
Digital Asset Planning: Plan Now or Pay Later

Many of us are encouraged to create an estate plan from an assortment of diverse professional groups: attorneys, accountants, insurance agents and financial planners, to name a few. We know from experience that this advice makes a lot of sense and can avoid a great deal of expense, emotional trauma and complication for our loved ones after death. With the passage of time and our ever-increasing dependence on the internet, the concept of planning for our “digital assets” has become an essential part of the estate planning process.

What is a “digital asset?” A digital asset, simply stated, is an account that is stored electronically. It may be stored on a computer, an iPhone, Android, Blackberry, other Personal Data Assistants (“PDAs”) or in the “cloud.” There are many different types of digital assets: (1) iTunes accounts that store music, movies and books; (2) Gmail, Yahoo, Outlook or other types of email accounts; (3) online banking or brokerage accounts; (4) social media accounts, such as Facebook, Twitter, LinkedIn and Instagram; (5) cloud storage accounts, such as Dropbox, Box, Google Drive or iCloud; (6) medical provider accounts; (7) stores and merchant accounts, including Amazon, Ebay, Target and the like; (8) Netflix and You Tube accounts, etc. The list goes on and on.

Access to these accounts is generally not a problem while the user (or owner) is alive. So long as the user remembers his/her password (which is becoming increasingly more challenging for many) and any additional access information, the user usually may obtain access to the particular account without a problem. But what happens when the user dies, suffers a stroke, dementia or becomes otherwise mentally incapacitated? Are there steps or actions that should be taken in advance to protect this very sensitive and proprietary information and preserve these assets and information for the user’s beneficiaries and loved ones?

Alternatively, what happens if the user has failed to document his/her digital asset plan and passes away or becomes incapacitated?

Initially, we strongly advocate the creation of an inventory of all user names, passwords, accounts and files that are stored on the computer. Although one may create this list on paper and store the list in a safe deposit box or other well-protected place, a better practice in this day and age is to store this information

electronically on the computer, PDA or the cloud. The practical advantage for storing such information electronically is that account information and passwords change so frequently that use of an electronic system is more likely to remain current if the updating process is more seamless than a list kept on paper and stored in a safe deposit box. There are a number of excellent and secure programs and apps that are available for this purpose, such as 1Password, Dashlane, Password Manager or even the creation of a spreadsheet that is password protected and encrypted. The password to access this protected and secured information should only be shared with one's spouse, attorney, trustee or a person who is extraordinarily trustworthy.

Revising one's estate plan to provide the power to fiduciaries or trustees to access the information and to take actions on behalf of the person creating the trust is recommended. If the above mentioned steps have not been taken, the user/owner's beneficiaries and loved ones will likely be left with a substantial problem. Often, due to various federal statutes that restrict access to digital accounts¹, a probate proceeding may be needed, whereby a personal representative will have to be appointed to obtain the appropriate rights to obtain control of the computer. In addition, a computer service may be needed to unlock or decipher the information. This process can take weeks or months and can be quite costly.

The National Conference of Commissioners on Uniform State Laws has drafted legislation that is intended to enable fiduciaries to obtain access to digital assets and manage and distribute the digital assets.

In the state of Michigan, there is also a draft proposal of the Michigan Fiduciary Access to Digital Assets Act. If you are interested in discussing this issue or would like to learn more about the developments in this area of the law, please contact me at either 248.827.1890 or sweiner@maddinhauser.com.

¹ Under the Stored Communications Act, 18 USC 2701, and Computer Fraud and Abuse Act, 18 USC 1030, the unauthorized access to electronic communications or a computer, under certain circumstances, is a criminal violation of a federal statute. See also MCL 752.795 where the state of Michigan prohibits access to a computer and its systems and programs without appropriate authorization.

