December 21, 2017

Estate Planning Update December 2017 - Digital Assets and Your Estate Plan

E-mail accounts, digital photographs and videos, music and e-books purchased online, PayPal and eBay accounts, Facebook, LinkedIn, and Twitter. These are all examples of digital assets, and at this point we all have them. Digital assets are essentially information such as text, images, photos, videos, sounds that is stored electronically. Over the past 30 years, use of the Internet has exploded, and digital assets have become commonplace. Beginning in the 1980s, federal laws were enacted to protect our privacy in digital assets. Federal law now bars custodians (service providers) from allowing third-party access to digital assets and criminalizes unauthorized accessing of digital assets. These laws, intended to protect us, can cause problems when a user becomes incapacitated or dies. The user's designated representatives may be unable to access and manage digital assets on her behalf. In 2014, the Uniform Law Commission drafted the Uniform Fiduciary Access to Digital Assets Act (UFADAA) as model legislation that each state could enact to address this problem. It was revised in 2015 (RUFADAA) to garner greater support from the technology industry. To date, 38 states including Connecticut, Florida, New York in 2016 and, most recently, New Jersey in September 2017 have enacted versions of RUFADAA, and most other states have legislation pending. The law of the state in which you reside will govern your digital assets, and each state's version of RUFADAA may have slightly different provisions from the uniform law. RUFADAA governs how a user may permit her fiduciary (or other designated representative) to access digital assets and when a custodian must provide access. "Fiduciary" is defined to include a personal representative (executor) of an estate, an agent authorized under a power of attorney, a trustee of a trust, and a court-appointed guardian. Note that these rules govern access to digital content, not control of real-world assets – the person who has access to your e-mail account after your death may not necessarily have legal control over your bank account, even if you typically access your bank account and receive statements online. Under RUFADAA, a distinction is made between the content of electronic communications, such as the substance of e-mails, and the catalogue of electronic information, such as a list of transactions in a bank account. Access to content typically requires express consent by the user, while a fiduciary should be able to access catalogue information without express consent (unless explicitly revoked by the user during life). RUFADAA establishes a hierarchy by which the user may grant access. Access may be granted, to a fiduciary or anyone else, first by use of a custodian's "online tool," and otherwise by powers granted within the user's various estate planning documents that expressly permit access to digital assets. If you do not grant access using an online tool and your estate planning documents do not contain express powers authorizing access to digital assets, your fiduciaries may not be able to access the full content of your digital assets. As digital assets become increasingly important, you should take steps to make sure the people you choose will have proper access in the event of your death or incapacity. What do you need to know and what steps should you take?

- Be aware that unless you take affirmative actions to grant access, your fiduciaries and your loved ones may not have access to your online content.
- Consider who should have access to the content of your most important digital assets (the executor of your will, a spouse or child?).
- Check the website of each service provider to determine if an online tool is available. For instance, Facebook permits the designation of a Legacy Contact who can have limited access to your "memorialized" account after your death, while Google provides an Inactive Account Manager tool to designate a trusted contact.

- Be aware that designations you make through an online tool will prevail over any provisions in your estate plan. If you designate your son to have access to your e-mail account using an online tool and your daughter as executor of your will, after your death only your son will have a right to access the content of your e-mails
- Consider updating your estate planning documents, particularly your power of attorney and your will, to expressly grant access to the content of digital assets to your fiduciaries.

Many providers have online tools that are the clearest way to designate someone who will have access to your account after your death or incapacity. You should be aware that the person you designate will have access in place of, not in addition to, your executor. The online tools can be difficult to find. Examples for two commonly used websites:

- Facebook calls its tool the Legacy Contact. It can be accessed in Facebook's General Account Settings (go to http://bit.ly/FBAcctSettings).
- Google calls its tool the Inactive Account Manager. It can be accessed on Google's Personal Info & Privacy page (go to http://bit.ly/GglePersonalInfo).