

Digital Assets and Your Estate Plan

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Our computers have become one of the most popular ways to store personal information, keep in touch with family members and

friends, share photographs, access financial accounts, and even pay bills. E-mail records, social-media accounts, such as Facebook, Instagram, LinkedIn, Twitter, and YouTube, electronic bank and investment account statements, and digital images are all considered to be digital assets.

When establishing an estate plan, it is becoming especially important to address digital assets and what should become of them should you become incapacitated or pass away.

It's not an easy transfer

Contrary to popular belief, your spouse or next of kin cannot automatically step in to manage your digital assets if you become incapacitated or pass away. Federal privacy laws prohibit service providers from knowingly divulging the contents of electronically stored documents. While many states have enacted statutes relative to the administration of digital assets, Massachusetts is not one of them. Further, the validity of the state laws that have been enacted is unclear, especially if the state laws conflict with federal law. As such, it should be expected that the service-provider agreement provided by the online site itself will govern the

ongoing management of digital assets.

Remember to read the fine print

When establishing an online account, you should be made aware of the service-provider agreement. In fact, you are typically asked to agree to the service-provider agreement by clicking a box signifying your agreement to the provider's terms of use. You will find great variety in these agreements. In the case of incapacity, some providers allow access by an agent named in a Durable Power of Attorney. Other providers will only release content if they are required to do so by a court order. Similarly, if you have passed away, some providers will allow access by your Personal Representative (formerly known as an Executor) once they are appointed by the Probate Court. Many providers now have mechanisms for accessing an inactive account, or even to "memorialize" or delete your content once you are proven to be deceased.

Follow these planning guidelines

Your Personal Representative has the fiduciary responsibility of administering your estate after you have died, which includes marshalling and ultimately distributing all of your property to your heirs/beneficiaries. Even with access to your computer, tablet, smart phone, or other technological device, your Personal Representative may still be unable to access your digital assets. To eliminate this hurdle, you should consider taking

the following steps to facilitate access by your Personal Representative to your digital assets, if desired.

- Create a list of your digital assets that includes account numbers, usernames, and passwords. Of course, you will need to update this list any time you create a new digital asset or change a username or password. You might consider creating this list in an "encrypted" fashion such that it could only be understood by someone who has the "key." For example, you might use "dgbd" to indicate a password that is made up of your dog's name and your birthday. This can prevent identity theft problems if the list is ever discovered by a hacker or inadvertently made public.
- Keep your list in a secure place. There are a number of "apps" as well as paid service companies that will retain this list for you, and upon your demise, provide the list to whom you designate. If you choose to store your password list in your computer, you should avoid naming the file "passwords," so that it would not be obvious to any thief that might gain access to your system; however, also be sure to give the file location to the person who will carry out your affairs. Also, do not place any passwords in your Will as a probated Will becomes a public document.

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Alternatively, you may request that your estate planning attorney retain your list within your estate plan file.

- Leave detailed instructions regarding your wishes as to how to use, terminate, or distribute your digital assets.

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Our world has evolved, and if your estate plan does not address digital assets, it will likely be incomplete. Letters have become emails. Photo albums have become digital photo files or social media websites. Some financial accounts exist only on the internet, as there is no brick and mortar financial institution to visit. Current privacy laws are hindering families of incapacitated or deceased people from gaining access to online assets without prior planning as the laws have not yet caught up with the vast number of digital assets that may be held by any given person. Fortunately, proper planning that includes the contemplation of your digital assets will ensure that they will be accessible to be properly managed by the person that you have chosen to be responsible for this task.

Gina M. Barry is a Partner with the law firm of Bacon Wilson, P.C. She is a member of the National Association of Elder Law Attorneys, the Estate Planning Council, and the Western Massachusetts Elder Care Professionals Association. She concentrates her practice in the areas of Estate and Asset Protection Planning, Probate Administration