

Presenting a live 90-minute webinar with interactive Q&A

Estate Planning for Digital Assets 2014: Identification, Access and Ownership Challenges

Succession Plan Strategies for Internet and Computer Files, Social Media, and Electronic Accounts

TUESDAY, MAY 13, 2014

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ESTATE PLANNING FOR DIGITAL ASSETS

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EVERY 60 SECONDS ONLINE...

- 98,000 tweets
- 320 new twitter accounts
- 100 new linkedin accounts
- 6600 pictures uploaded to flickr
- 700,000 facebook status updates
- 695,000 google searches
- 168,000,000 emails sent
- 600 videos uploaded to YouTube

WHAT IS A DIGITAL ASSET?

- Digitally Stored Content
- Online Accounts
- Stored Locally
- Stored in the Cloud

EXAMPLES

- Pictures
- Videos
- Documents
- Music
- Bank Accounts

WHAT IS A DIGITAL ASSET FOR ESTATE PLANNING PURPOSES?

- Intangible Personal Property
 - Any non-physical item stored on a computer, phone, USB drive, online
- Must Remain Intangible
 - Once printed, it becomes tangible personal property

WHAT ABOUT DIGITAL ACCOUNTS?

- Require a password to access
 - Email
 - Social media
 - Social networking
 - Bank accounts

VALUE OF DIGITAL ASSETS

- Emotional
 - Photos and documents may hold sentimental value
- Economic
 - Blogs and PayPal accounts may hold economic value

OWNERSHIP

- Created by Individuals
 - Emails and Pictures
 - Individuals own the content of the emails and pictures posted online

VS.

- Purchased by Individuals
 - Music
 - Individuals obtain a license from a provider to access the music system or individual music file for their individual use

OWNERSHIP

- Companies have policies to delete inactive accounts and remove all content
- Some of the content might be useful to a Personal Representative
 - Account information may be stored online in an account such as 1Password

POPULAR ACCOUNTS

- Gmail
 - Provides instructions for gaining access to user accounts and can provide access for authorized Personal Representative
- Hotmail
 - Will provide copies of any emails in user accounts, provide contact lists and close account
- Yahoo!
 - Upon receipt of death certificate, delete all content and remove account
- Facebook
 - Has set up a specific procedure for memorializing an account or will close account upon formal request from next of kin

POPULAR ACCOUNTS

- LinkedIn
 - After receiving verification of death, will close account
- Twitter
 - Upon request from next of kin, will provide copy of tweets and close account
- YouTube
 - Allows the Personal Representative to access user's account
- PayPal
 - Allows Personal Representative to close account and will distribute any remaining funds via check
- iTunes
 - No manner to transfer iTunes music files as user only has a license to the music

HOW TO PRESERVE DIGITAL ASSETS

- 5 Step Process
 - Identify and Inventory
 - Tech Savvy Personal Representative
 - Access
 - Instructions
 - Update Estate Plan

IDENTIFY AND INVENTORY

- Questions for clients:
 - If your computer was destroyed, what would be lost that you would want back?
 - If you forgot all your passwords, which online accounts would you want access to first?

IDENTIFY AND INVENTORY

- Questions for Clients:
 - What digital online assets have sentimental value to you and your loved ones?
 - Does anyone presently have access to your online accounts?

TECH SAVVY PERSONAL REPRESENTATIVE

- Most people name a spouse or sibling as Personal Representative
- He or she may not be tech savvy enough to handle the rapidly changing digital world

ACCESS

- Contrary to what we have been told, it is best to write all accounts and passwords and store them in a safe place
- Personal Representative will not have access to online accounts without passwords

INSTRUCTIONS

- Leave detailed instructions on how to access each account
- May also desire to leave instructions as to how death is to be communicated in online networks

UPDATE ESTATE PLAN

- To include digital assets
- Also update password list as needed

CLOSING

- Provide access to digital accounts
- Update passwords as they are changed
- Update estate plan to include digital assets

CLOSING

- Technology is rapidly changing
- Take the necessary steps to keep up with this change to protect assets

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Fiduciary Access to Digital Assets

Naomi Cahn, GWU Law School,
May 13, 2014

Parts of this PowerPoint presentation were adapted from Gerry W. Beyer, Professor's Corner, Nov. 2013

Legal Goals of planning:

- Upon principal's death or incapacity:
- Allow fiduciary to
 - (a) manage principal's digital assets;
 - (b) copy or delete digital accounts from entity that stores the principal's digital assets;
 - (c) access digital assets, including bypassing any authentication method; and
 - (d) distribute remaining digital assets to intended beneficiaries.

Legal issues

- Federal law
- State law
- Service provider agreements

The Law

- Digital assets should be subject to other trust and probate laws – but . . .
 - Are digital assets the same as bricks-and-mortar assets?
 - Access issues certainly differ
 - So does quantity
 - Has technology outpaced the law?
 - Dearth of explicit legislation
 - Internet companies have relied on terms of service to guide them.

Digital Asset Law Issues

- Difficulty in defining and describing digital assets in the statutes themselves
 - Rapidly changing nature of digital assets
- Type of access/power sought by conservator may not be the type granted by statute
- Conflicts with terms of service and other laws
- Do state statutes effectively carry out the wishes of conservators?

- Federal law on unauthorized access
- US government recommends a “social media” will with an “online executor”
- <http://blog.usa.gov/post/22261234875/how-and-why-you-should-write-a-social-media-will>
- But what rights does the executor have?
- Computer Fraud and Abuse Act, ECPA/Stored Communications Act

CFAA

- Computer Fraud and Abuse Act of 1984
 - Criminal sanctions for anyone who “intentionally accesses a computer without authorization or exceeds authorized access”
 - Does fiduciary have authorization qua fiduciary?
 - From both the account holder AND the ISP?

- Stored Communications Act looms large
- Few cases:
 - In re Facebook, Inc.
 - --- F.Supp.2d ----, 2012 WL 7071331
 - N.D.Cal., 2012.
- Copyright
- IRS treats digital assets as property

State Digital Asset Laws

- Since 2005, various states have passed digital asset legislation
 - Conn., Idaho, Ind., Okla. & R.I., VA, NV
 - NUMEROUS other states are considering legislation
 - See <https://www.everplans.com/tools-and-resources/state-by-state-digital-estate-planning-laws>
- First Generation - E-mail Only
 - Conn. 2005, R.I. 2007
 - Restricted to contents of “electronic mail accounts”
 - Allows “access or copies”

State Digital Asset Laws

- Second Generation - Open-Ended
 - Ind. 2007
 - Release of records “stored electronically”
- Third Generation - Social Networking
 - Okla. 2010, Idaho 2012, VA 2013 (only minors)
 - Estate may take control of or terminate:
 - Social networking
 - Microblogging/short messages
 - E-mail

- Fourth generation
 - Expands class of fiduciaries covered
 - Interfaces with federal law
 - Covers all accounts
 - Addresses privacy issues

ULC

- Drafting Committee on Fiduciary Powers and Authority to Access Digital Assets
- Final Act?
 - Which fiduciaries covered?
 - What powers granted?
 - I'm the reporter.

Draft ULC language

- Authorizes access by executor, conservator, agent pursuant to a power of attorney, and trustee
- Fiduciary has same power as original account-holder (no more/no less)

Must check website policies

- Click-through policies are generally enforceable
- I just agreed to what?

Agree

Whatever

iTunes Policy

- iTunes' Terms and Conditions and Privacy Policy do not directly address deceased users or account transferability
- Terms limit iTunes to “personal, noncommercial use” and states users shall only access accounts they are “authorized to access”
- Downloaded media may be used on and transferred to a limited number of devices

Must check website policies

E.g., Facebook:

- Safety: You will not solicit login information or access an account belonging to someone else.
- Registration and Account Security: You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account.
- You will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission.

Google:

Some providers do have explicit policies

- Microsoft has a policy clarifying conditions on which they'll provide copies of digital information.
 - they distinguish between viewing someone's information and full access

GOOGLE POLICY – April 2013

- Google has now rolled a euphemistically titled "Inactive Account Manager" tool
- "Control what happens to your account when you stop using Google," the company says
- Amount of time before Google takes action
- Can list up to 10 trusted contacts and share your data

From the Atlantic

John Doe (john.doe@gmail.com) instructed Google to send you this mail automatically after John stopped using his account.

John Doe has give you access to the following account data:

- +1s
- Blogger
- Drive
- Latitude
- Mail
- Picasa Web Albums
- YouTube

[Download John's data here.](#)

Sincerely,
The Google Accounts Team

WILL THE OTHERS FOLLOW?

Files Purchased by the Client

- When you purchase digital files (music, movies, books), you have merely purchased a *license* for personal use.
- Apple's Terms of Service has nothing specifically about the transfer of your media on death.
- It appears that legally –for now- there may be no way to transfer iTunes media on death

USE OF PURCHASED OR RENTED CONTENT

You agree that the iTunes Service and certain iTunes Products include security technology that limits your use of iTunes Products and that, whether or not iTunes Products are limited by security technology, you shall use iTunes Products in compliance with the applicable usage rules established by Apple and its licensors ("Usage Rules"), and that any other use of the iTunes Products may constitute a copyright infringement. . . You agree not to access the iTunes Service by any means other than through software that is provided by Apple for accessing the iTunes Service. You shall not access or attempt to access an Account that you are not authorized to access. You agree not to modify the software in any manner or form, or to use modified versions of the software, for any purposes including obtaining unauthorized access to the iTunes Service. Violations of system or network security may result in civil or criminal liability.

I Agree

I Have No Idea
What This Says



Transferring Digital Assets: Just what is owned?

- Licenses/contractual rights v. property ownership
- Check the terms of service
- Examples:
 - Email accounts – user has a license from the service provider to access the email system in accordance with the Terms of Use or Terms of Services. Client should retain a property interest in the sent and received email in the inbox.
 - Social Networking sites – client has a license from the internet service provider (ISP) to access the site in accordance with the Terms of Use or Terms of Services. Client should retain a property interest in the user generated content, contact lists, etc. on the networking site.

Guidelines for will language

- Cover lawful consent, range of devices and accounts, types of powers; recognize difference between access and distribution
- THIS SHOULD NOT BE USED!
- Power of my executor concerning digital assets: I give my executor lawful consent to access my digital assets, including but not limited to, electronic devices and electronic records, that I may control at my death, and to have all powers that I as the legal account holder or owner would be able to exercise . . .
- Samples are available on the web.

What if no planning?

- The distribution is left to the provider
 - Various policies in place OR
- Your personal representative TRIES to take control
- Note electronic privacy protections
 - E.g., Electronic Communications Privacy Act, CFAA
- For missing information, then email might be source
 - Might be means of accessing bank accounts, etc., so avoid late fees, etc.
- Ask for authority in conservator/guardian court order
- Online services, such as Webcease, promise to help track down information

THE FUTURE?

- Who knows?

What about the future?

- New digital assets and technologies
- New laws
 - Federal and state
 - Need to amend federal law
 - States need to ensure probate courts have authority
- New internet policy
- More public awareness
- More planning!

More information?

- Some websites about protecting your digital assets
 - www.thedigitalbeyond.com
 - “blog about your digital existence and what happens to it after your death”
 - www.yourdigitalafterlife.com/resources
 - Based on the book
 - <http://www.digitalpassing.com/about/>
 - “blog covering the intersection between estate planning . . . and the digital world”
- [Password protection:](#)
 - LastPass.com or [1Password \(www.agilebits.com\)](http://1Password.com).

Articles

- Digital Death Conundrum: great review of issues: <http://lawreview.law.miami.edu/wp-content/uploads/2011/12/The-Digital-Death-Conundrum-How-Federal-and-State-Laws-Prevent-Fiduciaries-from-Managing-Digital-Property.pdf>
- Digital Planning: The Future of Elder Law: <http://www.naela.org/NAELADocs/PDF/Library%20Tab/NAELA%20Journal%20Spring%202013/08NJSpring2013BeyerCahn.pdf>

Sample questionnaires, etc.

- Useful questionnaire:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166422
- Useful language and resources:
 - <http://www.digitalestateresource.com/sample-language/>
 - Also includes list of online companies that can help
- More online services:
 - <http://www.thedigitalbeyond.com/online-services-list/>

Thank You

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Estate Planning Options for Digital Assets

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May 13, 2013

Digital Asset Estate Planning

- Digital estate planning is similar to other estate planning issues we face...except the fact there is not 100's of years of jurisprudence or books of legislation to fall back on.
- So, think about the client and ask yourself:
 - What type of person is the client? Age? Technical ability? Married? Single? Etc.
 - How to address the breadth and type of digital assets the client owns?
 - What is client trying to accomplish with digital assets?
- Are the digital assets more sentimental/personal in nature?
- Do the digital assets have more monetary value to them?
- What type of planning needs to be drafted to meet client's goals?
- What is the likelihood client's beneficiary will want the digital asset?

Reason for Estate Planning of Digital Assets

- Goes beyond just typical estate plan that distributes assets after decedent's passing.
- Can make it easier on Personal Representative and family members and other fiduciaries.
- Limits potential for identity theft.
- Prevents wasting away of estate assets.
- Prevents losing deceased's personal story stored digitally.
- Prepares client and you for a growing information-soaked age.

Low Tech v. Hi-Tech

Digital Estate Planning Options

Low-Tech Solutions

- Within estate plan:
 - Can take a passive/advisory approach within plan.
 - Can be more proactive within in estate plan. Specific bequests in will or trust.
- Outside of estate plan
 - Some form of physical instrument to convey access/distribution
- Less legally enforceable.
- Relies on all the parts moving together.

Hi-Tech Solutions

- Looks toward commercial services to distribute assets.
- Takes a more non-probate approach to distribution digital assets.
- Relies on cooperation between third parties to follow through on distributing assets.

Low Tech Estate Planning Solutions

- Within the Estate Plan
 - Passive Approach:
 - Listing of the digital assets in some hard-copy format. Is it legally binding?
 - Accomplishes the biggest concern with digital assets is identification and existence of digital assets.
 - Just the process of listing out digital assets is a relief. Eases the burden on fiduciaries to be aware of the digital assets.
 - Have a clause in will stating personal representative as has access to estate plan. Will the PR have the ability to utilize the digital assets?
 - Problems: safety concerns, hassle, updating, location of document, backed by law?, etc.
 - Proactive Approach:
 - Prepare an inventory of digital assets including user names and passwords.
 - Designate beneficiaries you would like to see receive each asset.
 - Create specific bequests in will similar to testator giving away important personal property.
 - Could incorporate by reference the inventory of the digital assets in the will.

Low Tech Estate Planning Solutions

- Within the Estate Plan
 - Proactive Approach – the Trust option
 - Owner transfer digital assets into owners typical revocable living trust..
 - Is creating a Digital Asset Protection trust overkill?
 - Provides trustee with instructions to trustee on management of digital assets in trust document.
 - Client could register digital asset accounts in name of trust so successor trustee would legal gain access.
 - Since many digital assets take the form of license that expire upon death. Theoretically, these accounts would survive the death of the settlor.
 - Advantages:
 - Easy to update
 - Avoids probate and remains private
 - Continuation of ownership after death
 - Disadvantages –
 - nothing to say licenses would continue,
 - non-transferability of ownership – See Apple’s User Agreement.

Low Tech Estate Planning Solutions

- Outside of the Estate Plan:
 - More for issues of incapacity to gain access to account and knowledge about the account.
 - Create list of digital assets including username and password. List can be stored electronically or hard copy. Encrypted?
 - At least provides identification of digital assets and potentially access to the accounts.
 - Problem: security, hassle of updates, storage, access, etc.

Hi-Tech Estate Planning Solutions

- Afterlife companies – provide varying levels of services to store digital assets depending on what a client wants to pay for protection.
 - Some give only minimal services by providing users with online storage for passwords and digital documents.
 - Some enable users to save all online account information in a digital safe deposit box and assign beneficiaries for each account.
 - Some will provide the opportunity to also create some form of last message to the client’s family including videos, letters, emails, etc.
 - And, everything in between.
- Some of the afterlife companies include:
 - Legacy Locker, Deathswitch, Asset Lock, Secured Safe [formerly DataInherit, Entrustet, and others]
- You also have the general on-line storage companies like DropBox, Box.com, Amazon on-line storage.
- Issue with many AfterLife companies is reliability and the fly-by-night atmosphere that currently exists.
- Relies on third party company transferring the digital asset like it says it will.
- Lack of cases makes it hard to determine if digital estate planning will work.

Risk Management

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May 15, 2013

Risk Management

- **Risk management** is the identification, assessment, and prioritization of the effect of uncertainty on objectives (whether positive or negative) followed by coordinated and economical application of resources to minimize, monitor, and control the probability and/or impact of unfortunate events or to maximize the realization of opportunities.
- But what does all that mean when it comes to estate planning and digital assets?

Identification – Assessment – Prioritization

- Identification:
 - What are digital assets?
 - What type of digital assets does our client own? License v. Property
 - What estate planning can be done with respect to client's digital assets – is it an identifying tool or part of the overall estate?
- Assessment:
 - What type of digital assets does the client own?
 - Sentimental digital assets v. financial valuable assets. Is your client a blogger or social media maven?
 - What is the value of those assets?
 - How valuable and type of assets will dictate direction on digital estate plan?
 - What level of digital services does the client have? Or what is the current digital asset plan in place by client?
- Prioritization:
 - How important are the digital assets to client's estate?
 - How important is access to digital assets upon client's passing? Should Flickr pictures go to multiple heirs? Do heirs get along? Can it be transferred.
 - How important and level of addressing digital assets is measured against the other parts of client's estate plan.

Effect of Uncertainty on Objectives

- Legal uncertainty
 - Only a few states address digital assets, and most of those states' laws have a limited scope.
 - In July 2012, the Uniform Law Commission appointed a Drafting Committee on Fiduciary Access to Digital Assets to propose a uniform law for states to hopefully adopt. You can follow the Committee here: <http://uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets>
 - Over last 5 years most of us have been dealing with legal uncertainty in other areas of estate planning. See EGTRRA.
- Technology uncertainty –
 - Technology development and advancement are taking place on a breathtaking pace.
 - Sites created in the past can be fall by the wayside. See for example, AOL, Microsoft Explorer, MySpace, Friendster, etc.
 - Think about this in 2007:
 - iPhone was introduced in July.
 - Twitter posted approximately 400,000 tweets per quarter in 2007.
 - Facebook has less than 100 million users.
 - What's Instagram, Tumblr, Pinterest?
 - Looks sunny to me. What are you talking about the "Cloud?"
 - Technologies with high popularity in 2013 does not mean they will be popular tomorrow. Are photo-sharing websites like Flickr, Photobucket and Shutterfly going to exist in 5 years?
 - Think about the recent Australian case of *In re Estate of Karter Wu*
- Business uncertainty
 - Does a company have stability. Time is not the best indicator. Maybe look at number of users.
 - Afterlife companies is still developing area. Larger player are coming in and buying. See Secure Safe.
 - Changes in law could impact afterlife companies.

Application of Resources

- Attorney should dedicate time and be aware of changing technology landscape and its impact, including:
 - Awareness on the reputation of new products. Changing products means one can not rely a site being around because of company closure, technology advance, etc.
 - Awareness of client experience. Many sites/technologies (large and small) have fierce and loyal consumers. Apple v. PC, Android v. Apple.
 - Awareness of legal ramifications that arise from advances in technology legal by being up-to-date via CLEs, trade publications, conferences, etc.
 - Awareness of the transfer policies of online sites and services and their impact on clients digital assets.
 - Awareness of client's ability to react to changes in technology.
 - Awareness that technology is advancing much faster than legal codes are adapting to incorporate assets.
- One thing to remember is that there is only so much time in the day and not get lost in weeds.

...To Control the Impact of Events...

Minimize/Maximize Realization of Opportunities

- Insurance (Policies v. Practice)
 - Malpractice
 - This is new area of law (Justin Ellsworth case was 2003/04). That means it is very unsettled as to the unique nature of digital assets.
 - Recordkeeping – like any other area of practice to avoid malpractice, documentation of practices and steps taken with individual clients is important.
 - General Liability
 - What does general insurance policy say with regard to digital assets of significant value.
 - Copyright issues could be a client concern.
 - Redundancy
 - What type of back-ups and controls does the client have in place. Digital assets should be backed-up locally and a second copy stored at another location. Cloud programs are fairly cheap to store the sentimental type digital assets. Be aware of your state's ethic's opinions on cloud computing.
 - Transfer of management – who oversees managing the digital assets. (goes back to uncertainty)
 - Make sure to ask about digital assets in estate planning questionnaire.

...To Control the Impact of Events...

Minimize/Maximize Realization of Opportunities

- “Failing to plan, is planning to fail...”
- Planning:
 - Storage Practices
 - On-line storage: ensure that selected on-line solution is sound. Like other vendors you use, keep a list of on-line providers and track good/bad outcomes.
 - Should automatically have some form of Cloud system – Mozy is \$5.99/month for 50 GB, Carbonite is \$59/yr. for unlimited storage on 1 computer.
 - Off-line storage: ensure client understands need for back-ups.
 - Off-line back-up should have a second back-up stored at another location.
 - Transfer
 - What is the client’s wishes with respect to on-line memorial? How would client like on-line presence treated after passing? Should on-line presence be maintained?
 - Management
 - Need to be aware but not an expert. Let 19 year old worry about ins and outs of Facebook be aware of impact of Facebook on digital assets.
 - Does particular assets generate fiduciary duties.

Additional Online Resources and Articles

- Estate Planning in the Digital Age, by Gerry Beyer, April 21, 2013, http://lawprofessors.typepad.com/trusts_estates_prof/2013/04/estate-planning-for-digital-assets.html
- Digital Estate Resource - <http://www.digitalestateresource.com>
- Digital Estate Resource - <http://www.thedigitalbeyond.com/>
- Wills, Trusts & Estates Prof Blog
http://lawprofessors.typepad.com/trusts_estates_prof/
- Digital Estate Blog - <http://www.digitalpassing.com/>
- Estate Planning for Your Digital Assets, *Law Practice Today*, by Dennis Kennedy, March 2010, ,
<http://apps.americanbar.org/lpm/lpt/articles/ftr03103.shtml>
- E-Legacy: Estate Planning for Digital Assets, *Wisconsin Lawyer*, by Nathan J. Dosch and Joseph W. Boucher, December 2010,
http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=99281

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