Do Not Go Gentle into the Digital Dark

By Stephanie Fierro

We live in the information age. Instant access to information and increasingly paperless digital storage are its key features. Rapid technological advancement causes nearly instant obsolescence of recent technology. As a result of this lightning-fast technology evolution and its widespread adoption and use, concern has been circulating since the late 1990s that a digital dark age may result if data, stored in an obsolete file format, cannot be retrieved.

For estate planning purposes the digital dark age will more likely result from ignorance than obsolescence. Whether it is ignorance as to the existence of an asset or how to access it, planning for the management and disposition of digital assets is increasingly important.

We are now accustomed to accessing information in a digital form. In fact, you may be reading this article online. When you really think about all we do and all we can do online, technology's role is undeniable.

When was the last time you received a paper bank statement? Chances are that you are paperless, working toward being paperless, or are being encouraged by someone to become paperless. When was the last time you took a roll of film to be developed? For many, the answer is "never" and the ritual of flipping through a printed photo album has given way to gathering around a digital slideshow.

We can search for anything online and instantly receive hundreds of hits containing useful information. We can access our personal and professional files from the airport, a neighboring city, even another country. Ironically, this ability to access information requires us to impose security features to prevent unauthorized access and harmful use of that information.

How many usernames and passwords do you have? Ever forget your password and have to reset it by answering a security question like "What's your pet's name?" The point is - most people have a hard enough time accessing their own digital information let alone someone else's. How then is a survivor expected to gather all of someone else's digital assets? Should those assets just fall into the digital dark?

An asset is something useful or desirable. This, by definition, connotes a certain value. Understanding the value and ever-increasing importance of digital assets is essential for 21st century estate planning.

What's a Digital Asset?

Digital assets are, perhaps, the ultimate intangible assets. Digital assets are those that only exist in a digital form and are primarily online such as, domain names, social networking profiles, emails, photo and video sharing accounts, music accounts, and information storage accounts. Even banking and investment accounts are increasingly managed entirely online. In the past decade, popular sites such as LinkedIn, Facebook, PayPal, Amazon, iTunes and Flickr have become household names and underscore the prevalence of digital assets.

Sentimental vs. Economic Value

Unlike traditional assets, digital assets are often characterized as sentimental. Items such as digital photo albums, personal blogs and social networking accounts, have little or no economic value though these items are certainly not valueless. These assets may be priceless from a sentimental standpoint and in most cases can be preserved and passed on.

As banking and business transactions are increasingly performed online, digital accounts may well have significant "tangible" economic value. For example, if someone operates an online business, continuation of the business may generate a lot of economic value for the surviving family. Not to mention the value of funds in their PayPal or other online bank account. Or, even if there are no plans to continue the business, the domain name may be desirable and thus marketable.

License vs. Ownership Rights

It is important to recognize that not all digital assets come with ownership rights. Instead the vast majority provide the user with a limited license. Subscription-based sites (or a site like iTunes), for example, merely grant the user a license for personal lifetime use. As a general rule contracts prevail over estate plan documents so it's important to know what the terms of use say. It can mean the difference between ownership rights that survive the user and other rights that terminate upon death.

For example, a person may own his or her user-generated content such as email but lose their email address.

Identification, Access & Security

A person's heirs can derive no sentimental or economic value from assets they don't know about or cannot access. More than with tangible property, creating a digital asset inventory is essential.

We are trained not to disclose usernames or passwords to anyone but ultimately someone needs to know them. Deciding who that person will be and how to provide the information they need can be difficult. In response to the prevalence of digital assets there are password storage companies that not only store the information securely but will disclose the information as instructed by the account holder. It is truly imperative to figure out who can access the accounts and make sure usernames and passwords are secure but accessible to them.

Digital asset planning should not be considered a novelty. As with most things, solutions lag behind the problem and there is currently little legislative guidance. Only a handful of states have enacted any legislation specifically addressing digital assets and of those, the legislation is very narrow in scope. Nevertheless, so long as people acquire digital assets, estate plans will need to address them.

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