

Access to and Control over Digital Assets

Estate Planning and Administration Sample Provisions*

I. Will/ Revocable Trust Provisions:

a. Grant of Authority and Physical Control over Digital Devices: Consider incorporating into clause disposing of Decedent's tangible personal property:

Notwithstanding the above, any and all computers, cell or smart phones, and all other digital devices shall be held by my Executor to aid in the administration of my estate and shall not be distributed as part of my tangible personal property.

-And then what?? i.e.

Upon completion of administration of my estate.... (Options—Wipe clean/destroy, turn over to named heir, retain??)

b. Scope of Authority: Consider adding to provisions of Will or Revocable trust that define powers of fiduciary:

1. Alternative 1: *To access, use, control, and manage all digital devices, assets, and accounts I may own or have license to use, including but not limited to: accessing all of my electronic devices, including computers, laptops, phones, tablets, and routers; financial management accounts, including banks, stocks, retirement accounts, accounts for federal and state tax payments, utility accounts, PayPal, and online bill pay accounts; social networking sites including but not limited to LinkedIn, Facebook, and Google; e-mail accounts; websites and domain names; cloud storage accounts, including photo storage and processing sites such as Shutterfly and Blurb. My agent also may use any of my digital devices or may use other digital devices for the purpose of accessing, controlling, deleting, transferring, and distributing any digital asset and digital account that I may own or have license to use, to the extent then authorized by law, including the content of electronic communications. I specifically authorize my Agent to obtain and disclose any username, login, password, or other electronic credential associated with any of my digital devices, digital assets, and digital accounts. I specifically consent, for the purposes of the Electronic Communications Privacy Act/Stored Communications Act, 18 U.S.C. § 2701, et seq., for my Agent to receive any electronic content I owned or had license to use from a service provider.*

2. Alternative 2: *To access digital devices, assets and accounts. To the extent permitted under any federal or state data privacy law or criminal law, my Agent may access, use, obtain, modify, delete and control all digital or electronic data that may be stored on my desktop, laptop, tablet, or other computer, peripheral drive, storage device, mobile telephone or any similar device, including without limitation, all internet accounts, e-mail accounts, online financial accounts, online photographs and videos, online music, online documents, online tax preparation accounts, online shopping accounts, all licenses to online items and software, social network accounts, domain registrations, DNS service accounts, file share accounts, computer backup processes, and user passwords and other security access*

to any of the forgoing, and all similar digital items, accounts or otherwise which currently exist or may exist as technology develops. In general, my Agent may exercise all powers with respect to digital devices and online assets and accounts as I could if present.

3. Alternative 3: *Executor/Trustee shall have the power to access, use, and control any digital device that I may own or have license to use (e.g., computers, tablets, peripherals, storage devices, mobile telephones, smartphones, etc.) for the purpose of accessing, controlling, deleting, transferring, and distributing any digital asset and digital account that I may own or have license to use, to the extent then authorized by law. I specifically authorize Executor/Trustee to obtain any username, login, password or other electronic credential associated with any of my digital devices, digital assets and digital accounts. Pursuant to 18 U.S.C. §§2701 et seq., or any successor provision thereto, I consent to the release to my Executor of any of my communications or the contents thereof.*

4. Alternative 4: *To the extent permitted under any federal or state data privacy law or criminal law, my fiduciary may access, use, obtain, modify, delete and control all digital or electronic data that may be stored on my desktop, laptop, tablet, or other computer, peripheral drive, storage device, mobile telephone or any similar device, including without limitation, all internet accounts, e-mail accounts, online financial accounts, online photographs and videos, online music, online documents, online tax preparation accounts, online shopping accounts, all licenses to online items and software, social network accounts, domain registrations, DNS service accounts, file share accounts, computer backup processes, and user passwords and other security access to any of the forgoing, and all similar digital items, accounts or otherwise which currently exist or may exist as technology develops. In general, my fiduciary may exercise all powers with respect to digital devices and online assets and accounts as I could if present.*

- Which works best?
- What specific input is required from client? Especially as to “content of communications”?
- Is “to the extent permitted by law” (Alternatives 2 and 4) language problematic?
- Should language be included to address use of online tool?

II. Estate or Trust Family Settlement Agreement Provisions:

- a. Alternative 1. Consider using when fiduciary has made no attempt to access digital assets.

Beneficiary acknowledges that executor/trustee has made no attempt to access the digital assets or digital accounts of the decedent (because not authorized by law or governing instrument / because the executor/trustee determined that it would cost the estate/trust more for her to access such accounts than it would result in gain to the estate/trust) and releases and holds harmless executor/trustee for any liability that may arise as a result, including liability for any third party access to such accounts electronic communication service or for not obtaining something of value to the estate or beneficiary as a result.

- b. Alternative 2. Consider using when fiduciary has made reasonable efforts to access digital assets.

Beneficiary acknowledges that executor/trustee has made all reasonable efforts to access the digital assets and digital accounts of the decedent and to discover, delete, transfer or obtain value from such assets and accounts as the law or practicality will allow and releases and holds harmless the executor/trustee for any liability that may arise as a result, including liability to any third parties for accessing such accounts or for not obtaining a digital account or digital asset of value to the estate or beneficiary even with the reasonable efforts made.

III. Power of Attorney Provision:

Digital Assets and Accounts. To access, use, control, modify, delete and transfer digital devices (e.g., computers, tablets, peripherals, storage devices, mobile telephones, smartphones, etc.), digital assets (e.g., music, photographs, licenses, videos, currency, etc.) and digital accounts (e.g., email accounts, social media accounts, file sharing accounts, financial accounts, etc.) I may own or have a license to use, now or in the future. I specifically authorize my Agent to obtain any username, login, password or other electronic credential associated with any of my digital devices, digital assets and digital accounts. Pursuant to 18 U.S.C. §§2701 et seq., or any successor provision thereto, I consent to the release to my Agent of any of my communications or the contents thereof by any electronic communication service or remote computing service.

- Will all clients want to grant access to contents of communications?

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