



Every day we become more connected to each other through our computers and smartphones, and we increasingly depend upon digital technology in our daily lives. The Internet has replaced snail mail. We use social media to keep in touch with our “friends” and to network with our professional contacts. We pay our bills online and store our financial records, photographs, music, and videos in the “cloud.” This technological and behavioral revolution has created new challenges for families when a loved one becomes incapacitated or dies. Largely unheard of ten years ago, estate planning for digital assets has become a hot topic.¹



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What are digital assets?

Digital assets can be tangible or intangible. Tangible examples include smartphones, personal computers (e.g., laptops and tablets), flash drives and other storage devices, e-book readers, cameras, music players, and home security systems. Intangible digital assets include email accounts; electronic financial and tax records (e.g., tax returns prepared and filed electronically using TurboTax or similar software); online accounts used for buying and selling goods (e.g., Amazon and eBay); social networking accounts (e.g., Facebook, Twitter, and LinkedIn); web pages, domain names, and blogs; e-books, music, and photos; “virtual” currency, real estate, and other assets in video games; and rights to creative intellectual property that may exist in digital form (e.g., copyrights, licenses, patents, and trademarks).



Most intangible digital assets are personal in nature and have no monetary value

Do digital assets have any real value?

Often digital property has little or no financial value. Although tangible digital assets can have steep price tags when purchased, their resale value can decline rapidly due to technological obsolescence. Most intangible digital assets are personal in nature and have no monetary value. However, there can be exceptions. The intellectual property of an author or photographer, for example, can be very valuable. A video can go “viral” and accrue meaningful value. A clever website domain name may have extraordinary value—last year, for example, the name “PersonalLoan.com” was sold for \$1 million.

Of course, value can be nonmonetary. Photos, videos, and other digital items have priceless sentimental value for families. Consider the value of emails from a soldier deployed overseas. Financial and tax return records are exceedingly valuable in a practical sense for managing the affairs of an incapacitated person or in administering an estate. Access to a digital contact directory can be crucial for family members wishing to notify friends of a loved one’s decline in health or death.

What are the challenges of administering digital assets?

Digital property presents a number of challenges for family members and fiduciaries of an incapacitated or deceased person as they try to pay outstanding bills, preserve and protect assets, and attend to other details. The first challenge is simply identifying all of that person’s digital assets. The conventional steps of searching through a file cabinet in the study and monitoring the snail mail will be inadequate.

If the person’s routine was to receive and pay bills electronically, there may be no readily available record of past transactions to provide clues about various assets and amounts due. Perhaps in recent years the person has prepared and filed income tax returns electronically and no longer prints hard copies. Digital information such as this on personal computers and smartphones may be protected by passwords on the device itself and on specific accounts. And these passwords may not be known. If the data on the device has been “encrypted,” this will present an additional challenge to access.

Even if a digital account has been identified and the password is known, a family member or fiduciary may still face challenges in accessing it. You may be surprised to learn that the consumer usually does not own the content stored in digital accounts such as iTunes music, e-book readers, downloaded movies, and personal photographs. Instead, the consumer is a licensee whose rights are defined in a “terms of service” contract. These terms usually are in the fine print that you click a box to accept. Under these terms, the license may terminate at death, restrict transfer to others, and prohibit access by a family member or fiduciary representing the person who opened the account.

State and federal statutes present additional obstacles to access. Criminal laws in all 50 states that are intended to protect consumers prohibit unauthorized access to computer systems and personal information. A family member or fiduciary

opening a digital account may unknowingly be committing a crime. At the federal level, privacy protections in the Consumer Fraud and Abuse Act and the Stored Communications Act can impair legitimate attempts by family members and fiduciaries to access and manage digital assets.

As these challenges become better understood, we can expect accommodating changes in vendors' contractual terms of service and in state and federal laws. For example, at least seven states have enacted statutes to assist fiduciaries in accessing online accounts such as social networking or email. A committee of the Uniform Law Commission is working on a draft model act governing access to digital assets by fiduciaries. Once this draft is completed and approved, it will serve as a guide for states in enacting further legislation.²

It will take time for this evolution in the legal landscape to unfold. In the meantime, individuals should take proactive planning steps to facilitate the identification, protection, and desired transfer of their digital assets.

What steps should you take in planning for your digital assets?

As with all other assets (liabilities as well), you should prepare a list of your digital assets. This list should include your user names, passwords, and answers to security questions. Although such a list may be relatively easy to prepare, it will be a challenge to keep updated as you acquire new digital assets and change passwords. In addition, by its very nature it will raise security concerns. If you use a written list, consider storing it in a safe deposit box or in your advisor's vault with the originals of your other estate planning documents. An alternative may be to use an electronic list that is protected by an overall password and encryption. Such an electronic list may be stored on your computer, another device, or on the website of a vendor offering this service.

In choosing fiduciaries to serve under your estate plan, consider their ability to handle digital assets and provide them with express authorizations to access and administer such assets. This could involve adding special language to your durable power of attorney and your will. It also may be advisable to have a standalone document authorizing access to digital information. You might supplement this language in your formal documents with a side letter outlining your wishes for the transfer of certain digital assets.

If a digital asset has significant monetary value, you might register it in the name of your revocable trust to facilitate its management and transfer. The legal rules governing such monetarily valuable assets can include the state and federal statutes referred to above and perhaps other intellectual property law such as copyright law. This complex level of planning will require the advice and guidance of an attorney who has experience in estate planning for intellectual property.

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Conclusion

Even if you don't consider yourself particularly savvy when it comes to technology, there's a good chance that your use of and reliance upon digital assets has been increasing. Please feel free to contact your Fiduciary Trust officer if you would like to discuss the planning consequences of this trend and the possible action steps you should consider.

Disclosure: The opinions expressed in this article are as of the date issued and subject to change at any time. Nothing contained herein is intended to constitute investment, legal, tax or accounting advice, and clients should discuss any proposed arrangement or transaction with their investment, legal or tax advisers.

¹ Sources for this article included numerous articles and the following outline for a presentation delivered at the 47th Heckerling Institute on Estate Planning (January 2013): Lamm, James D., Digital Death: *What to Do When Your Client Is Six Feet Under but His Data Is in the Cloud*.

² Lamm, James D., Blog: www.DigitalPassing.com.