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When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets

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When You Pass on, Don't Leave the Passwords Behind

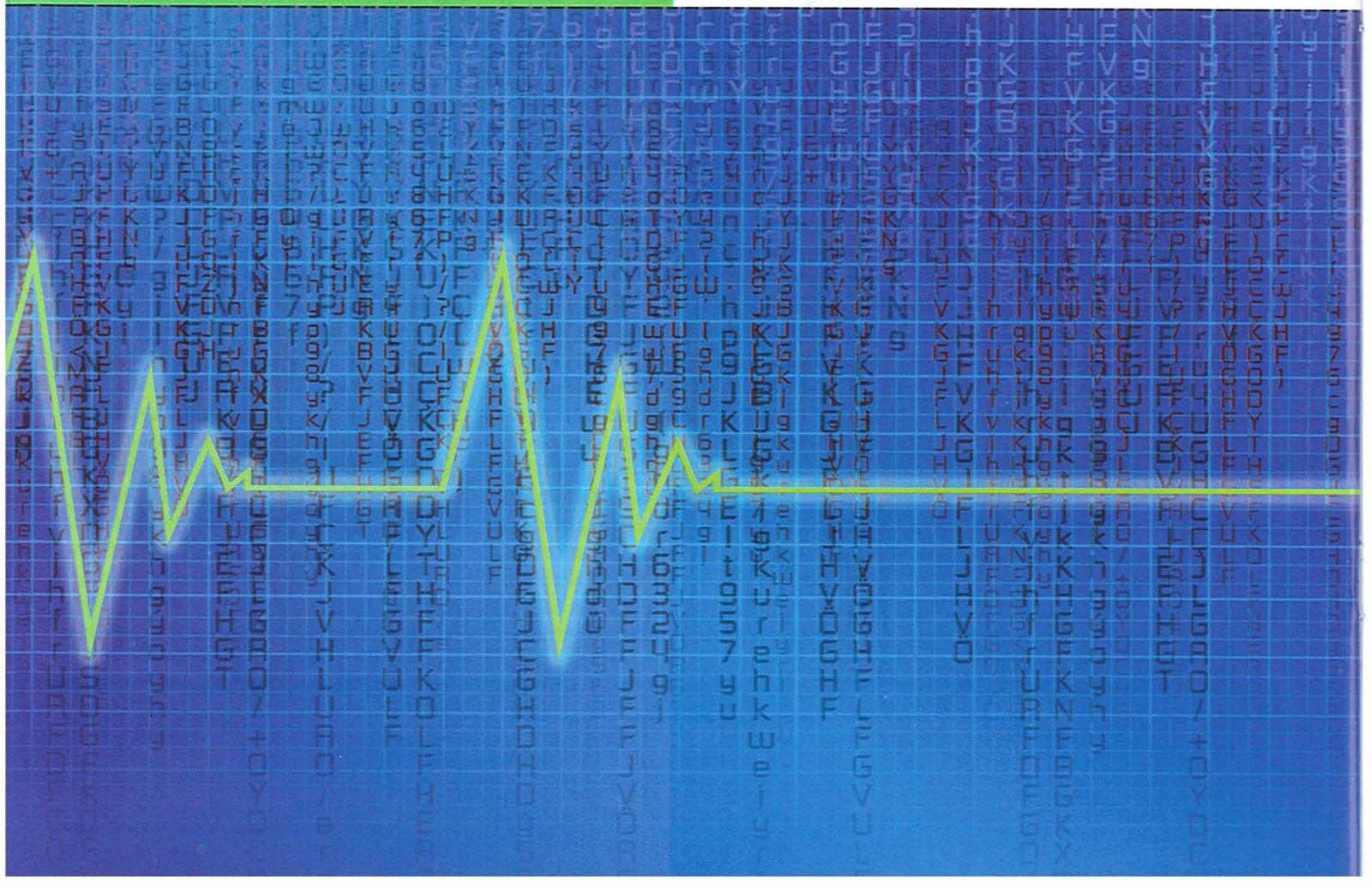
Planning for Digital Assets

By Gerry W. Beyer and Naomi Cahn

Eva Kripke held a power of attorney for her husband, who had been diagnosed with Lewy body dementia, a disease affecting cognition, movement, and emotions. She managed his online bank account with Bank of America for several years until she was informed that she had the wrong password. Although she was able to answer a series of questions on the site, including her husband's Social Security number, she could not answer questions about the numbers on his Bank of America credit card—which she had cut up because her husband could no longer use it. Ultimately, she wrote to reporter Jon Yates, the author of the *What's Your Problem?* column of the *Chicago Tribune*, www.chicagotribune.com/business/problemsolver/ct-biz-0526-problem-kripke--20110526,0,4543699. Yates called Bank of America, which offered several compromises, including listing Eva as a joint account holder. A power of attorney, he was told, does not grant access to online banking. "You must be an account holder or user," a bank spokesperson explained. "The reason we do this is to protect the customer and mitigate risk."

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Andrew O. Alcala



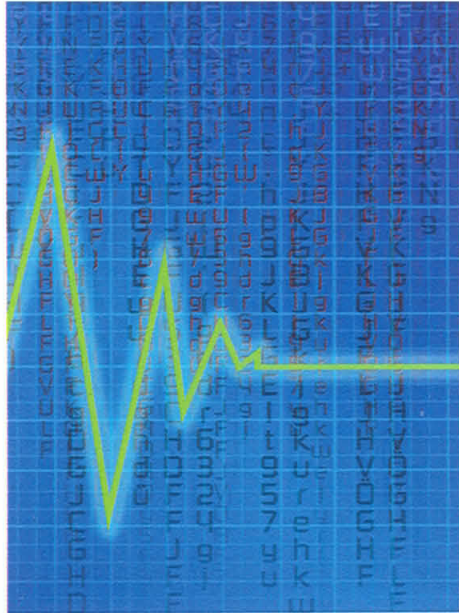
Although powers of attorney are powerful tools, those who work in the digital asset world are at the beginning stages of determining how conventional estate planning tools affect on-line accounts and other types of digital assets. This article continues the discussion started in Naomi Cahn, *Postmortem Life On-Line*, Prob. & Prop., July/Aug. 2011, at 36, addressing the importance of planning for the disposition of digital assets, providing concrete suggestions for how to do so, and discussing some of the problems inherent with these assets.

The universe of digital assets is vast, including "any online account that you own or any file that you store on your computer or that you store in the cloud." Posting of Nathan Lustig to Entrustet HIWI Blog, *Digital Estate Planning: What Are Digital Assets?* (Apr. 19, 2010). As well as the on-line banking account that caused Kripke so many problems, these assets range from e-mail accounts, picture and video storage sites, social networking sites, domain names, games and related sites, professional sites, and backups. Moreover, digital assets go beyond on-line accounts to include personal or work computers and their hardware and software. If your clients are smart about their digital assets' lives, then your clients have numerous usernames, passwords, and security questions for their accounts.

Trust and estates lawyers are increasingly helping to plan for the care of digital assets on their clients' incapacity or death, providing advice concerning both the safekeeping of usernames and passwords and the disposition of the assets themselves. Each of these issues requires different techniques from the estate planning toolbox. Lawyers provide this planning for new clients, and lawyers often follow up with previous clients to ensure a periodic review of the disposition of these assets.

Reasons to Engage in Digital Asset Planning

There are numerous reasons to engage in this planning: the uncertainty of existing law, preventing on-line identity theft, and ensuring that the client's



The rights of executors, agents, guardians, and beneficiaries with regard to digital assets are muddy.

wishes are respected in the disposition of these assets. See Gerry W. Beyer & Kerri M. Griffin, *Estate Planning for Digital Assets*, Estate Planning Studies and Briefs (July 2011).

Lack of Clear Laws

The rights of executors, agents, guardians, and beneficiaries with regard to digital assets are muddy. As mentioned in the earlier article, very few states have begun to deal with this issue, and the interstate application of these laws may be problematic. Although many on-line services have their own policies for how to deal with a user's death or incapacity, not all sites have developed policies. Moreover, a client may not be entirely satisfied with a particular site's procedures. Prudent planning can help clients ensure, to the maximum extent possible, that their wishes are carried out regardless of the lack of clarity.

Preventing Identity Theft

Estate planning for digital assets can be useful in preventing on-line identity theft. According to the Federal Trade Commission, up to 9 million people per year are victims of such thefts. When an individual is unable to continue to

monitor her on-line accounts because of incapacity or death, criminals have an enhanced opportunity to hack these accounts, open new credit cards, apply for jobs, and even procure state identification cards. There are methods for protecting a deceased's identity, but they all involve having access to the deceased's online accounts. See Aleksandra Todorova, *Dead Ringers: Grave Robbers Turn to ID Theft*, Wall St. J., Aug 4, 2009.

Marshaling Assets

On-line access helps the executor administer both nondigital and digital assets. Although bank accounts may be held by brick-and-mortar institutions, administering the accounts on-line can ease the probate process. The decedent may have paid all bills on-line, and accounts can be placed in default without quick access. Frequent flyer miles and other loyalty programs accumulate through on-line systems. These nondigital accounts may be subject to Internet-based service agreements. Although the assets themselves can be available to the executor or agent, their management and transfer may require compliance with those agreements.

Moreover, some assets may exist only in on-line form. When Leonard Bernstein died in 1990, he left only an electronic, password-protected draft of his memoir, *Blue Ink*. The manuscript is so well-protected that no one has yet been able to break the password. Helen W. Gunnarsson, *Plan for Administering Your Digital Estate*, 99 Ill. B.J. 71 (2011).

Appropriate Disposition

Although many digital assets are not inherently valuable (our e-mail accounts often contain little that would interest anyone else, for example), some have emotional value. Instead of shoeboxes with old letters and pictures or tangible photo albums, people often use digital means for preserving this material. They may have established on-line albums or accounts that preserve love letters or even recipes. Without alerting family members that these assets exist, and without telling them how to get access to them, the deceased risks losing the story of her life forever.

This is not only a tragedy for family members but also possibly for future historians who are losing pieces of history in the digital abyss. Rob Walker, *Cyberspace When You're Dead*, N.Y. Times, Jan. 5, 2011.

For more active on-line lives, this concern also may involve preventing spam from infiltrating a loved one's web site or blog site. Comments from friends and family are normally welcomed, but it is jarring to discover the comment thread gradually infiltrated with links for "cheap Ugg boots." Id. "It's like finding a flier for a dry cleaner stuck among flowers on a grave, except that it is much harder to remove." Id. In the alternative, family members may decide to delete the deceased's web site against the deceased's wishes simply because those wishes were not expressed to the family. Id.

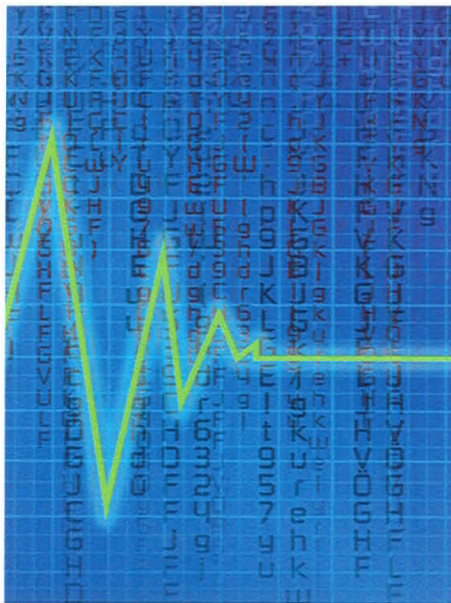
Sometimes people do not want their loved ones discovering private e-mails or messages. They may contain hurtful secrets, or maybe just inside jokes and personal rantings. Without designating appropriate people to take care of certain accounts, the wrong person may come across this type of information.

The Actual Planning for Digital Assets

Two separate issues are involved in digital asset planning: ownership of the underlying asset and access to the on-line asset. Trusts and estates lawyers must account for the complexities of each issue.

Identifying the Assets

The initial estate planning questionnaire can include questions about digital assets and how they are protected. Clients need to develop an inventory of these assets, including a list of how and where they are held, along with usernames, passwords, and answers to "secret" questions. Lawyers can then provide advice on the default deceased/incapacitated user provisions as well as on the choices for opting out of the default systems.



Wills are generally unsuitable as repositories for passwords or other information that is critical to accessing on-line assets.

Using Wills or Trusts for Digital Assets

When digital assets have value, the client may dispose of them through a will or transfer ownership to a trust. Although either a will or a trust can deal with these assets, the more complicated questions center on how to manage the assets.

Given the formality attendant to the execution of nonholographic wills, and the often rapidly changing nature and ownership of digital assets, wills can be awkward. Provisions regarding digital assets may be outdated quickly, as the asset disappears or takes a new form. Moreover, it is unclear whether service providers will respect the terms of wills to transfer ownership of digital assets.

Nonetheless, as providers develop improved policies and states enact more specific laws, it will become increasingly common to add language to the will specifically devising digital assets and incorporating by reference a document that sets out a distribution system. Of course, state law will

determine how the document incorporated by reference can be updated.

Wills are generally unsuitable, however, as repositories for passwords or other information that is critical to accessing on-line assets. Again, not only might the information change before a new will can be executed, but also wills become public information. A will might instead reference a separate document containing detailed account information; such a reference would be better than placing this information in the will itself. See Beyer & Griffin, *supra*.

A trust is a more desirable place for ownership and account information because it would not become part of the public record. A digital asset can be owned by the trustee through a special digital asset trust. If the value of the digital assets is substantial, a digital asset trust may be created for digital property. The trust's ownership of the assets will survive death. Moreover, trusts can be amended more easily than wills, a useful mechanism for both ownership of the assets and recording of information so that others can access them. LifeEnsured, an on-line service, allows an individual to establish a digital asset trust, to register assets with the company to be included in the trust, and to appoint LifeEnsured as a successor trustee. See www.lifeensured.com/faqs#q20. Florida estate planning attorney David Goldman is developing software and documents that allow clients to create and manage beneficiary designations through a DAP (Digital Asset Protection) Trust (see daptrust.com), which has a high level of security and allows clients to easily store passwords and assign beneficiary designations on the fly. He notes that digital assets often take the form of licenses that may be, by their own terms, non-transferable and expire at the owner's death, so a trust can provide for orderly transfer and management.

Drafting a Separate Document with Digital Asset Information

In light of the privacy issues involved with placing information such as usernames and passwords in a will or even a trust, drafting a separate document

with all of the information may be a better idea. Have your clients make a list of all their on-line accounts, passwords, security questions, and answers, whether the accounts have monetary value, and special instructions for locating specific assets or information. Your clients also need to designate which assets should be deleted versus which ones should be passed on to family members and who should take care of such business. This document can be printed or stored on a computer, USB flash drive, or in a cloud with remote access. Deborah L. Jacobs, *Six Ways to Store Securely the Keys to Your Online Financial Life*, *Forbes*, Feb. 15, 2011.

Although an individual, before incapacity, might decide to give this information to a family member, this could backfire on your clients. For example, if a client gives his daughter his on-line banking information to pay his bills while he is sick, siblings may accuse her of misusing the funds. See Deborah L. Jacobs, *When Others Need the Keys to Your Online Kingdom*, *N.Y. Times*, May 20, 2009. Further, a dishonest family member would be able to steal your client's money undetected. If you decide that a separate document with digital asset information is the best route for your clients, this document could be kept with your client's will and durable power of attorney in a safe place. The document can be delivered to the client's executor on the client's death or agent on the client's incapacity. On-line "lockers" also provide storage options, although as discussed later in this article and in the earlier article, this solution may still have problems.

What Are the Obstacles to Planning for Digital Assets?

"I Never Thought About This!"

Even when clients are prepared to deal with drafting wills and other documents, they may never have considered estate planning for digital assets. Moreover, clients may be reluctant to trust one person, or to create one document, with all of their usernames, passwords, and other information. Repeatedly, we are told neither to keep written records of our

passwords nor to share them with anyone else. Given the ethical protections of the attorney-client relationship, however, a client might be willing to provide this information to a lawyer. Another option is for the client to create two documents, one with usernames and one with passwords. The documents can be stored in different locations or given to different family members or stored with an on-line afterlife management company or an on-line password vault. Of course, with on-line systems, clients may still worry that the security system could be breached.

"It's Not Worth It!"

Another obstacle to planning for digital assets is that it is an unwanted burden. Digital asset information is constantly changing and stored on a variety of devices (for example, desktop computers, laptop computers, smartphones, cameras, iPads, CDs, DVDs, and flash drives). A client may open new e-mail accounts, new social networking or gaming accounts, or change passwords routinely. Documents with this information must be revised and accounts at on-line afterlife management companies must be updated frequently. For clients who wish to keep this information in a document, they should be told to update the document quarterly and save it to a USB flash drive or in the cloud, making sure that a family member knows where to locate it. See Schweitzer, *supra*.

"I've Taken Care of It!"

Clients may have signed up with an on-line asset management company and so be hesitant to address these assets in the estate planning process. Clients may believe the companies' claims that they will be able to distribute digital assets to beneficiaries or to destroy assets that the client wishes to discontinue on her death. Clients need to understand that the legality of these actions is doubtful. Although these companies can be used to store information, other estate planning methods should be used to transfer assets. David Shulman, an estate

planner in Florida, has stated that he "would relish the opportunity to represent the surviving spouse of a decedent whose eBay business was 'given away' by Legacy Locker to an online friend in Timbuktu." David Shulman, *Estate Planning for Your Digital Life, or, Why Legacy Locker Is a Big Fat Lawsuit Waiting to Happen*, *S. Fla. Est. Plan. L.*, Mar. 21, 2009.

The Future

The way forward involves not just estate planning, but also Congress and state legislatures. As estate issues involving digital assets proliferate, more states will follow Oklahoma's lead and enact legislation regarding rights over digital assets of the deceased. A model uniform state law would ensure that powers of attorney apply to on-line assets, that executors can administer and distribute on-line assets, and that heirs and devisees can take ownership of on-line assets. States also may develop additional means to ensure transmission of on-line assets, and service providers may begin asking, when accounts are first set up, for "stand-by" owners who are entitled to manage an account on the original owner's incapacity or death. Congress may need to step in to ensure that on-line service providers comply with state probate laws on each of these issues. Indeed, there is a lack of clarity about whether using someone's password without the individual's permission might be subject to civil or criminal penalties under the federal Computer Fraud and Abuse Act, showing the importance of thinking about the intersection of Internet law and probate law.

And estate planners need to be aware of new developments. Despite the complications surrounding planning for digital assets, clients need to understand the ramifications of failing to do so. Estate planners need to understand that this is not a trivial consideration but rather a developing area of law. Litigation is certain to arise regarding terms of service agreements, rights of beneficiaries, and the legality of the actions of on-line afterlife management companies. ■