DAY PITNEY LLP

Estate Planning Update
Summer 2022

The following is a summary of some estate planning developments and opportunities that may be of interest to you. We hope you find this helpful and look forward to hearing from you with any questions.

IN THIS ISSUE **PAGE**

In February, the U.S. Treasury published proposed regulations of which beneficiaries of inherited retirement plans need to be aware. The SECURE Act, which became effective in 2020, eliminated the ability of many beneficiaries of inherited retirement plans to stretch out withdrawals over their lifetime. Retirement plans include individual retirement accounts and other tax-deferred retirement accounts, including 401(k) and 403(b) plans. The proposed regulations, surprisingly, require that beneficiaries of many inherited retirement accounts continue to take annual distributions from the accounts.

Specifically, under the SECURE Act, an ordinary designated beneficiary (i.e., not an "eligible designated beneficiary") is required to receive the entire account within 10 years of the original account owner's death. Since its enactment, many practitioners, even those who are experts on retirement plans, believed that the concept of Required Minimum Distributions (RMDs) was eliminated in all instances where the 10-year rule applied. The proposed regulations clarify the 10-year rule vis-a-vis the RMD rules.

Eligible designated beneficiaries retain the ability to stretch distributions over their lifetime. An eligible designated beneficiary is any designated beneficiary who, on the date of

the original account owner's death, is (i) the account owner's surviving spouse, (ii) a minor child of the account owner, (iii) disabled, (iv) chronically ill or (v) not more than 10 years younger than the account owner.

Generally speaking, where a properly drafted trust is a designated beneficiary, one can look through the trust to the beneficiaries to determine the applicable rules for distributions.

Account Owner Dies Before Required Beginning Date

The proposed regulations provide that if the original account owner dies *before* the required beginning date (now age 72) and the proceeds from the account are left to an ordinary designated beneficiary, no distributions are required until the year of the 10th anniversary of the original account owner's death, at which time the entire account must be distributed. If the beneficiary is an eligible designated beneficiary, distributions are made in annual installments over the life expectancy of the eligible designated beneficiary, and the entire account must be fully distributed 10 years after the eligible designated beneficiary's death if it was not exhausted sooner by the beneficiary's life expectancy distributions.

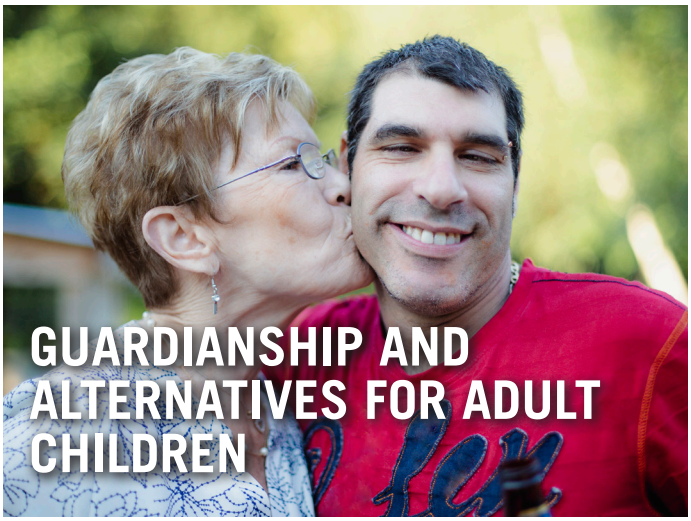
Account Owner Dies After Required Beginning Date

If the original account owner dies *on or after* the required beginning date, annual distributions to the eligible designated beneficiary will be made over the longer of (i) the original account owner's life expectancy (as if he or she were still living) and (ii) the eligible designated beneficiary's life expectancy; however, the entire account must be distributed upon the earliest of (i) the year that contains the 10th anniversary of the eligible designated beneficiary's death, (ii) the final year of the eligible designated beneficiary's life expectancy and (iii) the final year of the deceased account owner's life expectancy. A notable exception: If the eligible designated beneficiary is a minor child, the entire account must be distributed by the child's 31st birthday or 10 years after the child's death, whichever is earlier.

If the account owner names an ordinary designated beneficiary, the entire account must be distributed upon the earlier of (i) the year of the 10th anniversary of the original account owner's death and (ii) the final year of the ordinary designated beneficiary's life expectancy; *however*, during this period, distributions must be made annually over the longer of (A) the ordinary designated beneficiary's life expectancy and (B) the account owner's life expectancy (as if he or she were still living). As noted above, this provision is contrary to the previously widely accepted interpretation of the SECURE Act.

Effective Date

At this time, the regulations are not final, and accordingly, these rules are not yet the law. The IRS is accepting comments on the proposed regulations through the end of May, and we anticipate seeing final regulations before the end of 2022. ■



For those of us raising a child with an intellectual disability or developmental delay (ID/DD) or a mental health impairment, there are many decisions and changes to contemplate as our children reach the age of majority. These decisions include those involving transition planning within the special education system, converting to adult support services, applying for government benefits and contemplating whether our loved one has the capacity to make independent legal choices. There are many different fiduciary roles designed to assist our adult children with decision making, including guardians and conservators appointed by the court and agents appointed by the individual or by a government entity providing services to such individual. It is important to understand which role is appropriate and who has the authority to make a particular decision.

Guardian and Conservator

All individuals are presumed to be legally competent with the right to make their own decisions once they reach the age of majority in their state (typically age 18). These rights include the right to make financial decisions and enter into legal contracts, the right to make their own medical decisions and the right to keep their medical information confidential. If an individual is

unable to make informed decisions due to a disability, a local probate court will appoint a legal guardian who is tasked with making educational, financial and medical decisions for the incapacitated person. The guardianship may be limited by the court so the incapacitated person retains the right to make certain decisions. The court will typically require the opinion of a medical professional as to the individual's lack of capacity to make informed decisions. In some states, there are separate appointments for a guardian of the person to make educational, medical and life decisions, and a conservator or guardian of the estate to make financial and legal decisions. The court may appoint the same person to both such roles. Guardians and conservators are subject to ongoing court oversight.

Representative Payee

If an individual is receiving either Supplemental Security Income benefits or Social Security disability income from the Social Security Administration (SSA) and that person does not have the capacity to manage such income, the SSA will appoint a relative, a friend or even an agency to be the "representative payee." The role of the representative payee is to use such income to meet the beneficiary's basic needs for food, shelter and medical care as well as personal needs, including those for clothing, therapies and recreation.

Trust

It is vitally important that an individual with special needs receive any inheritance or substantial gift in trust. A Special Needs Trust (SNT) would typically be used in such a case. An SNT is designed to hold that inheritance or gift for the benefit of the individual while preserving the individual's eligibility for means-tested government benefits. The trustee manages and invests the trust's assets on behalf of the individual, making distributions that are in the best interests of the beneficiary, taking into account the impact such distributions may have on any government benefits. The trust should protect the individual from exploitation, financial waste and financial mismanagement. The trustee is named in the trust document by the creator of the trust (typically parents or relatives of the individual). The trustee typically is not under the supervision of a court. An SNT designed to receive a gift or inheritance is a third-party trust created by individuals other than the disabled individual and is distinct from a self-settled SNT, which is typically created by family members or a court to hold assets already owned by the disabled individual.

Supported Decision Making

There is a common misconception that all individuals with ID/DD require a court-appointed guardian to make all decisions for them for the duration of their lifetime. Families of children with ID/DD who are approaching adulthood typically receive only information related to the court process of guardianship. These families often receive neither information offering alternatives to court-appointed guardianship nor access to other resources, such as a formal support network that could encourage the adult child's independent growth.

Statutory alternatives to the court process could permit adults with ID/DD to retain independent decision making, self-advocacy, self-expression and the ability to select individuals to assist them. Many people informally engage in supported decision making when asking the opinion of others, such as asking a friend who is a mechanic to advise on the purchase of a car or asking a friend who is an interior decorator which paint color looks best for a bedroom wall. Adult children with ID/DD are better served by formally identifying the individuals who will assist them in a "supported decision-making agreement." Supported decision making is gaining leverage nationwide, and disability organizations and advocacy groups, such as the Arc and the National Council on Disability, strongly support the use of these agreements as an alternative to court-appointed guardianship. Some states, such as Rhode Island, have passed laws to recognize these agreements as legally enforceable contracts. In states where such laws do not yet exist, other documents remain viable for promoting supported decision making, provided that the adult child with ID/DD who retains the requisite level of capacity does not subsequently revoke them. Documents that serve as alternatives (or supplements) to supported decision-making agreements include the following:

Health Care Proxy/Health Care Representative
A health care proxy is a document that names one or more individuals as having the authority to make medical decisions for a person unable to do so independently. Typically, a health care proxy assumes full responsibility for the medical treatment and care of an adult with ID/DD, but when able to do so, the adult with ID/DD could assist with more routine care decisions.

Durable Power of Attorney
A durable power of attorney allows one or more individuals to assist with personal and financial affairs, including banking, legal matters and applying for government benefits. (The SSA requires individuals to sign their own form designating a representative.)

Educational Agent
Adult children with ID/DD may select an educational agent to represent them regarding individualized education programs and other educational needs. The educational agent will advocate for and provide approval of special education services, promoting continuity and minimizing exploitation within the educational system.

Conclusion

Every individual has the right to dignity, respect and self-determination. Regardless of whether an adult with ID/DD has a legal guardian or employs alternatives, such as the supported decision-making agreement, to designate supporters, those tasked with such responsibility have the duty to consider the disabled person's wishes, desires and preferences. Promoting independence and self-determination in the decision-making process is paramount and understanding the disabled person's desires is imperative. ■

In 2021, Florida joined Alaska, South Dakota, Kentucky and Tennessee to allow for certain assets owned by married couples to be owned as "community property," despite none of these states being "traditional" community property states. A community property state is one that treats all assets acquired during the marriage as being owned by both spouses, even when the assets are not actually titled in joint names.

Florida law already allowed married couples moving into Florida from a traditional community property state to retain the community property status of their marital assets. Now, Florida permits married couples to create a wholly new community property interest, even if they never lived in a community property state.

The benefit of community property is advantageous income tax treatment for the community property asset. You may be familiar with the concept of "basis" for income tax purposes. Generally, when an asset is sold, the taxpayer must report capital gain or loss, which the taxpayer calculates by subtracting his "basis" from the sale price for the asset. As a general rule, "basis" is what a person paid for the asset that is later sold; however, when an asset is received by a person because the owner died, the basis of that asset in the hands of the new owner is "stepped up" to the fair market value of the asset on the date of the prior owner's death.

In a separate property state (like Florida), jointly-held property is considered as being owned one-half by each spouse. Thus, when one spouse dies, the surviving spouse will only receive a stepped-up income tax basis as to one-half of the property. If the asset is community property, however, the entire interest in the community property receives a full step-up in income tax basis on the first spouse's death. This step-up can be incredibly valuable to the surviving spouse and the family, as it can eliminate or substantially reduce any capital gains incurred upon a sale subsequent to the deceased spouse's death. This technique is available to any taxpayer regardless of personal wealth and is beneficial for any married couple with appreciated assets. Except for the states mentioned above, this benefit has not previously been available to taxpayers who did not reside in a community property state.

To opt in to community property treatment, the married couple must transfer the property to, or have it acquired by, a Florida Community Property Trust (the "Trust"). To properly qualify, the Trust must meet specific requirements. First, the Trust must contain special language that manifests the intention to own community property. Second, the spouses must be the only qualified beneficiaries of the Trust when both are living. Third, the trustee of the Trust must either be a Florida resident or banking institution authorized to conduct business in Florida.

While beneficial, this technique is not without risk. Generally, the IRS is bound by state law property determinations; however, it is unclear whether the IRS will ultimately accept a community property "opt-in" from an otherwise separate property state. While similar laws in other states have been around for more than two decades, the IRS has not provided specific guidance on this Florida law. Additionally, a Community Property Trust may expose Trust assets to the creditors of both spouses. Those assets otherwise would have been protected had the assets been held separately by the non-creditor spouse. There may also be implications should the married couple later divorce. It is important to understand these risks prior to implementing this strategy.

In addition to being a great estate planning strategy for Florida residents, the Florida Community Property Trust may be an opportunity for residents of other states who can identify a Florida Trustee. As always, please contact our firm's attorneys if you are interested in learning more about the opportunity to add a new component to your estate plan with potential for substantial income tax savings. ■

With nonfungible tokens (NFTs) becoming more and more prevalent and an eye-popping amount of money changing hands in NFT sales, it is important that people who create or own NFTs understand how to protect and preserve their NFT assets. NFTs transform a digital file, such as an NBA highlight, a digital work of art or another digital collectible, into a verifiable asset (often referred to as "tokenizing"), the ownership of which becomes a discrete thing that can be bought, sold and traded using blockchain technology. The "nonfungible" nature of a token means it cannot easily be interchanged with another token. Because each token is unique, assigning a standard value to a token is nearly impossible due to the lack of comparable products and sales. Boiled down to their essence, NFTs aim to replicate the properties of scarcity, uniqueness and ownership more commonly associated with physical items, such as artwork, but in new and evolving forms.

Some commentators predict that NFTs are the next step for artists seeking to monetize unique mediums or for musicians aiming to increase profits in the era of streaming. Some have suggested that titles to houses, contracts and perhaps even estate planning documents will eventually be tracked via blockchain technology.

Many of the recent newsworthy NFT sales may have been outliers, and it is possible that the value of NFTs has started to descend from its peak earlier this year. Nonetheless, there are still multimillion-dollar sales being reported monthly. Although the market will probably level out at some point, the underlying concept seems to have lasting appeal.

Estate Planning Implications

Many people who own NFTs or advise people who own NFTs may be wondering how NFTs will impact their planning and their advice. Many professionals asked the same question years ago when cryptocurrency was new and untested, but now there are many people holding blockchain-based currencies in their portfolios. As a first step, client intake questionnaires and asset summaries should include a reference to NFTs. Identifying emerging asset classes in a portfolio could trigger an important discussion with implications for tax planning, re-titling and allocations to specific beneficiaries.

Planning With NFTs

In many cases, holding an NFT in a limited liability company (LLC) may be ideal. An LLC can provide for the efficient management of the entity's underlying NFT. The owner can transfer the NFT to the LLC and, subject to certain limitations if estate tax planning is an objective, retain control over the sale and management of the NFT by serving as manager of the LLC. The current owner can also name a successor manager who can take over when the current owner is no longer willing or able to serve.

An LLC can also facilitate transferring ownership of interests in the NFT. As the members (the owners of the LLC interests) wish to sell, gift or transfer interests in the NFT, they will be able to do so by simply transferring membership interests in the LLC, rather than having to go back to the blockchain for each transfer. Moreover, because the NFT will be owned by the LLC rather than the members individually, economic interests in the underlying assets can be transferred (via the transfer of membership interests in the LLC) without also transferring control of the token. This allows for the centralized management of the NFT even if the economic interests are spread across many parties.

An LLC can also provide a mechanism for minimizing transfer taxes by taking into account discounts for minority interests, the lack of marketability associated with a transferred membership

interest, and the volatile nature of these assets. It is conceivable that the growth potential of NFTs could make them ideal assets for gifting strategies as part of a well-rounded estate plan.

Finally, an LLC can also be used for asset protection purposes. In most cases, LLCs are used to protect the members' personal assets from liabilities related to the LLC—and that can certainly apply in the NFT context. For liability purposes, an LLC is treated as a limited liability entity—liabilities of the LLC are limited to the assets of the LLC—and the personal assets of the members won't be implicated in the LLC's liabilities (absent fraud). In some cases, however, the NFT may represent a very valuable asset of the members. In such a case, a properly structured LLC in an asset-protection-friendly jurisdiction can protect the NFT from the reach of the members' personal creditors.

Updating Estate Plan Documents

Regardless of whether the NFT is held in an LLC, the language regulating digital assets in wills, trusts and durable powers of attorney should be drafted to be as broad as possible, with the goal of encompassing NFTs and other emerging technologies. It is advisable to incorporate a reference to the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) into estate planning documents in states that have enacted RUFADAA or a similar state statute.

Care should be exercised in selecting fiduciaries who are knowledgeable with respect to NFTs and who are capable of managing such assets. It may be worthwhile to name a separate "digital fiduciary" who is tasked only with handling digital assets. Clients might also consider directing their fiduciaries to seek the advice of a tech-savvy trusted advisor to help the fiduciaries handle and manage valuable digital properties.

Consideration should also be given to specifically authorizing trustees to retain NFTs as part of the trust, despite the fact that many states have enacted prudent investor rules. Such rules generally require that fiduciaries invest as a "reasonable, prudent person would" after considering the purposes, terms, distribution requirements and other circumstances of the trust and to diversify trust investments to mitigate risk. In the absence of specific authorization to retain an NFT, a trustee may be obligated to sell the token and reinvest the proceeds, particularly in circumstances where the NFT represents a substantial portion of the members' wealth.

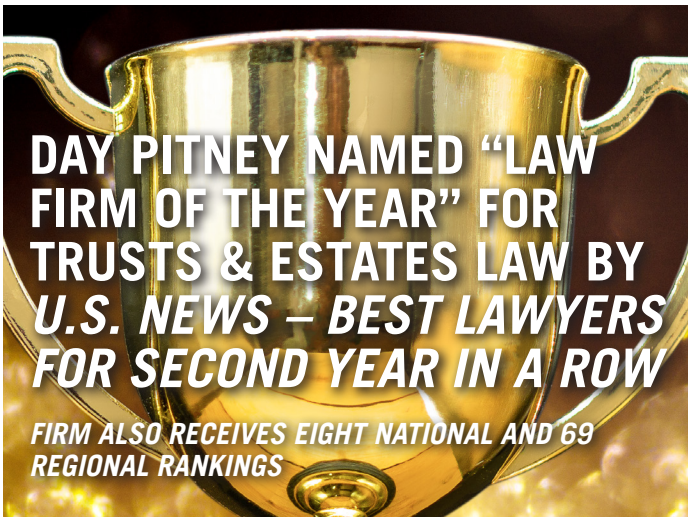
Access and Security

The decentralized nature of blockchain technology poses some unique issues with respect to access and control of NFTs. It is absolutely crucial that owners create a system for tracking and locating the personal keys and passwords necessary for accessing these digital assets, both for security during the owners' lifetimes and so that those administering estates and trusts can locate and secure digital assets after the owner's death.

Hacking is also a very real security threat for this type of asset. Although blockchain technology records are very secure, if a hacker is able to access the holdings in a wallet through compromised login credentials, the hacker can then sell or transfer the underlying asset. This sale would be recorded on the blockchain irreversibly. Attorneys can certainly envision how undue influence could be a contributing factor to accessing or hacking an account with a valuable digital asset.

Conclusion

Given the recent popularity of NFTs and their seemingly endless permutations, many of us can expect to be interacting with NFTs in one capacity or another for years to come. Advisors would best serve their clients by understanding this emerging asset class and the planning opportunities that may accompany NFT ownership. ■



In the 2022 edition of "Best Law Firms," published by *U.S. News & World Report* and *Best Lawyers®*, Day Pitney wins "Law Firm of the Year," for Trusts & Estates Law for the second year in a row. The firm also garnered top-tier rankings, earning Day Pitney both national and regional recognition.

The firm is ranked nationally in eight practices areas, including Tier 1 for Litigation - Construction and Trusts & Estates Law, and received 69 regional rankings, including 47 Tier 1 rankings across Boston, Hartford, Miami, New Haven, New Jersey, New York City, Stamford, and West Palm Beach.

According to the *U.S. News – Best Lawyers®* "Best Law Firms," law firms receiving the "Law Firm of the Year" are determined based on a handful of factors, including: feedback from lawyers recognized by Best Lawyers on individual lawyer and firm-wide work, the size and coverage of the firm in a specific practice area, historical analysis of the firm's "Lawyer of the Year" awards in this area, and research surrounding the firm's overall scope and areas of experience.

Please visit our website for our complete 2022 rankings at bit.ly/DPBLF2022.

"Best Law Firms" results are issued by *The U.S. News – Best Lawyers®* "*Best Law Firms.*" A description of the selection methodology can be found here (go to bit.ly/BLWMETHOD). No aspect of this advertisement has been approved by the highest court of any state. Prior results do not guarantee a similar outcome. ■

INDIVIDUAL CLIENTS DEPARTMENT ATTORNEYS

Charles P. Abraham NY, NJ	(973) 966 8029	Rebecca A. Iannantuoni CT	(203) 752 5011	Susan A. Robb MA	(617) 345 4618
Mary Katherine Andrews MA	(617) 345 4632	Sarah B. Jacobson FL	(305) 373 4024	Richard D. Sanders NJ, NY	(973) 966 8073
Christina N. Asimacos MA	(617) 345 4725	Hilary S. Kabak CT, NY, DC	(203) 862 7828	Dina Kapur Sanna NY	(212) 297 2455
Oliver K. Ayer CT	(860) 313 5725	A. Max Kohlenberg RI, MA	(401) 283 1239	Kaitlyn Sapp MA	(617) 345 4762
James A. Ballerano, Jr. FL, NY	(561) 537 4915	Edward F. Krzanowski CT	(860) 313 5729	Immeke M. Schmidt NY	(212) 297 2403
Emma D. Becker MA, RI	(401) 283 1266	Dana Levin CT, NY	(203) 977 7550	Jordana G. Schreiber MA, NY	(617) 345 4608
Jenna L. Bessette CT, RI, MA	(401) 283 1223	Amy R. Lonergan MA, NH	(617) 345 4613	Heidi A. Seely MA, CA	(617) 345 4687
Claire N. Carrabba RI, MA, FL, CT	(401) 283 1240	Leiha Macauley MA	(617) 345 4602	Sara Selmanaj CT	(860) 313 5753
Jenna E. Carroll NY	(203) 977 7342	Katherine A. McAllister CT, MA, NY	(203) 977 7303	Peter M. Shapland MA	(617) 345 4766
Daniela P. Catrocho NJ, NY	(973) 966 8426	Margaret St. John Meehan CT, NY	(203) 977 7583	Ken W. Shulman MA	(617) 345 4789
Peter Chadwick CT, CA	(860) 313 5757	Anna Rothfus Merin CT	(860) 313 5790	Grant W. Silvester FL	(561) 803 3513
Daniel J. Cohn CT	(203) 752 5030	Carl A. Merino NY	(212) 297 5829	David L. Silvian MA, CT	(617) 345 4655
Tasha K. Dickinson FL, NY, NC	(561) 803 3515	Seth J. Mersky FL	(305) 373 4019	Joshua Simon RI, MA, FL	(401) 283 1252
B. Dane Dudley CT, MA, NY	(860) 313 5752	Alessia P. Miller CT, NY	(203) 977 7302	Joanna M. Targonski CT, MA	(860) 313 5728
Renée A.R. Evangelista CT, MA, NY, RI	(401) 283 1238	Matthew L. Moore NJ	(973) 966 8035	Brian E. Thompson FL	(561) 537 4922
Megan D. Ferris FL	(305) 373 4005	Kyle G. Munns MA, FL, RI	(617) 345 4645	Angela Titus McEwan NJ, PA	(973) 966 8054
Christopher S. Fox MA	(617) 345 4641	Jay D. Mussman FL	(561) 537 4934	Christopher Voukides NH, MA	(617) 345 4627
Leigh E. Furtado MA, RI	(401) 283 1247	Andrew M. Nerney FL, CT, NY	(561) 803 3516	Darren M. Wallace CT, DC, NY	(203) 862 7874
Keith Bradoc Gallant CT	(203) 752 5025	Leigh A. Newman CT	(860) 313 5778	Barbara Freedman Wand MA, NY	(617) 345 4628
Sarah Elizabeth Gelfand DC, NY, CT	(212) 297 2456	Amit Ochani NY	(203) 862 7816	A. Michael Wargon FL, NJ, NY	(561) 537 4989
Alexis S. Gettier CT, NY, NJ	(203) 977 7432	Jaclyn S. O'Leary MA	(617) 345 4682	Ryan T. Welwood MA	(401) 283 1224
Christiana N. Gianopulos CT	(860) 313 5708	Jennifer M. Pagnillo CT, NY	(203) 862 7875	G. Warren Whitaker CT, NJ, NY	(212) 297 2468
Meredith H. Greene MA	(617) 345 4622	Mary Lou Parker FL, NJ	(973) 966 8061	Amy K. Wilfert CT, NY	(203) 862 7811
Alisa L. Hacker MA	(617) 345 4651	Melissa A. Passman CA, NY	(212) 297 2411	Susan W. Ylitalo CT, NY	(203) 977 7360
Heather N. Harris MA, CT	(617) 345 4703	Dana T. Pickard RI, FL	(401) 283 1262	Stephen Ziobrowski MA	(617) 345 4648
Gregory A. Hayes CT, DC, NY	(203) 977 7365	Moriah Preston MA	(617) 345 4616		
Alexander C. Horowitz FL	(305) 373 4016	Stephanie E. Rapp FL	(561) 803 3523		

California CA Connecticut CT Florida FL Massachusetts MA North Carolina NC New Hampshire NH New Jersey NJ New York NY Pennsylvania PA Rhode Island RI Washington, DC DC

ONLINE VERSION

You can access the online version of this issue of the *Estate Planning Update* at bit.ly/EPUSMR2022 or by scanning the QR code to the right.

Bit.ly Link
To access the first article, with links to other articles in this issue, or, articles mentioned in this *Update*, type the bit.ly link into your web browser. For example, to see the complete 2022 "Best Law Firms" rankings mentioned on page 7, type "bit.ly/DPBLF2022" into your web browser.

QR Code
Alternatively, you can access the first article by using the camera on your mobile device to scan the QR code. Then, click on the notification, which usually appears at the top or bottom of the screen, to visit the web version of the article.

A PDF version of the full newsletter is also available at the bottom of each article on our website.

SCAN ME