

Estate Planning in the Digital Age

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As a society, we have become more reliant on the Internet as a mechanism to keep in touch with family members and friends, share photographs, pay bills

and store other personal types of information. Digital assets are emerging as a new category of personal property. Digital assets include digital images, electronic bank and investment account statements, e-mail records and associated passwords, as well as social-media accounts such as Facebook, LinkedIn, Twitter and YouTube. The use of digital assets will only continue to grow and evolve, and estate planners must recognize the emergence of digital assets when advising clients relative to their estate plans.

Many people erroneously believe that their spouses or next of kin may automatically step in to administer digital assets upon their incapacity or death. Although discussions have increased among legislatures regarding administration of digital assets, federal privacy laws prohibit service providers from knowingly divulging the contents of electronically stored documents, and only seven states (not including Massachusetts) have enacted statutes relative to the administration of digital assets. The validity of these state laws is unclear, since they sometimes conflict with federal law. In most cases, the user and their estate will be governed by the service-provider agreement provided by the online site.

Service-provider agreements play a large role in determining what happens to a decedent's digital assets. Many times the user is made aware, or at least has the opportunity to be made aware,

of these policies upon registering for an online service, typically by clicking a box signifying that they agree to the provider's terms of use. These agreements greatly vary.

Yahoo! explicitly provides within its agreement that the account may not be transferred, and Yahoo! retains the right to delete the content within the decedent's email account upon receipt of a death certificate.

Gmail has a policy for potentially releasing emails to the personal representative of a decedent's estate but the agreement makes it clear that there is no guarantee the email content will be released, and a court order may be required.

Google, in April of 2013, became the first service provider to provide a solution to obtaining access of a user's account upon their death or incapacity. The feature, called the "Inactive Account Manager", may be accessed by the user during their lifetime on the user's profile page. The Inactive Account Manager will become "activated" after the user's account is inactive for a period of three, six, nine or twelve months as determined by the user. The user may also determine what will happen to their data upon becoming inactive. For instance, the user may elect to delete the data or some or all may be sent to a specified individual.

Facebook, upon receiving notice that the user has passed away, will place the user's profile in a "memorial state" so that certain profile sections are available for viewing. That is, only the decedent's confirmed Facebook friends may locate and post on the decedent's profile. Facebook will also remove a decedent's account from the site upon request by verified family members.

Twitter will remove the decedent's account from its "Who to Follow" suggestions upon verification of death, and a

family member can contact Twitter to delete the decedent's account entirely. However, Twitter will not allow family members access to a decedent's account.

YouTube will allow a Power of Attorney to access the decedent's account. LinkedIn prohibits transferring a LinkedIn account to another party and provides that California law shall govern all disputes.

A personal representative has the fiduciary responsibility of administering the decedent's estate, which includes discovering, protecting and facilitating the transfer of all of the decedent's property. Even in the event that the personal representative takes possession of a decedent's tangible technology device, the personal representative may still face the challenge of accessing the digital assets. It is recommended that the following steps be undertaken to facilitate access by your loved one to your digital assets.

Create a list of your digital assets including related account numbers, user names and passwords. It is imperative to continually update this list every time you create a new digital asset or change a password.

Keep the list in a secure place. There are a number of paid service companies that will retain this list for you, and upon your demise, provide the list to your designated beneficiaries. You do not want to place any passwords within your Will since a probated Will becomes a public document. Alternatively, you may request that your estate planning attorney retain this list within your estate plan file.

Leave detailed instructions regarding your wishes as to how to use, terminate or distribute your digital assets. Our world has evolved. Instead of sending letters and keeping photo

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albums on a bookshelf people are increasingly sending emails and loading pictures to social-media accounts. Currently, privacy laws and limited government interaction are hindering families of decedents from gaining access to a decedent's online assets without prior planning as the laws have not yet caught up with the practical issues and values that we now face relative to our digital assets. As such, proper planning and contemplation of digital assets in an estate plan will help the personal representative successfully administer the estate.

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