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## INSIGHT: Digital Assets, Digital Access, and Queen



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Recently, I was feeling nostalgic. So, I went down to my basement to play a record on my record player. I pulled out “The Game” by Queen, placed it gently on the player and guided the needle into the first groove. Even though I haven’t played that record for years, I remembered that there was a skip in the second verse of “Play the Game” and I was able to sing perfectly along with the lyrics as they sounded, not as they should be correctly. For a moment, I felt sorry for my daughters as they will never have that type of memory about a song. The music that they listen to is always perfect.

As I looked around the room, I saw a wonderfully large collection of cassette tapes, albums, and CDs that were purchased over the years by my husband and myself, starting when we were teenagers. Won’t our daughters love to receive these one day? Then I realized that this collection basically ends with music produced in the mid-2000s. Why? Because that was when my husband gave me my first iPod. I remember it well and even remember the first song I ever purchased and downloaded. The song was “Gravity” by John Mayer. Now, I’m not a huge John Mayer fan, but the song was new, I liked it, and I didn’t own any other music by him at the time.

As an estate planner, I’m often thinking about the items that I own and who might want to inherit them one day. It is really not such an odd train of thought for someone who discusses such things with clients every day. The decision of whom to give what is not an easy one, but a necessary one. So, when I was thinking about all of the music that I have purchased over the years, I realized that the collection that my daughters will ultimately receive (even though they probably don’t want it—but that’s their problem) ends in the mid-2000s, even though I have been “purchasing” music ever since. I own “The Game” by Queen, but I don’t own

“Gravity,” even though I paid for both. When I paid for “Gravity,” what I paid for is the right to listen to the song, not the purchase of a tangible item on which the song is recorded. What type of asset is “Gravity,” if an asset at all? This led me to further ponder items that I think I own, but don’t, and items I don’t really think about “owning,” but I do. What types of assets are these and what can I or should I do about them?

Put simply, assets used to fall into three basic categories—real property (my house), tangible property (the stuff in my house), and intangible property (the assets used for pay for the prior two categories). Now, with our ever changing world, propelled by the digital age that we find ourselves in, there are more categories being added. Digital categories. When I’m talking about digital “assets,” I’m not talking about digital “access” (the password to your bank account, for example). Digital access is a different issue that has its own problems. I’m now talking about digital assets.

I’m a pretty basic person. My digital assets consist mainly of a Facebook account, lots of miles on United, and countless pictures on my phone and computer, but all of these have value to me. In fact, in the last few years, McAfee conducted a worldwide survey to determine the perceived value of people’s digital assets. On average, people believed those assets to be worth approximately \$35,000. For an ever changing list of assets that is being added to every day, that number is not unsubstantial within the context of someone’s estate. What happens to these “assets” when we die? And, how do our fiduciaries administer these?

As an estate planner and over the past 20 years or so when I have met with clients, we have always discussed three main points:

1. What do you own? Bank accounts, insurance, retirement accounts, real estate, investments, etc.

2. What is the best method to get what you own to the persons or charities of your choice? Do you want an outright distribution, a trust for the individual(s), or other type of disposition?

3. Who or what would be your best choices for fiduciaries? Who should be your agent under a durable power of attorney, executor, guardian for minor children, or trustee?

Now, however, those three main points of conversation are evolving to include the category of “digital assets.” Again, digital assets is that category of assets that is very important to individuals, but people don’t think about owning them when they really do. It is a category of assets that is difficult, if not impossible, for your fiduciaries to manage after your death if you have not planned ahead. Again, a few common digital assets include: accounts for Facebook, Twitter, airline miles, Instagram, e-Bay, Pay Pal and blogs. The list is ever changing and expanding.

In my discussions with clients, when I bring up their digital assets, I often get a look of confusion, then clarity. When reflecting on the category of their digital assets, usually, they realize the importance to them of that asset and they want to know their options. This is where it gets a little complicated.

Let’s get back to the issue of digital *access*. Prior to the digital revolution, “in the old days,” it was easy to know what you owned, what it was worth, and how to transfer that asset. Let’s start simply with a savings account. One always knew, approximately, how much was in the account and what the interest rate was. Once a month, a paper statement would appear in your physical mailbox confirming the balance and reflecting any withdrawals or deposits. If you wanted to transfer this bank account upon death, either you would put a joint owner on the account or have the account transfer through probate to go to a beneficiary pursuant to the terms of your Will. Now, let’s say you died owning that account, but your fiduciary did not know what bank held the account. I would then advise your fiduciary to wait for your mail. After a month or so, we would know where the account was, since the paper statement would arrive.

Now take that same savings account in today’s world. Most likely, you monitor the account through online access and do not receive paper statements. If you died, then how does your fiduciary know where the account is? Some of the readers might answer, “my fiduciary will just log into my computer because they know (or I will tell them) my password and will be able to access my account. Just let him or her pretend to be me by entering my password. They will be able to get the information that way.” Easy, right? Not so fast.

A fiduciary that gains access to an account without proper authorization is violating federal law. Specifically, the Computer Fraud and Abuse Act (CFAA) or Title II of the Electronic Computer Privacy Act (ECPA) known as the Stored Communications Act (SCA). This violation is punishable by fine, imprisonment, and other penalties. The issue becomes what is “proper authorization” and how to prove that someone has it. The risks may not be the best result for your fiduciary.

The states began to recognize this problem across the country. The issue became how to permit fiduciaries to do their jobs, collect information, and take control of assets without violating federal law. So, a new law was drafted and, to date, 42 states have enacted the Revised

Uniform Fiduciary Access to Digital Assets Act (otherwise known as RUFADAA). According to the Uniform Law Commission, RUFADAA “extends the traditional power of a fiduciary . . . to include management of a person’s digital assets. The act allows fiduciaries to manage digital property like computer files, web domains, and virtual currency, but restricts a fiduciary’s access to electronic communications such as email, text messages, and social media accounts *unless the original user consented in a will, trust, power of attorney or other record.*” (emphasis added). So, this is all part of a process—a process that includes you, your estate planning attorney, and the custodian of that asset. You need to give the proper authority to your fiduciary to do their job with respect to digital assets.

I mentioned the “custodian” of the asset above. Who are the custodians? They are the companies that have your data and information. They are the Facebooks, Instagrams, Amazons, Apples, Marriotts, you know, the ones that make you agree to their terms and conditions prior to use and from time to time. You read those, right? An increasing number of those custodians are creating “online tools” whereby you can grant authority to a custodian to disclose or not disclose the content of your data. Actually, this trumps anything in your estate planning documents. So, if you provide in your estate planning documents that you grant access to your fiduciary for your digital assets, but your online tool for the custodian says “no, I do not grant access,” then no access is granted.

Let’s assume for the sake of argument that you are the exceptional individual out there and you have included digital assets access in your estate planning documents, your state has enacted RUFADAA, *and* you have availed yourself of every online tool available regarding all of your digital assets, then everything will work out for your fiduciary, right? Not exactly—service provider’s and custodian’s policies are all different. Remember the agreement to the terms of service that you clicked yes to? Surprisingly, most of them prohibit users from granting anyone but you access to your accounts.

So, we come back to the beginning. What are my digital assets and how do I deal with them? The answer is still evolving. The best advice is first use online tools, if available. Then, put appropriate language in your estate planning documents. Also, to the extent you can, back up all of your files and assets on tangible media (flash drives, etc.). Give the tangible media to your fiduciary, or let them know where to find it. If you live in a RUFADAA state, tell your fiduciary your passwords. Constantly update that list. Make your wishes known about what you want done with your assets. Do you want to memorialize your Facebook account? Do you want to transfer those airline miles, if permitted? Some airlines permit it, some do not. As you can guess, every custodian is different and I can’t even begin to list which ones allow you to do what, as those terms of service are always changing. Be proactive. Be vigilant. Be up to date on all things digital and, at the same time, let some part of you long for simpler days. Go blow some dust off an old favorite record, preferably one with a skip. Play it loudly and when your kids ask what you are doing, smile knowingly, that one day it will be theirs. If they are lucky.

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