



Consider Digital Estate Planning Services For Your Clients

By: Scott R. Zucker, J.D.



Digital estate planning is an area of law that is still in its infancy. However, it could be of great benefit for you to develop your knowledge and practical wisdom about digital estate planning to help you prepare for the ever-increasing demand for services in this area.

This article will briefly identify some of the issues involving digital assets and several steps you and your clients can take to protect them. You may be surprised to find that the applicability of this topic is not limited to younger families and individuals.

What Are Digital Assets?

The two main classes of digital assets are 1) any online account that requires a username and password; or 2) any file stored in places including an individual's computer, mobile phone, server, local DVD or CD-ROM or at online storage sites.

Online Accounts

If the client is the only person who has access to her online accounts, then what happens when she dies? Much of the concern involves the rights of the online company, which were granted when the individual initially accepted the account's Terms of Service (TOS).

Several issues to consider for online accounts requiring a username and password include the following:

- The TOS Agreements of most popular online companies rarely, if ever, allow for the immediate or automatic transfer of the account to the personal representative.
- Without access to a decedent's bank and investment accounts, a trustee or executor will have difficulty obtaining necessary information for meeting the requirements of the underlying will and trust.

- Without access to a decedent's email, blog or website, the personal representative may not even be aware of certain ongoing obligations, especially with more transactions occurring online only.

Digital Files

Files on an individual's computer are difficult enough to find, depending on the individual's levels of organization or disorganization. The personal representative's job can become exponentially more difficult if the important data is stored offsite.

Additionally, there are two main kinds of digital files to consider:

- **Client-Created Files** – including scanned financial files, address books, and digital photos, but can also include valuable business documents or intellectual property.
- **Client-Purchased Files** – including music, videos and e-books bought during the individual's lifetime. In the typical TOS, the seller only grants the individual buyer a non-transferrable license to use the work "for life."

Steps Clients (and You) Can Take Now

Through their TOS, several online companies have the right to delete an online account within a certain period of time after the decedent's death. Also, the personal representative needs the ability to protect the decedent's digital files and hardware from beneficiaries who seek their possession before proper administration.

These are some steps and suggestions the practitioner and client can take to protect your client's digital assets after death.

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Client Steps

1. **Make a list of all digital assets.** This should be a comprehensive list of the client's online accounts and data files, including email accounts, websites, hard-drives, important Word and Excel documents, online storage accounts, and social media accounts.
2. **List wishes for each asset.** For local hardware containing data files, this can include leaving the asset directly to a specified heir. For online accounts, this can include:
 - a. Shutting down the account;
 - b. Doing nothing;
 - c. Archiving contents on CD or DVD;
 - d. Creating an auto-response on the account; and/or
 - e. Forwarding all messages to another place;
3. **Choose the person who will receive each asset.**
4. **Provide access and control to the recipient.**

Implementation by the Practitioner

Much like other estate planning, to help clients achieve their digital estate planning goals, the practitioner can recommend or implement the following range of options.

- **Non-binding Instructions**
 - o Where the client's key goal is merely to identify all digital assets for the personal representative, the client's list need not be legally binding.
- **Incorporation by Reference**
- **Specific Bequests**
- **Transfer of assets into trust during client's lifetime**
 - o Some practitioners believe that a license granted by a TOS "for life" can apply for the trust's lifetime.
- **Partner up with an online digital asset firm**
 - o Several online companies provide the practitioner or client with various digital estate planning services, such as secure maintenance of all digital asset information online, access by the client's "digital executor" or other personal representative to such information, and storing messages to be delivered to loved ones posthumously.

Be sure to keep up with state law and the various TOS agreements regarding your ability to use these or other methods of implementation.

Conclusion

We in the estate planning industry have already experienced the effects of delaying changes to meet client demand. For example, we all shudder when we observe the growing numbers of people who avoid law firms completely in favor of an estate plan from unreliable, yet cheap software or a non-legal online site.

We are similarly in danger of losing influence over digital estate planning issues. As of this date, there are already several dozen online services offering digital death and afterlife services, several of which offer digital estate planning as a service.

As part of your continuing efforts to modernize your practice for your clients, give some serious consideration to keeping current in this fascinating and developing area of estate planning law.

About the Author:

*Scott R. Zucker, Esq. is an estate planning attorney licensed in Virginia, Maryland and Pennsylvania, and has been in practice for over fifteen years. He is an active blogger and author of the acclaimed "Thoughts on Wills and Estates" blog at www.estateplanninginfoblog.com, and has been cited on websites such as Forbes.com, the *North Carolina Journal of Law & Technology*, and *Investment News*. He is also a fee-only Certified Financial Planner. Scott can be reached at scott@thezuckerlaw-firmonline.com.*