

TECHNOLOGY UPDATE

Digital Assets—How to Plan For, and With, Them

By Joseph G. Hodges, Jr., Esq.

A new form of assets that we all must now learn to deal with has gained significant attention within the estate planning and administration community in recent years, due in large part to the proliferation of the Internet and all of its associated tools and commercial websites. This new form of assets is commonly being referred to as “digital assets.”

In really simple terms, digital assets consist of the user IDs and passwords we all use daily as we travel around and use the Internet. Without those in hand we often cannot gain access to a given Internet resource or website or we are forced into having to “reset” the same, which often can be a daunting and difficult task.

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The problem is, when we first gain access to a site that requires a user ID and password, we often forget to record those in a safe and accessible place as we typically think then that we can

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and will easily remember them. Moreover, some sites have strict rules on what is considered by them to be an acceptable ID or password. This often means that the ones we select to use on one given site cannot be the same as the ones we select for use with another site. This makes remembering all of our user IDs and passwords virtually impossible unless we write them down somewhere, and doing that often leads to even more security issues.

As long as we are the only ones with a need to use these sites, there usually are no major problems, provided we can somehow remember or figure out by trial and error what user IDs and passwords we chose to use on each of those sites.

However, for us as estate planners and administrators, the rubber hits the road when our client becomes incapacitated or dies and the family needs to have access to the sites where the client is registered. This can be particularly important if our client banks on-line or manages

his or her brokerage account on-line and urgent access is needed to those accounts. However, the scope of the kind of sites that could be involved is much broader than that and can easily include one or more of the following sites: e-books, music download, gaming, photo storage, movie and TV downloads, social media, domain hosting and, most importantly, e-mail hosting and storage.

You may have seen the famous Internet cartoon of the dog sitting at a PC keyboard saying something to the effect that “they will never

know I am a dog." Well, if the client's family members have complete and easy access to all of the client's user IDs and passwords, there is normally no problem in gaining access to the client's registered sites, assuming such access does not violate the terms of the site's contract with the user. Otherwise, the complications and hassles that can arise in trying to do this can be many, and sometimes are even insurmountable.

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What is even more frustrating about trying to deal with digital assets is that there are currently very few states that have enacted or are considering legislation that tries to address at least some of the issues surrounding the ownership and use of user IDs and passwords, let alone the ownership and control of the personal content that is stored on many of these websites, and especially social media sites like Facebook and LinkedIn. Those states at last count are: California, Connecticut, Idaho, Indiana, Oklahoma, Rhode Island, Nebraska, Oregon, Massachusetts, New York, Virginia, Colorado, and New Hampshire. Fortunately, as is discussed further below, an effort has begun to try and get the Uniform Law Commissioners to address this subject in a formal way. The Commissioners created a study committee in 2012 to address the growing concerns about digital assets and to make recommendations about the rights of fiduciaries when someone becomes incapacitated or dies.

Given this sad state of affairs, as we all have to readily admit that our own secure lists of our Internet user IDs and passwords are not what they should be, let's look at what some of the experts in this area of the law have to say about how to go about remedying this situation, at least for our clients.

I think it is fair to say that, absent governing legislation, the first thing we should have our clients do as part of the planning process is to pre-

pare an inventory of their digital assets. Something as simple as listing the following for each site should suffice: the Host, the domain URL, the ID or username, and either the password or a clear clue as to what it is. Once it is prepared, safekeeping of the same and keeping it up to date becomes very important.

As for safekeeping, while there are afterlife management software companies such as Legacy Locker, Secured Safe, and Vital Lock that purport to provide safe storage and disposition for such assets, the current consensus seems to be that concerns about the sustained existence of these companies makes using them an unsafe bet at the present time. Thus, the best bet now would be to record all this information on a UBS

stick or other memory device and put that along with a printed copy in a safe deposit box or home/office safe. If you safely can, you might also identify the actual passwords used by some sort of an equivalent phrase that can easily be translated into the real password for use.

As for the update process, probably the best we can hope for is that the clients will do this as time goes by and that they will give us an updated version at least each time we meet with them for more planning. It is also advisable to have a companion Power of Attorney that authorizes the Agent to deal with these assets, at least while the client is alive. No matter what we do along these lines, we have to realize that the client's relationship with the various Internet vendors is one of a contract and, thus, that family members and fiduciaries may have no standing or legal right to substitute themselves for the client in that relationship and gain access to the client's data.

Obviously column space does not allow for an exhaustive treatment of this subject here, so what I am going to do here instead is give you a list of some of the more helpful resources in this area for your further study.

Perhaps the main source of scholarly writing in this area has been done by Professor Gerry Beyer of the Texas Tech University School of Law who also hosts a Wills, Trusts and Estates Prof Blog on

the Internet. You should read his article entitled *Planning in the Digital Age* that was published on November 11, 2012, on SSRN (Social Science Research Network). It can be accessed for free from <http://tinyurl.com/c7ym65e>. See also his article with Professor Naomi Cahn entitled *Planning for Digital Assets* that was published in the January/February 2012 issue of *Probate & Property* that is published by the Real Property Trust & Estate Law (RPTE) Section of the ABA.

Another prolific writer and speaker in this area is attorney James D. Lamm of Gray Plant Mooty in Minneapolis, whose first formal presentation on this subject was done with attorney Karen C. Prangley of Krasnow, Saunders and Cornblath in Chicago during Special Session II-D at the 45th Heckerling Estate Planning Institute in January of 2011. His outline was entitled *Estate Planning 2.0: Digital Property and Tech-Savvy Clients—Time to Reboot Your Practice*, and was followed by his presentation on this subject at the 56th Annual Estate Planning Seminar in Seattle, Washington in November of 2011 entitled *Estate Planning for Passwords, Online Accounts and Digital Property*. He spoke again on this subject at the 47th Heckerling Estate Planning Institute in January of 2013 during Special Session III-E that he presented with Prof. Christina L. Kunz of William Mitchell College of Law and Attorney Damien A. Riehl of Minneapolis. Sadly, the Heckerling Special Session Materials are only made available to those who actually attend Heckerling, although summaries of those presentations are available at the ABA RPTE Section's Heckerling website at http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports. If Mr. Lamm's written materials are not enough for you, he also maintains a Blog about this subject and recent developments at www.DigitalPassing.com.

In addition, Mr. Lamm has spearheaded the effort to get the Uniform Law Commissioners (ULC) to take on this subject. He co-authored the initial proposal to them with Commissioner Gene

Hennig that was submitted to the Committee on Scope and Program at the July 2011 ULC annual meeting. That proposal was referred to the Joint Editorial Board (JEB) for Uniform Trust and Estate Acts, which gave its approval to it at their December 2011 meeting. The proposal then went back to the Committee on Scope and Program at its January 2012 meeting. Currently this is still in the concept stage while the ULC tries to figure out whether to amend applicable portions of other uniform laws to deal with this issue or to create a stand-alone uniform act. Personally I think the latter is the correct way to go given the complexity of the issues that are involved in this area.

Still another scholarly article in this arena was written by then JD candidate Molly Wilkens of the Hastings College of Law and published in Vol. 6 of the *Hastings Law Journal* at page 1037 (March 2011). It is entitled *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?* In this article Ms. Wilkens outlines the duties and frustrations of the executor, the Internet privacy laws, the inevitable conflicts between privacy and access, and some proposals for solving the problems.

Other useful materials include the ALI-CLE July 2011 course on Virtual Assets by Michael Walker and Victoria D. Blachy of Samuels, Yoelin & Kantor in Portland; Justin Atwater's article entitled *Who Owns E-Mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life* in 2006 *Utah L. Rev.* at page 397; and Naomi Cahn, *Postmortem Life On-Line*, July/August 2011 ABA RPTE Section *Probate & Property*.

This whole subject of digital assets and how to plan for them is a fascinating one. While the problems these assets present have been around as long as the Internet itself has been, it has only been recently that we as estate planners and administrators, and the legislators of the various states, have begun to focus our attention on it. Readers of this column should keep a close eye on their state legislators and the ULC in the years to come for further developments along these lines.

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