


Digital Assets and Estate Planning

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Good Morning,

Digital assets have become a ubiquitous part of nearly all of our daily lives and yet Massachusetts remains one of the only states in the nation that has not yet passed laws to uniformly address how these important assets can be accessed in the event of the account-holder's incapacity or death. While legislation was introduced in Massachusetts in January 2019 proposing adoption of the Revised Uniform Fiduciary Access to Digital Assets Act, it remains to be seen whether this legislation will be passed and signed into law. See MA House Bill No. 3368, available at <https://malegislature.gov/Bills/191/H3368>.

As difficult as these issues are to contemplate, planning is especially essential in this area. What would happen to your online financial accounts, digitally stored documents, photos, email accounts, and other digital assets if you were to become incapacitated or die? Who could access the data stored on your locked smart phone, tablet, or computer? Who would be able to access these digital assets to ensure that your bills are paid, that your digital photos and documents are protected, or perhaps that the web domain for your small business is properly renewed and remains functional during an unexpected transition? You will want to make certain that your designated person (for example, your spouse) and your named backup, has both the legal authority and practical ability to access your online banking and investment accounts as well as any bill paying sites such as Quicken.

While Massachusetts laws concerning access to digital assets remain in flux, there are a number of proactive, common sense steps that you can take now which can be of great assistance in planning for the future management and disposition of your digital assets. Below are some examples:

1. Update your Estate Planning documents. Given that the disposition of digital assets is not yet directly addressed under Massachusetts law, many estate planning documents do not currently include specific provisions addressing the access, management and control of digital assets in the event of your incapacity or death. We highly recommend that you consider updating your estate plan to specifically address how and by whom you would like your digital assets managed. Be aware that, in the absence of specific estate planning documents addressing access to digital assets, each online provider's "terms of service" may very well be controlling and may empower the online provider to deny access to your personal representative or even delete your online data in the event of your death. If not already included, a simple codicil (amendment) to your Will and amendment to your Durable Power of Attorney should be sufficient to assure that the person of your choice (and a successor) are specifically empowered to access and use your online and other digital assets. More than one person may be necessary for two reasons: first, there should be a successor in case the primary person is not available when needed; and second, the person who is appropriate for banking and investment decisions may not be the right person for access and responsibility for the rest of your digital assets.

2. Create an inventory of your digital assets. In addition to updating your estate plan, you should also create (or update) an inventory of all of your digital assets. This inventory should ideally identify all of your electronic devices, as well as your online or "cloud" accounts, including:

Banking & Credit accounts (i.e. online banking, credit accounts, Paypal, etc.)
Investment accounts (e.g. brokerage accounts, retirement accounts, etc.)
Government benefits accounts (e.g. Social Security, V.A., Medicare, etc.)
Email accounts (e.g. Gmail, Hotmail, and other webmail accounts)
Online shopping accounts (e.g. Amazon, eBay, Wayfair, StubHub, Ticketmaster, etc.)
Membership/organization accounts (e.g. charitable institutions, alumni groups, unions, etc.)
File storage accounts (e.g. DropBox, iTunes/iCloud, Google Drive, YouTube, etc.)
Social Media accounts (e.g. Facebook, Instagram, Twitter, Pinterest, etc.)
Website Accounts and Hosting services (e.g. GoDaddy, Register.com, etc.)
Publications (e.g. newspapers, magazines, trade publications, listservs, blogs, etc.)
Software subscription accounts (e.g. Office 365, Adobe, Online gaming subscriptions, etc.)
Rewards accounts (e.g. rewards from airlines, hotels, credit card use, etc.)

3. Identify a secure location for storage of your digital assets inventory. Keep in mind that your inventory list will need to contain your usernames, passwords, and other sensitive account access information for each account. As such, it will be extremely important that you keep it in a secure location, but one that will be known and/or accessible to the person or persons that you designate for access in your absence.

4. Check with your online account providers to determine if they provide a direct mechanism for designating account access in the event of your death. While a piecemeal approach to accessing digital assets is not generally optimal, you should be aware that some online providers have attempted to create their own policies and procedures to address access to a deceased member's account. For example, Facebook's settings contain an area for each user to designate a "Legacy Contact" who would be given access to that user's account in the event of his or her death. If you elect to designate a legacy or similar contact directly with an online service provider, please be sure to add that information to your digital assets inventory as well.

5. Carefully manage your password updates. Make sure, and this is the hard one, that you update your passwords in your digital asset inventory when you change them. There are way too many usernames and especially passwords in our lives. Given that passwords change frequently, you may also want to consider using a secure password management service that will allow you to keep all of your current passwords in one secure location that will allow you (or a designated person) to access all of your site-specific passwords through one master password on a secure portal. For your own convenience and to reduce frustration your master password (if any), as well as your site-specific passwords should be changed in your digital asset inventory as soon as you change them on a particular site. Otherwise your spouse or successor will have inordinate difficulty in gaining timely access to your digital assets at the very time when such access may be most needed.

As always, if you would like assistance with any of your estate planning needs, please contact us.

Sincerely,

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