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Estate Planning for Digital Assets

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As we move further into the twenty-first century, most of us are accumulating a digital footprint – we correspond by email; we connect with family, friends and business colleagues through social or professional networking sites such as Facebook and LinkedIn; we create, purchase and store photographs, videos, music and books in digital formats, sometimes in places known as “clouds;” we utilize subscription-based online services; we pay our bills online; we operate a business through a website and use PayPal to receive payments from customers; and some of us have “gone paperless.” The activities of our digital lives are carried out on various devices – personal computers, tablets, phones. We set up accounts with user names and passwords, probably not reading the terms of service agreements, as we impatiently click the “I agree” button in order to satisfy our desire for faster, more immediate access to information and services.

What is to become of this footprint when you die? Will your executor be able to rely on the postal service, the stack of unopened mail on the kitchen counter, or your filing cabinet to figure out the location and extent of your assets and liabilities? What is to become of your online profile (Facebook, LinkedIn) – will you die a “digital death” or do you want someone to maintain a memorial in your name?¹ Assuming your digital assets can be given away, who will be entitled to own them after your death? These are just a few of the new questions we need to ask and answer when thinking about estate planning.

In order to organize our thinking about digital assets, it is helpful to keep in mind three categories: (1) devices; (2) accounts; and (3) assets. In the realm of devices, your executor should be able to quickly identify and secure any computers, phones, tablets and data storage devices that contain your personal information. This is an important first step towards preventing identity theft. If any of your devices are password protected, or if your content is encrypted, you should keep a record of the passwords in a safe place known or available to your executor. If your password is not known, your executor may need to hire a computer security expert to gain access to your computer. If under the terms of your Will your computer will pass to the beneficiary of your other tangible personal property, you should consider leaving instructions for your executor to first clear the device of certain personal information, although the executor should be careful about destroying potentially valuable content.

It is essential that you create and maintain a list of all usernames and passwords for your online accounts, including the password “prompts.” Your executor will need to close any online retail shopping accounts, which hold your credit card information. If financial information is being delivered electronically to your email account, it is imperative that your executor be able to access the email account. At a minimum, your executor will be hunting for current and past bank and brokerage account statements, copies of electronic billing notices, and copies of your income tax returns and year-end tax statements. No one should be allowed to use your email accounts in a way that would mislead others after your death. Ultimately, your executor should close your email accounts and social media profiles (unless your instructions provide for someone to maintain a memorial profile in your name). It is very important not to use an employer provided email account for personal financial transactions, because your executor will be denied access to the account.

Some financial institutions allow you to designate someone as your agent to access your bank accounts, or they will presume that if you have shared your account access information you have done so intentionally and are thereby liable

¹ “Death on Facebook Now Common As ‘Dead Profiles’ Create Vast Virtual Cemetery.”
http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles_n_2245397.html.

for the actions taken by that person.² The law is sorely inadequate with respect to the legal authority of fiduciaries (such as attorneys-in-fact and executors) to access another person's accounts. Current federal laws³ and most service provider terms of service agreements prohibit accessing another person's computers or accounts, even by an executor, which means that without knowing the user name and password, the executor is likely to be denied access by the service provider.⁴

"Digital assets" consist of a wide variety of property interests, such as content created by you (such as musical compositions, literary works, photographs, digital artwork, movies, software programs and games), websites, domain names, blogs, Bitcoins, PayPal accounts, eBay accounts, online bank accounts, and frequent flyer miles.

If you store potentially valuable copyrighted content or content with sentimental value on your computer, in another electronic storage device, or with a service provider, you need to think about how that data will be accessed and controlled after your death. You should leave detailed instructions for your executor so that she knows what these assets are and where to find them. If you store digital content in the cloud, it is very important that you read the terms of service agreement imposed by the service provider. For example, you may be surprised to learn that your rights to the data stored on iCloud terminate at your death,⁵ which means that you should always keep a separate copy of your digital content on a storage device that you own and control.

It is important to understand that your account with a service provider is merely a license to use the service. You do not have a property right in the account itself or in the data that you store in the account. For example, it may come as both a surprise and a disappointment to learn that you cannot give away your iTunes collection because you do not own the content; you have merely purchased a license to view or listen to the downloaded content. This is very different from buying a compact disc or digital video disc, which you own and can give or sell to another person. A license agreement ends with your death and cannot be transferred. Although an iTunes account can be shared with your family, when the account holder dies, the license agreement dies with that person. Arguably, once content is downloaded to a device it is not lost when the account holder dies, but it too will eventually disappear with the inevitable death of the device.

In addition to giving thought to naming the beneficiaries of your digital assets in your Will, it is equally important to leave detailed instructions regarding the destruction of digital information that you want to be kept private. To obtain a copy of a Digital Affairs Checklist for organizing your digital affairs, see the link found on the right side of Reid and Riege's Individual Client Services Practice Area page at www.rrlawpc.com or contact your attorney in the Individual Clients Group at Reid and Riege, P.C., to obtain a copy by mail.

² Some financial institutions will allow you to add an attorney-in-fact to your account but reserve the right not to and can reject your power of attorney form if it does not meet the institution's requirements. See Ally Bank Deposit Agreement and Disclosures, December 7, 2013.

³ See the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and the Stored Communications Act, 18 U.S.C. §§ 2701-2702.

⁴ In order to bridge this gap, the Uniform Law Commission has drafted legislation designed to allow fiduciaries the same access to digital assets that they have to other types of assets. We are hopeful that the Connecticut Uniform Fiduciary Access to Digital Assets Act will be enacted during Connecticut's next legislative session.

⁵ "No Right of Survivorship. You agree that your Account is non-transferable and that any rights to your Apple ID or Content within your Account terminate upon your death. Upon receipt of a copy of a death certificate your Account may be terminated and all Content within your Account deleted." <http://www.apple.com/legal/internet-services/icloud/en/terms.html>.

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