

# Estate Planning for Digital Assets

Orange County Estate Planning Council

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## I. What is a Digital Asset?

- Devices
- Social Media
- Information/Data
- Financial Accounts
- Business Accounts
- Bitcoin/Cryptocurrency

### a. Devices

- i. Mobile phone
- ii. Computer
- iii. Kindle reader
- iv. Storage Drive

### b. Social Media

- i. Facebook
- ii. Twitter
- iii. LinkedIn
- iv. ?????

### c. Information/Data

- i. Email
- ii. Photos
- iii. Music
- iv. Videos
- v. Movies
- vi. Documents

- vii. DropBox
- viii. iTunes
- ix. Google Account
- x. Amazon Account
- xi. Kindle Books

d. Financial Accounts

- i. Paypal
- ii. Domain names
- iii. Online Bank Accounts
- iv. Online Investment Accounts

e. Bitcoin/Cryptocurrencies

i. Bitcoin – Virtual currency

1. Decentralized digital currency

2. Value of 1 Bitcoin:

- a. Jan 12, 2013 - \$14.15
- b. June 2, 2015 - \$225
- c. Oct 1, 2016 - \$614
- d. Jan 5, 2017 - \$1,112
- e. Sept 22, 2017 - \$3,561

3. Total Value of Bitcoin Economy

a. June 2017

- i. Bitcoin - \$40 billion
- ii. Bill Gates - \$86 billion
- iii. Apple Inc \$730 billion
- iv. Gold \$8.2T
- v. Stock Mtk \$66.8T

4. Online payment system

5. Cryptographic address – 33/34 characters

6. No clearinghouse/central bank

7. Can be stored online, on local storage drive, or physical paper

8. IRS Treats it as Property – not Currency

- a. “Convertible virtual currency”

- b. Report recognized Gains and Losses
      - i. May be capital or ordinary
      - ii. Capital Asset rules
    - c. Valuation issues
    - d. Basis step-up at death
    - e. Gift Tax – valued on date of gift
    - f. Estate Tax – valued on death
  - 9. Alt coins –
    - a. Ethereum
    - b. Litecoin
    - c. Bitcoin Cash
    - d. And many, many others
  - ii. Virtual game currency
- f. Business Accounts – significant business value is online
  - i. Customer orders and preferences
  - ii. Shipping addresses
  - iii. Credit Card data
  - iv. Patient information
  - v. Client files

## II. Who “Owns” my Digital Assets?

- a. My Devices
  - i. Kindle reader
  - ii. Computer
  - iii. iPhone
- b. Things I Probably Own
  - i. Bitcoin
  - ii. Photos
  - iii. Book - PDFs (Kindle – do not own the books)
  - iv. Bank accounts (\$\$)
  - v. Scottrade account (the investments)

c. Things I License

- i. Facebook account
- ii. Kindle account

III. Online Accounts at Death

a. Many online accounts will not grant access/give out password to decedent's accounts

- i. EULA governs relationship between user and online company
- ii. Most EULAs terminate right of use at death
- iii. Most EULAs do not recognize fiduciary rights

b. Twitter - will shut account down on notice of death

c. Yahoo - will provide contents on court order

d. Outlook (Microsoft) - will provide DVD of email

e. Facebook – Legacy Contact

- i. Facebook will memorialize account on notice of death
- ii. Legacy contact (if named) can manage account
- iii. No access to fiduciary or family

f. Google (Gmail)

- i. Can designate inactivity period and notify named person after period expires
- ii. Will send copy of online information (photos, email, etc.) to designated person

IV. Fiduciary Access to Digital Accounts

- a. Some states have enacted laws regarding Fiduciary Access
  - i. Does not cover all digital assets
  - ii. Limited judicial interpretation
  - iii. User agreements are often inconsistent
  - iv. Online companies may ignore State and Federal laws
  - v. Can be of little practical benefit
  
- b. California – RUFADAA – Revised Uniform Fiduciary Access to Digital Assets Act – Effective 1/1/2017
  - i. Creates Hierarchy For Disclosure of Disclosure of Digital Asset Information
    - 1. Online Tool - Authorizes a person to use an online tool to give directions to custodian of digital assets.
    - 2. Will/Trust/Power of Attorney - If online tool not used (or if no online tool), a person may give directions regarding disclosure of digital assets in a will, trust, power of attorney, or other record.
    - 3. Terms of Service – If no online tool/not used/no will or trust used, terms of service apply.
  
  - ii. New Probate Code Section 870 – 884
  - iii. Custodian of digital assets required to comply with fiduciary’s request for disclosure, except under certain circumstances.
  - iv. Principal/trustor must be deceased for fiduciary to have access. [No provision for Guardian/Conservator]

- c. Federal Law – A Federal Crime to access decedent’s digital assets without permission
  - i. Electronic Communications Privacy Act - 28 USC § 1782
  - ii. Stored Communications Act - 18 USC § 2702
  - iii. Computer Fraud and Abuse Act - 18 USC § 1030
  - iv. Focus is on Privacy Protection
    - 1. Prohibits unauthorized access to electronic communication
    - 2. Prohibits unauthorized access to a computer

V. Future Reform

- a. Uniform Law Commission Drafting Committee on Fiduciary Access to Digital Information – 20+ states considering adoption.
  - i. Authorize fiduciarys/agents to access digital accounts.
  - ii. Most will give users ability to opt out.
  - iii. Is It Stalled?
- b. Backlash by Privacy Advocates
  - i. Some users do not want fiduciaries or family members to have access to their online accounts.
  - ii. Oregon attempted to give fiduciaries broad authority but was forced to remove social media from legislation.
- c. A better understanding how fiduciaries and successors can access our things can provide some help
  - i. But will not address basic questions of who owns information/things.
    - 1. Books/movies/music/cars are evolving from things we own to things we license or rent.

- ii. More things are moving online - “30% of banking jobs could disappear within the next 5 years” Vikram Pandit, former CEO of Citigroup.
- iii. Will be increasingly difficult for family and fiduciaries to find assets and administer trusts and estates after someone dies if good records are not maintained.
- iv. Kindle Books are just a license to use, not ownership
- v. Photos uploaded to a service may just be copies that the user does not own

## VI. How to Plan for Digital Assets

- a. Use an Online Tool – If Available – to Designate a Successor and a Digital Fiduciary
- b. Direct disposition of your Digital Assets in a Will or Trust
  - i. Don't put passwords in a Will
  - ii. May be helpful if you need court order
  - iii. Shows intent to give access
  - iv. EULA may treat digital assets as non-probate asset
- c. Create an Inventory of your Digital Assets
  - i. Prepare comprehensive inventory of digital assets and passwords
  - ii. Store inventory in secure accessible location
    1. beware of identity fraud and theft
    2. store with estate planning documents
    3. store passwords separately
  - iii. Keep inventory updated
  - iv. Password Tips
    1. Use difficult passwords
    2. Use different passwords
    3. Use a Password Manager
      - a. LastPass
      - b. 1Password

#### 4. Avoid Most Common Passwords

- 123456
- password
- 12345
- 12345678
- football
- qwerty
- 1234567890
- 1234567
- princess
- 1234
- login
- welcome
- solo
- abc123
- admin
- 121212
- flower
- passw0rd
- dragon
- sunshine
- master
- hottie
- loveme
- zaq1zaq1
- password1

#### d. Authorize Agent to Access Digital Assets

- i. Digital Power of Attorney
  1. Shows intent to avoid imposition of Federal Privacy laws.
- ii. Online companies may not recognize fiduciary authority
- iii. Shows intent to give access and avoid liability under Federal Law

e. Hold Digital Assets in a Trust

- i. Transfer of account ownership to trustee
- ii. Assignment of Digital Assets to Trust
- iii. Ability to hold Digital Assets in a trust depends on EULA
- iv. Shows intent to give access
- v. How do you document trust title?

VII. Challenges to Effective Planning

a. Identity Theft

- i. List of accounts and passwords becomes too valuable/risky to keep
- ii. Use two documents – stored separately
  - 1. usernames
  - 2. passwords

b. Keep Records Current

- i. Constantly adding new digital assets
- ii. Constantly changing passwords
- iii. How to keep digital asset inventory current?
  - 1. Update quarterly
  - 2. USB or Cloud storage
  - 3. Online password storage services

c. Recognize What You Do and Don't Own (License vs. Ownership)

- i. Many accounts only give license to use
- ii. EULA will govern user and fiduciary access rights

## VIII. The Information Culture

- a. Most information will be digital
  - i. 1999: 80 bn photos taken by consumers.
  - ii. 2014: ~800 bn photos shared on social web sites.
  - iii. 2015: probably more photos taken than on film ever.
  - iv. citation: Benedict Evans
- b. Without proper planning – Access to Digital information will be lost
- c. Make Multiple Backups of Valuable Items
  - i. Cloud backups
  - ii. Off-line backups
- d. Secure Your Information
  - i. Use Encryption
- e. Digital information does not disappear like traditional information