

21st Century Considerations for Estate Planning: Digital Assets

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Why do I need an estate plan? The answers can be as varied as the individuals who pose the question. Reasons often mentioned include preserving assets, protecting beneficiaries and reducing death taxes. Certainly, the purpose of the core document of any estate plan, the Last Will and Testament, is to provide the testator with a means to state to whom their property will be distributed following death. Historically, wills were used most often by men who had no biological descendants, to devise their land. In modern times, one of the primary reasons for having an estate plan was tax avoidance. Understandably, individuals seek legal means to reduce or avoid potential estate tax liability and trust and estate practitioners are able to oblige through carefully drafted estate planning documents. In light of recent state and federal tax law changes, death taxes are no longer the primary reason the majority of individuals seek to complete their estate plans, as only the wealthiest individuals' estates are subject to estate tax. So, if not to escape taxation, why do people need an estate plan?

Important reasons for estate planning include specifying who will receive assets following death, naming guardians of minor children, and setting up trusts to provide for controlled distributions to beneficiaries. Comprehensive estate plans not only address the transfer of assets at death, but also lifetime needs such as the management of legal and financial matters, including planning for a potential incapacity, disability planning for yourself or a loved one, planning for the possible need for long term health care, or preparing for a time when you may not be able to manage your affairs. In addition to the will, estate planning documents may include an Advance Directive for Health Care, by which the principal names a Health Care Representative and states end of life wishes; a General Power of Attorney, which authorizes an agent to act for you on legal and financial matters; a Funeral Representative Designation, a document that names someone to make your funeral and final disposition arrangements, as well as other situation-specific planning documents. As additional parts of the estate planning process, beneficiary designations should be reviewed, business succession and charitable giving plans may be addressed, and other matters particular to one's stage of life will be discussed.

Assets are defined in Webster's as the "entire property of a person ... subject to the payment of debts." In the vernacular, assets are simply your "things." Just as the reasons for preparing a Last Will and Testament have changed throughout history, the types of items passing both pursuant to a will and as non-probate assets passing outside the will have also changed. In centuries past, an individual's worth consisted primarily of his land. Later, assets included not only real property, but other tangible items, such as banks accounts, business interests and personal property. In the 21st century, our assets often include a significant amount of intangible items, such as logos, e-mails, websites, etc. Photos may be stored in the cloud rather than a photo album; books may be purchased at a bookstore and put on a bookshelf or purchased online and housed on an e-reader;

money may be in a bank account, but it may also be in an online account such as Venmo. Our assets have broadened dramatically in the past years to include a significant amount of intangible assets, including digital assets, and our estate plans must expand accordingly.

Digital assets are generally defined as assets that are not tangible but have a right to use. The Uniform Fiduciary Access to Digital Assets Act, N.J.S.A. 3B:14-61.1- 61.18 (the “Act”), broadly defines digital assets as “an electronic record in which the individual has a right or interest.” Where the initial estate-planning meeting once focused on the individual’s bank accounts, real estate holdings and the like, we are now compelled to expand our conversation to inquire about intangible assets. As part of the beginning estate-planning discussions, which typically include an asset inventory, we must now include an inventory of digital assets and online presence. To assist the client, an attorney may prompt the client with an estate-planning questionnaire by listing the most common categories of assets, which should include digital assets.

Digital assets are generally categorized into four areas: personal/sentimental assets, financial digital assets, social media accounts and business interests. Personal digital assets often include photos stored online, personal email accounts, and music purchased and retained in an account such as iTunes. Sensitive medical records may be stored in an online health-care patient portal. Social media accounts such as Facebook, Instagram and Twitter typically do not have financial value but nonetheless may be of great importance to the user. Financial accounts at Venmo or PayPal may have an identifiable monetary value. A small business owner may have an e-commerce shop at Etsy, Gypsy Spoonful or eBay. Once the assets are clearly identified, the individual must consider if she would want to provide her agent, under a Power of Attorney, access to her digital assets, along with her other assets.

As attorneys, we counsel our clients to consider who would manage their assets should the client become unexpectedly incapacitated, or otherwise unavailable or unable to manage their affairs. At the very least, just as it is best practice to maintain a list of financial accounts, the client should maintain an inventory of their digital assets with user names and passwords. This personal information may be retained with the original Power of Attorney, or perhaps the client would feel more comfortable entrusting this information to their attorney, to be released upon the issuance of an instruction from the client or the happening of certain specified events, such as incapacity verified by the client’s physician. Thereafter, an individual should consider what will happen to these assets following her death. The practitioner’s role is to identify the issues and to assist the client with effectuating her intent.

The law in the area of digital asset management by third parties is developing. The Act recognizes that users have property rights in digital assets, which may be managed by an agent under a power of attorney, trustee of a trust or executor or administrator of an estate. Additionally, access to digital assets may be granted to a guardian by order of the court. The law provides direction as to how a fiduciary may receive authorization to access another’s digital assets. First, if the custodian offers an “online tool” (i.e., a means to authorize or deny access) that tool has priority over any estate planning documents. The online tool is akin to a digital power of attorney, in that it is a means to name a third party to have access for that particular site. If the user does not utilize the online tool or if the custodian does not provide one, then the language in the user’s estate planning documents controls. In the context of an estate administration, unless the user clearly prohibited disclosure via the online tool or her estate

planning documents, or if the provider's terms of service prohibit access to third parties, the personal representative has the right to receive from the custodian the username and/or account number upon showing that such information is reasonably necessary. Similarly, where a power of attorney specifically grants the agent authority to receive electronic communications and other digital assets, the custodian should release the user name and password so the agent may access those communications. Further, language in the statute permits a trustee and a court appointed guardian to request access to a principal's digital assets. Notably, a user may specify that she does *not* want digital assets disclosed to a fiduciary following her death or in the event of incapacity. One can quickly think of circumstances where an individual would not want her executor or personal representative reviewing or disseminating her online presence, medical records, emails, etc. The privacy concerns are clear, and they often continue from the grave. Just as with tangible assets, the fiduciary is charged with the duties of care, loyalty and confidentiality when managing digital assets.

Certain digital assets may be transferred at the user's death by an executor or administrator of the decedent's estate. Notably, the law does not grant fiduciaries the power to transfer digital assets, where the original user did not own the content. The terms of service agreement for the particular site control in this regard. The law specifies that it "does not change or impair the right of a custodian or a user under a terms-of-service agreement ... [and it] does not give a fiduciary ... any new or expanded rights other than those held by the user" N.J.S.A. 3B:14-61.5. For example, when a user downloads a book to an e-reader, she may own a license to read that particular book. She may not own the content. The particular rights to digital assets are set forth in the terms of service. This is different from purchasing a book in a bookstore, where you now own that book and may gift or transfer it at will. For example, if you have a vast library of music on iTunes, it may be wise to download that music to your computer (rather than solely streaming from the cloud) so your family can enjoy your music without restriction. If you take family photos, but have put off printing your pictures, now is the time, before they are inaccessible to your loved ones. Intangible digital assets need particular attention to ensure that they can be conveyed to your beneficiaries following your death.

So what does all this mean to the everyday user? The basics of estate planning have not changed. Know where your assets are. Know who has access to them. Just as you know where your money is, you need to know where your digital, intangible assets are, and how to access them. Review the terms of service. Prepare a hard copy (offline) log of your user ID's and passwords. Tell someone where that log will be kept. If you have a password manager, be sure someone knows how to access it. Technology is developing faster than the law can (or is inclined to) keep up. It is incumbent on each of us individually to be organized and aware of the rights we have in our digital footprint. Estate planning is crucial to every one of us, as we each want to ensure that our assets are prudently managed during our lifetime and distributed appropriately following our death. Now, as ever, information, preparation and planning are the keys to a well-constructed estate plan.

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