

Estates, Gifts and Trusts Journal

BNATAX
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America's Tax Authority

Virtual Assets

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Virtual assets may be something one sees, creates, or relies upon every day, yet they may simultaneously be something one never considers as valuable or worth incorporating into an estate plan. This article will explain how to reshape perceptions and protect virtual assets to benefit one's estate and heirs.

WHAT ARE VIRTUAL ASSETS?

With respect to electronics and the internet, "virtual" is defined as something that is "occurring or existing primarily online" or that is "being simulated on a computer or computer network."¹ Accordingly, one's "virtual assets" are the electronic information

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Thank you to Aubrey Thomas, Annie Palm and Darlene Pasieczny for their contributions to this article. See our blog at <http://www.wealthlawblog.com>.

¹ "Virtual," *Merriam-Webster.com.*, <http://www.merriam-webster.com/dictionary/virtual>.

stored on a computer or through computer-related technology. This could include digital images from photographs, electronic investment account statements, emails, social internet accounts like Facebook or LinkedIn, bank account statements, etc.

For many, our primary means of communication is email, often through multiple email accounts. We "tweet" about the latest happenings through our Twitter accounts. We keep in touch with friends and colleagues through social networking sites, such as Facebook and LinkedIn. We store family photos and other important information on a growing array of online sites. We access our financial assets, such as bank accounts and brokerage accounts, over the internet. We pay our bills electronically. We own internet domain names. In the aggregate, these "virtual assets" have tremendous aesthetic, emotional, and financial value.

A large segment of the U.S. population has some type of online account. These accounts are used to communicate, pay bills, conduct business, create online personalities, and even date. Because many individuals protect such accounts by limiting access to themselves only, accounts with protected passwords can create problems when the account holder passes away, as no one has access to the passwords. As a result, digital assets with online accounts or any information, document, or media stored on one's computer are oftentimes left untouched. This includes photos, videos, music, medical records, legal or financial documents, websites, blogs, social media accounts, banking information, business accounts, and any other material or data owned by an individual. Oftentimes, these assets have economic or sentimental value and should be included in the estate for tax purposes.

The proliferation of virtual assets is certain to increase in the future. In a recent study,² internet use in the age group over 71 was only 29%. However, inter-

² Estabrook, Pew Internet & Am. Life Project and Graduate Sch. of Libr. & Info. Science, U. of Ill. at Urbana-Chapman, "Information Searches That Solve Problems: How People Use the Internet, Libraries and Government Agencies When They Need Help" (2007).

net use jumped to almost 80% among the Baby Boom generation and exceeded 90% for those 30 and younger. As the Baby Boomers grow older, virtual assets are certain to become a most significant factor in the estate planning process.

Online Accounts

Anything that an individual creates is considered intellectual property and is governed by traditional property law.³ Thus, an individual usually owns the contents of his or her emails. Many accounts, however, are in the form of licenses rather than actual property, and these licenses generally expire upon death.⁴ Moreover, the terms of service of many sites require that the account holder grant the provider ownership of his or her content.⁵ Thus, transferability upon death is oftentimes prohibited by the site's terms of service.⁶ It is, therefore, important to read the terms of service of each site and service used. Examples of some of the policies are set forth below.

Yahoo! Mail

Yahoo!® Mail (Yahoo) considers an account to be private property, and it will not hand over account information to the decedent's family members without legal action.⁷ Additionally, Yahoo may permanently delete all accounts and their contents, preventing access to anyone, upon receipt of a copy of a death certificate.⁸

In fact, Yahoo's terms of service include a "no right of survivorship and non-transferability clause." The clause states that, "You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted."⁹

In the well-known case of *In re Justin Ellsworth*, for example, a U.S. Marine was killed in Iraq, and his family was denied access to his Yahoo email account

because of the company policy.¹⁰ Yahoo refused to give the email password to the family as a result of Yahoo's terms of service, which required the company not to disclose the private email communications of its users.¹¹ The family filed a suit against Yahoo, and in April 2005, a probate judge signed an order directing Yahoo to provide the contents of the email account used by Ellsworth.¹² Although Yahoo complied with the order, Yahoo maintained that its compliance was no way indicative of its stance on who holds legal title to the account information.¹³ Yahoo's compliance, it claimed, was a product of the court order, and Yahoo promised to defend its commitment to treat user emails as private and confidential.¹⁴

Hotmail

Hotmail is one of the more accommodating providers when it comes to accessing or closing a deceased family member's account. In submitting a request, one needs to include the following information:

- One's name, phone number, and email address.
- A document that states that he or she is the beneficiary or the executor of the decedent's estate and/or that he or she has power of attorney for an incapacitated customer and/or is the next of kin.
- A photocopy of one's driver's license or other government-issued identification.
- A photocopy of the death certificate.
- The complete name, address, email address, and date of birth of the account holder.
- Approximate date of account creation and date of last login (if known). If this information is not known, one should indicate that it is not known.¹⁵

Within five days of the receipt of all of the aforementioned information, the Custodian of Records will contact the individual to confirm his or her identity and will then send him or her a CD with the decedent's account information, including contacts and emails.¹⁶

Google Gmail

Gmail also provides a method through which family members of a deceased individual may gain access

³ "Intellectual Property," *Merriam-Webster.com*, <http://www.merriam-webster.com/dictionary/intellectual%20property>; Carroll, "A Legal Perspective," *Digital Beyond* (6/30/09), <http://www.thedigitalbeyond.com/2009/06/a-legal-perspective>.

⁴ *Id.*

⁵ Calem, "What Happens to Your Online Accounts When You Die?" *Techlicious* (6/29/10), <http://www.techlicious.com/how-to/what-happens-to-your-online-accounts-when-you-die>.

⁶ *Id.*

⁷ AuMiller & Hoyt, "Estate Planning for Your Online Identity," *Wealth Counsel* (6/9/10), <http://estateplanning.wealthcounsel.com/bid/44803/Estate-Planning-for-Your-Online-Identity>.

⁸ Calem, above, fn. 5.

⁹ "Yahoo! Terms of Service," *Yahoo!* <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html>.

¹⁰ Atwater, "Who Owns E-Mail? Do You Have a Right to Decide the Disposition of Your Private Digital Life?" *Utah L. Rev.* 397, 399 (2006).

¹¹ *Id.* at 401.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ "Hotmail Death Policy: How to Access or Delete Hotmail Accounts," *Entrustet*, <http://blog.entrustet.com/digital-executor-toolbox/how-to-access-or-delete-hotmail-accounts>.

¹⁶ *Id.*

to account information. However, Gmail automatically deletes any account that has been inactive for more than nine months. For a family member to gain access to the contents of the deceased's account, Gmail requires that a family member submit the following information:

- His or her complete name, address, and email address, and a photocopy of his or her government-issued ID or driver's license.
- The decedent's name (first and last) and email address.
- A copy of an email he or she received at his or her email address from the decedent, including complete headers.
- Proof of death (death certificate or equivalent).
- If the decedent was over 18, legal proof that the family member is the next of kin or legal executor of the estate.
- If the decedent was under 18, a copy of the decedent's birth certificate.¹⁷

Gmail will process the request within 30 days and will provide a CD with complete contents of the decedent's email account, including contacts and emails.¹⁸

MySpace

MySpace provides no means by which heirs can inherit a deceased user's page.¹⁹ Rather, the MySpace terms of agreement imply that, when an individual dies, his or her profile dies as well.²⁰

Although MySpace will not let someone else edit any of the information, MySpace may assist in preserving, deleting, or removing information from a profile if one:

- Makes note of the decedent's MySpace ID.
- Sends an email to accountcare@support.myspace.com with the decedent's MySpace ID, the sender's email address and relation to the deceased, and proof of death (i.e., death certificate or obituary).

¹⁷ "Gmail Help: Accessing a Deceased Person's Mail," *Gmail*, <http://mail.google.com/support>.

¹⁸ *Id.*

¹⁹ Ramadge, "What Happens to Your Email When You Die?" *Technology* (11/4/09), <http://www.news.com.au/technology/what-happens-to-your-email-when-you-die/story-e6frfo0-1225794263778>.

²⁰ Spies, "What Happens to Your Website When You Die?" *Associated Content* (1/8/09), http://www.associatedcontent.com/article/518313/what_happens_to_your_website_when_you_pg3.html?cat=15; "MySpace Terms of Use Agreement," *MySpace*, <http://www.myspace.com/Help/Terms>.

- Includes in the request whether information in the profile should be preserved, deleted, or removed.²¹

Facebook

When Facebook is notified that a user has passed away, Facebook puts the profile in "memorial state."²² In this state, certain profile sections are hidden from view to protect the privacy of the deceased.²³ Logging on to the account is prohibited, but confirmed friends are able to leave messages on the wall.²⁴ Moreover, Facebook allows for the creation of "digital memorials," which provide family members and friends with the administrative rights to manage tributes to the deceased on the user's profile.²⁵

YouTube

YouTube allows heirs with power of attorney to gain access to a user's account and its content. YouTube has a web page that contains instructions for this process.²⁶

Websites

A website domain name (URL) is registered to an individual as a true asset that is transferable and that passes with the residue of an estate.²⁷ Moreover, one's website blog content firmly belongs to an individual under copyright law.²⁸

The law provides that an individual can bequeath his or her copyright to others.²⁹ For an individual to transfer a website to a beneficiary, therefore, the website must be properly owned and copyrighted.³⁰ Thus, once a copyright is obtained, a website can be trans-

²¹ "MySpace Death Policy: How to Access, Memorialize or Delete a Deceased Person's MySpace Account," *Entrustet*, <http://blog.entrustet.com/digital-executor-toolbox/how-to-access-memorialize-or-delete-a-deceased-persons-myspace-account>.

²² Romano, "So What Does Happen to Your Digital Assets After You Die?" *Digital Beyond* (12/21/10), <http://www.thedigitalbeyond.com/2010/12/so-what-does-happen-to-your-digital-assets-after-you-die/#facebook>; "Report a Deceased Person's Profile," *Facebook*, http://www.facebook.com/help/contact.php?show_form=deceased.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ "I Need Access to the Account of a Deceased YouTube Member," *YouTube*, <http://www.google.com/support/youtube/bin/answer.py?hl=en&answer=94458>.

²⁷ AuMiller & Hoyt, above, fn. 7.

²⁸ *Id.*

²⁹ 17 USC §201(d) (2006) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession").

³⁰ AuMiller & Hoyt, above, fn. 7.

ferred to the intended beneficiary through a will or trust with other estate assets.³¹

Many individuals and businesses have actual websites, as opposed to accounts. Thus, the “owner” of a website must determine whether or not he or she would like the website to continue upon his or her death. If an individual chooses to shut down his or her website upon death, or if he or she decides to continue the website after death, it is important that there be a plan as to how, when, and who carries out this desire. If the website is owned by a business entity, such as a corporation or limited liability company, then the website’s ownership will not change upon the death of the business owner, and more traditional business succession principles will determine who will control the website after the decedent’s death.

Yet, when we die or become incapacitated, what happens to these assets? Who can gain access to this “virtual existence” when we are gone?

The answer is very complex. Most of these virtual assets are controlled by a license agreement with the provider of the online access. Such license agreements vary from provider to provider. Without careful planning, chaos may reign. This article provides some key recommendations to consider.

INTEGRATE VIRTUAL ASSETS INTO YOUR ESTATE PLAN

The Planning Dilemma

As the internet has developed over the last 20 years, so has the sophistication of the use of passwords to internet-based virtual assets. Online providers of virtual assets require user name and passwords, and the providers’ security protocols often require users to change passwords periodically. When registering for online access to virtual assets, we are often required to list “challenge questions,” the answers to which would often only be known to the user (e.g., “What was the name of your favorite teacher in high school?”). Providers caution us to not share our passwords with anyone.

These security measures create a serious dilemma when the user dies or becomes incapacitated. If the virtual assets in question are vital to one’s overall estate planning, the failure of fiduciaries or family members to access these assets could create serious difficulties and unnecessary expenses. Hence, it is very important that sensible measures be taken to integrate virtual asset planning into one’s overall estate plan. Here are some steps to consider in this process:

Identify All Virtual Assets

Whether one is in the planning stages of an estate plan or beginning the process of administering a decedent’s estate, one key preliminary step is to identify the relevant assets. When evaluating virtual assets, many such assets will be fairly obvious, and they include many of the assets already discussed in this article (i.e., online financial accounts, email, social media accounts, access to vendors whose bills are paid electronically, online subscriptions, and online storage accounts). Often, it may take a careful review of a year’s worth of bank and credit card statements to identify most vendors who may be paid by some electronic means.

Not all virtual assets are internet-based. For example, a great deal of electronic information may exist on the hard drive of one’s home computer or laptop, or more portal storage devices, such as flash memory drives, CDs, or DVDs. If the file structure on such media is difficult to interpret, this could lead to great confusion if clear instructions are not left behind by the decedent. Home security systems are often accessed through keypad codes or passwords. In addition, personal or business smartphones may contain significant amounts of personal information that would be very sensitive.

Not all electronically accessed information relates to an “asset.” It is now very common for many regular monthly bills (such as utility bills) to be paid electronically. Most credit card, bank loans, and mortgage accounts allow electronic access and bill paying capabilities. Hence, it is essential that a list of such “virtual liabilities” be maintained as well.

Choose Appropriate Personal Representatives, Trustees, and/or Advisors

Wills, trusts, and powers of attorney have been around for centuries. In appointing an executor, trustee, or agent under a power of attorney, an individual is appointing a representative that he or she trusts to take control of his or her assets and follow his or her legal instructions. Whether dealing with virtual assets or an office building, one should appoint individuals in these roles who are both trustworthy and competent to carry out instructions.

But let us face reality! Not everyone is computer and internet savvy. If a person’s estate is complex and has a great many virtual assets, a technophobic fiduciary is likely not the best choice. If family politics or “primogeniture” (i.e., oldest child serves first, then the next oldest, etc.) requires that an individual without technical or computer skills be named as personal representative and/or trustee, then the will or trust could name either a co-fiduciary or an informal advisor to help administer the virtual assets. In a trust setting, the Oregon version of the Uniform Trust Code

³¹ *Id.*

contains a provision relating to trust “advisors” in which an individual is appointed to perform particular tasks on behalf of the trust.³² Hence, one might consider appointing a “virtual asset trust advisor” if the circumstances require.

Provide Specific Virtual Asset Authority in the Will or Trust

The law relating to virtual assets has been somewhat slow in developing. At this writing, only two state legislatures have promulgated statutes to specifically authorize fiduciaries to access a decedent’s virtual assets.³³ Hence, one should consider including specific authority in wills and trusts to give the fiduciary specific authority over virtual assets. Particularly because the contemplation of virtual assets in the estate planning process is a relatively new issue, a trust or will that grants specific authority to a fiduciary could be particularly important if one’s estate contains a significant number of virtual assets. For example, one could consider including the following provision in his or her trust:

Upon the death of the Settlor, the Trustee may take such actions as are reasonably necessary and prudent to locate, administer, transfer, and distribute any Virtual Asset (as hereinafter defined) which the Trustee or Settlor may own or otherwise possess rights to at the time of the Settlor’s death. Without limiting the generality of the foregoing, the Trustee is authorized: (a) to hire and reasonably compensate computer or other technical experts to assist the Trustee with respect to any Virtual As-

set; (b) to change passwords or other means to access and/or control any Virtual Asset; (c) to take such actions as the Trustee shall deem necessary to protect the security and continued accessibility of any Virtual Asset; and (d) to communicate with any software licensor, internet service provider, or other third party in connection with the location, administration, transfer, or distribution of any Virtual Asset. For purposes of this Trust, a “Virtual Asset” shall mean any intangible personal property which is stored and/or accessed by any electronic means whatsoever, whether on a personal computer, computer network, portable electronic storage device or media, or through and/or over the internet.

Create a Virtual Asset Instruction Letter

A “Virtual Asset Instruction Letter” or “VAIL” will list all online accounts and other virtual assets, and will provide web addresses, user names, and passwords to give the designated representative the ability to identify and access these accounts. The VAIL should also contain the decedent’s instructions as to what is to be done with these assets. *However*, it is important to keep in mind that, under the laws of most states, unless the VAIL is incorporated into the terms of one’s will or trust, any such instructions may not be legally binding. That is not to say that the VAIL would not be an extremely helpful resource; it is just important to realize that the VAIL is not the place to designate the beneficiary of any asset or issue instructions that *must* be legally binding.

One should place the VAIL in a safe location, such as a safe deposit box or a home fire-proof safe, which can be accessed only by a legal representative. In addition to placing the VAIL in written form, one might consider saving the VAIL to a flash memory drive or CD, which can make the representative’s access to these accounts more efficient. For assets such as email accounts, the VAIL may instruct the representative to delete the account after a period of time. Most such accounts will simply terminate after a certain period of inactivity.

Gaining access to another’s online accounts is often more troublesome in cases of incapacitation. One reason for this is that the records may be needed to meet expenses, which continue while a person is disabled, but which generally end at death. Informal measures, such as giving a password to an adult child so that he or she can pay the bills of an ill parent can be problematic. If, for example, a sibling accuses that child of misusing funds, the child may need the par-

³² See, e.g., Or. Rev. Stat. §130.735 (2009). Or. Rev. Stat. §130.735 specifically states:

A trust instrument may appoint a person to act as an adviser for the purpose of directing or approving decisions made by the trustee, including decisions related to distribution of trust assets and to the purchase, sale or exchange of trust investments. The appointment must be made by a provision of the trust that specifically refers to this section. An adviser shall exercise all authority granted under the trust instrument as a fiduciary unless the trust instrument provides otherwise. A person who agrees to act as an adviser is subject to Oregon law and submits to the jurisdiction of the courts of this state.

See also Del. Code Ann., tit. 12, §3313 (Delaware’s trust advisor statute).

³³ See Idaho Code §15-3-715(28) (2011) (authorizes personal representative to “take control of, conduct, continue or terminate any accounts of the protected person on any social networking website, any microblogging or short message service website or any e-mail service website); Okla. Stat. Ann., tit. 58, §269 (2010) (stating that “[t]he executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites”).

ent's authorization and instructions to defend himself or herself.³⁴

Some recommend preparing a durable power of attorney, authorizing another individual to act as an agent and handle finances, to avoid these problems.³⁵ However, a power of attorney alone may not be sufficient in the electronic world.³⁶ Bills paid online, automatically charged to a credit card or debit card account, can nevertheless be hard to identify and audit.³⁷ A VAIL provides the necessary information to allow a trusted fiduciary to perform his or her duties.

In addition to containing instructions as to particular assets, the VAIL could set forth a decedent's wishes as they relate to administering his or her virtual presence after death. For example, a decedent may wish that email contacts and Facebook friends be notified of his or her passing.

Consider How Virtual Assets Should Be Disseminated

If a virtual asset is a bank or investment account, the will or trust should (presumably) control who will receive these assets at death. However, what about access to family photos or genealogical information? One might want to specifically instruct his or her executor or trustee to replicate and distribute these items so that they pass to *multiple* intended beneficiaries.

ADMINISTERING VIRTUAL ASSETS IN A DECEDENT'S ESTATE

In an estate or trust administration, the fiduciary³⁸ should adhere to the common practices required by law in dealing with virtual assets. However, as this area of the law is still developing, the fiduciary charged with administering a decedent's estate or trust is likely to encounter a relative dearth of clear legal authority as it relates to the administration of an estate or trust containing virtual assets. Nevertheless, a careful application of existing fiduciary standards will likely be helpful. This discussion would also be relevant in a similar context if a person loses mental capacity and a conservator or successor trustee is faced with similar dilemmas with respect to the incompetent person's assets.

³⁴ Jacobs, "When Others Need the Keys to Your Online Kingdom," *N.Y. Times* (5/20/09), available at <http://www.nytimes.com/2009/05/21/your-money/estate-planning/21ONLINE.html>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ In this section, we use the term "fiduciary" to generally refer to the individual or entity charged with administering a decedent's estate or trust (i.e., an executor or personal representative of an estate and a trustee of a trust). Most of the principles discussed in this section apply in the same manner to each type of fiduciary.

Virtual Assets and a Trustee's "Prudent Person" Standard

In a general sense, a fiduciary's duty is often expressed as a "prudent person" standard. For example, Section 804 of the Uniform Trust Code states that a trustee "shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust."³⁹ However, how do these standards apply to a fiduciary's duties in dealing with virtual assets held by an estate or a trust? First, comment "a" to Section 174 of *Restatement (Second) of Trusts* is helpful in stating that the standard of care and skill required of a trustee is an "external standard." Hence, the proliferation of virtual assets in modern society would necessarily lead to the conclusion that a trustee's duties must evolve to meet the changing manner in which individuals own and manage their assets. In 1960, it would have been unlikely for a court to conclude that the "ordinary prudence" of a trustee would include a working knowledge of computer technologies. However, a court in the "information age" would likely reach a much different conclusion. The following discussion may provide the fiduciary with at least a starting point in evaluating the appropriate steps to meeting the "prudent" standard in the context of an estate or trust that owns a substantial number of virtual assets.

Locating a Decedent's Virtual Assets

Consider the possibility of a decedent with substantial assets and a strong tendency to manage those assets in a way that leaves only a limited "paper trail" in the traditional sense. If the decedent managed his or her assets online, received "paperless" account statements via email, maintained information about those assets on a "cloud" server, and generally communicated about those assets by email, unless the decedent undertook careful planning during his or her lifetime, merely *finding* the decedent's virtual assets may present a serious challenge.

If such a decedent had not planned adequately, what constitutes "prudent" action by the fiduciary

³⁹ See also *Restatement (Second) of Trusts* §174 (the trustee "is under duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property . . ."); Uniform Probate Code §7-302 (the trustee "shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another . . ."); Or. Rev. Stat. §130.665 (statute is identical to Uniform Trust Code §804); Del. Code Ann. tit. 12, §3302(a) ("a fiduciary shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account").

may be difficult to ascertain. First, the fiduciary should consider whether it may be necessary to hire a forensic expert in information technologies to advise the fiduciary on a prudent process for locating a decedent's virtual assets. The fiduciary should also attempt to gain working access to and analyze all potential "portals" into the decedent's digital existence. This may include the decedent's personal computer(s), smartphone, or other digital storage devices. If the decedent utilized financial software (e.g., Quicken or Microsoft Money), entries found in such programs might lead to virtual assets. Finally, sources such as tax returns and Forms 1099 could reflect assets that might not otherwise be found in traditional "paper records" such as account statements.

Administering an Estate with Virtual Assets

Presuming the decedent's assets can be located, there are a number of steps that the personal representative and/or trustee should consider.⁴⁰

1. The fiduciary should properly "marshal" these assets by making certain that the fiduciary is the only party that has access to the assets. For example, the fiduciary should consider changing the password that is used to access the asset. If the decedent had shared such a password with a family member or other individual who is not the fiduciary, then such a "digital interloper" could interfere with the fiduciary's ability to accomplish the proper administration of the estate or trust. The fiduciary should remove all private and/or personal data from online shopping accounts (or close them as soon as reasonably possible).

2. If the decedent had established any form of "automatic" means to pay bills, make loan payments, or other debts, the fiduciary should determine the exact nature of these arrangements, then evaluate whether they should be continued, or (more likely) converted to a payment method that is consistent with the fiduciary's administrative and accounting procedures.

3. If possible, the fiduciary should endeavor to remove personal or sensitive data (such as credit card information) from online sites. This is yet another means to try to prevent identity theft or other unforeseen consequences.

4. While undertaking such control, the fiduciary should also take steps to archive important electronic data for the full duration of the relevant statutes of limitation. In this way, if data is updated during the course of administration, the fiduciary will have a

⁴⁰ See also Kennedy, "Estate Planning for Your Digital Assets," *Law Prac. Today* (Mar. 2010), available at <http://apps.americanbar.org/lpm/lpt/articles/pdf/ftr03103.pdf>.

"baseline" of data if beneficiaries or other parties raise questions or complaints in the future.

5. Along with all other assets under the fiduciary's control, the fiduciary should prepare a written inventory of the decedent's virtual assets. If a virtual asset has its own extrinsic value (such as a commercial website or online publication), then the value of such asset should be separately listed on the estate's or trust's asset inventory. While placing a value on such assets may be difficult, it is certainly not beyond the professional expertise of a qualified valuation professional. This step may also be relevant to the extent that the estate may be subject to federal estate tax or state-level transfer taxes.

6. The fiduciary should consider consolidating virtual assets to as few "platforms" as possible (e.g., have multiple email accounts set to forward to a single email account). This may ease the fiduciary's administrative burden.

7. If appropriate, the fiduciary should consider notifying the individuals in the decedent's email contact list and other social media contacts. As these contacts may be very sensitive and personal in nature, the fiduciary may wish to consult with any appropriate family members before undertaking such communications.

8. The fiduciary should keep all accounts open for at least a period of time to make sure all relevant or valuable information has been saved and all vendors or other business contacts have been appropriately notified, and so all payables can be paid and accounts receivable have been collected.

COMMERCIAL SERVICES ("ELECTRONIC WILLS" AND OTHER SNAKE OIL GIMMICKS)

A new cottage industry has sprung up to provide a type of "online safe deposit box" to store virtual assets and provide a means by which designated individuals can gain access to virtual assets. A few words of caution are in order. First, one should be careful and make sure to deal with a reputable company. Giving someone the keys to an individual's digital existence would be a goldmine for someone bent on stealing that identity. Second, one should remember that giving someone access to information *about* an asset is not the same as *giving* that asset to that individual. The will or trust should ultimately control who should inherit assets, not an online service provider. There may be complex legal and tax issues that need to be taken into account in designating beneficiaries of virtual assets. For example, one online service provider refers to an "electronic will." In most states, a will requires certain formalities (typically a written instrument signed before two witnesses), and the absence of

these formalities can render one's good intentions legally invalid.

There are many online companies that provide what is essentially an "online safety deposit box" for passwords and account information. The following three companies, which are among many others, are referred to as "digital afterlife planning sites" — but such representations may lead to future litigation.

Legacy Locker

Legacy Locker offers three membership plans. A free "trial account" is limited to listing three digital assets and two beneficiaries. Both an annual plan and a lifetime membership allow members to list an unlimited number of digital assets and an unlimited number of beneficiaries. Members also receive cards, which can be kept with their wills, that direct heirs to contact Legacy Locker upon the members' deaths. After the website confirms a death, the designated beneficiaries receive emails containing links to the information that the decedent wanted the beneficiaries to have.

DataInherit

DataInherit provides a service very similar to Legacy Locker. DataInherit, however, provides notification to beneficiaries by postal mail as well as by email. In addition, all of the accounts can be accessed by DataInherit's free iPhone app, for convenient access to passwords on the go.

Entrustet

Entrustet also provides a service similar to the aforementioned companies. Entrustet, however, provides an "account guardian" feature that allows an account holder to name one digital executor, who will be in charge of deleting or transferring control of his or her digital assets. In doing so, the account holder leaves instructions as to what he or she would like done with the accounts.

Words of Caution

Some experts, however, caution against the use of these services. First, companies such as Deathswitch.com send out emails with the account information to the named beneficiaries in the event that a user does not respond to one of its "are you still alive?" notices.⁴¹ If the customer's failure to respond is a mere mistake, then he or she is left with others having access to his or her accounts.

⁴¹ Rosenwald, "Web Sites Let Online Lives Outlast the Nearly Departed," *Wash. Post* (1/25/10), at A1.

Second, David Shulman has identified companies such as Legacy Locker as "a big fat lawsuit waiting to happen."⁴² Shulman's concern is that many online accounts contain assets with actual financial worth, such as PayPal or Ebay accounts.⁴³ Moreover, one cannot use an online company to "give" assets to a beneficiary following death without a properly executed estate planning document.⁴⁴ Legacy Locker has responded, however, by affirming that its goal is not to replace an estate plan, but rather to help the decedent's family gain access to the decedent's accounts.⁴⁵

Another upcoming product is that of digital cemeteries. Personal Rosetta Stone, for instance, is a company that sells "wireless headstones." The objective of this product is to provide a memorial for the deceased individual that a traditional headstone cannot provide. A wireless headstone allows family, friends, and heirs to access information about the life of the deceased person. The information shared ranges from the simple (basic information and pictures) to elaborate (genealogical information, profession, achievements, relationships, etc.).

CONCLUSION

Upon an individual's death or incapacity, virtual assets can be difficult to administer, and sometimes to even locate. According to a recent article in the *Wall Street Journal*, state treasurers around the United States currently hold \$32.9 billion of unclaimed assets.⁴⁶ As the ownership of virtual assets continues to proliferate, without careful planning, this number could increase significantly.

While it may be tempting to marginalize issues relating to virtual assets as relevant only to individuals that lead highly "digital" lives or those who maintain intellectual property or creative assets in some type of electronic media, the growing reality is that individuals use numerous electronic devices to access information about assets and debts, to communicate for business or personal purposes, and to generally function in modern society. This new existence will have a profound effect on estate planning as well as fiduciary administration and litigation. Being aware of the

⁴² Shulman, "Estate Planning for Your Digital Life, or, Why Legacy Locker Is a Big Fat Lawsuit Waiting to Happen" (3/1/09), <http://www.sofloridaestateplanning.com/2009/03/articles/digital-assets/estate-planning-for-your-digital-life-or-why-legacy-locker-is-a-big-fat-lawsuit-waiting-to-happen>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Chaudhuri, "The 25 Documents You Need Before You Die," *Wall St. J.* (7/2/11), <http://online.wsj.com/article/SB10001424052702303627104576410234039258092.html>.

various challenges and planning in advance with a VAIL and similar instruments will help to reduce or eliminate the risks of losing important information left for those charged with managing an estate. If virtual assets are any part of one's legacy or estate, then steps should be taken to protect them.⁴⁷

⁴⁷ See also Carroll & Romano, *Your Digital Afterlife: When Fa-*

cebook, Flickr and Twitter Are Your Estate, What's Your Legacy? (2011).