



When the Social Media Influencer Follows You: Tips for Navigating Estate Planning for Social Media Influencers

The unique concerns and asset portfolio of social media influencers warrant familiarity with both planning techniques and digital asset protocols.

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The social media influencer market is expected to be worth more than \$10 billion this year,¹ with revenues from sources including affiliate links, blog advertisements, paid campaigns and partnerships, and, for the most successful influencers, product collaborations and standalone brands. The most successful super influencers have diverse asset portfolios including cash and marketable securities, luxury real estate, including vacation homes, artwork, high end handbags and jewelry, and, in some cases, investments in the brands which the influencer promotes. Where does estate planning fit in to such a fast-paced, exciting lifestyle?

While influencers share some similarities with more mainstream celebrities, the unique business model and asset profile of the influencer present special challenges when planning for the influencer client.² This article discusses some of the things to consider when embarking on such an engagement.

The Importance of Post-Mortem Domicile Planning

Practitioners often cite domicile as the most important issue for clients such as entertainers and athletes because establishing a domicile in a low or no income tax state can result in significant lifetime income tax savings. Domicile planning to maximize the benefits of the post mortem right of publicity is also an important component of the estate plan for the super influencer “deleb”³, or the deceased public figure whose estate continues to generate revenues after death.

The right of publicity refers to a person’s right to control and profit from the commercial use of her name, likeness, and persona. It is largely conferred by state statute or

common law, with more than half of all states giving their domiciliaries the right to limit the public use of their names,⁴ likenesses, and identities by others for commercial purposes, and to seek compensatory damages if that right is infringed upon. This right is descendible and divisible, although the law of the state where the individual is domiciled (or in some cases, resident) at death will govern the post-mortem use of this right.

For states which recognize a right of publicity, there is significant variation in the time period for when the right of publicity may be asserted post-mortem (and therefore, monetized by the decedent’s heir or licensee). California, for example, provides for such a right for a period of up to seventy years after death.⁵ Further, states differ as to who may assert this right and the manner by which the right may be asserted. While a descendible right, heirs of intestate estates could see this right divided among any

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number of family members as provided under the applicable state intestacy statute. In addition, certain states including Nevada and Texas require that a decedent (or his licensee) register a claim of the decedent's right of publicity before he can assert that the right has been infringed upon.⁶

For this reason, practitioners representing influencers who may hold such publicity rights should evaluate the applicable state law in the state where the influencer is domiciled. If an influencer expects to have valuable post-mortem rights, she should consider establishing domicile in a state that not only clearly recognizes these post-mortem rights, but offers opportunity to exercise the rights for an extended period of time. For example, an influencer who frequently collaborates with brands on clothing collections and is currently domiciled in New York, which does not recognize the post-mortem right altogether, should consider taking steps to establish domicile in a state with a clearly specified lengthy period of use, such as California. This will permit the beneficiaries or fiduciaries of the decedent's estate, as the case may be, to avail themselves of opportunities to monetize the use of the deceased influencer's persona following the influencer's death, and to restrict others who are not so authorized from doing so.

Although the right of publicity is not protected under federal law, practitioners should be aware that the value of such right (even if not monetized) will be included in a decedent's gross estate for federal estate tax purposes.⁷ This asset could be a good candidate for more sophisticated planning techniques early in the influencer's career when the value of such rights is *de minimis*.

Privacy is Paramount

Influencers are well known for their willingness to lay bare their personal lives in order to attract followers on Instagram and Youtube. In fact, authenticity in brand partnerships is often cited as one of the primary factors which drives the influencer's success. Some influ-

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encers, however, are not interested in sharing the most intimate details of their lives when it comes to their personal affairs. Wills are generally a matter of public record in most states, and may be easily accessed by third parties. For example, an influencer who resides in New York may not realize that a copy of her Will (or the proceedings relating to the administration of her estate, including, for example, guardian ad litem reports discussing the well-being of minor children) may be obtained by any third party simply by walking into the records department of the local Surrogate's Court and pressing "print" at the publicly accessible computer terminal. For

this reason, a "Pour Over" Will coupled with a Revocable Trust offers numerous benefits to the influencer client. Primarily, the dispositive terms of the Revocable Trust are generally not made part of the public probate record. Further, if a Revocable Trust is funded during the influencer's lifetime, probate may be bypassed altogether, offering an additional layer of privacy. Last, if the influencer becomes incapacitated, the trustee of the Revocable Trust can immediately step in to continue to manage the influencer's affairs without court involvement.

Don't Forget About Digital Assets

While traditional estate planning tools aid in the management and disposition of real and personal property, they may be ineffective as to the influencer's digital assets, access to which is generally governed by the terms and conditions set by its custodian.

The Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA"), which has been adopted by most states in varying forms, recognizes the existence of digital property as a property right that can be managed and accessed by third parties, including fiduciaries. RUFADAA defines a "digital asset" as an electronic record in which an individual has a right or interest.⁸ Influencers are unique in that digital assets such as email accounts, social media accounts, digital photos, website domains, and blogs are paramount to the business. Often these digital assets

¹ Social Media Influencers: Mega, Macro, Micro, or Nano, <https://www.cmswire.com/digital-marketing/social-media-influencers-mega-macro-micro-or-nano/> (last visited February 3, 2020)

² See Exhibit 1.

³ Rose and Pomeranz, *Top Earning Dead Celebrities*, Forbes (October 27, 2009).

⁴ For a list of states with statutes in effect, or

proposed statutes, see <https://righttopublicity.com/statutes>

⁵ Cal. Civ. Code section 3344.1(g).

⁶ See, e.g., Nev. Rev. Stat. Ann. section 597.800 and Tex. Prop. Code Ann. sections 26.006-.008.

⁷ *Estate of Andrews*, 850 F. Supp. 1279 (E.D. Va., 1994).

⁸ Section 2(10) of the Revised Uniform Fiduciary Access to Digital Assets Act.

have significant value, which would be lost if the influencer's heirs or fiduciaries are unable to access and manage such property.

RUFADAA provides a clear hierarchy as to how an individual's assets may be accessed by a fiduciary. Importantly, RUFADAA enables a fiduciary to access and manage digital assets both during the lifetime and after the death of the owner. Under RUFADAA, a fiduciary's access to an individual's digital assets is dictated by one of three tiers, in descending order of hierarchy:

- **“Online Tools”:** a user can utilize the provider's “online tool,” which is an electronic service 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 to the custodian for disclosure (or nondisclosure) of digital assets to a third party. Common examples include Facebook's Legacy Connect or Google's Inactive Account Manager. Any decisions made via the “online tool” will control over other designations, including the user's estate planning documents.
- **Estate Planning Documents:** A user who does not use a custodian's online tool (or if the custodian does not have an “online tool” available) may authorize access to and disclosure of assets through her estate planning documents, including lifetime access under a Power of Attorney instrument.
- **Default – Terms of Service:** Last, if the user has not utilized the provider's “online tool” and has not set forth instructions in estate planning documents, the provider's

terms of service will apply. Generally, the custodian's terms of service are not user-friendly and may prohibit a fiduciary from accessing a record of the digital assets altogether.

Practitioners who counsel influencers should become familiar with the applicable state version of RUFADAA so that the influencer's planning documents properly provide for access to and management of digital assets. When drafting, planners should define “digital devices” both currently, with respect to devices which are presently in existence, and prospectively to address devices that could exist in the future as technology advances. Moreover, “digital assets” should be defined broadly but should refer to, at a minimum, the influencer's email and social network accounts, photos, domain registrations, and web hosting accounts.

Critically, the planning documents should express the influencer's lawful consent for the fiduciaries (including lifetime fiduciaries such as an agent under a Power of Attorney instrument) to access the digital assets. Although many prominent influencers have teams in place to access or manage social media accounts, websites, and Youtube channels, without further planning these teams will not have the requisite legal authority under RUFADAA to access these assets when the custodian's terms of service agreement does not permit for such access or transfer of rights, and such informal access may be construed as “hacking” punishable under federal statute. With proper planning, access as set forth under RUFADAA can be granted to team members or a “Digital Assets Trustee” both during the influencer's life and following the death of the influencer. Because digital assets may have significant value

to the influencer and her estate, it is imperative that the planner think through the applicable provisions of RUFADAA to make sure that access to these assets is not lost.

Plan for Rainy Days with Spousal Lifetime Access Trusts

One of the most advantageous estate planning techniques for influencers is the spousal lifetime access trust (“SLAT”). The SLAT functions like a credit shelter trust but is funded during the grantor's life, which enables the grantor to take advantage of her significant \$11,580,000 estate and generation-skipping transfer tax exemptions⁹ before the exemptions sunset to pre-2018 levels, as is scheduled for January 1, 2026. Further, the influencer's generation-skipping transfer tax exemption can be allocated to the trust on a timely filed Form 709 when the trust is initially funded, thereby permitting property transferred to the SLAT (which could include the influencer's right of publicity, as noted above) and appreciation thereon to flow to lower generations free of transfer taxes.

The SLAT is a particularly attractive option for married influencers given the uncertainty of the longevity of the influencer industry. The influencer can fund the SLAT with a range of assets, including more traditional assets such as marketable securities and real estate. Since the influencer is often compensated in varying ways, the influencer can also fund the SLAT with more unique assets such as equity interests in businesses in which the influencer promotes, or even use the SLAT as an investment vehicle for new investments.

The allure of the SLAT is with its flexibility: by including the influencer's spouse as a beneficiary, if

the influencer needs access to the trust property in a less profitable year, distributions can be made by the trustee to the influencer's spouse, who could be a permissible beneficiary of the trust. This is a "back door" way of providing some income stream to the influencer without directly running afoul of the tax laws.

Plan Upstream

While traditional "downstream" planning focuses on transferring assets downstream to lower generations, the expanded estate and generation-skipping transfer tax exemptions make "upstream" planning a viable planning technique for influencers with significant wealth in excess of the applicable estate tax exemption. Upstream estate planning generally involves making gifts, whether outright or in trust, to family members in a more senior generation. When the recipient passes away (presumably earlier than the grantor), the assets transferred will receive an imme-

diated step-up in income tax basis to the date of death value.

Upstream planning can be an effective tool for super influencers who have amassed wealth over a short period of time and have one or more parents who have yet to utilize their respective estate tax exemptions. Because influencers are often compensated, in part, with stakes in newer companies that they promote, which often appreciate rapidly once the influencer asserts influence, these low-basis, appreciated assets are excellent candidates for upstream planning. The influencer can transfer low basis property to her parent outright or preferably to a trust for his or her benefit. Although the influencer may expend some exemption in transferring the property upstream to the parent, the step up in basis at the parent's death means that little or no capital gain is recognized on a later sale of the transferred property. Further, the property will not be subject to estate tax in the parent's estate, provided that sufficient exemption remains at his or her death. As the estate tax laws are

presently in flux, there is always some risk that Congress could scale back the expanded exemptions which are currently in effect, which could result in the imposition of estate tax on the transferred property in the parent's estate depending on the tax laws in effect at that time. Together with other tools such as traditional annual exclusion gifting and gifts structured to take advantage of the unlimited exclusion from gift tax, including payments for certain medical expenses, upstream planning can be an effective tool for influencers who wish to support a more senior family member and are not purely motivated by the tax benefits.

Conclusion

As a massive and growing celebrity market, the unique business model and asset profile of the influencer present special challenges, and a practitioner will be best prepared if they consider both the asset mix and transfer processes to retain value and control post mortem. ■

⁹ For tax year 2020, indexed for inflation.

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