Published on *The National Law Review* https://natlawreview.com

Estate Planning Enters the Digital Age

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One reality of modern life is our increasing reliance on digital information and services. It's difficult to take and then order prints of photographs, accumulate travel rewards, book travel, sort through financial records, communicate with distant friends, and even keep abreast of breaking news without a computer and e-mail access. Most creditors and banks encourage customers to "go green" and receive bills and statements electronically. Medical records and histories are increasingly available to patients and caregivers via online systems. Many people use online rental sites to rent their under- or unused vacation property to offset carrying costs. Unfinished novels and other valuable content produced by authors and artists will likely be stored on a remote service in the cloud, instead of locally on a hard drive.

There are many crypto and digital currencies, such as Bitcoin. Domain names continue to garner seven- and eight-figure sales prices: the $35.6 million paid for "Insurance.com" in 2010 is an extreme example. Virtual gaming is enormously popular: one gamer named Jon Jacobs built, ran and ultimately sold $635,000 in digital assets (including a casino called "Club Neverdie" built on an asteroid) that only existed virtually in Entropia Universe, an online gaming platform.

Despite the increasing prevalence of digital assets in our lives, few online account custodians offer customers online tools allowing them to provide for access to or disposition of any property held in these accounts, or even the records associated with the accounts. Unfortunately, the law has not kept pace with modern life and technologies. Digital assets are treated the same as non-digital ones by the majority of state probate statutes. This has proven unworkable, as the custodians of many online accounts have refused to recognize fiduciaries' authority over digital assets.

In fairness, electronic communications and accounts are unlike traditional letters and accounts in several ways. As compared to paper letters, lost and even deleted e-mails might be easily located and retrieved from an e mail service provider. A decedent or incapable person might have opened an online account (to access embarrassing content, or a dating service such as Ashley Madison, for example) with the expectation that it would remain private and undiscoverable by anyone, including a fiduciary. Without evidence of the account holder's intent, it is impossible to know for certain whether the user intended the account to be accessible and not private.

If you become incapable or die, your fiduciaries will become responsible for handling your finances. They will inventory your assets, and they may need to manage or close your financial accounts or business, pay your debts, taxes, and expenses, and distribute your assets to your beneficiaries. In

today’s digital world, your fiduciaries need access to your digital assets to do their jobs and to monitor and close your online accounts, protecting them from cyber thieves. (In 2014, alone, $16 billion was stolen from 12.7 million identity fraud victims in the United States!)

In the past, fiduciaries responsible for managing assets of and for others could easily marshal, collect and manage the assets. Often, the biggest nuisance was convincing a recalcitrant financial institution to honor a power of attorney, and personal representatives and conservators, armed with court decrees, encountered few problems. That has changed, because digital assets can be encrypted, secured by passwords that die with you, or protected by federal and state data privacy and anti-hacking laws.

Even if the fiduciary can find a password, the account provider’s terms-of-service agreement (TOSA) might forbid account access by anyone except the account holder—implicitly barring a fiduciary from access. Online TOSAs are frequently silent as to postmortem options, and often simply prohibit postmortem transfer. See the compendium of a myriad of TOSA provisions, maintained at https://www.mylennium.com/domaininfo.

To ensure your beneficiaries and fiduciaries can access your digital assets, either to preserve and distribute them, or to destroy them for you, your Power of Attorney and estate planning documents must indicate what you wish to happen to your digital assets. To that end, your estate planning attorney will ask you about your digital and online accounts and will include appropriate provisions in your will, trust and power of attorney documents. Without your express consent in your documents, your family and fiduciaries may be unable to access your accounts, even if you have used a password manager or shared your access information with them. If you use encryption to secure your data, wherever it is stored, you must assume that your fiduciary will be unable to break it, and plan accordingly.

National Law Review, Volumess VI, Number 126

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