Estate Planning Goes Digital in Michigan

By Geoffrey N. Taylor

A CPA recently referred a 78-year-old single woman to me for an estate plan. As I do for all new clients, I agreed to review her current estate plan documents and to have an initial meeting without charge. Her existing estate plan revealed great care in disposing of certain of her tangible personal property, including jewelry, a silver service set given to her by her grandmother, and knitted hot pads given to her by her aunt. When we met later that week, she told me she gave these personal items to the designated recipients many years ago. While she was still focused on disposing of certain personal assets, the nature of those assets had changed considerably since she last engaged in estate planning. Certain “digital assets” were priorities now, including her Facebook account, the virtual currency she purchased for her favorite application, Candy Crush, and, most importantly, her death metal music collection, especially that of her favorite band, Impending Doom. Although her particular list of digital assets surprised me, I was not at all surprised that digital assets were a high priority as we all continue to digitize our lives and our assets. (Note the client described above may be completely fictitious.)

Michigan passed the Fiduciary Access to Digital Assets Act, which became effective June 27, 2016. The Act allows a client to designate an attorney in fact, personal representative, and trustee to have access to the client’s digital assets. The Act covers an electronic record in which the user owns a right or interest. Specifically excluded from the Act are employer assets used by the employee in the course of employment (e.g., a work email account). The designated agent must give the custodian of the digital asset (i) a written request for access, (ii) a copy of the death certificate (if the client is deceased), and (iii) copies of letters of authority (for a personal representative), a durable power of attorney (for an attorney in fact), or a certificate of trust (for a successor trustee), as applicable. The custodian, in turn, may require the agent to provide additional documents or information. Importantly, the Act also applies to attorneys in fact under a general power of attorney. The inclusion of an attorney in fact as an authorized agent is significant because clients of all ages increasingly conduct their lives electronically, whether through paying bills, communicating with family, friends,

and business associates, managing doctors' appointments, etc.

The Act certainly begins the facilitation of designating a third-party to step into a client's shoes and manage the client's digital assets. However, like with many new statutes, the Act may raise more questions than it answers. For example, when I buy a digital asset, am I purchasing a property right, which can be transferred at death, or am I simply purchasing a license, which typically cannot be transferred and expires on death? If the client has designated a third person through an online tool, would that designation override a contrary designation in a will, power of attorney, or trust agreement? Will the agent have access only to the catalogue of electronic communications (meaning the identity of the sender and recipient and the time and date of the communication) or will the agent have access to the content of the communication as well? Can the custodian limit the agent's access to the client's account and charge a fee? Can a client prohibit disclosure of one or more digital assets? Is the agent subject to fiduciary standards? There are at least partial answers to some of these questions, but the law in this area is in its infancy and evolving.

Please call or email one of Maddin Hauser's estate planning attorneys if you would like to discuss the Act or any other estate planning or administration issue.