

Does My Digital Estate Belong to Me? Estate Planning for Digital Assets

Author : Camille Davidson

Date : November 27, 2013

Jamie Patrick Hopkins, *Afterlife in the Cloud: Managing a Digital Estate*, 5 **Hastings Sci. & Tech. L.J.** 210 (2013), available at [SSRN](#).

In the article, *Afterlife in the Cloud: Managing a Digital Estate*, [Professor Jamie Hopkins](#) steps into the tangled web of estate planning for digital assets. Professor Hopkins's article is timely and allows us to begin a much needed discussion about a new and important area of estate planning. He begins to answer the question of what happens to digital assets when an individual dies. Can an individual dispose of his or her digital assets in a will or trust? How should issues of security and privacy be addressed? Hopkins reminds us that digital assets are vast and complex and traditional estate planning tools do not adequately address the issues that are involved with transferring such assets at an individual's death. He suggests a combination of federal legislation and better service agreements between service providers and users as a solution to the digital dilemma.

Although, I am not convinced that federal legislation is the appropriate mechanism, I agree that uniformity is in order. Since only a handful of states have addressed the issue, many individuals are not aware of whether they may transfer certain assets when they die. For example, in my will, I devise my real and personal property to my designated beneficiaries. When I executed my will several years ago, I used a 35mm camera to take pictures. I used a day planner to keep my schedule, I kept paper copies of bank statements and other financial documents, and I used a Rolodex to store information from professional contacts. Today, my digital photographs are stored on a hard drive or in a cloud. I use an online scheduler to keep my appointments, I use online banking for most of my investments, I share photographs and videos via Facebook, I download my music and books from iTunes, and I use Twitter for professional connections. I have numerous passwords to these accounts, and I have checked "I agree" to several online service agreements. Will my beneficiaries have access to my digital assets? Professor Hopkins's article is a wake-up call for people like me.

Professor Hopkins defines digital assets broadly to include "any electronically stored information" that can be used for both business and social purposes. Digital assets contribute to the value of a business since businesses use digital assets for numerous purposes including marketing, payroll, and storing information. Social digital assets have now replaced once traditional assets.,Photographs are stored in clouds or on websites such as Facebook instead of in physical photo albums.

Since digital assets are stored "on a variety of mediums, devices, and locations," anyone charged with managing such assets is bound to run into unforeseen complications. Even though most estate lawyers are not technology gurus, they may now have to locate digital assets and may be charged with determining the value of the assets in order to probate a simple estate. Not so long ago, a simple search through a desk or file cabinet could provide clues to bank accounts and other assets. Today, such a search may not uncover those digital assets that are stored in clouds or with third party services.

Even if the asset can be located, issues of privacy and ownership arise. A terms of service agreement may prevent an executor from gaining control of an asset in order to transfer it to a designated beneficiary. Terms of service agreements are not uniform and the issue of whether or not an account is transferrable may be governed by a contract between the service provider and the user. For example, Facebook memorializes a user's account after his or her death and "is the sole holder of the any of the deceased's digital assets."

Professor Hopkins criticizes digital estate planning services because of the unanswered questions about owner privacy and security. For starters, given the rate of identity theft crimes, customers may not want to put passwords into a third party account. Also, there is high industry turnover so individuals may not be so trusting of companies without history.

Professor Hopkins highlights Oklahoma legislation that gives an executor control over a decedent's digital accounts. But, as he points out, Oklahoma's legislation does not address all digital assets. He suggests that since most states are on the sidelines, federal legislation is necessary to clarify digital asset ownership rights. Although the current fractured Congress will probably not pass federal legislation in the near future, the [Uniform Law Commissioners](#) are drafting model language with respect to digital accounts. Professor Hopkins also suggests that service providers should improve online service agreements. This seems much more feasible than the federal legislation.

I would like to see Professor Hopkins offer suggested language that would help resolve the digital dilemma. He has already highlighted issues of ownership and transferability. Suggested standard language for terms of service agreements or model legislation that each state legislature could then address would be beneficial to the discussion. In the meantime, there is no doubt that traditional wills and trusts will need to adjust to meet the challenges of the digital estate.

Cite as: Camille Davidson, *Does My Digital Estate Belong to Me? Estate Planning for Digital Assets*, JOTWELL (November 27, 2013) (reviewing Jamie Patrick Hopkins, *Afterlife in the Cloud: Managing a Digital Estate*, 5 **Hastings Sci. & Tech. L.J.** 210 (2013), available at SSRN), <http://trustest.jotwell.com/does-my-digital-estate-belong-to-me-estate-planning-for-digital-assets/>.