

Presenting a live 90-minute webinar with interactive Q&A

Estate Planning for Social Media Influencers: Identifying Assets, Tax Issues, Estate Administration Challenges

Choice of Entity, Selling Off Assets, Receipt of Gifted Products, Structuring Investments With GRATs, SLATs

TUESDAY, MAY 28, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Robert W. Clarida, Partner, **Reitler Kailas & Rosenblatt**, New York

Shaina S. Kamen, Attorney, **Stroock & Stroock & Lavan**, New York

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-961-9091** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

ESTATE PLANNING FOR SOCIAL MEDIA INFLUENCERS

Presented by

Robert W. Clarida, Esq.
Reitler Kailas & Rosenblatt LLC
rclarida@reitlerlaw.com
(212) 209-3044

Shaina Kamen, Esq.
Stroock & Stroock & Lavan LLP
shainaskamen@gmail.com
(561) 379-4119

PROGRAM OVERVIEW

- Industry overview
- Domicile planning
- Choice of entity
- Estate planning strategies
- Succession planning
- Considerations in administering estates with digital assets

INDUSTRY OVERVIEW

THE RISE OF THE “SUPER INFLUENCER”

What is influencer marketing?

- Form of marketing
- Focus is on influential social media users
 - Credibility
 - Authenticity
 - Access to a large audience
 - Industry-specific

Treated by the Federal Trade Commission as a form of paid endorsement

- Influencers subject to truth-in-advertising standards

Categories of influencers include:

- Brand builders
 - Boost brand awareness
- Brand converters
 - Drive sales, “convert”
- Hybrid approach

INDUSTRY OVERVIEW (CTD.)

Mediums of Influence

Blogging

- Affiliate linking
 - rewardStyle
 - LikeToKnowIt

Advertising

- Paid partnerships (short term pay per post or campaigns)
 - Kayture and L'Oreal (Kristina Bazan)
- Brand “Ambassador”
 - Song of Style and Laura Mercier (Aimee Song)
- Hosting and/or attending events
 - Revolve Around The World
 - Fashion Week
 - Met Gala
- Other brands advertising through the influencer’s website
 - Banner or side advertisements

INDUSTRY OVERVIEW (CTD.)

Mediums of Influence (ctd.)

Partnerships or collaborations with existing designers/brands

- Sold through department stores or specialty stores
 - Joe's Jeans x We Wore What (Danielle Bernstein)

Independent clothing or lifestyle brands

- Sold through influencer's personal website and/or in partnership with a brick and mortar or online store
 - Nordstrom: Something Navy (Arielle Charnas), Chriselle Lim Collection (Chriselle Lim), Pink Peonies (Rachel Parcell), Gal Meets Glam (Julia Hengel)

INDUSTRY OVERVIEW (CTD.)

Compensation

- Cash (including percentage of product sales)
 - Affiliate links: “Swipe up” through Instagram stories, link through blog, LikeToKnowIt
 - reported average 10% commission of sales from annual Nordstrom Anniversary Sale
 - Royalties
- Interest in company/brand
 - In lieu of, or in addition to compensation
- Other forms of compensation
 - press trips (i.e. travel)
 - products

IDENTIFYING ASSETS

Compensation

Cash

Closely-held business interests

Products

Travel/experiences

Acquisitions

Securities

Real estate

Closely-held business interests

Other “investment” assets
– artwork, jewelry, etc.

Life insurance

Inherent

Rights of Publicity

Intellectual property

Digital Rights (blogs, social media accounts)

DOMICILE PLANNING

- Objective – protect the influencer’s commercial rights in his or her name and likeness after death.
- Some states do, some states don’t; no federal law.
- Choice of law depends on legal domicile at time of death.

CAL. CIVIL CODE SEC. 3344

- Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.

N.Y. CIVIL RIGHTS LAW SEC. 50-51

- Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use . . .

COMPARISON

California:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, . . .

New York:

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade. . .

CAL. CIVIL CODE SEC. 3344.1

- (a)(1) Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. . . .

INDIANA CODE 32-36-1-8

Consent required for commercial use of a personality's right of publicity; application to the rights of a deceased personality

A person may not use an aspect of a personality's right of publicity for a commercial purpose during the personality's lifetime or for one hundred (100) years after the date of the personality's death without having obtained previous written consent from a person specified in section 17 of this chapter

MILTON H. GREENE ARCHIVES, INC. v. MARILYN MONROE LLC (9th Cir. 2012)

. . . At issue is whether appellants inherited a right of publicity, which was created and deemed posthumous by the states of California and Indiana decades after her death, through a residual clause in her Last Will and Testament. The will was subject to probate in the state of New York, which does not recognize a posthumous right of publicity. The issue of appellants' rights turns on whether Monroe was domiciled in California or New York at the time of her death. We conclude that because Monroe's executors consistently represented during the probate proceedings and elsewhere that she was domiciled in New York at her death to avoid payment of California estate taxes, among other things, appellants are judicially estopped from asserting California's posthumous right of publicity. . . .

DETERMINING DOMICILE

“Totality of circumstances,” e.g. –

Where does person reside more than 50% of the time?

Tax jurisdiction

Voting registration

Car registration

Drivers License

Passport address

ENTITIES – WHY BOTHER?

- Objective: transfer ownership of rights from individual to entity, to provide for continuity after death
- Unity of decision-making is important

CHOICE OF ENTITY

- Sole Proprietorship, with or without d/b/a
- Partnership
- Limited Liability Company – “loan-out company”
- “S” Corporation
- “C” Corporation
- Trust (many variations)

FEDERAL ESTATE, GIFT, AND GST TAXES

	<u>Prior Law (as of 12/31/17)</u>	<u>January 1, 2019 through December 31, 2025</u>	<u>As of January 1, 2026</u>
Estate, Gift, and GST Tax Exemption Amounts	\$5,490,000 per individual	\$11,400,000 per individual (2019) (as indexed for inflation)	\$5,490,000 per individual (as indexed for inflation)
Step-up in Basis for Inherited Property to Fair Market Value	Yes	Yes	Yes
Unified Tax Rates	40%	40%	40%
Annual Exclusion from Gift Tax	\$14,000/donee	\$15,000/donee	\$15,000/donee (as indexed for inflation)

TOOLBOX

- Planning for Incapacity
 - Health Care Proxy
 - Power of Attorney

- Testamentary Provisions
 - Last Will and Testament
 - Pour Over Will, coupled with Revocable Trust
 - Beneficiary Designations

- What about digital assets?

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT ("RUFADAA")

- As of May 1, 2019, RUFADAA has been enacted in 42+ jurisdictions and introduced in 5+ jurisdictions
- Recognizes digital property as a property right that can be managed
- Provides 3-tier framework for fiduciaries to access digital assets
- As a uniform law, state legislatures can "pick and choose" which sections to adopt or omit

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT ("RUFADAA") (CTD.)

What are digital assets?

- information that is stored on a user's computer and other digital devices
- content uploaded on websites
- rights in digital property

Examples:

- Email accounts
 - Contact lists
 - Website domains
 - Social media accounts
-
- May have economic or sentimental value

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT ("RUFADAA") (CTD.)

RUFADAA applies to the following "fiduciaries":

- Fiduciary acting under a Will signed before or after the effective date of the Act
- Agent acting under a power of attorney signed before or after the effective date of the Act
- Personal representative of a decedent who died before or after the effective date of the Act (including intestate decedents)
- Conservatorship commenced before or after the effective date of the Act
- Trustee of a trust created before or after the effective date of the Act

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT ("RUFADAA") (CTD.)

Priority under RUFADAA:

Tier #1 - Online tools

- Electronic tool provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person
- A digital "power-of-attorney"
 - Examples: Google's Inactive account manager; Facebook's Legacy Contact
- Participation renders all other instructions irrelevant
 - Overrides estate planning documents, standard Terms of Service Agreement

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT ("RUFADAA") (CTD.)

Priority under RUFADAA (ctd.)

Tier #2 - Estate planning documents

- Can be used to explicitly grant or restrict access to a fiduciary
- Addresses rights to digital assets
 - Examples: Will, Trust, Power of Attorney
- Consider naming a "digital executor"

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT ("RUFADAA") (CTD.)

Priority under RUFADAA (ctd.)

Tier #3 - Terms of Service Agreement

- Default if user does not utilize online tool and not addressed in planning documents
- Drawback: Often does not favor user

PUTTING IT ALL TOGETHER: DRAFTING FOR DIGITAL ASSETS

Define “digital devices” broadly in estate planning documents

- i.e., including, but not limited to, desktops, laptops, tablets, storage devices, telephones . . . and any similar digital device which currently exists or comparable items that may exist as technology develops.

Define “digital assets” broadly in estate planning documents

- i.e., any electronic record in which I have a right or interest, including, but not limited to, any electronic communication sent or received by me, email and other electronic communication accounts, digital music, digital photographs, digital videos, digital audio and video recordings, document files, digital libraries, file sharing accounts, cloud storage accounts, social network accounts, financial accounts, digital currency and wallets, software licenses, domain registrations, web hosting accounts, tax preparation and bookkeeping service accounts, online stores, affiliate, loyalty and rewards programs, other online accounts and similar digital assets which currently exist or comparable items that may exist as technology develops in the future.

Clearly express “lawful consent” in estate planning documents

- Give fiduciary access to digital assets stored in any location
- Fiduciary should be an authorized user to counteract hacking accusations

Empower fiduciaries to deal with digital devices and assets

- Fiduciary may otherwise not be able to access content and could be limited to “catalogue” of electronic communications
- Fiduciary should have authority to retain consultants or experts to secure and manage digital assets

PUTTING IT ALL TOGETHER: DRAFTING FOR DIGITAL ASSETS (CTD.)

- **My Executors shall have the power to take any action with respect to my digital assets, including the power to access, modify, delete, control, and transfer my digital assets**
- **To obtain copies of any electronically stored information of mine, including communications sent or received by me**
- **To engage experts or consultants or any other third party to assist in dealing with my digital assets**
- **To delete and/or reset the digital content of any such digital device prior to delivery of such device to a beneficiary**
- **I direct that any person or entity having custody of my digital assets shall disclose to my Executors all of my digital assets, including the content of electronic communications sent or received by me, and this direction shall override any contrary provisions in such custodian's terms-of-service agreement**
- **The authority granted herein to my Executors shall be construed as my "lawful consent" under the Electronic Communications Privacy Act of 1986, as amended, including the Stored Communications Act, as amended, the Computer Fraud and Abuse Act of 1986, as amended, and any other applicable federal or state data privacy law or criminal laws**

SPECIFIC PLANNING CONSIDERATIONS RECAP - IDENTIFYING ASSETS

Compensation

Cash

Equity, including closely-held business interests

Products

Travel/experiences

Acquisitions

Securities

Real estate

Closely-held business interests

Other “investment” assets
– artwork, jewelry, etc.

Life insurance

Inherent

Rights of Publicity

Intellectual property

Digital Rights (blogs, social media accounts)

PLANNING STRATEGIES TO LEVERAGE EXPANDED FEDERAL GIFT AND GST EXEMPTIONS

Dynasty/GST Trusts

- Assets removed from grantor's estate and not included in estate of children and more remote descendants; offers creditor protection
- Trust property grows free of transfer taxes for multiple generations
- May allocate GST exemption
- Best candidate: Assets likely to appreciate in value (securities, closely-held business interests, artwork); life insurance; cash (so that trust may make investment directly)

PLANNING STRATEGIES TO LEVERAGE EXPANDED FEDERAL GIFT AND GST EXEMPTIONS (CTD.)

Spousal Lifetime Access Trust (“SLAT”)

- Similar features of and benefits to dynasty/GST trusts, but spouse is included as beneficiary
- “Back Door” way of routing trust property to grantor through distributions to spouse
- May allocate GST exemption
- Best candidate: residential real estate; life insurance; other assets likely to appreciate in value (securities, closely-held business interests, artwork); SLAT should be funded with separate property only (and not assets jointly owned with beneficiary spouse)

PLANNING STRATEGIES TO LEVERAGE EXPANDED FEDERAL GIFT AND GST EXEMPTIONS (CTD.)

Grantor Retained Annuity Trust (“GRAT”)

- At the end of the GRAT term, the remaining assets pass to the ultimate beneficiaries free of gift tax
- May be structured as “zeroed out” GRATs so as to produce little or no taxable gift
- Low-risk from a valuation perspective because annuity automatically increases to produce a near zero gift
- Apply GST exemption when the GRAT terminates
- Best candidates: Assets which are likely to appreciate during the GRAT term at a rate that exceeds the IRS hurdle rate; assets which have a low valuation or represent a minority interest (closely-held business interests); assets with risky valuation (closely-held business interests)

PUTTING IT ALL TOGETHER EXAMPLE

Sally the Social Media Influencer (“Sally”) is married to Husband Harry. They have 2 minor children.

Sally has enjoyed a busy and vibrant career as a social media influencer. She has 2 million “followers” on Instagram, her own website with banner advertising and affiliate linking, and a newsletter with hundreds of thousands of subscribers.

Sally is a brand ambassador for a hair care brand (compensation reported by trade industry publications to be in the 7 figures), and is paid at least \$25,000 per post or appearance. For longer term campaigns, Sally can earn up to \$250,000.

As part of her compensation, Sally received a minority interest in an expensive athleisure brand. Sally and her husband have also invested in other start-ups.

Sally has collaborated with existing brands on product lines.

Two years ago, a major department store offered Sally the chance to develop an exclusive clothing line which is sold online and in selected stores.

PUTTING IT ALL TOGETHER EXAMPLE (CTD.)

Sally (and Harry) have accumulated significant wealth over the last few years. Their assets are as follows:

- Securities
- Cash
- Life insurance
- Minority interest in start-ups received as part of Sally's compensation
- Investments in other start-ups
- House in Bridgehampton
- Apartment in NYC
- Digital assets: blog, Instagram account

Sally and Harry come to you for estate planning advice. What would you advise Sally and Harry?

PUTTING IT ALL TOGETHER EXAMPLE (CTD.)

- Basic Planning Documents

- Pour Over Will
- Revocable Trust
- Health Care Proxy
- Power of Attorney

- Plan for Digital Assets

- Identify and inventory
- Value
- Team Approach

PUTTING IT ALL TOGETHER EXAMPLE (CTD.)

SLAT FBO HARRY AND DESCENDANTS

Residential property

Life insurance

Cash/securities

New investments

GST TRUST FBO DESCENDANTS

Life insurance

Closely-helds

Cash/securities

New investments

GRAT WITH FOLLOW ON TRUSTS

Closely-helds

Cash (to facilitate first few annuity payments)

SUCCESSION PLANNING

Register valuable intellectual property (trademarks, copyrights), to facilitate transfer to successor, for example....

Word Mark **CHRISSELLE**

Goods and Services: clothing for women, namely, shirts, blouses, skirts, trousers, pants, shorts, blazers, suits, dresses, tops, jumpers, singlets, tank tops, jackets; all related to celebrity fashion stylist, blogger and digital influencer Chriselle Lim.

Filing Date February 2, 2018

Registration Number 5737310

Registration Date April 30, 2019

Owner (REGISTRANT) Chriselle Inc. CORPORATION CALIFORNIA 1667 N. Main St. #220 Los Angeles CALIFORNIA 90012

Other Data The name(s), portrait(s), and/or signature(s) shown in the mark identifies Christie So Jung Lim, whose consent(s) to register is made of record.

Live/Dead Indicator LIVE

Word Mark **MIA KHALIFA**

Goods and Services Entertainment services, namely, . . . personal appearances by a social influencer, model, actress, host, and media personality; Entertainment services, namely, providing video podcasts in the field of sports, comedy, media, pop culture, contemporary social commentary, and adult entertainment; Entertainment services, namely, providing a web site featuring non-downloadable adult-themed photographs and videos.

Filing Date January 22, 2018

Published for Opposition June 5, 2018

Registration Number 5545813

Registration Date August 21, 2018

Owner (REGISTRANT) Obrien, Sarah Joe INDIVIDUAL UNITED STATES 1724 Woodward St, Apt 106 Austin TEXAS 78741

Other Data The name(s), portrait(s), and/or signature(s) shown in the mark identifies Sarah Joe Obrien, whose consent(s) to register is made of record.

CAUTIONARY TALE

JA Apparel Corp. v. Joseph Abboud, 682 F. Supp. 2d 294
(S.D.N.Y. 2010)

CONSIDERATIONS IN ADMINISTERING ESTATES WITH DIGITAL ASSETS

Best Practices in Administering Estates with Digital Assets

- Obtain disclosure of digital assets from applicable custodians
- Inventory and marshal digital assets
- Consider security measures to safeguard accounts
- Obtain valuations of certain digital assets such as websites and social media accounts
- Close, transfer, or sell digital assets consistent with client's estate plan

ESTATE PLANNING FOR SOCIAL MEDIA INFLUENCERS

Presented by

Robert W. Clarida, Esq.
Reitler Kailas & Rosenblatt LLC
rclarida@reitlerlaw.com
(212) 209-3044

Shaina Kamen, Esq.
Stroock & Stroock & Lavan LLP
shainaskamen@gmail.com
(561) 379-4119