What New Jersey Residents Need To Know About Digital Assets Under New Jersey's New Digital Asset Act

September 28, 2017

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On September 13, 2017, Governor Chris Christie signed into law the Uniform Fiduciary Access To Digital Assets Act (the "Act"). The Act essentially grants New Jersey residents the right to arrange for the access to and management of digital assets in the event of their disability or death. The following represents a summary of what individuals need to understand about the Act and its impact on their estate planning.

What is a digital asset?

The Act defines a "digital asset" to be an "electronic record in which an individual ("User") has a right or interest."

In plain English, a digital asset is any account, document, information, or record that is accessible primarily via an individual's access to an electronic device (i.e. a tablet, smart phone, personal computer). Examples of digital assets include: email accounts, text messages, electronic calendars and contact lists, social media accounts (such as Facebook, Instagram and LinkedIn), blogs, cryptocurrency (such as Bitcoin and Ether), photos and videos posted to internet websites, online purchasing accounts (such as EBay and PayPal), music sharing services (such as ITunes, Pandora, and Spotify), video sharing accounts (such as YouTube), electronic libraries (such as Kindle and IBooks), sports gambling accounts, digital magazine and newspaper subscriptions, cloud based storage accounts (such as Carbonite, Barracuda, ICloud, DropBox and OneDrive), medical record and electronic brokerage and bank accounts. These digital assets are normally carried, maintained, processed and stored with a third party provider which is referred to as a "Custodian" under the Act.

What exactly does the Act do?

The Act essentially recognizes that an individual who has a digital asset (the "User") has a property right in a digital asset, and like other property may make advance arrangements for the management of a digital asset in the event of the User's incapacity or death. The Act provides a mechanism by which a User may take affirmative steps to arrange for such management. A User may confer such management powers on a fiduciary (i.e. Executor/Administrator of a decedent's estate; Attorney-In-Fact under a Durable Power of Attorney, Trustee of a trust) or may designate a third person to have those rights. Similarly a court may convey management powers to a court appointed Guardian.

Does the Act grant me the legal right to transfer my digital assets upon my death to members of my family or other third parties?

No. The Act by itself does not grant a User the right to control the disposition of a digital asset. A User's ownership interest in a digital asset is generally defined under a "Terms of Service Agreement" ("TOSA") which the User consents to when he or she registers with the Custodian. The TOSA, which most User's never read in full, defines the User's proprietary rights to the asset. Consequently the TOSA is generally drafted to be favorable to the Custodian. For example a User who creates a social media account with a Custodian (such as Facebook or Instagram) generally agrees that by posting text, videos and pictures to the Custodian's site surrenders all of his or her legal ownership of the content of the post to the Custodian (however by granting a fiduciary the power to access the digital asset, the User is potentially enabling the fiduciary to obtain copies of the asset for potential transmission to family members). A TOSA may also be constructed as a licensing agreement which grants the User the right to access the asset until death at which time the User's license expires and there is nothing to transfer to third parties. An example of such licensing agreements would include music sharing services and digital books and magazine subscriptions.

Suppose I do not want anyone to access and manage the digital asset for me in the event of my incapacity or death. Does the Act allow me to pick and choose which digital assets I wish to give third parties a right to access?

Yes. The Act specifically allows Users to decide on an asset by asset basis whether they wish to allow fiduciary access to the asset.

My employer has provided me with a work email account that I use in the course of business. Does the Act give me rights over this digital asset as well?

No. The Act does not apply to any digital asset of an employer used by an employee in the ordinary course of the employer's business. To avoid any issues as to whether a digital asset belongs to an employer or employee, an employee should avoid installing access to his/her digital assets on a workplace computer.

How do I designate a fiduciary to have access to and manage my digital assets in the event of my disability or death?

The Act specifically provides three mechanisms by which a User can designate a third party to access and manage a digital asset:

Online Tool: If offered by a Custodian, a User may designate on the Custodian's website, who may have access to the digital asset in the event of the User's death or incapacity. As of the date of this article Facebook and Google are the only Custodians who offer an Online Tool mechanism.

Estate Planning Document: A User may also grant the fiduciary access to digital assets by including a direction in his/her estate planning documents such as a durable power of attorney, Last Will and Testament and Trust instrument.

TOSA: Although very rare, the TOSA can also address issues of who can access and manage a User's digital assets in the event of his or her death or incapacity. The author is not aware of any TOSA that as of yet authorizes such access.

Which one of the three mechanisms has priority?

The Act specifically provides that any designation contained in an Online Tool has priority over any designation contained in a User's estate planning documents or the TOSA. If the User does not designate a third party under the Online Tool (or if the Custodian does not offer an Online Tool), then any direction contained in a User's estate planning documents will control who has access. If there is no Online Tool designation or a direction contained in a User's estate planning documents, then the Custodian's TOSA will determine who has access to the digital asset.

Suppose I do take no action, what happens?

If a User does not take any affirmative steps to designate someone to have access to the digital asset, then the terms and provisions in the TOSA will control access. As discussed above, most TOSA's specifically state that access to the digital asset is restricted to the User only and no third party (including a fiduciary) will have lawful access to the digital asset.

What actions should I be taking now in order to my protect my digital assets?

Individuals should consider doing the following:

1. Creating a catalog list of all digital assets in which the individual has an ownership interest.
2. Conferring with qualified legal counsel to assist you in formulating a plan on how you wish to have your digital assets managed in the event of your incapacity or death.

The attorneys in the Wealth Preservation Practice Group at Porzio, Bromberg & Newman, P.C. are available to confer with you regarding this matter.