

Digital Asset Planning

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In today's increasingly digital world, our lives revolve around technology and many of our personal possessions and important documents have become integrated into online databases and cloud technology for easy access and convenience. When creating your estate plan, it is important to consider not only your traditional assets, but also your digital assets. What are digital assets? Who has access to them and what are their rights? What can you do to plan for your digital assets after you die? What happens to your digital assets after you die?

What are digital assets?

Simply put, a digital asset is an electronic record. It is electronic content that exists outside the physical world which has personal value to someone. Digital content includes individual files and some online accounts. A few types of digital assets are:

- **Personal items** such as photos, videos, and email accounts.
- **Social media** and productivity tools such as Facebook, Twitter, Instagram, Pinterest, LinkedIn, Tumblr, and Evernote.
- **Financial accounts** such as mutual fund accounts, retirement accounts, online bill payment services that exist in the digital and paper world. There are also digital only accounts

such as PayPal, Bitcoin, eCommerce sites, and credit card loyalty programs.

- **Business Tools** such as a domain name, blogs through WordPress, SquareSpace, YouTube, and personal websites, as well as e-commerce sites such as eBay, Amazon, Alibaba, VRBO, and Etsy.

Items that are not typically considered as digital assets are music, movies, eBooks, and audio books purchased from Apple iTunes or Amazon, as examples. The Terms of Service (TOS) agreements that govern these types of assets make them nontransferable; you do not own the digital content. You pay for a license to listen, watch, and read during your lifetime only. Many people are surprised to learn that they cannot transfer their eBooks or music to their heirs upon death.

Digital hardware, such as laptops or PCs, portable hard drives and flash drives, smartphones, tablets, and digital cameras are not digital assets. As tangible assets, these devices are covered by your traditional estate plan, most likely your will or trust. However, access to the devices where your digital assets are located is important for preserving these assets, and having any required passwords to each device is imperative for data recovery and collection.

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For all digital assets, it is important to understand the TOS agreement, which governs the transferability of the account when you die, and what rights your surviving heirs have to access your digital assets. Each service, from Facebook to Gmail, Yahoo! to Dropbox, has its own TOS agreement with the intent of protecting the rights of the deceased. Knowing what the TOS agreement allows, and preparing your digital assets accordingly, will ensure a smooth and easy transition, deletion, or preservation of your digital assets.

The Laws

Legal representatives of an estate have a duty to protect the assets of the decedent; however, they may face significant roadblocks when dealing with multiple TOS agreements or policies regarding when or if they can access online accounts and information. Currently, if an online account has a policy that does not allow transferability and the user agrees to this policy when creating or updating the account, the executor administering the estate does not have the legal authority to overstep these restrictions. To gain access, the executor may have to go through a complicated, time consuming, and costly court procedure. For example, Yahoo's TOS agreement purports to provide the company with full and sole authority to delete an account on the death of the account holder¹—regardless of the effect that may have on an estate.

Most states are actively pursuing legislation to deal with access by a fiduciary to a decedent's digital assets and accounts, and in the intervening time, each state has laws governing the rights of a representative of an estate, guardianship, or trust.

It is important to note that technology has far outpaced legislation regarding access to digital assets. Your professional advisors should be consulted to ensure that your wishes coincide with your state's laws.

Planning for your Digital Assets

Besides familiarizing yourself with what your digital assets are and knowing your state's laws, there are some relatively simple steps you can take to protect your digital assets and make sure they are handled according to your wishes after your death. First, take an inventory of all of your digital assets, which can be highly useful as a guide and will remain a living document throughout your lifetime.

While not a legally binding role, naming a digital executor is a prudent step to take when planning for your digital assets. Choose someone you trust and who is comfortable with technology. An individual who is highly organized and patient also demonstrates qualities of a digital executor. This person should be aware of where your digital hardware is located, what accounts you have, and any pertinent information on accessing those accounts. Compiling your passwords for various online accounts in a safe and secure place, as well as your digital asset inventory, is an easy and effective way to transfer this knowledge to your digital executor.

Consider using a password manager with inheritance features, which will share passwords with heirs electronically or even by registered letter to ensure this information is not lost. There are also online services that can assist you in planning for your digital assets, some of which

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include Digital Estate Planning, Digital Locker, Postmortem Messaging, and Digital Assets Locator. Consulting services are also available to assist you with creating a plan, organizing, or digitizing your assets.

Although it may seem daunting to plan for your digital assets, taking action early will facilitate a smooth process. Create a digital asset inventory, and use a password manager. Consider adding language to your estate plan that authorizes access to your digital accounts. Name a digital

executor and work with him or her as early in the process as possible. Be sure to keep your inventory and password manager up to date, with regular reminders to edit pertinent information as technology changes and new platforms and services are added to your digital asset collection. Consult with your trust officer or estate planner to be sure that your estate and trust documents reflect your wishes in regards to your digital assets, and to ensure that your wishes are carried out.

¹ Yahoo Terms of Service, <https://policies.yahoo.com/us/en/yahoo/terms/utos/>

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