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Estate Planning for Digital Assets

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This year marks my 25th year as a lawyer. When I reflect on what's changed the most during my career it's easy to know it's the use of technology. As a new lawyer, when I needed to draft a document, I dictated onto a cassette tape which was then transcribed by one of the ladies in the typing pool. Now, 25 years later, I'm sitting outside using the hotspot on my phone to connect to my firm's cloud-based server and typing this article on my laptop.

Technology has not only changed how I practice law, but also the substance of my practice. When we talk to clients about their assets, we're no longer focused on just their real estate and financial accounts. We now also have to consider a new category of assets - digital assets.

Technology allows people to store significant personal data in digital formats. Most individuals don't ever consider the value and extent of their digital assets and the potential loss if these assets become inaccessible or the conflict that can arise if it's unclear who has access to and control over them. As a result, well-drafted estate plans must now include consideration of digital assets.

What is a digital asset?

The definition of "digital assets" is constantly evolving to include innovative asset classes including the following:

- electronic communications, such as emails, social networking sites, and blogs;
- online reward programs, such as for credit cards, hotels, and airlines;
- financial accounts, such as PayPal, Venmo, or other online banking or investment accounts;
- digital collections, such as music files, photographs, and videos;
- domain names and intellectual property;
- electronically stored data, whether in the cloud or on a physical device; and
- cryptocurrencies such as Bitcoin.

What controls access to digital assets?

Complex rules exist related to ownership and access to digital assets which try to balance the original owner's privacy and a fiduciary's right to access these assets after the owner's incapacity or death.

When an individual creates a digital asset, they typically accept a contractual user agreement. Rarely do users actually read these agreements but instead just hurriedly click on the "I agree" box. Even if they do read it, most still don't realize that they have agreed to prohibit third-party access to their digital asset. This causes issues for fiduciaries when trying to account for a decedent's assets.

Federal laws criminalize hacking and the unauthorized access of digital assets to protect the original owner, but thereby also limit a fiduciary's ability to properly access the assets. As a result, even if fiduciaries have the user name and password for digital assets, they may not have legal authority to access them and doing so could be a criminal act.

Fortunately, most states have passed laws that give fiduciaries some authority to access digital assets. In 2014, Delaware was the first state to enact such legislation with the "Fiduciary Access to Digital Assets and Digital Accounts Act." In 2016, Maryland passed the "Maryland Fiduciary Access to Digital Assets Act." These laws give fiduciaries the ability to take legal control of digital assets just as they would more traditional assets. However, limitations exist to the authority given by these statutes, so it is critical to plan accordingly.

How do you create an estate plan for digital assets?

The first step in planning for digital assets is to create a thorough inventory. For each asset, you should identify what type of asset it is, where it's stored online, and the login information required to access it. If you have multiple online accounts, it may be helpful to use an online password manager such as Keeper or SecureSafe. Make sure though, with whatever storage method you choose, that you update it regularly and make it accessible to your fiduciary.

The second step in planning is to create a thorough estate plan including a Power of Attorney, Will and in most cases, a Revocable Trust which address your digital assets.

Creating a Power of Attorney allows you to name an Agent who can act on your behalf if you become incapacitated or otherwise need help managing your affairs during your lifetime. But be aware that in Delaware and Maryland, in order for an Agent to access digital assets, the Power of Attorney document must *expressly* grant that authority. Thus, these documents should always be created by an experienced attorney who specializes in estate planning and knows these rules.

Similarly, most Wills and Trusts don't specifically address digital assets and as a result, the assets pass along with all the other remaining assets. Often, "residuary" provisions in Wills and Trusts divide the assets in percentages among various beneficiaries. This can be problematic because how does an executor give a beneficiary 25% of the photos stored on Shutterfly? A better option is to include specific bequests of digital assets which can give the assets to a particular individual or each individual digital asset can be designated separately.

It's also important for a person's Will and Trust to specifically authorize their fiduciary's management authority over digital assets so that it's clear who has that authority and who is then responsible for marshalling and ultimately distributing the assets to your intended beneficiaries.

How do you ensure a lasting legacy?

In 2017, a survey conducted by Caring.com reported that 60% of American adults have no estate plan in place, let alone one that addresses digital assets. I urge you to make sure you create a thorough estate plan that considers not only traditional assets but also your digital assets and that you commit to reviewing and updating it regularly.

Many people now use digital assets to document their lives. These assets provide a lasting legacy of what's important to a person, evidencing their values, history and memories. If our surviving loved ones don't have access to those assets, that history and a piece of ourselves, will be lost.