Focus
LAW

INSIDE

Don't leave heirs a mess

McKay Johnson says that old estate plan you have may be a tax disaster waiting to happen and that it's time to look at it in light of the new laws concerning the way trusts are constructed to benefit your family when you pass on to your reward.

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Break the tie before it turns to conflict

50/50 owners need to structure their companies to anticipate the legal battles that will inevitably arise

All too often, owners of small businesses find themselves in the unenviable position of being a 50/50 owner in a company or a member of a board on which a "deadlock" exists. The obvious problem with a business being owned equally by two parties is the possibility of a deadlock or "stalemate" and the resulting inability to quickly and efficiently resolve the deadlock. Unfortunately, when owners finds themselves in a deadlock situation, with no "tiebreaker" mechanism in place, there aren't many options available to quickly resolve the deadlock.

Proper Governance Procedures

Ideally, 50/50 business owners will discuss the possibility of a deadlock or voting tie in advance of the occurrence of a stalemate and adopt mutually agreed-upon procedures to address and resolve any deadlocks that may arise. However, the founders of companies often fail to consider the "what if" scenarios in the event the business relationship evolves such that the owners no longer agree on the management and operation of the company. It's not uncommon for business relationships, personal goals and objectives and management philosophies to evolve and change over time.

Deadlock resolution clauses are contractual provisions provided in a company's organizational documents (such as its bylaws, operating agreement or partnership agreement) or in a separate, standalone contract (such as a buy-sell or shareholder agreement) that provide a mechanism to address and efficiently resolve deadlocks on key issues related to the management and operation of the company. Such mechanisms are standard, customary and strongly encouraged in every 50/50 ownership situation or any business arrangement that could possibly result in 50/50 ownership. While disagreements often can't be avoided, with carefully drafted and appropriately tailored organizational documents and dispute resolution mechanisms, it's possible to resolve most business disagreements quickly and at minimal cost and expense while preserving the business relationship and maintaining the company's value.

THOMAS TAYLOR

Tiebreaker Provisions

Typically, in a corporation, tiebreaker provisions are imbedded in the company's bylaws, in the operating agree-

see 50/50 TIE pg. F11

Fiduciary duties under the new Utah LLC act: What you need to know

As has been widely reported, Utah adopted a new limited liability company act in 2013, the Utah Revised Uniform Limited Liability Company Act (new act). The new act applies to limited liability companies (LLCs) formed under Utah law in 2014 and after. The new act appears in the Utah Code beginning at Section 48-3a-101. The Utah Revised Limited Liability Company Act (old act) remains effective until 2016 for LLCs formed before Jan. 1, 2014, unless the LLC elects to be governed by the new act.

DAMON COOMBS

The new act has provisions governing fiduciary duties that work very differently than the old act. The fiduciary duties that apply by default (if not changed by an operating agreement) are different. The new act also changes how fiduciary duties may be altered by an operating agreement.

The new act may change how an operating agreement drawn up under the old act works beginning in 2016.

The provisions in an operating agreement that affect fiduciary duties are usually included to make management less likely to be held liable to the LLC and other members for how they manage the LLC, if sued.

Fiduciary duties are the obligations persons managing a business entity have to the business entity and the owners of the business entity. These duties may be different for different types of entities (such as corporations, partnerships and LLCs) and differ between states. The scope of fiduciary duties and how they may be changed by agreement may be a reason to choose to form an LLC in one state over another.

Whether you are involved in management of an LLC with multiple members or are an investor or co-owner in an LLC managed by someone else, what the LLC's operating agreement says about fiduciary duties will be very important to you.

The best time to negotiate what an operating agreement says about fiduciary duties is before you allow other members into your LLC, if you are managing the LLC, or before you invest in or become a co-owner in someone else's LLC. The next best time is before there is a controversy between management and other owners. If you are a manager or member of an LLC formed under the old act, it may be wise to review your operating agreement before the new act automatically applies to the LLC, and certainly before you decide whether your LLC should opt in early to the new act.

Fiduciary duties usually include a "duty of care" and a "duty of loyalty."

If the operating agreement doesn't say anything about these duties, management is subject to the duty of care and duty of loyalty described in the new act.

Keeping Fiduciary Duties in the Cabin

The new act leaves the door open for judicial development of fiduciary duties in addition to the duty of care and the duty of loyalty. That means a judge could make up an additional fiduciary duty to cover some situation which seemed (to the judge) to call for a remedy. No one really knows what might result under this provision. The drafters of the new act call this "uncabined." This provision is in the new cct because LLCs are still a relatively new type of business entity and the drafters thought judges should have some latitude to deal with situations which might be unique to LLCs. Most judges are careful about venturing into uncharted territory, but there is a chance that some new way for management to be held liable to an LLC or its owners might be invented.

From management's point of view, this may inject an uncomfortable amount of legal risk into what may already feel like a risky business. However, the new act provides a way to keep fiduciary duties mostly "cabined." Under the new act an operating agreement can provide that there are no fiduciary duties other than the duties of care and loyalty, if such a provision is not "unconscionable."

Unconscionable in contract law usually means a gross unfairness, great overreach or one-sidedness. As between parties of roughly equivalent bargaining power, it is relatively difficult to show that a contract provision is unconscionable. The new act has

see LLC ACT pg. F4

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ESTATE PLANNING:

That plan you're counting on may be built around some old rules

Celebrations are still underway since Congress raised the death tax exemption amount to $5 million per person in 2012. Sadly, there's some bad news: Many Americans have estate plans that are built around the old tax rules and those plans are now dangerously out of date.

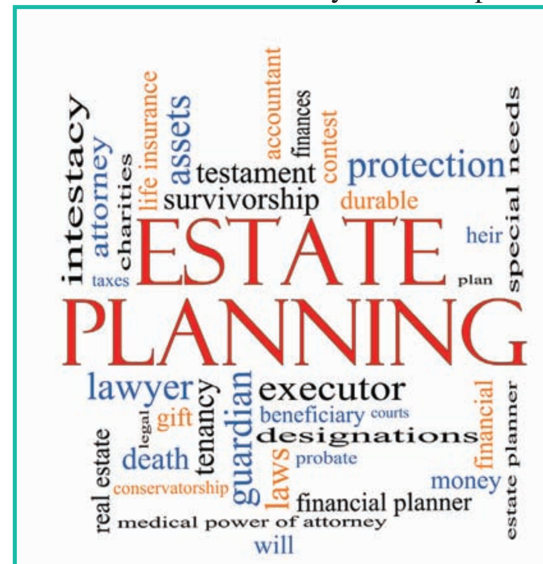
In the old days, we frequently recommended an estate plan with a mandatory "Exemption Trust" (also known as "Family Trust" or "Credit Shelter By-Pass Trust"). Many professionals call this type of trust an "A/B Trust."

Formerly, the only reason (or the main reason) to have an Exemption Trust was to save estate or death taxes. It was the only way to give your family the benefit of two death tax exemption amounts (one for each spouse). Under current law, you no longer need a separate Exemption Trust to cash in on those death tax savings. Indeed, if your plan calls for an Exemption Trust, your family could be heading into three kinds of trouble.

First, will your surviving spouse be happy with an unnecessary separate trust? This irrevocable trust springs into existence following the death of the first spouse. It requires separate bookkeeping, separate tax returns, separate management, accounting fees, attorney's fees, etc. — every year for the rest of his/her life. How ironic. Lots of folks got their trust and estate plan to avoid the one-time cost of the probate process, yet the aggregate, annual costs of administering an Exemption Trust will be much worse.

Second, many Exemption Trusts impose serious fiduciary duties on the surviving spouse; it gives the other beneficiaries legally enforceable rights against your spouse. Recently, several surviving spouses have asked us, "What do you mean, these assets are not mine?" Sadly, both the trust agreement and Utah law say the children (possibly step-children) have vested rights that often trump a surviving spouse's goals and desires. In extreme cases, the family dukes it out in court.

Third, an Exemption Trust could deliver an income tax disaster. None of the assets in an Exemption Trust will qualify for a step-up in basis that all other assets enjoy. Suppose you own a tract of land with a potential taxable gain of $1 million. At your passing, that potential for taxes is wiped out. That's because the tax basis for your land is re-set to its then-fair market value and if your family sells it soon after your death, they will pay ZERO income taxes. If your spouse inherits this land and holds on to it until she dies, it gets a second step-up at her passing. Again, no income taxes if it is sold at its date of death value. But if the same land goes into an Exemption Trust, it will not get that second step up in basis. Your family will be stuck with unnecessary income taxes.



You might be better off with a plan that only has one trust for the surviving spouse — no hassles, no handcuffs, no heartburn. Maybe your plan is better off as-is, especially if you need the Exemption Trust to deliver protected benefits to your spouse and/or descendants. Maybe you need a plan that has options so the surviving spouse (or your trustee) can pick the best arrangement based on the situation at the time.

Bottom line: Your plan was probably good (back then), but now it could be very bad. Sometime soon, prior to your "promotion to glory," dust off your documents and get them reviewed and revised.

McKay Johnson is a shareholder and member of Durham Jones & Pinegar's Estate Planning Section. His practice focuses on advanced estate and tax planning, asset preservation, business formations and operations, charitable giving and business succession.

LLC ACT

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provisions which should make such a showing even more challenging. A provision might be reasonable in some circumstances and unconscionable in others. It may, therefore, be prudent to include "savings" language to specifically say that the provision isn't intended to be unconscionable, and if a court finds it unconscionable, the court should cut back the meaning of the provision to provide the greatest limitation on fiduciary duties without being unconscionable. In theory, this approach to drafting a provision to cabin in fiduciary duties should protect management as much as possible from the new act's uncabining of fiduciary duties. Since the old act did not refer to unconscionable as a standard, older operating agreements are not likely to have such language. Under the new act, unless the operating agreement expressly cabins fiduciary duties, they are uncabined. A cabining provision is generally desirable from management's point of view. Operating agreements drawn up under the old act may not fully "cabin" duties under the new act.

How Much Loyalty is Reasonble?

The new act defines the duty of loyalty in more detail than the old act. Management has a general duty to account for and use the LLC's property only for the LLC's benefit. The new act makes it clear that business opportunities are treated like other property of the LLC and that the corporate opportunity doctrine applies to LLCs under the new act. This means management of the LLC cannot use an opportunity that the LLC could use, which is within the scope of the LLC's activities, or which becomes available because of the LLC's activities, other than for the benefit of the LLC. Management is also prohibited from dealing with the LLC if management has an interest adverse to the LLC, or deals on behalf of someone with an interest adverse to the LLC. The new act also prohibits management competition with the LLC.

It is common for operating agreements to provide that management can deal on its own behalf with the LLC, engage in activities competitive with an LLC, and exploit opportunities that might otherwise belong to the LLC. In almost all small-business settings, such activities are necessary, and, therefore, an operating agreement should usually authorize them to some extent.

Provisions of this sort which seek to broadly exonerate management from those aspects of the duty of loyalty may be perfectly reasonable in some settings, and over-reaching enough in others to be unconscionable. For this reason, while broad generic provisions are likely desirable to management, under the new act thought should be given to tailoring these provisions to meet the specific needs of the LLC in light of its specific proposed activities. Broad provisions should include appropriate "savings" language.

You may want to consider whether your operating agreement gives you the latitude you need in your LLC in a way you can reasonably expect to be enforced. Old act operating agreements may need to be amended before 2016 to validate existing practices.

What Approval do you need from Other Members for Specific Transactions?

The old act requires management to account for and hold as trustee benefits that are derived from transactions which may breach the duty of loyalty without the consent of members holding a majority interest in profits. The default provisions of the new act require that approval for conduct which violates the duty of loyalty must come from a unanimous vote of members after full disclosure. The requirement for unanimous approval could be a very unwelcome surprise.

The new act permits an operating agreement to include methods by which a transaction, which otherwise violates the duty of loyalty, can be authorized or ratified by "one or more disinterested and independent persons after full disclosure of all material facts." This is an invitation to include provisions in an operating agreement which establish a method for authorization, or maybe more than one method. A provision that imports the generic statutory concept is probably a good starting point.

More specific procedures should also be considered. For example, a process for review by an independent committee of managers could be helpful. Appropriate ratifying processes for transactions which might breach the duty of loyalty should be implemented.

Does Management have a Reasonable Duty of Care?

A conscious attempt was made in the new act to keep the duty of care very similar to the duty of care set forth in the old act. In both, a member in a member-managed LLC or a manager in a manager-managed LLC will not be liable for a breach of duty of care unless that person's conduct is reckless, grossly negligent, intentional misconduct or a knowing violation of law.

This is a much lower standard than the "reasonable care" standard

see LLC ACT pg. F11

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Marijuana in the workplace: Other states' laws affect Utah employers

An employer in Utah might be inclined to ignore marijuana as a workplace issue because marijuana is illegal in Utah. But, an employer should consider some questions: Does the employer have offices or employees in other states? Has the employer been keeping up with trends in marijuana laws in surrounding states? Does the employer know current Utah law regarding cannabanoids and the legislature's consideration of options for medical marijuana in Utah?

This article provides a brief summary of marijuana laws and court decisions, implications for employers and legislative activities in Utah.

Federal and State Laws Addressing Marijuana

Marijuana is a controlled substance classified in schedule I under Utah and federal law. This means it has a high potential for abuse and there is no currently accepted medical use in the United States. Contrast a schedule I substance to a schedule II drug like morphine. The latter has a high potential for abuse but also has an accepted medical use. This distinction is the crux of the controversy over "medical" marijuana. States that have "legalized" medical use take the position that marijuana (with its innumerable strains) has a legitimate medical use, particularly for conditions for which there are not effective drugs and for patients who do not respond to FDA approved drugs.

There are FDA approved drugs that contain THC, the most notable and active constituent of marijuana. Marinol CIII (dronabinol) is an isomer of THC used to treat to treat refractory chemotherapy induced nausea (RCIN) and AIDS-related loss of appetite. Cesamet CII (nabilone) is a synthetic drug that mimics THC and is used to treat RCIN. According to a review article published in the *New England Journal of Medicine* in 2014, marijuana or other cannabinoids might relieve symptoms of the following conditions: glaucoma, nausea, AIDS-associated anorexia and wasting syndrome, chronic pain, inflammation, multiple sclerosis and epilepsy.

Some 24 states, including Utah, have legalized marijuana in some form. Four states — Alaska, Colorado, Oregon, and Washington — have legalized recreational use. Four states bordering Utah have legalized marijuana for medical use: Arizona, Colorado, New Mexico and Nevada. Therefore, Utah companies that employ people from these states or that have work locations in these states need to understand the scope of permissible use, whether an employee can be terminated for off-site medical use, any protections afforded employees who use medical marijuana, and the effect of medical use of marijuana in another state when an employee tests positive for THC in Utah. Answering these questions is far beyond the space allocated for this article. Nonetheless, some courts have addressed some of these issues and a sample of decisions can be instructive.

Termination for Marijuana Use that is Legal under State Laws

In June, the Colorado Supreme Court issued ruling in a case, *Coates v. Dish Network LLC*, that epitomizes the confusion created by the federal-state law conflict. A man named Coates, a

quadriplegic, worked for Dish Network as a telephone customer service representative and was licensed by Colorado to use medical marijuana. Dish Network fired Coates after he tested positive for marijuana as permitted by the company's employment policies. The court held that an employee's lawful use of marijuana under Colorado law was "unlawful" under the governing Colorado statute because such use was illegal under federal law. Courts in California, Montana, Oregon and Washington have reached similar conclusions.

Employee's Right to Collect Unemployment Benefits after Termination for Marijuana Use

In *Brask v. Challenge Mfg*., the Michigan Court of Appeals decided three cases where the "common issue presented in the three cases is whether an employee who possesses a registration identification card under the Michigan Medical Marihuana Act . . . is disqualified from receiving unemployment benefits . . . after the employee has been terminated for failing to pass a drug test." The court held that the employees were entitled to unemployment benefits. A Colorado court held otherwise and concluded the fired employee was not eligible for unemployment benefits.

Court decisions addressing marijuana laws turn on the specific language of each state's law. Likewise, employers must understand the specific language in each state's law as they create and enforce employment policies addressing employees' legal use of medical marijuana.

Use in a State Where Medical Marijuana is Legal When a Person Lives in a State Where Use is Illegal

Last year, the North Dakota State Bar issued an opinion that concluded it would be unethical for an attorney to live and use medical marijuana prescribed by a physician in Minnesota and to be licensed to practice law in North Dakota. The Bar's reasoning could be easily applied to an employment law issue: "federal law and North Dakota law and policy show that Attorney's conduct would be unlawful and unethical" and "participating in a medical marijuana treatment program would constitute a 'pattern of repeated offenses' that indicates indifference to legal obligations and constitutes a violation of [North Dakota's Code of Professional Conduct.]"

Utah Marijuana Law and Proposals

In 2014, the Utah legislature passed a law (Charlee's Law) that allows Utahans with intractable epilepsy access to a non-intoxicating, seizure-stopping cannabis oil. The active ingredient is cannabidiol.

On March 9, the Utah Senate narrowly defeated a medical marijuana bill, SB529, by a vote of 15-14. SB-529 would have legalized cannabis use for medicinal purposes such as cancer, Alzheimer's disease, PTSD, glaucoma, Chrohn's disease, multiple sclerosis and chronic pain. Saratoga Springs Republican Sen. Mark Madsen sponsored the bill. According to news reports, Sen. Madsen has suffered from back pain for years and traveled to Colorado to try obtaining pain relief through cannabis-infused gummy bears and an electronic-cigarette device, which he is reported to have found effective. Another Utahn told lawmakers she found relief from medical marijuana after living with a brain tumor and fibromyalgia for 20 years. As a result, she reported she is no longer housebound, does not need to use a cane and can be a mother to her children again.

On July 15, the Utah legislature's Health and Human Services Committee held an interim meeting to discuss policy issues related to allowing medical marijuana use in Utah. For those interested in the legal aspects of medical marijuana use, a report by the Utah Division of Occupational and Professional Licensing, *Consequences of Conflicting Federal and State Medical Marijuana Laws*, can be found on the Utah legislature's website.

According to one poll, 72 percent of likely voters in Utah favor medical cannabis use for serious medical conditions if prescribed by a properly licensed doctor. This figure augurs favorably for some change in Utah marijuana laws.

States' initiatives to legalize use of medical marijuana create complex and challenging issues for employers who should devote at least some attention to the legal implications of these laws on their businesses and their employees.

William J. Stilling is a shareholder and chairs the Healthcare practice group in the Salt Lake City office of Parsons Behle & Latimer and is the immediate past president of the American Society for Pharmacy Law and has taught drug law in the Department of Pharmacotherapy at the University of Utah College of Pharmacy.

The unexpected tax consequences of Bitcoin

Bitcoin is a form of convertible virtual currency commonly known as cryptocurrency. It exists entirely in digital form without coins or paper currency to represent ownership. Cryptocurrencies are not tied to any particular country or regulatory body.

Bitcoin and other cryptocurrencies are developing into valuable online tools that can be used to complete transactions anonymously, without bank involvement or credit card transaction fees. Bitcoin is not printed, but is "mined." Mining Bitcoin involves complex computer processes that, when completed, result in Bitcoin being distributed to the miner. In practice, these convertible virtual currencies are an electronic substitute for cash that can be used to pay for goods and services worldwide, or converted to dollars or euros. These convertibility features provide Bitcoin with its initial value to the holder. Bitcoin is becoming increasingly common. Companies such as Amazon, Apple, Dell, Home Depot, Microsoft, Overstock.com, Sears and Target all accept Bitcoin as a form of payment.

In addition to using Bitcoin as a cash substitute, online Bitcoin Exchanges have popped up that allow users to buy, sell or trade Bitcoins for hard currency or other cryptocurrencies. The value of Bitcoin and other virtual currencies fluctuates in the same manner as do stocks or bonds. As of July 8, a single Bitcoin was worth $272. With over 14 million Bitcoins in circulation, it has a market capitalization of nearly $3.85 billion.

As Bitcoin's presence has grown, the IRS has issued guidance on the tax treatment of Bitcoin and other convertible virtual currencies — that is, those cryptocurrencies that can be converted to dollars. Bitcoin relies on its ease of use and the prevalence of this form of currency is predicated on the notion that these virtual currencies are simply treated like digital cash that cannot be traced to particular holders.

However, the IRS has taken a contrary position. The service has given notice that it intends to treat convertible virtual currencies as property, not currency, for tax purposes. In Notice 2014-21, issued in April 2014, the IRS stated that for federal tax purposes convertible virtual currency is treated as property, not as currency or a commodity. The notice applies to all convertible virtual currencies. This article will use the most familiar of these currencies, Bitcoin, to refer to all convertible virtual currencies.

The subtle distinction imposed by the IRS has enormous tax consequences for those that traffic in Bitcoin. Rather than treat taxpayers doing business in Bitcoin as using cash or its equivalent, the IRS will treat them as if they are buying and selling stock in publicly traded corporations. For example, if Taxpayer A owns shares in Apple, Taxpayer A will have a taxable gain upon disposition of the stock. If a single Apple share trades at approximately $125, and the taxpayer paid $100 for it, when the taxpayer sells that

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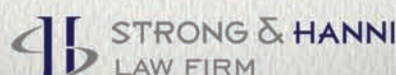

BITCOIN

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share or uses it in an exchange to obtain goods or other property, the taxpayer will have capital gain on the difference of $25. While most people expect this tax consequence from an investment in stocks, bonds or real estate, few will expect it from something billed as an alternative to cash.

A taxpayer who receives Bitcoin as payment for goods or services must include it at fair market value in his or her gross income, measured in U.S. dollars, as of the date of receipt. This is obviously the same treatment imposed upon a taxpayer who receives cash for goods or services. However, as the recipient has been paid with property, not cash, he or she must also track the basis in the Bitcoin received. The basis will be the fair market value on the date of receipt. Fortunately, all Bitcoin transactions are tracked and logged on something called a "Bitcoin wallet." This preserves a record of transactions. While the presence of the "Bitcoin wallet" helps alleviate the record-keeping burden, many taxpayers will be unaware there is a burden in the first place, forcing them into unexpected, and detrimental, tax consequences when they attempt to sell or exchange their Bitcoin in the future.

If a business elects to pay its employees or contractors in Bitcoin, that business may have a taxable gain on the exchange, and the employees will have to include the value as wages. Federal income tax, as well as applicable FICA taxes, will be withheld on the payments. Self-employed individuals will have to pay self-employment tax on the value of Bitcoin they earn.

Corporations that hold Bitcoin cannot distribute it to their shareholders without incurring a corporate-level tax. Most commonly, corporations distribute cash to their shareholders as dividends. The corporation pays no tax on the distribution, but receives no deduction. The shareholder is taxed on the dividend income. However, if the corporation elects to distribute appreciated property to its shareholders, the corporation must pay tax on the property as if it was sold for its fair market value and the proceeds used in the distribution. This is another instance in which classifying Bitcoin as property leads to unexpected tax consequences. Corporations that hold Bitcoin and wish to distribute it will be engaging in a taxable transaction if the Bitcoin has appreciated in value.

While these rules can be difficult to comply with or result in an unexpected tax burden, those that obtained Bitcoin in 2011 or 2012 may have significant tax losses available to them. Bitcoin's price peaked at around $1,200 in 2012 and has steadily declined in value. Holders of Bitcoin that acquired it at higher values may have capital losses available to them that can offset capital gains.

Since Bitcoin is treated as property for all tax purposes, the loss rules available to investors generally are available to Bitcoin holders. Corporations that hold Bitcoin that has declined in value should sell the Bitcoin to benefit from the corresponding tax loss, rather than use the Bitcoin in a shareholder distribution or other transaction. Taxpayers holding Bitcoin as a capital asset that has declined in value can time the disposition to offset unusually high capital gains in a particular year. The capital losses on Bitcoin can be carried back or forward in the same manner as other capital losses. While this is small consolation, it does provide some planning opportunities for investors and businesses that are not interested in the anonymity provided by Bitcoin, but that have made, or are interested in making, overtures into the virtual currency market.

As a practical matter, most of those that use convertible virtual currencies will be hesitant to comply with these rules. The allure of Bitcoin is its anonymity and freedom from government or bank intervention. Using an extreme example, a user that pays for dinner or a movie with Bitcoin is quite unlikely to consider the tax issues involved — nor care.

However, for those established enterprises that wish to begin using or accepting Bitcoin, or those individuals who wish to make Bitcoin a component of an investment portfolio, these tax rules must be carefully considered and a competent tax professional consulted prior to executing any significant Bitcoin transaction.

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Ranked by Number of Utah Attorneys ***page 1***

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8	**Stoel Rives LLP** 201 S. Main St. Ste.1100 SLC, UT 84111	801-328-3131 stoel.com	70 400	40 10	50 12	Corporate, litigation, energy development, environmental, technology & intellectual property, real estate & construction, labor & employment	Scott Young 1907
9	**Strong & Hanni Law Firm** 102 S. 200 E., Ste. 800 SLC, UT 84111	801-532-7080 strongandhanni.com	58 58	38 15	110 2	Business & litigation law	Catherine M. Larson 1888
10	**Snow Christensen & Martineau** 10 Exchange Place Floor 11 SLC, UT 84111	801-521-9000 scmlaw.com	55 55	37 16	51 2	Bankruptcy & creditors' rights, commercial litigation, commercial real estate, construction, cyber security, employment & benefits, estate planning	Andrew M. Morse 1886
11	**Snell & Wilmer** Gateway Tower West 15 W. South Temple Ste.1200 SLC, UT 84101	801-257-1900 swlaw.com	54 425	25 6	102 9	Commercial litigation, product liability, commercial finance, real estate, corporate finance, corporate & securities, bankruptcy, intellectual property, employment, natural resources, environmental & energy	Brian Cunningham Brian Hulse 1991 - Salt Lake City 1938 - Snell & Wilmer founded

The Enterprise
UTAH'S BUSINESS JOURNAL

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Law Firm Directory

Ranked by Number of Utah Attorneys ***page 2***

Rank	Firm Name Address	Phone Web	Number of Utah Attorneys Number of Nationwide Attorneys	Number of Partners Number of Paralegals	Number of Full-time Employees Locations Nationwide	Major Areas of Practice	Managing Partner Year Established
12	**Fabian Clendenin** 215 S. State St., Ste.1200 SLC, UT 84111	801-531-8900 fabianlaw.com	45 51	28 2	71 2	Business & corporate, litigation, trials & appeals, bankruptcy, real estate, tax & estate planning, employment, government investigations & white collar criminal defense	David N. Kelley 1919
13	**Callister Nebeker & McCullough** 10 E. South Temple Ste. 900 SLC, UT 84133	801-530-7300 cnmlaw.com	41 41	33 13	68 1	Banking & finance; bankruptcy & creditor/debtor; business entities, transactions & financing; construction; employee benefits & ERISA; energy, etc.	T. Richard Davis 1920
14	**Workman Nydegger** 60 E. South Temple Ste. 1000 SLC, UT 84111	801-533-9800 wnlaw.com	39 40	24 6	83 2	Intellectual property litigation & prosecution	Jonathan Richards 1984
15	**Ballard Spahr LLP** One Utah Center Ste. 800 201 S. Main St. SLC, UT 84111	801-531-3000 ballardspahr.com	38 645	20 13	82 14	Business & finance, commercial litigation, communications, international, labor & employment, life sciences/technology, M&A, mortgage banking, patents, public finance, etc.	Blake K. Wade 1987
16	**Prince, Yeates & Geldzahler** 15 W. SouthTemple Ste. 1700 SLC, UT 84101	801-524-1000 princeyeates.com	37 37	28 4	55 1	Real estate, labor & employment, general & civil litigation, banking & finance, corporate & transactional, bankruptcy, estate/probate, family, etc.	Glenn R. Bronson 1971
17	**Clyde Snow & Sessions** 201 S. Main St. Ste. 1300 SLC, UT 84111	801-322.2516 clydesnow.com	36 36	24 4	58 3	Business transactions, litigation, water & natural resources, employment, white collar criminal defense, securities, banking, etc.	Walter A. Romney Jr. 1951
18	**Dorsey & Whitney LLP** 136 S. Main St., Ste. 1000 SLC, UT 84101	801-933-7360 DND	36 562	18 7	65 13	Corporate, securities, M&A, private equity, bankruptcy & financial restructuring, litigation, mining, IP, international, white collar defense	Nolan S. Taylor 1912
19	**TraskBritt PC** 230 S. 500 E., Ste. 300 SLC, UT 84102	801-532-1922 traskbritt.com	26 26	11 11	62 1	Intellectual property	Edgar Cataxinos 1973
20	**Thorpe North & Western** 8180 S. 700 E. Sandy, UT	801-566-6633 tnw.com	24 24	11 1	48 2	Patents, trademarks, copyrights, intellectual property litigation	Garron Hobson 1979
21	**Cohne Kinghorn PC** 111 E. Broadway 11th Floor SLC, UT 84111	801-363-4300 cohnekinghorn.com	23 23	20 1	33 1	Business formation & planning, civil litigation, commercial litigation, construction, creditors' rights, employment law, family law, etc.	John S. Bradley 1992
22	**Smith Hartvigsen** The Walker Center 175 S. Main St., Ste. 300 SLC, UT 84111	801-413-1600 smithhartvigsen.com	13 13	5 3	26 1	Water law, land use law, employment law, corporate, family	J. Craig Smith 2002
23	**York Howell & Guymon** 6405 S. 3000 E., Ste.150 SLC, UT 84121	801-527-1040 yorkhowell.com	10 5	6 6	11 1	Tax planning, real estate law, corporate/business planning	David R. York Andrew L. Howell Paxton R. Guymon 2013
24	**Robinson, Seiler & Anderson LC** 2500 N. University Ave. Provo, UT 84604	801-375-1920 rsalawyers.com	7 7	4 2	12 1	Business law, civil litigation, personal injury, real estate, estate planning, probate, bankruptcy	Mark Robinson 2005
25	**Van Cott, Bagley, Cornwall & McCarthy PC** 36 S. State St., Ste.1900 SLC, UT 84111	801-532.3333 vancott.com	DND DND	DND DND	DND 1	DND	Gregory P. Williams 1874

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50/50 TIE

from page F1

ment for a limited liability company and in the partnership agreement for a partnership. Tiebreaker provisions can also be addressed in a standalone written contract such as a buy-sell or shareholder agreement. In the event of a deadlock, it's extremely helpful to have a clear, mutually agreed-upon mechanism and procedure to resolve the disagreement. A clear and understandable mechanism and procedure will streamline the resolution of deadlocks, avoid confusion and uncertainty, save time and money and minimize management distraction and business disruption. The principal goal of any deadlock provision is to provide for a mechanism that will treat each of the owners fairly, while at the same time, preserving the value that has been built in the company and allow the business to continue operating and remain a going concern.

Once a deadlock or "stalemate" occurs, the options available to 50/50 owners in a business become very limited and often are difficult, and sometimes impossible, to implement, particularly after each of the owners becomes entrenched in his or her position. The key is to carefully consider and fully discuss the types of tie votes that may arise at the board and owner level and the issues over which ties are thought to be most likely to arise, and then to carefully structure, tailor and draft appropriate deadlock mechanisms to address and resolve those issues. Well-drafted organizational documents and/or contracts will anticipate possible areas of disagreement and provide for one or more ways to address and resolve deadlocks.

Many different tiebreaker mechanisms are possible and their structure and mechanics are only limited by the ingenuity and creativity of the lawyers who draft such provisions. Tiebreaker mechanisms can be as simple as requiring an odd number of directors on the board of directors/board of managers, to very complicated deadlock resolution mechanisms and procedures.

Key Takeaways

The important thing is to adopt tiebreaker mechanisms before a deadlock or stalemate occurs. Once adopted, deadlock or tiebreaker mechanisms should be periodically reviewed and updated to address any changes in the company's ownership, the composition of the board or other governing body, and the company's operations. An experienced corporate lawyer can assist in structuring, properly tailoring and drafting appropriate and clear governance provisions and documents that will properly address and provide for the resolution of any deadlocks that may arise.

Thomas R. Taylor is a corporate, corporate finance and M&A lawyer and a shareholder in the Salt Lake City office of Durham, Jones & Pinegar PC.

LLC ACT

from page F4

contained in the draft act promoted by the National Commission on Uniform State Laws (the authors of the form from which the new act was taken), which would have required management to exercise the care that a person in a like position would reasonably exercise under similar circumstances, and in a manner reasonably believed to be in the best interest of the LLC, subject to the "business judgment rule." The NCUSL drafters expected that the business judgment rule as interpreted in accordance with precedent in the adopting state would be applied to the state's LLCs. This rule would provide managers of a business entity some assurance that the exercise of their decision making authority would not expose them to liability for being wrong, so long as a process reasonable under the circumstances was used to make the decision.

Without broad exemption from liability, business managers are rightfully concerned that they may be personally liable when their decisions are viewed with "20/20 hindsight." It is worth noting that the standards of care for directors of a Utah corporation, partners in a Utah partnership and management of an LLC are all substantially similar and all generally based on a "gross negligence" standard. Most managers do not expect their duty of care to change simply based on choice of entity.

There is much controversy over how much latitude business managers should have. There are commentators who have stridently expressed the view that business managers should always be accountable to manage with reasonable care under the circumstances. If it is your expectation that your close friend and co-owner/co-manager in a Utah LLC should have a duty of reasonable care to you, you need to know that there is no such legally enforceable duty unless it is expressly stated in the operating agreement. The statutory default duty of care is favorable to management, but may defeat the expectations of other owners of the LLC.

This article highlights a few of the issues which should be considered in forming an LLC under the new act, or which should be considered for existing LLCs given that the new act will govern all Utah LLCs beginning in 2016. Consult a qualified attorney when considering the formation of an LLC.

Damon E. Coombs is a shareholder of the Salt Lake City law firm Callister Nebeker & McCullough and practices in the areas of business transaction, corporate, securities, real property, estate planning and tax law.

PROTECT YOUR STUFF

Left to Right: Sarah Matthews, Randall Bateman, Tenley Schofield and Christopher Wight

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