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Estate Planning to Ensure That Digital Assets Do Not Disappear in the Cloud

Technology is advancing more and more each day, so much so that digital assets are becoming more prominent in society. According to Estates, Powers & Trusts Law (EPTL) Article 13-A, a digital asset is "an electronic record in which an individual has a right or interest."[1] In other words, a digital asset is not something tangible like a smart-phone or a computer, but instead something intangible that is used on a smartphone or a computer.

Digital Assets Are Widespread

There is a vast range of types of digital assets. For instance, some digital assets, although accessed by the internet, may resemble a physical asset, such as online access to a bank account or the owner-ship of Bitcoin. Alternatively, other digital assets may seem more like hobbies, such as a Facebook page, a YouTube channel, or a Twitter account. The growing use of the internet has broadened what is considered one's "assets," as more people have become dependent on their computers and reliant on cloud-based storage.

The rise in the use of the internet may result, in part, from its use by the millen-nial generation; however, studies show that the older generations own smartphones and utilize social media as well. According to a recent study published by the Pew Research Center, while 85% of mil-lennials (ages 22-37) may use social media accounts, the same is true for 75% of Gen Xers (ages 38-53), 57% of Baby Boomers (ages 54-72), and 23% of the Silent Generation (ages 73-90).2 As a result, digital assets must be accounted for when creating estate plans for clients of all ages.

Digital Assets Legislation

Article 13-A of the EPTL was signed into law on September 29, 2016 to address the growing issue of digital assets. Prior to the adoption of this law, a personal representa-tive of an estate had little access to a dece-dent's digital accounts and assets.

Because of federal privacy laws, service providers were hesitant to grant a personal representative access to a decedent's account. Instead, service providers present users with their terms of service agreements, or "click-wrap agreements" that outline their policies and procedures, both during the user's lifetime, and upon one's pass-ing. These policies may state that upon a user's passing, the service provider has no obligation to provide the user's log-in credentials to a personal representative or, that the user's account simply terminates. Many—if not all—users blindly agree to these clickwrap agreements in order to access the service provider's website.

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Therefore, prior to the adoption of the new legislation, service providers controlled what access a personal representative of an estate would have to the decedent's account, creating many issues for the administration of the estate.

New York began considering adopting digital assets legislation after the Uniform Law Commission finalized its Uni-form Fiduciary Access to Digital Assets Act in 2014. The law now requires service providers to disclose to a decedent's personal representative electronic communications sent or received by the deceased user. This ensures that a personal representative will at least be entitled to the decedent's contact list; howev-er, it does not provide access to the decedent's electronic content

Digital Content

For clarification on what is considered "content," the Court in *Matter of Serrano*,[3] a New York Surrogate's Court case decided in June of 2017, held that, in the case of an email account, the decedent's calendar was not con-sidered content, and therefore the personal representative was entitled to access it. In contrast, a personal representative would not be entitled to read the content of a decedent's emails.

That being said, although the law has addressed this growing concern, a person-al representative remains unable to receive automatic access to the content of a decedent's digital communications. The main reason for this is the importance of the decedent's privacy. The statute attempts to balance the importance of keeping confidential in-formation private against the personal representative's duty to properly administer the estate.

This is one of the many reasons why it is important for clients to periodical-ly review and update their Last Will and Testaments.

The best way to ensure that a personal representative will have no obstacles when attempting to access a decedent's digital assets is to address it in the decedent's will. A will can explicitly allow a personal represen-tative to take any actions necessary in dealing with the decedent's estate. This will guarantee that digital assets are appropriately taken care of upon one's passing.

Guidance for Practitioners

When drafting will provisions regarding digital assets, the attorney should provide a broad definition of exactly what encompasses the client's digital assets. For example, digital assets could include both electronic records, assets, or liabilities that are accessible to the client digitally, as well as electronic accounts that are maintained by a custodian or service provider, which the client has lawful authority to access. Further, the personal represen-tative should be granted complete access to manage, control, or delete any digital asset, or any data or information stored on said digital asset, unless the client expresses otherwise.

Although a decedent can state in his will that his personal representative has unfettered access to his digital assets, there is a provision in the EPTL that could override the will.4 Under the statute, a decedent has the ability to utilize an online tool to instruct a service provider to disclose or not to disclose the user's digital assets to his personal representative upon the decedent's passing. In the event the decedent has made such a direction during his lifetime, those instructions will prevail over the provisions in the decedent's will. This is important to note in the event that a decedent imposes a limitation on his personal representative as it relates to admin-istering his digital assets and thereafter mistakenly fails to revise said instruction.

The complexity and the growth of digital assets make estate planning even more important in today's digital age. Undoubtedly, estate planning attorneys should be incorpo-rating provisions for the administration of digital assets in wills, trusts, and powers of attorney for all clients. However, an attorney's duty in this regard goes beyond that, due to the fact that many clients may not know what digital assets are, let alone what happens to those assets upon their passing.

When discussing estate planning with a client, it is crucial for the attorney to discuss whether the client previously executed an online tool which would negate a will provision, as well as inquire as to whether the client does not wish to provide access to certain digital assets.

Finally, attorneys should be advising clients to select fiduciaries who have an under-standing of how to administer digital assets. In this regard, clients should begin tracking their digital assets, as well as the correspond-ing usernames and passwords, during their lifetimes. This will ensure a more efficient estate administration upon the client's passing.

Overall, the use of digital assets is continuing to grow and therefore, the law will continue to develop and adapt over time. Estate planning attorneys should be familiar with the changing laws and how their clients will be affected. Additionally, clients should be informed as to what digital assets are, and how they can utilize estate planning to maintain their privacy after their passing, while ensuring that their estate is administered properly. Ultimately, it is only a matter of time before one's legacy is stored digitally for eternity.

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1. EPTL § 13-A.
2. Jingjing Jiang, Millennials stand out for their tech-nology use, but older generations also embrace digital life, Pew Research Center, (May 2, 2018), http://www.pewresearch.org/fact-tank/2018/05/02/millenni-als-stand-out-for-their-technology-use-but-older-genera-tions-also-embrace-digital-life/.
3. Matter of Serrano v. Alexander, 894 N.Y.2d 221 (2010).
4. EPTL § 13-A-2.2.