

Tiffany N. McKenzie on Creating the Ultimate Digital Estate Planning Checklist

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Tiffany N. McKenzie

The Estate Planning and Probate Section of the Atlanta Bar Association was privileged to welcome Tiffany N. McKenzie, Partner with *Bryan Cave Leighton Paisner, LLP*, as the guest speaker at the December 11, 2019 breakfast, where she discussed how to create the ultimate digital estate planning checklist for clients.

Ms. McKenzie began her talk by discussing the nature of digital assets – what they are, and why we, as estate planners, need to be cognizant of these assets when designing estate plans for our clients.

A digital asset is, in essence, an electronic record. The term “electronic record,” Ms. McKenzie explained, includes both the record’s catalogue of electronic communications, as well as the content of those communications. Digital assets include, among other things, email, online sales accounts, online purchasing accounts, online cloud storage, websites, domain names, blogs, video blogs (“vlogs”), and social networking accounts. A client’s digital assets often include photos, online messages, and other content that he or she posts to sites such as Facebook, LinkedIn, Instagram, Twitter, Snapchat (this isn’t a website), YouTube, and various dating sites, as well as content uploaded to cloud services offered by companies like Google, Apple, Amazon, and Dropbox. In short, digital assets include everything that can be accessed on a smartphone, tablet, or computer. While digital assets do not include the underlying fungible assets in bank or brokerage accounts, digital assets can be the key to unlocking such “hard” assets.

Digital assets such as cryptocurrency and domain names can have significant value. For instance, the domain name *vacationrentals.com* sold for \$45 million. Ms. McKenzie noted that the aggregate value of blogs is approximately \$785 million. Vlogs and YouTube channels can also be quite valuable, as Daniel Robert Middleton, age 28, demonstrates. He has a YouTube channel on which he posts video game reviews. He produces his YouTube videos in his home studio in Wellingborough, England, and his 30 million YouTube subscribers have helped to make his vlog worth over \$18 million USD.

Then there is the existence of Genesis City, the first virtual city within Decentraland (<https://decentraland.org/>), a virtual world where participants buy and sell plots of land, build, explore, play games, and socialize. Genesis City has neighborhoods and is approximately the size of Washington, D.C. Users can gain – or lose – real, actual money in the course of buying and selling virtual real estate in Genesis City.

In addition to having financial value, digital assets can hold great sentimental or historical value. They can help to tell a decedent’s story and preserve memories that may help grieving family and friends cope with the loss of their loved one. Unfortunately, digital assets can also pose challenges when it comes to protecting the owner against identity theft, and protecting an

agent or other fiduciary that may need access to digital assets from accessing those assets without proper legal authority to do so.

In many instances, a decedent's fiduciaries may not even know what digital assets are in the decedent's estate. Physical devices called cryptowallets, which unlock certain digital assets, are often mistaken for thumb drives and destroyed or discarded. Sometimes a fiduciary may know of a digital asset, but may not have the username, password, or answers to security questions needed to access the asset. Finally, the fiduciary may know of the asset and may have the login credentials needed to access it, but may not have the legal authority to do so. It is often this last issue that gets unsuspecting fiduciaries in trouble.

To address these concerns and create a statutory pathway for fiduciaries to access digital assets legally, the Uniform Law Commission ("ULC") created a committee in 2012 to study the issue and create proposed legislation. The committee completed its work in March 2014, and the ULC approved the Uniform Fiduciary Access to Digital Assets Act ("UFADAA") in July 2014. However, this first attempt to address issues surrounding digital assets was controversial and heavily opposed by lobbyists due to the inclusion of a legal presumption that a decedent consents to unfettered access by his or her fiduciary and that presumption's ability to override any online agreements to which the decedent had been a party. Revisions were made by the ULC, and the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA") was approved by the ULC.

As of this writing in January 2020, the RUFADAA has been enacted in 44 states, including Georgia, plus the U.S. Virgin Islands. It has been introduced but not yet enacted in Oklahoma, Pennsylvania, Massachusetts, Kentucky (failed to pass in 2015, but reintroduced in 2020), and the District of Columbia. Louisiana failed to pass the RUFADAA, but has its own statute regarding digital assets. California has adopted a modified version of the RUFADAA, and Delaware has enacted UFADAA but has not yet introduced legislation to enact the RUFADAA.¹

Ms. McKenzie discussed the improvements contained in the RUFADAA, including improved coordination with federal privacy laws, more clear definitions and enumerations of rights and duties, and the establishment of legal recognition for a decedent account holder's instructions, as provided in that person's estate planning documents. She offered a helpful flowchart illustrating the steps that fiduciaries should take to review a decedent's accounts. Paramount in the hierarchy of authority giving the fiduciary access to a decedent's digital assets is the service provider tool. This is a form that the decedent may have filled out online, at the provider's site, granting someone access to the decedent's digital assets in that provider's custody after the decedent's death.² If the decedent made a choice using the provider's online tool, then that

¹ A chart of the status of RUFADAA in the various states and territories of the United States may be found on the ULC website at <https://www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22>.

² As of the presentation date, Facebook (which offers the option to set a "legacy contact") and Google (which offers an "Inactive Account Manager" and a "Trusted Contact" option) were the

choice controls access to, as well as the disclosure and deletion of, the assets. An online tool may also allow the user to set a period of inactivity on the user's part after which the account will be automatically locked or deleted. The user's choices as expressed through such online tools override any contrary directions in a will, trust, power of attorney, or other such records. However, the terms of a will, trust, power of attorney, or other record executed by the decedent which allow or prohibit disclosure to a fiduciary of some or all of the user's digital assets *will* override a Terms of Service agreement.

If the decedent either didn't use such an online tool or the custodian did not provide one, then the fiduciary must look to the decedent's will or trust, if either exist. If the will or trust instructs that the decedent's online accounts should be deleted, then the fiduciary must provide the custodians of the decedent's online accounts with proof of the decedent's death, and request that the accounts be deleted. If the will or trust designates a third-party directive, then the fiduciary should contact that third party per the decedent's applicable estate planning document. If the will or trust says to disclose private communications to a named party and the fiduciary provides the necessary documents to the custodian (e.g. a certified copy of the user's death certificate, a certified copy of the document appointing the fiduciary, any information needed to identify the account and link it to the decedent, or depending on the custodian's requirements, perhaps an affidavit stating that disclosure is reasonably necessary for estate administration or a court order establishing the fiduciary's right to and need of the private communications for estate administration purposes), then the custodian should disclose the content of the private communications to the fiduciary who, in turn, would provide it to the party named by the decedent. The RUFADAA provides a procedure for the disclosure of digital assets and also sets forth both the duties of the fiduciary and the compliance requirements of the custodian.

However, if the decedent had no will or trust, or if such document exists but is silent with respect to access to private communications, then, upon submitting the necessary documents to the custodian (as described above), the fiduciary can obtain digital assets *other* than private communications - such as photos, documents, public blog posts, and records or "catalogs" of the private communications (e.g., sender, recipient, date, and time) but not the content of those communications.

Ms. McKenzie closed her presentation with a brief discussion of the estate planning attorney's duties to be knowledgeable about the various types of digital assets a client might have, to ask the client about his or her intentions for the disposition of his or her digital assets, and to find out specifics about those assets. Atlanta Bar Association ("AB") members can access both Ms. McKenzie's written CLE paper, which includes the previously described flow chart, as well as her presentation slides, by logging onto the AB website and following the "CLE Materials" link on the Estate Planning & Probate Section's webpage.

only major online services that provide online tools to direct the management of a user's online account after the user's death.

The members of the Estate Planning and Probate Section thank Ms. McKenzie for sharing her time and knowledge with the Section members.

Tiffany N. McKenzie is a Partner at Bryan Cave Leighton Paisner, LLP, where she focuses her practice on estate planning and administration, family wealth transfer tax planning, succession planning, and fiduciary litigation. More information about Ms. McKenzie can be found at <https://www.bclplaw.com/en-US/people/tiffany-n-mckenzie.html>. She may be reached at (404) 572-6725 or tiffany.mckenzie@bclplaw.com.



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