

IN THE COURT OF COMMON PLEAS, PROBATE DIVISION, GEAUGA COUNTY, OHIO
Judge Timothy J. Grendell

Information Sheet
Digital Assets

WARNING

This Information Sheet is intended to provide you with an overview of the subject matter, effective as of the date noted in the upper left-hand corner. This Information Sheet is not intended to provide you with all legal information that may be necessary for you to decide upon a course of action, and the information provided may not be error-free, complete, or accurate. Moreover, this Information Sheet may not accurately describe the cited sections of the Ohio Revised Code or cited case law. Finally, this Information Sheet is not intended as a substitute for legal advice from a competent licensed attorney, who is familiar with all of the relevant facts of your case, and therefore the Help Center recommends that you seek legal advice from a competent licensed attorney that you select before taking any action. While the Help Center can provide you with a limited amount of general legal information, neither the Help Center staff nor any other Court employee can give you any legal advice.

Background

Decedents and Wards are increasingly likely to own Digital Assets (defined below). The Fiduciary¹ has a duty to exercise reasonable efforts to ascertain whether the Decedent owned digital assets, for the benefit of creditors, a surviving spouse (and minor children), and beneficiaries or next-of-kin. Like any other probate property, digital assets may need to be sold to pay creditors, distributed to satisfy the rights of a surviving spouse, or distributed under the terms of a Will admitted to probate or under the laws of descent and distribution. Likewise, a Guardian must determine whether a Ward owns Digital Assets. The Fiduciary must be aware of, and abide by, applicable federal and state law, and the Fiduciary must be sensitive to the privacy rights and concerns of the Decedent or Ward.

What is a Digital Asset?

At the risk of being too technical, a digital asset is defined in R.C. 2137.01(I) as follows:

“Digital asset” means an electronic record in which an individual has a right or interest. Digital asset does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

Because a Digital Asset is any “electronic record” you must also consider the definitions of “electronic” and “record.”

“Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.²

¹ “Fiduciary” means a person appointed as the Executor, Administrator, or Commissioner (for a Release from Administration) or applicant of a Summary Release from Administration; or the Guardian of a Minor or Incompetent Adult.

² R.C. 2137.01(J)

"Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.³

"Information" means – *data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.⁴*

Some examples of Digital Assets are:

- Personal
 - Photos, videos, music
 - Emails and texts
 - Digital books, gaming assets
 - Home security system recordings
 - Medical records, tax documents
 - Loyalty Program Benefits – e.g. credit card points or airline air-mile credits
 - Domain name for a website
- Social Media – Digital Assets resulting from interaction on social media platforms – e.g. Facebook, LinkedIn, Twitter, YouTube, Instagram, Reddit, Tumbler, etc.
- Financial Accounts⁵
 - Cryptocurrency – e.g. Bitcoins, Ethereum, XRP, EOS, etc.
 - Amazon, e-Bay, Apple, PayPal Accounts
 - Online Bill Paying Accounts
- Business – generally for a self-employed Decedent (or Ward)⁶
 - Customer, supplier, and employee Information
 - Credit card and online financial statement information

Non-custodial Digital Assets v. Custodial Digital Assets.

A Fiduciary can better understand his duties by identifying Digital Assets in two forms – i.e. "Non-custodial Digital Assets" and "Custodial Digital Assets." Essentially a Non-custodial Digital Asset is a Digital Asset that the owner stores on his own storage equipment while a Custodial Digital Asset is a Digital Asset that the owner stores on the storage equipment of a third party (the "Custodian").

Non-custodial Digital Assets

A Non-custodial Digital Asset is stored on a storage device that is owned by the owner. Examples of such equipment are computer hard drives (including a tablet), cellphone, "flash" drive, backup systems, CD, DVD, etc. Both the storage equipment and the Digital Assets stored on the storage equipment are the owner's property, but the storage equipment is tangible personal property and the Digital Asset that resides on the storage equipment is a "Non-custodial Digital Asset" – i.e. an "electronic record." Think of a safe that is located in the owner's home and within the safe is certificates of stocks and bonds. The safe is tangible personal property and the stocks and bonds are intangible personal property. With Non-custodial Digital Assets, the safe is the storage equipment

³ R.C. 2137.01(U)

⁴ R.C. 2137.01(O)

⁵ R.C. 2137.01(A)

⁶ R.C. 2137.01(Z)

(e.g., a flash drive), which is tangible personal property, and the Non-custodial Digital Assets, which reside on the flash drive, are like the stocks and bonds that are stored in the safe.

Both the owner's electronic storage equipment and the Digital Assets that reside on such equipment are Probate Property.

- Dealing with Non-custodial Digital Assets

- Appraisal. Some Digital Assets can have substantial economic value.

- Cryptocurrency
- Domain Names
- Book manuscript
- Music collections

Of course, some Digital Assets can have little economic value but significant sentimental value – e.g., photos, videos, emails, documents. The Fiduciary may need to have those Digital Assets with economic value appraised if their value is not readily ascertainable.

- Inventory. Like any Probate Property, the Fiduciary must include Digital Assets on the Inventory, or otherwise include them in the preparation of documents for a Release from Administration or Summary Release from Administration. Likewise, a Fiduciary must include the Ward's Digital Assets on the guardian's inventory.
- Sale. If Probate Property must be sold, then the Fiduciary must consider whether and to what extent the Digital Assets must be included in the sale process.
- Rights of Surviving Spouse. The Rights of a Surviving Spouse extend to Digital Assets that are Probate Property.
- Distribution. The Fiduciary must carefully consider the wording of a Will admitted to probate to determine who should receive any Digital Assets. If a Will does not specifically determine what beneficiary or beneficiaries should receive the Digital Assets, then the Fiduciary must prepare and file the form titled "Application to Distribute in Kind" (Probate Form 10.0) to obtain a court order for distribution – see the probate information sheet titled "Full Administration."
- Access Rights.⁷ A Fiduciary, with authority over the property of a Decedent or Ward, has the right to access any Digital Asset in which the Decedent or Ward had a right or interest and that is not held by a Custodian or subject to a terms-of-service agreement.

Custodial Digital Assets.

A Custodial Digital Asset is stored on a storage device that is owned by a third-party (the "Custodian"). Think of a bank safe deposit box ("BSDB"). Suppose the owner of property, while married, has four types of property that he wants to store in a BSDB. They are (1) family photos, (2) stock certificates, (3) love letters to and from a girlfriend, and (4) "compromising" videos. The owner would go to a bank, sign a contract, and receive a unique number and key for the BSDB and deposit his property in the BSDB. Thereafter, he can easily access his property. The owner has an

⁷ R.C. 2137.14(C)

expectation of privacy as to the property he has deposited. After the owner has died, the Fiduciary cannot access the BSDB without a court order - see the website checklist titled "Checklist - Safe Deposit Box."

Storing Digital Assets with a Custodian is not much different. Before being permitted to store (i.e. "upload") Digital Assets on a Custodian's "storage facility" the owner will sign a contract, which is known as a "Terms of Service Agreement," (TOSA), often the result of a "click in the box" or clicking the "I agree" box. Such contracts, known as "clickwrap" agreements, are enforceable as any other contract. After entering into the TOSA, the owner will receive a "username" and "password," (just like the unique number and key for a BSDB). The username and password give the owner future access to the Digital Assets (just like going to the bank and opening the BSDB). Likewise, the owner has an expectation of privacy as to the Digital Assets he has uploaded onto the Custodian's storage equipment and Custodians will honor that expectation of privacy of their users.

Both federal and state laws have been enacted to protect the privacy rights of an owner of Custodial Digital Assets.

- Federal Law – the *Storage Communications Act*⁸ ("SCA"). In summary the SCA requires that the Custodian may not disclose certain types of Custodial Digital Assets "without the lawful consent of the originator or an addressee." Although that may be helpful while the owner is living, the SCA is problematic when the owner dies or becomes legally incompetent.
- State Law – the Uniform Fiduciary Access to Digital Assets Act⁹ (RUFADAA), which provides a process for a Fiduciary to access Digital Assets held by a Custodian.
- Dealing with Non-custodial Digital Assets. A Fiduciary must deal with Custodial Digital Assets in the same manner as described above for Non-custodial Digital Asset regarding appraisal, inventory, creditor and surviving spouse rights, sale, and distribution.
- Access to Custodial Digital Assets. Assuming that the Fiduciary has possession of the owner's storage equipment and the applicable passwords if required, the Fiduciary can easily access Non-custodial Digital Assets. However, access to Custodial Digital Assets is more challenging because of the contract between the owner and the Custodian. Additionally, the Custodian may violate federal law (i.e. SCA) if a Custodian permits the Fiduciary to access Digital Assets without the owner's consent.
- Granting or Denying Access. The owner of Custodial Digital Assets (e.g., social media accounts, other website accounts) may determine whether a Fiduciary may access, or prohibit access to, such Digital Assets.
 - Online Tools.¹⁰ Many Custodians offer their users specific methods to govern access to the Digital Assets held by the Custodian, known generally as online tools. By using an online tool, the owner can grant access or deny access to a Fiduciary for all or certain Digital Assets – such as the "content of electronic communications" (e.g., emails, texts). Any directions regarding disclosure of access that is made by an online tool overrides any direction provided in legal documents explained below.

⁸ 18 USC 2701 et seq., enacted in 1986.

⁹ R.C. Chapter 2137.

¹⁰ R.C. 2137.03(A)

- Legal Documents.¹¹ The owner of Custodial Digital Assets may provide directions regarding access (or denial of access) to such property (including access to the content of emails) by providing directions in a Will, a power of attorney, or a trust. If the directions and authority provided in a legal document are contrary to an election made in an online tool, the online tool governs.
- Terms-of-Service-Agreement (TOSA).¹² In some cases, the Custodian's TOSA will have provisions regarding access (or denial of access) to Digital Assets held by that Custodian. However, any contrary provision by an online tool or a legal document will override the TOSA.
- Court Order.
 - If an Estate Representative requires a court order to access Digital Assets pursuant to R.C. §§2137.06 or 2137.07 in order to determine the full extent of the Digital Assets that are part of the probate property, then that Fiduciary shall prepare and file with the Court the form titled "Application for Access to Digital Assets - Estate" (GC PF 6.5B). The Estate Representative should deliver an authenticated copy of the judgment entry to the Custodian. Hopefully, the Custodian will abide by the judgment entry and grant access.
 - Likewise, if a Guardian requires a court order to access Digital Assets pursuant to R.C. §2137.13, then the Guardian shall prepare and file with the Court the form titled "Application for Authority Over Digital Assets" (GC PF 15.5C). Again, the Guardian should deliver an authenticated copy of the judgment entry to the Custodian.

Notifying the Court of the Decedent's or Ward's Digital Assets. The Fiduciary must make a good faith effort to determine the extent of the Decedent's Digital Assets and report their existence to the Court.

- A. Digital Asset Certification.¹³ At or before the filing of (i) the Inventory and Appraisal (Form 6.0), (ii) an Application to Relieve Estate from Administration (Form 5.0), or (iii) an Application for Summary Release from Administration (Form 5.10), the Estate Representative shall prepare and file with the Court the form titled "Digital Asset Certification (GC PF 6.5).¹⁴ Likewise, a Guardian, at or before the filing of the guardianship inventory, shall file with the Court the form titled "Digital Asset Certification - Guardianship" (GC PF 15.5A).
- Supplemental Schedule of Assets. Depending upon the disclosure on the Digital Asset Certification, the Court may require the Fiduciary to prepare and file a Supplemental Schedule of Assets.

Distribution of Decedent's Digital Assets.¹⁵ The Court deems the distribution of Digital Assets as "in kind" and governed by R.C. §2113.55. After the Estate Representative has filed the initial filing that describes the probate property, and provided that there is sufficient probate property to pay valid creditor claims and to satisfy all statutory spousal and minor children rights, the Estate

¹¹ R.C. 2137.03(B)

¹² R.C. 2137.03(C)

¹³ See Geauga Probate Local Rule 78.5(A)(3)

¹⁴ See Geauga Probate Local Rule 78.5(A)(3)(a)

¹⁵ See Geauga Probate Local Rule 78.5(A)(3)(b)

Representative may not distribute any Digital Assets unless: (1) the Estate Representative prepares, obtains all required signatures, and files with the Court the form titled "Consent to Distribution of Digital Assets" (GC PF 6.5A) or (2) obtains a court order authorizing such distribution, which may be obtained by filing the form titled "Application to Distribute in Kind" (Form 10.0), together with the form titled "Order Approving Distribution in Kind" (Form 10.1); provided however, that if Decedent's will is admitted to probate is uncontested, then to the extent that such will makes a specific bequest of any Digital Assets, then the Estate Representative need not obtain a court order or written consent in order to distribute such Digital Assets in accordance with that will. If the Court sets a hearing on the Application to Distribute in Kind, then the Estate Representative shall notify all Interested Persons using the form titled "Notice of Hearing" (GC PF 4.18) no less than 10 Court Days before the hearing. Additionally, the applicant shall provide the Court with proof of service of that notice. See the probate information sheet titled "Service of Notice, Subpoena, or Summons" and see Geauga Probate Local Rule 78.13 for more details on service of notice and proof of service to the Court. If the address of a person to be served is unknown, or the name is unknown, and service of publication is required, then review Geauga Probate Local Rule 78.14 and the probate information sheet titled "Service of Notice, Subpoena, or Summons" for more details.

If the probate property is not sufficient to pay valid creditor claims and all statutory surviving spouse and minor children rights, then the Estate Representative may not distribute any Digital Assets unless the Estate Representative obtains a court order authorizing such distribution, which may be obtained by filing SC Form 10.0 "Application to Distribute in Kind;" together with SC Form 10.1 "Order Approving Distribution in Kind."

LEGAL PRACTICE IN THE PROBATE COURT IS RESTRICTED BY LAW TO ATTORNEYS WHO ARE LICENSED BY THE SUPREME COURT OF OHIO AND INDIVIDUALS WHO ARE HANDLING THEIR OWN LEGAL MATTERS. IF AN INDIVIDUAL WISHES TO HANDLE HIS OR HER OWN CASE, THAT PERSON MAY ATTEMPT TO DO SO, HOWEVER DUE TO THE COMPLEXITY OF THE LAW AND THE DESIRE TO AVOID COSTLY ERRORS, MANY PERSONS WHO HAVE MATTERS BEFORE THE COURT ARE REPRESENTED BY AN ATTORNEY.

IF YOU CHOOSE TO REPRESENT YOURSELF AND USE THE COURT'S FORMS, BE AWARE THAT STATE LAW PROHIBITS THE JUDGE, MAGISTRATE, AND EMPLOYEES OF THE GEAUGA COUNTY PROBATE COURT, INCLUDING THE HELP CENTER STAFF, FROM PROVIDING YOU WITH LEGAL ADVICE. IF YOU NEED LEGAL ADVICE, THEN YOU SHOULD CONTACT AN ATTORNEY OF YOUR CHOOSING.