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# Virtual estates: helping clients take stock of digital assets

By Marjorie Suisman

According to an annual digital assets survey conducted by online security company McAfee, digital devices, on average, hold an estimated $35,000 of value per person. Additionally, 55 percent of survey respondents claim to keep assets on their devices that are impossible to re-create, download or purchase again.

When counseling individuals and families to plan the orderly disposition of their assets at death, in the past we thought of tangible items that have monetary or sentimental value: real estate, cash, a home library, artwork or a box of photographs under the bed. In today's digital age, however, bank records may be entirely electronic, most correspondence is done through email, and photographs are shared through digital albums on Facebook and Instagram, among other social networking sites.

As our reliance on technology continues to transform our lifestyles, the concept of an "estate" must adjust with it. The modern estate almost certainly includes digital assets, such as those mentioned above, but although planning for digital assets and digital access has become a hot topic in the trusts and estates world, no truly satisfactory solution has emerged thus far.

Unlike a book collection or a photo album, virtually all digital assets hide behind user names and passwords. Many people do not record passwords, or, if they do keep an up-to-date list, the passwords are often not recorded in a way that will be readily accessible to a fiduciary when the need arises.

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How will a fiduciary gain access to the password-protected assets? Will he have to rummage through a sock drawer in hopes of finding the password list? More fundamentally, will the fiduciary even be entitled to any access of the assets?

## Access to content

In reflecting on what will happen to your client's digital assets after his death, it is important to distinguish between accounts such as Facebook and Instagram, which hold an individual's own content, and accounts such as iTunes and Kindle, which hold content that, technically speaking, does not belong to the client.

Some service providers already allow users to arrange posthumous access to their accounts. Google, for example, allows users to select digital heirs or "inactive account managers" for its cloud services, including its popular email service.

On the Google Account settings page, you can specify what should happen to your Gmail messages and data from several other Google services if your account becomes inactive for any reason. You can choose to have your data deleted after three, six, nine or 12 months of inactivity, or you can select trusted contacts to receive data from Google services.

Similarly, a recent development on Facebook allows you to designate a "legacy contact" to manage an account posthumously. The legacy contact cannot log in as you or view your private messages, but he can make a post on your Facebook page, respond to friend requests, update your cover photo and profile information, and archive your posts. The legacy contact also is permitted to have your page deleted entirely.

Twitter, on the other hand, will remove a deceased person's account, but will not provide account access to the executor or any other person.

Accounts that house e-book collections, game purchases, and music and video libraries also are considered digital assets, although these are controlled by the original service provider's end user license agreement, or EULA.

If you read the Kindle or iTunes EULA, you will discover that every time you hit "buy" in the Kindle or Apple store, you are not purchasing an e-book or music content, but rather you are licensing it for your personal use only.

Most, if not all, EULAs stipulate that any rights you have to the company's products may not be transferred or assigned to any third party without authorization. The end result is that, as long as your client's heirs have access to the account on one of the client's devices, the heirs can continue to enjoy the content. However, there is no way to transfer the actual ownership of those assets to them.

In contrast, bitcoins and other digital currencies are considered property like any other, and are disposable in a will or estate planning trust. The IRS has determined that bitcoin should not be treated as currency for tax purposes, so your client's bitcoin will get a step up or step down in basis at death to the then-current market value.

As with other digital assets, fiduciaries must be made aware that your client's bitcoin exists; otherwise, that bitcoin will die with the client. Similarly, fiduciaries should be made aware of your client's private key, in order for the directive in your client's will or trust to be carried out.

## Lack of clear laws and the UFADAA

While digital services continue to grapple with posthumous access policies, there is almost no legal guidance or authority to assist executors in identifying, collecting or distributing digital assets.

The laws governing access to digital assets are a mix of federal and state law, privacy laws, and intellectual property and copyright law. While several states have drafted statutes that authorize fiduciary access to digital assets under certain circumstances, these state laws are limited to specific types of assets, such as the email or online accounts of deceased minors.

In 2014, the Uniform Law Commission, a group of attorneys tasked with drafting model legislation, addressed the limited legislative response by releasing the Uniform Fiduciary Access to Digital Assets Act, or UFADAA.

The purpose of the act was to "vest fiduciaries with the authority to access, control, or copy digital assets and accounts." The goal was "to remove barriers to a fiduciary's access to electronic records and to leave unaffected other law, such as

fiduciary, probate, trust, banking, investment, securities and agency law."

The 2014 act created unique rules for four different types of fiduciaries: personal representatives or executors, conservators, attorneys-in-fact and trustees. Access to digital assets was generally permitted to all fiduciaries, although the path to achieving access differed slightly from one to another.

Shortly after the Uniform Law Commission adopted the UFADAA, and more than 27 states were on their way to adopting it, opposition to the law emerged from tech and Internet companies and their lobbying groups. The basis for their objection was that the law violated the privacy rights of consumers and improperly overrode terms of service agreements with the providers. These groups went on to create alternative legislation that greatly restricted fiduciary right of access.

In the face of this opposition, the Uniform Law Commission completely revised the UFADAA in 2015. In the 2014 version, a personal representative's access to digital communications and other digital assets was permitted unless the decedent opted out. Under the 2015 version, however, access to digital communications is not permitted unless the decedent opted in and consented to disclosure before death.

Thus, if a person dies without a will, no access will be granted. Access to other digital assets is permitted unless the decedent opted out. Attorneys-in-fact, conservators and trustees can still access digital communications and other digital assets, but they face restrictions. The custodians of the assets, in many instances, may require a court order before granting access.

Under the 2014 version of the UFADAA, boilerplate agreements with a digital service provider limiting a fiduciary's access to a decedent's digital assets or accounts were made void by law as against public policy.

Under the 2015 version, however, the result is different. A user's direction using an online tool prevails over the terms-of-service contract if the direction can be modified or deleted at all times. A user's direction in a will, trust or power of attorney also prevails over the boilerplate, but, if the user provides no direction, the boilerplate provisions of a terms-of-service contract will prevail.


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Although planning for digital assets and digital access has become a hot topic in the trusts and estates world, no truly satisfactory solution has emerged thus far.

Although we do not know how many states will adopt the UFADAA, nor with what modifications, the message is clear: Given the importance of digital assets in everyday living, it is imperative to help our clients think through and communicate what they want to have happen to their digital assets after death so that their estate planning documents can memorialize their directives. This also should include instructions on what information should be deleted or destroyed, rather than preserved, after death.

**Provide easy access to logins, passwords**

In the face of all the uncertainties in the law, it may still be best practice to avoid these issues altogether by having your clients give their fiduciaries easy access to login information and passwords.

That, of course, presents practical problems regarding the storage and format of the information and how to keep it updated and safe. There are websites that provide online password storage services, but that solution may be risky in the event that the security of the website is compromised.

There also are a number of so-called "afterlife management companies" that offer storage and post-mortem services. Unfortunately, however, the staying power of such services is still in doubt.

For example, Legacy Locker, which originally enabled customers to save online account information and designate beneficiaries for each account, was acquired by PasswordBox, which had a different focus but continued to include Legacy Locker features. But now PasswordBox has been acquired by Intel, and the future of the Legacy Locker features under Intel's ownership is uncertain.

**Include digital assets in estate planning discussions now**

If a client has compiled a comprehensive record of his digital assets including login information, passwords and location, the information can be stored on a password protected and encrypted digital storage device, such as a thumb drive, and the information can be updated on an ongoing basis. That reduces the number of access points your client must give to or leave behind for his fiduciaries.

Until other solutions emerge and mature, self-management appears to be the best option for passing on digital assets.

More of our business and social interactions are conducted online each day, and counseling clients to develop a plan for their digital assets is becoming increasingly important. By helping them plan now for the secure transfer of their digital estate, you will help them improve the chances that their goals for the disposition of these assets are met. MLW