on a crypto exchange, the exchange may allow for creating an institutional account, akin to a bank account, that will hold the trust's cryptoassets. This should be done with caution, however, and an understanding that transferring the assets to the institutional account means relying on the exchange to safeguard the cryptoassets in its wallet. An owner selecting an exchange to take custody of cryptoassets for a trust should find a U.S.-based exchange that is well insured and has high security standards.

In certain circumstances, it may be advisable to form a limited liability company to hold title to and manage cryptoassets.

Fiduciary Duties. Choosing a fiduciary – an agent under a power of attorney, a trustee of a revocable or irrevocable trust, a personal representative under a will – should always be done with careful consideration. This is especially true where cryptoassets are concerned; once the fiduciary gains access to the account, there is limited oversight of the fiduciary's activities with regard to the assets held in the account. Another factor to consider is that a fiduciary who accesses the cryptoassets, and who later resigns or is replaced, may still be able to access the account through the password information that was previously used. The owner should consider granting the fiduciary the authority to change any passwords and pins that the fiduciary determines could be compromised.

The owner's estate planning documents should take account of the obligations imposed on fiduciaries by prudent investor standards. Generally, such standards impose a duty to diversify investments. If cryptoassets are a large part of a financial portfolio initially, or become a large part of the portfolio through a rise in their value, such that their value is or becomes disproportionate to the owner's other assets, the controlling document should provide guidance to the fiduciary as to whether the fiduciary may retain the assets or if he or she is expected to rebalance the portfolio. The owner may want to consider as fiduciary someone with specialized knowledge in cryptoassets who can be trusted with assessing the risk of holding a cryptoasset.

It is also critical for the owner to consider the fiduciary's ability to access the technology that manages the cryptoassets. During the owner's lifetime, the owner should sit down with his or her fiduciary and go through each step that is required to access a digital asset or digital currency account. This is vital to ensuring that the fiduciary can gain control of the assets when it is necessary.

Conclusion. The owner of cryptoassets should discuss with their fiduciaries and with their estate planning lawyer the specific types of assets that they hold and their current forms of storage. The owner should also provide the estate planning lawyer with an inventory of the cryptoassets. We recommend that our clients review their estate planning periodically to evaluate whether any revisions are in order. That review should include evaluation of changes in the value and form of assets as a result of acquisition of cryptoassets. ■

PREMARITAL AGREEMENTS AND POST-EXECUTION CONDUCT

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Issues in Planning for Death. When a premarital agreement creates obligations to a surviving spouse, parties must see to the execution of estate-planning documents – the will; beneficiary designations – while both are alive. When a spouse was previously divorced, he/she must update beneficiary designations; a failure to do so may result in a former spouse receiving life insurance or an IRA that parties intended go to a new spouse. A spouse who is entitled to life insurance under a premarital agreement should see to the payment of premiums so that the policy does not lapse.

Conclusion. A premarital agreement can be useful for many couples, especially those who have been married before, want to avoid a contentious divorce and to provide for both a spouse and children. However, such an agreement is only useful when parties take the steps necessary to carry out their obligations and make appropriate decisions during the marriage. ■

PASTERNAK & FIDIS, P.C.
7101 Wisconsin Avenue
Suite 1025
Bethesda, Maryland 20814

Our Firm sponsored a family through **Hearts & Homes for Youth**. Hearts & Homes is a nonprofit dedicated to empowering youth who have experienced abuse, neglect, mental health issues, homelessness and other trauma, to make positive life choices. Thanks to our generous employees for their contributions, and of course the caring folks at the organization for the important work they do.

Our employees supporting a family in need over the holidays.