

Estate Planning for Digital Assets: A Web of Uncertainty

presented by:

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How prevalent are digital assets?

- Every 60 seconds:
 - 204 million emails are sent;
 - 278,000 tweets are sent on Twitter;
 - 20 million photos are viewed on Flickr;
 - 72 hours of video are uploaded to YouTube;
 - 15,000 tracks are downloaded on iTunes;
 - 571 new websites are created; and
 - \$83,000 is spent on Amazon.



How prevalent are digital assets?

- The average American:
 - Has 25 online accounts;
 - Uses 8 *different* passwords per day;
 - Owns \$55,000 of digital assets; and
 - Spends 13.6 hours on digital devices a day.



What are digital assets?

- No well-established definition.
- Generally, digital assets include:
 - Any online account that you own or any file that you store on your computer or on a server.
- Many States (including NC) are considering legislation to define digital assets and digital accounts.



What are digital assets?

- "Digital assets" means, but is not limited to, files, including, but not limited to, e-mails, documents, images, audio, video, and similar digital files that currently exist or may exist as technology develops or such comparable items as technology develops, stored on digital devices, including, but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device that currently exists or may exist as technology develops or such comparable items as technology develops, regardless of the ownership of the physical device upon which the digital asset is stored.
- In 2013, NC Senate Bill 279 included the above definition, but the digital asset provisions were removed before the bill became law.



Digital Assets – Common Location

- Computer
- Smartphone
- Tablet
- eReader
- CDs, DVDs and floppy disks
- Memory cards and flash drives
- Online merchant accounts (eBay, PayPal)
- Online storage accounts (i.e. "the cloud")



Digital Assets - Common Categories

- Email accounts
- Social networking accounts
- Blogs
- Financial accounts accessible online
- Online bill payment services
- Registered domain names
- Video games and virtual worlds
- Digitally stored music, photos, videos, books and documents



Problems Presented by Digital Assets.

Harold converted his vinyl records, CDs, and home movies and photos into digital format stored on his computer and backed them up in the "cloud." Harold threw away or donated the physical media shortly thereafter. Harold passes away in 2013. When trying to retrieve the files, the family finds that Harold's hard drive is encrypted and the "cloud" storage site is password protected.

- What can be done?



Digital Assets - Potential Issues After Loss of Capacity or Death

- The fiduciary or heirs may not be able to access digital assets and accounts:
 - Digital assets and accounts are often password protected;
 - Federal and State Law may prohibit access;
 - User Agreements may prohibit access; and
 - Digital assets may be nontransferable.



Digital Assets - Potential Issues After Loss of Capacity or Death

- Financial loss:
 - Bills transmitted online may go unpaid.
 - Identity theft.
 - Valuable assets may be overlooked.
 - Domain names may have significant value.
 - Blogs and personal websites may generate significant advertising revenue.
- Potential loss of digital assets with sentimental value.
- Digital assets containing sensitive information or materials may be revealed.



Digital Assets – Legal Environment

- Federal Law
 - Stored Communications Act (18 USC § § 2701-2712).
 - Criminalizes the *unauthorized*, intentional access of electronic communication.
 - Enacted in 1986.
 - Computer Fraud and Abuse Act (18 USC § 1030).
 - Criminalizes a variety of actions involving accessing computers to obtain information without authorization.



Digital Assets – Legal Environment

- State Law
 - States are just beginning to address the issues surrounding a fiduciary's access to digital information.
 - The Uniform Law Commission
 - Fiduciary Access to Digital Assets Drafting Committee formed in 2012
 - Goal: Draft an act vesting fiduciaries with the authority to access, manage, distribute and destroy digital assets.



Digital Assets – Legal Environment

- State Law (cont.)
 - States that have enacted legislation that at least recognizes digital assets:
 - California, Connecticut, Indiana, Idaho, Oklahoma, Rhode Island and Virginia.
 - North Carolina:
 - Senate Bill 279 –
 - Originally included provisions designed to define a fiduciary's right to access digital assets.
 - The digital asset provisions were *removed* before the Senate Bill 279 became law.



Digital Assets – Legal Environment

- State Law (cont.)
 - North Carolina
 - The proposal in Senate Bill 279 would have:
 - Defined digital assets and digital accounts;
 - Authorized fiduciaries to (1) access and (2) possess digital assets; and
 - Prohibited custodians of digital assets from destroying digital assets for 2 years after the custodian received a request from the fiduciary for access.



Digital Assets – Legal Environment

- Concerns regarding digital asset legislation:
 - Can legislation keep up with the staggering pace of technological innovation?
 - Digital asset custodians are historically reluctant to disclose information.
 - Ellsworth v. Yahoo!
 - How will legislation impact the contractual relationship between the digital asset custodian and the user?
 - User Agreement - “I Agree”



Digital Assets – Legal Environment

- User Agreements
 - Often prohibit a user from granting third parties access to a user’s digital account or assets.
 - Yahoo!
 - Will close an account, but will not provide access or contents.
 - Hotmail, MSN – Microsoft Next of Kin
 - Will not provide access, but will release contents via a data DVD.
 - Google – Inactive Account Manager
 - Will notify trusted contacts and share data after a period of inactivity, or delete the account.



Digital Assets – Legal Environment

- User Agreements
 - eBay
 - Facebook
 - Twitter
 - Flickr
 - Users often have a nontransferable license to use digital media:
 - iTunes
 - Amazon



Steps in Digital Estate Planning

- 1. Create a digital asset inventory.
 - Location and/or website
 - Username
 - Password
- 2. Safeguard the digital asset inventory!
 - Safe deposit box
 - Encrypted file



Steps in Digital Estate Planning (cont.)

- 3. Plan for access during incapacity and upon death.
 - Give a third party immediate access to digital assets?
 - Must be a trusted person.
 - Logistical concerns:
 - Safeguarding the login information.
 - Passwords frequently change.
 - Authorize agent to access digital assets?
 - Must be a trusted person.
 - Grant authority to access, manage, distribute and destroy digital assets to:
 - Attorney-in-fact (Power of Attorney)
 - Executor/Personal Representative (Will)
 - Trustee (Trust Agreement)
 - **Caveat:** Granting access to a third party or fiduciary may give rise to legal liability:
 - May violate the User Agreement.
 - May violate State or Federal law.
 - Requires significant trust.



Steps in Digital Estate Planning (cont.)

- 4. Provide for the disposition of digital assets.
 - Provide instructions to digital asset service providers pursuant to the User Agreement.
 - **Problem:** Very few service providers allow users to select what happens to their digital content upon death.
 - Exception: Google Interactive Account Manager
 - Will.
 - The digital assets must be transferable.
 - Licenses generally expire at death.
 - Certain digital assets (iTunes) are not transferable, meaning the Will may have not bearing on certain digital assets.
 - **Cautions:** The Will becomes part of the public record!
 - Sensitive information should **not** be included in the will.



Steps in Digital Estate Planning (cont.)

- 4. (cont.) Provide for the disposition of digital assets.
 - Corporate Entity
 - Revocable Trust
 - Not part of the public record.
 - For high value or sensitive digital assets, consider a standalone trust to just hold the digital assets (i.e., domain names).
 - Potential Issues:
 - Again, the digital assets must be transferable.
 - Certain assets (such as iTunes media) can only be owned by individuals.
 - May violate User Agreements, State or Federal law.



Steps in Digital Estate Planning (cont.)

- 5. Consider digital afterlife services (with caution).
 - Companies are beginning to offer online storage services to assist in storing and distributing digital assets and messages after death.
 - Serves as a central storage point for passwords, usernames and important digital documents.
 - Provides the decedent the opportunity to schedule messages to be delivered post-death.
 - Caution:
 - Questionable reliability.
 - Relatively new industry with a lot of players that may not operational in the future.
 - Requires due diligence – sensitive information can be compromised.
 - May not be able to deliver promised services:
 - Not all digital assets are transferable.



Administering a Digital Estate

- Ascertain the scope and nature of digital assets.
 - Did the decedent leave a digital asset inventory?
 - If not, attempt to create one by searching computers, emails and online accounts.
- Protect and preserve the digital assets.
 - Change passwords.
 - Review emails for bills transmitted electronically.
 - Check online payment accounts (PayPal) for account balances.
 - Check for pending sales/purchases the decedent may have been a party to online (eBay, Craigslist, StubHub, etc.).
- Consider the decedent's post-death social media presence.
 - Facebook & LinkedIn Memorial Profiles
 - Blogs



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