

Producers, Please Consider Digital Estate Planning

By Irene Wang & Eric Harrison

You are going to die. It's not fun to think about, but it's true. The following article explains digital estate planning for filmmakers and media producers.

Estate Planning isn't a privilege for wealthy families. It can be a useful tool for media producers to protect their family and their media assets. The primary purpose of estate planning is to arrange family affairs and to protect property. The property involved does not have to be physical property like land, houses, buildings, or stocks & bonds. Digital property is quickly becoming a valuable asset that should be considered in Estate Planning. This article discusses Digital Estate Planning for filmmakers and media professionals.

Two main approaches to digital media estate planning include wills and trusts.

Will Details:

A will is composed of the following parts: (a) opening and declaration of the will; (b) family and guardianship of family members; (c) executor of the will; (d) disposition of the property by the will; (e) other arrangements, for example, how to deal with life support and funerals; (f) executor's power; and (g) signatures.

Trust Details:

A trust is a legal document carefully prepared by a qualified attorney. The trust shall clarify: (a) the intention to create a trust; (b) the assets or properties to be contributed to the trust; (c) the beneficiaries; (d) the appointment and obligations of the trustee. A trust usually will specify how the assets in the trust should be handled and distributed.

A trust could be categorized as a testamentary trust, a living recoverable trust, or a living irrevocable trust as explained on the following pages.

Producers, Please Consider Estate Planning

	Testamentary Trust	Living Revocable Trust	Living Irrevocable Trust
What is it?	A trust that is funded upon the settlor's death according to his will. The trust intent and essential terms of the trust must be ascertained from the will.	A trust that is created and funded during the settlor's lifetime. Such trust can be revoked or amended during the person's lifetime.	A trust that is created and funded during the settlor's lifetime. Such trust cannot be revoked or amended by the person. Once the settlor contributes the assets to the trust, the settlor are not entitled to the assets any more.
Advantages	A trust can be created to oversee the settlor's assets, or the proceeds from a life insurance policy after the settlor's death. The main purpose of a testamentary trust is to protect the minor or infant beneficiaries, rather than tax purposes.	(1) Convenient management of assets; (2) Plan for the possibility of incapacity and avoid probate costs and delays; (3) permit secrecy as to beneficiaries and assets; (4) Allow the settlor to chose applicable state law.	(1) Avoid Settlor's income taxes on the income from the assets; (2) Protect the assets from future creditors or claims; (3) May avoid estate or gift taxes by using annual gift exclusions.
Disadvantages	The probate court may involve. The privacy is not well protected.	The assets are not shield from the settlor's creditors.	The settlor cannot dissolve the trust and get back the assets.

There is a variety of trusts derived from above distinctions to serve different purposes, including privacy, avoiding the probate court, taxes, asset protection, and charities. If you are not yet tired of learning about Trusts, the following pages are a non-exhausting list and explanation of common trusts.

Producers, Please Consider Estate Planning

	Explanation	Main Use
Spendthrift Trust	A spendthrift trust precludes the beneficiary from voluntarily or involuntarily transferring his interest in the trust. Further the beneficiary's creditors are precluded from reaching the assets. They have to wait until the income from the trust is paid to the beneficiary. However, the spendthrift clause cannot be used to shield the beneficiary if the beneficiary is the settlor.	Asset protection from the beneficiary's creditors
Charitable Trust	A charitable trust is set up for charitable purposes. Such charitable purposes include the relief of poverty, place an advance of education, religion or health.	Charity
Life Insurance Trust	A life insurance trust is usually a testamentary trust. The assets of the trust come from the proceeds from the life insurance policy upon the person's death. It is usually used to protect the minor children because they are not capable to manage the assets.	Protect the minor children
Dynasty Trust (Generation-skipping Trust)	This type of trust pass the assets down to the settlor's grandchildren. The children of the settlor never own the assets, but they may access the income of the assets on behalf of the minor grandchildren, while still leaving the assets in trust for grandchildren. This arrangement may help the family avoid estate taxes.	Reduce estate taxes
Grantor Retained Annuity Trust (GRAT)	GRAT is an irrevocable trust. A grantor transfers assets(s) as a gift into a trust. During a specified time of period, the grantor will still receive an annual payment. At the end of the term, the financial property is transferred to the named beneficiaries. It could help to realize tax benefits. In addition, the trust corpus (the remainder of the trust assets after the payment of annuity) are shielded from creditors.	Asset protection

Producers, Please Consider Estate Planning

	Explanation	Main Use
Qualified Terminable Interest Property Trust (QTIP)	QTIP trusts are commonly used when a spouse has children from another marriage. The other spouse may wish to provide for this spouse and take advantage of the spouse's unified credit against gift and estate tax, but nonetheless designate where the money will go after that spouse is deceased. For example, if Andrew's wife Betty has a son from her previous marriage, Andrew wants to support Betty's life, but prefer to pass the remaining assets to another beneficiary rather than his stepson (Betty's son from her previous marriage) when Betty dies. Andrew may set up a QTIP to clarify above arrangement.	Support the spouse, but control the distribution of assets upon the spouse's death
Pour Over Trust	The trust is empty at creation during life and the will transfers the property into the trust at death. For example, Peter may set up a will to clarify that what ever left in his estate will be poured over into a trust.	Manage the assets for minor children
Crummey Trusts	Crummey trust gives the beneficiary a power to withdraw the amount of any gift made to the trust during a short period of time. If the beneficiary does not exercise such withdrawal power, the assets will stay in the trust. Such assets are vulnerable to creditors during the time the withdrawal power exists. The reason to create a withdrawal power is for tax consideration.	Tax reasons
Offshore Trust	An offshore trust may serve for asset protection purpose. In such trust, the assets are poured to an offshore trust, with a trustee domiciles in a foreign country. Creditors first need to obtain the judgement in a U.S. court and then goes to the foreign jurisdiction where the trustee's domicile is located. Because the foreign law may be favorable to the settlor or beneficiaries, the creditors usually face heavy challenges to reach the assets. However, such arrangement could be expensive.	Asset protection

Ethan Johnson – 42 yr, Acclaimed Producer, Single Father

Let's start with a hypothetical example. Ethan is a 42-year-old acclaimed producer. He traveled extensively for work and has archived more than 4,000 video footage clips that he's shot over the past 15 years. He's utilized [Nimia Legal](#) to help secure ownership of a portion of his 4,000+ video footage library. Ethan is a single father with an eight year-old son. From time to time he shoots in difficult locations under extreme conditions. Occasionally, Ethan wonders, "what if some crazy accident occurs to me... What would happen to my son and my life's work?" Ethan has a vague idea of estate planning, but he is clueless about where to start.

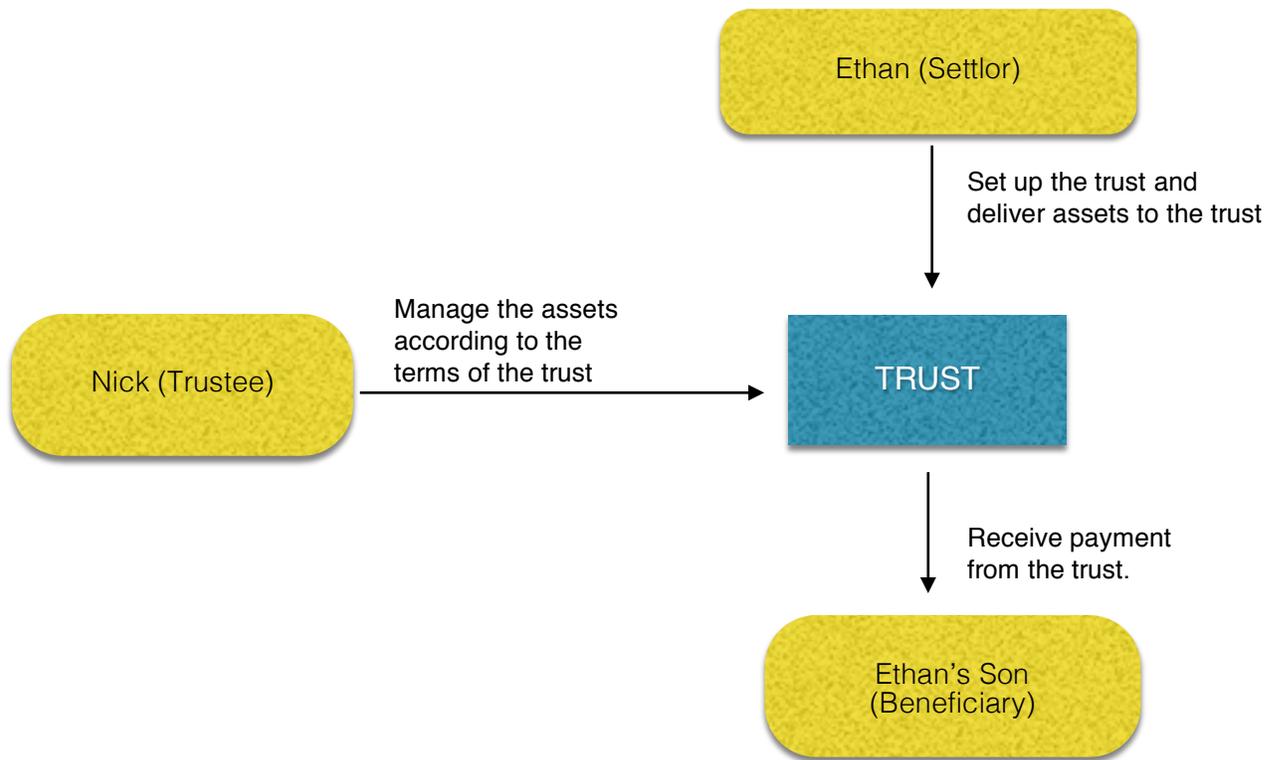
Will or Trust?

Ethan will encounter two main approaches to digital media estate planning: wills and trusts.

A *will* enables a person to direct the disposition of his estate as he wishes. If a person dies without a will, his spouse and descendants usually inherit the entire estate under the applicable state laws. For example, in Washington the default is half to your wife and half to your children. Friends, siblings and parents may be left out.

If a person has specific thoughts on how to dispose his digital media estate, setting up a proper will may be the right answer. For example, in the case of Ethan, he may want to give his best friend Doug the copyright to the "MotoX" series for memory of their friendship. Ethan may also want to donate \$1,000 to the Seattle Art Museum and \$1,000 to his church. Ethan needs to set up a will or trust to express these arrangements.

A *trust* is an arrangement in which one person has an obligation to keep assets for the benefit of another. It's similar to a will, but more complicated and has a few additional benefits. Let's explain by example. Ethan has digital media assets he wants to protect from creditors and since Ethan is a single father he wants a professional agent to manage his media assets so that his son can receive the yields, eg., if Ethan dies unexpectedly, Ethan's son is not old enough to actively monetize media assets. In addition, if someone sues Ethan, creditors will try to take his digital assets. A trust will help protect his son and protect his digital media assets from creditors. A basic trust relationship is illustrated in the chart below.



Ethan & Estate Planning 101

Ethan is presented with two choices: wills and trusts. He is more familiar with wills, and for him a trust seems like a limited privilege for very wealthy families. However, Ethan soon learns that a trust can be a useful tool to protect his digital media assets and his son.

(1) Will v. Trust:

Both wills and trusts can enable persons to dispose their property. A will does not dispose the assets during the person's lifetime, while a living trust requires the assets to be delivered to the trustee to establish a valid trust.

There are several reasons people would set up a living trust. First, the trust will have a reliable trustee who bears fiduciary obligations to manage the assets. This is helpful when the beneficiary is a minor. Secondly, unlike a will, a living trust can avoid the need of probate court upon the person's death. Thirdly, a trust is usually more private than a will, which could be important to some families. Finally, if properly designed, a trust could bring tax benefits when passing the estate to the next generation.

Producers, Please Consider Estate Planning

However, there are some downsides of a trust. First, a trust requires attorney fees for preparing a trust document and administration expenses. Furthermore, a trust only deals with monetary/property matters. A person still needs a will to appoint the guardianship of young children, or to arrange life support or organ donation.

Therefore, in many circumstances, a hybrid of will and trust is used for estate planning.

What Does Ethan Decide?

Ethan decides to make both a will and trust to achieve the following objectives: (a) name his cousin Julie as a guardian for his son Matt until Matt reaches 18 years old; (b) grant his best friend Ernst the copyrights of “X-Game” series; (c) donate \$1,000 to Seattle Art Museum; (d) pour all the residuary legacy, 4,000 video assets and all the proceeds of Ethan’s life insurance policy, to the family trust (a living revocable trust that will be discussed later); and (e) reject any life support if Ethan falls terminally ill.

Ethan: Step One

1. Before starting the digital estate planning process, media producers need to organize and manage their digital media assets.

Since media assets constitute a majority of producers’ assets, it is vitally important to build and safeguard a warehouse of your media assets well in advance of your estate planning. (selfless reminder... Nimia provides a badass Video Asset Manager to help archive and manage your life’s work, here’s a link to [sign up](#)).

In the case of Ethan, he will complete the following in preparation for his estate planning:

- (1) Create a comprehensive inventory list of all his media assets. A producer using Nimia can see a clear list of all his video footages in his Nimia asset manager.
- (2) Create an inventory list of other digital assets, including social networking profiles, blogs, webpages and domain names, online financial informations, digital photos, other online accounts/information, computer and phone information, email information, and sensitive information.¹ It is important to understand each website’s service agreements. Some websites

¹ Rochelle L. Haller, *Estate Planning Consideration for Digital Assets*.

Producers, Please Consider Estate Planning

prohibit any third party, even the person's heirs, to access the content or transfer the data. Ethan may need to migrate to a website which allows his heirs to access the data.

- (3) Store his media assets in a reliable place. This gives Ethan the ability to hand them over to his children, family members, or friends. Nimia provides a secure place to store media assets for producers.
- (4) Complete copyright registration for media assets. Under 1976 Copyright Act, Ethan does not need copyright registration to obtain the copyright. Once he creates a video work he owns the copyright. However, a timely and proper copyright registration will allow Ethan to bring copyright infringement claims and seek statutory damages. For details on the benefits of registering your copyright, [click here](#). For the details on the copyright registration process, please [click here](#).
- (5) Commercialize media assets. The copyright of a work created in and after 1978 endures the lifetime of the author and 70 years after the death of the author.² Therefore, as a producer, Ethan does not want to see his valuable footages sitting there without generating any revenues during such a long time of period. One of the good ways to commercialize his media assets is to display them on a market place like Nimia so that potential buyers from all over the world could see and purchase the license to use his video footages.
- (6) Actively monitor and seek settlements from people infringing his copyrights. Nimia Legal may provide such assistance with cease and desist notifications and collections.

Example Case Studies

Case 1:

In the case of Ethan, as we discussed earlier, the majority of his estate is the copyrights of the video footages, which are managed and stored on Nimia platform. His agent Nick is a good candidate to manage those media assets. Ethan is a single father of a young son Matt. He bought life insurance since he shoots in extreme weathers from time to time.

Ethan's goal is to leave a trust to his son, and have a reliable trustee to manage the media assets under the trust. A good option for Ethan is one of the two following trusts:

² See 17 U.S.C. 302.

Producers, Please Consider Estate Planning

- (1) Life Insurance Trust for the proceedings from his life insurance with a spendthrift clause. Proceeds from Ethan's life insurance policy will be remitted to this trust, whose sole beneficiary is Ethan's son Matt. As a minor, Matt is not capable of managing the assets. The trust will have a reliable trustee, either a corporate trustee or an individual, to handle the financial investment and look after Matt's financial needs. To prevent possible irrational use of the trust funds by Matt, the trust could place a limit on how much Matt could withdraw each year even after Matt becomes an adult.
- (2) A living revocable trust to manage Ethan's media assets. Ethan's agent Nick will be the trustee. The beneficiaries include Ethan himself and Ethan's son Matt. Ethan may use annual gift tax preclusions to transfer such assets to his son gradually so that in the future his son would not be obligated for estate taxes. Further, in case any accident happens to Ethan, the management of the assets run by Nick will go on smoothly.

Case 2:

Jennifer is a freelance cinematographer. Her hobby is to discover and shoot videos of flea markets all over the world. Jennifer's videos turn out to be highly valuable. Her husband Jack is a surgeon. Early this year a former patient brought a malpractice lawsuit against Jack for damages over \$2 million. Even though the claim was finally settled, both Jennifer and Jack are worried that litigations may happen again and may impact on their assets. Jennifer truly does not want to lose her videos that she cherishes so much.

Jennifer's goal is asset protection from future creditors. She may choose a living irrevocable trust, like a GRAT. Jennifer and Jack may put the real estate, stocks and the videos to the trust. Their son will be the beneficiary. Jennifer and Jack may still receive annuity from such GRAT trust, but the assets under the trust are no longer the couple's. For this reason, Jack's creditors could not put a claim on the assets.

Case 3:

Mike owns an advertising company. The asset portfolio of Mike and his wife is worth \$2.3 million, including the company, real estate, camera equipment and video archive. Their daughter just graduated from college and works in Mike's company. Mike and his wife plan to retire in 10 years. They would like to leave their daughter enough money down the road (possibly half of their assets). Mike's major concern is the considerable amount of estate tax that will occur.

To minimize estate tax, Mike may consider a Crummey Trust. Every year Mike and his wife will transfer \$28,000 to the trust. Mike's daughter has a power to withdraw such assets within 30 days. If the daughter does not exercise such withdrawal power, the assets will stay in the trust.

Producers, Please Consider Estate Planning

Because of the existence of withdrawal power, the assets transferred to Mike's daughter is eligible as a "gift". Since each year Mike and his wife each has annual tax exclusion for gift tax as much as \$14,000, the transfer of this amount of assets fit into annual exclusions and become tax free. Over the next ten years, a Crummey Trust could help Mike transfer considerable amount of assets to his daughter and avoid substantial estate taxes.

If you feel interested in estate planning, please feel free to contact Nimia Legal: legal@nimia.com .

**A SAMPLE FORM OF WILL
(for reference only)**

WILL

I, (*name of testator*), of County, (*state of residence*), declare this to be my Will.

FIRST: Revocation of Prior Wills. I revoke any and all other Wills and testamentary dispositions made by me at any time prior to the execution of this Will.

SECOND: Family. From the marriage to my predeceased spouse (*name of spouse*), I have children, namely, and (*names of children*). For purposes of this Will, any references to “my children” or “children of mine” shall refer to and (*names of children*), and any references to “my descendants” or “descendants of mine” shall mean my children and the descendants of my children.

THIRD: Disposition of Assets.

- A. _____.
- B. _____.
- C. _____.

FOURTH: Residue. I give all my remaining property (excepting, however, any property over which I have a power of appointment, because it is my intention not to exercise any power of appointment by this residuary gift) to the then Trustee of the (*name of testator*) Trust, a trust previously established by me and dated the same day as this Will, as that Trust may be amended from time to time, to be added to that Trust and to be held, administered, and distributed under the terms and conditions of that Trust.

FIFTH: Personal Representative. I nominate and appoint to be my personal representative. In the event is unable or unwilling to serve, I then nominate and appoint to be my personal representative. I direct that any of the above be permitted to serve as personal representative without bond or other surety.

SIXTH: Authorized Power of Personal Representative.

I authorize and empower my personal representative in my personal representative’s absolute discretion and from time to time and without order of court to _____.

SEVENTH: Guardian of Minor Child. In the event that my child is a minor at my death, I nominate and appoint, if she survives me, as guardian of the person and estate of my child. In the event does not survive me, I nominate and appoint _____, as guardian of the person and estate of my child.

EIGHTH:

A. Neither the gender nor the number of any word shall be construed to exclude another gender or number when a different gender or number would be appropriate.

Producers, Please Consider Estate Planning

B. The underlined captions set forth in this Will are for convenience of reference only and shall not be deemed to define or limit the provisions following the caption or to affect in any way their construction or application.

C. For the purposes of this Will, any person who does not survive me by thirty (30) days shall be deemed to have predeceased me.

D. It is my intention that the provisions of this Will shall be construed under the laws of the State of _____ .

I, _____, the testator, sign my name to this instrument, consisting of pages (including the additional page required for witnessing and notarizing of the Will), on this day of _____, 20____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last Will and that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

Signature of Testator:

We, _____ and _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as the testator's Will and that the testator signs it willingly, that each of us, in the presence and hearing of the testator, hereby signs this Will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

Signature of Witness:

Signature of Witness:

STATE OF:

COUNTY OF:

Subscribed, sworn to, and acknowledged before me by, the testator, and subscribed and sworn to before me by and, witnesses, this day of _____.

Notary Public for the State of:

Residing at:

Commission Expires:

(SEAL)