



Generations

A Newsletter of the Family Office Practice at Day Pitney

The Winter of 2022 is clearly a winter of discontent. The predominant mood is one of anxiety, a sense that we face threats on many fronts. Russia's invasion of Ukraine represents the most significant military action in Europe since World War II and has sent shock waves around the world and across global financial markets. Inflation has reared its ugly head, with prices and energy costs increasing faster than we have seen in the United States in nearly 40 years. The Omicron variant of COVID-19 took hold in December and ravaged the country for more than two months, delaying plans to reopen offices and forcing us to live once again with mask mandates and other restrictions. Although the numbers indicate that Omicron is rapidly receding, the last two years have taught us that we need to remain vigilant as we move forward.

Our Winter 2022 Family Office Newsletter focuses on topics of current interest and new developments. We have a roundtable discussion on the topic of inflation, with a panel of financial experts providing insight on what is causing this unwelcome development and how to cope with it. We have two articles on NFTs and digital art, a current hot topic. One piece explains exactly what the acquisition of an NFT means and why buyers must be careful; the other addresses how owners of NFTs should think about planning for passing ownership of NFTs to future generations. We also offer an article about the stress and disruption that can be inflicted on a family business when insufficient attention is paid to succession planning, as well as an article on how some states are or are not adapting to changed circumstances resulting from COVID-19. To end on a more positive note, we offer an article that summarizes a symposium that Day Pitney hosted last November as part of our ongoing Palm Beach Family Office Forum series on the subject of charitable giving. Perhaps throwing a spotlight on charitable inclinations will remind us that Winter cannot last forever.

Best regards,

Stephen Ziobrowski
Editor-in-Chief and Tax Partner



Written by: Sarah B. Jacobson

On February 17, Day Pitney partner Sarah B. Jacobson led a roundtable discussion* on inflation with Jeff McGrew, chief investment officer at Foster Dykema Cabot & Co. in Waltham, MA; Jay Winthrop, a partner at Douglass Winthrop Advisors LLC in New York, NY; and Aron Weingard, CFP®, CEPA®, AAMS®, financial advisor at Weingard Wealth Management of Raymond James, with offices in New York, NY and Boca Raton, FL.

Sarah Jacobson (SJ): Thank you for joining us today! Let me make brief introductions.

Jeff McGrew has more than 25 years of experience in the investment management industry. He chairs the Investment Policy Committee at Foster Dykema Cabot. Jeff is responsible for leading the investment team and overseeing all aspects of the investment process, including asset allocation, research and the selection of investments.

Jay Winthrop is a partner at Douglas Winthrop Advisors LLC, a New York City-based registered investment advisory firm serving individuals, families and trusts, with \$5 billion under management. Before founding Douglas Winthrop Advisors in 2000, Jay was an investment banker at JPMorgan Chase and predecessor firms. He is currently chairman of the Conservation Fund and is a former chairman of American Farmland Trust.

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Aron Weingard, Managing Partner of Weingard Wealth Management of Raymond James, focuses on wealth planning and investment management for individuals and multi-generational families and specializes in guiding business owners with succession planning and exit strategies across the United States. He began his career with KPMG Management Consulting, helping global clients with matters of financial management, merger integration, employee engagement and customer strategy.

Jeff, why don't we start with you? Please tell us how we got here with inflation [and] what is causing this spike that we're experiencing.

Jeff McGrew (JM): When you think about the pandemic, the Federal Reserve and Congress had to do something to stimulate this economy. They did that by making money very cheap and available to everyone. The order of magnitude of fiscal response and the amount of capital that was injected into the economy [were] unprecedented. The United States has never before expanded the money supply by 40 percent. That clearly will create inflationary pressures.

The Fed has increased its balance sheet by \$5 trillion in just two years. To put that into perspective, when the financial crisis hit in 2008, the Fed took six years to inject a little [more than] \$3 trillion into the economy. On top of that, the supply chain issues that we're seeing now exacerbate this supply and demand imbalance.

SJ: Do you feel this is specific to certain industries—for example, used cars?

JM: It is increasingly broad. Seeing what is happening in the new and used car market is very tangible. People can drive by a car dealership and notice there are no cars. This is really getting the Fed's attention. [It is] tacitly admitting that [it is] behind the eight ball. We are going to see an interest rate increase in March, which will be the first of a series of interest rate increases.

SJ: Jay, what's your take? Do you share that view?

Jay Winthrop (JW): I really do. I was just thinking about

a quote from Milton Friedman. He said, "Inflation is always and everywhere a monetary phenomenon in the sense that it is and can be produced only by a more rapid increase in the quantity of money than in output." In other words, there is too much money chasing too few goods. The Fed's balance sheet has more than doubled in two years, and that's driven the money supply to levels that we haven't seen in a very long time. It's demand-side stimulus, if you will, on both the monetary side and the fiscal side. The government has been active, and not just the Fed, at the same time that supply chain issues hit. There are too few goods, [so] there is no supply of things that could soak up all the dollars injected into the economy.

There were several things that restricted the supply of goods. The pandemic was the underlying cause. In the first instance, there [were] too few workers. A lot of people accelerated retirement. You have too few workers doing everything from cutting hair to making product. On top of that, China's total lockdown during COVID-19 really constrained the amount of goods, because China is a major supplier to the global economy. The movement to "just-in-time inventory" that many companies adopted has also contributed to the problem. Those companies do not have lots of inventory lying around for sale. When demand gets too hot, they can't just sell things they have on hand. They have to wait for the inventory to be replenished, and that has been difficult. Finally, there has been some underinvestment in critical parts of the supply chain—for example, transport and microprocessors. It is that imbalance between the demand side really being stimulated by the government and the supply side being pinched that has created the problem, because there are just too few things to buy. In the pandemic, people are not spending money on services; they are spending money on things.

Aron Weingard (AW): I agree. The recent inflation spike was driven by pandemic-related issues, which affected the supply chain. Activity moved to e-commerce, which further stressed the supply chain. Also, bottlenecks were created, stemming from factory shutdowns and employees having to stay home. All these factors drove up costs. We saw a meaningful surge in durable goods

prices, such as housing [and] home appliances, as well as new and used cars. All served as drivers [of] the increase in inflation. Since people were not going to restaurants, bars, theaters or sporting events, money flowed into e-commerce.

For a good portion of 2021, we experienced a reopening of the economy, and the Fed suggested that we were in “transitory inflation.” Over the past couple of months, we started to see a broadening of inflation, beyond pandemic-related goods and services, leading the Fed to pivot and stop using the word “transitory.” This has caused a recalibration in the Fed policy outlook, upward pressure on interest rates and stock market volatility.

We have had an extraordinary amount of stimulus pumped into the economy during the pandemic to keep the economy afloat, with cash payments going directly to households and companies to compensate for job losses and shuttered businesses. This created a temporary lift in demand—hence the sharp post-pandemic bounce and rise in inflation, as the supply side remained constrained due to the lockdowns.

Now that the pandemic-related fiscal measures have expired and households and businesses are no longer receiving cash payments or unemployment benefits, the strong rebound in spending should start to subside. We are not expecting consumption to crater, as the consumer will still be supported by a strong labor market and solid wage gains. Rather, we see demand cooling from here to more of a steady state, which should take some of the pressure off inflation. The eventual normalization of the supply chain should also help.

SJ: Jeff, you mentioned that interest rates were going to be going up. Do you see this as a temporary thing, or do you feel we are going to be dealing with this for a while?

JM: That’s the magic question. When we say “inflation,” we are really talking about the Consumer Price Index basket. When you break that into pieces, you can identify things that are probably temporary, but there are other things that could take longer to reverse.

Automobiles are 8 percent of that basket. Given what we are seeing in that supply chain, that is not structural. Used car prices are not going to be this high forever, and I would say that is an example of something temporary. Energy is another big piece. It is also around 8 percent of the basket. We all know how fast energy prices can move. So those are two examples of temporary things.

One of the things that is more structural and difficult to slow down is the cost of housing. Housing is about a third of that entire CPI basket, and it is growing at around 4 percent.

SJ: I just read that the housing market in Miami, where I am, has probably even exceeded New York at this point in terms of cost.

JM: Exactly. Zillow publishes a measure of annual rent increases around the country, and right now, it is a 14 percent year-over-year increase in rents. It is an example of something that is longer term in duration and more challenging to address, because what the Fed will have to destroy [is] some of that demand for housing. [It does] that by making things more expensive, particularly mortgages. It is dangerous when you mess with the housing market, as we all have seen, but that would be an example of an area that is a bit more structural and is going to be more difficult.

SJ: Jay, what’s your take? Is this something that’s going to be with us for a while, or do you break it down into categories?

JW: I agree with so much of what Jeff has said. Over the medium term, elevated prices are likely to remain. Some of the things that could slow down rising prices—like adding semiconductor supply, finding new energy sources and building out new capacity—do take a while. Even though energy prices might move around a bit in the short run, there are going to be some parts of the economy that require a long time to fix.

Longer term, though, inflation really should come down, and it’s important to remember that inflation is the rate

of change. Elevated prices may stay for a while, but are they going to continue to rise at the current pace? I think that is unlikely.

SJ: That is good news.

JW: We look at it that way. We are thinking that inflation is going to moderate, and in the longer run, there are some structural reasons why a return to a lower level of inflation makes a lot of sense. We all know about the action by the Fed to signal that [it is] raising rates to reduce the size of [its] balance sheet. This will obviously have an effect on inflation.

The second piece is the pandemic. We are hopeful now that will ease. If we get into more of an endemic phase, we can learn to live with it. You might have people spending more on services and less on goods, maybe more people coming back to the workforce. That is likely to contribute to an easing of inflation.

The final piece, and perhaps the most significant, is that we live in a very different economy now than we did in the late 1970s. We are a global economy. There is global cross-border capital flow, and, importantly, there is a lot of automation. It is hard for a manufacturer to sustain high prices in that environment. You do not have to buy a book from one local bookseller. You are able to find that book anywhere in the world using technology. The ability to sustain high prices today is more difficult.

The combination of these factors should bring down inflation, but in the short run, it will be hard to turn the train around as quickly as we would like. I think we are certainly in for a quarter or two of very elevated prices and tougher inflationary readings until the new policy begins to kick in.

AW: While the Fed continues to monitor inflation, it believes that inflation will be on a clear, decelerating path as we go through the end of the year. We do think that we could still have upward inflationary pressure through March. However, we expect it to decline precipitately after March.

SJ: That is really interesting. The inflation rate may not continue to go up, but it does affect people if prices stay high. Besides what you have heard coming out of the Fed, are there any other indicators of how this is going to break?

AW: We would look at the decline in prices of the pandemic winners, such as home improvement and athletic equipment—for example, Peloton. In January, we started to see the first drop in used car prices.

In addition, the manufacturing report is telling. With respect to backlogs of orders, it shows six consecutive months of declines, which means that some of the supply chain pressures are receding. Moreover, the suppliers' delivery index has declined each month since October. New orders and production are off their peaks. The Manufacturing Prices Index also shows a decline. The Baltic Dry Index, a helpful indicator of global shipping costs, is down 75 percent from its October peak. We will watch these indicators to see whether these trends continue. In summary, we do believe that inflation will decelerate. We are watching the level at which inflation stabilizes and how that impacts the Fed's appetite to raise interest rates.

JM: I will tie that to how important the housing market is to that CPI basket. That would be the first place I would be looking. It is important to be careful what you wish for, but you really do want to see some demand destruction there, so you would look for housing starts beginning to decline, average home sale prices beginning to decline, rent growth. As I mentioned, we are beginning to see that.

Then, you just keep thinking through what other components there are, such as energy, seeing oil prices begin to come back down. That is a great leading indicator of economic activity. We talked about cars. I would like to see some more inventory on car lots.

And lastly, I would say the labor market. The supply of labor is so tight. We are beginning to see some of the job-opening data points come down, which is another sign that that supply-demand imbalance is beginning to come back into balance.

JW: A couple of things that I will be looking at are the PPI versus the CPI—the Producer Price Index versus what consumers are seeing. At the moment, the PPI is higher, and you would want to see that get a bit more even.

We also are always looking at the yield curve and whether long-term rates keep rising. They have been very low for a long time. To the extent the yield curve flattens a bit and longer-term rates are not so high relative to short-term rates, it suggests that inflationary expectations are moderating. Also, we listen really closely to management, to companies. It is often a good place to get an early read on what they are seeing.

SJ: When you say you are talking to management of companies, what sectors are you looking to for that information?

JW: We are just listening to management when we are doing our quarterly calls with companies. We are listening to the companies talk about their quarterly earnings reports. You are going to see inflationary pressure much more in companies that make things, that have a lot of consumption of raw material, than you would in, say, a Google. We are listening closely to those companies and how they are seeing the inflationary pressures in their own businesses.

SJ: That makes sense. So what should we be doing? What should family offices do?

JM: Everyone is looking for the silver bullet for this inflationary environment, and it really does not exist. Gold is often offered as an example, but you can find plenty of examples where gold did not do what it was supposed to do as inflation accelerated.

I think the two areas that we would highlight are equities and real estate. On the equity front, an example of what you would avoid would be expensive growth companies. When you think about the value creation of those companies, it is happening much further out into the future. You have to discount that back to today's value, and when interest rates are going up, you have to use a bigger discount rate.

On the real estate side, very often the publicly traded real estate stocks do not behave the way you want. They are very sensitive to interest rates. We would recommend getting exposure to the real estate market through private investments, through a private equity fund.

AW: Agreed; there is no silver bullet for how to invest in this type of environment. The asset classes that historically tend to defend in a rising inflation environment are not as appetizing this time around. Gold went nowhere in 2021. It has been flat over the [p]ast 12 months, and that is likely due to bitcoin and crypto taking a larger share of investments by folks looking to find an uncorrelated asset class. Another area where people tend to flock is commodities; however, we see headwinds from tightening policy and U.S. dollar strength. The appreciation of commodity prices is likely behind us.

Real estate is a sector that has historically done better in inflationary environments. In fact, the publicly traded sector was up significantly in 2021, correcting what had been an undervalued sector. It is important to keep in mind that REITs trade with significant interest rate sensitivity, as evidenced thus far in 2022. Real estate is down nearly 10 percent in 2022, due to rising interest rates. That said, there is reason to remain optimistic on this sector, presenting an opportunity to invest during correction periods. Some direct investments in real estate are also attractive. Investments in property with shorter-term leases [and] strong underlying growth fundamentals can lead to a faster translation of rents into cash flows. One example would be hotels, which offer one-night leases.

If you are concerned about inflation, the best area of the market may be equities. Within equities, companies with pricing power and stable margins will lead the way. Look at Amazon. [It] just raised the Prime subscription fee and people did not even blink, because Amazon owns the e-commerce market. Historically, equities have performed well during environments when inflation was between 1 and 5 percent, and we believe we could be in that sweet spot.

History does not repeat itself, but it often rhymes. While headline inflation is currently running at 7.5 percent and core inflation is 6 percent, we do think inflation will move lower as we progress through the year as growth moderates and supply chain constraints start to fade. Also, with the pandemic shifting more toward the endemic phase, labor issues and capacity constraints should start to resolve themselves so wage growth does not get too out of hand. If we are correct, this should bring inflation comfortably back into that 1-to-5-percent window, where equity markets have performed well in the past.

SJ: Thanks. And Jay, what is your take?

JW: Well, it is colored to a great degree by our own bias as high-quality value equity managers. My answer is going to be similar in that I think that quality equities are the place to go, and I share the concerns about other so-called hedges against inflation.

It is important to note that many of these so-called hedges, whether they actually work or not, are hard for investors to access. You could, I suppose, make the case that crypto is an asset class to consider, or gold is, or real estate, or private equity and venture capital. A lot of those asset classes are really difficult for investors to access because they cannot store gold, or they do not have the capital to buy real estate, or they are not able to lock up their capital in a 10-year venture fund.

One consideration is not just what the best hedge might be, but what the most practical solution is. On that front, there is no question that the long-term ownership of very-high-quality equities is the way to go. That approach offers liquidity, transparency and low costs, but within that asset class, I emphasize the words “high quality.”

If you can own companies that have pricing power, you are going to be able to ride this thing through. It may not be next month or the month after that, but if you can own wonderful businesses, you are going to do just fine. We look for companies that have a lot of demand, that do not have high capital reinvestment requirements, that have wide economic moats and

high return on invested capital, and, very importantly, that have pricing power. Those companies are going to do just fine.

SJ: Can you give us some examples?

JW: Mind you, I am not making a stock selection or stock pick, because some of the companies I will mention have done very well in this current environment. Two companies on the consumer tech side—Amazon and Costco. Both have some sort of a membership model. They have an extraordinary ability to raise that membership fee and get a really large uptake from their client base. The client base feels a lot of value in participating in that model because they can get access to great shipping, great distribution and a huge amount of product at low prices. Businesses like that—again, not picking particularly those stocks at this moment—are going to be worth more in the periods ahead as inflation moderates.

I would also point out Nestlé, which is a food company. I will mention Alphabet, Aon, Canadian National Railway [and] Mastercard, one of the largest payment processors. These are all businesses that have a great degree of pricing power and very wide economic moats that will allow them to raise prices without losing customers.

SJ: If investors are not heavily invested in that direction now, should they trade their portfolios now, or should they hang onto what they have and make gradual shifts?

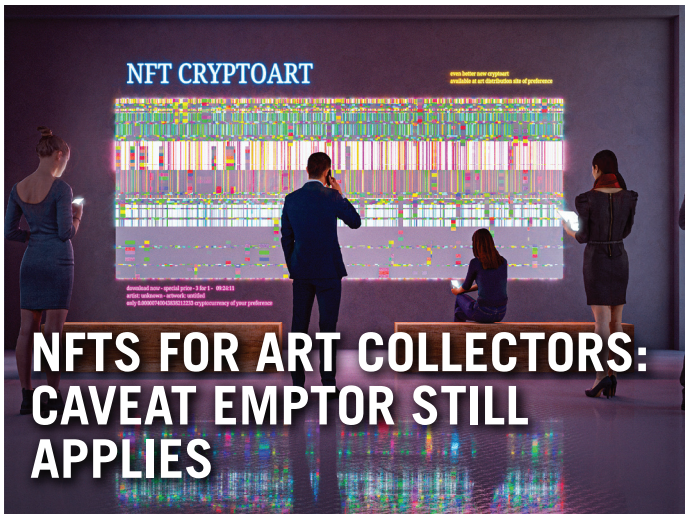
JM: I do not think anybody should be overly reactive, and I am saying that in a general way. However, if an investor was overly positioned toward, for example, very expensive growth stocks, then he or she might want to be more reactive. I would add that if there is also a structural driver behind a particular company's growth, that is an additional element to the story. That supports the ability to have pricing power.

An example of that is Nike. The fact that [it is] changing [its] distribution channel and going directly to the consumer is incredibly additive to [its] profit margins. It was going to happen whether we were in an inflationary

environment or not. As long as you own those types of stories and some longer-term growth drivers, you are going to be just fine.

JW: We own Nike as well, but I would also suggest upgrading the quality of the equity portfolio. It's not to change strategies, unless you are invested in companies without a profit that trade at stratospheric multiples or that are heavily leveraged and require access to the capital markets to fund their operations. If you're in bonds, this is a great time to get out of them. That's a really dangerous asset class at the moment. The old kind of 60/40 asset allocation, whatever the old balanced portfolio idea was, for a while that's maybe not where I would counsel people to go.

* The views expressed in this roundtable discussion do not constitute investment advice. Each investor must make investment decisions based on his or her particular circumstances. ■



Written by: Adam B. Weisman, Richard D. Harris, Alex P. Garens

On March 11, 2021, a digital artist named Mike Winkelmann, known professionally as “Beeple,” sold a non-fungible token, or NFT, associated with a digital collage of his images for \$69 million. The most expensive NFT art (or crypto art) ever sold to an individual buyer, Beeple’s “Everydays: the First 5000 Days” will likely be remembered as the first major NFT

art sale to break through into the mainstream, bringing the concept of NFT art sales to the masses.

On its face, Beeple’s sale of his digital art linked to an NFT was made in a form with which we are all familiar—an artist created a work of art and sold it to a third party at an auction through a reputable auction house. There are major differences, however, between the sale of a physical work of art and the sale of an NFT associated with digital art, centering on what the parties own once the purchase is finalized.

An NFT is a string of data embedded in a public ledger known as a blockchain. In the case of crypto art, the NFT is digitally linked to a particular piece of digital art that is typically stored separately from the NFT itself. An NFT is akin to a certificate of authenticity signifying ownership of a digital work of art. Unlike a physical painting, an NFT does not embody a work of art. Instead, the typical NFT being sold through most digital art platforms simply points to a file comprising a digital image that visually depicts the associated digital artwork.

For centuries, tokenized forms of ownership in the forms of deeds, certificates of title and bills of sale have been accepted as proof of ownership of assets. To be effective, these tokens described with detail the underlying assets they represented. For example, a deed will describe the specific metes and bounds of the underlying real property. The metes and bounds are immutable in the real world, and no identical real property can ever exist. Similarly, an NFT will describe an underlying digital asset by pointing to a digital location in which the underlying asset is stored. Unlike real property, however, the digital assets referenced by most NFTs may not exist forever in the locations specified in the NFTs, and duplicates of the digital assets can easily be created.

Digital files associated with an NFT can be stored in three different ways: (1) with the NFT token on the same blockchain (NFT-embedded storage), (2) on a different blockchain or decentralized storage (off-chain decentralized storage) or (3) in a private or centralized server (centralized storage). NFT-embedded storage is

the most desirable for a purchaser of an NFT because it ensures that the digital artwork will be accessible as long as the NFT exists. Unfortunately, the cost of embedding digital artwork within the blockchain on the most popular blockchains (e.g., Ethereum) is far too high to make NFT-embedded storage practicable. Most digital artists have opted for off-chain decentralized storage networks, such as the InterPlanetary File System (IPFS) peer-to-peer network, for their digital art. This form of storage requires payment of an ongoing “pinning” fee to ensure persistent availability of the digital artwork; otherwise, an NFT might be linked to a nonaccessible location within the IPFS network. Finally, many NFT platforms offer their own private, decentralized storage for digital art minted on their platforms. While convenient and easy to use, the reliability of these platforms for long-term storage of digital images is uncertain. If the platform is no longer in business five or 10 years from now, how will the owner of the NFT linked with the artwork access the artwork?

Given this background, the question arises: What is it exactly that a purchaser actually acquires when purchasing crypto art? The traditional purchaser of artwork acquires the right to possess the physical representation of the work, display the work for personal use and enjoyment, and sell the work to a buyer. The traditional purchase of artwork does not include any rights to reproduce the artwork (in digital or any other form), distribute or display a copy of the work, or make any derivative works (for commercial or other purposes). Those rights are retained by the artist through the term of copyright in the work (i.e., generally, the life of the artist plus 70 years), unless the purchaser acquires those rights by direct negotiation with the artist.

Ownership with respect to digital art means something entirely different. Unlike a painting, digital art, which is embodied in the form of a digital file, is easily reproduced at little cost. The copy is indistinguishable from the original. So, physical possession of a file embodying digital artwork means very little, since other people can possess identical files. Without a written agreement from the owner of the copyright (usually the artist), the holder of a digital file has little more than an implied license to display the embedded image of

the artwork for personal use, and nothing prohibits the owner of the copyright from reproducing and distributing identical files containing representations of the same work of art.

If the purchaser of digital artwork receives only a copy of a file containing a representation of a work of art, the purchaser of an NFT receives even less, absent a written agreement. The owner of an NFT receives a verifiable digital certificate that points to a storage location that holds a file containing a representation of a specific work of art. As with traditional art sales, unless otherwise specified in the purchase contract, the copyright in the work associated with an NFT remains with the creator of the work, allowing the creator to make and sell derivative works. Because an NFT is just a token, a purchaser of an NFT acquires no substantive rights without also entering into an additional embedded license or associated written agreement. Absent such a license or other agreement, there is no assurance that the link from the NFT to the stored file embodying the work of art will continue to work in perpetuity.

Typically, the platform used to mint and transfer an NFT will offer standard terms of service through which the creator retains ownership of the underlying intellectual property rights in the artwork but grants the purchaser of the NFT a license to certain limited rights in the work (e.g., the right to display for personal use). The most popular platforms for the minting and selling of NFTs, OpenSea and Rarible, do not require licensing of any rights in their terms of use.

Shortly after his historic sale of the “First 5000 Days” NFT, Beeple was quoted (go to nyti.ms/36A3ntX) in *The New York Times* as saying “just making a[n] NFT does not give it any value. There’s going to be a moment whe[n] we realize we got a little crazy and assigned insane value to crap.” Here, Beeple was not talking about the quality of the artwork associated with NFTs. Instead, he was talking about the nature of NFTs themselves. If a purchaser cannot establish with certainty the rights he or she is acquiring with digital art, the purchaser may be acquiring nothing more than bragging rights over a digital certificate

that was created by an artist and transferred along a traceable, publicly available chain of transactions stored on an immutable blockchain.

In the current unregulated world of crypto art, it's still "caveat emptor." Buying an NFT is not the same as buying a painting to hang on a wall. When a purchaser acquires an NFT associated with a work of digital art, unless the purchaser also enters into an agreement providing otherwise, the purchaser is not acquiring the actual digital artwork or any rights to reproduce, distribute or display the artwork, except for personal use. The purchaser is not even guaranteed that a stored copy of the digital artwork will always be available. Before buying an NFT associated with digital art, a purchaser should conduct the same due diligence regarding authenticity, provenance and rights obtained in the transaction as would a purchaser of a physical work of art. ■

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



Written by: Leigh E. Furtado

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,

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. ■

Robinson's Estate Plan

Scholastic was founded by Robinson's father and is most renowned as the publisher of J.K. Rowling's *Harry Potter* series. Robinson served as chief executive officer and chairman of the board of Scholastic for 46 years and worked full time until the moment of his death, according to his published obituary.

Robinson's obituary further indicates that he was survived by his children, John Benham Robinson and Maurice Robinson; his "former wife and close confidant," Helen Benham, who also worked at Scholastic for 33 years; and four siblings.

Notwithstanding the deep family ties to the business, Robinson's will left all his personal possessions and 53.8 percent of Scholastic's Class A common stock to Iole Lucchese, Scholastic's chief strategy officer and Robinson's rumored longtime romantic partner. As a result, Lucchese became the sole owner of the majority of the voting power of Scholastic.

Robinson, 84 when he died, was reported to be a fitness buff and appeared to be in excellent shape. Family members and Scholastic colleagues—including Lucchese—were surprised by his passing and by his estate plan. The Wall Street Journal reported that Robinson was private about his estate planning and his personal life, but his motivations for giving Lucchese control of the company were clear to no one. This was particularly surprising because it was perceived that Robinson and Lucchese had ended their "open secret" romance years ago.

Robinson's sons and ex-wife shared their dismay and shock upon learning of the estate plan and expressed concern about someone outside the family having control of Robinson's stock holdings. Other observers felt that Robinson's will raised questions about the future of Scholastic as an independent concern.

Robinson's Failure to Plan for Succession

Robinson's estate plan has all the hallmarks of a made-for-TV movie, which contributed to the



Written by: Jaclyn M. D'Esposito

On June 5, 2021, M. Richard (Dick) Robinson Jr., the longtime head of Scholastic Corp., died suddenly while on a walk in Martha's Vineyard. Since then, Robinson's surprising estate plan has garnered headlines due to the real-life *Succession* drama that he left behind.

newsworthiness of his passing. Perhaps of greater consequence to Scholastic was Robinson's failure to have any succession plan in place for the operations and management of the company in the event of his death or incapacity.

Robinson never groomed a successor, and neither of his sons expressed any interest in running the business. As a result of the confusion that followed Robinson's death, it was unclear for weeks who was in control of the company. *The Wall Street Journal* reported:

On June 28, Laura Twomey, a partner with Simpson Thacher & Bartlett, LLP who handled Robinson's estate planning, asked a probate court in New York to take action on his will. She wrote that the company was unable to respond to 'time sensitive corporate decisions or emergencies' because stockholders were unable to reach a quorum.

Scholastic eventually, and unceremoniously, named a new chief executive officer, but Robinson's lack of planning for his succession left the company in disarray and disrupted management's ability to conduct the company's affairs following his death.

Start Planning Early

The disorder at Scholastic following Robinson's passing is perhaps an extreme example of the consequences of a failure to plan and a failure to communicate, particularly for a company of Scholastic's size. That said, failing to plan for succession is a problem that afflicts many family businesses. Succession planning takes great effort and requires families to have difficult but important conversations, which leads some business owners to put off these discussions until it is too late.

The story of Scholastic demonstrates that succession planning is a process, not an event or a point in time. It also reminds us that the person responsible for managing the family business could become unfit or unable to provide services to the company with little

or no advance warning, and it is incumbent upon family leaders to ensure that the business can remain operational in that person's absence. In this regard, succession planning should be viewed as part of the same process that includes estate planning.

The specific actions that families can take will vary and depend on the size and nature of the business, but it is never too early to start having conversations about succession planning and governance. It is equally important to be transparent about the management of the business and to clearly communicate the business owner's intentions throughout this process. Basic steps to take in family business succession planning include:

- Openly discuss and articulate the roles and rights of all stakeholders in the succession process, including who will have ownership interests and who will take on leadership roles.
- Agree whether a family member or an outsider will be groomed as the successor.
- Involve the successor as early as possible in the operations of the business and the decision-making process so that he or she is capable of fulfilling that future role.
- Organize the company's corporate governance structure to reflect the succession plan and the family's intentions.
- Ensure that more than one person at the business has decision-making and signatory authority in the event that the principal officer is incapacitated or dies.

By having these discussions early in the process, families may be able to alleviate the stress and tension that accompany succession planning. Good planning may spare the business from uncertainty and unnecessary expense and often affords the business and the successor the best opportunity to succeed following the transition. ■



Written by: Scott Brian Clark

Dealing with the pandemic has been a challenge for everyone, yet at this point, many people have worked out the complexities of working from home, a hotel room, a vacation home or Mom's house. Many are resigned to working outside the office, while others view it as a much more preferable way to work. From the tax law point of view, one immediate consequence of this development is the technical issue of how to properly report and apportion wages or income among the states or local taxing jurisdictions in which people work or are located, particularly where people are working temporarily or permanently in a state different from the state in which their employer is located. A formerly simple issue has become complicated by the continued enforcement of antiquated laws that were intended for a different day.

In most states, the sourcing of a nonresident employee's compensation or wage income is based on the employee's location or physical presence for that workday. Generally, a ratio or fraction is applied to apportion a worker's income among those jurisdictions in which he or she was physically located during the year. The numerator of the fraction is the number of days worked in the particular state and the denominator is the total number of days worked everywhere. In defining a workday, most states take

the position that a day or part of a day spent in New York on company business constitutes a full day worked in New York. But what about remote work? What if the worker is working from his or her home, vacation home, a hotel room or parents' house in another state? How does the tax law allocate income in those situations?

The simple answer is that most states apply a physical presence rule. Thus, if a worker was physically present working in a state, that day would be treated as a day worked in that state, even if the day was worked in the employee's home. A handful of states, including New York, do this allocation differently. Those states essentially source days worked at home back to the state where the employer's office is located. The rule in these states, called the "convenience of the employer rule," requires that an employee's compensation will be sourced back to his or her office location under the theory that the days worked outside the office are done so out of convenience to the employer and, so, are treated as days worked by the employee at his or her office location. Basically, the rule says that if an employee works from home for his or her own convenience, and not because of any requirement of the employer, those days worked at home will be treated as days worked at the employee's assigned work location.

Over the years, this doctrine has become an infamous aspect of New York tax law. Yet Arkansas, Connecticut, Delaware, Nebraska and Pennsylvania, in addition to certain municipalities, have also come to apply the convenience rule. This rule continues to generate significant controversy in New York and elsewhere. The merits of the convenience rule have been litigated all the way up to New York's highest court, with the New York State Department of Taxation and Finance almost always coming out on top. However, the issue now arises as to whether the pandemic and our "new normal" work environment, including the various shelter-at-home edicts imposed during the past two years, may now give taxpayers additional leverage to argue the fundamental unfairness and unconstitutionality of the rule.

In one case that arose in the 1990s, a professor at Cardozo Law School in New York City taught in New York three days per workweek and worked from his home in Connecticut the other two days. The professor apportioned the percentage of his salary reflecting the number of days he commuted to the law school to New York and allocated the remainder to Connecticut. However, the New York State Department of Taxation and Finance maintained that the professor's entire salary was subject to New York tax because he chose to work at home merely for his own convenience. The professor contested the assessment on constitutional grounds, but an administrative law judge rejected his challenge, as did the Tax Appeals Tribunal, the Appellate Division and the New York Court of Appeals, the state's highest court.

In upholding the tax, the Court of Appeals held that the convenience test did not unfairly burden commerce or discriminate against commerce. Rather, the court held that the rule serves to prevent nonresidents from manipulating their New York tax liability in a way that residents could not. The court further responded that even if double taxation did result, that alone did not serve to invalidate the tax because the New York tax was fairly apportioned and the Commerce Clause does not protect residents from their own state taxes. The court further held that the tax did not violate the Due Process Clause because the professor had a minimum connection with New York through his employment there.

More recently, the same professor has reprised his case, but this time invoking the new realities of the COVID-19 environment as a further challenge to New York's law. That case currently is in litigation and we shall see whether the New York courts' view on the issue has changed in light of dramatically changed circumstances.

In another case in New York, from 2005, the Court of Appeals held that New York could apply its convenience of the employer rule to tax a Tennessee telecommuter on 100 percent of his income even though he earned only 25 percent of that income

in New York. The taxpayer, Thomas Huckaby, was a Tennessee resident working for a New York company. Huckaby and his employer agreed that he could continue to work from Tennessee, traveling to New York only as needed. For the two relevant tax years, Huckaby filed New York nonresident income tax returns, allocating his income between Tennessee and New York based on the number of days he spent working in each state. Because he spent a quarter of his time in New York, he paid taxes to New York on a quarter of his income. However, under the convenience of the employer rule, New York's Department of Taxation and Finance disallowed Huckaby's allocation and taxed him on his entire income, including the 75 percent he earned in Tennessee.

The taxpayer challenged the department's position, arguing that New York's application of the convenience rule violated his Due Process and Equal Protection rights under the U.S. Constitution as well as New York's statute. Although the Court of Appeals' decision was split, the majority thought that applying the convenience rule complied with both the Constitution and the New York statute.

To help better define the issue, in 2006 New York came out with a safe harbor rule for determining what would constitute a bona fide office allowing an employee to source his or her income to a home or other remote office. The determination under this rule as to what constitutes a bona fide office is based on an array of factors. Unfortunately, the factors are quite difficult to meet, so taxpayers seldom have any success with this safe harbor.

Today, one might rightly ask whether the new remote work environment brought about by COVID-19 changes anything. Although the logical answer should be "yes," unfortunately, at least in New York, the answer is still "no," even in situations where employees work from home pursuant to shelter-at-home rules in their home state.

Some states have come out with different guidance to provide relief to taxpayers who are working remotely,

but New York continues to cling to its traditional approach. One bright spot is New Jersey, which has so far “tolerated” New York’s convenience rule and offers a credit to New Jersey residents who pay tax to New York under that rule.

The United States Congress has also been considering the issue. Under a proposal made some years ago, a state’s ability to tax a nonresident would extend only to days when the employee was physically present in the state. That proposal was not passed into law, and with all that is going on in Washington these days, there is little reason to believe it will see the light of day anytime soon. ■



Written by: Jennifer M. Pagnillo

On November 17, 2021, Day Pitney’s Palm Beach Family Office Forum Series presented a panel webinar discussion on philanthropy, focusing on “doing good by doing more” and emphasizing current trends and innovative approaches. The panel was moderated by Jennifer M. Pagnillo, partner at Day Pitney and co-chair of Day Pitney’s Tax-Exempt Organizations and Charitable Giving practice group, and other panel members included Elissa Cook and Tandy Robinson of Goldman Sachs & Co. LLC and Scott J. Nance and Nageeb Sumar of Fidelity Charitable.

The panel first focused on impact investing, and Elissa and Scott walked through some of the relevant terms, myths and challenges. Elissa discussed “alignment” – where negative or positive screening is used to align values in an investment portfolio; “integration”—where an investor is looking for alpha by finding outperformance or avoiding risk; and “impact investing”—seeking financial return while still achieving measurable environmental and social impact.

Scott then turned to some of the myths surrounding impact investing, focusing on donor-advised funds and the availability of engaging in this type of investing. He explained that the largest donor-advised fund providers, including Fidelity Charitable, offer a robust menu of investment options for donor-advised funds to engage in this space. He also noted the myth that impact investing means accepting a lower rate of return, and he explained that as with any type of investing, impact investing covers a wide spectrum of opportunities to achieve financial returns. Finally, Scott explained that impact investing in a donor-advised fund does not need to be “at odds” with the charitable purposes of the fund. The growth in a donor-advised fund (or even a family private foundation) simply means that more assets are available to support the charitable purposes of the fund (or foundation).

The largest challenge noted by the panel is the educational piece, specifically bridging the gap between the interest an investor may have in engaging in impact investing and actually making the investments. The full spectrum of options can be overwhelming to an individual investor, and so the need for good education is an important part of the process. There also may be a generational divide, where the younger generation of a family may be more focused on the impact investing space, so there is a need to educate across the generations to bring different family members to the same page. Good advice is extremely important here.

Nageeb then turned to the topic of strategic and mission-oriented grant-making in donor-advised

funds. This very personal topic is driven by one's values, and Nageeb noted the need for education in this process in order to help individuals think through their strategic philanthropic objectives. There can be generational divides in this process as well, where giving practices are not well aligned between older and younger generations of a family. Again, good advice and education are extremely important here. Creating a mission statement can be a good first step, coupled with education and a mechanism for accountability.

Specifically, with respect to donor-advised funds, Nageeb explained that Fidelity offers a "recoverable grant" option. Similar to a PRI (or program-related investment) for a private foundation, this option allows a donor-advised fund to make a no-interest loan for charitable purposes, which can be paid back to the donor-advised fund. A few success stories here involved the Global Health Organization and the establishment of a healthcare facility in Peru, which needed upfront capital to establish the facility that the facility would repay through smaller streams of revenue received from patients over time, as well as a workforce training program initiated by Social Finance Forum, which provided funds to train students, who would pay back the funds over time once the students were gainfully employed.

Finally, Tandy discussed giving circles and ways that a group of people can pool resources to give more effectively to charitable causes. These groups are brought together by a common interest or shared values and can provide local and specific focus through grassroots activism. These groups often breathe new life into underrepresented and underfunded local organizations and causes. This type of social giving has grown dramatically over the past two decades and allows people to collaborate in their learning and giving. Tandy explained the Impact 100 model, where 100 (or more) women come together, and each contributes \$1,000. Each woman has one vote to decide how to make grants of the funds to local nonprofit organizations and charitable causes. These circles can empower women as activists through utilizing larger grants to make an impact in the local community.

The panel concluded by noting there are so many ways to make a difference and to do good by doing more in your investing, philanthropy and everyday life! ■

LEADING DATA PRIVACY AND CYBERSECURITY ATTORNEY WILLIAM J. ROBERTS JOINS DAY PITNEY'S HARTFORD OFFICE



Accomplished data privacy and security attorney William “Bill” J. Roberts, FIP, CIPP/US, CIPM, has joined Day Pitney as partner in the firm’s Hartford office. Roberts previously practiced with Shipman & Goodwin LLP, where he advised many key clients on privacy and security matters and technology transactions since 2008.

“Bill is a highly regarded lawyer sought by companies, organizations and colleagues from across the country for his privacy and cybersecurity experience and knowledge,” said Day Pitney’s Managing Partner Thomas D. Goldberg. “He will be a strong and welcome asset to the firm, as well as our Cybersecurity and Data Protection practice group, which has established itself as an industry leader in implementing critical corporate infrastructure, policies and procedures necessary to protect against, and react to, modern cybersecurity, data protection and privacy threats.”

Roberts has provided data privacy and security counsel to many leading healthcare providers, insurers, and technology companies, as well as life science entities, throughout his career. At Shipman & Goodwin, he was named chair of the firm’s Data Privacy and Protection group as an associate. Roberts managed a team of attorneys servicing public and private sector clients on data privacy and security matters, leading to his elevation to partner in 2017.

Roberts has represented healthcare entities during investigations by state attorneys general, state departments of insurance and consumer protection, the U.S. Department of Health and Human Services Office for Civil Rights, the Federal Trade Commission and other state and federal regulatory agencies. He has advised several healthcare organizations on the investigation of and response to data security incidents, privacy-related complaints and data breaches, and he has experience representing healthcare entities during complex technology contracting matters. Roberts has also advised a number of manufacturers, retailers, media and technology companies, software and mobile app developers and educational institutions on the development and launch of new technology products and services.

Roberts received his B.A., *magna cum laude*, from Colby College and his J.D., *cum laude*, from the University of Wisconsin Law School. He is admitted to practice in Connecticut. ■

About Day Pitney’s Family Office Practice

Day Pitney routinely represents family offices and their executives and family principals in a wide variety of complex matters. Our family office clients, which are U.S. and international, have significant investable assets spread globally across numerous asset classes.

Day Pitney is a full-service law firm with almost 300 attorneys in Boston, Connecticut, Florida, New Jersey, New York, and Washington, DC. The firm offers clients strong corporate and litigation practices, with experience on behalf of large national and international corporations as well as emerging and middle-market companies. With one of the largest individual clients practices in the country, the firm also has extensive experience helping individuals and their families, fiduciaries and tax-exempt entities plan for the future.

Please visit our website to learn more about our [Family Office Practice](#), our [Family Office Investing Series™](#) and our [Trusts and Estates and Individual Clients department](#).

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