



Don't Let Your Digital Assets Evaporate Into the Cloud

Stop for a minute and make a quick mental list of your assets. You probably immediately thought of some of the following: your home, heirlooms, automobiles, jewelry, bank accounts, stock accounts, and mineral interests. These are the types of assets that one normally considers when designing an estate plan (e.g., will, trust) in the event of death or in the event of incapacity (a durable power of attorney).

But have you considered estate or management planning for your digital assets? At first, you might think you have no need for digital asset planning, but consider the following:

- Do you receive financial statements, bills, or other information via email which your fiduciary (successor trustee, personal representative, guardian or attorney-in-fact) will need?
- Should your fiduciary close or maintain your social networking accounts such as LinkedIn, Twitter, Facebook?
- Do you have a website or blog from which you derive financial value? Should the site be maintained or can it be sold?
- Do you have photographs or other sentimentally valuable materials stored on cloud software or multimedia websites? Who can access them?
- Do you have downloaded books or music?

First, does your fiduciary have the necessary knowledge and authority to access your digital assets? Most digital assets require a username and password to access them. Consider keeping an updated list of usernames and corresponding passwords with your governing document (e.g., will, trust, or power of attorney) or explaining in your governing document where your fiduciary might find such information. Additionally, if your fiduciary is not technologically savvy, you may want to consider naming a separate or additional "Digital Asset Fiduciary." You might consider this in other circumstances as discussed below.

It's 2013... Do you know where your family photo album is?

Your fiduciary will also need authority to access your digital assets. Oklahoma is a frontrunner in this area as one of only six states with a law that provides certain fiduciaries with the power to access and control certain digital asset accounts. However, Oklahoma's statutory authorization applies only to personal representatives, so other fiduciaries will need the governing document to provide explicit authorization. And if you want your Oklahoma personal representative to have more direction, you might provide more explanation in your will. For example, the governing document might use language adapted from Oklahoma's statute and/or the National Conference of Commissioners on Uniform State Laws' draft Fiduciary Access to Digital Assets Act to state:

Fiduciary shall be authorized to take control of, conduct, continue, or terminate any accounts on any websites and any electronic devices, to the extent permitted under a terms-of-service agreement. Fiduciary shall be authorized and may maintain ongoing access to digital property, assets, and accounts. Digital property, assets, and accounts include but are not limited to information created, generated, sent, communicated, received, or stored by electronic means on a digital service or digital device.

But be careful! Generally, before creating a digital asset, you must agree to a terms-of-service agreement. If you're like most people, you don't read these agreements but just check the box stating something like "I agree to the terms of the terms-of-service agreement" so you can go ahead and get started. This agreement likely addresses whether someone else like your fiduciary can access and/or maintain the account. For example, pursuant to the applicable terms-of-service agreements, a fiduciary cannot access your Facebook or Apple (think iTunes) accounts. A



fiduciary may seek written approval from the provider, but the provider is not required to deliver such approval, and a court generally cannot compel the provider to do so.


Thus, despite the authorization provided by statute or your governing document, a fiduciary who maintains or accesses a digital asset without the provider's written approval might be guilty of violating federal criminal law. This could carry a hefty financial penalty and/or imprisonment. While a surviving spouse or child might disregard such penalty as too remote, it is unlikely a corporate fiduciary will attempt such access without the provider's prior written approval. This might be another good reason to have a family member serve as a separate Digital Asset Fiduciary.

Further, certain digital assets like iTunes and Kindle downloads are licensed for use only by the person purchasing them. That person does not "own" those assets to sell, give, or pass down to others, but rather merely has a license that expires upon the purchaser's death. Thus, unlike past generations who could pass down their library collections, whether or not valuable, future generations may lose out on being able to listen to a parent's or grandparent's favorite songs or read a favorite book, unless, of course, the future generation also purchases the electronic copy of the song or book title.

To avoid this result, some estate planners are implementing a "digital asset trust" or other entity which purchases and holds the licenses of the electronic downloads. Because an entity doesn't die like a person, the license arguably continues in perpetuity, or at least several generations, and the entity's beneficiaries or members can continue to enjoy these digital assets as long as they remain beneficiaries or members through the use of trust or corporate law.

Don't be surprised if your governing document doesn't currently address digital assets. As you can imagine, this is a pretty new concept and the law is just now taking steps to catch up. As mentioned before, Oklahoma is one of only six states to even begin addressing it statutorily. That said, you may want to revisit your estate and management plans to include digital asset planning.

- Do you need to name a separate Digital Asset Fiduciary, and if so, who should it be?
- How will your fiduciary access your digital assets?
- Does your governing document provide your fiduciary with the power to access your digital assets?
- Are you and your fiduciary both comfortable with him/her accessing your digital assets?
- Do you need or want a digital asset trust?

If you need help identifying your digital assets or formulating a plan, one of the professionals at Trust Company of Oklahoma will be happy to assist you. 



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