MORRISSEY, HAWKINS & LYNCH
ATTORNEYS AT LAW

PLANNING FOR DIGITAL ASSETS

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In May 2013, the Massachusetts Appeals Court decided the case of *Ajemian v. Yahoo, Inc.* The case involved the administrators of an estate seeking access to an email account. The administrators argued that an email account is property of the estate and, accordingly, the administrators should have access to it as they would any other property. Yahoo argued that a federal law, the Stored Communications Act, barred access to the emails because the SCA prohibits divulging the content of electronic communications without the account holder's authorized consent. The Appeals Court ultimately did not reach the substantive issue at the heart of *Ajemian*, but remanded the case to be fully briefed on the issue.

Ever since *Ajemian*, the legal water has been left murky. Estate planning attorneys have grappled with how to help clients plan for their digital assets in the event of their death or incapacity. More and more, people are communicating online and storing information and assets online. People are amassing a wealth of digital assets, including information stored on computers and cell phones, email accounts, social networking accounts, online banking, photo sharing, online medical records, websites and blogs – to name just a few. These assets are often valuable for personal reasons and, in some instances, can have significant monetary value as well. Digital assets are both pervasive and elusive. The task of sorting through the digital life of a deceased family member may involve far greater time and hassle than sorting through their house. Yet, there is no clear way for people to plan for the ultimate disposition of their digital assets, as they can for their tangible assets. Between federal laws intended to protect privacy and service policies that vary widely between financial institutions, email providers and social media sites, we are in a legal gray area.

Currently, only 9 states have digital access recovery laws – Connecticut, Delaware, Idaho, Indiana, Maine, Nevada, Oklahoma, Rhode Island and Virginia. The Uniform Law

Commission has created the Uniform Fiduciary Access to Digital Assets Act, which would permit legally appointed fiduciaries to access and dispose of digital assets and would impose a fiduciary duty to comply with the account-holder's instructions. The Act has been introduced in 17 states, but thus far has only been adopted by Delaware. Even in the states that have enacted laws on the subject, the power of state law to grant access to a deceased's digital assets remains unclear as the laws are new, have not been subject to judicial interpretation, and may not resolve the overriding federal law issues.

Until there is more clarity and consistency in the law concerning the ability of fiduciaries and loved ones to access and manage digital assets, it is important that clients consider including such powers in their estate planning documents. Clients can provide in their Durable Powers of Attorney for their agent to have authority to access, manage and distribute their digital assets in the event of incapacity. Similarly, clients can give such authority to the Personal Representative appointed in their Wills so that their digital assets can be disposed of in the same manner as their tangible assets. Where digital assets are backed up into tangible form, such as a CD or flashdrive, a person's Will should specify who should receive such property or else it would fall under the general disposition of personal property. For certain digital assets, it may be possible to register the asset in the name of the client's revocable trust or transfer the asset into the name of the trust. The client could then include detailed instructions to the trustee in the trust concerning the management and distribution of the digital assets. Clients might also consider appointing a special digital asset trustee who, alone, would have the power to access and administer digital assets. The special digital asset trustee might be someone who could be trusted with sensitive confidential digital material or simply a member of the younger generation who has the necessary technical proficiency.

Alternately, clients can execute a standalone document called a Virtual Asset Instruction Letter ("VAIL"). With a VAIL, a comprehensive inventory of digital assets is created, as well as user name and password information, and instructions are given as to what assets are to be maintained, deleted, transferred, etc. and who should be permitted access to what accounts. The VAIL can be kept in a secure location with instructions to be delivered to the appropriate individual in the event of incapacity or death. Executing a VAIL may be preferable where the

individual with the skill set to serve as power of attorney or Personal Representative would not be the ideal choice for dealing with digital assets, particularly where they are not computer savvy. On the other hand, a VAIL will only be useful if it is updated frequently and can be accessed when needed.

Of course, even including digital assets in your estate plan cannot ensure your family and fiduciaries will not end up battling with service providers who are worried about violating federal laws and their own privacy policies. But it does service as evidence of your consent to access to your accounts and will provide your fiduciary with needed ammunition.