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PRACTICES

Trusts & Estates

Include Digital Assets in Your Comprehensive Estate Plan

By Catherine Barton Rossetti on October 25, 2017



Creating or updating an estate plan is a collaborative process by which you and your professional advisors can achieve your goals for passing property to loved ones while minimizing estate tax liability and avoiding probate. This collaboration requires a comprehensive inventory of your property so that your advisors can make appropriate recommendations for an estate plan. It is also important to work together to develop a strategy to properly fund the plan once it is finalized. Additionally, you must choose the person or persons who shall advance the estate plan's directives, including collecting and allocating assets after death, or while under a disability. The person or persons so chosen, often called a trustee, personal representative, or attorney-in-fact, depending upon the nature of your estate plan, is a fiduciary who owes the estate a duty of utmost good faith. The fiduciary must have access to the property to be managed, allocated or transferred under the terms of the estate plan. You must carefully consider what person or persons should occupy such a position of trust so that the estate plan's directives are honestly and accurately effectuated.

Traditionally, an inventory of property has focused on real estate, cash on hand or in the bank, life insurance proceeds, jewelry, art work, antiques, motor vehicles, and other tangible property – basically, property that can be touched. However, as digital technology continues to advance, “Digital Assets” are becoming much more widespread, and must be factored into the creation of one's estate plan.

As its name implies, Digital Assets refer to property interests associated with electronic records or files that one may own outright, or use via a license agreement that allows a non-owner to use the asset with the permission of the asset owner. Generally, Digital Assets cover any personal or professional activity or work conducted online, by computer, or by a mobile device, such as a phone or tablet. Electronic mail, online investing/banking, web site ownership, and social media accounts, such as Facebook, LinkedIn, and Instagram, are some examples of digital assets.

If you answer “yes” to any of the following questions, whether personally or professionally, you own or have a right to use Digital Assets that you may wish to incorporate into your estate plan with the help of your attorney:

- Do you own an online or mobile business or web site?
- Have you already obtained, or do you need to obtain, the protection of a trademark and/or patent for any aspects of your business?
- Do you conduct online or mobile investing and/or banking?
- Do you own or control social media accounts?
- Do you own or control digital art or media, such as photographs, films/videos, digitized artwork, manuscripts/writings, and/or music?
- Have you already obtained, or do you need to obtain, the protection of a copyright for your digital art or

media?

If you answered “Yes,” or if you anticipate answering “Yes” in the near future, to any of the above questions, then you own or control Digital Assets. Those assets, and the ability to access or control those assets (for example, by password), should be included in your inventory of property, and your attorney should incorporate these assets, and the ability to access or control them, into any estate plan that you create or update.

In creating or updating your comprehensive estate plan to include your Digital Assets, the following should be addressed:

- Inventory all of your social media accounts, digital media accounts, and email accounts, and the passwords that correspond to each of those accounts. Do the same for your online banking and investment accounts.
- Specify that the fiduciary or fiduciaries chosen for your estate plan have the express authority to access the passwords and the accounts to which they correspond, and to operate/manage those accounts according to the direction that you provide in your estate plan.
- Prepare a succession plan for your online/mobile business interests to ensure a seamless transition to the new owner(s) or an expeditious liquidation and distribution, depending upon your intent as stated in your estate plan.
- Identify all of your assets that either enjoy copyright, trademark or patent protection, plus assets that should be reviewed for copyright, trademark or patent protection.

Addressing the foregoing issues now will help to eliminate any uncertainty, the burden on your loved ones, and the possible conflict that may ensue if you die without directing how your Digital Assets are to be accessed, managed and distributed. You and your attorney can eliminate such uncertainty by working collaboratively to address your Digital Assets in your estate plan.

If you have any questions or wish to create or update your estate plan, to include direction for your digital assets, consult with a qualified professional. I or other members of our Trust and Estates Group are available to discuss these issues.

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