

Legal Update

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ESTATE PLANNING OPPORTUNITIES FOR DIGITAL ASSETS

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Your estate plan likely includes a will, a living trust, powers of attorney, investing wisely with the intention of leaving a sizable estate for your spouse, heirs and/or charities, and perhaps making lifetime gifts. Has your estate plan, however, evolved as your needs have changed or, equally important, as the laws have changed? This is the first of three newsletters that provide examples of planning opportunities that you may not have considered for (1) disposition of your digital assets; (2) provisions for pets; and (3) a health care power of attorney for the benefit of minor children. Our February 2015 newsletter will address the first topic, our March 2015 newsletter will address the second topic, and our April 2015 newsletter will discuss the third topic.

Digital assets have come to permeate our lives. They currently include items such as email and email accounts, social network content and accounts, social media content and accounts, text messages, electronic documents, digital photographs, digital videos, software, software licenses, computer programs, computer source codes, database file sharing accounts, financial accounts, health insurance records and accounts, health care records and accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online store accounts and affiliate programs, and other online accounts. Today's estate plans should not only provide for the disposition of such digital assets to the extent they have financial value, but also provide for those that merely have sentimental value, such as photos, letters, and journals.

Many estate plans do not include procedures for managing and distributing digital assets. Federal and state laws regarding such matters continue to develop. Nevertheless, the following are a few steps that you may wish to take in order to provide for your digital assets in the event of your incapacity or death. While we will mention some potential third-party providers that may be able to assist you, we are not, expressly or impliedly, recommending or endorsing them:

Place digital assets in a revocable living trust.

One of the most important steps you can take is to provide for digital assets in your revocable living trust. Although similar provisions can be provided in your will, a trust may be preferable for the disposition of digital assets because (1) a trust, unlike a will, does not become public record upon one's death, (2) a trust is easier to amend, and (3) a trust can reduce estate expenses that could arise if digital assets are deemed to be physically situated outside of the state in which an individual resided. Whether you choose a will or a trust, these instruments can also provide the opportunity for you to provide fiduciaries with specific requests regarding the disposition of your digital assets.

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Consider carrying health care wishes for you and your loved ones on your smartphone.

You should also take steps to ensure health care wishes, family and medical contacts, insurance information, and other health care information for you and your loved ones are readily accessible. This information may include advance directives, living wills, health care powers of attorney, DNR (Do Not Resuscitate) orders, and POLST (Physician Orders for Life-Sustaining Treatment) documents. One option is to provide such information to your attorney, a fiduciary, or a loved one who can quickly access the information. This option, however, may be insufficient during an emergency when time is of the essence. Another option is to securely store the information on your smartphone using an application such as My Health Care Wishes Pro created by the American Bar Association. In the event of an emergency, such an application will allow you or a loved one to retrieve your health care information and convey copies of your health care documents to a hospital or physician from your smartphone in a matter of minutes.

Maintain a comprehensive list of user names and passwords.

Sorting through mobile devices and online accounts can be a tremendous undertaking. Moreover, a fiduciary, such as an agent, an executor, or a trustee, without relevant information regarding such digital assets, may have to go to court for legal authority to gain access. Therefore, you should maintain a comprehensive list of user names and passwords for mobile devices and social media and online presence Internet sites such as Facebook, Google+, and PayPal and keep the current list in a secure location where a fiduciary can access it if the need arises. Alternatively, you may use an online password storage service such as Norton Identity Safe, LastPass or Dashlane.

Maintain a back-up of digital assets on tangible media.

You should continually back-up information stored on Internet sites, computers, and devices such as cellular phones. You could back-up the information on tangible media, such as portable hard drives and USB flash drives, and store it in a secured location such as a safety deposit box. Alternatively, you could store the information in a secure online backup service such as Carbonite or Mozy. The information should be encrypted to prevent unauthorized access. For information having sentimental value, such as photographs and videos, you may want to save the information on tangible media and share it with loved ones during your life, share the photos and videos directly through online services such as Shutterfly or DropShots, or place them on external hard drives or USB flash drives.

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Consider, with caution, an online “digital afterlife company” to assist in the disposition of digital assets.

Online digital afterlife companies provide a variety of services to assist with storing and retrieving sensitive information. Some companies even provide a service, for example, that will forward an email to loved ones upon your death with your comforting words (the modern day “to be read in the event of my death” letter). These services, however, are part of a developing industry, and there is no guarantee that a particular digital afterlife company will exist down the road or carry out your wishes. If you would like to consider digital afterlife services, it is important to use due diligence in investigating and selecting a digital afterlife company that suits your needs. For more information, visit <http://www.thedigitalbeyond.com/online-services-list/>.

For many people, an estate plan that does not address the management and distribution of digital assets could prove to be inadequate. The administrative burden on the fiduciary may be tremendous. Add to that the potential financial losses that may occur if (a) digital assets with significant intrinsic values are never found, (b) digital assets are inaccessible, or (c) pending online orders for a person's business are not promptly filled. The results could be significant if not devastating. If your estate plan does not include provisions for digital assets, or if you are not sure whether your estate plan provides such provisions, you should consult with your attorney.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Jon Vegosen 312.701.6860 jvegosen@fvldlaw.com, Jeff Shelley 312.701.6819 jshelley@fvldlaw.com, or your regular FVLD contact.

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