

Digital Asset Planning

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You've got mail! What happens to your email, online banking and investment accounts, Facebook, etc., after you die? Is your spouse or executor authorized to access your accounts? Federal and state privacy laws along with the terms-of-service agreement you agreed to (and probably did not read) when you signed up for your account, restrict the access to online accounts after the user dies. To address these concerns, in September, 2016, New York State added a new section to the Estates, Powers, and Trusts Law. New York's digital asset legislation, Article 13-A Administration of Digital Assets, provides guidance and direction on how fiduciaries can gain access to digital assets after an individual dies.

Pursuant to EPTL §13-A-1(i), "digital assets" refers to an electronic record in which the user has a right or an interest, but does not include the underlying asset or liability unless the asset or liability is also an electronic record. If the electronic record represents another electronic record, such as emails, then this is considered to be an "electronic communication". If the electronic record represents photographs or other virtual assets, then this is categorized as "other digital assets".

Digital assets include, music, videos, photographs stored on websites such as Shutterfly, file storage sites such as Dropbox, social media websites such as Facebook, Instagram, Pinterest, email accounts, online banking accounts, Paypal accounts and Amazon accounts.

Digital asset planning is important for a variety of reasons. Many digital assets have sentimental value (photographs, emails, social media posts), and without the proper planning loved ones may not have access to these accounts after the user's death. Digital asset planning is an important tool to prevent post-mortem identify theft and to maintain post-mortem privacy.

Small to medium size businesses that utilize significant digital assets, such as bank accounts, payroll and timekeeping systems, should consider digital asset planning to protect their businesses and prevent any losses to their estate.

Specific rules apply to different types of fiduciaries:

Executor

- Executor may access the content of the deceased user's electronic communications only if the user consented to the disclosure or a court order directs the disclosure.

- Executor may access the "electronic catalogue" and "other digital assets" upon written request to a custodian and submission of required documents.
- Unless prohibited by the deceased user, the executor may access the deceased user's "catalogue" and "other digital assets".

Agent

- For an agent to gain access to the principal's digital assets, the principal must include language, expressly granting the agent access, in the power of attorney form appointing the agent.
- A court cannot issue an order granting an agent access to the content of the principal's electronic communications.
- The principal must affirmatively prohibit the executor's access to digital assets to prevent the disclosure of the "catalogue" and "other digital assets".

Trustee

- If a trustee creates an online account for access to trust assets, then they are considered to be an "original user", and their access to the online account should not be restricted.
- Unless otherwise prohibited, if the trustee is not considered to be an "original user", then the custodian may disclose the contents of the electronic communications to the trustee upon written request and the submission the trust agreement. The trust instrument must include language that the grantor consented to the disclosure of the contents of electronic communications to the trustee.
- The grantor must prohibit the trustee's access to digital assets to prevent the disclosure of the "catalogue" and "other digital assets".

The organization and implementation of digital assets in your estate plan should be a consideration when you review your estate plan. If you have questions regarding digital asset planning it is advised that you consult with your attorney.