

Digital Estate Planning

Everyone has some “digital assets” that require attention in their estate planning. A “digital asset” is any electronic record in which you have an interest. Specific examples would include e-mail, photos, music, videos, documents, books, spreadsheets and anything else that is stored on an electronic device or that you access through the internet.

This definition is very broad. When you apply it to your daily life, the prospect of planning for digital assets seems to become overwhelming. After you think about everything that you use that could be called electronic or digital, you then need to count the number of devices that you use – phones, iPods, MP3 players, Kindles, computers, external hard drives, cameras and cloud-based storage sites. Next you need to consider all of the websites and on-line services that are linked to your accounts and through which you access or use your digital assets – your bank, your financial advisor, Facebook, Google, Instagram, Amazon, Shutterfly, etc.

Generally, people do not want to lose all of the data, information and other digital material out in the world. It would be a catastrophe if you lost it right now. It would also be unfortunate if you lost it all when you die. The need to access digital assets after death can range from the sentimental desire to see photos to a financial need to access bank and investment accounts.

If your family and the executor of your estate want or need access to your digital assets, they will find that the third party providers of online services such as Google, Facebook, Amazon, banks and investment firms do not want to give your family or your estate access to the material. The standard Terms of Service Agreements for online sites either prohibit or discourage access after death. In part this is because federal law may prohibit access after death. However, third party providers go beyond the terms of federal law by putting strict terms into their Terms of Service Agreements, lobbying against any state law that would permit greater access and adopting practices that make it virtually impossible to take advantage of the small amount of access that the law allows.

In this environment, what can you do to plan for your digital assets? A basic step is to inventory your devices and key internet or social media sites, including passwords, usernames and security questions to access various devices, accounts and websites. This can be more difficult than it seems. First, the list of items and sites you use is probably very long. To the extent that you make a complete list, the list changes frequently. Passwords are frequently updated, you start to use new websites from time to time and phones and other devices are either upgraded or swapped for a different technology.

Assuming that you have a good inventory and keep it up-to-date, you then need to figure out what to do with it. You obviously do not want to store it on a computer or in the cloud because the list itself would be out of reach of family (and probably too available for hackers and other bad guys). An old fashioned written document can work if it is stored in a safe place. An encrypted file on a thumb drive or computer might also do the job. However, the next problem

is how you share your inventory with your family or executor. Just giving one of your children the inventory may work, but some people would be uncomfortable giving up full access to their digital life. Sharing the location of the list or the password to an encrypted file with a child or trusted person would allow access after death and still preserve privacy during lifetime.

You can also take some additional steps to help overcome the obstacles that third party service providers will put in the way after your death. You can back-up your information on a CD-ROM or external hard drive from time to time. Your family can then access the information without going through your internet-based accounts. In the modern world the traditional box of family photos you found in mom or dad's closet may be replaced by a box of discs, thumb drives and external hard drives that the family will look through after death.

Finally, you can authorize your agents and executors to gain access to your on-line material. If your providers give you an option to authorize your executor under their Terms of Service Agreement, then you should go through their process. Because few providers offer such an option, you should also include language in your Financial Power of Attorney, Will or Revocable Trust that authorizes your agent and executor to gain access to the information.

Planning for digital assets is growing in importance. Each family needs to assess how vital it is for their particular situation. Based upon the need that you see for your family, you can include some or all of the options discussed above into your estate plan.