

# MAY 2018 NEWSLETTER

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## ESTATE PLANNING FOR DIGITAL ASSETS IN 2018

### FIRM ANNOUNCEMENTS

#### A. SEMINAR

Joseph R. Pozzuolo, Esquire presented a seminar to the graduating medical professionals at Thomas Jefferson University Medical School on Monday, April 30, 2018 at noon titled “Practical and Legal Considerations of Planning Your Professional Future”.

#### B. BLOGS

1. The following are a few of the business, tax, employment, estate planning and business litigation blogs posted on our main website [www.pozzuolo.com](http://www.pozzuolo.com) during the past month:

- a. Liquidated Damages Enforceable Even When A Party’s Breach Does Not Cause Harm To Non-Breaching Party;
- b. Should I Use A Will Or Living Trust To Deal With My Property;
- c. Divorce & The Family Business; and,
- d. Business/Commercial Litigation Injunctive Relief Is Granted In Enforcing Non-Competitive Clause In Sale Of Business

**Please visit our website [www.pozzuolo.com](http://www.pozzuolo.com) for more information on these and other relevant business, tax, estates and employment topics.**

2. The following are a few of the family law blogs posted on our family law website [www.pozzuolofamilylaw.com](http://www.pozzuolofamilylaw.com) during the past month:

- a. Marriage, Divorce & The Family Business Pre-Marital & Post-Marital Agreements;
- b. Pending Divorce Action Is Not A Basis For Forfeiture Of Spousal Share Of Husband's Estate;
- c. Estate Administration- The Will After Death; and,
- d. How Do I Name A Guardian For My Young Children?

**Please visit our website [www.pozzuolofamilylaw.com](http://www.pozzuolofamilylaw.com) for more information on these and other relevant family law topics.**

Please visit our Facebook page to read all of our past and future blogs: Pozzuolo Rodden, PC

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## ESTATE PLANNING FOR DIGITAL ASSETS IN 2018

Twenty years ago all of your telephone calls were made from your home phone; all written messages were letters or faxes on paper; your music was confined to collection of records, 8-track or cassette tapes or CDs; your favorite movies were on a shelf; your photos were in album books or boxes; your favorite books were stored on a bookshelf; your games were confined to a shelf or closet; playing video games meant owning a cartridge that could be played regardless of a subscription fee or internet connection; if you sold items, you took them to a store which physically held inventory and sold items; and all your important documents were stored in a fire protected file safe. When you died, everything was in your home, office, safe deposit box, with a trusted friend or professional, or a storage container. Everything was easy to find and access and easy to transfer to your loved ones.

Today, almost all of these physical mementos are replaced by a few connected devices. Access is not merely by entering your home, but by typing in a username and password as well as submitting to certain terms and conditions of service. We are living in a digital age and more or less living our lives intangibly online rather than physically. Digital assets takes many forms and includes all content, files and accounts created and stored online or on a computer, smartphone and tablets, etc. Some examples include online banking and brokerage accounts, trading sites like Ebay, e-books, internet payment sites like Paypal, email, facebook and twitter accounts, digital currency like Bitcoin and online gaming accounts.

Accordingly, there are different issues that now arise such as to your ability to transfer the digital rights to the music, videos, games and books you have already paid for, your ability to ensure your family or personal representative can find all the important information contained on the digital assets that would have traditionally been contained on paper in your home, and more importantly, whether your personal representative and/or heirs can even access those rights or accounts to settle

your estate, transfer your assets and settle your final bills.

For instance in the most simplest form, while in the past you could have easily bequeathed your 2,000 music record collection to your children, you may not have the rights to bequeath your 20,000 song iTunes music collection. You may have organized 10,000 photos of every special event of you and your family's life on Flickr, but now your family may not be able to find your photos after searching Photobucket, Google Drive, and a dozen other photo sites. Last, even if your family knew those photos were on Flickr, Flickr may deny your personal representative, spouse or children access due to its terms of service, or federal cyber and privacy laws.

You have amassed this whole collection of items and mementos, but if you do not plan properly, it may be the equivalent of dumping your record, game and book collection at sea, and burying your photos, letters, and such in a random forest. This newsletter will discuss the issues relating to: 1) ownership of such digital rights; 2) the importance of ensuring all digital rights are accounted for; and, 3) gaining rights to access to such rights.

#### 1) *Ownership of Digital Content*

There are a number of issues relating to your ownership of content purchased from a third party. For such content, there are two models of a subscription like Spotify and Pandora, or the more traditional pay per item model.

The subscription model is similar to paying for a library card at a traditional library. The library has a collection of books, which you can access while you continue to pay for the library card and follow the terms and conditions of the library. This is not as much of an estate issue as it is fairly transparent that you are paying for a license and your children do not have any rights to your access after your death.

The model that creates confusion and needs to be planned for is the iTunes or Amazon music type model. In this model, you shell out \$X for songs, videos, games, and other digital content and you seemingly have unlimited non-commercial fair use rights. This appears to mimic the traditional rights and ownership of your tapes and CD collection but in the digital form.

However, what most people do not realize is while you can bequeath your CD/tape collection to whomever you want, it may not be legal to transfer the songs, videos, games, and other digital content collection to a third party child(ren) absent further permission. Most of these models provide that you are only purchasing a user license to the content that technically cannot be transferred. For instance, Apple's Apple Media Services Term and Conditions states that content can only be used on up to five computers and any number of devices that you sync to from those computers. If you died, you personally or physically cannot sync to any computer so arguably the media should not be used on any computers. Further, there is nothing on point that gives you a right to transfer or bequeath these songs the same way you could transfer or bequeath a physical tape or CD.

To address these issues the following recommendations are made:

1. **Due Diligence:** While each individual purchase with a content provider may be minor dollar purchase, over your life you may have purchased \$10,000 worth of

songs, videos and games, therefore, it may be wise to research the company's transfer at death policy before investing substantial dollar sums for the digital content. Certain content providers may permit you to transfer content to a third party account upon providing documentation, or permitting someone with user and password access to change the contact information. This ensures that if you are spending \$10,000 intending to create a digital music/video/game collection, it will not go to waste at your death.

2. **Consider Subscription Models:** The subscription models may or may not be a better option depending on your use. For instance, if Spotify is \$10/month, but you rarely add new songs to your collection or it does not have many songs that you like due to artist restrictions, it may be better to purchase the songs individually whereby the ability to transfer at death is an added bonus, if permitted.
3. **Address Digital Content in Will or Trust:** In all instances, make sure to have a section bequeathing digital content in your will or a trust. In addition, while it is not wise or prudent to have user names and passwords in your will or trust, it is wise to have a list of digital account information with your final documents.
4. **Transfer to a Hard Drive:** If possible, make sure you have a downloaded version of your digital content on a hard drive, CD, DVD, or some other similar device. While your heirs might not be able to access the content from the provider if the provider terminates access and/or your personal representative or heirs do not have your password, you can physically bequeath the hard drive so it mimics the simplify traditional CD and/or tape model.

## 2) *Accounting for All Assets*

There are two major reasons why digital assets need to be accounted for: 1) the ability to actually find the assets; and, 2) the need to value any digital assets transferred.

First, traditional physical assets are much easier to keep track of. For music, photos, videos, and the like, ten years ago, they were usually contained somewhere in your home and even if they were under that pile of clothes in the attic, they are relatively easy to find. Now these assets may be on one of the many of platforms available on the web. To find where all of your digital assets are would be a great undertaking and be like hiding your assets in a hole in a gigantic forest, without letting your heirs know you even had such assets. This is especially true for digital assets like bitcoins that are anonymous and without codes. Without specific information, the assets would just sit there lost. The main way of addressing this is to assure that you have a thorough list of your digital assets with user names, passwords, and other pertinent information like login question answers with your will and other final documents. This way, there is a treasure map to where you hid your digital assets rather than asking your heirs to scour the internet. Better yet, you may backup all or most of the content periodically onto a separate hard drive. This way your personal representative will have list, with everything in one place and it saves the time, effort and expense of downloading the content from the cloud.

The second kind of accounting would be the need to value and report such digital assets. If you

transfer \$20,000 worth of digital assets to your son, this must be reported on your federal and state death tax returns. Beside death taxes, another reason to report these assets is that upon death appreciated assets receive a step up in basis to fair market value which can save future capital gains taxes. Bitcoins are prime examples of this as they are treated as capital assets. You might have bought \$100,000 of Bitcoins at \$1,000/coin and the market is currently at \$9,000/coin. In the absence of reporting, you have an \$800,000 built in gain. By death tax reporting, the basis in such Bitcoins is stepped up to \$900,000 whereby if your heir sells the coins for \$1,000,000 a month after your death, he/she only recognizes \$100,000 of capital gains instead of \$900,000.

### 3) ***Gaining Rights to Access the Digital Assets***

A critical issue with digital assets is gaining rights to access such digital assets. Beyond transferring rights to third party digital content as discussed above, there are a number of obstacles that may stand in the way of accessing certain accounts even if you know where they are along with the user name and passcode. The access is generally governed by federal or state cybersecurity laws and privacy laws including the Computer Fraud and Abuse Act, the Electronic Communications Privacy Act and the Stored Communications Act, as well as the terms and conditions of service of the specific company hosting the account. While knowing usernames and passwords may enable you to access everything incognito and do what you need without contacting the hosting companies themselves, under federal and state law, generally you can face fines and potentially jail time for unauthorized access to accounts, if caught. To an extent these protections are warranted as you may not want your personal representative or heirs to see everything on your email accounts. However, you may need access to such email account to access other digital assets where information, including important financial information and documentation, is emailed to the primary email address. Additionally, terms of service of the company hosting the account may have additional restrictions. The company may forbid unauthorized access without actual consent or require certain documentation before accessing the information. This means, absent actual consent to access your digital contents they may be lost forever.

The following are recommended to address access issues:

1. **Provide Clear and Explicit Access to Digital Accounts**: Besides providing the username and password list, it is extremely important to be clear about who has access, the extent of the access, whether you want certain accounts not to be accessed, and in which situations you want to permit access to the restricted accounts. This may be done through a power of attorney, a will, a trust or another separate document. This makes it clear so family members are not poking around into something you wanted to let die with you, and individuals, other than yourself, can only access what you wanted them to access. While this document may not always be accepted, this gives you a document that your family or personal representative can submit (redact non related account information when submitting!!!) to the company hosting the account to help ease the process.
2. **Uniform Fiduciary Access to Digital Assets Act (“UFADAA”)**: In the absence of such written consent as discussed above, most states have approved some form of the UFADAA which provides a fiduciary access to digital accounts. It is good as a backstop, but do not rely on this as express consent putting forth specific

permissions is always better to tailor the access that you would like to provide and your state may not have enacted it to date. In the tristate area, New Jersey and Delaware have a form of the UFADAA, but Pennsylvania DOES NOT which makes providing specific consents more important in Pennsylvania.

3. **Transfer to a Hard Drive**: As stated above, if you transfer the content to a hard drive periodically as a backup, this is a self-help way to circumvent account host restrictions. You can put the photos, videos, and email content you want your personal representatives and/or heirs to have an access on the hard drive and bequeath the hard drive. Again, this may be illegal for some third party content, but for self-created content like family pictures, the hosting site has no involvement. Also, you can put only the pictures, videos, and emails you want heirs to see which protects your privacy.

#### 4) ***Conclusion***

We are in a different digital world than twenty years ago and the laws of the country and the states are still catching up. While there is a gap, it is important to plan specifically for your digital assets to avoid the issues relating to ownership, ensuring all digital assets are accounted for, and that your digital information can be accessed. Overall, this requires providing due diligence on how important digital accounts and assets are treated at your death, leaving a list of usernames, passwords and other information relating to digital information, provide clear consents how much you would like a fiduciary or other heirs to access your digital assets or what you do not want them to access, and potentially move the content on a hard drive that can be bequeathed. The UFADAA has helped to provide a backstop in the failure of planning, but this may not provide the exact direction and access you would prefer, and it does not help if you are a resident of a state such as Pennsylvania that has not enacted it yet.

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If there are any legal questions you would like this office to answer in the future, please email the question to us at [info@pozzuolo.com](mailto:info@pozzuolo.com). Each month, the question with the most relevance to our privately held business clients, advisors, and friends will be answered in our monthly newsletter. The questions can relate to any of the areas practiced by this office including business planning and transactions, corporate law, commercial litigation, employment law and litigation, commercial real estate and development, construction law and litigation, estate planning, estate administration, tax and pension law, family law litigation.

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***Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.***

This newsletter is courtesy of Pozzuolo Rodden, P.C.

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