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DIGITAL ASSET

Planning for Digital Assets

By Jennifer Woodhouse

With the increasing influence of technology in our daily lives, digital assets are becoming more important. A 2013 study estimated that the average person has digital assets worth \$35,000.¹ Beyond digital assets with a monetary value, many of us have digital assets with significant sentimental value. No longer do we have family photo albums, journals, and stacks of love letters in a bureau drawer; instead, we have Instagram, Facebook, and Match.com accounts.

At death, it is critical that one's personal representative² be able to identify and value all assets both so those assets can be distributed to the appropriate person or organization and so that they can be properly reported on the decedent's estate tax return, if necessary. The increasing move to electronic records has made this task incredibly difficult for personal representatives to accomplish. As financial institutions try to entice account holders to move to electronic records and statements, many individuals conduct their banking and financial activities entirely online. No longer can a personal representative assume a physical search of the decedent's records and careful monitoring of the decedent's mail will turn up all the decedent's assets.

For example, a debit card in the decedent's wallet may be the only tan-

gible evidence of the location of a bank account. But how is the personal representative to find out about a brokerage account if all statements and disclosures are electronic? In some cases, reviewing the decedent's email might turn up these accounts. However, accessing the decedent's email can be problematic in and of itself, and moreover, how is the personal representative to know if he or she has identified all the decedent's email accounts? Or consider a small business owner who conducts most of her business by email. The ability to quickly access her email account in the event of her death or incapacity may be essential to carrying on the business.

Legal Issues Related to Digital Assets

The Uniform Law Commission has drafted the Uniform Fiduciary Access to Digital Assets Act (UFADAA), which would give a personal representative (and other fiduciaries) the right to access the decedent's digital assets. Legislation has been introduced in Oregon³ and Washington⁴ to enact UFADAA, but it has not yet been adopted in either state.

In the absence of state law specifically addressing digital assets, personal representatives must try to use traditional means to access these assets, and their success depends largely on the type and custodian of the asset. Each digital asset

may be unique in its treatment on the death of the owner and may be subject to various user agreements, licenses, and company policies.

Email, for example, varies widely by company. Yahoo's current policy is that neither the account nor the content is transferrable. Yahoo will not provide login information to a fiduciary and will permanently delete the account upon notification of the account holder's death.⁵ Hotmail will provide a copy of everything in the email account to a personal representative or other individual authorized under its "Next of Kin" policy and will then close the account.⁶

Further complicating the ability of fiduciaries to access digital assets, there are two federal statutes that prohibit unauthorized access to computers and computer data and could apply to the access of digital assets by fiduciaries.⁷ While it seems unlikely that a lawfully appointed personal representative accessing the decedent's Yahoo email account would be prosecuted for violating the law, the laws have had a chilling effect on the willingness of some digital asset custodians to provide information to fiduciaries.

The lack of uniformity among email providers is equally true with other digital assets, including social media accounts, credit card and airline points, and online shopping accounts like Amazon ▶

DIGITAL ASSETS

and eBay. The personal representative will need to individually research each account and determine whether it is governed by a terms of service agreement, end user license agreement, or company policy that determines its disposition on the death of the account holder.

Other Barriers to Accessing Digital Assets

In addition to legal issues and the unwillingness of digital asset custodians to provide information and assets to personal representatives, there are a number of other barriers to identifying and accessing digital assets.

It can be difficult to even identify all of the decedent's digital assets unless the decedent has kept some sort of list. If the decedent maintained good security practices—changing passwords regularly, choosing passwords that are difficult

to guess, keeping a separate password for each account or website—accessing accounts can be nearly impossible. If any documents or files are encrypted, access will be even more difficult.

Delay in identifying and accessing accounts can also create problems, as some accounts are terminated after a certain period of activity. Hotmail, for example, deletes accounts after 1 year and 1 month of inactivity. This makes it particularly important to identify assets as soon as possible after death to ensure needed information is preserved.

Some items one might consider to be digital assets capable of being transferred at death are merely licenses and are non-transferrable, like Kindle books.

Planning for Digital Assets

Given the complex problems that can arise in these situations, it is to your

client's advantage to do as much as possible to plan for these assets during their lives. Clients should be discussing these assets with their CPAs, financial planners and estate planners, so the value of the assets (both monetary and sentimental) can be evaluated and the appropriate steps taken to plan for the disposition of those assets in the case of death or incapacity.

1. Make a list of all digital assets along with logins, passwords, security questions and web addresses. Keep it in a secure place and update it regularly.
2. Review access policies, end user license agreements, and terms of service for each account to determine options for the access and transfer of assets.
3. Decide how assets should be dealt

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with on death. Should copies (of photographs, for example) be made and distributed to certain named individuals? Should certain accounts be deleted? Consider drafting and maintaining a Virtual Asset Instruction Letter. Consider whether it is necessary to amend estate planning documents to direct the disposition of specific digital assets or to appoint a specific individual to deal with digital assets.

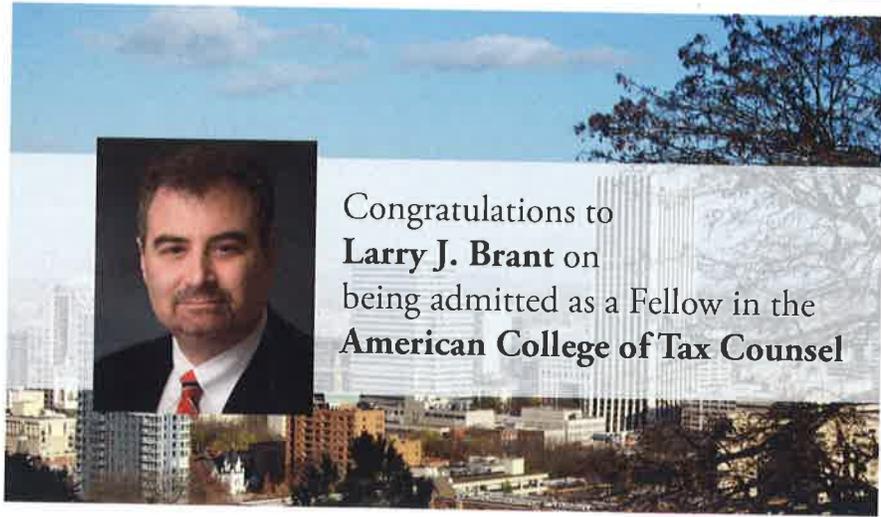
4. Update estate planning documents (wills, trusts, and powers of attorney) to include provisions that explicitly authorize the fiduciary to access, modify, control, archive, transfer, and delete digital assets and to dispose of any specific assets.
5. Periodically revisit these steps to ensure the plan adequately covers newly acquired digital assets and newly developed technologies; changing account agreements, terms of service, and policies; and changes in state and federal law governing digital assets.

While there is no perfect solution in this complex and rapidly changing area of law, the steps above can significantly improve a fiduciary's ability to access and deal with digital assets. ❁

The author's profile is on page 4.

Endnotes

- 1 <https://blogs.mcafee.com/consumer/digital-assets>. Last accessed 10/24/15.
- 2 Note these problems may also affect other fiduciaries, including conservators and trustees.
- 3 Oregon Senate Bill 369.
- 4 Washington Senate Bill 5029
- 5 <https://help.yahoo.com/kb/SLN9112.html>. Last accessed 10/24/15.
- 6 http://answers.microsoft.com/en-us/outlook_com/forum/oaccount-omyinfo/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6. Last accessed 1/11/15.
- 7 The Computer Fraud and Abuse Act (18 USC 1030) and the Stored Communications Act (18 USC 2701-2712)



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