

Estate planning for digital assets

The significant impact of the digital age on estate planning and administration has only recently begun to receive widespread recognition.

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Digital assets may include images, text, multimedia information or other personal property stored in a digital format on a computer, server or other electronic device.

Gone are the days when it was relatively easy to inventory the assets after a death. Tangible personal property could be identified by walking around the residence of the departed. If the executor was not aware of all the decedent's assets, he or she could simply watch the mail for account statements that would inevitably show up in the mailbox. Similarly, bills and other obligations of the decedent would appear in the mail. Checking statements could be reviewed to ascertain the typical cash flows each month. Thus a physical inspection plus a little bit of time usually provided a fairly accurate guideline to the assets and liabilities of an estate.

The digital age has drastically changed this tried and true process. Statements of accounts are often sent electronically or are simply available for review online. Payroll deposits are made electronically and bill payment is done online—often automatically to regular payees each month. Individuals have social media accounts and store their treasured family photos electronically. They may have domain names or blogs that have a value.

This digital transformation has had a significant effect on both estate planning and estate administration that has only recently begun to receive widespread recognition. The executor may be unaware of the scope of the decedent's online accounts. Even if there is an awareness of specific accounts, the accounts may not be accessible to the executor because he or she does not have the passwords to the decedent's computer or the specific accounts. Bill payments may continue unabated as the executor has no way to shut them off or is unaware that they are occurring. Unsavory types may use obituaries to attempt to steal the decedent's identity such as by opening new credit cards in the decedent's name. Executors may not be aware of such activity for months.

This article will explore the importance of planning for digital assets and note the uncertainties surrounding this largely undeveloped body of law. It will describe the steps that estate planners may want to consider as well as actions that individuals may undertake to enhance the accessibility of these assets to their heirs.

What are digital assets?

Without attempting to provide a comprehensive definition, the term "digital assets" often refers to images, text, multimedia information or other personal property stored in a digital format on a computer, server or other electronic device. The most common types of such assets are as follows:

1. Financial accounts that are generally designed to be accessed via the internet and have little or no connection to a physical location. This may be an account at a specific financial institution or arrangements to pay bills that reoccur with some regularity online.
2. Social media accounts such as Facebook or Twitter or personal e-mail accounts. These are used for personal interface and also to store and share photos and videos.
3. Loyalty programs. The most common are airline miles, hotel points and cash back programs on credit cards.
4. Personal assets. These often include information uploaded onto a computer device such as photographs, videos or music playlists. Sensitive personal information is increasingly stored such as medical records or

Planning for digital assets can help minimize the risk of identity theft.

income tax filings. It is not uncommon for such sensitive information to be password protected above and beyond the basic password for someone's computer.

5. Domain names or blogs. Some of these may have considerable value but may require passwords.

Why plan for digital assets?

The above-noted description of digital assets should make it obvious why planning is important. Unfortunately, dealing with such assets is an important step that is often overlooked in the estate planning process.

The most important reasons to plan for digital assets are the following;

1. Prevent financial loss. If an account with significant value cannot be accessed, it may be lost to the heirs or, at the very least, its distribution delayed. Bill payments will not automatically stop because someone dies. For example, monthly payments of health insurance premiums can continue long after death when the decedent is obviously not in need of further coverage. Level payments for natural gas service may continue in the summer even after a home has been sold. Clearly these need to be stopped.
2. Make it easier for the heirs and/or the executor. The family cannot deal with assets it does not know about or cannot access because it lacks passwords. The more accounts that someone has, the more potential problems are created for those left behind.
3. Don't lose those treasures. Irreplaceable photos of deceased family members or significant family moments may be lost if no one can access them. Tax records may be vital for the executor and may be otherwise unavailable—especially if a decedent did not have a regular accountant.
4. Minimize the risk of identity theft. A variety of unsavory types look to steal the identities of the departed both for financial gain and to create new identities for others.
5. Keep private information private. Personal information should not become public.

The obstacles

Planning for digital assets is not easy. First the law in this area is either non-existent or unclear, both at the state and federal level. There have been attempts at legislation in several states with limited results.

The National Conference of Commissioners on Uniform State Laws approved the "Uniform Fiduciary Access to Digital Assets Act" in mid-2014, but this has met opposition because of both privacy concerns and potential conflict with federal law. This is clearly an area where the law has not caught up with the real world.

Ownership is another area of concern. Many digital accounts, such as electronically purchased music or books, are not owned by a decedent but rather are used through licensing agreements with a provider. Few people actually know what these agreements say—they usually simply clicked "I agree" when they signed up. Such agreements may prohibit or limit transfer at death.

Most well-drafted wills, revocable trusts and powers of attorney today contain a "Digital Assets Clause," which grants a trusted third party access, use and control over your digital assets.

Safety is a significant issue. Yes a person can make a list of all their passwords or use the same one for everything, but this creates major risk if these passwords fall into the wrong hands. Getting ones credit card numbers into the public domain surely will create a personal nightmare.

Planning for digital assets

Despite these obstacles and uncertainties, there are a number of reasonable steps that can be taken to protect and transfer digital assets. The following are suggestions that everyone may want to consider to ease the burden in administering an estate.

First, update your estate planning documents. Most well drafted wills, revocable trusts and powers of attorney today contain a so-called "Digital Assets Clause" which essentially grants your executor, trustee or attorney-in-fact broad access, use and control over all your digital accounts, electronically stored information, social media and the like. If your documents have not been recently updated or do not contain such a clause, you should consider discussing with your estate planning attorney the wisdom of including such language. These clauses are untested for the most part and may run into obstacles with licensing agreements. They cannot hurt, however, and may encourage a court or provider to grant access to accounts to your fiduciaries. In addition, specific bequests should be made with respect to loyalty program benefits such as airline miles or hotel points. Again there may be rules of the airline or hotel chain that come into play. If you have a very large mileage accumulation on "Occasionally On Time Airline," you may want to check with their program before discussing this with your attorney.

Secondly, inform your executor-to-be or a trusted relative. Let them know where you have online accounts and provide a means of accessing your passwords. Consider making a digital inventory. There are services that will store all passwords that can be accessed through one password. If you use one, remember to check to make sure your executor or named beneficiary will be able to access it. If you make a list of passwords, keep it stored in a safe place, such as your son or daughter's safe deposit box, and remember to keep it updated as passwords change. Giving someone else your user name and/or password may violate your service agreement, so consult your legal counsel on this issue. There is always some risk in creating a list, so consider its security carefully. Back up your family photos and place them on a CD, thumb drive or other media that will allow them to be saved if there is an issue with your computer.

Take steps to protect privacy. A revocable trust does not become a public record in most states, so it typically provides more privacy than a will. Most particularly, if specific accounts (such as an airline frequent flyer account) are being referenced, a revocable trust may be preferable. Discuss this issue with your attorney. Minimize the number of accounts if possible. Consolidation of accounts leaves fewer accounts for your executor to deal with. If all bills are being paid from one account, it always gives your executor the option of closing that account to stop unwanted bill payments.

Think digital

The bottom line is that digital assets are more and more of a concern in preparing an estate plan. Preparing for the disposition of the jewelry and the beach house is often an obvious task. Accessing your online accounts is not, but it should be!

– *Robert Madden*, Senior Wealth Strategist

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