

June 1, 2016

Property and Assets in the Digital Age

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Traditionally when people are planning the distribution of their estates, they would consider their assets and decide how to distribute their assets, after dealing with any liabilities, among their intended beneficiaries. Legally assets are divided generally speaking into real and personal property. Real property being real estate and interests in land; and personal property being everything else.

This “land and stuff” division worked well from ancient and medieval times but as our world has increased in sophistication, innovations were required. For example, money morphed from coins to paper and fiat currency and now to a world where money is stored, accessed and transacted with computers. And much of the valuable assets in our modern world are intangible and in various forms of intellectual property like patents, trade-marks, industrial designs and copyrights in music and other modes of expression. We have come a long way from assets consisting of some land and a bunch of tools.

Our legal mechanisms for transferring assets on death have evolved and have generally met the challenges of our changing notions of property and value. The ancient Romans did Wills and had laws dealing with the disposition of property on death. Our common law has historically been flexible enough to deal with innovations.

However, since the beginning of this century more and more people have digital assets which can be viewed as a digital estate or a digital legacy. By way of example, think of your items stored on digital devices such as emails, music, photographs, etc. Also think about your social network accounts on Facebook, Twitter, your YouTube videos, your personal website, your LinkedIn profile, Instagram accounts and the list goes on.

As mentioned above, traditional assets are now embodied in this digital world. For example, your means of self-expression like your diary, journals, the short story and the novel you are working on, as well as your homemade music and recipes, etc. And I haven't even mentioned the world of games or your slideshows and homemade plays and shows. All of these electronic and digital possessions have utility – otherwise you wouldn't keep them and use them – along with sentimental and sometimes monetary value.

The law has not really caught up with our new world of digital assets and property. This is not to say that our law won't, with a few tweaks, or can't even as is. It's just that the normal tools of Wills and Powers of Attorney have to be properly understood to cover, as they do legally, all of our assets.

The problem is the interface with our law and the digital asset world's in terms of service agreements, contracts, locked devices, passwords and privacy concerns and issues.



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There have been difficulties in the very recent past with accessing and dealing with the digital assets of a deceased person. And while sometimes the persons involved in dealing the deceased's estate have had to obtain court orders, both the legal and regulatory environment (new legislation being considered in the United States to deal with these specific problems) and the desire of the holders of such assets to find a way to deal with their customers' in a responsive manner has meant that indications of authority to act on the behalf on someone with respect to their digital assets are now, and will likely more normally and frequently in the future, be accepted.

I now usually include in the Wills that I draft and the Powers of Attorney that I draft the following language:

"My Trustee shall have the power to access, handle, distribute, and dispose of my digital assets, and the power to obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my digital devices and digital assets.

"Digital assets" includes the following:

1. Files stored on my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops; and
2. Emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, banking accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items which currently exist or may exist as technology develops, regardless of the ownership of the physical device upon which the digital item is stored."

"My Attorney shall have:

1. the power to access, use, and control my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile phones, smartphones, and any similar digital device which currently exists or may exist as technology develops for the purpose of accessing, modifying, deleting, controlling, or transferring my digital assets, and
2. the power to access, modify, delete, control, and transfer my digital assets, including but not limited to, my emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, banking accounts, domain registrations, DNS service accounts, web hosting accounts,

tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items which currently exist or may exist as technology develops, and

3. the power to obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my digital devices and digital assets described above.”

As well, I advise clients to keep an updated inventory (in a very safe place) with login names and passwords and other information describing their digital assets.

The law as it has always done will evolve to meet and deal with the new digital asset world however slowly. My guess is that in a couple of decades or so, digital assets in the legal estate planning and administration world will be no more of novelty than automobiles were a century or so ago.

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