

Estate Planning for Digital Assets - Is It Really Necessary?



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Our lives are inundated with digital assets – whether through email, online banking or electronically stored photos and documents. Every sixty seconds, over two-hundred million emails are sent, seventy-two hours of video are uploaded to YouTube and six thousand photos

are shared on Flickr. Further evidence of how prevalent digital assets are is that the average American has twenty-five online accounts, uses eight different passwords a day and owns \$55,000 dollars worth of digital assets.

The widespread growth of digital assets in people's lives has created new challenges, which are particularly pronounced when a loved one becomes incapacitated or dies, as family members find that they are unable to access important digital information.

The days of handwritten letters and photos kept in a shoe-box are numbered as these items are now overwhelmingly being kept solely in electronic format. As a result, the problems of dry rot and decay are being replaced with missing passwords and being denied access by online service providers. Without instructions on how to access digital assets, families are faced with potentially losing valuable or sentimental digital assets.

Law Regarding Digital Assets.

While there are well-established laws governing traditional forms of property like real estate and personal property – digital property has burst into our world and our laws have been slow to react. Most states, including North Carolina, have not addressed who has the right to access another's digital assets upon death or incapacity.

In addition, there is wide variation in the terms of service agreements that account holders agree to when they open an account with an online service provider regarding account access upon death or incapacity. As a result, it is becoming more important for individuals to specifically address their digital assets as part of their overall estate plan.

Steps in Planning for Digital Assets.

The first step in planning for digital assets is to create a comprehensive digital asset inventory. Of course, new online accounts are created and passwords routinely change, so the inventory

should be frequently updated. Once all of this incredibly sensitive information is in one place, the second step is to safeguard the inventory.

Giving another person access to the inventory during lifetime is incredibly risky from both a security standpoint and from a legal standpoint. For instance, many terms of service agreements prohibit sharing account information and there is continued uncertainty in the law regarding whether a fiduciary can lawfully access their principal's online accounts.

As a result, immediate access may be only appropriate for sentimental assets like family photos and videos – which can be compiled and distributed on data DVDs or flash drives, or shared through online "cloud" services. To safeguard more sensitive accounts, the digital asset inventory should be secured in a place safe from fire or loss, such as where estate planning documents are stored.

The next step in planning is to provide instructions in the estate planning documents for access to and the disposition of digital assets. Importantly, not all digital assets are transferable, even despite the instructions in the estate planning documents. For example, digital media licenses purchased from digital media retailers, such as iTunes, are

generally non-transferable, meaning rights to use the digital media typically expire upon the account holder's death.

Conclusion.

As technology develops, digital assets will become even more prevalent in our lives. Legislation that would have provided guidance regarding access to a decedent's digital assets was recently considered in North Carolina, but it was not adopted. As a result, the rights of executors, attorneys-in-fact and beneficiaries with regard to digital assets remain uncertain.

It is a good practice to include provisions in an individual's Will, Power of Attorney and, if applicable, Revocable Living Trust, regarding digital assets. Doing so can help individuals ensure that, to the maximum extent possible, their wishes are carried out – and help prevent the inadvertent loss of sentimental or valuable digital assets.

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