

VIRTUAL WORLD, REAL MONEY: ESTATE PLANNING CONSIDERATIONS FOR THE ONLINE GAMER

*by Michael Austin**

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I. INTRODUCTION

“You’re never going to make a living sitting in that chair playing those silly computer games!”¹ If you have ever been a fan of playing video games, then you have likely heard these words, or words to a similar effect, at some point during your childhood.² Maybe you heard these admonishments during your adult years, which is okay too.³ Do not be ashamed—we all need hobbies, and gaming is a great way to relax and let time pass.⁴

Video games have progressed leaps and bounds in both technological complexity and popularity since the early days of gaming, when arcade games, like *Pong*, captured the attention of children and adults alike.⁵ In fact, video games have come so far that the old “you’ll never get anywhere with those” attitude may no longer hold any weight.⁶

Presently, numerous video games take advantage of the Internet’s networking capabilities and enable players to pit their skills against competitors from across the globe.⁷ Many games also feature economies where players can buy, sell, and trade various in-game items.⁸ You might find yourself thinking that purchasing item upgrades to fuel your pastime of fighting intergalactic space battles is a pretty cool way to spend Saturday afternoon, but even so, why should an online game and its virtual economy concern estate planners?⁹ The answer is simple: There are some virtual gaming economies that run on real-world money and contain in-game items—digital assets—that are worth large amounts of money.¹⁰

Online gaming is growing rapidly.¹¹ As online gaming continues to grow in popularity, there is increasing need for estate planners to recognize

1. See *infra* Part I.

2. See *infra* Part I.

3. See *infra* Part I.

4. See *infra* Part I.

5. Entm’t Software Ass’n, *2014 Sales, Demographic, and Usage Data*, THEESA 2, http://www.theesa.com/wp-content/uploads/2014/10/ESA_EF_2014.pdf [<https://perma.cc/5RWZ-HTFA>]. Michael D. Gallagher, President and CEO of the Entertainment Software Association, recognizes that video game entertainment is reaching a broader audience than ever before, partially due to technological advances that make video games more easily accessible to a variety of demographics. *Id.*

6. *The International Dota 2 Championships*, DOTA 2, <https://www.dota2.com/international/overview> [<https://perma.cc/Z3VS-RR4G>] (last visited Oct. 15, 2015). Video game tournaments are doling out big checks to winners, *id.*

7. Entertainment Software Association, *supra* note 5.

8. Eliot Lefebvre, *Perfect Ten: 10 MMOs That Let You Turn Real Money Into MMO Money*, MASSIVELY OVERPOWERED (Apr. 9, 2015), <http://massivelyop.com/2015/04/09/perfect-ten-turning-your-real-money-into-mmo-money> [<https://perma.cc/M7DB-GRUH>].

9. See *infra* Part I.V.

10. Brad Plumer, *The Economics of Video Games*, WASH. POST (Sept. 28, 2012), <http://www.washingtonpost.com/news/wonkblog/wp/2012/09/28/the-economics-of-video-games> [<https://perma.cc/W383-7WP9>].

11. See Entertainment Software Association, *supra* note 5.

that their clients may possess virtual assets worth considerable amounts of money.¹² Virtual economies that rely on real-world currencies to function are making some gamers rich.¹³ As online gaming continues to enjoy its meteoric rise in popularity, the infrequent cases of gamers selling in-game items for tens of thousands of dollars, if not more, will become a more common occurrence.¹⁴ The days of gaining wealth through online gaming are just beginning.¹⁵

This comment aims to address potential issues inherent in estate planning for digital assets, and it poses a series of questions that estate planners may use to gain a better understanding of their client's virtual assets.¹⁶ But, before this comment can explore the intricacies of virtual economies in today's games, a brief history of online gaming is necessary.¹⁷

To begin, this comment will present a history of online gaming to lay a foundation for understanding online gaming's evolution to its current state.¹⁸ The comment will then turn to briefly discussing recently reported, notable transactions in online economies to give examples of situations in which estate planning may benefit the purchasing gamer.¹⁹ Next, this comment will outline the approach that current state laws take to handle digital assets from an estate planning perspective.²⁰ This comment will then argue that, in lieu of these laws, estate planners must pay special attention to the emergence of online gaming economies, which can yield considerable wealth for their clients.²¹ With these state statutes in mind, this comment will propose legislation that any state could adopt to account for the influx of virtual wealth throughout the video gaming community.²² Finally, this comment will propose a series of questions that can help an estate planner prepare to handle the various digital assets that a client may possess.²³

12. *See id.*

13. *Worlds Without End*, THE ECONOMIST (Dec. 14, 2015), <http://www.economist.com/node/5300059> [<https://perma.cc/MGM7-9HEL>]. An *Entropy Universe* player sold in game property for over \$25,000. *Id.*

14. *See* Entertainment Software Association, *supra* note 5.

15. *See id.*

16. *See infra* Parts I–IV.

17. *See infra* Part II.

18. *See infra* Part II.

19. *See infra* Section II.C.

20. *See infra* Section III.A.

21. *See infra* Section III.B.

22. *See infra* Section IV.A.

23. *See infra* Section IV.B.

II. THE EMERGENCE OF ONLINE GAMING: A HISTORY

A. *The Life and Times of Video Games*

1. *Origins*

Video games first surfaced as early as 1940 and operated as closed systems—a computer programmed to challenge the user to complete a task, such as picking up matchsticks or shooting a target.²⁴ Although these early iterations of computer games are not what come to mind when people think of a video game, these programmed machines are the forefathers to the popular video games people enjoy today.²⁵ With the introduction of many popular arcade games, such as *Pong*, the 1970's ushered in the first wave of commercially popular, and memorable, video games.²⁶ *Atari* marketed the first home-gaming system in 1977, introducing the emerging video game market to the common American household.²⁷

As technology progresses, video game developers create video games that are more complex, immersing, and engaging.²⁸ Michael D. Gallagher, President and CEO of the Entertainment Software Association, recognized that video game entertainment now reaches a broader audience than ever before.²⁹ The increase in gamer participation is partially due to technological advances that make video games more accessible to a variety of demographics.³⁰

2. *Growth*

Video game developers continue to innovate and expand their brands to draw in new gamers and keep current customers satisfied with the product.³¹ Many gaming companies are revamping their market approach and are starting to let gamers play their games for free.³² Instead, video game developers profit when players purchase premium features, items, or other gaming goods to enhance the gaming experience.³³ Game developers have

24. *Video Game History Timeline*, THE STRONG NAT'L MUSEUM OF PLAY, <http://www.museumofplay.org/icheg-game-history/timeline> [https://perma.cc/56BG-NXMJ] (last visited Oct. 4, 2016).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Entertainment Software Association, *supra* note 5.

30. *Id.*

31. See generally Daniel Tack, *The Subscription Transition: MMORPGs and Free-to-Play*, FORBES (Oct. 9, 2013), <http://www.forbes.com/sites/danieltack/2013/10/09/the-subscription-transition-mmorpgs-and-free-to-play> [https://perma.cc/ZD4Y-FFDM] (explaining significant changes in the MMORPG industry).

32. *Id.*

33. See *id.*

also begun to host international tournaments for their competitors.³⁴ The Invitational, an international *Dota*—an immensely popular Multiplayer Online Battle Arena game—tournament held in Seattle, Washington, boasted a prize pool of over \$18 million.³⁵ Websites, such as Twitch.tv, broadcast tournaments so that gamers across the globe can watch their fellow gamers compete in real-time.³⁶

B. The Internet and Online Gaming

1. Classes of Online Games

Video games are often categorized into different genres depending on various characteristics: gameplay, operation, style, strategy, etc.³⁷ One of the most immersive genres of gaming is the Massively Multiplayer Online Role Playing Game (MMORPG).³⁸ MMORPGs allow gamers to live vicariously through their online avatar; often these gamers control every aspect of the avatar's interactions in the gaming universe.³⁹ Other genres, such as Multiplayer Online Battle Arena (MOBA) games, are arguably less immersive than many MMORPGs but are gaining global recognition thanks to the Electronic Sports League.⁴⁰

2. The Importance of MMORPGs

Today, video games exist as a complex string of code that enables a player to take advantage of the Internet to compete against, or cooperate with, millions of other players across the globe.⁴¹ MMORPGs are the epitome of the integration of modern gaming technology and gaming specific networks.⁴² MMORPGs can be immersive experiences for the gamer—a vicarious life in the eternal expanse of the Internet.⁴³

34. See Dota Team, *Announcing the Frankfurt Major*, DOTA 2 (Sept. 23, 2015), <http://www.turtle-entertainment.com/esports/>.

35. *The International Dota 2 Championships*, *supra* note 6.

36. Twitch, *Social Video for Gamers*, TWITCH, <http://www.twitch.tv/p/about> [<https://perma.cc/W3HN-CVCM>] (last visited Feb. 3, 2016).

37. See Philip Hanna, *Video Game Technologies*, QUEEN'S U. 1, 5 <http://www.di.ubi.pt/~agomes/tjv/teoricas/01-genres.pdf> [<https://perma.cc/YEH3-2TX>] (last visited Feb. 3, 2016).

38. Lauren Indvik, *The Fascinating History of Online Role-Playing Games*, MASHABLE (Nov. 14, 2012), <http://mashable.com/2012/11/14/mmorpgs-history/#giLl0wPs.uqJ> [<https://perma.cc/F564-PW35>].

39. See *id.*

40. See *eSports: The Competitive Play of Video Games*, TURTLE ENT., <http://www.turtle-entertainment.com/esports/> [<https://perma.cc/HF78-QK8E>] (last visited Feb. 3, 2016).

41. Nicholas Yee, *The Psychology of Massively Multi-User Online Role-Playing Games: Motivations, Emotional Investment, Relationships and Problematic Usage*, NICKYEE.COM 1, 1 [http://www.nickyee.com/pubs/Yee%20-%20MMORPG%20Psychology%20\(2006\).pdf](http://www.nickyee.com/pubs/Yee%20-%20MMORPG%20Psychology%20(2006).pdf) [<https://perma.cc/4TTY-KD2P>] (last visited Feb. 3, 2016).

42. *Id.* at 2.

43. *Id.*

III. WHERE DOES THE MONEY GO? HOW WEALTH IS ACCUMULATED, EARNED, AND GAINED IN VIRTUAL WORLDS

A. Online Gaming and Economics

Buying and selling gaming items is not constrained to the gaming economy itself; it is common practice for players to amass valuable gaming items or create high-level gaming accounts and sell those goods online.⁴⁴ Ebay is a popular host for many gamers seeking to sell valuable gaming accounts.⁴⁵ Other online market places, such as Playersauction.com, serve as a virtual trading block for various gaming items and accounts.⁴⁶ Whether a particular game has an active online market for in-game items will largely depend on the genre of the game itself.⁴⁷ Video games that utilize online networks tend to take advantage of online economies because items in the game can be unique and limited in quantity thus, driving demand for each item, which in turn increases an item's value.⁴⁸ By the same token, if a video game does not utilize an online network and the game is a closed system, meaning that every player has equal access to every in-game item, that video game will not thrive on the open market because there is no demand for any unique item.⁴⁹

B. MMORPGs and Their Economies

MMORPGs often utilize in-game economies through which players buy, sell, and trade goods within the gaming universe.⁵⁰ Players participate in robust gaming economies that include “speculating on commodities,” creating “fluctual markets” based on supply and demand of materials and items, and forming coalitions and banks to handle the gaming currency—the value of which can be wholly dependent on the value of a real-world currency.⁵¹

A persistent universe game affects the value of digital goods in a unique way—economies and in-game environments continue to evolve even when

44. See Nathan Gibson, *10 of the Most Expensive Virtual Items in Video Games*, THERICHEST (Nov. 15, 2014), <http://www.therichest.com/rich-list/most-popular/10-of-the-most-expensive-virtual-items-in-video-games/?view=all> [https://perma.cc/H2G3-ZRSF].

45. *Id.*

46. PLAYERSAUCTION.COM, <http://www.playerauctions.com/> [https://perma.cc/3V2H-MWBL] (last visited Feb. 3, 2016).

47. See Gibson, *supra* note 44.

48. See *id.*

49. *Id.*

50. See Plumer, *supra* note 10.

51. *Id.*

the gamer is not online.⁵² These gaming economies operate like real-world economies.⁵³ *EVE Online*, an MMORPG with an impressively developed in-game economy that fluctuates depending on the value of Icelandic currency operates on a single server housed in Iceland, creating a persistent universe in which every player's actions and omissions affect the state of the game as a whole.⁵⁴ This means all the players in the game are playing against every other player while simultaneously playing in the same universe.⁵⁵

C. The Virtual Goods Bought, Sold, and Traded in Gaming Economies

Basic economic principles posit that when a resource is in high demand, but there is a limited amount of that resource, the price an individual will pay to obtain the resource will grow as the resource becomes increasingly scarce.⁵⁶ When only one item of its kind exists in the entire observable universe, and naturally any unobservable universe because we would not know the item was there even if it did exist, the scarcity can drive the price for the item abnormally high; for example, the "Dragon Slaying Sabre" from *Age of Wulin* is the only weapon of its kind in existence and sold at auction for roughly \$16,000.⁵⁷ Powerful weapons seem like a worthwhile investment for a battle-tested online gamer; however, an item as innocuous as a "Blue Party Hat" in the online game *Runescape* could fetch over \$1,500 on the open market due to its rarity.⁵⁸

To the average person, paying \$1,500 to never physically possess an online item is an absurd economic decision, and paying \$16,000 for a sword that does not actually exist is unfathomable.⁵⁹ But, it takes all kinds of folks to make the world turn round, and the Blue Party Hat is only the tip of the iceberg when it comes to expensive video game items.⁶⁰ A crossbow in *Diablo 3* sold in-game for over 12 billion gold (gold being *Diablo 3*'s in-game currency), which equaled about \$3,500 at the time of sale.⁶¹ A night elf character in *World of Warcraft* sold for \$9,000.⁶² *Entropia Universe*, an online MMORPG, has had its fair share of expensive in-game items sold on

52. Kyle Chayka, *The Very Real Value of Gaming's Virtual Economies*, PAC. STANDARD (Aug. 19, 2013), <http://www.psmag.com/business-economics/the-real-value-of-virtual-economies-eve-world-of-warcraft-64593> [<https://perma.cc/ZG82-H9PG>].

53. *Id.*

54. See Plumer, *supra* note 10.

55. *See id.*

56. See Reem Heakal, *Economics Basics: Supply and Demand*, INVESTOPEDIA, <http://www.investopedia.com/university/economics/economics3.asp> [<https://perma.cc/C3YL-EDNX>] (last visited Nov. 2, 2015).

57. See Gibson, *supra* note 44.

58. *Id.*

59. *See id.*

60. *See id.*

61. *Id.*

62. *Id.*

an open market; the “Crystal Palace” sold for \$330,000 and “Club Neverdie” fetched a whopping \$635,000 for its former owner.⁶³

D. The Market Place for Digital Gaming Assets

eBay has become a popular outlet for gamers looking to make a profit off of their gaming accounts or items, so much so that eBay has published a user-written guide to buying or selling online gaming accounts on its website.⁶⁴ A simple keyword search in eBay’s search bar can yield numerous video game items up for auction in any number of different video games.⁶⁵ Playerauctions.com allows gamers to post in-game items and accounts for sale for almost any online video game imaginable.⁶⁶ Recognizing that online gaming is becoming accessible to larger audiences, Playersauction.com provides a help center with guides on how to approach buying and selling digital gaming assets.⁶⁷ Craigslist also provides gamers with an online forum on which to post gaming items, accounts, etc. for sale.⁶⁸

IV. VIRTUAL PROPERTY IN THE EYES OF THE LAW

A. 50 Shades of Grey Area: How Do State Legislatures Handle Digital Property?

Many states have yet to enact legislation that specifically addresses the issue of characterizing or defining digital property.⁶⁹ Of the state legislatures

63. *Id.*

64. *Guide to Buying and Selling Online Game Accounts*, EBAY (May 12, 2016), <http://www.ebay.com/gds/Guide-to-Buying-and-Selling-Online-Game-Accounts/1000000000937297/g.html> [<https://perma.cc/74BS-XQ9E>].

65. Online Gaming Accounts for Sale on eBay, EBAY, <https://perma.cc/G2HM-BBT7> (last visited Oct. 4, 2016).

66. PLAYERSAUTION.COM, *supra* note 46.

67. *See id.*

68. Online Gaming Accounts and Items for Sale on Craigslist, CRAIGSLIST, <http://www.craigslist.com> [<https://perma.cc/PTV2-CCJ4>] (last visited Oct. 4, 2016).

69. *See* H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015); H.B. 1189, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 979, Gen. Assemb., Jan. Sess. (Conn. 2015); H.B. 313, 117th Reg. Sess. (Fla. 2015); H.B. 41, 28th Legis. (Haw. 2015); S.B. 1055, 63d Legis., 1st Reg. Sess. (Idaho 2015); S.B. 308, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 1238, 86th Gen. Assemb., 1st Sess. (Iowa 2015); S.B. 53, 2015 Reg. Sess. (Ky. 2015); H.B. 809, 127th Legis., 1st Reg. Sess. (Me. 2015); H.B. 531, 435th Sess. of Gen. Assemb., 2015 Reg. Sess. (Md. 2015); H.B. 3422, 189th Gen. Ct., 2015 Reg. Sess. (Mass. 2015); H.B. 5034, 98th Legis., 1st Reg. Sess. (Mich. 2015); H.B. 200, 89th Reg. Sess. (Minn. 2015); S.B. 266, 64th Reg. Sess. (Mont. 2015); Legis. B. 463, 104th Legis., 1st Reg. Sess. (Neb. 2015); Assemb. B. 434, 78th Reg. Sess. (Nev. 2015); S.B. 59, 52d Legis., 1st Reg. Sess. (N.M. 2015); S.B. 2106, 64th Legis. Assemb. (N.D. 2015); S.B. 369, 78th Legis. Assemb. 2015 Reg. Sess. (Or. 2015); S.B. 759, 199th Gen. Assemb. 2015 Reg. Sess. (Pa. 2015); H.B. 3444, 121st Gen. Assemb., 2015-2016 Reg. Sess. (S.C. 2015); H.B. 2183, 84th Legis. (Tex. 2015); S.B. 5029, 64th Legis., 2015 Reg. Sess. (Wash. 2015); Assemb. 4666, 216th Legis., 2d Ann. Sess. (N.J. 2014); S.B. 1452, 2015 Sess. (Va. 2014); H.B. 345, 147th

that have enacted law regarding digital property, many statute's wording differ slightly, but they ultimately achieve a substantially similar end; further, proposed state laws regarding defining digital property contain varied language.⁷⁰ Certain states have worked to codify a property definition to account for digital assets while other states have yet to enact legislation addressing digital assets.⁷¹

1. *The Uniform Fiduciary Access to Digital Assets Act*

Many states have enacted, or have considered statutorily enacting, the Uniform Fiduciary Access to Digital Assets Act.⁷² This act allows “fiduciaries to access electronically stored assets to ensure a person's assets and property rights in the digital realm are adequately protected.”⁷³

Tennessee House Bill 1945 is a prime example of a state legislature anticipating the need for legal recognition of digital assets—the bill proposes

Gen. Assemb. (Del. 2013); S.B. 279, N.C. Gen. Assemb., 2013 Sess. (N.C. 2013); H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013).

70. Compare H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013), with H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015); H.B. 1189, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 979, Gen. Assemb., Jan. Sess. (Conn. 2015); H.B. 313, 117th Reg. Sess. (Fla. 2015); H.B. 41, 28th Legis. (Haw. 2015); S.B. 1055, 63d Legis., 1st Reg. Sess. (Idaho 2015); S.B. 308, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 1238, 86th Gen. Assemb., 1st Sess. (Iowa 2015); S.B. 53, 2015 Reg. Sess. (Ky. 2015); H.B. 809, 127th Legis., 1st Reg. Sess. (Me. 2015); H.B. 531, 435th Sess. of Gen. Assemb., 2015 Reg. Sess. (Md. 2015); H.B. 3422, 189th Gen. Ct., 2015 Reg. Sess. (Mass. 2015); H.B. 5034, 98th Legis., 1st Reg. Sess. (Mich. 2015); H.B. 200, 89th Reg. Sess. (Minn. 2015); S.B. 266, 64th Reg. Sess. (Mont. 2015); Legis. B. 463, 104th Legis., 1st Reg. Sess. (Neb. 2015); Assemb. B. 434, 78th Reg. Sess. (Nev. 2015); S.B. 59, 52d Legis., 1st Reg. Sess. (N.M. 2015); S.B. 2106, 64th Legis. Assemb. (N.D. 2015); S.B. 369, 78th Legis. Assemb., 2015 Reg. Sess. (Or. 2015); S.B. 759, 199th Gen. Assemb. 2015 Reg. Sess. (Pa. 2015); H.B. 3444, 121st Gen. Assemb., 2015-2016 Reg. Sess. (S.C. 2015); H.B. 2183, 84th Legis. (Tex. 2015); S.B. 5029, 64th Legis., 2015 Reg. Sess. (Wash. 2015); Assemb. 4666, 216th Legis., 2d Ann. Sess. (N.J. 2014); S.B. 1452, 2015 Sess. (Va. 2014); H.B. 345, 147th Gen. Assemb. (Del. 2013); S.B. 279, N.C. Gen. Assemb., 2013 Sess. (N.C. 2013) (evidencing the linguistic differences in statutes aimed at accomplishing a singular goal).

71. Compare H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013), with H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015); H.B. 1189, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 979, Gen. Assemb., Jan. Sess. (Conn. 2015); H.B. 313, 117th Reg. Sess. (Fla. 2015); H.B. 41, 28th Legis. (Haw. 2015); S.B. 1055, 63d Legis., 1st Reg. Sess. (Idaho 2015); S.B. 308, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 1238, 86th Gen. Assemb., 1st Sess. (Iowa 2015); S.B. 53, 2015 Reg. Sess. (Ky. 2015); H.B. 809, 127th Legis., 1st Reg. Sess. (Me. 2015); H.B. 531, 435th Sess. of Gen. Assemb., 2015 Reg. Sess. (Md. 2015); H.B. 3422, 189th Gen. Ct., 2015 Reg. Sess. (Mass. 2015); H.B. 5034, 98th Legis., 1st Reg. Sess. (Mich. 2015); H.B. 200, 89th Reg. Sess. (Minn. 2015); S.B. 266, 64th Reg. Sess. (Mont. 2015); Legis. B. 463, 104th Legis., 1st Reg. Sess. (Neb. 2015); Assemb. B. 434, 78th Reg. Sess. (Nev. 2015); S.B. 59, 52d Legis., 1st Reg. Sess. (N.M. 2015); S.B. 2106, 64th Legis. Assemb. (N.D. 2015); S.B. 369, 78th Legis. Assemb., 2015 Reg. Sess. (Or. 2015); S.B. 759, 199th Gen. Assemb., 2015 Reg. Sess. (Pa. 2015); H.B. 3444, 121st Gen. Assemb., 2015-2016 Reg. Sess. (S.C. 2015); H.B. 2183, 84th Legis. (Tex. 2015); S.B. 5029, 64th Legis., 2015 Reg. Sess. (Wash. 2015); Assemb. 4666, 216th Legis., 2d Ann. Sess. (N.J. 2014); S.B. 1452, 2015 Sess. (Va. 2014); H.B. 345, 147th Gen. Assemb. (Del. 2013); S.B. 279, N.C. Gen. Assemb., 2013 Sess. (N.C. 2013) (showing which states have adopted a property definition and which have not).

72. H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013).

73. *Id.*

amendments to the state's current statutory definitions to allow for the increasingly common use of digital accounts.⁷⁴

Tennessee House Bill 1945 proposes the following additional extensive definitions to current statutory cannon:

“Digital accounts” means any electronic or online account, including email accounts, Internet-based or cloud-based accounts, software licenses, social network accounts, social media accounts, file sharing accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service accounts, online stores, and affiliate programs; “Digital assets” means any electronic content or files stored on digital devices regardless of the ownership of the physical device upon which the digital asset is stored; “Digital assets” includes emails, documents, images, still photographs, blogs, video blogs, podcasts, instant and text messages, audio files, and videos; “Digital devices” means any devices that use electronic signals to create, transmit, store, or receive information; “Digital devices” includes desktops, laptops, tablets, peripherals, storage devices, mobile telephones, and smartphones; and “Digital records custodian” means any person or entity who electronically stores the digital assets of another person or who operates the digital accounts of another person.⁷⁵

Tennessee House Bill 1945 does not specifically address video game accounts or video game items.⁷⁶ However, as currently written, House Bill 1945's definition of digital account does not provide an exhaustive list of accounts that fall under the proposed definition.⁷⁷ This means that while not explicitly mentioned in the proposed law, video game accounts are substantially similar enough to the offered examples of digital accounts that the Uniform Fiduciary Access to Digital Assets Act and accompanying definitions could be read to apply.⁷⁸

Tennessee is just one of many states that have proposed adopting the Uniform Fiduciary Access to Digital Assets Act.⁷⁹ Currently, the following

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. See H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013). Compare H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013), with H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015); H.B. 1189, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 979, Gen. Assemb., Jan. Sess. (Conn. 2015); H.B. 313, 117th Reg. Sess. (Fla. 2015); H.B. 41, 28th Legis. (Haw. 2015); S.B. 1055, 63rd Legis., 1st Reg. Sess. (Idaho 2015); S.B. 308, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 1238, 86th Gen. Assemb., 1st Sess. (Iowa 2015); S.B. 53, 2015 Reg. Sess. (Ky. 2015); H.B. 809, 127th Legis., 1st Reg. Sess. (Me. 2015); H.B. 531, 435th Sess. of Gen. Assemb., 2015 Reg. Sess. (Md. 2015); H.B. 3422, 189th Gen. Ct., 2015 Reg. Sess. (Mass. 2015); H.B. 5034, 98th Legis., 1st Reg. Sess. (Mich. 2015); H.B. 200, 89th Reg. Sess. (Minn. 2015); S.B. 266, 64th Reg. Sess. (Mont. 2015); Legis. B. 463, 104th Legis., 1st Reg. Sess. (Neb. 2015); Assemb. B. 434, 78th Reg. Sess. (Nev. 2015); S.B. 59, 52d Legis., 1st Reg. Sess. (N.M. 2015); S.B. 2106, 64th Legis. Assemb. (N.D. 2015); S.B. 369, 78th Legis. Assemb., 2015 Reg.

states are also considering enacting the Uniform Fiduciary Access to Digital Assets Act to account for the disposition of, and probative access to, digital assets:

- Arkansas – House Bill 1362, 2015.⁸⁰
- Colorado – House Bill 1189, 2015.⁸¹
- Connecticut – Senate Bill 979, 2015.⁸²
- Florida – House Bill 313, 2015.⁸³
- Hawaii – House Bill 41, 2015.⁸⁴
- Idaho – Senate Bill 1055, 2015.⁸⁵
- Indiana – Senate Bill 308, 2015.⁸⁶
- Iowa – Senate Study Bill 1238, 2015.⁸⁷
- Kentucky – Senate Bill 53, 2015.⁸⁸
- Maine – House Bill 809, 2015.⁸⁹
- Maryland – House Bill 531, 2015.⁹⁰
- Massachusetts – House Bill 3422, 2015.⁹¹
- Michigan – House Bill 5034, 2015.⁹²
- Minnesota – House Bill 200, 2015.⁹³
- Montana – Senate Bill 266, 2015.⁹⁴
- Nebraska – Legislative Bill 463, 2015.⁹⁵
- Nevada – Assembly Bill 434, 2015.⁹⁶
- New Mexico – Senate Bill 59, 2015.⁹⁷
- North Dakota – Senate Bill 2106, 2015.⁹⁸

Sess. (Or. 2015); S.B. 759, 199th Gen. Assemb., 2015 Reg. Sess. (Pa. 2015); H.B. 3444, 121st Gen. Assemb., 2015-2016 Reg. Sess. (S.C. 2015); H.B. 2183, 84th Legis. (Tex. 2015); S.B. 5029, 64th Legis., 2015 Reg. Sess. (Wash. 2015); Assemb. 4666, 216th Legis., 2d Ann. Sess. (N.J. 2014); S.B. 1452, 2015 Sess. (Va. 2014); H.B. 345, 147th Gen. Assemb. (Del. 2013); S.B. 279, N.C. Gen. Assemb., 2013 Sess. (N.C. 2013).

80. H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015).

81. H.B. 1189, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015).

82. S.B. 979, Gen. Assemb., Jan. Sess. (Conn. 2015).

83. H.B. 313, 117th Reg. Sess. (Fla. 2015).

84. H.B. 41, 28th Leg. (Haw. 2015).

85. S.B. 1055, 63d Leg., 1st Reg. Sess. (Idaho 2015).

86. S.B. 308, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).

87. S.B. 1238, 86th Gen. Assemb., 1st Sess. (Iowa 2015).

88. S.B. 53, 2015 Reg. Sess. (Ky. 2015).

89. H.B. 809, 127th Leg., 1st Reg. Sess. (Me. 2015).

90. H.B. 531, 435th Sess. of Gen. Assemb., 2015 Reg. Sess. (Md. 2015).

91. H.B. 3422, 189th Gen. Ct., 2015 Reg. Sess. (Mass. 2015).

92. H.B. 5034, 98th Leg., 1st Reg. Sess. (Mich. 2015).

93. H.B. 200, 89th Reg. Sess. (Minn. 2015).

94. S.B. 266, 64th Reg. Sess. (Mont. 2015).

95. Legis. B. 463, 104th Leg., 1st Reg. Sess. (Neb. 2015).

96. Assemb. B. 434, 78th Reg. Sess. (Nev. 2015).

97. S.B. 59, 52d Leg., 1st Reg. Sess. (N.M. 2015).

98. S.B. 2106, 64th Legis. Assemb. (N.D. 2015).

- Oregon – Senate Bill 369, 2015.⁹⁹
- Pennsylvania – Senate Bill 759, 2015.¹⁰⁰
- South Carolina – House Bill 3444, 2015.¹⁰¹
- Texas – House Bill 2183, 2015.¹⁰²
- Washington – Senate Bill 5029, 2015.¹⁰³
- New Jersey – Assembly Bill 4666, 2014.¹⁰⁴
- Virginia – Senate Bill 1452, 2014.¹⁰⁵
- Delaware – House Bill 345, 2013.¹⁰⁶
- North Carolina – Senate Bill 279, 2013.¹⁰⁷

Each proposal varies depending on the state.¹⁰⁸ Not every state includes a change to various property definitions found within their respective statutes.¹⁰⁹ Although each state has proposed or adopted minutely varied versions of the Uniform Fiduciary Access to Digital Assets Act, the overall theme of the legislation remains constant: The law must adapt to recognize a need for structured, clear language detailing how to handle digital assets upon death.¹¹⁰ Whether the varied statutory constructions will result in vastly

99. S.B. 369, 78th Legis. Assemb., 2015 Reg. Sess. (Or. 2015).

100. S.B. 759, 199th Gen. Assemb. 2015 Reg. Sess. (Pa. 2015).

101. H.B. 3444, 121st Gen. Assemb., 2015-2016 Reg. Sess. (S.C. 2015).

102. H.B. 2183, 84th Leg. (Tex. 2015).

103. S.B. 5029, 64th Leg., 2015 Reg. Sess. (Wash. 2015).

104. Assemb. 4666, 216th Legis., 2d Ann. Sess. (N.J. 2014).

105. S.B. 1452, 2015 Sess. (Va. 2014).

106. H.B. 345, 147th Gen. Assemb. (Del. 2013).

107. S.B. 279, N.C. Gen. Assemb., 2013 Sess. (N.C. 2013).

108. *Compare* H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013), *with* H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015); H.B. 1189, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 979, Gen. Assemb., Jan. Sess. (Conn. 2015); H.B. 313, 117th Reg. Sess. (Fla. 2015); H.B. 41, 28th Legis. (Haw. 2015); S.B. 1055, 63d Legis., 1st Reg. Sess. (Idaho 2015); S.B. 308, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 1238, 86th Gen. Assemb., 1st Sess. (Iowa 2015); S.B. 53, 2015 Reg. Sess. (Ky. 2015); H.B. 809, 127th Legis., 1st Reg. Sess. (Me. 2015); H.B. 531, 435th Sess. of Gen. Assemb., 2015 Reg. Sess. (Md. 2015); H.B. 3422, 189th Gen. Ct., 2015 Reg. Sess. (Mass. 2015); H.B. 5034, 98th Legis., 1st Reg. Sess. (Mich. 2015); H.B. 200, 89th Reg. Sess. (Minn. 2015); S.B. 266, 64th Reg. Sess. (Mont. 2015); Legis. B. 463, 104th Legis., 1st Reg. Sess. (Neb. 2015); Assemb. B. 434, 78th Reg. Sess. (Nev. 2015); S.B. 59, 52d Legis., 1st Reg. Sess. (N.M. 2015); S.B. 2106, 64th Legis. Assemb. (N.D. 2015); S.B. 369, 78th Legis. Assemb., 2015 Reg. Sess. (Or. 2015); S.B. 759, 199th Gen. Assemb., 2015 Reg. Sess. (Pa. 2015); H.B. 3444, 121st Gen. Assemb., 2015-2016 Reg. Sess. (S.C. 2015); H.B. 2183, 84th Legis. (Tex. 2015); S.B. 5029, 64th Legis., 2015 Reg. Sess. (Wash. 2015); Assemb. 4666, 216th Legis., 2d Ann. Sess. (N.J. 2014); S.B. 1452, 2015 Sess. (Va. 2014); H.B. 345, 147th Gen. Assemb. (Del. 2013); S.B. 279, N.C. Gen. Assemb., 2013 Sess. (N.C. 2013) (explaining the differences between some state statutes).

109. *Compare* H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013), *with* H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015) (explaining that Tennessee's bill is independent of historical property definitions, while Arkansas's is not).

110. *Compare* H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013), *with* H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015) (explaining that Tennessee's bill is independent of historical property definitions, while Arkansas's is not).

different applications across the nation is still unknown.¹¹¹ As with any law, various courts may interpret the similar language in the proposed Uniform Fiduciary Access to Digital Assets Act in drastically different ways.¹¹²

The near-nationwide movement to adopt the Uniform Fiduciary Access to Digital Assets Act shows the overwhelming recognition of the need for law that specifically addresses how estate planners can expect to handle digital assets upon their clients' death.¹¹³ Although the Uniform Fiduciary Access to Digital Assets Act allows fiduciaries access to digital accounts, assets, etc. upon a person's death, the disposition of these things may turn on whether they fall within the states' definition of property.¹¹⁴ More specifically, the state's view of digital property through an estate-planning lens will impact how the law categorizes video game assets as digital assets.¹¹⁵

111. Compare H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013), with H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015) (explaining that Tennessee's bill is independent of historical property definitions, while Arkansas's is not).

112. Compare H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013), with H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015) (explaining that Tennessee's bill is independent of historical property definitions, while Arkansas's is not).

113. 28 states have proposed a version of the UFADAA. Compare H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013), with H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015); H.B. 1189, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 979, Gen. Assemb., Jan. Sess. (Conn. 2015); H.B. 313, 117th Reg. Sess. (Fla. 2015); H.B. 41, 28th Legis. (Haw. 2015); S.B. 1055, 63d Legis., 1st Reg. Sess. (Idaho 2015); S.B. 308, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 1238, 86th Gen. Assemb., 1st Sess. (Iowa 2015); S.B. 53, 2015 Reg. Sess. (Ky. 2015); H.B. 809, 127th Legis., 1st Reg. Sess. (Me. 2015); H.B. 531, 435th Sess. of Gen. Assemb., 2015 Reg. Sess. (Md. 2015); H.B. 3422, 189th Gen. Ct., 2015 Reg. Sess. (Mass. 2015); H.B. 5034, 98th Legis., 1st Reg. Sess. (Mich. 2015); H.B. 200, 89th Reg. Sess. (Minn. 2015); S.B. 266, 64th Reg. Sess. (Mont. 2015); Legis. B. 463, 104th Legis., 1st Reg. Sess. (Neb. 2015); Assemb. B. 434, 78th Reg. Sess. (Nev. 2015); S.B. 59, 52d Legis., 1st Reg. Sess. (N.M. 2015); S.B. 2106, 64th Legis. Assemb. (N.D. 2015); S.B. 369, 78th Legis. Assemb., 2015 Reg. Sess. (Or. 2015); S.B. 759, 199th Gen. Assemb., 2015 Reg. Sess. (Pa. 2015); H.B. 3444, 121st Gen. Assemb., 2015-2016 Reg. Sess. (S.C. 2015); H.B. 2183, 84th Legis. (Tex. 2015); S.B. 5029, 64th Legis., 2d Ann. Sess. (Wash. 2015); Assemb. 4666, 216th Legis., 2d Ann. Sess. (N.J. 2014); S.B. 1452, 2015 Sess. (Va. 2014); H.B. 345, 147th Gen. Assemb. (Del. 2013); S.B. 279, N.C. Gen. Assemb., 2013 Sess. (N.C. 2013) (showing the increasing demand for digital asset law in the United States).

114. See generally TEX. EST. CODE ANN. § 22.034 (West 2015) (codifying that a will directs how to dispose of property).

115. Compare H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013), with H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015); H.B. 1189, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 979, Gen. Assemb., Jan. Sess. (Conn. 2015); H.B. 313, 117th Reg. Sess. (Fla. 2015); H.B. 41, 28th Legis. (Haw. 2015); S.B. 1055, 63d Legis., 1st Reg. Sess. (Idaho 2015); S.B. 308, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 1238, 86th Gen. Assemb., 1st Sess. (Iowa 2015); S.B. 53, 2015 Reg. Sess. (Ky. 2015); H.B. 809, 127th Legis., 1st Reg. Sess. (Me. 2015); H.B. 531, 435th Sess. of Gen. Assemb., 2015 Reg. Sess. (Md. 2015); H.B. 3422, 189th Gen. Ct., 2015 Reg. Sess. (Mass. 2015); H.B. 5034, 98th Legis., 1st Reg. Sess. (Mich. 2015); H.B. 200, 89th Reg. Sess. (Minn. 2015); S.B. 266, 64th Reg. Sess. (Mont. 2015); Legis. B. 463, 104th Legis., 1st Reg. Sess. (Neb. 2015); Assemb. B. 434, 78th Reg. Sess. (Nev. 2015); S.B. 59, 52d Legis., 1st Reg. Sess. (N.M. 2015); S.B. 2106, 64th Legis. Assemb. (N.D. 2015); S.B. 369, 78th Legis. Assemb., 2015 Reg. Sess. (Or. 2015); S.B. 759, 199th Gen. Assemb., 2015 Reg. Sess. (Pa. 2015); H.B. 3444, 121st Gen. Assemb., 2015-2016 Reg. Sess. (S.C. 2015); H.B. 2183, 84th Legis. (Tex. 2015); S.B. 5029, 64th Legis., 2015 Reg. Sess. (Wash. 2015); Assemb. 4666, 216th Legis., 2d Ann. Sess. (N.J. 2014); S.B. 1452, 2015 Sess. (Va. 2014); H.B. 345, 147th Gen. Assemb. (Del. 2013); S.B. 279,

2. Defining “Digital Asset”

There are four categories of digital assets: personal assets, social media assets, financial assets, and business accounts.¹¹⁶ Gerry W. Beyer and Naomi Cahn offer artful definitions and examples of four categories of digital assets.¹¹⁷ The first category of digital assets that Beyer and Cahn discuss is the personal asset.¹¹⁸

3. Personal Assets

On its face, the definition of personal assets as a subset of digital assets does not appear to account for video game items.¹¹⁹

In the first category are personal assets stored on a computer or smart phone, or uploaded onto a website, such as Flickr or Shutterfly. These can include treasured photographs or videos, e-mails, or even playlists. Photo albums can be stored on an individual’s hard drive or created through an online system. They also can be created through social media, as discussed below. People can store medical records and tax documents for themselves or family members. The list of what a client’s computers can hold is, almost literally, infinite. Each of these assets requires different means of access. Simply logging onto someone’s computer generally requires a password, perhaps a different password for operating system access, and then each of the different files on the computer may require its own password.¹²⁰

Video game items are not merely photographs, videos, or text files hosted on an e-mail server explicitly mentioned in the definition, yet Beyer and Cahn note “the list of what a client’s computers can hold is, almost literally, infinite.”¹²¹ With this in mind, we can imagine that a sword owned in a video game could be a personal asset under Beyer and Cahn’s definition because the sword is a part of a larger game accessed through a video game account, which the owner accesses with a password.¹²² Whether video game items fit into the personal asset category of digital assets depends on the interpretation and breadth each reader gives to the definition.¹²³

N.C. Gen. Assemb., 2013 Sess. (N.C. 2013) (explaining the differences in states’ views of digital assets as property).

116. See Naomi Cahn, *Postmortem Life On-Line*, 25 PROB. & PROP. 36, 36 (2011).

117. Gerry W. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 NAELA J. 135, 138 (2013).

118. *Id.*

119. *Id.*

120. *Id.* at 138.

121. *Id.*

122. *Id.*

123. *Id.*

Beyer and Cahn next turn their attention to digital assets of a kind that are responsible for the expensive overages on everyone's cell phone data plans: social media assets.¹²⁴

4. Social Media Assets

Once again, video game items are not explicitly mentioned in the definition of social media assets.¹²⁵

Social media assets involve interactions with other people, including the websites Facebook, MySpace, LinkedIn, and Twitter, for example, as well as e-mail accounts. Not only are these sites used for messaging and social interaction, but they also can serve as storage for photos, videos, and other electronic files.¹²⁶

This should not shock the conscience; video games historically allow players to interact with previously programmed players in a closed system or with friends—as Player 2—sitting on the other side of the couch.¹²⁷ However, it behooves one to reconsider how technology has changed the gaming landscape and refrain from hasty assumptions.¹²⁸ Modern video games allow players to live-stream, record and post online, and otherwise share their in-game footage.¹²⁹

The ability to share one's gaming dominance draws many similarities between modern video games and social media accounts—the purpose of social media is to share your experiences with those you share your life with, and now video games allow you to do the same.¹³⁰ Due to the shared characteristics of video games and social media accounts, gamers can use their video game accounts to live-stream, broadcast, and share their game on certain consoles.¹³¹ Gamers could use their gaming accounts as a social media asset to share their in-game footage across a wide Internet audience in limited situations.¹³²

Beyer and Cahn have used e-mail as an example of both personal assets and social media assets—this fact deserves special attention.¹³³ By doing so, Beyer and Cahn posit that digital assets may fit into more than one

124. *Id.*

125. *Id.*

126. *Id.*

127. *See supra* Part II.

128. *See supra* Part II.

129. *Broadcasting Your Gameplay*, PLAYSTATION, <http://manuals.playstation.net/document/en/ps4/share/broadcast.html> [<https://perma.cc/8FKJ-PN5S>] (last visited Nov. 4, 2015).

130. *See generally* Beyer & Cahn, *supra* note 117, at 135 (explaining similarities between video games and social media).

131. *Id.*

132. *Id.*

133. *See id.*

category.¹³⁴ Estate planning for digital properties is a more dynamic field due to the fluid nature of intangible properties rather than a static application of statutes to an unchangeable physical property.¹³⁵

A silver diamond ring is always a silver diamond ring; it is a physical, tangible property that can never change into a gold diamond ring.¹³⁶ However, a digital asset could fluctuate between a personal asset and a social media asset depending on the asset's use.¹³⁷ A client could potentially possess digital assets that fit multiple definitions; statute readers could interpret the law to apply to different categories of digital assets in various ways.¹³⁸

That a digital asset may fit into multiple categories forces the conclusion that the way in which the digital asset is used will, at least partially, determine which category of digital asset it will fall into.¹³⁹ If a court treats digital assets differently, depending on which category of digital asset the court believes to be at issue, then the use of the digital asset could ultimately determine how the law will handle that asset.¹⁴⁰

Now that money trees are not always the perfect place for shade, or for holding one's wealth, Beyer and Cahn next turn to defining financial accounts as a digital asset.¹⁴¹ Back in yesteryear, when cash ruled everything, gold held within federal reserves backed the United States Dollar, and paying for an item required forking over tangible currency in exchange for a good or service.¹⁴² Currently, executive securities back the United States Dollar, and

134. *Id.*

135. *Id.*

136. *Id.*

137. *See id.*

138. *Id.*

139. *See id.*

140. *Compare* H.B. 1945, 108th Gen. Assemb. 2d Sess. (Tenn. 2013), *with* H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015); H.B. 1189, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 979, Gen. Assemb., Jan. Sess. (Conn. 2015); H.B. 313, 117th Reg. Sess. (Fla. 2015); H.B. 41, 28th Legis. (Haw. 2015); S.B. 1055, 63d Legis., 1st Reg. Sess. (Idaho 2015); S.B. 308, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 1238, 86th Gen. Assemb., 1st Sess. (Iowa 2015); S.B. 53, 2015 Reg. Sess. (Ky. 2015); H.B. 809, 127th Legis., 1st Reg. Sess. (Me. 2015); H.B. 531, 435th Sess. of Gen. Assemb., 2015 Reg. Sess. (Md. 2015); H.B. 3422, 189th Gen. Ct., 2015 Reg. Sess. (Mass. 2015); H.B. 5034, 98th Legis., 1st Reg. Sess. (Mich. 2015); H.B. 200, 89th Reg. Sess. (Minn. 2015); S.B. 266, 64th Reg. Sess. (Mont. 2015); Legis. B. 463, 104th Legis., 1st Reg. Sess. (Neb. 2015); Assemb. B. 434, 78th Reg. Sess. (Nev. 2015); S.B. 59, 52d Legis., 1st Reg. Sess. (N.M. 2015); S.B. 2106, 64th Legis. Assemb. (N.D. 2015); S.B. 369, 78th Legis. Assemb., 2015 Reg. Sess. (Or. 2015); S.B. 759, 199th Gen. Assemb., 2015 Reg. Sess. (Pa. 2015); H.B. 3444, 121st Gen. Assemb., 2015-2016 Reg. Sess. (S.C. 2015); H.B. 2183, 84th Legis. (Tex. 2015); S.B. 5029, 64th Legis., 2015 Reg. Sess. (Wash. 2015); Assemb. 4666, 216th Legis., 2d Ann. Sess. (N.J. 2014); S.B. 1452, 2015 Sess. (Va. 2014); H.B. 345, 147th Gen. Assemb. (Del. 2013); S.B. 279, N.C. Gen. Assemb., 2013 Sess. (N.C. 2013) (showing the different classifications of digital assets).

141. Beyer & Cahn, *supra* note 117; *see also* KENDRICK LAMAR, MONEY TREES (Interscope Records 2012) (exploring personal values toward wealth and money).

142. *Is U.S. Currency Still Backed by Gold?*, FED. RES., http://www.federalreserve.gov/faqs/currency_12770.htm [<https://perma.cc/8EZ2-7SFS>] (last updated Aug. 2, 2013).

the playing-card-sized pieces of plastic in our pockets, rather than stacks of green paper, commonly connect us to our money.¹⁴³

5. Financial Accounts

A court is unlikely to consider a video game account a financial account.¹⁴⁴

Though some bank and investment accounts have no connection to brick-and-mortar buildings, most retain some connection to a physical space. They are, however, increasingly designed to be accessed via the Internet with few paper records or monthly statements. For example, an individual can maintain an Amazon.com account, be registered with PayPal, Bitcoin, or other financial sites, have an e-Bay account, and subscribe to magazines and other media providers. Many people make extensive arrangements to pay bills online such as income taxes, mortgages, car loans, credit cards, water, gas, telephone, cell phone, cable, and trash disposal.¹⁴⁵

Video game assets and accounts do not enable the user to achieve the same ends that could be reached using commonplace financial assets: “to pay bills online such as income taxes, mortgages, car loans, credit cards, water, gas, telephone, cell phone, cable, and trash disposal.”¹⁴⁶ Although certain video games are valuable, they do not fall under the traditional definition of financial assets.¹⁴⁷

6. Business Accounts

Lastly, Beyer and Cahn address business accounts as digital assets.¹⁴⁸

An individual engaged in any type of commercial practice is highly likely to store some information on computers. Businesses collect data such as customer orders and preferences, home and shipping addresses, credit card data, bank account numbers, and even personal information such as birthdates and the names of family members and friends. Physicians store patient information. eBay sellers have an established presence and reputation. Lawyers might store client files or use a Dropbox.com-type service that allows a legal team spread across the U.S. access to litigation documents through shared folders. A blog or domain name can be valuable,

143. *Id.*

144. *See id.* at 135 (stating that video game accounts do not meet the traditional definition of a financial account).

145. Beyer & Cahn, *supra* note 117, at 138.

146. *See id.*

147. *See id.* (defining digital assets and pointing out common characteristics of those assets).

148. *Id.* at 138.

yet access and renewal may only be possible through a password or e-mail.¹⁴⁹

If the client is streaming his gameplay online to make money, then the client could consider the video game assets used to create the product he markets to consumers over the Internet as business assets contained in a business account, but this seems unlikely.¹⁵⁰

Although States define these categories as encompassing various types of digital assets, they are slow to act to incorporate any definition of digital assets into their statutes.¹⁵¹ Without clear legislation directing the court to handle digital assets or property in a way that accounts for society's increasing dependence on technology, it may be difficult for digital assets and property to be sufficiently protected through probate.¹⁵²

7. Texas Estates Code Section 22.028

Texas Estates Code § 22.028 defines property to include “an interest in goods; money; a chose in action; an evidence of debt; and a real chattel.”¹⁵³ The Texas Estates Code does not yet have a provision that details how a probate court should handle the distribution of digital assets or property, but it should.¹⁵⁴ With society's lust for technology only continuing to increase, Texas law should have a progressive outlook and plan for a time when its citizens will routinely possess digital properties in numerous and various forms.¹⁵⁵ If Texas fails to recognize the trend of digital dependence, it is inviting its law to stagnate and may fail to effectively address the needs of its citizenry.¹⁵⁶ Specifically, the law fails to address digital assets owned in the video game context, even though video game usage is steadily growing.¹⁵⁷

8. The Texas Property Code

The Texas Legislature has amended the Property Code to account for digital property and assets: S.B. 648 amends § 111.004(12) of the Property Code expanding the definition of property to include “property held in any digital or electronic medium.”¹⁵⁸ The Texas Property Code recognizes digital

149. *Id.*

150. *See id.*

151. *Id.*

152. *See supra* Section IV.A.

153. TEX. EST. CODE ANN. § 22.028 (West 2015).

154. *See generally* TEX. EST. CODE ANN. (West 2015) (showing the Texas Estate Code does not have a section defining digital assets for this purpose); *see also supra* Section IV.A (discussing how the Texas Estates Code lacks provisions instructing probate courts how to distribute digital assets or property).

155. *See infra* Section IV.B.

156. *See supra* Section IV.A.5.

157. *See* Entertainment Software Association, *supra* note 5.

158. S.B. 648, 83d Leg., Reg. Sess. (Tex. 2013).

assets as a subset of personal property.¹⁵⁹ However, realizing what suffices as a digital asset to decide whether certain digital property falls under the Property Code is critically important.¹⁶⁰

9. Oklahoma Law

The Oklahoma Legislature recognized the need to specifically account for digital assets and enacted a statute that expressly provides that an “executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website, or any e-mail service websites.”¹⁶¹ This statute does not discuss gaming assets, or really any sort of digital asset with market value, but it points to the fact that legislatures are aware of the pressing need for law that handles the distribution of digital property.¹⁶²

Video game accounts differ from microblogs and e-mail service accounts in function but not in form—each account holds information stored in a digital medium that is a product of the client’s work in some fashion.¹⁶³ The key difference is that often video game assets are worth some value, while blogs and e-mails are essentially worthless to any individual other than the client themselves.¹⁶⁴ Oklahoma’s statute pertaining to specific types of digital assets should not functionally differ if its legislature expanded it to include digital video game assets.¹⁶⁵ If an estate executor is able to exercise power over one kind of digital asset, then there is no reason why an executor should not be able to exercise control over other kinds of digital assets as well.¹⁶⁶

In light of our society’s current dependency on technology, and the trend towards storing valuable property in various digital forms, Texas should take action to introduce legislation which provides access to a client’s digital assets upon death and provides explicit direction for handling digital assets that hold value in an open market.¹⁶⁷

159. *Id.*

160. *See supra* Section III.B.

161. OKLA. STAT. ANN. tit. 58, § 269 (West 2015).

162. *Id.*

163. *See* Beyer & Cahn, *supra* note 117.

164. *See* Gibson, *supra* note 44.

165. *See* tit. 58, § 269.

166. *See id.* (showing no explicit limit of control).

167. *Id.*

B. How Should the Texas State Legislature Handle Video Game Assets?

1. Proposed Texas Legislation

To account for society's rapid exodus from hard copy assets to digital assets, the Texas Legislature should propose and adopt statutory amendments that codify a definition of digital assets and detail how to treat these assets throughout the probate process.¹⁶⁸ Clear legislation would help estate planners seamlessly advise clients on the most beneficial way to handle their estates.¹⁶⁹ Such legislation would also show that our state legislature is aware of dramatic changes throughout the societal landscape and the immediate need to ensure that the law reflects the state of society.¹⁷⁰

Oklahoma has taken a big step in the right direction in considering how our digital lives could affect our estates, and Texas should follow.¹⁷¹ Oklahoma's statute allows for an executor "to have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging [sic] or short message service website, or any e-mail service websites."¹⁷²

While Oklahoma has taken a step in the right direction, the attempt to account for disposition of digital assets falls short of realizing the integration of technology-based digital assets in our lives and the need for control of disposition of those digital assets.¹⁷³ The Oklahoma statute recognizes that a deceased person is able to direct the disposition of only a few kinds of digital assets, namely social media assets as Beyer and Cahn define.¹⁷⁴ However, Texas should adopt the following statute to encompass the virtually infinite variations of digital assets a client may possess:

The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website, any e-mail service websites, any digital account that allows access to digital properties holding value on an open market, including video game accounts and any digital property contained within such an account, any digital property or assets that are or were used in making a profit for the deceased when exercised

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Beyer & Cahn, *supra* 117.

under their control, and any digital property or assets the deceased deems or wishes to be under the executor's control.¹⁷⁵

Although the proposed change to the statute would invite some ambiguity in determining the digital assets an executor could control, an expansive interpretation of the law would stay consistent with the modern principle that an individual has the privilege of directing the disposition of their property upon the decedent's death.¹⁷⁶ Most importantly, the proposed language would ensure that a client could leave valuable digital properties, specifically those contained in video game accounts, to a specific individual or in the control of the executor.¹⁷⁷ This specific language is necessary moving forward because an increasing number of people are purchasing valuable digital assets that are left in limbo upon the death of the gaming client.¹⁷⁸

V. THE END OF THE GAME: PROBATING VIDEO GAME ASSETS

A. Wills, Trusts, and Digital Assets

Digital assets are now included in the Estates Code's definition of property, so the probate process should handle the tangible and intangible property the same.¹⁷⁹

Texas Estates Code § 251.002(a) provides that any competent client may control the disposition of the client's property interests in the event of death.¹⁸⁰ Section 251.002(b)(2) states that the client has the power to "direct the disposition of property or an interest passing under the will or by intestacy" through a last will and testament.¹⁸¹ If the Texas Legislature enacts a law or laws substantially similar to the Uniform Fiduciary Access to Digital Assets Act, then a person with valuable digital assets would be able to direct the disposition of those assets in the same or similar fashion as a person who wishes to direct the disposition of other valuable assets obtained as part of a hobby, such as a signed baseball or a rare, vintage sports car.¹⁸²

A uniform approach to probate, allowing both tangible and intangible properties to be disposed of in similar fashions, would help streamline the stressful probate process and ensure that clients are able to control the disposition of all their property with confidence.¹⁸³ The intent of Texas's current estate planning and probate statutes is that any competent client

175. Tit. 58, § 269. (emphasis added to show proposed language).

176. See TEX. EST. CODE ANN. § 251.001 (West 2015).

177. See tit. 58, § 269.

178. See Entertainment Software Association, *supra* note 5.

179. See *supra* Section IV.A.4.

180. § 251.002(b)(2).

181. § 251.002(a).

182. See generally § 251.002 (explaining how to dispose digital assets).

183. See *supra* Section IV.B.1.

should be able to control the disposition of property to the client's liking.¹⁸⁴ The clear intent of the law is hindered when the law restricts a person's ability to distribute digital property because the law has not expressly recognized that digital property in the statutory canon.¹⁸⁵ The Texas legislature can continue to support the freedoms inherent in property ownership by enacting law that recognizes and treats digital properties in the same manner as tangible property throughout the probate process.¹⁸⁶

B. Preparing for the End of the Game: What Questions Should Estate Planners Ask Their Gaming Clients?

Estate planners may not be familiar with the many kinds of digital property their clients might own.¹⁸⁷ However, with the right approach, any estate planner can ask the right questions and discover the client's estate planning needs.¹⁸⁸ In determining whether a client possesses digital video game property that should garner special attention throughout the estate planning process, an attorney should ask their clients the following questions:

1. Do you play any video games?
2. If yes, do any of the video games you play utilize in-game economies for purchasing game items?
3. If yes, are these economies based on real-world currencies?
4. Do you own any in-game items that are particularly valuable?
5. Have you used legal currency to purchase in-game items, such as property, resources, or vehicles, which are unique and constantly accessible in the video game's persistent universe?
6. Do you sell or trade digital gaming items through a web-based marketplace, e.g. eBay or Playersauction?
7. Have you purchased any digital gaming items through a web-based marketplace, e.g. eBay or Playersauction?
8. Do you utilize your video game accounts to earn a profit in any way?
9. Do you utilize your video game accounts to share or live-stream video game play as a form of business?
10. Do you utilize your video game accounts to share or live-stream video game play as an extension of a social media account?¹⁸⁹

184. § 251.002.

185. See *supra* Section IV.B.1.

186. See generally TEX. EST. CODE ANN. § 251.002 (West 2015) (showing the importance of the Texas Legislature in adopting this language).

187. See generally Beyer & Cahn, *supra* note 117 (indicating that a client may have any type of property imaginable).

188. See *supra* Section IV.B.

189. See Beyer & Cahn, *supra* note 117.

While an estate planner may not recognize the value of a client's digital property, the client is in a good position to identify any valuable digital properties and inform the estate planner of where the client is holding such assets.¹⁹⁰ Further, if the client uses video game accounts to earn a profit, the estate planner will be able to consider tax implications associated with any profits the client may earn from that intangible property.¹⁹¹

In order to best serve clients, estate planners must gain an intimate knowledge of the clients' property they wish to devise.¹⁹² Though video games and their digital assets may be a foreign world to some estate planners, the questions proposed here will help start a dialogue between client and counselor about how to handle all of the client's property appropriately.¹⁹³ These questions will serve to aid the estate planner in gaining a solid understanding of the client's property, both tangible and intangible.¹⁹⁴ These ten questions will also give an estate planner some insight into how the client utilized their digital properties and if the use of the property will demand special attention throughout the estate planning process.¹⁹⁵

VI. CONCLUSION

Video games have been around for decades and show no sign of fading into obscurity anytime soon.¹⁹⁶ Rather, evolution of the video game industry suggests that video games will continue to play an ever-increasing role in our society.¹⁹⁷ Introducing children to gaming is occurring at record pace, and that involvement and interaction could spawn generations of people who invest heavily in digital assets used in their favorite games.¹⁹⁸ Regardless of potential growth in the video game market, today's adults are enjoying video games regularly and with that enjoyment may gain ownership of valuable digital properties.¹⁹⁹

Some states' current laws adequately address the handling of very few categories of digital assets upon death.²⁰⁰ This lack of legislation leaves a litany of lawful citizens in limbo, unable to confidently plan the disposition of their estate.²⁰¹ The Uniform Fiduciary Access to Digital Assets Act can open the door for a widely accepted and consistent framework for handling

190. *See id.*

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. *See id.*

196. *See* Entertainment Software Association, *supra* note 5.

197. *See id.*

198. *See id.*

199. *See* Chayka, *supra* note 52.

200. *See generally* OKLA. STAT. ANN. tit. 58, § 269 (West 2015) (explaining the powers of the executor or administrator of an estate).

201. *Id.*

digital property and assets, including digital video game assets, throughout the probate process.²⁰² Texas should work to enact its own proposed legislation to ensure that its citizens' digital properties are recognized in the law.²⁰³

An estate planner must have a concrete understanding of the contents of the client's estate.²⁰⁴ With the increasing enjoyment of technology and video games, specifically MMORPGs that contain unique and valuable in-game items, taking care of a client's digital video game properties throughout the estate planning process is critically important.²⁰⁵ Due to the high value of many video game assets, these digital properties can represent significant portions of a client's estate, especially when owning one planet in a game like *Entropia Universe* could be worth well over six figures.²⁰⁶ The questions detailed in this comment will help an estate planner understand whether the client's estate contains digital assets in need of special attention throughout the estate planning process.²⁰⁷

"In this life nothing can be said to be certain, except death and taxes."²⁰⁸ Upon death, we must turn to the law to help ensure our property is left with those whom we desire to gain ownership.²⁰⁹ Regardless of the kind of property in question, the law must address any type of legally recognized property that a person wishes to pass down through probate.²¹⁰ Texas's Property Code recognizes the need for a statute that reflects society's increasing use of technology and possession of digital property.²¹¹ The time

202. See H.B. 1362, 90th Gen. Assemb., 2015 Reg. Sess. (Ark. 2015); H.B. 1189, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); S.B. 979, Gen. Assemb., Jan. Sess. (Conn. 2015); H.B. 313, 117th Reg. Sess. (Fla. 2015); H.B. 41, 28th Legis. (Haw. 2015); S.B. 1055, 63d Legis., 1st Reg. Sess. (Idaho 2015); S.B. 308, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015); S.B. 1238, 86th Gen. Assemb., 1st Sess. (Iowa 2015); S.B. 53, 2015 Reg. Sess. (Ky. 2015); H.B. 809, 127th Legis., 1st Reg. Sess. (Me. 2015); H.B. 531, 435th Sess. of Gen. Assemb., 2015 Reg. Sess. (Md. 2015); H.B. 3422, 189th Gen. Ct., 2015 Reg. Sess. (Mass. 2015); H.B. 5034, 98th Legis., 1st Reg. Sess. (Mich. 2015); H.B. 200, 89th Reg. Sess. (Minn. 2015); S.B. 266, 64th Reg. Sess. (Mont. 2015); Legis. B. 463, 104th Legis., 1st Reg. Sess. (Neb. 2015); Assemb. B. 434, 78th Reg. Sess. (Nev. 2015); S.B. 59, 52d Legis., 1st Reg. Sess. (N.M. 2015); S.B. 2106, 64th Legis. Assemb. (N.D. 2015); S.B. 369, 78th Legis. Assemb., 2015 Reg. Sess. (Or. 2015); S.B. 759, 199th Gen. Assemb. 2015 Reg. Sess. (Pa. 2015); H.B. 3444, 121st Gen. Assemb., 2015-2016 Reg. Sess. (S.C. 2015); H.B. 2183, 84th Legis. (Tex. 2015); S.B. 5029, 64th Legis., 2015 Reg. Sess. (Wash. 2015); Assemb. 4666, 216th Legis., 2d Ann. Sess. (N.J. 2014); S.B. 1452, 2015 Sess. (Va. 2014); H.B. 345, 147th Gen. Assemb. (Del. 2013); S.B. 279, N.C. Gen. Assemb., 2013 Sess. (N.C. 2013); H.B. 1945, 108th Gen. Assemb., 2d Sess. (Tenn. 2013).

203. H.B. 2183, 84th Legis. (Tex. 2015).

204. See generally TEX. DISCIPLINARY RULES PROF'L CONDUCT 1.01 (explain an attorney's responsibilities).

205. See *supra* Part IV.

206. See Gibson, *supra* note 44.

207. See generally TEX. EST. CODE ANN. (West 2015) (showing how imperative clarification in the law is).

208. *Nothing is Certain but Death and Taxes*, THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/death-and-taxes.html> [<https://perma.cc/4MMQ-EJ8T>] (last visited Sept. 5, 2016).

209. See generally TEX. EST. CODE ANN. §§ 201.001-.003 (explaining the estate of an intestate).

210. See *id.*

211. See generally S.B. 648, 83d Legis., Reg. Sess. (Tex. 2013) (explaining the distribution of assets).

has come for the legislature to enact similar laws in the Texas Estates Code—digital property should enjoy the same benefits of the probate system as physical, tangible property.²¹²

212. *See id.*