Digital Estates: Handling Digital Assets In The Real World (With Forms And Resources)

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Estate planning for digital assets is little different from estate planning for any other assets. The first step is identifying the assets and the second is properly addressing how to handle those assets during life and later at death.

WHAT ARE clients doing online? What happens to their online presence in the event of disability or death? What is the role of the estate planner to preserve content? To preserve value? To avoid being at the mercy of a forensic data retrieval specialist?

Computers, smartphones, and the Internet are a major part of most clients’ lives. Reports issued by the Pew Research Center state:

- For the first time, half of American adults ages 65 and older are online (June 6, 2012);
- In a Pew Internet/Eton University survey, internet experts predict that payment with mobile devices will be commonplace by 2020 (April 17, 2012);
- Forty-six percent of American adults now have a smartphone of some kind, and for the first time most smartphone owners outnumber users of more basic phones (March 1, 2012); and
- Sixty-five percent of Internet users have paid to access or download some kind of digital content. Music and software are the most common kinds of content purchases (December 20, 2011).


Virtual assets are intangible assets and generally defined as electronic content and/or media and may have financial as well as sentimental value.

Domain names (words, letters or numbers that are used to refer to an internet address, e.g., Google.com or Porterfamily.com), may have financial value. Wikipedia, the free online encyclopedia, citing various references, lists the top 15 highest prices for domain names. Included on the list are:
According to godaddy.com, there are over 53 million domain names registered. Similarly, web pages and blog services, while free to the user, can make money by selling advertising and should be treated as a business. The Atlantic reported that America’s top ten most valuable blogs have an estimated aggregate value of $785 million. Rochelle Haller and Karin Prangley, *Rise of the Internet: Planning for Virtual Assets*, American Bar Association Section of Real Property Trust & Estate Law eCLE, June 19, 2012 at p. 1. Blog contents are protected by copyright for the life of the author plus 70 years after the author’s death. 17 U.S.C. §302 (a).

Who owns a client’s web assets after death? Who has the right to access the web assets? Does it make a difference if access is password protected?

In 2004 Michigan resident Lance Corporal Justin Mark Ellsworth was killed by a bomb near Fallujah, Iraq. While in the military he frequently communicated by email with family and friends. After his death, his father requested the contents of Justin’s email account from Yahoo!, but the Internet service provider denied the request for privacy reasons, noting that the Terms of Service (“TOS”) for its free email accounts states that a person’s rights to the accounts and its contents terminate at death. Justin’s father went to the Michigan probate court where he was appointed personal representative of the estate and obtained a court order directing Yahoo! to turn over the emails. (Yahoo! was made a party to the proceeding.) Yahoo! ultimately provided a C.D. with photographs and emails — but only the emails Justin received because he set up the account not to save sent messages. Evan E. Carroll, John W. Romano, and Jean Gordon Carter, *Helping Clients Reach Their Great Digital Beyond*, Trusts & Estates, September 2011, 66, 67. In re Ellsworth, No. 2005-296. 651-DE (Mich. Prob. Ct. 2005).

For those clients who maintain good security practices (e.g., changing passwords regularly) as well as for those clients who were cautioned never to write down passwords and PIN numbers, the executor faces a huge challenge when the client dies — how to identify and access the digital assets. Executors sometimes face the “digital asset dilemma,” which refers to the difficulty that users of online services have in trying to ensure that the contents of their online accounts are passed to heirs. Michael D. Roy, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning*, 724 Quinnipiac Prob. L. J. 376, 378 (2011-2012). Several commentators illustrated the executor’s digital asset dilemma by asking readers to consider the plight of Leonard Bernstein’s executors after his death in 1990. He purportedly left the manuscript of a memoir, *Blue Ink*, on his computer. To this day, so the story goes, no one has cracked the passcode, suggesting that the heirs are unable to take advantage of either the historic or financial value of the memoir. Helen W. Gunnarson, *Plan for Administering Your Digital Estate*, 99 Ill. B.J. 71 (2011).¹

### WHAT IS DIGITAL PROPERTY?

¹The author, believing that many clients were very new to personal computers in the late 1980s and early 1990s, sent an email to Barbara Haws, Archivist and Historian for the New York Philharmonic Archives, to ascertain the foundation for the Bernstein story. Ms Haws responded: “I’ve checked with the Bernstein office. When LB died he did not have a computer. There was only one computer in the Bernstein office, a Commodore 64. Lenny never started writing his memoirs — he was too busy trying to compose music. He was a technophobe (he couldn’t even get his stereo to work without help),” Ms. Haws concludes: “I don’t remember our PCs having passwords in the 1980s, do you?” Email exchange dated August 22, 2012.
drive or website and any online account or membership." Nathan Dosch, an estate planning and tax attorney with Nieder & Boucher pieced together this definition according to John Conner, Digital Life After Death: The Issue of Planning For a Person’s Digital Assets After Death, Estate Planning & Community Property Law Journal, Vol. 3:301 at 303. Digital assets include digital documents and personal files, e.g., emails and online photographs, music, video, medical records, vital documents, and financial or legal papers.

**Devices**

Physical devices include personal computers, tablets and smartphones (e.g., Nook, Kindle, iPod, iPad, iPhone and similar products). What, if anything, is stored on a device? Examples include documents, photographs, music, videos, and records of all kinds — medical, financial, business. Are items stored on the device owned or licensed?

**Email**

Email is a method of exchanging digital messages. Email operates across the Internet or other computer networks. Some emails are stored on physical devices while all email is stored on the provider’s platform. If items are stored on a client’s computer, it is referred to as “local” storage, whereas storage on internet servers is referred to as “cloud” storage. An email account often serves as a passkey to other online accounts. Some clients use an Internet Service Provider (“ISP”) on a paid basis (e.g., optonline.net or nyc.rr.com) while others use web-based services which are free [e.g., Google (gmail.com), Microsoft (hotmail.com) and Yahoo! (yahoo.com)]. Some ISPs delete client’s date if it is not accessed for four to nine months and they delete the client’s account if it is not accessed for eight to 12 months.

**Online Accounts**

These are often referred to as digital accounts rather than digital assets. They may have monetary value but most will have sentimental value to the family or friends of the decedent:

- Social media accounts such as LinkedIn, Facebook, Twitter, MySpace, YouTube, Flickr, Picasa, Shutterfly, Kodak Easy Share, and websites or Blog platforms such as Blogger or Typepad;
- Financial accounts such as online banking and online brokerage;
- Business accounts, including digital property owned by a company;
- Sales and buying accounts, such as eBay, Craigslist, PayPal and Western Union; and
- Website domain names are sometimes valuable. However, they are leased and if not renewed, lost.

**Other Types Of Property**


**POST MORTEM ACCESS TO DIGITAL PROPERTY**

What is the website’s policy for access after death? Internet accounts are governed by contracts between individuals and service providers. These are usually referred to as the Terms of Service (“TOS”). Each website has its own specific policies which typically cover who has authority to access the account.

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2 Cloud computing has been around for years, but now it is powering all kinds of new businesses around the globe, quickly and with less capital. An article on the front page of The New York Times reports that Amazon is moving into cloud computing and just one of its 10 data centers in the Eastern United States region has more servers dedicated to cloud computing than Rackspace, a public cloud company serving 180,000 businesses with more than 80,000 servers. Active in Cloud, Amazon Reshapes Computing, by Quentin Hardy, The New York Times, August 27, 2012, p. 1.
and to close the account, a statement of the user’s rights and the privacy policies and broad limitations on liability and indemnification. They almost always state that the provider may make unilateral changes in the provisions of the TOS without notification (and without compensation for any loss incurred as a result of the change). Clients signing up for online service typically do not read the contractual document with the service provider, but scroll to the bottom of the TOS and click on the box, “I agree,” thereby consenting to the TOS.

Most email accounts are licenses to use an internet provider’s website service. In general, the license expires at death. When a client creates or puts information on these websites, they are putting it on a server they do not own.

TOS agreements vary among all the service providers such as Gmail, Hotmail, Facebook and MySpace. Here are a few examples:

- Yahoo!’s TOS provide: “No right of survivorship and Non-transferability. You agree that your Yahoo! Account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate your account may be terminated and all contents therein permanently deleted.” Evan Carroll and John Romano, Your Digital Afterlife: When Facebook, Flickr and Twitter Are Your Estate, What’s Your Legacy? (Voices That Matter 2011). After quoting the Yahoo! TOS, the authors state at page 146: “Yahoo takes a harsh stance on death, but the good news is that they will not take this action without the receipt of a death certificate. It’s possible for you to ask your digital executor to archive your Yahoo account contents before presenting Yahoo with a death certificate.” Yahoo! Terms of Service is available at http://info.yahoo.com/legal/us/yahoo/utos/utos-173html.

- Google’s TOS state that the individual agrees not to “assign (or grant a sub-license of) your rights to use the Software, grant a security interest in or over your rights to use the Software, or otherwise transfer any part of your rights to the Software,” although copyright remains in the user. Naomi Cahn, Postmortem Life On-line, Probate & Property July/August 2011 at 37. Google Terms of Service ¶ 11, available at www.google.com/accounts/TOS. In April 2013 Google introduced a program called Inactive Account Manager which allows those who stored data on YouTube or in accounts such as Gmail or Picasa to decide how they want to deal with the data stored on line. This new feature allows the user to give the executor or a designee the data — or Google can be instructed to delete it.

- Facebook does not provide the decedent’s password to anyone, but offers an option to request that a profile be switched to memorial mode upon proof of death through an obituary or a news article. Facebook’s privacy policy provides: “Memorializing Accounts. If we are notified that a user is deceased, we may memorialize the user’s account. In such cases we restrict profile access to confirmed friends, and allow friends and family to write on the user’s Wall in remembrance. We may close an account if we receive a formal request from the user’s next of kin or other proper legal request to do so.” www.facebook.com/help/contact.php?show_form=deceased. Who is permitted access after death? Having the means to access information (i.e., someone knows the decedent’s usernames and passwords) is not the same as having the legal right to access accounts after death.

If a close friend, a family member or fiduciary are prohibited from having access to third party accounts by the TOS contracts, what should they do to obtain access to the account and its contents? Three leading blogs providing advice in the area of digital death discuss the legality of any attempt to collect information or transfer the property. See Resources for Lamm (www.digitalpassing.com), Beyer (http://lawprofessors.typepad.com/trusts_estates_prof/) and Carroll & Romano (www.thedigitalbeyond.com). One commentator states that the safest way is to recommend the duly appointed fiduciary communicate with the web service provider to request a copy of “the contents” of the account.

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1 See, Evan Carroll and John Romano, Your Digital Afterlife: When Facebook, Flickr and Twitter Are Your Estate, What’s Your Legacy? (Voices That Matter, 2011) at 145. It’s reasonable for the heir or executor to request that the account be deleted or that it be left in a memorial state. It’s not possible for it to stay active.
commentators state that an executor’s best practice is to avoid this potential conflict altogether and obtain a court order or direction granting account access. Colin Korzec and Ethan A. McKittrick, *Estate Administration in Cyberspace*, Trusts & Estates September 2011 at 62.

Naming a digital executor or authorizing the executor to retain and pay a tech-savvy “special advisor” should be considered whenever the client has sensitive digital asset information among the contents of the account.

**Illegal Access**

There are laws about improperly accessing someone else’s digital information — hacking is a criminal offense.

The Federal Statute is the Computer Fraud and Abuse Act at 18 U.S.C. §1030(a)(2). This Act is intended to reduce hacking of computer systems, particularly those belonging to financial institutions and the federal government. The Act makes it a criminal offense to access financial institution records without proper authority.

All 50 states have criminal laws regarding unauthorized access to accounts. The state statutes, in general, provide consumer protection against fraud and identity theft. Accessing an account without legal permission could constitute a criminal offense. In New York, refer to the New York Penal Law Article 156. Query: Will the statutes extend to executors who are well intentioned in obtaining access to a decedent’s account assuming they are standing in the shoes of the testator-decedent?

As noted above, some service providers have explicit policies in their TOS regarding what will happen on the death of the account holder. Other providers are silent on the subject. Does state law say anything on this topic? Six states have enacted legislation dealing with electronic content, digital assets and access to them:

- Connecticut, C.G.S.A. §45a-334a) enacted in 2005;
- Indiana, I.C. 29-1-13-1.1;
- Oklahoma, 58 Okl. St. An. §269;
- Rhode Island, RI Gen. Laws 33-27-1 et seq.;
- Virginia, sec. 64.2-110.

For the most part, these statutes are limited in scope and do not cover all digital assets. The Connecticut and Rhode Island statutes address only access to email accounts. Indiana’s statute deals with electronically stored documents; the Oklahoma statute gives the executor power over online accounts, and the Indiana statute gives power to a conservator of an incapacitated person in addition to the executor. But none of the statutes change the TOS between the service provider and the account holder. Furthermore, the TOS agreements are typically governed by laws of states other than the laws governing the decedent’s domicile.

Other states are considering similar legislation. See Jim Lamm’s *List of State Laws and Proposals Regarding Fiduciary Access to Digital Property During Incapacity or after Death* (www.digitalpassing.com).

The Uniform Law Commission at its annual meeting in July 2012 appointed a Drafting Committee to prepare a uniform law on Fiduciary Access to Digital Assets. James Lamm, together with his colleague, Gene Hennig, co-authored a Project Proposal for the Uniform Law Commission process regarding Digital Assets. The Drafting Committee is chaired by Suzanne Brown Walsh of West Hartford, Connecticut.

**Authorized Access**

Similar issues regarding “authorized access” arise when a client becomes incapacitated. Does an agent under a power of attorney have authority to act? At least one bank has taken the position that a power of attorney does not grant access to online banking. Gerry W. Beyer and Naomi Cahn, *When You Pass On, Don’t Leave the Passwords Behind: Planning for Digital Assets*, Probate & Property, January/February 2012 at 40.