



# Digital Death

# Duties of an Executor (*simplified*)

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- ◆ **Find** assets of the decedent
- ◆ **Manage** assets until distributed (buy, sell, hold & maintain property)
- ◆ Determine **ownership** of assets (probate, non probate)
- ◆ Determine **inheritance** of asset (transferability)
- ◆ Pay **taxes** on assets (valuation)

# Defining the Problem IS a Problem

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*“Digital Accounts” means but is not limited to, email, financial, personal and other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.*

*“Digital assets” means text, images, multimedia information or personal property stored in a digital format, whether stored on a server, computer or other electronic device which currently exists **or may exist as technology develops and regardless of the ownership of the physical device upon which the digital asset is stored. Digital assets include, without limitation, any words, characters, codes or contractual rights necessary to access the digital assets.**”*

◆ Oregon State Bar Proposed Legislation. *Emphasis Added.*

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# Personal Digital Assets

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- ◆ **Hardware** – Computers, tablets, smart-phones, old phones, thumb drives, zip drives, CD ROMs, DVDs, floppy disks, game disks, game consoles and handhelds, mp3 players, memory cards for cameras, e-readers, Blu-ray, VCR tapes...

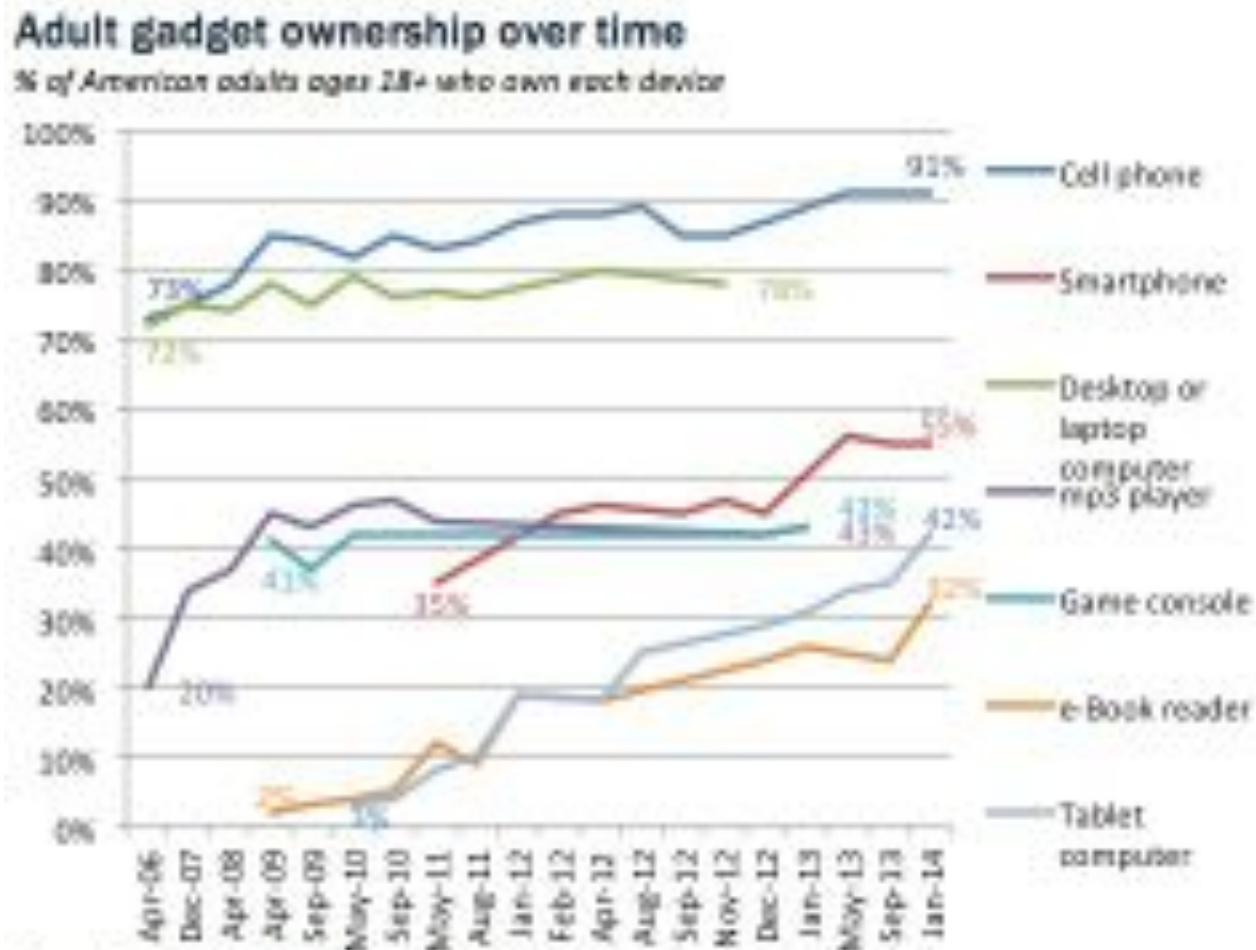


# Software and Virtual Digital Assets

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- ◆ **Exist across multiple platforms and/or ‘gadgets’**
  - Conventional documents (MS Word, WordPerfect, PDFs, Excel, etc.)
  - Photos
  - Music
  - Videos
  - Email
  - Text Messages
  - Voice Mails
  - Game disks
  - Smart Phone or Internet Apps
  - Cloud-Based applications

# The Problem is Expanding



Source: Pew Internet surveys 2005-2014

Note: Desktop and laptop computers are now reported as one computer ownership figure to reflect changes in our question wording. 2013 e-reader/tablet results based on Americans ages 16+.

# Business (and Other) Assets

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- ◆ Customer databases (and protection of privacy concerns)
- ◆ Inventory
- ◆ Income, Sales and Employment Tax Records
- ◆ Client records or Patient records (physicians)
- ◆ Social media pages (Linked In, Facebook, Pinterest, Etsy, Ebay, Twitter, etc.)
- ◆ Domain names, blogs, mailing lists, RSS feeds
- ◆ Other assets – frequent flyer miles, reward points, vouchers



Can you really find all the assets?

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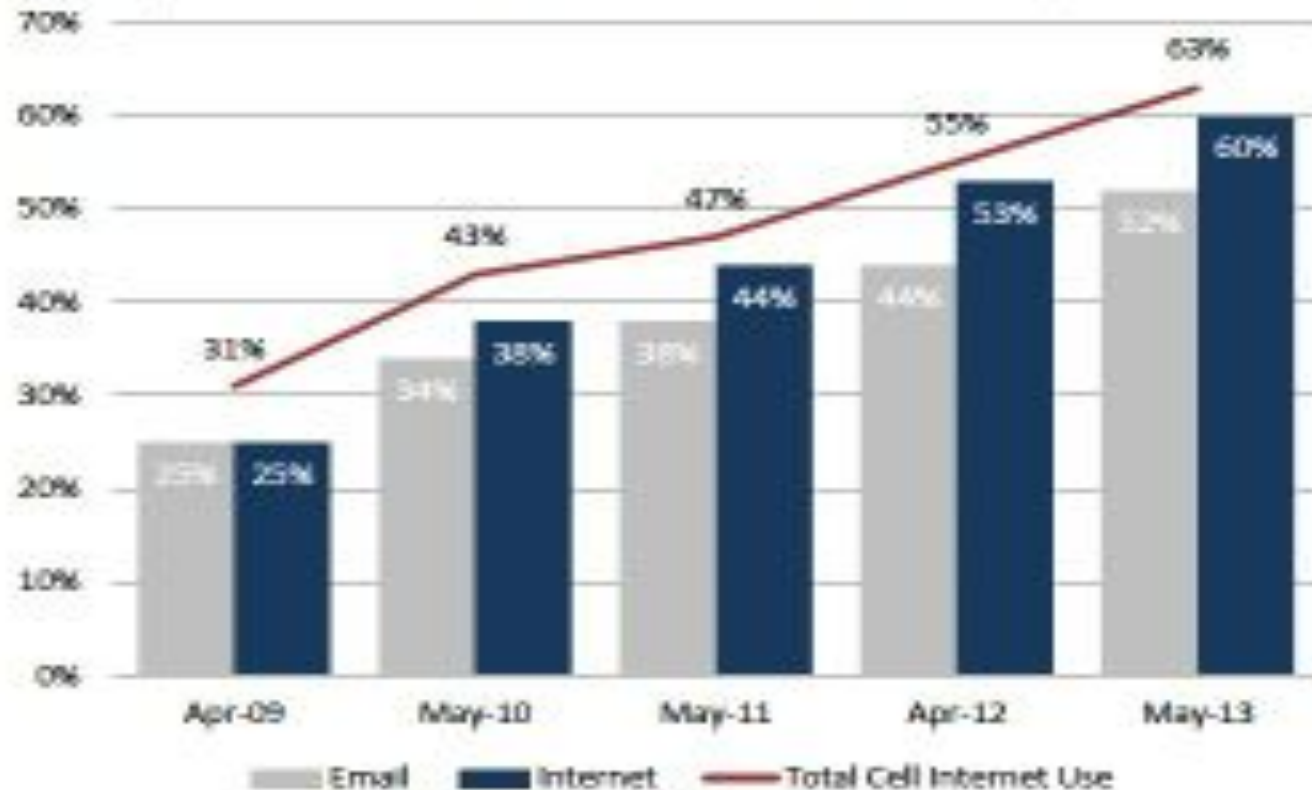




# Tracing access can be difficult

## Almost two-thirds of cell owners go online using their phones

Among cell phone owners, the % who use the internet or email on their phone



Source: Pew Internet & American Life Project Spring Tracking Survey, April 17-May 19, 2013. N=2,076 cell phone owners ages 18+. Interviews were conducted in English and Spanish and on landline and cell phones. The margin of error for results based on cell phone owners is +/- 2.4 percentage points.

# Can you access the accounts?

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# Proliferating Passwords

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- ◆ A Pernicious Problem
  - Almost 60% of adults have 5 or more unique passwords
    - Raises issues of identity theft if doubling or tripling up on passwords
  - Over 30% have 10 or more passwords
  - One out of 10 people. have 21 or more unique passwords
- ◆ Number of devices increasing
  - Average U.S. household has 5.7 connected devices – many have 15+
  - College students have 7 tech devices, on average
- ◆ Frequent Resets
  - Access to Email Required
  - Security Questions and Special Icons need verification
- ◆ Encryption Concerns

# Criminal laws

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- ◆ **Stored Communications Act** – Creates privacy rights preventing disclosure of assets
  - Part of Electronic Communications Privacy Act of 1986
- ◆ **Computer Fraud & Abuse Act (CFAA)** – Allows prosecution when individual, including a fiduciary, “exceeds authorized access”
- ◆ Much debate over scope and extent of these provisions
- ◆ Issues of contract law, public policy, choice of law, arbitration provisions and even constitutionality can arise

# State Laws

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- ◆ Nine states have clear fiduciary access provisions
- ◆ Some state laws offer only limited access to email, others cover broader electronic media
- ◆ Still in conflict with Federal CFAA
- ◆ Initiatives recently have passed (Delaware, Louisiana) or are pending in a number of states, including Oregon
- ◆ Legal considerations extend beyond just the CFAA to touch on areas of intellectual property, contract law, international law, arbitration provisions and general transfer issues

# Uniform Fiduciary Access to Digital Assets Act

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- ◆ January 2012 -- Uniform Law Commission approved committee to study issues pertaining to fiduciary power and authority over digital assets of a disabled or deceased person
- ◆ July 2014 -- Committee presented its report and proposed legislation for the model act (UFADAA)
  - Stand alone act, designed to balance needs of fiduciaries with privacy and contractual considerations
  - Permits fiduciaries to step into shoes of decedent for purposes of disclosure by service providers of digital media
  - Creates a presumption of authorization (must elect *out* of access), overriding terms of service contract limitations

# Can you transfer the assets?

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# Terms of Service (TOS) Contracts

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- ◆ Understand the terms of service but recognize change rapidly
- ◆ Despite state laws and new UFADAA, fiduciary may still not have access
  - UFADAA only allows access, does not affect transfer restrictions
  - Releases or directives may not be recognized by provider
- ◆ Access to (and use of) a “real” account can differ from “memorial” sites or access for purposes of administration
- ◆ Copyright, licenses and Digital Rights Management (DRM) copy protection can effect disposition of hardware as well as use of software

# Curating the Digital Assets

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- ◆ Fiduciary needs to understand the value of the assets as well as how to preserve digital assets appropriately
  - What actions are required during estate administration to preserve value (and often to preserve the asset itself)
  - What are the concerns around disposal (deletion) of digital assets and devices?
  - What guidance is provided as to deletion or disposition of digital assets?
- ◆ Digital Obsolescence – how should the assets be stored during the administration period and beyond? What is transferred to the beneficiaries?
- ◆ For unique assets, be aware of a number of initiatives around formalizing preservation and archiving of digital assets
  - Provenance is often the key to value of a digital asset

# Valuing the Assets

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- ◆ Value is the “price at which the property would change hands between a willing buyer and a willing seller” *Treas. Reg. 20-2031(b)*
- ◆ Traditional metrics are often meaningless (initial cost, comparable sales, replacement value)
- ◆ Asset may not have any value after death, or have significant value
  - Sentimental vs. historic value
- ◆ Copyright, licensing and terms of Service contracts limit value
- ◆ Some assets have value on “illegal” markets (video avatars, virtual worlds)
- ◆ Other assets have value but require time “in the game” to monetize

# Security & Privacy of Digital Information

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- ◆ Leaks of financial or personal information often comes to light years after the breach occurred
- ◆ Benefit fraud is increasingly common and often overlooked
- ◆ Assuming control over financial and digital information can be challenging even with robust security measures



# Chaos is Overwhelming

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- ◆ Planning here is challenging
  - Knowledge of the issue generally
  - Time to set up a system - overwhelming
  - Upkeep of relevant information



# Organization is Key

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- ◆ Provide Templates and Guidance for clients to get organized
- ◆ Encourage Organization
  - Consistent File Structure
  - Centralized Password or Access lists
- ◆ Do not assume custody of passwords or sensitive material



# Some Best Practices to Encourage

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- ◆ Maintain up to date password list – legible, with all information (email login, security questions and answers, etc.). Hardcopy often best
- ◆ Scan password list to secured storage unit annually, if not quarterly
  - Locally back up important internet information (email, web, Facebook etc.)
  - Locally back up computer to multiple locations
  - **Virtually** back up computer to multiple locations
- ◆ Understand Encryption and provide access keys
- ◆ Do not use attorney or other advisor as the “password keeper”
- ◆ While password and verification is key, most important is ***where the password resets and how it resets***



# Commercial “Password Keepers”

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- ◆ A Master “Password Vault”
  - Updating
  - Company viability
  - Access limited by other reasons
- ◆ Over 2000 Password-related Apps on the Apple App store alone, many more web based solutions
- ◆ Authorization or Encryption as Second Level of protection
  - May require email or smartphone App access to authenticate
- ◆ Location of servers and consumer rights under international laws complicate access and legal claims for damages

# Location, Location, Location

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- ◆ What is the **physical** location of files?
  - Home
  - Office
  - Car
  - Briefcase
  - Virtual storage of assets (apps, etc.)
  - Cloud based back-up of files and archives
  - Website-related information and content
- ◆ What is the **ownership** of files stored?
  - Corporate files, non-disclosure, non-competes

# Add Language to all documents

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- ◆ Wills and Revocable Trusts
  - Incorporate model language
  - Clearly provide authorization
  - Educate Executors and Fiduciaries as to concerns over privacy
- ◆ Powers of Attorney
  - Consider multiple powers or specific designations as to assets
  - Clients to provide guidance as to disposition
- ◆ Digital Asset Executor as special designation
- ◆ Incorporate Releases for Executors, Trustees, Attorneys-in-Fact with respect to Digital Assets

# Sample Revocable Trust Language

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*My Trustee has the authority to access, modify, control, archive, transfer and delete my digital assets.*

*Digital assets include my sent and received emails, email accounts, digital music, digital photographs, digital videos, gaming accounts, software licenses, social-network accounts, file sharing accounts, financial accounts, domain registrations, Domain Name System (DNS) service accounts, blogs, list-serves, web-hosting accounts, tax-preparation service accounts, online stores and auction sites, online accounts and any similar digital asset that currently exists or may be developed as technology advances.*

*My digital assets may be stored on the cloud or on my own digital devices. My Trustee may access, use, and control my digital devices in order to access, modify, control, archive, transfer and delete my digital assets – this power is essential for access to my digital assets that are only accessible through my digital devices. Digital devices include desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar hardware that currently exists or may be developed as technology advances.*

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# Don't forget about Health Records!

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- ◆ HIPPA was designed to permit access to records and information to survive the death of the named individual
- ◆ Standard forms are usually silent on access to digital assets or medical records
- ◆ State laws may limit who can request information
- ◆ Hospitals and medical staff unaware of nuances in disclosure
- ◆ Use of digital information can be expanded or restricted in documents
- ◆ Add language that provides for access after death, especially in blended families, domestic partnerships or same-sex marriages (where state laws may attempt to preclude access)

# Other Ideas

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## ◆ Pre-Death Audits

- What is important (location and access)?
- What should be retained or purged?
- Can we access all accounts properly?

## ◆ Digital Asset Trusts

- Not widely used or understood
- Asset must be transferable
- Unclear application in many situations when the asset “morphs” on death
- Legal considerations remain as to access

## ◆ Broad based security and archiving for assets is a must

- Assume multiple failure points

# The Rise of Digital Mourning

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- ◆ A community that lives online will mourn online
- ◆ Online memorial walls or guest books increasingly part of offering by funeral homes and planners
- ◆ Facebook pages revisited frequently as source of psychological comfort
- ◆ Incorporate into client discussions around funeral planning where possible





# Looking Ahead

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For more information or sample language

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