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Estate Planning In The Digital Age

You've done everything right in setting up your online financial and social media accounts. You have solid passwords and change them periodically to prevent hackers from gaining access, and you have never had any issues accessing your accounts or had any unauthorized person do so. Your online banking and brokerage accounts have made life more convenient, and your social media accounts have opened vast social and business networking opportunities. These are examples of "digital assets," which include any electronic record in which you have a right or interest.

But what happens to those digital assets if you die or become incapacitated? Who has the right to access them, and how is that access gained?

Digital Asset Hardships

In *In re Ellsworth*, the family of a U.S. Marine who was killed in Iraq wanted to retrieve the contents of his Yahoo email account. The family had to obtain a court order to get Yahoo to provide a compact disc with photographs and emails of the deceased serviceman.¹

In *In re Facebook, Inc.*, the family of a young woman who allegedly committed suicide wanted access to her Facebook posts to determine her state of mind at the time of her death. The family was forced to seek court relief, but the court refused to order Facebook to produce the content, stating that to hold otherwise would run afoul of the privacy interests that federal laws seek to protect.²

The Law of Digital Assets

Overview

Digital assets, similar to other assets, are protected under federal and state laws. Failure to properly authorize a fiduciary the right to access digital assets may result in a violation of federal or state law. For example, if your spouse accesses your online brokerage account with your password after your death without proper authorization, your spouse may have acted in violation of federal privacy laws such as the Stored Communications Act or the Computer Fraud and Abuse Act.

The laws governing digital assets have been a confusing morass of contract, federal privacy and state and federal computer access laws, and fiduciaries such as executors and agents under a power of attorney have often had great difficulty accessing and administering digital assets. It is not like showing up at your local bank branch with a power of attorney.

The Uniform Fiduciary Access to Digital Assets Act

As is often the case, the law has been playing catch-up to technological advances. New York only several months ago adopted a version of the Uniform Fiduciary Access to Digital Assets Act (the "Digital Assets Act"), which has been enacted by 31 other states, and is designed to facilitate the administration and management of digital assets upon a user's death or incapacity.

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Under the Digital Assets Act, a “user” is a person that has an account with a custodian, and a “custodian” is defined as a person or entity that carries, maintains, processes, receives or stores a user’s digital assets.

Four types of fiduciaries are authorized specifically to access digital information:

- an executor or administrator of a decedent’s estate;
- a legal guardian;
- an agent acting under a power of attorney; and
- a trustee of a trust.

The Digital Assets Act makes a distinction between a fiduciary’s right to access a “catalogue of electronic communications,” which is information identifying the persons with whom a user has had electronic communications, their electronic addresses, and the time and date of the communications, as opposed to a fiduciary’s right to access the “content of an electronic communication,” which is information concerning the substance or meaning of the communication. In general, a fiduciary may access a catalogue of communications unless the user has affirmatively prohibited disclosure, while access to content is permitted only if the user has consented to disclosure.

Traditionally, the terms-of-service agreement between the custodian and user governed the access to digital assets. Under the Digital Assets Act, a user may now use an “online tool” (electronic service) provided by a custodian, in an agreement separate from a terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person.

The rules for user direction regarding disclosure are summarized below:

1. If an online tool allows a user to modify or delete a direction, the direction in the online tool overrides a contrary direction in a will, trust, power of attorney or other record;
2. If a user has not used an online tool to give direction, or if the custodian has not provided one, a user may give direction in a will, trust, power of attorney or other record; and
3. If there is no direction in an online tool or in estate planning documents, the terms-of-service agreement will control.

In disclosing a user’s digital assets, a custodian may, in its discretion, grant a fiduciary or designated recipient selected by an online tool full access to the user’s account, partial access sufficient for the fiduciary to perform his or her tasks, or a copy of the digital asset. Custodians also have the right to seek a court order before providing access, and may charge an administrative fee for the cost of disclosing digital assets.

Planning Recommendations

Wills, trusts and powers of attorney should be updated to include specific language granting a fiduciary comprehensive authority to access and administer digital assets and, where appropriate, how to dispose of those assets. In addition to regularly updating estate planning documents to include current provisions, we recommend that you (i) prepare and maintain an inventory/catalogue of your digital estate, including the name and website of each online account, the email address associated with each online account, together with usernames, passwords, and answers to security questions, (ii) back up account data from websites

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and data stored on the cloud, (iii) examine the terms-of-service agreements to identify and give effect to postmortem transfer options, and (iv) determine how you want your fiduciaries and family members to access and manage your digital assets, providing written instructions for those individuals regarding your wishes. The inventory/catalogue and written instructions, of course, should be maintained in a safe location, such as a safe, and the fiduciary should have access to the inventory/catalogue, if necessary.

Conclusion

In the Digital Age, estate planning for digital assets is as important as planning for the disposition of real and personal property. Failure to plan appropriately may cause your fiduciary to encounter needless expense and delay.

¹ *In re Ellsworth*, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005).

² *In re Facebook, Inc.*, 923 F. Supp. 2d. 1204 (N.D. Cal. 2012).

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