



The Times They Are a Changing – What are Digital Assets?

For years I have suggested that clients have their estate plans reviewed on a regular basis. Changes in life occur whether we are aware of them or not; you never know when one of these changes will have an impact on the plans you made.

Until this past year digital assets were not even on my radar as an estate planning issue until a problem for a client came up. The problems that arise from digital assets are not just limited to estate planning but also may have an impact on planning for incapacity as well.

Wikipedia defines a digital asset as “any item of text or media that has been formatted into binary source that includes the right to use it. A digital file without the right to use is not an asset. Digital assets are categorized in three major groups which may be defined as textual content (digital asset), images (media asset topics) and multimedia (media assets).”

Boy that definition really cleared things up! After doing some research on the topic, I'm not really sure there are many who actually do understand the concept of digital assets. Here is a list of some of the items I came up with (there probably are more than this):

*Emails | Online brokerage accounts | Videos
Blogs | Online Banking | Games | Social Media
Accounts | Online Bill Paying | Entertainment
accounts | LinkedIn | Amazon accounts | Medical
records | Twitter | eBay accounts | Customer
information | Facebook | Store accounts | Client
files | Music and Playlists | Tax returns
Photos you have stored online (think the cloud)*

Most financial assets are, and have been, easy to identify and pass on to heirs according to the estate planning documents you have drawn up. Digital assets are considered a form of personal property and part of a decedent's estate. This is where the complex stuff starts; who has rights of ownership, control, privacy and access are intertwined in a complex web of federal law, privacy laws, copyright law, intellectual property law and state law.

As we embrace and utilize the digital world (again, think the cloud), those you have given fiduciary responsibilities to help settle your estate are at present left with little or no legal authority or guidance on identifying, collecting, distributing and settling a decedent's digital estate assets.

Here is an example – you own a computer and leave it to your spouse. What do they actually inherit, the hardware, the actual computer, or the data that is stored on the hard drive? Let's say you were in business with someone else and kept the company books on this machine along with a large library of family photos.

Who has access to the data, company books and photos, how long is that access granted and who has authority to grant the access? The photos, are all of them something you would want to share with your family?

The concept of sexting is apparently not limited to the young and innocent. What about the emails stored on the machine? At your death you were working on a business transaction that was taking a very aggressive tax position. Does the IRS

have right to access the emails regarding this transaction? Does the answer change if the emails are stored in the cloud and not on your machine? If the data is stored in the cloud, how long are your rights to privacy protected and when does that data become a public domain?

Another issue that arises is the ability to transfer digital assets. Over the years you accumulate a large library of iTunes songs that has grown to be a significant investment. The user agreement states you do not have the right to transfer use of that data to another user. So when you die, according to the user agreement, the value of this library is lost because it is nontransferable. Some service agreements have inactivity clauses, if you do not access an account for a certain period of time they have the right to shut down the account. So, if you have a stroke and recovery takes 9 months; will the account be there to access?

Part of a fiduciary's job is to distribute your assets according to your wishes. Often, this leaves fiduciaries battling with service providers who have the responsibility to protect your rights and privacy. These service providers, as part of the user agreement you signed when you opened an account, will refuse to recognize the authority of a fiduciary and deny access to the user account. By federal law they are required to protect and safeguard your privacy. For them there are 2 issues to wrestle with; who actually is authorized to access the account and who has a right to the data.

In the event of incapacity, giving a loved one user IDs and passwords to access your accounts may expose them to violation of federal privacy laws. Unless there is some legal documentation that gives them the right to access your accounts, there may be a problem.

For more than a couple of years attorneys and legal experts have been wrestling with this issue under potential legislation known as the 'Fiduciary

Access to Digital Assets Act' to untangle the web of uncertainty. It is no surprise individual state governments have become involved in addressing the issues as well. In 1986 Congress passed two acts, 'Stored Communications Act' and the Computer Fraud and Abuse Act', which guides the discussion for digital assets and how the courts have interpreted the outdated federal legislation in an attempt to keep up with today's technology.

One complicating issue is - whose laws should we follow? Financial property rights are subject to the laws of the state the property is located. If you reside in Oregon and own a residential rental property in Idaho, property rights for the rental are governed by the State of Idaho and not Oregon. If data is stored in the cloud, how do we determine which state law governs if at all? What if you or your spouse is a citizen of another country or you are traveling outside of the United States on vacation when an accident occurs; whose laws govern?

As new technologies develop, the number of individuals with digital assets will continue to rise. Amid the uncertain legal landscape it is important for people to have a plan on how to deal with these assets. Such a plan is essential to:

1. Make a transition easier for the executor in the event of death or incapacity
2. Prevent identity theft
3. Prevent financial loss
4. Avoid losing the decedent's online presence
5. Protect personal information from being revealed or deleted

Even though this is still a legal quagmire, a review of your estate plan with an attorney who specializes in estate planning would be in order. If your plans are like most, the concept of digital assets has probably not been addressed at all. So if something happened to you, all those family pictures you have stored on the web belong to - - - -???

Brent