

HOW DO YOU HANDLE DIGITAL ASSETS IN YOUR ESTATE PLAN?

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The onset of the Information/Digital Age has created new types of planning not anticipated by the typical mold of traditional estate planning. We have:

- first frequent flyer miles,
- credit card rewards accounts,
- e-mail and digital music,
- health insurance rewards accounts linked to GPS enabled fitness devices (i.e. Fitbit and Garmin),
- social media accounts (i.e. Facebook, Snapchat and Instagram),
- digital movies and digital streaming accounts (i.e. Netflix and Hulu).

This short list does not even include access to tangible devices such as smartphones, tablets, or digital cameras (let alone cloud-based storage of electronic photos). Even a cursory review of historical consumer media consumption demonstrates how much our life has become digital over the past few year. If you don't believe it, ask a teenager if they have ever heard of Kodak, Blockbuster, Tower Records or Hollywood Video.

Although the estate planning community is typically slow to change, we are playing "catch up." The Arizona legislature recently enacted the Uniform Fiduciary Access to Digital Assets Act ("Digital Assets Act") which is meant to provide a fiduciary with the authority to access, manage, or distribute a deceased or incapacitated person's digital assets.

Protections for Digital Assets and Electronic Communications

Current federal and state statutes provide protections for unauthorized access to digital assets and electronic communications. These statutes provide that a person may be prosecuted for unlawful access to digital assets and stored communications or the unauthorized release of confidential information. These protections are similar to the protections for health and medical information.

An Agent, Conservator, Trustee, or Personal Representative usually has the authority to control tangible property (such as real estate, bank accounts, stocks, etc.) upon the incapacity or death of an owner. However, before the Digital Assets Act was enacted, the control of digital assets was not statutorily authorized. In fact, until recently, there was no statute precluding a fiduciary from being prosecuted for accessing a ward or decedent's digital account, user name or password.

How Does the Digital Assets Act Work?

The recently enacted Digital Assets Act attempts to address this issue by providing that a fiduciary with the appropriate authority is an authorized user of a ward or decedent's digital accounts and will not be guilty of any criminal act under Arizona law. This authorization is meant to also protect the fiduciary from criminal prosecution in a Federal Court. However, that protection has not yet been tested.

Further, the Digital Assets Act provides a three-tiered system to prioritize the distribution of the digital assets:

First: You may use an online tool provided by the custodian (i.e. Facebook) to name another person to have access to your digital assets. This online tool overrides any direction given in a Will, Trust, or Power of Attorney.

Second: If you have not used an online tool, or the custodian does not provide one, you may dispose of your digital assets in a Will, Trust, or Power of Attorney.

Third: If you have not provided any direction using an online tool or in your estate plan, the terms-of-service agreement for the account will determine whether a fiduciary may access your digital assets.

Here is how the Digital Access Act works:

Example 1:

Martha has a Facebook account. Martha used Facebook daily as a journal, including photos of her retirement activities and notes to her children and grandchildren. Martha also completed a Facebook online tool giving her daughter, Debbie, access to her Facebook account. Martha is now incapacitated. Under Martha's estate plan established in the 1990s, her son, Sam, is named as her Personal Representative, successor Trustee, and Agent under her Power of Attorney. However, Martha's estate plan did not include any provisions authorizing Sam, as her fiduciary, to access her digital assets.

Pursuant to the Digital Asset Act, Facebook's online tool giving Debbie access to the account overrides Martha's estate plan. Therefore, Debbie may access Martha's Facebook account, but Sam is unable. Debbie will not be able to share this access with Sam, and Sam does not have that authority otherwise to access Martha's Facebook account. Sam is upset that he cannot access Martha's account, because Martha used Facebook as her diary and storage for photos of Sam's children. If litigation ensued between the Sam and Debbie, according to the statute, Debbie would retain control over this digital asset, and could effectively block Sam from having any access or control.

We have been advising our clients for the past several years that they should make a list of their digital assets and authorize and provide a way for their fiduciary to access that list and those accounts. Martha could have easily avoided this situation by either 1) giving Sam access using Facebook's online tool, or 2) updating her estate plan to give Sam, as her fiduciary, the authority to access her digital assets without using the online tool giving Debbie access.

Example 2:

Doug created a revocable trust and pour-over will in 1980. At that time, Doug named his son, Samuel, as successor Trustee and Personal Representative. However, over the next 37 years, Doug never updated the Trust and never assigned his digital assets to the Trust. Doug earned \$80,000 in credit card rewards with American Express, a portion of which he was saving for a holiday trip to Ireland with Samuel and his three grandkids. Unfortunately, a week before meeting his goal, Doug was in a fatal car accident. Samuel wants to honor his father by making the trip anyway. Because the credit card rewards were never assigned by Doug to the Trust, Samuel will need to

initiate a probate proceeding and seek to be appointed as Personal Representative of the Estate in order to recover those credit card rewards worth \$80,000 from American Express. Once the probate process is completed (a minimum of six months later) Samuel will finally be able to recover and use the credit card reward funds.

Doug could have avoided the need for probate and the delay in Samuel's use of the funds by assigning his American Express rewards to his Trust, and updating his estate plan.

Your Estate Plan and Digital Assets

Providing for the authorized access of digital assets and electronic communications in estate planning is becoming a fairly routine concept and may not be included in your current estate planning documents. If you have not reviewed your tangible and intangible assets and updated your estate plan to conform to the new Digital Access Act, we suggest that you consider a review of your plan. **More than anything, you must maintain a list of all digital accounts and passwords, and authorize and provide your fiduciary the ability to access those accounts.**

We would be happy to meet with you to discuss your personal situation. You may schedule an appointment by calling 480.951.8044.