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Estate Planning for Digital Assets and Online Financial Accounts

Succession Plan Strategies for Password-Protected Accounts,
Social Media Pages and Other Digital Files

WEDNESDAY, JULY 27, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

David Shulman, Attorney, **David Shulman Law**, Fort Lauderdale, Fla.

Nathan J. Dosch, Private Wealth Services - Manager, **Grant Thornton**, Milwaukee

Ronald P. Wargo, II, Partner, **Friedemann Goldberg**, Santa Rosa, Calif.

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Estate Planning for Digital Assets and Online Accounts

David A. Shulman, Esq.
Law Offices of David A. Shulman, PL
401 E. Las Olas Blvd. Suite 130-491
Fort Lauderdale, FL 33301
Telephone: 954-990-0896
Email: david@davidshulmanlaw.com
www.sofloridaestateplanning.com

What are Digital Assets and Online Accounts?

Any digital file that is stored on your computer, on your phone, on a separate disc, or on the internet (in the cloud), and any online account that requires you to enter a username and password to access



Digital Files

- More people -especially young educated professionals- live not only “paperless” lives, but also no longer have *tangible* physical media (CDs, DVDs, photos)
- Digital files can:
 - Be essential for identifying a person’s assets, debts, friends, and heirs
 - Have Sentimental Value
 - Have Monetary Value

Why Identify Digital Files

- Some types digital files need to be identified during the planning process because of their unique status
- Other types of digital files are merely “paper replacements” that the attorney or the personal representative need to know exist, so they can be able to access them upon death.

Two Types of Digital Files to Identify During the Planning and Administration Processes

- 1) Files *created* by the client
- 2) Files *purchased* by the client

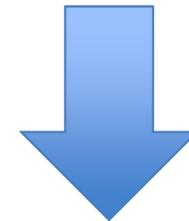
Files Created by the Client



Files Created by the Client

Paper Replacement

- Any paper document that previously was stored in a file or folder are now scanned or downloaded to the computer and saved in the cloud.
- Often stored as PDFs and can include:
 - Bank and brokerage statements
 - Tax Returns, 1099s, W2s, etc.
 - Medical Records
- Financial spreadsheets, Quicken



Files Created by the Client

Address Book /Calendar

- How do we contact a decedent's family?
- Friends?
- Companies that they do business with?
- Can be on their computer, in the cloud, or on their cell phone



Files Created by the Client

Sentimental Value

- Photos and home movies
- Families don't have to fight over these items anymore because infinite copies can be made—and they can be made now



Files Created by the Client

Monetary Value

- Some clients will have digital data created by them that has substantial intellectual property value.
- Often owned by:
 - Computer programmers
 - Graphic / Web Designers
 - Professional Photographers
 - Musicians
 - Artists



Files Purchased By The Client



Files Purchased by the Client

- **iTunes**

- The #1 seller of music in the US.
- Not just *digital* music, but *all* music.
- In February 2010, the iTunes store sold its *10 billionth* song

- **Amazon Kindle**

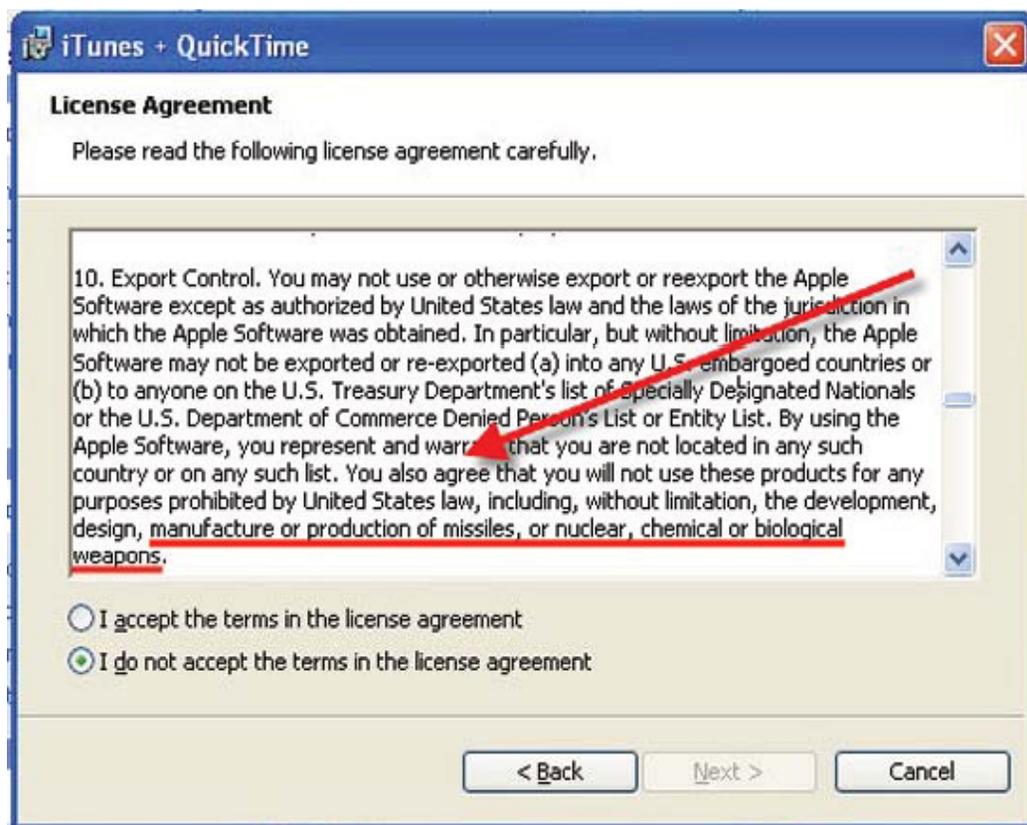
- In July 2010 Amazon announced that Kindle books started to outsell hardcover books
- In May 2011 Amazon announced that Kindle books were outselling *all* books, hardcover and paperback.

Files Purchased by the Client

- Substantial money has been invested in digital collections of music, movies, TV shows, books, “apps” and computer software
- In the past, physical media (books, CDs, etc.) would be disposed of in a will as tangible personal property
- However, digital media is obviously not tangible.

Files Purchased by the Client

- When you purchase digital files (music, movies, books), you have merely purchased a *license* for personal use.
- Apple's Terms of Service has a provision covering nuclear weapons – but nothing specifically about the transfer of your media on death.
- It appears that legally –for now- there is no way to transfer iTunes media on death



I Agree

I Have No Idea
What This Says

Online Accounts

Any account that requires a
username and password



Why are Online Accounts Important to Consider in Estate Planning?

- Access to accounts is necessary to learn about a person's assets, debts, and heirs
- They are often where people store their digital files
- Email, Texting, and Social Media have become the primary methods of communication for many people
- Online Assets can have their own real monetary value

Email Accounts

- Sources:
 - Internet Service Provider (ISP)
 - Online Services
 - Own Domains



Why Email Accounts Are Important

- Primary doorway to all of the other online assets
- Online statements, notifications, messages, will all come through to email
- Address book is often tied to or in the email account

Financial Accounts

- Traditional “Bricks and Mortar” Institutions
- “Branchless” Banks
- Non-Traditional Financial Accounts
- Credit Cards, Student Loans, Mortgage, etc.



Bank of America



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The Problem with Financial Accounts: Paperless statements may be good for the environment, but without proper planning, they make finding a decedent's assets a lot more difficult.



Social Networking

- The main way that many people communicate
- Could have a vast amount of information about someone and their life
- Another place that digital files - especially photos and videos - are stored

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a dark blue rectangular background.The Twitter logo, featuring the word "twitter" in a light blue, lowercase, sans-serif font.The LinkedIn logo, with the word "Linked" in black and "in" in white lowercase letters inside a blue square.

Online Storage Accounts

- In addition to storing their digital files on their computers, people will back them up to –or *only* store them in– the “cloud.”
- There are sites dedicated to specific files – such as photos – and there are sites that backup and store any type of file
- The “cloud” is just a trendy name for the internet



Business Accounts

- Storefronts or Accounts through other websites
- Separate Domain Names and online businesses



“Virtual Property” in Online Games

- In online games such as *World of Warcraft* or *Second Life*, players obtain or create items, or in game currency that enhance the enjoyment of the game to other players.
- Prisoners in China are forced to play a video game –World of Warcraft- all day to “farm” for online “gold” which is then sold for real money
- In 2010, the Second Life “property” pictured sold for \$335,000!



The Law Offices of

David A. Shulman, P.L.

Estate Planning • Asset Protection

David A. Shulman, Esq.

Law Offices of David A. Shulman, PL

401 E. Las Olas Blvd. Suite 130-491

Fort Lauderdale, FL 33301

Telephone: 954-990-0896

Email: david@davidshulmanlaw.com

www.sofloridaestateplanning.com



Estate Planning Issues Particular to Digital Assets

Nathan J. Dosch, JD, MST
Grant Thornton, LLP
100 E. Wisconsin Avenue, Suite 2100
Milwaukee, WI 53202-4169
Telephone: 414-277-6491

Overview of Estate Planning issues for Digital Assets

- Lack of clear definition of this category of property
- Intersection of property, contract, and property law leaves a void
- Little case law or statutory authority
- Limited awareness by practitioners and clients

"Digital Assets" and Property Law

- Definition of Real Property
- Definition of Personal Property
 - Intangible Property
 - Intellectual Property
- The category of digital assets doesn't neatly fit into the traditional property law system. In fact, there is concern as to whether they constitute property at all.

Property vs. Licenses

- To properly draft a plan addressing digital assets we must first identify whether the client has a property right or a contractual right to the asset
- Given the unsettled nature of this area of law it is difficult to say with certainty, however, most digital assets will contain both a license and a property right at some level.
- Examples:
 - Email accounts – client has a license from the internet service provider (ISP) to access the email system in accordance with the Terms of Use or Terms of Services. Client should retain a property interest in the sent and received email in the inbox.
 - Social Networking sites – client has a license from the internet service provider (ISP) to access the site in accordance with the Terms of Use or Terms of Services. Client should retain a property interest in the user generated content, contact lists, etc. on the networking site.

Property vs. Licenses, cont.

- Examples:
 - Websites/Blogs – Client's access may be impacted by the terms of use with the ISP hosting his/her site. However, client maintains property rights in all user generated content, IP, and domain names, if applicable.
 - Online photo galleries – Client has a license from the internet service provider (ISP) to access the photo gallery in accordance with the Terms of Use or Terms of Services. Client maintains property rights in the underlying photos and related user generated content.
 - Music directories (iTunes)- client has a license from the internet service provider (ISP) to access the music system in accordance with the Terms of Use or Terms of Services. Client maintains the right to play/listen to the licensed copy of lawfully downloaded music files. Music, like software, is not categorized as property, per se. Instead, the user has purchased an indefinite license to use one copy of the file.

Property vs. Licenses, cont.

- Examples:
 - Online business and auction sites (eBay) - client has a license from the internet service provider (ISP) to access the site in accordance with the Terms of Use or Terms of Services.
 - Online payment processing (Paypal) - client has a license from the internet service provider (ISP) to access the system in accordance with the Terms of Use or Terms of Services.
 - Online storage accounts - client has a license from the internet service provider (ISP) to access the system in accordance with the Terms of Use or Terms of Services. Client maintains property rights in underlying digital files.
 - Virtual Property - client has a license from the internet service provider (ISP) to access the system in accordance with the Terms of Use or Terms of Services. Most online games strictly prohibit transfer and the Terms of Use attempt to skirt tax related issues by expressly stating that the game "money" is not real currency.

Case Law or Statutory Authority

To date we have seen very little coverage of digital assets either in the courts or in the legislature. The most often cited examples of authority on this issue are as follows:

- Justin Ellsworth case. The Probate Court in Oakland County Michigan ordered Yahoo to turn over the contents of Justin's email account to his family after Justin was killed in Afghanistan.
- Oklahoma Probate statute. (HB 2800) Effective November 1, 2010. It was the first law to allow executors to access, delete or administer online accounts of deceased people.
- Idaho Probate statute. (SB 1044) Effective July 1, 2011. Copied verbatim the pertinent parts of the Oklahoma statute.

Limited Awareness by Clients and Practitioners

- Given the newness and rise of digital assets in the last decade it is no surprise that the traditional estate planning process may not address the issues. In addition, typical estate planning clients may not recognize that they even have digital assets.
- The statistics show that Internet usage and digital asset creation continues to increase exponentially:
 - 75.8% of US Residents use the Internet
 - 46% of US adults use Social Networking sites including 16% of Internet users 74 and older
- Bottom-line: Attorneys are either unsure as to how digital assets should be incorporated or unaware of the importance of making the a part of the estate plan.

Central Issues

Ownership, Access and Transferability

- Property vs. License
- Catch 22
 - Client has a license to access the system which is governed by the TOS/TOU. The license is not transferable and terminates at death. However, the clients maintains ownership of the underlying user generated content, IP, etc.
 - How do we ensure that mom's family photo album doesn't vanish into the Internet abyss?



Estate Planning Options Including Online Services

Nathan J. Dosch, JD, MST
Grant Thornton, LLP
100 E. Wisconsin Avenue, Suite 2100
Milwaukee, WI 53202-4169
Telephone: 414-277-6491

Options for Including Digital Assets in an Estate Plan

- Passive / Advisory Options
 - Hard-copy list of digital assets
 - State who you would like to see get it or what you'd like done with it
- Proactive, Legally Binding Options
 - Include specific bequests in the body of the Will or Trust
 - Incorporate by reference an existing list leaving digital assets to specific heirs
 - Combine option 1 or option 2 with the appointment of a digital executor

Passive, Advisory Options

- I refer to this approach as the "manila envelope" option. It is easy to set-up and easy to update. However, it is not legally-binding and it is likely to be out of date or lost when the need arises.
- It does accomplish arguably the most important objective: ***Identification of digital assets.***
- The process of creating an inventory of digital assets is a worthwhile pursuit, even if the client does not specifically address the assets in the body of a legally-binding will or trust, by easing some of the burden associated with locating and accessing the decedents personal property and/or accounts.

Proactive, Legally Binding Options

- Prepare an inventory of digital assets, including user names and passwords
- Designate the individual or individuals you would like to see receive each asset
- Include specific bequest language in the body of the Will, much like estate planners routinely do for important items of personal property

OR

- Include language incorporating by reference the existing inventory leaving assets to specific heirs. The list is attached to the governing document and can be updated by Codicil or Amendment, as needed.

Digital Assets in a Trust Option

- Utilizes a Revocable Trust
- Digital Assets are transferred (if permitted) into the trust during the client's lifetime
- Since many digital assets take the form of licenses that expire at death and since the trust does not die, the result should be that the assets survive the death of the client.
- Advantages:
 - Easy to update
 - Private, avoids probate
 - Continuation of ownership after death
- Disadvantages:
 - Expense
 - Transferability / "funding" issues

Online Digital Asset options

The big three in this area of as follows:

- Entrustet
- Legacy Locker
- DataInherit

The services offered by each of these companies are similar, although they differ in certain respects. They offer a free and a paid service. They each give the client the opportunity to create a secure inventory, to appoint beneficiaries and "executors", and to create some form of last message to the client's family including videos, letters, etc.

Absent additional action by the client or attorney the output will not rise to the level of a legally-binding bequest.

Available Online Resources and Articles

1. E-Legacy: Estate Planning for Digital Assets, *Wisconsin Lawyer*, by Nathan J. Dosch and Joseph W. Boucher, December 2010, http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=99281
2. Managing Online Accounts After Death, *The New York Times Blog*, January 2011, <http://bucks.blogs.nytimes.com/2011/01/20/managing-online-accounts-after-death/>
3. Cyberspace When You're Dead, *The New York Times Magazine*, by Rob Walker, January 5, 2011, http://www.nytimes.com/2011/01/09/magazine/09Immortality-t.html?_r=1&ref=magazine
4. Estate Planning for Your Digital Assets, *LawPractice Today*, by Dennis Kennedy, March 2010, <http://apps.americanbar.org/lpm/lpt/articles/ftr03103.shtml>
5. Digital Estate Resource - <http://www.digitalestateresource.com>
6. Digital Estate Planning – <http://www.digitalestateplanning.com>
7. Wills, Trusts & Estates Prof Blog - http://lawprofessors.typepad.com/trusts_estates_prof/
8. the digital beyond – <http://www.thedigitalbeyond.com/>

Business Development and Risk Management

By Ron Wargo
rwargo@frigolaw.com

Estate Planning for Digital Assets



Business Development

- Education
 - Technology
 - Applications
 - Solutions
- Communication
 - Using Technology
 - Educating Others
 - Growing Awareness
- Creativity
 - Selection
 - Licensing
 - Ownership



Education

- Technology
 - Becoming familiar with available technology assists a practitioner in developing sound legal strategies. Plus, many popular options are free.
- Applications
 - Understanding technology is not enough. Sound legal advice always requires a particular understanding of the client's unique use of their assets.
- Solutions
 - No estate plan is complete without presentation and implementation of tailored solutions for the client.



Education - Technology

- Types of Technology
 - Social media
 - Static Content
 - Dynamic Content
 - Hosting
- Technology Policies
 - Transfer
 - Ownership



Education - Applications

- Individual
 - Social media. Accounts with Twitter (www.twitter.com) and Facebook (www.facebook.com) are popular today, but there are many others.
 - Accounts. These can range from bank and brokerage accounts to photo sites (www.flickr.com) and file storage (www.dropbox.com).
- Business
 - EBay (www.ebay.com) and PayPal (www.paypal.com)
 - Others. Business accounts often have particular use and value. Some online businesses are substantial, and require inventories and detailed financial reporting.



Education - Solutions

- Digital Asset Storage
 - Users of online storage sites have thousands of family photos and important files stored in the ether. Know where those assets are located. Dropbox, Google's Gdrive, Windows Live SkyDrive, and countless others are available.
- Password Keepers
 - These software solutions change all the time. Currently, RoboForm, Sticky Password, Aurora Password Manager are often used.
- Beneficiary Designations
 - Be careful when sites advertise an ability to designate a beneficiary or representative to manage online information. Often, that contradicts state law.



Comprehensive Solutions

- Positives

- These companies, such as Legacy Locker, My Wonderful Life, AssetLock advertise comprehensive digital estate planning, data storage, password keeping, and post-death instructions. They may assist clients and their administrators in navigating the myriad changing policies respecting online assets.

- Negatives

- These companies may not be around, and their transfer policies may contradict state law.



Communication

- Using Technology
 - When emphasizing a practice with digital estate planning, consider incorporating digital marketing as well.
- Educating Others
 - Presenting seminars, webinars, and writing articles greatly expand an advisor's presence in this new area of planning.
- Growing Awareness
 - Pay particular attention to the death policies of important online material, such as Facebook and Twitter.



Creativity

- Selection of Techniques
 - With thousands of choices come thousands of opportunities. Asking questions about client's intended use of digital assets and the practicalities of planning for those assets is imperative.
- Licensing
 - Is licensing an option? Usually a license can work for copyrightable material, and may present a solution for conflicts between state law and online designations.
- Business Ownership
 - Similar to licensing, business ownership of digital assets may be an option. Keep in mind that some services may not permit corporate ownership of individual data.



Creativity – Selection of Techniques

- Changing Techniques
 - Online policies change all the time. Keeping abreast of important developments is essential. Pay attention to informational websites, such as The Digital Beyond (www.thedigitalbeyond.com) and Death and Digital Legacy (www.deathanddigitallegacy.com) which often have breaking news on the subject.
- Conferences
 - Conferences will become more prevalent as this issue increases. See, e.g. SXSW, Digital Death Day.



Creativity - Licensing

- Steps
 - Owner licenses to Third Party
 - Owner retains ownership
 - Third Party maintains, and maybe pays fee
- Possibilities
 - Licenses are simply agreements, and can bind the estate of a decedent post-death. Copyright licenses are limited to the length of the copyright (currently, life of the author +70 years) These licenses can circumvent many state laws, but may be thwarted by online data retention and access policies.



Creativity – Business Ownership

- Expansion to Business Ownership of Digital Assets
 - Often difficult to transfer individual accounts to corporate accounts.
- Possibility of Trust Ownership of Digital Assets
 - Like business accounts, many services seem ill-equipped to handle the online ownership by a trust.
- Transfer Not Necessary
 - Of course, if business or trust ownership works, it can simplify post-death transfer of digital assets.



Risk Management

- Awareness
 - Stability
 - Reputation
 - Understanding
- Insurance
 - Malpractice
 - General Liability
 - Redundancy
- Planning
 - Storage
 - Management
 - Transfer



Awareness

- Stability
 - Sites created in the 1990s are generally obsolete. See, for example, Prodigy, CompuServe, even AOL. Facebook (2004), Twitter (2006), Flickr (2004) show that extensive online history is almost non-existent.
- Reputation
 - Popularity today does not equal popularity tomorrow. See, e.g. MySpace.



Awareness - Stability

- Length of time
 - Length of time does not equal a stable online service. In fact, some may argue that the longer a site has been around, the less stable it is.
- Number of customers
 - Sites with many users often serve as a better barometer of stability. However, larger sites become targets of hacking, spamming, and data loss or deletion.



Awareness - Reputation

- Popular Reputation
 - Take reputation with a grain of salt. The ever-changing nature of online technology proves that one cannot count on any site being around for any significant length of time.
- Client Experiences
 - On the other hand, many sites, large and small, engender fierce consumer loyalty. If a client is part of a fanatical group of users of a particular type of technology, it is best to work with that technology rather than try to change the client's preferences.



Awareness - Understanding

- Basic Technological Understanding
 - Understanding the technology at issue is important, and seminars like this one get you on the road to that understanding.
- Back Office Understanding
 - Generally, this means understanding the transfer policies of online sites and services, as well as understanding the ownership of data. Many online services merely allow you to license the data, which may be owned by the site itself.



Insurance

- Insurance comes in many flavors, both traditional “protective” insurance that we advisors and our clients purchase, and insurance-like practices such as backups. The next few slides will to focus on:
 - Malpractice
 - General Liability
 - Redundancy



Insurance - Malpractice

- New Area of Law
 - Currently, legal malpractice policies do not address the unique nature of digital asset planning, and may not. However, expect future questions in the future about the nature and extent of online data management.
- Recordkeeping
 - As with any area of potential malpractice, documentation of practices and steps taken with individual clients is essential.



Insurance – General Liability

- Valuable Assets
 - Make sure that loss of clients' digital assets are covered by a general insurance policy, if the assets have any significant value.
- Copyright – Trademark Violations
 - If a client is sued for violating another's' right of publicity, copyright, trademark, or patent rights, does their typical homeowners' umbrella policy defend them? What about defamation (for bloggers and frequent comment posters)?



Insurance - Redundancy

- Backups
 - Important user files should be backed-up locally and a second copy of important files should be kept offsite. Loss of digital data happens too easily to ignore this issue. (Note, this applies to your files too, practitioners).
- Transfer of Management
 - Pay particular attention to the person managing digital assets.
- Transfer of Assets
 - The very nature of digital estate planning attempts to address this issue. Don't forget about the digital assets in any estate planning questionnaire and in the actual documents.



Planning

- Storage
 - Practitioners should ask clients about their storage practices.
- Management
 - Questions about the current management of digital assets can facilitate questions about future management.
- Transfer
 - If important, ask if the recipient of digital assets should be different from other assets. No more fighting over family photos?



Planning - Storage

- Online
 - Make sure the online storage solution selected by your client is around. Practitioners should keep a database of solutions.
- Offline - Owner
 - Emphasize the need for backups to your clients.
- Offline – Third Party
 - For important materials, emphasize the need for an offsite storage solution for backups. A fire can burn both the computer and the backup if kept at the same location.



Planning - Management

- Technological Savvy
 - When considering expertise, you do not need to be a computer programmer. However, estate planning advisors need more than a passing familiarity with technological options. Consider it similar to life insurance. Most of us know far more about life insurance products than we would care to admit, although we are not experts.
- Fiduciary Responsibilities
 - Particular assets will generate fiduciary duties.

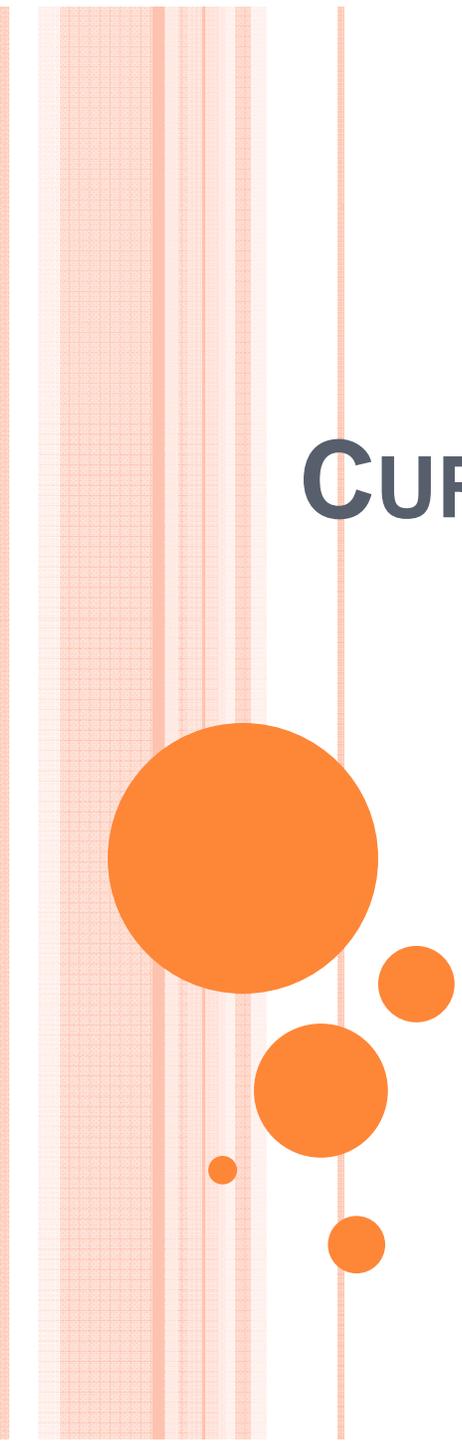


Planning - Transfer

- Maintenance
 - What are the clients' wishes with regard to maintenance of digital assets after death? Will there be a perpetual online memorial?
- Ongoing Issues
 - If collection of royalties is an issue, make sure the administrator understands it. For online memorials, who pays for the hosting, if needed?

Ronald Wargo

Friedemann Goldberg LLP
420 Aviation Blvd, Suite 201
Santa Rosa, CA 95403
(707) 543-4900
www.frigolaw.com



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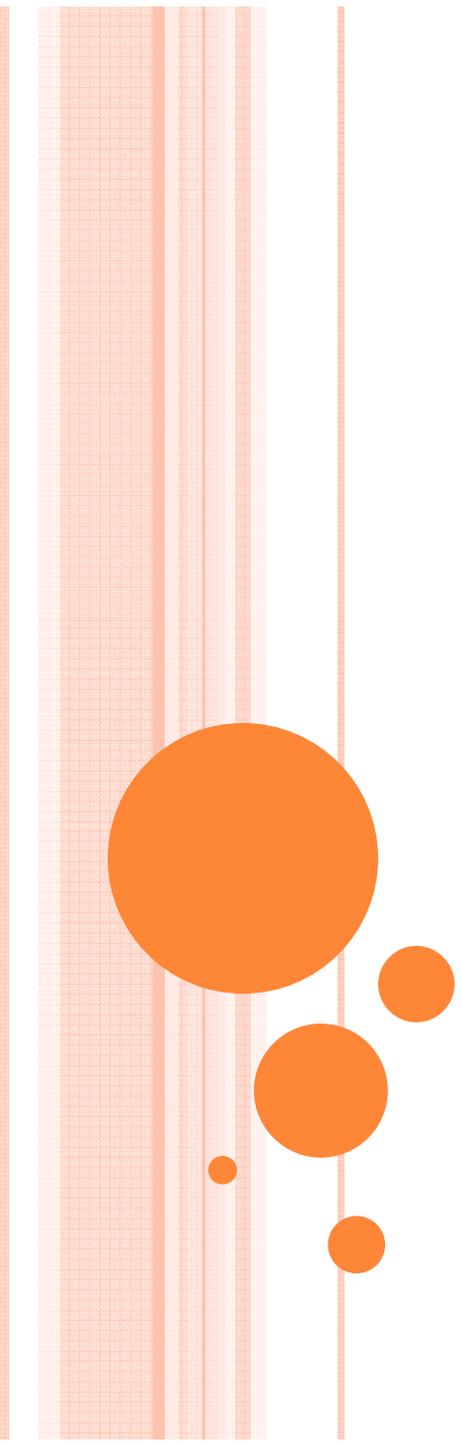
ESTATE PLANNING FOR DIGITAL ASSETS

Panel Discussion

Ronald Wargo

David Shulman

Nathan Dosch



QUESTIONS?

ESTATE PLANNING FOR DIGITAL ASSETS

Presenters

Ronald Wargo

David Shulman

Nathan Dosch