

Estate Planning for Digital Assets

What You Need To Know

Michael Lichterman



Estate Planning for Digital Assets

What We Will Cover

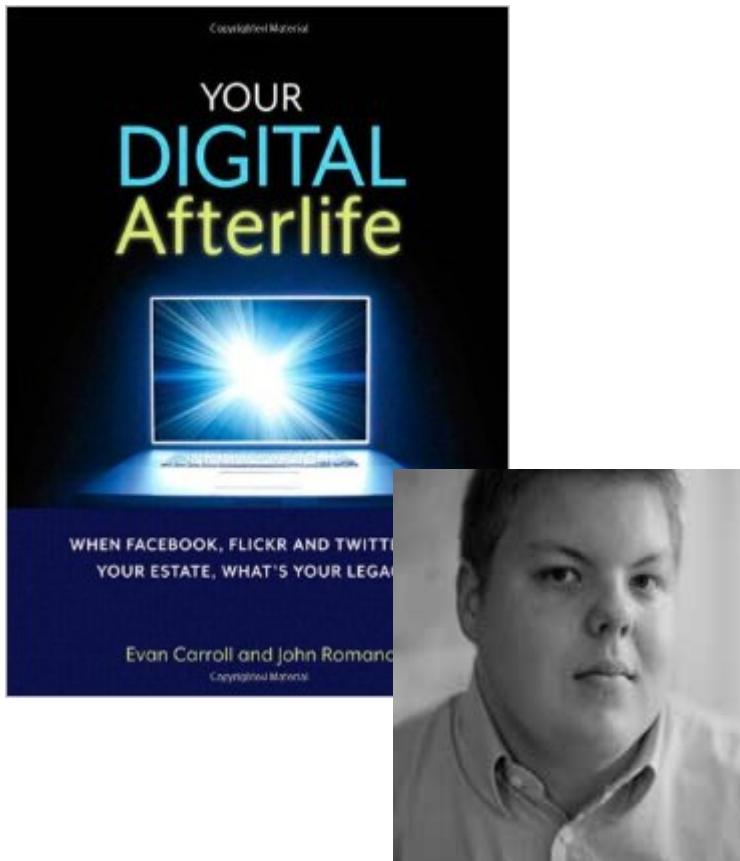
What Is It and
Why Does It Matter?

What Does the Law Say?

What Can You Do to Plan?



Your Digital Afterlife



“While you may have many collections, all the things you own combined create a greater personal collection where the theme is you. You are the arbiter of what belongs or does not belong. Increasingly, the things you gather for that collection are digital.”

– Evan Carroll, Author of “Your Digital Afterlife”

<http://www.yourdigitalafterlife.com/book/>

What Are Digital Assets?

- Practical definition – accounts and information in digital form
- Legal definition – covered later
- Digital assets come in a variety of forms, and are constantly changing, along with technology and social trends.
- An individual may have a property ownership interest in an asset or merely a license

Categories of Digital Assets

Personal

- Stored on computers, smart phones, or other devices, or are uploaded to a Web site or digital service
- Photographs, videos, emails, and music playlist

Social Media

- May involve photos, videos and other electronic files stored on these accounts

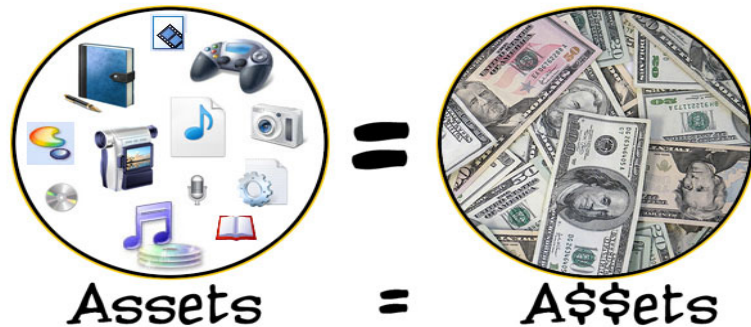
Financial

- Online banking, online bill-paying activities
- Online accounts with no connection to a brick-and-mortar establishment (Amazon, eBay, PayPal and digital wallets)
- Cryptocurrency

Business

Varies by types of business and extent of its computer or Internet associated activities, which may include blogs, domain names, credit card, financial data, and client data

Value of Digital Assets



- Digital assets may have sentimental **and** monetary value
- 2013 survey conducted by McAfee – average value placed on digital assets worldwide = \$37,000*; in US = \$54,722*
- Both personal and business assets – actual monetary value (i.e. domain names, blogs, YouTube[®] channels, TikTok accounts, affiliate accounts, etc.)

*<https://bit.ly/3h3ktCq>

What Happens If Something Happens To You?



Could someone else, acting on your behalf, gain access to your digital assets?

Would you want them to be able to?

What if the person was deceased?

Article on In Re Ellsworth case - <https://www.cnet.com/news/yahoo-releases-e-mail-of-deceased-marine/>

The Law F.A.D.A.A.



- Fiduciary Access to Digital Assets Act
- Big picture – what does it do?
 - Gives Account Holder control over whether digital assets should be preserved, distributed or destroyed
 - Authorizes access to digital assets that would otherwise violate the Federal Stored Communications Act* or Computer Fraud and Abuse Act**
- Michigan's FADAA: MCL 700.1001***

Michigan's Fiduciary Access to Digital Assets Act

- **FADA Applies to:**
 - Agent (Attorney-in-fact) acting under a power of attorney
 - Personal representative acting for a decedent estate
 - Conservator
 - Trustee of a trust
 - Digital custodian if the user resides in this state
- **FADA Does Not Apply to:** A digital asset of an employer used by an employee in the ordinary course of business

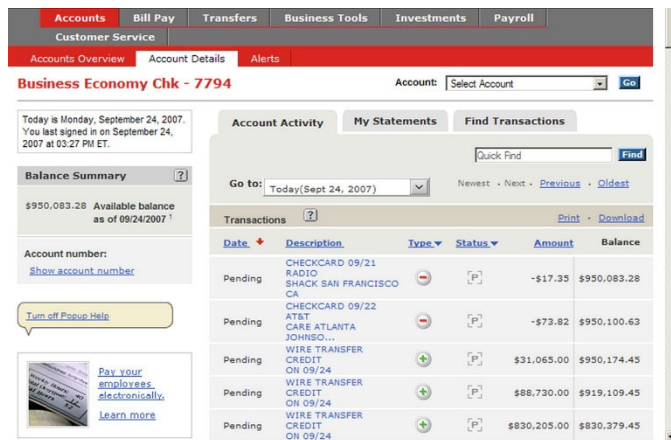
Michigan's Fiduciary Access to Digital Assets Act

What is a Digital Asset?

An electronic record in which a user has a right or interest.
Does not include an underlying asset or liability unless the
asset or liability is itself an electronic record.

It IS access to the bank account

It is NOT the money in the bank



Date	Description	Type	Status	Amount	Balance
Pending	CHECKCARD 09/21 RADIO SHACK SAN FRANCISCO CA		[P]	-\$17.35	\$950,083.28
Pending	CHECKCARD 09/22 AT&T CARE ATLANTA JOHNCO...		[P]	-\$73.82	\$950,100.63
Pending	WIRE TRANSFER CREDIT ON 09/24		[P]	\$31,065.00	\$950,174.45
Pending	WIRE TRANSFER CREDIT ON 09/24		[P]	\$86,730.00	\$919,109.45
Pending	WIRE TRANSFER CREDIT ON 09/24		[P]	\$830,205.00	\$830,379.45



Michigan's Fiduciary Access to Digital Assets Act

Differentiates between “catalogue” and “content”

Catalogue: information that identifies (1) each person with which a user has had an electronic communication, (2) the time and date of the communication, and the (3) electronic address of the person.

Content: information concerning the substance or meaning of an electronic communication.

How does the difference play out?

Those who plan will be rewarded

Michigan's Fiduciary Access to Digital Assets Act

Accessing Content vs. Catalogue

Personal Representative: has access to the catalogue of communications. Has access to content only if Will provides for it or Court orders it.

Power of Attorney: has access to the catalogue of communications. Has access to content only if the power of attorney provides for it.

Trustee: has access to catalogue of communications *and* content IF the Trustee is the “original user”. If Trustee is not the original user, then only catalogue of communications unless Trust provides for access to content.

Conservator: has access to digital assets only if the Court order appointing him/her provides for it

Michigan's Fiduciary Access to Digital Assets Act

How Much Access Must the Digital Custodian Provide?

The amount of information provided is in the Digital Custodian's sole discretion. They may do any of the following:

- Grant a fiduciary or designated recipient **full access** to the user's account.
- Grant a fiduciary or designated recipient **partial access** to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged.
- Provide a fiduciary or designated recipient **a copy** in a record of any digital asset that, on the date the digital custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

What To Do and How It Can Help

- Have a comprehensive estate plan that specifically provides powers over digital assets and directions on how to handle them
 - Will
 - Power of attorney
 - Trust
 - Stand-alone digital assets representative designation (optional)
- Consider using an “online tool” if one is offered by the digital custodian

Example Online Tools



Facebook

Memorialize the Account

“If Facebook is made aware that a person has passed away, it's our policy to memorialize the account. Memorialized accounts are a place for friends and family to gather and share memories after a person has passed away. Memorializing an account also helps keep it secure by preventing anyone from logging into it.”

“Please keep in mind that it's always against the Facebook Terms to log into another person's account. We'll only be able to give you access to an account if we can verify that it's your own account.”

Ask to have profile removed or deleted

“To help us remove your loved one's account from Facebook, we'll need you to provide documentation to confirm you're an immediate family member or executor of the account holder. The fastest way for us to process your request is for you to provide a scan or photo of your loved one's death certificate. If you don't have your loved one's death certificate, you'll need to provide proof of authority and proof that your loved one has passed away.”

Example Online Tools



Facebook

Appoint a Legacy Contact

A Legacy Contact is someone you choose to look after your account if it's memorialized. After your account is memorialized, your legacy contact will have the option to do things like:

- Write a pinned post for your profile (ex: to share a final message on your behalf or provide information about a memorial service)
- Respond to new friend requests (ex: old friends or family members who were not yet on Facebook)
- Update your profile picture and cover photo

Your Legacy Contact cannot do any of the following

- Login to your account
- Remove or change past posts, photos and other things shared on your Timeline
- Read messages you've sent to other friends
- Remove any of your friends

Example Online Tools



Twitter

“In the event of the death of a Twitter user, we can work with a person authorized to act on the behalf of the estate or with a verified immediate family member of the deceased to have an account **deactivated**.”

For us to process an account deactivation, please provide us with all the following information:

- The username of the deceased user's Twitter account

- A copy of the deceased user's death certificate

- A copy of your government-issued ID (e.g., driver's license)

- A signed statement including:

 - Your first and last name

 - Your email address

 - Your current contact information

 - Your relationship to the deceased user or their estate

 - Action requested (e.g., 'please deactivate the Twitter account')

 - A brief description of the details that evidence this account belongs to the deceased, if the name on the account does not match the name on death certificate.

Example Online Tools



Google's Inactive Account Manager

- Can be setup through Google Settings
- Lets Google know what to do with some or all Google related accounts after a specified period of inactivity
- Services that can be controlled: Blogger; Contacts and Circles; Drive; Gmail; Picasa Web Albums; Google Voice and YouTube
- Google sends a warning text and email before action is taken

Incorporating Digital Assets into Your Estate Plan

- To help the process, complete a questionnaire to list all digital assets and the value of those assets
- Discuss if any of the assets have financial value
- Keep a record of all passwords and profiles
 - There are websites specifically designed to release account information after death to designated beneficiaries, but they may be here today, gone tomorrow.
 - Consider a “master key” approach
- Protect significant data with strong encryption
- Speak to an Estate Planning Attorney about your legal needs

Incorporating Digital Assets into Your Estate Plan

Inventory Checklist



- Make sure you include everything from your computer, other devices, and the “virtual world” (i.e. cloud, internet)
- All email accounts
- All social websites you participate in
- Financial and commerce accounts
- How? Master key approach, a simple spreadsheet with passwords to access assets, other ways that work for you

Digital Assets Inventory						
Asset		Access			Wishes	
Name	Contents	Location	Username	Password	Instructions	Recipient

Incorporating Digital Assets into Your Estate Plan

- If you want a site to continue (e.g., website, blog, Youtube channel, etc.), you need to leave instructions for keeping it active or having someone take it over and continue it.
- If a site is currently producing or could produce revenue (e-books, photography, videos, blogs), make sure your successor knows this.
- If there are things on your computer or hard drive that you want to pass on (scanned family photos, ancestry research, a book you have been writing), make sure to note the location in your planning (or consider putting them in a “do not delete” folder)

Incorporating Digital Assets into Your Estate Plan

- After you inventory your digital assets, you must decide who to give the access to in the event of your death or disability.
- Make sure you indicate whether you want your appointee to **archive** your content, **share** your content with others, or **delete** your content.
- Make sure to include any special instructions (think sensitive and/or embarrassing content).



Crypto Currency It's So Hot Right Now!

The (very) Basics of Crypto

- USB drives (“cold” storage)
 - Security of the physical drive
 - Security of the private key (and password to the USB drive because you should encrypt the drive)
- Hardware wallets
 - Security of the physical wallet
 - Security of the PIN to the physical wallet
- Cryptocurrency exchanges
 - Examples: Coinbase, Robinhood, Binance
 - You don't hold the private key



Crypto Currency What Do We Do?

- Not many good options at this time
- USB drives (“cold” storage)
 - Treated as tangible personal property
 - Consider the security of the USB drive during your life balanced with access to it after death, and make sure to cover the physical drive and digital key
- Hardware wallets
 - Treated as tangible personal property
 - Similar considerations to the USB drive
- Cryptocurrency exchanges
 - Examples: Coinbase, Robinhood, Binance
 - “Planning” is similar to an online bank – options are very limited currently



Questions?

Contact Information

Michael Lichterman
BAAR & LICHTERMAN, PLLC
(616) 965-2221
mike@baarlegal.com
www.baarlegal.com