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THE TRUSTWORTHY ADVISOR

ASSETS FROM SPACE: CYPERSPACE, THAT IS!

PART TWO

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Our last column discussed the identification and access issues faced by trust & estate lawyers in planning with a client's digital assets. Here, in Part Two, we discuss the practical issues of drafting and valuation.

Most trust & estate lawyers have a "data form" which clients are asked to complete for the first client meeting, to assist the lawyer in learning about the client, her family, her assets and liabilities, and her goals. In gearing up to plan for this new breed of assets, you might consider up-dating your data form to include questions regarding digital assets such as: "(i) Do you consider any of your digital assets to be of value emotionally? Economically? (ii) What digital assets would you want your family to have at your death? (iii) Are there any digital assets you would wish to remain private? (iv) Would your legal representative know how to access your digital assets? Do you keep a personal inventory of your digital life? (v) Is the person you would like to administer your estate computer savvy? (vi) Do you back-up your digital assets or store them in the cloud?" The answers to these questions will guide the drafting of documents.

The client's durable power of attorney, last will, and trust should all contain language designed to give the appropriate fiduciary broad access to digital assets. You might consider the following language, which can be adapted for the particular document you are drafting:

"Subject to any limitations imposed under federal law and contract terms applicable to a Digital Account (as defined herein), my FIDUCIARY shall have the power to take such reasonable

actions as are necessary and prudent to locate, access, administer, transfer, and distribute any property, information, or both held in, controlled by, or governed by a Digital Account which I may own or to which I otherwise possess rights. The power to administer includes the power to open and close accounts, to access and change passwords and security questions, to transfer information and property, and to delete information. The powers herein include without limitation the power to hire computer and other technical experts to assist the FIDUCIARY to do whatever is necessary to gain control over a Digital Account and property and information held in a Digital Account.

For the purposes of this DOCUMENT, "Digital Account" shall broadly mean (i) any account or record of mine stored in electronic or digital form that is governed by a terms-of-service agreement; (ii) any data storage device or account of mine; (iii) any user accounts of mine; (iv) all of my information stored on my computers and hand held devices; and (v) any domain names I own.

I authorize and hold harmless any person or entity who controls a Digital Account, whether public or private, to divulge to my FIDUCIARY all Digital Accounts, including without limitation, (i) any and all of my electronically stored information, (ii) the contents of any and all of my electronic communications, and (iii) any and all of my information, including without limitation passwords, pertaining to the Digital Asset. This authorization is intended and should be construed as my consent pursuant to the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended, and any other federal or state privacy or criminal law. This authorization shall be immediately effective and unless revoked by me in writing is intended to continue to be effective during any period of my incapacity or disability, and shall remain effective after my death."

Some practitioners like to use the last paragraph of the suggested language as a stand-alone consent form. If you adopt this practice, you might consider adding exculpation and third party reliance language which is typically found in a trust, last will, or durable power.

The client might also consider appointing a special trustee who alone will have the power to administer the digital estate. This might be a good idea where privacy is a concern. The special "Digital Asset Trustee" alone would have access to digital assets and would be someone who can

be trusted to keep confidential sensitive digital assets and delete them as instructed in the documents (Grandma's Match.com account?). Or, the Digital Asset Trustee might simply be a family member of the younger generation who has the aptitude for understanding the digital estate, but who might not be the best selection for overall administration of the trust.

Finally, what about valuation? Wikipedia reports that the domain name *VacationRentals.com* sold for $35 million. Video gamers engage in "microtransactions" wherein the gamer pays for enhancements to her character or avatar to gain a gaming advantage and those game accounts increase in value overtime. Query whether lawyers who prepare estate tax returns are asking the fiduciary the right questions to avoid an Internal Revenue Code §6694 understatement penalty should a valuable digital asset go unreported. In addition to the penalty, a lawyer who falls asleep at the digital wheel may also face referral to the Internal Revenue Service's Office of Professional Responsibility. I.R.M. 20.1.6.2.1.

Digital assets should be valued under the provisions of Internal Revenue Code §2031 and Treas. Reg. §20.2031-1(b), which are the general estate tax valuation provisions, but nothing therein specifically refers to digital assets. The IRS has considered bitcoins, however, and its pronouncement on virtual currency is found in IRS Notice 2014-21. Perhaps the cautious client will list all digital assets on Schedule F (Other Miscellaneous Property Not Reportable Under Any Other Schedule) of the estate tax return and offer a best guess value of each asset, which might often be minimal.

Digital assets are the true intangible – elusive, ethereal, and often unquantifiable. But the estate planning issues are tangible and real. Ignore them at your peril.