

# Estate Planning for Digital Assets

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*Digital assets survive incapacity or death, requiring a plan for everyone who owns a digital device or maintains an online account, regardless of their age.*

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Your digital assets include the computers, smartphones, tablets and other devices you own, your data stored on those devices and other servers throughout the world in the “cloud”, and your online user accounts with financial institutions, Facebook, LinkedIn and other service providers. Ensuring the proper management and orderly transfer of these digital assets after incapacity or death is an increasingly important aspect of estate planning.

The basic idea is to knit into your estate plan provisions for your digital assets that are comparable to provisions for your financial and other assets. This requires a complete inventory of your digital assets, decisions regarding how they should be handled and who should be responsible for them after your incapacity or death, arrangements for handling data you don’t want others to access, and the inclusion of proper language in your estate documents.

Planning for digital assets following incapacity or death applies to anyone who uses digital devices or online accounts, including aging parents and family members too young to have traditional estate documents.

## Digital Reality

At first blush, making plans to allow others to gain access to your digital property at your incapacity or death may not seem like a pressing concern, certainly not on par with issues such as who should inherit your financial assets or raise your minor children. However, the financial and emotional value attached to digital assets is real and the volume of these assets is constantly increasing.

Some digital assets can have significant financial value, as in a manuscript on a best-selling author’s computer,

while others can have significant intrinsic value, such as the only copies of family photos and videos. Domain names, personal websites, personal blogs and items downloaded from digital music and book libraries also may have transfer value, depending on the provider’s Terms of Service.

If adequate steps aren’t taken before incapacity or death, your wishes regarding how your digital assets should be handled won’t be known or, even if they are known, it may not be possible to implement them.

## Logistical and Legal Hurdles

In addition to describing your digital assets and your desires for how they should be handled, it also is important to provide adequate access to them. Digital assets may be password protected or encrypted, and they may also be covered by data privacy laws or criminal laws regarding unauthorized access to computer systems and private data. Fiduciaries or family members responsible for handling the digital data of others may be able to unearth passwords and gain access to online accounts, but they may not be able to do so legally without adequate authorization.

Digital estate planning is evolving quickly, as are digital providers’ policies on what should happen to digital assets that are left behind. Digital assets are governed by a complex web of rapidly developing federal and state laws, with only a handful of states currently having laws that address digital assets. Terms of Service agreements are becoming common place, but the rules vary widely among service providers and they often limit access rights and the ability to transfer content to others.

Here are a few recent examples of service provider practices that apply to their members or account users/holders/owners (“users”):

- Facebook gives the account user an opportunity to get a list of historical files. However, other individuals currently are not allowed to gain access to data stored on the social media firm’s site.
- Google has created an Inactive Account Manager, which allows the account user to name a trusted person who can gain access to data once an account has been inactive for a certain period of time.
- iTunes and Kindle both have provisions in their Terms of Service that require a deceased member’s account to be terminated and prohibit the transfer of the member’s library content. However, while not advocating such activity, it would be difficult for either provider to trace the transfer or ongoing use of a deceased member’s digital library.
- Microsoft and some other service providers provide the opportunity for an account user to request a CD copy of historical email records and contacts, such as from an Outlook account. It is less clear whether the CD would be provided to a representative of a deceased account holder’s estate.
- Sites maintained by Google and many other service providers have trusted contacts that the account user can enable. Likewise, many financial accounts allow the account user to designate an administrator who has shared access or certain trading rights. Designating a trusted family member or friend for these roles can help maintain access upon the account user’s incapacity or death.

## Recommended Approach

The piecemeal overlay of legal constraints that apply to digital assets is an additional impetus for anyone who owns a digital device to take time now to put in place a personal digital plan. Here are some recommended steps:

### 1. Answer Key Questions

- What valuable items would you lose if one or more of your digital devices were lost or stolen today?
- If you became incapacitated today, would someone you trust be able to gain access to your digital information?
- If you were to die today, what digital property would you like someone you trust to be able to access, transfer and maybe delete?

### 2. Inventory Your Digital Assets

Document all digital assets, including user names and passwords, that are associated with:

- Digital devices, such as computers, smartphones and tablets;
- Data-storage devices or media, such as back-up devices and remote servers in the cloud;
- Electronically stored data, including online financial records, whether they are stored on your device or remotely;
- Bank accounts, credit cards and bills that are paid online;
- User accounts, such as for email, Facebook, LinkedIn, iTunes, Kindle and Shutterfly;
- Domain names that you own; and
- Intellectual property in electronic format, such as books, trademarks and copyrights, including completed versions and drafts.

### 3. Keep Your Inventory Secure

The inventory of your digital assets will contain sensitive information, so keeping it safe is crucial. A printed document will tend to be the most vulnerable, unless you store it in a safe or safe deposit box. A password protected electronic list of your digital assets and instructions on how to gain access to them is a step in the right direction, but it will need to be updated on a regular basis as passwords change.

Software programs such as LastPass and Dashlane, which securely store your online account information and passwords on your computer and smartphone,

are one possibility. Web-based services also exist, such as Legacy Locker and AssetLock, which take the extra step of making this information available to your fiduciaries, after a verification procedure.

These providers are new and for the most part untested, so it may be best to take a hybrid approach and:

- Maintain an electronic inventory protected with strong encryption and a strong password, and backed up in the cloud rather than only on your computer and smartphone;
- Store a printout of the master password for the electronic list or a date-stamped printed copy of the entire electronic list in a safe deposit box or home safe; and
- If you are a Gresham client, provide Gresham a copy to store in your Summitas digital vault where we store all of your estate planning documents.

#### 4. Use Back Up Storage

Storing digital assets on a back-up personal storage device or on remote servers in the cloud helps ensure the longevity of those assets in the event a specific device malfunctions. While online account service providers may voluntarily disclose the contents of electronic communications, they're not compelled to do so. If you want your fiduciaries and heirs to have access to information in your online accounts, backing it up on your own device and in the cloud is a best practice.

#### 5. Plan for the Removal of Unwanted Records

You probably will want your profiles on Facebook and LinkedIn terminated at your passing, so providing instructions to your fiduciaries or family members is necessary to accomplish eliminating your digital footprint on these websites. There may also be unflattering content or emails on your devices or stored in the cloud that you would prefer to not be accessed by others. A best practice is to keep "clean" files, verify that unwanted data is not backed-up or stored in the cloud, and maintain empty trash and delete folders on your devices. In more sensitive situations, consider

directing and authorizing a trusted family member or friend to remove unwanted data before it might cause family discord or damage your reputation.

#### 6. Put Your Plan in Writing

Experts recommend formalizing your digital estate plan with the written lists described above and incorporating appropriate language into your estate documents, including your will, trust agreements and property powers of attorney. The complexity of criminal and data privacy laws makes it necessary to have broad authorizations in place for your fiduciaries and, depending on the type of property and applicable state law, they may need special powers and authorizations to deal with specific assets.

Here are sample provisions regarding digital assets that a leading national law firm suggests, while we wait for state and federal laws that more specifically address issues involving digital assets. This language is provided only as an illustration and your estate planning attorney should be consulted regarding the actual language to be used in your particular circumstances.

*I hereby grant the [agent / trustee / personal representative / executor / digital fiduciary] the maximum authority and powers permitted under relevant federal and state law over digital accounts and digital assets, including, without limitation, the power to access and control any digital asset owned by me during my life and any digital account to which I had access during my life. This is intended to be my consent and authorization under the Electronic Communications Privacy Act of 1986, the Computer Fraud and Abuse Act of 1986 and all other state and federal data privacy and relevant criminal laws. For purposes of this paragraph, "digital asset" means information, including a contract right, created, generated, sent, communicated, received, or stored by electronic means on an electronic device that can receive, store, process or send digital information, or a system that delivers such information, and "digital account" means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.*

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## A Family Affair

Concerns about the handling of digital assets following incapacity or death apply to anyone using digital devices, including grandparents and family members too young to have traditional estate documents. Family members who do not fully appreciate the importance of these concerns should be helped to at least create and maintain an inventory of their digital assets that can be accessed by someone they trust if it becomes necessary to do so.

Family members who have the capacity to execute legal documents, but who resist making changes to their wills and trust agreements, should be encouraged to at least

execute a property power of attorney that contains language authorizing someone they trust to handle their digital assets. Depending on state law, a power of attorney may not remain valid following incapacity, but some documentation of authority is better than none when dealing with reluctant service providers.

Most importantly, fiduciaries and family members need to be provided adequate instructions regarding who to call, what actions to take and how to gain access to all documentation applicable to digital assets whenever it becomes necessary to do so.

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