Estate Planning for Digital Property

In today's society, most of us use digital property on a daily basis. Digital property includes such things as e mail accounts, data in smartphones and tablets, online purchasing and storage accounts, blogs, and social networking accounts, but does not include the physical devices where digital property may be housed. In some instances, digital property has completely replaced tangible property. Instead of letters, we use e mail to communicate. Family photos are no longer stored in photo albums, but are instead stored on our computers or on the cloud. Instead of buying a CD, we download our favorite music from various websites. We file our tax returns electronically and we perform most of our banking online.

This technology has made most of our lives easier, but at the same time has made it harder for fiduciaries to access the information they need to perform their duties after a loved one has died or become incapacitated. In 2015, the Revised Uniform Fiduciary Access to Digital Assets Act (the "Revised Uniform Act") was released to address issues relating to a fiduciary's access to digital property.

On March 30, 2016, Governor Scott Walker signed the Wisconsin Digital Property Act (the "Act") into law, and the law became effective as of April 1, 2016. The Act is largely based on the Revised Uniform Act, and it enables fiduciaries to obtain access to digital property so that they can perform their fiduciary duties.

The Act deals with access to digital property for four different types of fiduciaries: personal representatives, agents under powers of attorney, trustees, and guardians or conservators. The rules differ slightly depending on what type of fiduciary is involved, but the basics are the same.

The default provisions of the Act grant a fiduciary access to certain parts of the principal's digital property, but not all. The Act differentiates between a "catalogue" and the "content" of digital property. If we use e mail as an example, the catalogue would provide information on when an e mail was sent and to whom it was sent. The content, on the other hand, would be just what it sounds like, the actual content of the e mail. The default provisions of the Act give fiduciaries access to the catalogue, but not the content.

Since the rules are only default rules, a principal can override them to deny access to the catalogue or to grant access to the content. This can be accomplished in a number of different ways. A custodian (for example, Google) may offer an "online tool" whereby the user can direct the custodian to disclose or not disclose certain

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digital property to a designated recipient (not necessarily a fiduciary). This online tool should not be confused with the "terms of service agreement" signed when opening up a new account, which most of us generally accept without paying much attention to what it says. The online tool must be distinct and separate from the terms of service agreement. A direction in an online tool overrides a contrary direction in a will, trust, power of attorney or other governing instrument.

If a user has not used an online tool, direction can be given in a will, trust, power of attorney or other governing instrument. If direction has been given in either an online tool or a governing instrument, such direction will override anything contrary contained in a terms of service agreement. Lastly, if direction has not been given in an online tool or a governing instrument, the terms of service agreement may override the Act.

If you have questions regarding digital property or if you would like to update your estate planning documents to broaden or lessen your fiduciaries' access to your digital property, please contact one of the members of the Trusts and Estates Practice and we will be happy to assist you.