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Estate planning for your digital assets

The term "digital asset" does not have a well-established definition, for the pace of technology is faster than the law can adapt to it. Simply stated, digital assets are electronic ones and zeros; that is, information inscribed on a tangible medium or stored in an electronic or other medium, and which is retrievable in perceivable form. Common types of digital assets in which you may have an interest include:

Personal. Personal digital assets include email and text messages, e-books (e.g., Kindle and Nook), word processing and .PDF files, photographs, videos, music files (e.g., mp3s and iTunes), spreadsheets, PowerPoint presentations, tax records and returns, and similar materials.

Social media. Social media assets involve interactions with other people on websites such as Facebook, LinkedIn, and Twitter. These sites are used not only for messaging and social interaction, but also can serve as storage for photos, videos, and other electronic files.

Financial accounts. Many people manage their financial affairs online, including bank and PayPal accounts, investment and brokerage accounts, bill payment (e.g., utilities, credit cards, car payments, mortgage payments), and income taxes.

Business accounts. A professional such as a physician, attorney or CPA will have client records, many of which will contain confidential information.

Other digital assets. You may own a variety of other digital assets, such as domain names, blogs, loyalty program benefits (e.g., frequent flyer miles, credit card rewards, and business discounts or vouchers), and gaming property (e.g., virtual money, avatars, or other assets earned when playing online games).

Why planning is so important

We tend to take our digital assets for granted, but this is unwise. Key benefits of planning include:

Assist others upon death or incapacity. When individuals are prudent about their online life, they have many different usernames and passwords for their accounts. This is the only way to secure identities, but this devotion to protecting sensitive personal information can wreak havoc on families and fiduciaries upon incapacity and death, as their rights to access digital assets are often unclear. Proper planning may make this process less complicated.

Reduce identity theft. In addition to needing access to online accounts for personal reasons and closing probate, family members need this information quickly so that a deceased's identity is not stolen. Until authorities update their databases regarding a new death, criminals can open credit

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cards, apply for jobs, and get state identification cards under a dead person's name.

Prevent financial loss to estate. Failure to plan for digital assets upon death and disability may cause financial loss to the estate from four perspectives. For example, electronic bills for utilities, loans, insurance, and other expenses need to be discovered quickly and paid to prevent cancellations. For example, without power the furnace may not run and keep pipes in the house from freezing, or the security system may not work if the residence is burglarized.

Avoid losing personal story. Many digital assets are not inherently valuable, but are valuable to family members who extract meaning from what the deceased leaves behind. Historically, people kept special pictures, letters, and journals in albums, scrapbooks, or shoeboxes for future generations. Today, this material is stored on computers or online and often is never printed. Personal blogs and Twitter feeds have replaced physical diaries, and email messages have replaced letters. Without alerting family members that these assets exist, and without telling them how to get access to them, the story of the life of the deceased may be lost forever. This is not only a tragedy for family members but also, possibly, for future historians who are losing pieces of history in the digital abyss.

Protect secrets. Sometimes people do not want their loved ones to discover private emails, documents, or other electronic material. They may contain hurtful statements or personal rantings. A professional, such as an attorney or physician, may have files containing confidential client information. Without designating appropriate people to take care of electronically stored materials, the wrong person may come across this type of information and use it in an inappropriate or embarrassing manner.

Impediments to Planning

User agreements. When an individual signs up for a new online account or service, the process requires the person to agree to the provider's terms of service. Service providers typically include policies that govern what happens to the digital material on the death of an account holder, but individuals rarely read the terms of service carefully, if at all. Nonetheless, the user is at least theoretically made aware of these policies before being able to access any service. The terms of these "clickwrap" agreements are often upheld by the courts.

Ownership. A problem may also arise when one does not actually own the digital asset but merely has a license to use that asset while alive. It is unlikely that a person can transfer to heirs or beneficiaries music, movies, and books purchased in electronic form, although one may transfer "old-school" physical records (vinyl), CDs, DVDs, books, etc., without difficulty.

One approach being taken by some states, which either have or are considering granting fiduciaries the ability to access accounts, is to provide by statute that provisions of user agreements that would act to restrict fiduciary access are void as against public policy. Many issues may arise, however, with these types of provisions, such as whether they improperly interfere with freedom of contract or are unconstitutional attempts to circumvent federal law.

Planning suggestions

Legal uncertainty reinforces the importance of planning to increase the likelihood that an individual's wishes concerning the disposition of digital assets will actually be carried out. Digital assets are valuable, both emotionally and financially, and they are pervasive.

Backup to tangible media. The user should consider making copies of materials stored on Internet sites or "inside" devices on tangible media of some type, such as a CD, DVD, portable hard drive, or flash drive. The user can store these materials in a safe place, such as a safe deposit box, and then leave them directly to beneficiaries named in the user's will. Of course, this plan requires constant updating and may remove a level of security if the files on these media are unencrypted. However, for some files, such as many years of vacation and family photos, this technique may be effective.

Prepare a comprehensive inventory. Consider creating an inventory of digital assets listing how and where they are held, along with usernames, passwords, and answers to "secret" questions. Careful storage of the inventory document is essential. Giving a family member or friend this information while alive and competent can backfire. For example, if someone gives his or her daughter the online banking information to pay bills when he or she is sick, siblings may accuse her of misusing the funds. Further, a dishonest family member might be able to steal money undetected.

If maintaining a separate document with digital asset information is the best route, this document should be kept with the will and durable power of attorney in a safe place. The document can be delivered to the executor upon the individual's death, or agent upon the individual's incapacity.

Another option is to use an online password storage service. One then needs to pass along only one password to a personal representative or agent. This one password, however, is then extremely powerful—it unlocks the door to the entire digital world.

Remember that giving someone else one's username and password may violate the terms of service in the contract. Accordingly, use of the access information may be deemed a state or federal crime because it exceeds the access that the user agreement permits.

Provide immediate access to digital assets. You may be willing to provide family members and friends immediate access to some digital assets while you are still alive. You may store family photographs and videos on websites that permit multiple individuals to have access.

Place digital assets in a trust. One of the most innovative solutions for dealing with digital assets is to create a revocable trust to hold the assets. A trust may be a more desirable place for account information than a will because it would not become part of the public record and is easier to amend than a will. Assuming the asset is transferable, the owner could transfer digital property into a trust (new or existing) and provide the trustee with detailed instructions regarding management and disposition.

In addition, accounts could be registered in the name of the trust, so that the successor trustee would legally (and, one hopes, seamlessly) succeed to these accounts. In addition, many digital assets take the form of licenses that expire upon death. They may survive the death of the settlor if the trust owns these accounts and assets instead. When a person accumulates more digital assets, designating these assets as trust property may be as simple as adding the word "trustee" after the owner's last name.

Start today

Do you recognize yourself here? Do your loved ones know how to access your accounts in case of an emergency? If not, this might be a good time to make that information available and share it with your estate planning attorney as well.

Are you satisfied with the state of your estate plan? Please come to see us. We'd be pleased to share our insights in this regard. ☐

Your Social Security benefit start date

In an actuarial sense, it doesn't matter when someone starts to receive their Social Security benefit. An earlier start means a lower monthly benefit; a later start increases the monthly payment at the cost of skipping years of benefits. The two approaches are balanced for those who live to their life expectancy. For every individual, however, there are considerations that go beyond the actuarial, beyond the math. A recent study from the National Bureau of Economic Research explored some of those reasons ["Social Security Claiming Intentions: Psychological Ownership, Loss Aversion, and Information Displays," available online at https://www.nber.org/papers/w31499.

According to the researchers, more than half of Americans claim their Social Security benefits before reaching their full retirement age. One important reason may be that 40% of Americans ages 55 to 64 have no retirement savings at all, and so they need the money. But they might be still better off by staying longer in the paid workforce, delaying their retirement, thereby building a larger retirement benefit both by paying more Social Security taxes and avoiding the benefit reduction that comes with an early start. These additional, more emotional factors, were identified by the researchers.

Sense of ownership. Although Social Security is a pay-as-you-go system, with payouts largely funded with payroll taxes on current workers, it has always been presented as an earned benefit. It is therefore not surprising that many people in the study agreed that "The Social Security benefits that I receive will come from the money I contributed." Those who had the strongest sense of ownership in their benefits were the most likely to claim their benefits before their full retirement age.

Loss aversion. Many people fear losses more than they value gains, as has been well documented in studies of investor behavior. Among those in this study, those with the highest loss aversion were most likely to start benefits early, to reduce the chance of failing to recoup their tax payments.

Expectations of longevity. On the other hand, those who expected to live a long time tended to start their benefits later, perhaps out of fear of outliving their retirement resources.

Information availability. To give respondents a better sense of what is at stake in the decision, they were provided illustrations of cumulative benefits.

For example, a retiree who started receiving $1,339 monthly at age 62 would accumulate total payments of $353,500 if he or she lived to age 85. If the same retiree waited to start collecting $2,395 monthly at age 70, the cumulative total at age 85 would be $402,360.

Such information has been shown to influence people, making them more receptive to annuity purchases for augmenting retirement income. Paradoxically, in this case, the group that was shown the higher total accumulation became more inclined to claim early, giving up the possibility of that higher accumulation.

As interesting as these findings may be, for most people, family and financial circumstances will be more important drivers of the retirement start date. We can help you evaluate that decision. ☐

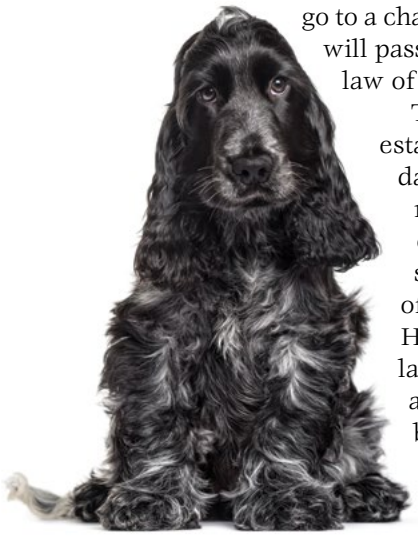
Clear intentions required

More and more people are creating testamentary trusts for the care of their pets after they pass. Teresa Jablonski was one such person. She had no children, but she did have four nieces and nephews. One of these, Ann, had a durable power of attorney for managing Teresa's finances. At Ann's suggestion, and using the services of Ann's attorney, Teresa executed a will in August 2013. The will left her entire estate to a testamentary pet trust for Teresa's cocker spaniel, Licorice. Any other pets owned by Teresa at her death were also to be beneficiaries of the pet trust. At the death of the last surviving pet, the trust assets were to pass to a charity, to be chosen by the trustee. Ann was named executor of the will, but the trustees were not specified.

Unfortunately, Licorice died before Teresa did, and she acquired no other pets before her death. When Ann presented Teresa's will for probate, the other nieces and nephews objected. They argued that because there were no pets to be beneficiaries, the pet trust had lapsed, and so Teresa's estate should be divided among themselves under the laws of intestacy. Ann countered that the correct result was an acceleration of the charitable interest in the trust remainder. The probate court ruled in Ann's favor, without holding a trial.

On appeal, this ruling was voided, because there is an issue of fact that requires a trial for determination. Whoever drafted Teresa's will did not do a very good job of it. When the pet trust failed, its assets passed to the residuary estate. But the residuary clause of the will then sent all remaining estate assets back to the pet trust, which no longer existed!

The appellate court held that Teresa's will failed to demonstrate a clear intent for the disposition of estate assets in the event all of Teresa's pets died before she did. The fact that no specific charity, or even type of charity, was mentioned in the will troubled the court. Additional fact-finding will be required to determine Teresa's intent. Unless it can be shown clearly at trial that Teresa really wanted her estate to go to a charity at her death, the estate will pass to her relatives under the law of intestacy.



This case demonstrates that estate planning is not over the day a will is executed. Wills need to be reviewed periodically, to be certain they still make sense in view of changing circumstances. Had Teresa met with Ann's lawyer after Licorice died, all ambiguities could have been resolved, and years of litigation would have been avoided. ☐