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How much of your life is stored online? Are your bank accounts and financial accounts accessible online? What happens to your online accounts when you die?

Many people, including estate and probate lawyers, are unaware that they may have valuable assets either stored online or accessible only via online accounts. Because of the ever-growing complexity of our clients' "digital footprints," developing comprehensive estate plans requires a good understanding of the emerging world of "Digital Assets."

Why is it important that legal practitioners know and advise clients about these assets? As the number of them held by the average person increases, questions surrounding their disposition upon the individual's death or incapacity are becoming more common. Few holders of digital assets and accounts consider the fate of their online presences once they are no longer able to manage their assets. And these assets have real value: According to a 2011 survey from McAfee, American consumers valued their digital assets, on average, at almost \$55,000.¹ These assets include photos, digital music, client lists, bank accounts, bill-paying, online gaming avatars, and more. There are 30 million Facebook accounts that belong to dead people.² The average individual has 25 passwords.

Some service providers have explicit policies on what will happen when an individual dies; others do not.³ And even where these policies are included in the terms of service, most consumers click-through these agreements. (See "Definitions" on facing page.)

Emergence of a New Standard of Due Diligence

A new standard of due diligence for personal representatives and trustees is in the process of being formulated as these new Digital Assets gain greater recognition and appreciation by clients and their attorneys. Estate planners will be expected to understand how these new Digital Assets affect estate planning and estate administration after death.

New State Laws

Pertaining to Digital Fiduciaries

Only a minority of states have enacted legislation addressing access to a decedent's digital assets: Connecticut, Idaho, Indiana, Oklahoma and Rhode Island. In addition, other states, including Massachusetts, Nebraska, New York and Oregon, have considered or are considering legislation. Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, and whether the principal's death or incapacity is covered.

The National Conference of Commissioners on Uniform State Laws has formed a drafting committee tasked with preparing a uniform law pertaining to "Fiduciary Access to Digital Assets." It is drafting amendments to the Uniform Probate Code, Uniform Trust Code, Uniform Guardianship and Protective Proceedings Act, and Uniform Power of Attorney Act addressing general definitions for digital property, setting sets out the right of the personal representative to take possession of the digital property, authorizing the personal representative to access and manage digital property, and establishing a special procedure for recovery of digital property.⁴

Digital Estate Planning Steps in a Nutshell

There are a few steps in Digital Estate Planning that may be incorporated into the traditional estate planning process to provide a roadmap for the personal representative or trustee during the planning and administration of an estate or trust.

STEP 1. Where is your Client's Digital House? – Identifying "Hard Goods."

Most Digital Assets are stored on some form of "Hard Goods," including desktop computers, laptop computers, Smartphones, tablet computers, hard drives, computer media (CD, DVD etc.) and USB devices or other portable drives, or on someone else's hard goods including network servers and "cloud" sites.

A logical starting point in developing a plan for disposition of Digital Assets is to identify and list the various hard goods that the client or decedent uses along with the type of information that is stored on each device.

STEP 2. How big is your client's "Digital Footprint"? – Creating a Digital Inventory List.

Once the client has identified his or her Hard Goods, they can begin listing the various Digital Assets that make up their digital footprint. The list can include email accounts, financial, social and business accounts.

STEP 3. Keys to your client's Digital House – Provide for Access.

Passwords are the keys to the client's digital house. By including all passwords in the digital inventory, the client provides a tool for access to his or her Digital Assets that, with proper planning, can be used by the client's personal representative or trustee to meet the client's financial and personal wishes. Some key questions to consider are:

- Where do you keep your passwords?
- Who else knows your passwords?
- Does anyone else know where you keep your passwords?

However, access by a trustee or personal representative to the decedent's digital accounts may violate several federal and state laws, and the estate and probate practitioner needs to be careful in advising clients in this regard.⁵

STEP 4. Selecting a Digital Fiduciary.

The personal representative or trustee selected by the client to manage his or her estate in the event of disability or death may or may not have the technical skills or understanding of Digital Assets sufficient to administer Digital Assets effectively. The client may want to consider what skills and knowledge level will be needed to administer his or her Digital Estate based on the size and extent of the client's digital footprint. Family members, friends or associates may be in a unique position to assist the client's personal representative or trustee with regard to the client's Digital Estate.

Preparing a list of "digital fiduciaries" that the personal representative or trustee can turn to may significantly streamline the administrative process.

STEP 5. Provide Instructions.

Providing instructions for management and distribution of Digital Assets involves potentially balancing contract (license), property and probate law. Estate planning should include consideration of:

- Instructions for account access
- Notifications in the event of death or disability
- Instructions for continuing or closing sites
- Realizing Value for Digital Assets with financial value
- Determining Do Not delete items
- Bequeathed information
- Coordinating beneficiary designation in wills or trusts

STEP 6. Give Appropriate Authority.

There are a number of commercial sites such as

Definitions



"Digital Assets" in this context means (1) intangible or tangible items that are stored digitally on "Hard Goods," and such assets include information, financial records, rights to income, passwords, bank accounts, personal memorabilia, and contractual and intellectual property rights; and (2) assets that only exist in a digital form (and only stored digitally on Hard Goods) and are, by their very nature, intangible. They may have value in the digital worlds or environments in which they exist, and that value may be converted to or exchanged for real cash currency.

The categories of these Digital Assets include (1) email accounts, (2) financial accounts that are accessible only online, (3) information contained in programs such as TurboTax or Quicken that may be stored in the cloud, (4) online bill payments that can only be paid online (such as mortgages), (5) online businesses ranging from simple Ebay businesses to web-based businesses, (6) PayPal accounts that may have stored value, (7) web pages and blogs that contain ads that generate revenue for the estate, (8) social networking accounts, (9) registered domain names held for sale, (10) intellectual property of the decedent that may only be stored digitally (such as mp3 files), and (11) video games and virtual worlds where stored value may exist through currency conversion or from assets that can be sold out of those games.

This list of Digital Assets scratches only the surface of the many different kinds of digital property.



"Hard Goods" are the physical devices or equipment that digitally store or contain the client's or decedent's Digital Assets.



"Cloud" means a network of computer servers or Hard Goods and related software owned, managed and maintained by a third party.

Entrustet, Legacy Locker, and Datainherit that are attempting to provide plans and systems to handle digital asset transfers. We will see over the next few years how well these services will fit into our system of contract, property and probate laws. For now, these sites and the services they provide are untested, unproven, and may not be financially stable to "outlive" the people to whom the information is entrusted.

Clients will need to work closely with their estate planning attorneys to assure that

proper authority is given to appropriate fiduciaries who have tools and knowledge of Digital Assets to identify, secure and distribute those assets.

Conclusion

Digital Assets are here to stay. Estate and probate practitioners must incorporate Digital Estate planning into their practices to better serve clients and ensure that all digital due diligence has been properly performed as a part of their law practice management.

endnotes

1. Kelly Greene, *Passing Down Digital Assets*, WALL STREET J. (Aug. 31, 2012), <http://online.wsj.com/article/SB10000872396390443713704577601524091363102.html>.
2. Craig Blaha, *Over 30 Million Accounts on Facebook Belong to Dead People*, TECHNORATI

(Mar. 7, 2012), <http://technorati.com/technology/article/over-30-million-accounts-on-facebook>.

3. For a detailed listing, see, e.g., *Deceased Account*, <http://deceasedaccount.com> (last visited Dec. 28, 2012).
4. Drafting Committee on Fiduciary Access to Digital

Assets, Uniform Fiduciary Access to Digital Assets Act, National Conference of Commissioners on Uniform State Laws, Nov. 2012.

5. Stored Communications Act, 18 U.S.C. § 2701 *et seq.* (2006); Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.* (2006); see, e.g., Orin S.

Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004); Allan D. Hankins, Note, *Compelling Disclosure of Facebook Content Under the Stored Communications Act*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 295 (2012).