

## Trusts & Estates Practice Group

### The Importance of Protecting Your Digital Assets: What it Means for Your Estate Plan

The way we live our daily lives has changed – more and more of it is conducted on-line. The manner in which we live our personal lives and handle our business and financial affairs has evolved with a clear shift to the Internet. Digital assets have become part of our daily lives. As a result of this change, it is important to consider digital assets when preparing your estate plan in order to protect those assets at your death.

#### What is a Digital Asset?

Currently, there is no universal definition of what constitutes a “digital asset.” The best way to understand the meaning, therefore, is to identify assets that are customarily considered as such. Examples include email accounts, social networking accounts, photograph and video sharing accounts, on-line sales accounts, on-line banking accounts, websites, blogs and other online accounts. In addition, voicemail accounts, rewards and points, security systems, electronically stored music and books, certain video games and related virtual assets are also considered digital assets.

#### Why Should You Care About What Happens with Your Digital Assets at Your Death or Incapacity?

Your digital assets, such as an online photo album or blog, may hold

sentimental value, which you hope to pass on to your loved ones. Some of your digital assets may have financial value. For example, a domain name could be sold for a windfall, and a blog may generate a revenue stream. The value can also come from money saved by accessing your accounts to make sure bills are paid and funds exist to cover automatic debits. Lastly, the identity of deceased individuals is being increasingly targeted through the use of personal information found on social media sites. These features highlight the importance of properly planning for the disposition of your digital assets so that your wishes can be fulfilled upon your death or incapacity.

#### What Are the Challenges Presented by Digital Assets?

Digital assets present numerous challenges given the unique nature of such assets. Oftentimes, digital assets are protected with a password. If no one knows your password, it will be difficult, and sometimes impossible, for anyone to have access to those assets after your death.

To complicate the issue further, many digital assets are governed by a Terms of Service (“TOS”) agreement. These TOS agreements typically address when an accountholder’s rights are terminated and whether the rights of the accountholder can be transferred. Often, the rights to the

account are terminated following a set period of inactivity or upon death. Further, many TOS agreements expressly prohibit an accountholder from disclosing access information to third parties, prohibit transfer of the account and prohibit third parties from accessing the account.

Because of the nature of digital assets, many different areas of law may govern the disposition of such assets, including trademark, copyright, contract and even federal income and transfer tax laws. Two particular federal laws are dictating the rights of fiduciaries and the resolution of this issue – the Stored Communications Act (“SCA”), which is a part of the Electronic Communications Privacy Act, and the Computer Fraud and Abuse Act (“CFAA”). The SCA, in general, protects against the unauthorized disclosure of certain types of electronic communications; the CFAA (and its state counterparts) protects against the unauthorized use of protected computers. Missouri, like many states, lacks clear statutory authority empowering a fiduciary to carry out his or her duties with regard to digital assets. The duties





of fiduciaries under Missouri law – such as to control and protect an individual’s assets – remain the same.

One thing is clear – the law with respect to digital assets is uncertain. As the laws regarding digital assets continue to evolve, it is important to understand how your digital assets will be disposed of at your death and how you can ensure that your wishes are fulfilled.

### How Should You Plan for Handling Your Digital Assets?

The first step in planning for the disposition of your digital assets is to prepare an inventory of all of your digital assets. You should include a description of each asset as well as all information needed to access the account, such as username, password, and answers to security questions. It is also important that you review your list frequently to add any new digital assets that you may acquire and update changes to your existing accounts.

It is important to store the inventory list in a safe place. Options include storing the inventory list in a safe deposit box or digitally storing the list with password protection. Because the list may need to be updated frequently due to the evolving nature of digital assets, you should consider keeping it somewhere that is readily

accessible. Regardless of where such list is stored, your fiduciary should always know where your inventory is kept and how to access it.

You should also consider how you want your digital assets to be handled at your death or incapacity. Do you want some or all of such assets to be destroyed? Should they be preserved? Should any of such assets be transferred? If so, to whom should they be given and with what instructions or restrictions, if any? Your wishes should be included as part of your estate plan to ensure your wishes are known and carried out.

### Who Should Handle Your Digital Assets at Your Death?

Another consideration is who you want to handle your digital assets at your death. You may choose to name the same person that you name as the Personal Representative of your estate, the Trustee of your Revocable Trust or your Agent under your Durable Power of Attorney. You may also choose to name someone different who has specialized skills or a better understanding of technology in order to better carry out your wishes.

For better or worse, the Internet is here to stay and much of our lives is found there. We may not have even noticed this change as we conduct our daily tasks. However, it can also be seen after a loved one has become incapacitated or has died. Yet, many fail to consider digital assets as part of their estate planning process. With the proper planning, the unfortunate difficulties that your family could face when handling your digital assets could be lessened and perhaps completely avoided.



For More Information:

**Jennifer A. Davis**  
Greensfelder, Hemker & Gale, P.C.  
10 S. Broadway, Suite 2000  
St. Louis, MO 63102  
(314) 345-4749  
jac@greensfelder.com

### The Trust & Estates Practice Group

The Trusts and Estates Practice Group at Greensfelder provides sophisticated and personal lifetime, estate and tax planning, and related legal services for family and individual clients. We counsel our clients and their families regarding the preservation of their wealth, the charitable component of their planning, probate process, and trust and estate administration. Our Practice Group represents entrepreneurs and owners of closely-held family businesses. We also represent a number of St. Louis charitable entities in their legal matters, assisting them in carrying out their goals and in their fund-raising efforts to continue their charitable works.