

PODCAST: Exploring Digital Asset Planning and Estate Administration with Author Sharon Hartung – Part One

The Digital Planning Podcast Series

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[Introduction – Unknown Speaker]

Welcome to the Digital Planning Podcast. This series is designed to educate individuals about all things digital in connection with estate planning, business planning and estate administration. To keep up with all things digital, please subscribe at iTunes, Stitcher, Google Play, or wherever you download your podcasts. And now Jennifer Zegel, a partner at Kleinbard LLC, Ross Bruch, a principal of EstateGenie and Justin Brown, a partner at Pepper Hamilton LLP with today's topic.

[Jennifer Zegel]

Welcome back to the digital planning podcast. I'm your host Jen and with me today is my podcast partner, Justin, and unfortunately our other team member, Ross, is not available to be here today because he has a work conflict. However we have something very special planned for you because we will be interviewing Sharon Hartung. Now Sharon is the founder and principal of Your Digital Undertaker and Sharon has over 30 years of experience in IT management, project management and consulting. Sharon realizes a multi-disciplinary approach to educate and assist people in better understanding the world of managing digital assets, in estate planning and estate administration.

Sharon has bought and maintains large enterprise systems in both the public sector and for financial clients. Sharon spent a large portion of her career as an executive and consultant in project management for IBM Global Services. Sharon's book, *Your Digital Undertaker - Exploring Death in the Digital Age in Canada*, was recently published. Sharon is also a Society of Trust and Estate Practitioners (STEP) affiliate and committee member of the STEP Global Digital Assets Special Interest Group.

Welcome Sharon. Thank you so much for being here with us today.

[Sharon Hartung]

Thanks so much Jenn and Justin, I really appreciate being here today.

[Jennifer Zegel]

So Sharon, how did you get interested in exploring digital assets?

[Sharon Hartung]

Really an interesting question when you're talking to someone from information technology. Now my journey into estate law and digital assets didn't start with technology but, as you might expect, it started when my mom died without a will. And when I was dealing with her estate I came to realize the job of executor and somehow we really haven't learned to talk about that. So the journey started by trying to crack the code on my mother's estate but once I started to realize

the transform impact technology and digital assets were about to have on the estate industry, my new vocation was born.

[Jennifer Zegel]

So you have a large background in technology and you're stemming that into exploring digital assets. How did that marriage really get effectuated as part of your mother's estate administration process.

[Sharon Hartung]

Certainly, my experience with technology as an Aerospace Engineering Officer where I managed and vetted system projects and from there I went to IBM where I ran projects for clients in the private and public sector. You know I had a variety of roles in project management from leading projects to quality enrich management and an interesting tour of duty went into division for outsourcing where our clients would hire us to maintain the system.

But when I was dealing with my mother's estate I couldn't find a basic how-to manual or anything that was written for the pre-digital world and when I was an executive at IBM I learned it wasn't about understanding processes, what was really important was documenting the processes so others could understand it. So that's how I've taken those skills and moved into document for universal process and obviously with a digital side.

[Justin H. Brown]

So Sharon was your mother's death the motivation for the book?

[Sharon Hartung]

It was definitely the pivotal event that unfolded. And as I mentioned, working through her estate I began to realize that although I ran large projects at IBM in the Air Force, I had no idea what a big project the executor's role is and when you start to layer on the fact that we have completely gone digital in our online lives, I began to realize the industry might need some help from a professional like myself who could understand project management enough to really think about the role of executor.

[Justin H. Brown]

Well it's so interesting because a lot of people who are in the estates world, started in the estates world. And you really didn't. You started in the tech world and came into this world.

[Jennifer Zegel]

You're a transplant.

[Sharon Hartung]

Absolutely, well having said that, in the estate world, as you know, estate lawyers and estate planners will often consult with advisors of different types, depending on what physical assets they're dealing with. So you might deal with a real estate agent to try and deal with property, you might deal with a tax advisor with expertise in tax and now we have a new set of assets called digital assets and the executor's role has fundamentally changed because there's no longer a paper train. We have a new player at the table, the technology advisor in estate planning.

[Jennifer Zegel]

And for listeners who are just joining our podcast maybe for the first time, you can go back and look at the history of different episodes we've done where we take a deep dive into exploring what digital assets really are and the various definitions thereto. So Sharon going back to your mother's estate, did you uncover digital assets that she owned?

[Sharon Hartung]

Yes, but I was lucky, simply in her case it was one email account which she had left written on a nice piece of paper in her beautiful handwriting and she hadn't moved it in a long time so it had expired. So fortunately, my digital undertaking role didn't have to come to play but I spent almost two years and it finally wrapped up in 2-1/2 years dealing with the fact that, first of all, she didn't have a will so I had to apply for the Court from a legal perspective and what's involved with that, and then the multi-faceted project that unfolds the tax, the inventories, collecting the properties, try to determine where things are and how to deal with that. And when you add now our digital lives on top of that, you've just made the executor's role even more complicated. I think Justin covered this in the estate administration podcast talking about he talks fundamentally that role, executors and corporate executors and advisors' executors roles are going to change as a result of the digital age.

[Justin H. Brown]

Yeah, I think it's going to change immensely as more and more digital assets are uncovered and fiduciary duties with respect to those assets. So we're glad to see somebody like you writing about this and bringing attention to digital assets and estate planning and estate administration.

[Sharon Hartung]

Well it's definitely a new territory and green but the great thing that I found about being in estate planning role, it's a team sport so there is a lot of interaction between technical people, estate lawyers and tax people and other advisors as we try to navigate this whole issue together.

[Jennifer Zegel]

That's definitely one of the trends in general with estate planning and administration. Are you seeing any other trends in connection with this digital administration and planning space in Canada?

[Sharon Hartung]

I feel it is more a global statement but I see trends on several spectrums. I can give you 3 off the top from a technology point of view. Number one digital assets, which you know so well. There's no question we're going to need processes or they call it tech-to-manager tech from estate planning to estate administration. We just have too many online accounts. So if we take digital asset management itself, we're seeing emerging tech entrepreneurs in the space. I co-wrote an article with Shelley Rhoads Perry in the July 2019 *STEP Journal* called "Bolster Your Digital Armoury." Around trying to relay a picture with a spectrum with emerging types of tech tools. The second thing I'm seeing is the need for financial institutions in the estate industry to optimize internal processes, not only for cost efficiency but customer engagement. You know the shocker to improve the whole creation process, the shocker to reduce the burden on the estate administration from inventories to tracking. And then the third thing I'm seeing is the emerging

demands of a customer driven market place. Consumers are going to look for the same rules of engagement in dealing with the death care and estate industry as they do with any other industry using apps and social media. I call this estate 2K. The massive transformation about to hit the death care and estate industry. I call it Estate Tech, going to be about the size of Fin Tech if you consider we're on the cusp of the largest world transfer in history and I think what's going to fuel that as well is the more open conversation of the death positive movement. If you look on Twitter, #deathpositive. It's large in Europe, UK in particular, emerging in the US and other places like Australia. You might have heard of Death Cafe which started in the UK and that are now global. And that's conversations about death and dying and end of life issues. Australia has a death planning learning day August 8 called Dying to Know which is designed to encourage death literacy.

Another U.S. example is Caitlin Doughty. She's a mortician and author. Started The Order of the Good Death. The death positive movement is injecting a new dialogue for end of life planning and how people want to die and be remembered. And if you want to look to two U.S. administrative examples recently, you know consider the interview by Anderson Cooper of CNN and Stephen Colbert on overcoming grief from loss as a child and the HBO special documentary called "Alternative Endings – Six Ways to Die in America." So we're really on the cusp of this transformation with technology and the death positive movement. In a conversation about death, you know, everything is going to change. How funerals are going to happen, how people are going to be memorialized. The demands the millennials will have of the estate industry as executors dealing with financial institutions. I mean they won't be quiet about it. They'll use social media to talk about if they're getting a positive client engagement through that process.

[Jennifer Zegel]

Sharon you're absolutely right. We couldn't agree with you more in terms of how society global is really changing the death care and estate administration movement. I had never heard of Death Café, so thank you for sharing that with us.

[Sharon Hartung]

Yeah it's very interesting, it's just a transformative conversation and it's really interesting that I think social media as a technology tool and platform has enabled that conversation globally so people are sharing about it and it started in other countries. And you could actually go to a death café in pretty much any city in the world.

[Justin H. Brown]

So Sharon, with this global movement for move awareness of death and estate planning, what do you think the hurdles to mass adoption of digital assets and digital asset planning would be?

[Sharon Hartung]

Very good question. Digital assets, as you know, when you've talked about in your podcasts, will need pre-planning to successfully not only identify them and transfer them so that we can obviously will may incur contesters intentions. Justin you talked about this in a previous podcast. The idea that the executor's role has fundamentally changed. But if you get under the covers of what's changed, you know physical assets obviously need pre-planning as well. But not to the same degree as digital assets. And the reason is digital assets are virtual. They're not

going to show up in search of a home office. You're going to be unlikely to leave a paper trail so if the executor is dependent on that paper trail for his or her administration job, there's going to be a challenge. And we've gone online with even our physical assets. So online banking. So I think the biggest hurdle that consumers and rule makers are going to have is that we're just not aware, we're not conditioned, we're not collectively learning from experiences of others the need to pre-plan as part of estate planning. I mean if you want to over simplify estate planning for the average person, it's just getting a will. They may not even have had a conversation with the executor and they may not have created an inventory list to help the executor figure out what their job is. When you look at this statistically, less than 50% of North Americans have a will and in Canada, less than 35% have an up to date one. So it means we're not talking about death, we're not pre-planning. Digital assets critically need pre-planning. This means that most people are going to leave the executor a disaster in the digital age.

[Justin H. Brown]

I was going through your book and there's a good chart in one of your chapters that compares what an executor who goes into an office would look for in 1980 and what an executor would be looking for today. And just going through that chart it is striking to me how it is a great demonstration of how the role of an executor has changed. It's looking, in 1980 the person is looking through a rolodex. People don't have rolodexes any more. You know going through letters on someone's desk where now you're going through computers or tablets. It's just, I think you did a great job of explaining how the world is changing.

[Sharon Hartung]

Yeah I love that diagram because as you point out, the internet had already been started 30 years ago, 1989, so as the picture paints, in the 80's we had physical assets, we had paper trail and we really relied on that paper trail for the executor's job. So we have thwarted the executor now because you know 30 years later, everybody's home office or kitchen table is going to have a laptop with a locked password.

[Jennifer Zegel]

Yes, it's the issue of the disappearing paper trail. Sharon I did read your book and I want to say you did a fantastic job writing it and I love your anecdotes sprinkled throughout. It really breaks up some of the seriousness of the subject matter that you cover in a light way. So very well done, thank you so much for sharing that with us and the world.

[Sharon Hartung]

Well thanks Jenn, awesome, appreciate that. It's a tough topic. So nothing can transform a topic with a little appropriate humor and certain diagrams which all us reviewers live for.

[Justin H. Brown]

So Sharon with this death movement and as people like you bring more visibility to digital asset planning, where do you see digital asset planning going in the next 5 to 10 years?

[Sharon Hartung]

Well I'd love to have a crystal ball on the blockchain technology because I'd invest in all those companies right away and you covered blockchains several times in your podcasts, very well by

the way. We know the broadest use case is clear so watching the law parties to exchange value in a trusted way without a meidiary and track as you go. Now if you consider most businesses rely on processes or a system to track transactions of some kind, there's no question this will be transformative. But what we don't know is who is going to be the next Netflix, Uber and Amazon of blockchain. Now that's on the technology side. On the, you know, the cryptocurrency, the unregulated cryptocurrency with the first implantation of the blockchain technology. If we consider Facebook announced their own plans for their crypto Libra certainly there's going to be regulatory consideration but wouldn't it be naïve to think that governments haven't started considering the future of these currencies and perhaps even the idea of a country-specific crypto. So in terms of digital assets in estate administration I think in 5-7 years we're going to have a crisis on our hands in estate administration for the 2 reasons we were discussing – new set of assets, digital assets and then over the last 10 years in the accelerated manner businesses have literally driven up online for banking, paying bills, statements and there's no longer a paper trail. And collectively the industry hasn't really raised the alarm with our clients. We have not been really talking about this extensively except for the last five, maybe arguably 10 years, so our money, our memories and our records are now virtual versus physical. The law and the courts have yet to see the hundreds of thousands of families that are going to be upset because they can't transfer royalty coins or they can't get access to family photos. And so far we've only seen the one off cases and with acceleration of our use of the internet, you know those sizeable problems are only going to grow.

[Jennifer Zegel]

So in the United States, the Uniform Law Commission created module legislation, a second attempt called RUFADAA which is the Revised Uniform Fiduciary Access to Digital Assets Act and this legislation was created so estates can adopt it as a way to fill gaps left in pre-existing federal and state laws that don't allow for a fiduciary to access a decedent's digital assets. And the default rules under RUFADAA require a user or an individual to specifically authorize a fiduciary's access to digital assets. That can be done through an online tool which is a separate service agreement with the user and the custodian specifically authorizing that type of access to named individuals. If there is no online tool it can be done through estate planning documents that would allow that authorization and if there is no estate planning documents with that requisite authorization, the terms of service agreements control, which could have various outcomes. Is there any default rule in Canada on accessing a decedent's digital assets similar to this option.

[Sharon Hartung]

Well I can give you the layperson's answer because I am an information technology advisor and not the Canadian lawyer, but first I'll say this. When most of us think about our estate planning and our wills, this is the layperson's perspective, we don't really realize all the laws and rules that apply and certainly when you're in estate planning you understand that there's a law that tells you how a rule can be valid, there's intestate and succession law that deals with what happens when you don't have a will. The idea that there are executor specific rules as in the U.S. being mostly U.S. states adopting RUFADAA is not something people generally going to understand so I just wanted to share that because from my layman's point of view, the average consumer out there has no idea of the implications of the law that was implemented in the U.S. Now in Canada, the Uniform Conference Law of Canada proposed legislation in 2016 is called

Uniform Access to Digital Assets by a Fiduciary's Act, doesn't have a nice roll on your tongue like RUFADAA. So it was proposed for adoption in all provinces and territories and it really clarifies the way the fiduciary can access digital assets with the same way they have to access physical assets. So in layman's interpretation this extends what you are already allowed to do for physical for your digital world. Now the proposed Canadian legislation has not been adopted by any province or territory. Now similar to the U.S. states, our estate law is at the prudential or territorial level so we are similar in that respect. Now the U.S. and Canada all started with the same starting point and as you know, as we have explained the U.S. legislation in most U.S. states was adopted the revised RUFADAA which has the big term in it, which required this pre-planning which we hadn't seen before in this data legislation. Now there is a reason Canadians or anyone globally actually need to pay attention to the U.S. rules, if you consider a lot of people use Google's email for example, or where many of the big check providers are, even if you have the right in Canada, supposing that legislation gets adopted in the province that we're dealing with, there's going to be a conflict of law question if you can actually get access. When I looked at the Google terms of service, if you don't have a password, it says you're going to need a U.S. collaborator. So to answer your question, you know this is where the Canadian proposed law is going that extends the executor's right to deal the same way with physical assets not yet adopted, but I guess the question that comes from me as a project manager and executor guiding project managers will now need to look at the digital assets that may cross borders, there's a conflict of law question here, too.

[Justin H. Brown]

I think that's a great point because I think we, as U.S. attorneys, tend to get into our tunnel of U.S. law and we don't always think of what somebody abroad is going to be encountering when they're running into a Gmail account or a Google account that's situs in the United States. I think that's a great point. I was wondering – we are hearing more and more of the term digital executor in connection with estate planning. And I mean your book is called *Your Digital Undertaker* so can you describe to us a little bit about, for the people who haven't read your book, what you mean by digital undertaker and how that overlaps with the digital executor.

[Sharon Hartung]

Okay certainly. *Your Digital Undertaker* as a title was selected because I really wanted to gain the attention of people to talk about this important topic of estate planning. I cycled through a lot of different project and project-related titles or sort of traditional estate planning titles and I wanted something that really embodied the fact that our estates have gone digital, although the book covers all the elements of estate planning, there's a digital element to everything now and I wanted to take a term that would garner some reaction and that's why I picked the undertaker term and the your was to more personalize it because as you know as estate planning attorneys and estate administration attorneys, it's a personal journey where everybody's situation is different than the next and it's your estate planning.

Now in strictly talking about digital executor and Jen knows I have a very strong opinion on this term, I have a very strong opinion about this from a private management point of view because I believe the term digital executor is just a made up term and could cause massive confusion. Now it's certainly great to raise the awareness that the future executor in a will has a role, but it can become confusing. Our digital lives are so interconnected with our physical lives, it's really

difficult to separate the two and in the book, I give a project management scenarios about how complicated naming a digital executor and an executor can get in sort of execution outside the law and the reason this is several fold. You know first executor and future executor is going to need to have some basic technology skills if you consider that everyone is using email and 2) I look at it from the point of view that like an art collection, there may be specific assets but you need more expertise than the executor has and how would you deal with those in a regular estate planning situation. So you have an art collection, a coin collection. The executor might engage an appraiser and advisor. The same principal can apply here, this time with a technical advisor. Or if you as a testate or a will maker have very specific digital assets, say you do have one of the unregulated crypto currencies, and the executor you pick you may not feel as qualified, you may put provisions in the will that appoint someone very specific to deal with those. But the idea that you would say the digital executor deals with the digital life and the executor deals with the physical life means that you are going to be in absolute conflict. You do the other chicken or egg scenario I give is you know if your laptop is a physical asset, is not considered a digital asset, but the photos on it are digital you know and you've got these two people, how does that work? So I sort of looked at this from a private management point of view and said we need to be really careful with the terminology.

[Jennifer Zegel]

Sharon I echo everything you have said and as we have discussed in private, I completely agree with all of your concerns just from the straight administrative perspective on naming somebody as a digital executor in a will and physical assets and digital assets are so intertwined that it could be extremely difficult for administration issues. From a legal perspective and Justin and I have begun to look at this more closely, we don't know in terms of United States Register of Wills or Surrogate's Offices or similar bodies in different states within the United States would actually react to an executor and a digital executor being appointed in the will and issuing short certificates to document that type of appointment. And there can be a lot of competing interests among both the digital executor and the main executor on who can do what or valuation and timing issues of digitally connected assets. For estate planning attorneys in terms of techniques for drafting, I think at this point in time it's actually a lot better to maybe appoint a digital committee that the executor could rely upon or engage for assistance with managing digital assets but those individuals would not rise to the level of an executor position.

[Justin H. Brown]

Sharon, to you point about how digital executor is just a made up term, I think that is one of the reasons why there are problems in the United States with going to the various surrogates and Register of Wills, because there is no legal definition of a digital executor. So they will all view your digital assets as different things, right. Some may view your social media accounts as digital assets and some may view your cryptocurrency as digital assets whereas some may view your cryptocurrency as part of your probate estate.

[Jennifer Zegel]

Right as intangible personal property, you know, as it's currently defined under the Internal – by the IRS.

[Justin H. Brown]

So for those people who are using a “digital executor” we think it kind of opens you up to potential ambiguity to potential problems down the road. I think that’s why having an advisory committee is kind of another way to go that can accomplish what you want to accomplish and not run afoul of the probate laws.

[Sharon Hartung]

Yeah I couldn’t agree more. Now just from the basic project management perspective you know I look at the executor’s role being a project manager and you have a multiple number of assets you have to deal with, you know it’s going to get very confusing when certain definitions of what is a digital asset versus what is not. In Canada, from a tax perspective there’s only one estate so if different people are named, how do taxes get dealt with, what’s the logistics of it? So from a project management point of view I look at this and basically say you know there’s a concept that works here. We have a will, we have an appointed executor. The idea that we have different kinds of assets and the executor needs help, absolutely. You know as you point out there’s advisory committees, there are different ways you can meet the needs the executor will have so that it doesn’t confuse who’s the boss, who’s on first to deal with the entire estate.

Now there’s one other area, too, that’s interesting and you’ve talked about it in previous podcasts as well, it’s the idea and I think this is going to be another area we’re really going to have to figure out how to deal with as well is there’s no question that we need more pre-planning opportunities and one of the easiest ones that providers can do is software providers and we have examples with Facebook and Google is where someone is appointed in a contractual way that is allowed to do something. The terminology is not consistent, Facebook says it’s a legacy contact and Google uses it as an inactive manager, in a way this is kind of like a beneficiary designation but not really it’s kind of a digital executor but not really. So the law is going to ultimately have to help us deal with what is that person and to what extent do they have responsibilities only to meet the contractual responsibility of the agreement. If a digital asset, for example, is allowed to appoint potentially a legacy contact that has some financial value, who has to deal with taxes. So there’s another project management level here that we’re going to have to get our heads around as we deal with the technology side.

[Jennifer Zegel]

So the Facebook and Google designations that you’re speaking of under RUFADAA that’s lumped together as an online tool even though they’re calling it different terms. But that’s essentially what it is because there’s a separate agreement between a user and a service provider to allow that designation or authorization to the digital assets. And we completely agree with you that there’s going to be a lot of competing interests if the person who is named in the online tool to have access or authority over the digital asset is different than the person named as the fiduciary in estate planning documents. There can be so many different situations that come up and a lot of litigation surrounding that issue. I mean one in particular that comes up with Google is if a person that was designated as the inactive account manager who can access the emails and information is different than the executor named in the document but if there’s information within the emails within the Google account that is required in order to access other property or digital assets that aren’t controlled by that online tool, does that person who is designated in the online tool have any responsibility to provide said information and right now I don’t think that

they do. At least there's nothing in place that would require them to under RUFADAA so it's a big issue that's yet to be addressed or come up in terms of cases in the court but stay tune because it definitely will be surfacing it's ugly head.

[Sharon Hartung]

Right and that one was very interesting of and to itself because email has become a home office. If you designated someone as an inactive manager you know they potentially have access to all the information the executor named in the will is going to need. So that will cause some confusion in that event.

[Justin H. Brown]

So Sharon aside from the United States and Canada, are you aware of any other countries that are actively developing practices surrounding digital assets and digital planning?

[Sharon Hartung]

Well I'll answer it this way – the STEP Association, the Society of Trust Estate Practitioners that I'm part of which is a global organization, has launched a digital asset special interest group in 2017. Any estate planner or estate administrator can join and you don't need to be a STEP member and it's free. They've developed jurisdictionally specific guidance and digital asset inventory to use with clients so I know from the representation on our committee that we do have representation from other countries in the globe, from Australia, from Israel, I don't have my list in front of me – but and jurisdictional specific guidance has been written for many jurisdictions and our new members from different geographies are writing guidance for their specific geography. So that's what I do know about what else is going on globally.

[Jennifer Zegel]

Well that's all the time we have for today. Thank you very much for tuning in and stay with us next time as we continue the discussion with Sharon Hartung, author of *The Digital Undertaker* - on estate planning and estate administration with digital assets.

[Closing – Unknown Speaker]

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Thanks for joining us – we'll see you next time.

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