

Outside Counsel

Expert Analysis

Estate Planning For the Digital Afterlife

As more Americans establish personal email accounts, social media accounts, and other electronic accounts, these “digital assets” are becoming an increasingly vital estate-planning consideration. The failure to consider how to dispose of digital assets in an individual’s estate plan could result in later complexities following the individual’s death.

California and New York recently joined 19 other states in implementing laws to govern the administration of digital assets after death, as the handling of digital assets becomes a more common issue in estate planning and estate administration.

This article discusses the importance of accounting for the digital assets in an estate plan, provides practical considerations for handling their disposition after death, and describes the current state of



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the law for the handling of digital assets after death.

What Are Digital Assets?

The term “digital assets” includes any and all content or electronic information stored on a computer, or through computer-related

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technology, but does not include the underlying hardware. Some examples of digital assets are financial accounts—such as the login credentials for online bank accounts, email accounts, social media accounts (including postings on social media accounts, such as

photos and videos)—and information stored on computers, tablets, or phones—such as Word documents, PDFs and music. Internet companies (“custodians”) may store some of these digital assets on their servers. In addition to having personal significance to the owner, many of these assets may have actual monetary value. Recent studies have documented that most individuals own about \$35,000 worth of digital assets, on average.¹

Without an estate plan that properly accounts for the eventual administration of these assets upon death, digital assets may be subject to unfavorable federal or state laws, or the “terms of service” contract that each online service provider has. For example, if a surviving spouse were to use the decedent’s password to log on to the decedent’s online bank account to pay a bill, the Stored Communications Act—a privacy law prohibiting Internet service providers from disclosing the contents of its user’s information—could prevent the spouse from accessing the account. Additionally, not only has the spouse likely

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violated the custodian's terms of service, but he or she may have violated the Computer Fraud and Abuse Act, which governs situations when individuals use a computer without access or in excess of the individual's authorized access.²

In addition to possible legal consequences that may result from such an oversight, a decedent's family may undergo additional stresses outside of the legal system. For example, one surviving spouse was told by Apple that she needed to obtain a court order to retrieve the decedent's password if she wanted to continue playing a card game app on the couple's shared iPad device.³ Using only a notarized death certificate and her husband's will, she was able to transfer title of the house, car and other assets in her husband's estate, yet was unable to retrieve a password to an Apple ID account without going through a long and complex court proceeding.

Protecting Digital Assets

A decedent's executor and/or family members will likely be responsible for gathering and managing the decedent's digital assets after death. Below are practical considerations estate planners may wish to suggest to clients to account for the disposition of digital assets after death.

Review Custodian Policies and the Applicable Laws. Each custodian has its own terms of service, which are commonly presented to the individual for review prior to the user completing the creation of their account. These terms often

forbid the user from transferring the account or providing access to anyone else and may present impediments to family members or friends who may want to access a decedent's email account, for example, to retrieve bills and other documents.⁴ Estate planners can suggest that their clients review each custodian's individual policy and consider switching their primary accounts to providers with their preferred terms of service.

Review Current Digital Asset Laws. Some states have adopted the Uniform Fiduciary Access to Digital Assets Act (UFADAA), a model law meant to provide legal authority for fiduciaries of an estate to access the deceased's digital assets. In 2016, the National Conference of Commissioners on Uniform State Laws adopted the revised UFADAA. Under

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this law, fiduciaries are allowed to manage a decedent's digital assets. Simultaneously, this law provides security by restricting fiduciaries from accessing electronic communications of the deceased unless the deceased expressly consented to such disclosure in a will, trust agreement, power of attorney, or other legal record.

The UFADAA alleviates many of the problems that digital assets may present for all involved parties. The uniform act grants fiduciaries the legal authority to manage digital assets in the same way they manage tangible property.⁵ Fiduciaries can gain access to the deceased's digital assets by requesting access from the custodian, supplemented with a certified copy of the document that granted the fiduciary the authority to do so (court order, letters testamentary, certification of trust, etc.). Finally, for custodians, the law insulates them from any liability when complying with a fiduciary's request as long as their acts were in good-faith compliance with the request. If all states were to enact the UFADAA, most of the obstacles currently associated with digital asset estate-planning would dissipate.

The UFADAA has been enacted in 21 states as of Oct. 14, 2016.⁶ On Sept. 29, 2016, Governor Andrew M. Cuomo signed into law legislation that substantively follows the model UFADAA for the administration of digital assets in New York, and Governor Edmund G. Brown in California also signed similar legislation on Sept. 24, 2016. Legislation substantively similar to the UFADAA has also been introduced in 12 other states so far.

Identify and Inventory Digital Assets. Estate planners should suggest that clients identify and take inventory of their digital assets and may keep a list of all of these accounts, identifying the username and related passwords

that correspond to each individual account. It might also be prudent for clients to list answers to any security questions associated with any account should password retrieval be necessary. If a client does keep such a list, she should be sure to update it periodically to reflect any changes that may result over time.

Admittedly, by maintaining such a list, the client runs the risk that someone untrustworthy may obtain it, or that the list may be difficult to access by the people who would need it after his or her death.⁷ To limit these adverse possibilities, it may be helpful to suggest that clients keep their lists in secure, but reasonably accessible, locations like a personal safe.⁸ If the list is in digital format, they should ensure that it has the appropriate encryption and inform a responsible party on how to overcome it.

Document Final Digital Asset Wishes in Estate Planning Documents. When preparing estate planning documents that account for digital assets, estate planners should include language that provides the fiduciary with access to the list documenting the testator's digital assets (if any) and expressly authorize the fiduciary to manage the digital assets in the estate. Estate planning documents should also communicate clear instructions to the fiduciary regarding what should be done with the testator's digital assets.⁹

Conclusion

Digital assets have become a vital consideration when planning for

death. A comprehensive estate plan attempts to protect the deceased's loved ones from unnecessary encumbrances and adequately carries out the deceased's wishes. While implementing the protections outlined in this article do not guarantee that a decedent's digital assets will be properly taken care of, an estate plan that accounts for the administration of these assets will reduce the difficulties fiduciaries and the decedent's loved ones may face in accessing and administering the decedent's digital assets after death. The potential benefits of being prepared outweigh the potential risks of being unprepared.



1. Evan Carroll, "How Much Are Your Digital Assets Worth? About \$35,000," THE DIGITAL BEYOND (July 24, 2014), <http://www.thedigitalbeyond.com/2014/07/how-much-are-your-digital-assets-worth-about-35000/>; Robert Siciliano, "How Do Your Digital Assets Compare?" MCAFEE CONSUMER BLOG (May 14, 2013), <https://blogs.mcafee.com/consumer/digital-assets/>.

2. Stored Communications Act, 18 U.S.C. Chapter 121 §§2701–2712; Computer Fraud and Abuse Act, 18 U.S.C. §1030(a)(2) (2012).

3. Rosa Marchitelli, "Apple Demands Widow Get Court Order to Access Dead Husband's Password," CBC NEWS (Jan. 18, 2016), <http://www.cbc.ca/beta/news/business/apple-wants-court-order-to-give-access-to-appleid-1.3405652>;

4. For example, Google recently updated its terms with respect to when a person can request information regarding a deceased user's account. The options are as follows: (1) close the account of a deceased user; (2) submit a request for funds from a deceased user's account; or (3) obtain data from the deceased user's account. Submit a Request Regarding a Deceased User's Account, GOOGLE ACCOUNTS HELP, <https://support.google.com/accounts/troubleshooter/6357590?hl=en&rd=2> (last visited Oct. 14, 2016).

5. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (2015) 1 (March 8, 2016), <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20>

to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf. Fiduciaries would have default powers over the assets under the law, but the deceased can always enter specific language within their estate planning documents addressing specific concerns they may have.

6. The UFADAA has been enacted in Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Maryland, Michigan, Minnesota, Nebraska, New York, North Carolina, Oregon, South Carolina, Tennessee, Washington, Wisconsin, and Wyoming. Legislative Fact Sheet—Fiduciary Access to Digital Assets Act, Revised (2015), UNIFORM L. COMM'N, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited Oct. 14, 2016).

7. For example, the list may be difficult to access if kept in a safe deposit box or a password-protected computer. Online tools are available that offer encrypted services to help protect and manage passwords.

8. The fiduciary should also have precise instructions on where to access and obtain the list that will provide them with access to the digital assets.

9. Because state laws are still in flux, estate planning for digital assets remains an evolving process, and it remains unclear whether a custodian will be required to honor the authorization granted to a fiduciary.