



Don't Forget Facebook, iCloud, Gmail, LinkedIn and Your Other Digital Assets in Your Planning

Today, is there anyone who doesn't have an online presence, whether through social media, emails, banking and investment accounts, media storage in the cloud, personal or business websites, blogs, or cryptocurrencies? Most likely you have several, if not many, of these accounts. These are your "digital assets." Owning digital assets is not a function of your net worth, and we all have online accounts.

Digital assets are all of your online and web-based accounts. These assets include electronic communications such as email and social media accounts; digital collections such as music, video or photo storage; financial items such as online accounts with banks, mutual funds, IRAs, employee benefits administrators, insurance companies, investment brokers and other financial institutions; personal benefits such as airline, hotel and shopping loyalty programs; merchant accounts such as department stores, Amazon, Etsy and other retailers; virtual currency such as Bitcoin; and much, much more.

Well-designed estate plans will account for all your digital assets. Not only do these assets have huge financial consequences such as control over your investments and finances, but many such as digital photo albums and video collections, have emotional and sentimental consequences if lost or not passed along to family members.

By now, you may be asking yourself, "What's the big deal? All I need to do is make sure that my family members or representatives have access to my usernames and passwords for my various accounts in case I die or become incompetent to handle my own affairs, right?" Wrong!

The law governing digital assets is relatively new and still being developed. Not only are there federal laws that may apply, but also state laws. For instance, in a Massachusetts case dating back to 2010, *Ajemian v. Yahoo!, Inc.*, the personal representative of a decedent's estate had to sue Yahoo! to gain access to the decedent's email account. Yahoo! argued that the federal Stored Communications Act prohibited unauthorized third parties from accessing communications stored by service providers. Initially, the lower probate court agreed with Yahoo! Ultimately, the case went up to the Massachusetts Supreme Judicial Court, which reversed the lower court in 2017.¹

Also, when you registered and signed up to open your online account, you agreed to the website's user or terms-of-service ("TOS") agreement. How many times have you actually read through a TOS agreement before hitting the "I Accept" or consent button? Many of the TOS agreements prohibit third-party access to the digital asset upon death or incapacity, even to named fiduciaries like an executor or trustee. Many fiduciaries may not even know of your digital account because communications are sent via email, which your fiduciaries may not have access to, and not via the U.S. Postal Service. Until recently, many laws were more concerned with protecting the privacy of the user and combating website hacking and phishing scams. So even if a family member or representative has your username and password, she may not have the legal authority to access the account.

In 2015, the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA" or "Revised Digital Assets Act") was drafted by the Uniform Law Commission, a nonprofit, nonpartisan organization that drafts proposed legislation for states to adopt. Over time, almost all of the states have adopted some variation of the Revised Digital Assets Act. One of the key provisions is that the creator of the digital asset must give affirmative consent, either online or in a paper record, that a fiduciary may access the account. This affirmative written consent will override a TOS agreement that would otherwise prohibit that fiduciary's access. That means that unless consent was provided using a tool in that online account, written consent is still required. Even if the online tool was used, written consent is still a best practice, and the best documents to embody that consent are estate-planning documents, which typically consist of the will, a trust and power of attorney.

Of course, in order to ensure that your ultimate wishes are followed, your representatives must know of the existence of the digital assets. The best way to document their existence is to make a list of them all by using a template. Rutgers University developed a form that can be used, which is simple to complete. The form can be found at: <https://njaes.rutgers.edu/money/pdfs/Digital-Assets-Worksheet.pdf>. This is not an endorsement or recommendation of the form, nor does the form cover every possible form of digital asset. It can, however, be used as a guide. You can use any form you wish, or simply create your own list of digital assets. Note, however, that whatever form or list you use, you must update it regularly. As you know, many websites require changing your password at regular intervals to avoid unauthorized persons from accessing your account, so your list must be updated accordingly.



Once that is accomplished, make sure that your estate-planning attorney is aware that you have valuable digital assets that you wish to pass down to your family members and heirs. Your attorney will ensure that your documents provide for the appropriate written consent so that your designated fiduciaries will have access to the digital assets.

Sources

¹ Ajemian v. Yahoo!, Inc., 84 N.E.3d 766 (Mass.2017)

For More Information Contact:



For more information on estate planning and starting the process to create an effective estate plan, please consult with your Security Mutual Life Insurance Advisor to review and discuss your goals and objectives for your assets and your family.

The information presented is designed to provide general information regarding the subject matter covered. It is not intended to serve as legal, tax or other financial advice related to individual situations, because each person's legal, tax and financial situation is different. Specific advice needs to be tailored to your particular situation. Therefore, please consult with your own attorney, tax professional and/or other advisors regarding your specific situation.

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