



## Estate Planning for Digital Assets

*Contributed by Michele Procino-Wells, Esquire*

This year marks my 26<sup>th</sup> year as a lawyer. When I reflect on what's changed the most during my career it's easy to know it's the use of technology. As a new lawyer, when I needed to draft a document, I dictated onto a cassette tape which was then transcribed by one of the ladies in the typing pool. Now, 26 years later, I'm sitting outside using the hotspot on my phone to connect to my firm's cloud-based server and typing this article on my laptop.

Technology has not only changed how I practice law, but also the substance of my practice. When we talk to clients about their assets, we're no longer focused on just their real estate and financial accounts. We now also have to consider a new category of assets - digital assets.

Technology allows people to store significant personal data in digital formats. Most individuals don't ever consider the value and extent of their digital assets and the potential loss if these assets become inaccessible or the conflict that can arise if it's unclear who has access to and control over them. As a result, well-drafted estate plans must now include consideration of digital assets.

### What is a digital asset?

The definition of "digital assets" is constantly evolving to include innovative asset classes including the following:

- electronic communications, such as emails, social networking sites, and blogs;
- online reward programs, such as for credit cards, hotels, and airlines;

- financial accounts, such as PayPal, Venmo, or other online banking or investment accounts;
- digital collections, such as music files, photographs, and videos;
- domain names and intellectual property;
- electronically stored data, whether in the cloud or on a physical device; and
- cryptocurrencies such as Bitcoin.

### What controls access to digital assets?

Complex rules exist related to ownership and access to digital assets which try to balance the original owner's privacy and a fiduciary's right to access these assets after the owner's incapacity or death.

**IN ORDER FOR AN AGENT TO ACCESS  
DIGITAL ASSETS, THE POWER OF  
ATTORNEY MUST EXPRESSLY GRANT  
THAT AUTHORITY.**

When an individual creates a digital asset, they typically accept a contractual user agreement. Rarely do users actually read these agreements but instead just hurriedly click on the "I agree" box. Even if they do read it, most still don't realize that they have agreed to prohibit third-party access to

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their digital asset. This causes issues for fiduciaries when trying to account for a decedent's assets.

Federal laws criminalize hacking and the unauthorized access of digital assets to protect the original owner, but thereby also limit a fiduciary's ability to properly access the assets. As a result, even if fiduciaries have the user name and password for digital assets, they may not have legal authority to access them and doing so could be a criminal act.

Fortunately, most states have passed laws that give fiduciaries some authority to access digital assets. In 2014, Delaware was the first state to enact such legislation with the "Fiduciary Access to Digital Assets and Digital Accounts Act." In 2016, Maryland passed the "Maryland Fiduciary Access to Digital Assets Act." These laws give fiduciaries the ability to take legal control of digital assets just as they would more traditional assets. However, limitations exist to the authority given by these statutes, so it is critical to plan accordingly.

### **How do you create an estate plan for digital assets?**

The first step in planning for digital assets is to create a thorough inventory. For each asset, you should identify what type of asset it is, where it's stored online, and the login information required to access it. If you have multiple online accounts, it may be helpful to use an online password manager such as Keeper or SecureSafe. Make sure though, with whatever storage method you choose, that you update it regularly and make it accessible to your fiduciary.

The second step in planning is to create a thorough estate plan including a Power of Attorney, Will and in most cases, a Revocable Trust which address your digital assets.

Creating a Power of Attorney allows you to name an Agent who can act on your behalf if you become incapacitated or otherwise need help managing your

affairs during your lifetime. But be aware that in Delaware and Maryland, in order for an Agent to access digital assets, the Power of Attorney document must *expressly* grant that authority. Thus, these documents should always be created by an experienced attorney who specializes in estate planning and knows these rules.

Similarly, most Wills and Trusts don't specifically address digital assets and as a result, the assets pass along with all the other remaining assets. Often, "residuary" provisions in Wills and Trusts divide the assets in percentages among various beneficiaries. This can be problematic because how does an executor give a beneficiary 25% of the photos stored on Shutterfly? A better option is to include specific bequests of digital assets which can give the assets to a particular individual or each individual digital asset can be designated separately.

It's also important for a person's Will and Trust to specifically authorize their fiduciary's management authority over digital assets so that it's clear who has that authority and who is then responsible for marshalling and ultimately distributing the assets to your intended beneficiaries.

### **How do you ensure a lasting legacy?**

In 2017, a survey conducted by Caring.com reported that 60% of American adults have no estate plan in place, let alone one that addresses digital assets. I urge you to make sure you create a thorough estate plan that considers not only traditional assets but also your digital assets and that you commit to reviewing and updating it regularly.

Many people now use digital assets to document their lives. These assets provide a lasting legacy of what's important to a person, evidencing their values, history and memories. If our surviving loved ones don't have access to those assets, that history and a piece of ourselves, will be lost.

## LEGAL MUMBO JUMBO

*Legal Language in Layman's Terms*

## CRYPTOCURRENCY

A digital form of currency that is secured by coding, making it nearly impossible to counterfeit or double-spend.

### TIME OUT — STAFF PROFILE

*Kimberly D. Holder*  
*Asset Alignment Coordinator*

**ON THE CLOCK:** Kim is a local small-town girl, raised in Federalsburg, MD. After graduating high school, Kim started her career at Preston Trucking Company. After they closed their doors, she changed industries but never veered from the foundation of knowledge that was built in logistics. Prior to joining PWW Law, Kim spent seventeen years serving in a supportive role with a large research manufacturer headquartered in Sussex County, Delaware. Kim assists our estate planning clients by aligning their assets with the trusts in their estate plan.



**OFF THE CLOCK:** Kim's family is and has always been very important to her and PWW's family centered approach to serving clients lines up with her own values. Kim still lives in Federalsburg and enjoys spoiling her fur-baby, Zoe. In her down time, you will likely find her chilling at home watching Hallmark or Lifetime movies.

### BELLA'S BRIEF

*The Office from a Dog's Perspective*

You know what's weirder than an airborne virus spreading across the world and the government knowing very little, but making all the decisions for the public? The fact that a movie, a comedy at that, was written with the very same premise in 1968. I happened to catch "What's So Bad About Feeling Good?" over the holidays and, let me tell you, my senses went awry.

**Fun fact: Dogs interpret the world predominantly by smell, whereas humans interpret it by sight.**

Back to the movie. A toucan nicknamed Amigo is the carrier of cheer and hope. One whiff and fears and cynicism vanish being replaced with delight and hopefulness. As the "virus" spreads, happiness replaces restlessness, dependency on alcohol and tobacco decreases, and people start telling the truth. Best of all, strangers treat each other with politeness and respect rather than skepticism and judgement. That's until a team of self-important control freaks begin to worry that good moods will slow the economy and ease the fear that drives voters. Citizens are encouraged to spread out, wear face masks, and report to hospitals for testing. Yikes! There's more, but I won't spoil the whole plot in case you want to check it out.

Anyway, I've considered the parallels of this movie with the crisis of today along with my own roller coaster of emotions over the past TWO YEARS, and stop in my tracks when I ask one simple question: "What's So Bad About Feeling Good?"

Happy New Year!



xoxo Bella



### *A note from the attorneys...*

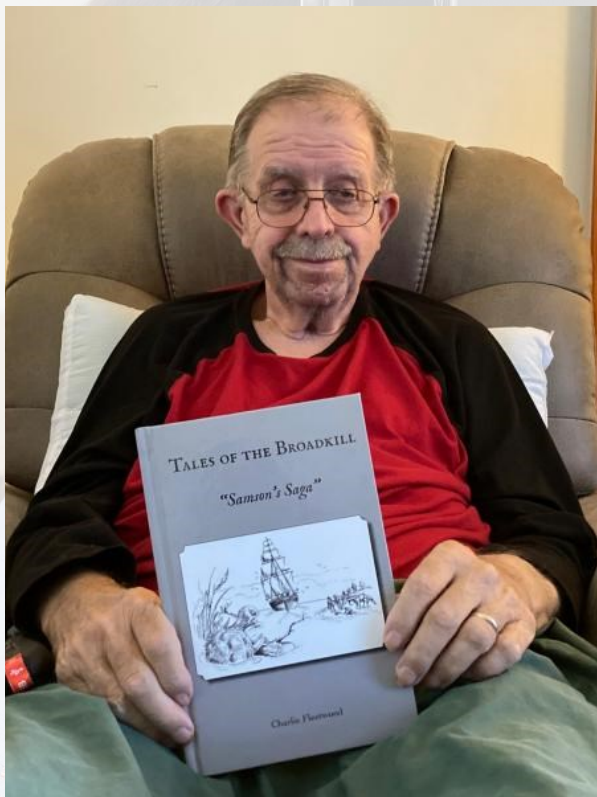
We begin this New Year with a reimagined, albeit consistent, vision for our firm. We asked our team to ponder if we weren't working in our current roles, what would we be doing? Our answers varied, but the overall theme came down to meaningfulness. Our passion is truly giving back to the world and making a difference in our community. That is our commitment to every family we serve.

Much success, *Michelle & Owen*



# PWW Fridge-worthy

We're proud to spread the word that PWW client and CARES member, Charlie Fleetwood, has recently written a children's book titled *Tales of the Broadkill: Sampson's Saga*. A lover of history, and longtime resident of Milton, Charlie's book is a telling of the history of Milton from the time of Native Americans through to the Revolutionary War era, from the perspective of a 400-year-old turtle.



Charlie's love of Milton lead him through many careers and service engagements in the town, not limited to three stints on town council, leading the Milton Chamber of Commerce, organizing and serving as President of the Friends of the Milton Public Library, and serving as President of the Milton Community Foundation.

The idea for this children's book was born during Charlie's time with the Milton Chamber of Commerce when he wrote well loved stories about the town in the Chamber's monthly newspaper.

"Tales of the Broadkill: Sampson's Saga" is available for purchase through Amazon or at the Friends store in the Milton Public Library and is recommended at the fourth grade reading level.

## **An excerpt:**

**I had other plans for the next couple of nights. We had a couple of thunderstorms in the evenings and I had chores to do. It was almost a week later before I could be on the shore on Wagamon's Pond. The bluegills were feasting on a large hatch of midges, the little bugs that bite your ears and love to fly up your nose and in**



your ears. They are annoying little rascals, but fish love to eat them and I was having a blast with the bluegills and my trusty fly rod. I didn't notice the sun was setting over the trees along the Pond. Summer was about half over and darkness was coming earlier each night. Then, with a huge swirl of water, I spotted Samson's head pop out of the water and he was giving me the "evil eye". I could tell he was mad about something.

Samson finally climbed on the shore. Boy, was he in a bad mood. He grumped, "Hello" and began giving me a hard time for not being on the shore for some nights. I explained my reasons, telling him I had other chores to do first, and that I don't fish in thunderstorms. He didn't seem to care a bit for my excuses and told me that he only had so much summertime left and he had many more tales to tell. He wanted to start with the first sighting of the white men coming to the River and how that changed everything on the River, not much of it for the better either. Once again Samson settled down on the Pond's shore and continued his saga of life on the Broadkill.

From Chapter Three, "Several Nights Later, Samson's Impatience"



## OFF THE CLOCK

We would like to thank our featured referrer of the month:



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