Including Digital Assets in Your Estate Plan

What should you know? What should your executor know?

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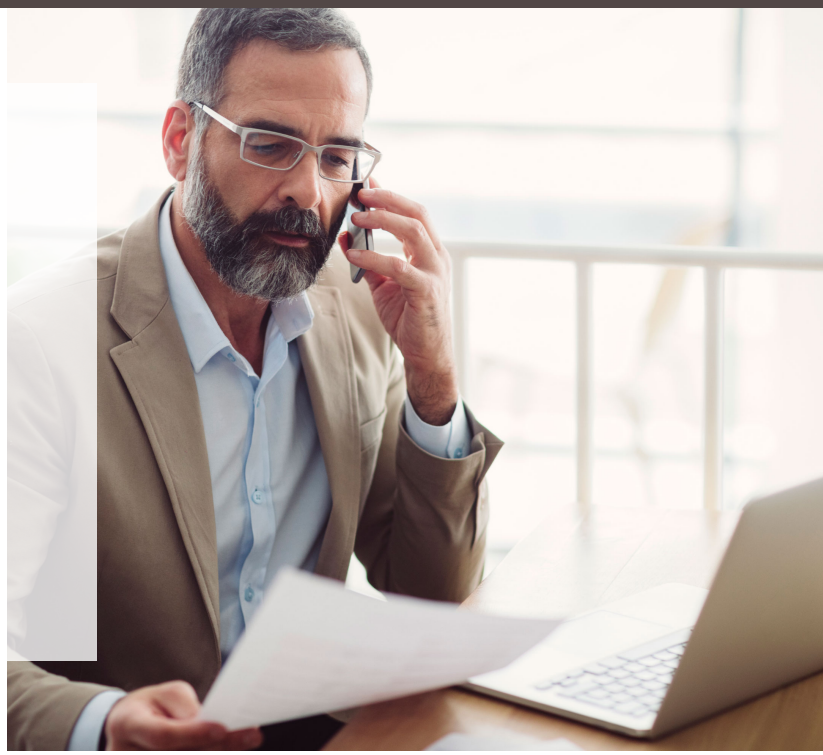

When people think about estate planning, they may think in terms of personal property, real estate, and investments. Digital assets might seem like a lesser concern, perhaps no concern at all. But it is something that many are now considering.[1]

Your digital assets should not disappear into a void when you die.

You can direct that they be transferred, preserved, or destroyed per your instructions. Your digital assets may include information on your phone and computer, content that you uploaded to Facebook, Instagram, or other websites, your intellectual/creative stake in certain digital property, and records stemming from online communications. (That last category includes your emails and text messages.)[1]

You can control what happens to these things after you are gone. Your executor – the person you appoint to legally distribute or manage the assets of your estate – will be assigned to carry out your wishes in this matter, provided you articulate them.[1]

In most states, you can legally give your executor the right to access your email and social media accounts. That reflects the widespread adoption by many states of the Uniform Fiduciary Access to Digital Assets Act, which the Uniform Law Commission (ULC) created as a guideline for states to

adopt or use as a model for their own legislation. UFADAA was later modified into the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA).[1]

Your executor must contact the custodians of your digital assets.

In other words, the websites hosting your accounts. In states without the above laws in place, your executor or other loved ones may have a tough time because, in theory (despite recent legal challenges), the custodians still have outright power to bar access to accounts of deceased users. Yahoo! takes this a step further by abruptly terminating email accounts when a user dies.[2,3]

The uniform law (UFADAA) established a hierarchy governing digital account access.

The instructions you have left online with the account custodian come first. Instructions left in your will rank second. Absent any of that, the custodian's terms-of-service agreement applies.[4]

So, in states that have adopted the uniform law, the fate of your digital assets at a website will be governed by that website's TOS agreement if you die without a will or fail to leave any instructions with the website. If you state your preferences in a will, but also leave instructions with the website, the instructions you leave the website overrule the will.[4]

Facebook, Snapchat, and Instagram have famously declared in their TOS agreements that all content uploaded by the user becomes their property. While claims like these have been scoffed at, the websites are not hesitant to stand by such assertions and may cite user account preferences to back them up – which, in some states, could mean a legal struggle for heirs.[2]

Do you need privacy protection once you die?

Before the onset of digital media, the prevalent legal view on that issue was "no." Now, things are different. You should not include online passwords in your will, for example, since a will can be made public. You must give your executor permission in writing to access your online accounts – if you do not have such a document in place, the bar is set very low for an unscrupulous heir, friend, or business partner to claim to be your executor and get away with it.[3]

Did you know that you need to specifically grant access to your email accounts in your estate plan, or alternately, through the email software's tools? If you fail to do this, your executor may only review the log of your email communications rather than the actual messages.[4]

Similarly, think about the risk of your digital assets being drained or manipulated if you can no longer care for yourself. You may want to appoint someone as a fiduciary for your digital assets through a Power of Attorney form, so that this responsible person can make decisions about them in your best interest should you lose the capacity to do so while living.[2]

What other steps should you take?

Leave a digital access map for your executor – your accounts, your passwords. This need not be seen until you pass away or are unable to maintain your digital profiles and accounts. It can be a file stored on a flash drive or similar backup media – and it can also exist on paper.

Check with websites to see what their policies are for transferring or maintaining digital assets when a user passes away. See how reward points and credits are transferred and how pending financial or investment transactions are handled.

Is the executor of your estate plan a technophobe?

If so, then think about appointing a second executor just to handle your digital assets. It may be worthwhile.

CITATIONS

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2 - nj.com/times-opinion/index.ssf/2018/05/safeguarding_digital_assets_sz.html [5/13/18]
3 - scientificamerican.com/article/estate-planning-for-your-digital-assets/ [2/7/18]
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