

Death, Incapacity & Digital Assets

Presented by:

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Facebook and the Death of Loren Williams

- Loren died in a Motorcycle accident in 2005.
- A mother's quest to secure keepsakes of the heart...
- ...and the frustration she experienced during the journey.
- "If this were a box of letters under his bed, no one would have thought twice." —*Karen Williams*

What Loren's Story (and Other Stories) Tell Us

- The 'digital life' impacts most everyone.
- Unless specifically planned for, there can be unintended interference with 'digital inheritance.'
- **What happens to my digital assets when I die or become incapacitated?**

WARNING

This is a developing area of the law. It is unsettled. There are numerous questions, and all of the answers are not yet known.

What are digital assets?

- Digital assets consist of any assets that exist in electronic form.
- An ever-evolving type of asset that can be classified in various ways.
 - 1. Personal Digital Assets
 - 2. Social Media Digital Assets
 - 3. Financial Digital Assets
 - 4. Business Digital Assets

Examples of digital assets:

- Bank accounts
- Investment accounts
- Payment of utilities
- Photographs on cell phone
- Emails
- Word documents
- Facebook
- LinkedIn
- Software
- PayPal account
- Customer database
- Business twitter account
- Client records
- Patient records

Where are digital assets found?

- The owner is in possession.
 - e.g., your pictures on your cell phone
- A third party is in possession.
 - e.g., your Facebook account
- The Cloud.
 - e.g., your documents on Dropbox
- Digital assets are the stored information – not the devices

Why is this important to clients?

- A mother in Oregon may want the pictures left by her deceased son on Facebook.
- A surviving spouse may need access to the online banking and investment accounts setup by the deceased spouse.
- Your “lives” on Candy Crush may have resale value.

Accounting for digital assets

- Many clients have a 'digital life' that is 'valuable' to them or their loved ones.
- Generally speaking, digital assets are easily utilized by the Account Holder...
- ...but are problematic for a fiduciary.

Why is this a problem for fiduciaries?

- Various federal and state laws.
- Restrictions from “Custodians” (that is, “...a person [and that term is broadly defined] that carries, maintains, processes, receives, or stores a digital asset of...a person that has entered into a Terms of Service Agreement.”)
- Clients do not always plan for digital assets.

Barriers to oversight by fiduciaries:

- Stored Communications Act (“SCA”)
- Computer Fraud and Abuse Act (“CFAA”)
- Tennessee Personal and Commercial Computer Act of 2003
- Various other Federal and State Laws
- Terms of Service Agreements (“TOS”)

The fiduciary conundrum

- Potential criminal liability under federal/state laws if a fiduciary acts in violation of the various laws...
- ...and potential for civil liability if the fiduciary does not undertake certain acts regarding digital assets.
- To act or not to act?

What can we do to help clients?

- Sensitize clients to the existence of digital assets.
- Educate clients regarding the need to account for digital assets in their estate plan.
- Help clients memorialize their digital assets so that the fiduciary has enough information to proceed as appropriate.
- Utilize specific language governing the control of digital assets in estate planning documents.

Questions in estate planning questionnaire:

- Do you conduct any important transactions electronically (e.g.: paying utilities, monitoring investments, etc.)?
- Do you have social media accounts that are important to you (e.g.: Facebook, Twitter, etc.)?
- Do you own or have an interest in any digital assets that are valuable (e.g.: domain names, blogs, etc.) ?
- Get them thinking about it early in the process.

The presenter's classification of digital assets:

- The “practical” digital assets
- The “sentimental” digital assets
- The “valuable” digital assets

The “practical” digital assets:

- Online access to bank accounts.
- Access to an investment account without a ‘brick and mortar’ presence.
- Automated payment of utilities.
- Access to computers, smart phones, and other devices.
- Most clients need to plan for these items.

The “sentimental” digital assets:

- Pictures uploaded to Shutterfly.
- Tweets on Twitter account.
- Participation in online communities.
- A blog chronicling the history of disagreements with siblings.

- Many clients would benefit from planning for these items.

The “valuable” digital assets:

- Planet Calypso, a fictional place on the Entropia Universe social gaming site, was purchased for \$6,000,000
- www.toys.com sold for \$5,100,000
- A blog chronicling the history of Tennessee license plates.

- Less likely to be needed by most clients.
- But may need specialized professional assistance.

Drawing the roadmap to digital assets:

- How should the client's digital assets be memorialized?
- Should you provide a *digital asset questionnaire* or count on the client to prepare a *digital asset inventory*?
- How much information should be recorded?
- Who should hold the information?
 - The client?
 - The fiduciary?
 - The professional?

Specific guidance to fiduciaries:

- The handling of digital assets should be specifically referenced in a client's Will, Durable General Power of Attorney, Trust, Conservatorship/Guardianship pleadings, and other estate planning documents.
- Specifically grant authorization to the fiduciary.
- Specifically **prohibit** authorization to the fiduciary.
- Absolve fiduciary of liability from acting or not acting (as is appropriate on a case by case basis).

Uniform Fiduciary Access To Digital Assets Act

- “UFADAA”
- National Conference of Commissioners on Uniform State Laws (“NCCUSL”)
- <http://www.uniformlaws.org/>
- Final Act* dated January 22, 2015

(*as of March 24, 2015)

From NCCUSL website:

- “UFADAA is an important update for the Internet age. A generation ago, files were stored in cabinets, photos were stored in albums, and mail was delivered by a human being. Today, we are more likely to use the Internet to communicate and store our information. This act ensures account-holders retain control of their digital property and can plan for its ultimate disposition after their death. Unless the account-holder instructs otherwise...fiduciaries will have the same access to digital assets...and the...duty to comply with the account-holder’s instructions.

From prefatory note in UFADAA:

- “The purpose of this act is to vest fiduciaries with the authority to access, control, or copy digital assets and accounts.”
- “The general goal of the act is to facilitate fiduciary access while respecting the privacy and intent of the account holder.”

The 15 sections of UFADAA:

- 1 – Title
- 2 – Definitions
- 3 – Applicability
- 4 – **Personal Representative**
- 5 – **[Conservator]**
- 6 – **Agent (under POA)**
- 7 – **Trustee**
- 8 – Fiduciary authority
- 9 – Compliance
- 10 – Custodian Immunity
- 11 through 15 – Miscellaneous topics, including uniformity of application, severability, etc.

Tennessee's version of UFADAA ('TUFADAA')

- TN SB0326 (2015-2016 | 109th General Assembly).
- February 3, 2015 – Filed for introduction.
- February 9, 2015 – Introduced; passed on first consideration.
- February 11, 2015 – Passed on second consideration, refer to Senate Judiciary Committee
- “...shall take effect July 1, 2015...”
- Largely follows UFADAA with Tennessee specific additions, and a few statutory additions.

T.C.A. §39-14-602 Violations – Penalties.

- Tennessee Personal and Commercial Computer Act of 2003.
- New subsection (e):
- (e) Any person who accesses, causes to be accessed, or attempts to access a digital asset pursuant to the Uniform Fiduciary Access to Digital Assets Act, compiled in title 35, chapter 51, is not in violation of this chapter.

T.C.A. §34-6-109. Attorney in fact -- Powers.

- New subdivision (23):
- (23) Access any catalogue of electronic communications sent or received by the principal, and any other digital asset in which the principal has a right or interest, pursuant to [‘TUFADAA.’] For purposes of this subdivision (23), “catalogue of electronic communications” and “digital asset” have the same meaning as defined in [‘TUFADAA.’]

New Section: T.C.A. §34-6-112.

- Subject to [‘TUFADAA’], if any power of attorney expressly grants an attorney-in-fact or other agent authority over the content of an electronic communication of the principal, then the attorney-in-fact or other agent shall have the power and authority to access the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act (18 U.S.C. § 2702(b)).

Self Help

- At this point in time, the most prudent action for a client to undertake is “self help.”
- Self help can take many forms, including:
 - Save pictures, stories, etc. posted on Facebook to external hard drive located in home.
 - Convert digital assets to a nondigital form.
 - Make alternate arrangements for financial items.

The Perfect Storm

- Clients are using technology in unprecedented ways.
- Federal and state laws do not account for the unanticipated ways in which clients use digital assets.
- Terms of Service Agreements can restrict the ability of clients and fiduciaries to plan and administer digital assets.
- Most clients do not plan for digital assets.
- In the aggregate, those factors yield an undesirable situation.
- Which is why clients can benefit from our guidance.

Thank you.

Questions?

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