

# Report From Counsel

Insights and Developments in the Law

Fall/Winter 2015

## *Protecting Your Digital Assets after Death*

*By Jason Smolen and Daniel Ruttenberg*

In today's digital and "paperless" age, it's difficult to stay on top of all our online accounts. Imagine how difficult it would be for a loved one to manage your "digital assets" after you die. From social media accounts to online financial holdings, you need to have a plan in place to protect your digital legacy. Without one, family members and estate executors are left to sift through email messages, Facebook status updates, blog posts, and photographs that may have significant monetary or personal value — provided they are able to access them with a password.

Until recently, estate planning primarily focused on one's personal property and finances, but for many of us, technology touches almost every part of our lives. Jason Smolen, a Principal with SmolenPlevy, says that is why it is vitally important that you decide how your digital assets will be managed properly. According to Smolen, "Technology is so much a part of the fabric of what we do every day, and many people don't realize that online accounts live on beyond them."

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## *SmolenPlevy in the Media*

For many of us in today's digital age, technology touches almost every part of our lives. It is important to keep a record of your "digital assets" as part of your estate planning. On WUSA 9, SmolenPlevy's Jason Smolen shared tips on safeguarding the location and access information of your online accounts and social media.



*SmolenPlevy Principal Jason Smolen  
with WUSA9 Anchor Mike Hydeck*

## *SmolenPlevy in the Community*

Devotion to Children (DTC) hosted its 5th Annual Cards 4 Kids Poker Event in September. Cards 4 Kids has raised more than \$150,000 for high-quality educational and childcare programs for children of economically disadvantaged families in the metropolitan area. SmolenPlevy, a longtime supporter of DTC, was proud to be a Card Sponsor of the event. Principal Daniel Ruttenberg currently serves as Vice President of DTC and has been a member of its Board of Directors since 2005.

# Divorce and Relocation

By Alan Plevy and Kyung (Kathryn) Dickerson

Divorce can be difficult, especially if one of the parties wants to move out of the area. The simple act of moving is complicated enough, but when you add children of divorce to the mix, relocating can become a daunting task. Your move may have a big impact on your custody or visitation rights.

Laws on relocation vary from state to state, but most states require each parent to notify the other parent and the court, in writing, at least 30 days before moving from one residence to another. This notice should include information such as the proposed future address, date of relocation and telephone number, if available.

Alan Plevy, Principal of SmolenPlevy, has had a significant impact on relocation cases in Virginia. In fact, *Virginia Lawyers Weekly* named two of Plevy's cases as among its top five Family Law cases in the last 25 years in its article, "25 Cases that Changed Law Practice in Virginia." *Northern Virginia Magazine* also named him to its list of top lawyers in the state.

In one of the cases, *Sullivan v. Jones* (2004), Plevy represented a divorced mother who remarried and wanted to move out of state so that, among other things, her current husband could be closer

to his son from a prior marriage. The child of her prior marriage spent most of her nights with the mother.

"It is very difficult for the other parent to see the child on a daily or weekly basis if the child moves across the country or even within the state if there are multiple

hours between homes," Plevy explains. This may mean that the non-custodial parent will not see the child in person, except on holidays, three-day weekends and

during the summer, though the parents can use technology to ensure regular communications. There are many reasons for relocation:

- a parent cannot find a job in their current geographic area
- relocation by an employer
- escalating cost-of-living issues
- military assignments
- to be closer to extended family or other support systems

"In my experience, these cases are difficult because, no matter what the outcome is in court, the children will no longer have regular personal contact with one of their parents," adds Kyung (Kathryn) Dickerson, Principal and Family Law attorney at SmolenPlevy. "It is best if the parents can come to an

agreement. Unfortunately, all too often, these cases are resolved by the court."

The court will consider factors such as the child's relationship with each parent, the child's stability at home and school, and the economic factors present. It is not sufficient that a parent

argues that the move is in the best interest of the parent seeking to move — the focus is what is best for the child. While relocation that provides a parent with a job has benefits for the child, those benefits are not the sole or primary

consideration in evaluating the impact on the child. Each relocation situation is factually different and seeking legal advice prior to relocating with a child is prudent.

Commonly, when courts rule in favor of relocation or if the non-custodial parent agrees to relocation, they are granted the larger blocks of vacation time during a school year and a greater portion of the summer.

In the end, the decision in *Sullivan v. Jones* ended up in Plevy's client's favor. The case was brought before the Court of Appeals twice, and the court upheld the mother's out-of-state move, finding it to be in the best interests of the child.



Alan Plevy



Kyung (Kathryn) Dickerson

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## Considering the LLC for Your Business Needs

Among the myriad issues facing principals contemplating a new commercial venture, the question of which legal organization vehicle to use must be addressed. While differences of opinion may abound regarding items such as selection of initial location, staffing and budgeting, the participants in any new venture hope to achieve similar goals when it comes to selection of the formal business entity. Each owner wants limitation of his or her respective personal liability, simplicity of organization, ease of operation and tax advantages. Given these criteria, the **Limited Liability Company**, or “LLC,” should be given strong consideration.

Traditionally, the **Business Corporation** or “C-Corp” was the vehicle of choice for most businesses. The entity is relatively easy to form; a mere filing of articles of incorporation with the secretary of state does the trick. All shareholders enjoy limitation of liability, meaning they cannot be personally sued for debts incurred by the corporation, and, thus, in a worst-case scenario, cannot lose more than their financial contribution to the corporation. However, the C-Corp requires certain actions to be taken via a board of directors that must operate through the strictures of formal bylaws that prescribe the

appointment of officers, notice and meeting requirements. Moreover, the C-Corp potentially subjects shareholders to double taxation; the corporation is taxed on income and the shareholders are then taxed on the distributed dividends occasioned by that income. Dividends are not deductible from C-Corp income.

Small qualifying corporations can make an election pursuant to **Subchapter S** of the Internal Revenue Code to escape the twofold taxation. A benefit of an “S-Corp” is that a reasonable salary is what is taxed as ordinary income and deductible to the corporation. Profit is like a dividend, but, unlike a C-Corp dividend, S-Corp distributions, though taxable at ordinary rates, are not taxed at the corporate level and are not subject to employment taxes.

The **General Partnership** requires no formal organization and is a “pass-through” entity for I.R.S. purposes; only the partners and not the partnership are taxed. The problem is that relatively minor decisions will most likely involve a majority of partners and, more importantly, each partner is vicariously liable

for partnership activities and for the full amount of partnership indebtedness. There is no limitation of liability.

Though there are other entity options, space does not permit the explication of all of them. The LLC is often an entity of choice as it provides liability protection while also avoiding double taxation. The LLC is neither a corporation nor a partnership, but rather enjoys the best aspects of both. The entity is formed in most states with the filing of articles of organization. Unlike a corporation, the LLC is not encumbered with the burdens of formal meeting requirements. It acts through one or more members or managing members and, unlike a partnership, both the managing and non-managing members benefit from limited liability. In addition to insulation from liability, the LLC is also a tax pass-through and, thus, shields members from double taxation. While specific and unique needs and circumstances must always be considered in making any decision, the LLC is an important option that oftentimes is one of the best options.

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*Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*



# Protecting Your Digital Assets after Death

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Smolen has seen an increase in the number of clients who want to include their digital property in their estate plans. He says that organizing and inventorying your online accounts is a necessary first step. “It used to be that, when someone died, you could go through their mail for a month, at the most a year, and usually find everything they owned. Now, with almost everything paperless, nothing shows up.”

Some online services have added features to protect digital assets. Facebook allows users to choose their “legacy contact” — a trusted person who can manage their account when they die. For online providers that don’t

offer this option, Smolen strongly recommends an “old school” approach. “You need to start with a physical list that gives instructions about what you have and what you want done with your various digital remains.” According to Smolen, it

can be a matter of dollars and cents. “If you don’t list a bank account, your family may never get that money.”

Even if your designated heirs or friends have all

the required passwords, they may still face some obstacles. Thanks to a confusing and sometimes contradictory snarl of online user

agreements and state and federal laws, your ability to transfer your online accounts to loved ones after death may be restricted or even prohibited. Smolen suggests, “Give your attorney the names of the people you trust, so that he or she can

make sure their names are on the right documents. This can help prevent post-death identity theft and fraud.”

Managing your digital legacy may be your trickiest estate-planning task. While death isn’t something we like to think about, it is essential to have a game plan for what

happens to your virtual life once you are gone. It will make things much easier on your loved ones during an already difficult time.



Jason Smolen



Daniel Ruttenberg

## Accolades for SmolenPlevy



*U.S. News & World Report* and *Best Lawyers* have ranked SmolenPlevy in their 2016 “Best Law Firms” publication for excellence in the practice areas of family law, and trusts and estates law. Firms included in “Best Law Firms” are recognized for professional excellence with persistently impressive ratings from

clients and peers. The 2016 “Best Law Firms” ranking complements the 2016 edition of “The Best Lawyers in America,” where Jason Smolen, Alan Plevy and Daniel Ruttenberg are recognized.

Principals Jason Smolen, Alan Plevy, and Daniel Ruttenberg have been included in the 22nd edition of *The Best Lawyers in America*®. The attorneys were listed in the 2016 edition of *The Best Lawyers in America*® in November. *Best Lawyers*® is the oldest peer-reviewed publication in the legal profession. It recognizes attorneys in 128 practice areas from all 50 states and the District of Columbia. Smolen, Plevy

and Ruttenberg were selected for this honor by other leading lawyers throughout the United States in the fields of business organizations, family law, and trusts and estates, respectively.

*Northern Virginia Magazine* has named Principals Jason Smolen, Alan Plevy, Daniel Ruttenberg and Kyung (Kathryn) Dickerson to its annual list of “Top Lawyers” for 2015.

Associate Joshua Isaacs is recognized as a member of Virginia’s Legal Elite by *Virginia Business Magazine* for 2015 in the Young Lawyers (Under 40) category.