



DIGITAL ASSETS

A Private Clients Group White Paper

What are "Digital Assets"?

Digital assets include photos and videos to music, whether on devices or in the cloud, as well as email accounts, social networking accounts, internet domain names, blogs, online gaming items, and client lists and other electronic files. According to a 2011 survey from McAfee, Intel's security-technology unit, American consumers valued their digital assets, on average, at almost \$55,000.

What are the Challenges Facing Digital Assets that are Different than Traditional Assets?

There are millions of internet-based accounts that belong to decedents. Some internet service providers (ISPs) have explicit policies on what will happen when an individual dies, whereas others do not. Even where ISPs include their policies in the terms of service agreements, most consumers only click through these agreements without a thought. Historically, few laws exist on the rights of fiduciaries over digital assets. Federal law, enacted more than three decades ago, imposes criminal penalties and possibly civil liability for the unauthorized access of computer hardware, devices and stored data.

Upon an Individual's Death, is a Fiduciary (e.g. Executor, Personal Representative, Trustee, Agent, Attorney - In Fact, or Guardian) Permitted to Access the Decedent's Digital Assets?

In July 2015, the National Conference of Commissioners on Uniform State Laws established a model law to help states enact legislation. Although some states have enacted their own legislation, other states are enacting this uniform legislation that allows a fiduciary to "step into the shoes" of the decedent. What a fiduciary may access depends upon the type of information sought and what the decedent authorized during life. Pursuant to the uniform legislation, a fiduciary may access a catalog of "non-content" information (i.e., the outside of the envelope) without the express prior consent of the decedent. However, to grant access "content" information upon death (e.g., the letter inside the envelope), the user /decedent has options:

- First, the user may use the ISP's online tool to provide direction to the fiduciary, which will supersede a will, trust or power of attorney.
- Second, in the absence of the online tool, the user may provide a written direction in a will, trust or power of attorney.
- Finally, if there is no written direction, the ISP's terms of service agreement controls.

What are Examples of "Outside the Envelope" Non-Content Information?

- Logs of email communications, including email addresses of senders and recipients and date/time sent or received.
- Catalogs of photo or music titles.

What are Examples of ISPS that Provide an Online Tool for Post Death Access?

- Facebook's Legacy Contact. Facebook permits the legacy contact to write a pinned post for the decedent's profile, respond to new friend requests, update the profile picture, and download an archived copy of what the decedent posted on Facebook. To access more, such as messages, the decedent would need to have specified in a will or trust.
- Google's Inactive Account Manager. Google permits a user to name an individual to have access to his or her Google account information, with the option to close the account and/or obtain data from the account (including Gmail, Google Photos, YouTube, Google+, Google Drive, etc.) with a court order.

What Steps Should a Fiduciary Take with Respect to Digital Assets?

- Identify digital assets, accounts and information.
- Locate them (e.g., computers and other devices, backup and flash drives, and online storage and accounts).
- Access them as permitted by law.
- Value them for inventory, tax and distribution purposes.
- Protect and preserve them. For example, if the ownership of a domain name is not maintained and expires, the domain is suspended for two months, then put up for auction.
- Retain knowledgeable, technical help.
- Transfer them to the intended beneficiaries.

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