



Estate-Planning to Prevent the Loss of Digital Assets

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As rapidly-evolving digital technology becomes increasingly ubiquitous, it is increasingly likely that decedents will own digital assets. Given the nature of digital assets, planning for estates containing digital assets poses unique legal considerations. Thus, it is crucial that estate-planning attorneys identify their clients' digital assets and plan for them accordingly.

Under Ohio law, a digital asset is defined as an electronic record in which an individual has a right or interest. The definition of a digital asset explicitly excludes an underlying asset or liability unless the asset or liability itself is a digital record. Examples of digital assets include, without limitation: cryptocurrency; social media accounts; online bank accounts; websites; and digital communications, such as emails.

Failure to adequately plan for such assets to pass in accordance with the decedent's wishes raises significant barriers for the decedent's heirs to obtain the digital assets. Such barriers include, without limitation, passwords, data encryption, and data privacy laws. If the heirs are unable to overcome these barriers, the digital assets could be lost forever.

To address such barriers, Ohio's legislature enacted Chapter 2137 of the Ohio Revised Code – Ohio's counterpart of the Revised Uniform Fiduciary Access to Digital Assets Act. This Chapter provides certain fiduciaries of a decedent – such as an agent acting under a power of attorney, a personal representative, a guardian, or a trustee – with potential solutions for gaining access to the decedent's digital assets. For example, Section 2137.06 and Section 2137.07 provide permissible ways for a custodian of a decedent's digital assets to disclose such assets to the decedent's fiduciary. Similarly, Section 2137.11 allows the custodian of digital assets held in a trust to disclose the same to a trustee who was not the original user of the digital assets, and Section 2137.13 allows the custodian to disclose a ward's digital assets to the ward's guardian.

However, the use of these provisions can be avoided if digital assets are properly identified and planned for within the estate-planning process. Section 2137.03(a) allows for a person to direct the custodian of its digital assets to disclose, or to not disclose, to a designated recipient some or all of the person's digital assets. Alternatively, Section 2137(b) allows for a person to allow or to prohibit, in a will, trust, power of attorney, or other record, disclosure to a fiduciary of the user's digital assets.

It is crucial to consider digital assets during the estate-planning process to prevent the loss of such assets. Given that digital assets raise specific considerations, and that the prevention of the loss of such assets requires the utilization of Chapter 2137 of the Ohio Revised Code, sophisticated and experienced counsel should be consulted to help prevent such loss.

This article provides an overview and summary of the matters described therein. It is not intended to be and should not be construed as legal advice on the particular subject.