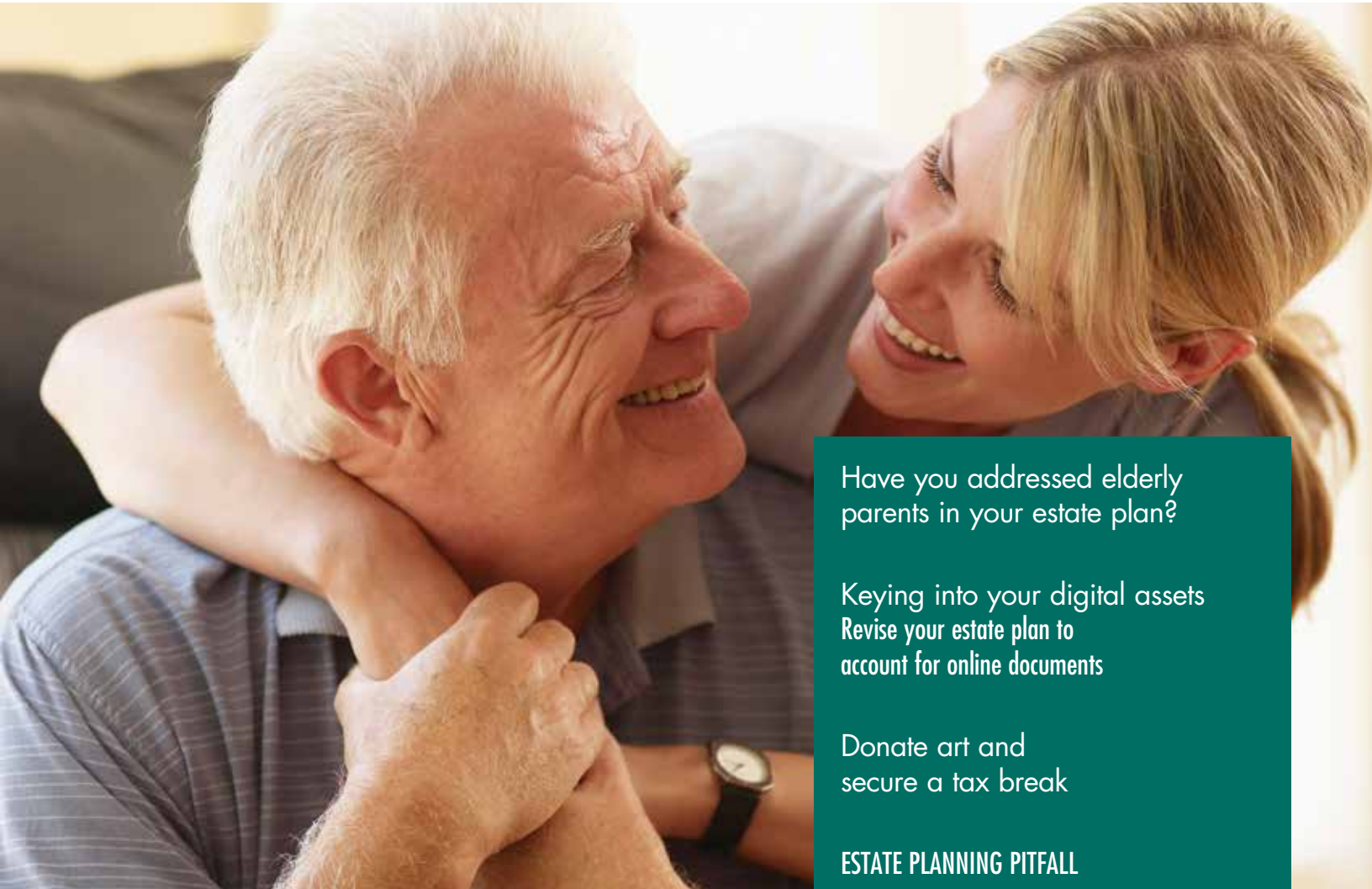


INSIGHT ON ESTATE PLANNING



Have you addressed elderly parents in your estate plan?

Keying into your digital assets
Revise your estate plan to
account for online documents

Donate art and
secure a tax break

ESTATE PLANNING PITFALL

Your college-age child
doesn't have an estate plan

APRIL/MAY 2016

CLARK HILL

www.clarkhill.com

Have you addressed elderly parents in your estate plan?

Typically, an estate plan includes accommodations for your spouse, children, grandchildren and even future generations. But some members of the family can be overlooked, such as your parents or in-laws. Yet the older generation may also need your financial assistance, perhaps even more so than Millennials who are off to successful starts in their careers.

5 step action plan

How can you best handle the financial affairs of parents in the later stages of life? Incorporate their needs into your own estate plan while tweaking, when necessary, the arrangements they've already made. Here are five critical steps:

Identify key contacts. Just like you've done for yourself, compile the names and addresses of professionals important to your parents'

finances and medical conditions. This may include stockbrokers, financial advisors, attorneys, CPAs, insurance agents and physicians.

List and value their assets. If you're going to be able to manage the financial affairs of your parents, having knowledge of their assets is vital. It would be wise to keep a list of their investment holdings, IRA and retirement plan accounts, and life insurance policies, including current balances and account numbers. Be sure to add in projections for Social Security benefits. When all is said and done, don't be surprised if their net worth is higher or lower than what you (or they) initially thought. You can use this information to formulate the appropriate planning techniques.

Open the lines of communication. Before going any further, have a frank and honest discussion with your elderly relatives, as well as other family members who may be involved, such as your siblings. Make sure you understand your parents' wishes and explain

Are strings attached to family gifts?

Medicaid is one form of assistance for the elderly that is based on financial thresholds. Therefore, large financial gifts to a Medicaid recipient can have negative implications. For instance, an elderly parent frequently can't have more than \$2,000 in assets to become eligible for Medicaid. Other potential benefits that may be cut if a person has too much income are Supplemental Security Income (SSI) payments to some elderly, blind and disabled people, Social Security Disability, food stamps, and certain forms of clinical services.

Thus, giving large gifts to a relative may increase the value of his or her assets for these purposes. Similarly, the law discourages parents from gifting to other family members so they can squeeze under the threshold for Medicaid. Under a "look-back rule," gifts made within five years of the application are subject to penalties, which would cause a delay in Medicaid eligibility. Bottom line: Consider all the angles when giving gifts.

the objectives you hope to accomplish. Understandably, they may be hesitant or too proud to accept your help, so some arm twisting may be required.

Execute documents. Assuming you can agree on how to move forward, develop a plan incorporating several legal documents. If your parents have already created one or more of these documents, they may need to be revised or coordinated with new ones. Some elements commonly included in an estate plan are:

- **Wills.** Your parents' wills control the disposition of their possessions, such as cars and jewelry, and tie up other loose ends. (Of course, jointly owned property with rights of survivorship automatically passes to the survivor.) Notably, a will also establishes the executor of your parents' estates. If you're the one lending financial assistance, you're probably the optimal choice.
- **Living trusts.** A living trust can supplement a will by providing for the disposition of selected assets. Unlike a will, a living trust doesn't have to go through probate, so this might save time and money, while avoiding public disclosure.
- **Powers of attorney.** This document authorizes someone to legally act on behalf of another person. With a durable power of attorney, the most common version, the authorization continues after the person is disabled. This enables you to better handle your parents' affairs.
- **Living wills or advance medical directives.** These documents provide guidance for end-of-life decisions. Make sure that your parents' physicians have copies so they can act according to their wishes.



- **Beneficiary designations.** Undoubtedly, your parents have filled out beneficiary designations for retirement plans, IRAs and life insurance policies. These designations supersede references in a will, so it's important to keep them up to date.

Spread the wealth. If you decide the best approach for helping out your parents is to give them monetary gifts, it's relatively easy to avoid gift tax liability. Under the annual gift tax exclusion, you can give each recipient up to \$14,000 without paying any gift tax, doubled to \$28,000 per recipient if your spouse joins in the gift. Any excess may be sheltered by the generous \$5.45 million gift and estate tax exemption in 2016.

Be wary, however, of giving gifts that may affect eligibility for some government benefits. Generally, availability of these benefits varies from state to state. (See "Are strings attached to family gifts?" on page 2.)

Seek professional help

Estate planning for elderly parents, which is complex in its own right, is intertwined with your own finances. Contact your estate planning advisor to help develop a comprehensive plan that addresses your family's needs. •

Keying into your digital assets

Revise your estate plan to account for online documents

In the not-so-distant past, you were likely to keep a copy of your will, power of attorney and other vital estate planning documents locked in a fire-resistant vault or file cabinet, with copies in your attorney's office. You also probably kept all your bank statements and other financial records filed away in your home. These paper documents weren't always easy to access, but were generally secure.

However, in this digital age, it's more likely that you're storing legal documents and financial statements in online ledgers, including email transmissions from banks and other financial institutions. This reduces paper clutter, but raises a host of other pre- and post-mortem issues.

More questions than answers

There are numerous questions to answer concerning your digital documents and social media accounts, such as:

- How will your electronic records be handled after your death?
- Can family members obtain passwords and access to your accounts?
- Will the bills you're automatically paying online continue to be paid?
- What happens to other information you consider to be confidential?

Unfortunately, with the laws in this area still evolving, the answers often aren't clear. For

example, a power of attorney may be thwarted by restrictive user agreements for social media sites. Another complication is that legal remedies vary from state to state, while many jurisdictions haven't enacted any legislation for these critical issues. One possible solution, the Uniform Fiduciary Access to Digital Assets Act (UFADAA), has yet to be embraced.

There are numerous questions to answer concerning your digital documents and social media accounts — unfortunately, the laws in this area are still evolving.

UFADAA at an impasse

UFADAA puts responsibility for handling most matters squarely in the hands of the fiduciaries. This proposed law, which culminated a two-year process by the National Conference of Commissioners on Uniform State Laws, gives executors, administrators, trustees, conservators/guardians and agents acting under a power of attorney authority to access the digital assets of a deceased person. For this purpose, "digital assets" include domain names, Web pages, online accounts, and electronic communications, such as email and social media messages.

A modified version of UFADAA was enacted in Delaware in 2014 and has been introduced in more than half of the states as of this

writing. The National Academy of Elder Law Attorneys and AARP have also endorsed the law. But it faces staunch opposition from social media giants like Yahoo and Facebook, as well as the American Civil Liberties Union. At this point, enactment of the law in most states appears remote.

Practical steps to take now

While lawmakers hash out the details of UFADAA, you can take steps today to help your family access your digital accounts after your death:

Compile a list of accounts and passwords. Provide email addresses, usernames and passwords to one or more relatives. Because passwords often change, update the list periodically.

Rely on a password manager. As an alternative to a list of passwords, you might use a password manager to handle accounts. You'll find this particularly useful when you can't remember the latest password change or where you jotted down the information. With this method, a single password grants access to all identified accounts.

Review social media agreements. Read the fine print about your participation in social media sites and other online accounts. If you're not satisfied with the terms upon closer inspection, you might terminate your account. Be especially wary of restrictions on the use of a power of attorney.

Find a storage unit. Another way to keep track of information is to use a digital



storage unit. There are online services available, or you could save information using encrypted files on your computer or other device such as a thumb drive. Wherever it's kept, be sure to share the location of the information, and the password for the files, with a trusted individual who'll need to access the data on your behalf.

Coordinate estate planning documents. Legal documents like a will and durable power of attorney will be strengthened if they're revised, where necessary, to accommodate digital assets. If these documents aren't already in place, now is a good time to have them drafted.

Bring your estate plan into the 21st century

Even though you can't physically touch digital assets, they're just as important to include in your estate plan as your material assets. Your estate planning advisor can help you account for any digital assets in your estate plan. •

Donate art and secure a tax break

When Peter and Kim decided to downsize and move into a condo in the city, they had to decide what to do with their sizable art collection. After discussing their options with their advisor, the couple decided to donate many pieces to their favorite charity.

By making the donation, Peter and Kim avoid capital gains taxes on the appreciated property, thus keeping more to pass on to loved ones. Because the top capital gains rate for art and other “collectibles” is 28%, donating art may be particularly effective.

What’s your art worth?

If you’re considering a donation of art, start by getting an appraisal. Given the subjective nature of art valuation and the potential for abuse, the IRS scrutinizes charitable donations and other transactions involving valuable artwork. Most art donations require a “qualified appraisal” by a “qualified appraiser,” and IRS rules contain detailed requirements about the qualifications an appraiser must possess and the contents of an appraisal.

IRS auditors are required to refer all gifts of art valued at \$20,000 or more to the IRS Art Advisory Panel. The panel’s findings are the IRS’s official position on the art’s value, so it’s critical to provide a solid appraisal to support your valuation.

Can you deduct the full market value?

To maximize your charitable deduction, donate artwork to a public charity, such as a museum or university with public charity status. These donations generally entitle you to deduct the artwork’s full fair market value. If you donate art to a private foundation,



your deduction will be limited to your cost. Keep in mind that the amount you may deduct in a given year is limited to a percentage of your adjusted gross income (for art, generally 30% for public charities, 20% for private foundations), with the excess carried over to future years.

It’s important to understand the related-use rule. To qualify for a full fair-market-value deduction, the charity’s use of the artwork must be related to its tax-exempt purpose. So, for example, if you donate a painting to a museum for display or to a university for use in art classes, you’ll satisfy the related-use rule.

Even if the related-use rule is satisfied initially, you may lose some or all of your deductions if the artwork is worth more than \$500 and the charity sells or otherwise disposes of it within three years after receiving it. If that happens, you can preserve your tax benefits by obtaining a certification from the charity stating that its use of the artwork before the sale or disposition was substantially related to its exempt purpose, or the charity intended to use the artwork in a manner related to its exempt purpose, but such use became impossible or infeasible.

Consider donating a fractional interest

Donating a fractional interest in art allows you to generate tax savings while still continuing to enjoy your art for part of the year. For example, if you donate a 25% interest in your art

collection to a museum, the museum receives the right to display the collection for three months of each year. You deduct 25% of the collection's fair market value immediately and continue to display the art in your home for the other nine months of each year. Be aware that the museum must exercise its right to display the art to support the deduction.

At one time, it was possible to give art away gradually using a series of fractional gifts, and claim increasing deductions if the art continued to appreciate. Under current rules, however, the

deduction for future fractional gifts is limited to the value of the initial fractional gift (or, if lower, the fair market value of the later fractional gift).

Making the right choice

After considering their options, Peter and Kim decided to donate a fractional interest of their art collection. But is that the right choice for you? The rules surrounding donations of art are complex. Your advisors can help you achieve your charitable goals while maximizing your tax benefits. •

ESTATE PLANNING PITFALL

Your college-age child doesn't have an estate plan

Is your child graduating from high school this spring and heading to college in the fall? Besides other essentials — such as clothing, toiletries, bedding and a laptop — make sure that he or she “packs” all the necessary financial and medical documents. Frequently, the checklist a college student should address will include some or all of the following items:

Will. Although your child is still in his or her upper teens, he or she isn't too young to have a will drawn up. The will specifies the disposition of his or her assets and can tie up other loose ends of the estate.

Health care power of attorney. With a health care power of attorney, your child appoints someone to act as his or her proxy or surrogate for health care decisions. Typically, you or your spouse is designated as the attorney-in-fact for this purpose.

HIPAA authorization. To accompany the health care power of attorney, Health Insurance Portability and Accountability Act



(HIPAA) authorization gives health care providers the ability to share information about your child's medical condition with you and your spouse. Absent a HIPAA authorization, making health care decisions could be more difficult.

Financial power of attorney. This legal document enables you and your spouse to conduct financial activities on your child's behalf. A “durable” power of attorney, which is the most common form, continues in the event that your child becomes incapacitated.

Clark Hill Personal Legal Services Group



Thomas M. Dixon specializes in litigating cases involving wills, trusts, and probate estates. Tom has substantial experience with will and trust contests and related litigation involving claims of undue influence, lack of testamentary capacity, fraud, and duress.

Tel: (313) 965-8587 • Fax: (313) 309-6887
Email: tdixon@clarkhill.com



Thomas E.F. Fabbri is an Associate in the Personal Legal Service Group of Clark Hill's Birmingham office and concentrates his practice in estate planning, tax planning, and probate matters.

Tel: (248) 988-5856 • Fax: (248) 988-2319
Email: tfabbri@clarkhill.com



Ryan M. Holmes focuses his practice on estate and trust planning and administration, estate planning for digital assets, special needs planning and administration, income, gift, generational and estate tax planning, probate and guardianship administration, and probate, trust and guardianship litigation.

Tel: (312) 985-5918 • Fax: (312) 985-5594
Email: rholmes@clarkhill.com



Mallory A. Kallabat is an Associate with the firm's Personal Legal Services Practice Group of Clark Hill's Birmingham office. She focuses her practice on estate planning, tax planning and probate matters.

Tel: (248) 530-6342 • Fax: (248) 988-2307
Email: mkallabat@clarkhill.com



Andrea M. Kanski's estate planning background includes analysis and development of tax and estate planning strategies consistent with the objectives of the individual and his/her family, including closely held, family-owned businesses. She has extensive trust administration experience and probate experience with both supervised and informal proceedings involving deceased estates, guardianships and conservatorships.

Tel: (313) 965-8589 • Fax: (313) 965-8252
Email: akanski@clarkhill.com



Ray J. Koenig III practices in the areas of probate litigation, trust litigation, fiduciary litigation, elder law, estate planning, and estate administration, with an emphasis on will, trust, guardianship, and advance directive contests and other fiduciary litigation. Ray has represented individuals, families, financial institutions, medical institutions and governmental organizations in all areas of his practice. Ray has extensive trial, appellate and mediation experience in state and federal courts.

Tel: (312) 985-5938 • Fax: (312) 985-5999
Email: rkoenig@clarkhill.com



J. Thomas MacFarlane specializes in estate, tax and business succession planning and in probate matters. He is a Fellow of the American College of Trust and Estate Counsel, and he is listed in *The Best Lawyers in America*, *Michigan Super Lawyers* and *Michigan Leading Lawyers*.

Tel: (248) 988-5846 • Fax: (248) 642-2174
Email: jmacfarlane@clarkhill.com



Darra L. Rayndon, a Member in Clark Hill's Estate Planning & Probate Practice Group, has over 30 years of practice experience and is certified as a tax specialist by the Arizona Bar. Darra's work includes tax planning, business entity formation and representation including corporations, partnerships, limited liability companies, and other businesses, estate and wealth succession planning, asset protection, exempt private offerings, and real estate matters.

Tel: (480) 822-6746 • Fax: (480) 684-1170
Email: drayndon@clarkhill.com



Ely W. Sluder is Of Counsel in Clark Hill's Personal Legal Services Group. He currently focuses his practice on business, contract, real estate, and intellectual property law. He typically handles client issues such as mergers and acquisitions, asset sales and purchases, business entity formations, commercial leases, and general contract drafting and review.

Tel: (480) 359-7583 • Fax: (480) 452-1223
Email: esluder@clarkhill.com



Heather C. Stumpf is an Associate in the firm's Estates and Trusts Practice Group. She focuses her practice on all aspects of estate and trust planning and administration. Heather advises her clients on the various complexities of estate and trust documents, including special and supplemental needs trust provisions, tax planning implications and the division of assets. She utilizes her experience acting as a corporate fiduciary to support individuals and families with retirement planning and multi-generational wealth transfer.

Tel: (412) 394-2485 • Fax: 412-394-2555
Email: hstumpf@clarkhill.com



Thomas F. Sweeney is very experienced in the planning, administering and dispute resolution of trusts and estates, business planning and the taxation of trusts, estates and gifts. He is a frequent writer and speaker for ICLE. Thomas is an adjunct tax professor at Wayne State Law School and he is listed in *The Best Lawyers in America*.

Tel: (248) 988-5867 • Fax: (248) 642-2174
Email: tsweeney@clarkhill.com



Steven J. Tjapkes, previously a veterinarian in private practice, works with family businesses, family farms, and agribusiness to meet the challenges of transferring family assets to the next generation. Steven lectures on estate administration and on buying and selling business assets.

Tel: (616) 608-1111 • Fax: (616) 608-1199
Email: stjapkes@clarkhill.com



Michelle Margolies Tran, Senior Counsel in Clark Hill's Estate Planning and Probate Practice Group, focuses her practice in the areas of sophisticated estate and tax planning for individuals, families, and businesses, using trusts and business entities to help her clients achieve their asset succession, estate tax reduction, and asset protection goals. She also assists her clients in the creation of business entities and business transfers, complex trust and estate administration, probate, prenuptial agreements, and QDROs.

Tel: (480) 822-6745 • Fax: (480) 684-1169
Email: mtran@clarkhill.com



Keith H. West is a Member with Clark Hill's Personal Legal Services practice group, has been involved in all facets of estate planning and estate administration for over 25 years. While in law school, Keith received the American Jurisprudence awards in estate planning and conflicts of law. In 2005, 2006 and 2011, Keith was named a Pennsylvania Super Lawyer, an honor bestowed upon the top five percent of Pennsylvania lawyers.

Tel: (412) 394-7756 • Fax 412-394-2555
Email: kwest@clarkhill.com