

Estate Planning For Digital Assets

Traditionally, estate planning provides for the transfer of your assets through a will or a trust. These documents name an executor or trustee, respectively, to handle your affairs after your death, including the transfer of your assets. These documents may make a few specific bequests to named beneficiaries and then typically they leave all of the tangible personal property, real property and the rest, residue and remainder of your assets to the surviving spouse, the children or some other named beneficiary. These



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traditional estate planning documents do not specifically mention digital assets, despite the fact that almost everyone now has at least some digital assets, whether they realize it or not.

This traditional estate plan formula has worked for decades to transfer the assets of a decedent down to his heirs and beneficiaries. However, in the wake of the digital age, these instructions and documents may not be enough



to transfer all of your digital assets. Depending on the location of the digital asset it is likely that you will need to take additional steps during your lifetime to ensure that the digital assets of your estate make it to the beneficiaries that you choose.

WHAT IS A DIGITAL ASSET?

Many things can be considered digital assets, even some things that were formerly not digital assets, such as bank accounts. There are many categories and types of digital assets. The list I provide here is by no means exhaustive of all of them, but the items listed are meant

to help you to consider what you may currently own or will acquire that is considered a digital asset.

Personal Digital Assets

Personal digital assets are those items that are saved on your personal computer or electronic device, such as documents, digital photos, music, e-books, text messages and email. The music can even include mp3s that you have converted from CDs. Once the CDs are converted to mp3 format these files are considered digital assets, while the CD is still considered a tangible asset.

Financial Accounts

Financial digital assets include items such as PayPal and Bitcoin that are strictly held in online accounts. Financial accounts that you may have opened at a physical location can also become digital assets. Banks and brokerage firms with a physical location, often referred to as a brick-and-mortar business versus a strictly digital business like PayPal, have recently been encouraging their clients to engage in more online features, such as paperless statements, online bill pay and automatic direct deposit. If most or all of your banking is completed online, your financial accounts, despite having a physical location, can be considered digital assets.

Business Accounts

Some business accounts are also considered digital assets. Businesses that are run solely online, such as an eBay store or an Etsy store, are purely digital assets. Brick-and-mortar businesses may also have some aspect of their business that is considered a digital asset. Examples include customer information or patient records that are retained online or for which online access is given to customers or patients, or online inventory records or the ordering of supplies. If the business runs its own website, the domain name itself is also considered a digital asset of the business.

Other Types of Digital Assets

Social media accounts, such as Facebook, Twitter, Google+, LinkedIn and others are also considered digital assets. The collection of items that you have saved or posted to each of these accounts becomes subject to the terms of service of the provider. Therefore, unlike the digital assets that are saved on your personal computer or electronic device, social media accounts are more difficult to transfer due to the restrictions on the access and transfer

of the account imposed by the terms of service.

Blogs are also considered a digital asset of the author. A blog is a type of online diary that typically centers on a narrow topic of interest, such as travel, cooking or a type of leisure activity. While this may appear to be an insignificant asset, many popular bloggers sell advertising on their site and earn an income stream from the advertising. A failure to plan for the transfer or winding up of a blog could cause a financial loss to the estate and a loss to the readership of the blog.

Loyalty programs are another type of digital asset. Loyalty programs include items such as frequent flyer miles, credit card rewards and more recently banking rewards. Many banks have begun offering rewards programs for clients that essentially make their bank account more like a digital asset by using things such as online banking, online bill pay and receiving statements online or through email.

WHY IS THIS IMPORTANT?

It is important to know what your digital assets are for several reasons. First, some digital assets have many facets to them, and without proper planning, the asset or portions of the asset may not be transferred to those beneficiaries as you intended. Second, failing to properly plan for the transfer of digital assets can create losses to your estate financially and to your heirs emotionally. Finally, the process for transferring digital assets and making sure they are properly addressed at your death can be vastly different than for the other types of assets that you own.

Personal Computer and Electronic Devices

To illustrate many of these issues, imagine a personal computer on which you saved a draft of a book you were writing, photos of your grandchildren

and your financial records. With a traditional estate plan your computer is considered a tangible asset, and at your death the computer will be transferred to a specific beneficiary of your choosing or the beneficiary to which you leave your tangible assets. Additionally, all of the information contained in the computer, including your book, photos and financial records, will also become the property of the beneficiary.

By planning for the transfer of your digital assets, you can essentially divide the individual assets that are stored on the computer's hard drive. For example, you could choose to leave the contents of the computer to your spouse and the computer itself to your grandchildren.

Another consideration is password protection that may be on a computer or electronic device. If your computer or the documents saved on the computer are password protected, it is possible that even with proper authority, no one will be able to obtain access to the items on your computer once you die or become incapacitated, because the password is unknown.

Lack of planning for these types of assets can create a loss to your estate through the loss of financial records or other documents that may have their own monetary value, such as the draft of the book you were writing. Without proper records or information, it is possible that your beneficiaries, executor or trustee may not be aware of all of the assets you possessed at death, such as bank accounts for which you no longer receive paper statements. Many beneficiaries may also feel an emotional loss if the contents of the computer are inaccessible or lost, especially if the computer held the only copies of family photos, journal entries or personal correspondence of the decedent.

Web Based Digital Assets

Assets that are based solely on the internet, such as social media and web based email accounts are subject to the terms of service of the provider. Some providers list specific instructions regarding the ability to backup the account and its contents, and others provide instructions for the transfer of the account and its contents at a user's death. Backing up an account may involve saving a copy of the contents to a type of tangible media, such as a thumb drive or a CD, or it may involve printing a paper copy of the contents of the account.

Most of the service providers require that the *user* take the necessary steps to backup or transfer the account.

This means that the planning for the transfer of digital asset subject to terms of service must be completed during the lifetime of the user. Often the terms of service provide that no one other than the registered user is authorized to access the account. Therefore, the harm in having a third party access the account, during the life of the user or at death, even with the user's permission, is that if the service provider discovers the third party access in violation of the terms of service, the service provider can shut down and delete the user's account.

Consider a popular blog, for which the blogger sells advertising space and earns an income. This digital asset is subject to the website provider's terms of service. At the same time, it can provide an income stream to the estate and the heirs if the transfer of the asset is properly planned prior to the blogger's death. If the blog is not properly considered, the estate could lose the income stream, and the readers could lose their access to the information that was provided on the blog.

WHAT CAN YOU DO NOW?

There are several steps that you can take now to prepare for your digital assets to be properly transferred at your death. First, identify each of your digital assets and the location in which each is stored: your computer, an electronic device, the internet, etc. Next, determine who should receive each of your digital assets. Remember that unlike other assets, such as your vehicle, it is possible to make multiple copies of many digital assets and to leave the assets to more than one beneficiary. Finally, for those assets that are stored on the internet, review the terms of service for the instructions or restrictions regarding the transfer of the asset.

You should save assets that are stored on your computer to tangible media such as CDs, thumb drives or external hard drives. If you would like to leave any of these digital assets to more than one person, you can make multiple copies of the tangible media. For example, if you would like each of your children to receive copies of all of the family photos stored on your computer, you can make a CD for each child that contains all of the photos.

If you identify digital assets that are stored solely on the internet, it may be possible to download or print a tangible copy of the asset. For example, if you have web-based email, the service provider may state in the terms of service that the account is not transferable. However, you can print any of the emails you wish to save for the transfer to beneficiaries. These printed copies then become tangible personal property and will pass pursuant to your estate planning documents and not pursuant to the terms of service of your email provider.

It is also a good idea to keep a list of your digital assets and the steps you have taken regarding their transfer. For example, if you have printed all of the necessary emails from your account, you can note this on the digital asset list. This will save your estate unnecessary time and money to gain access to an account for which you have sufficiently planned. Also, if you receive only digital statements for your bank or brokerage accounts, your estate representative may not be aware of the existence of these financial accounts, even though they can be easily transferred by visiting the brick-and-mortar location. Providing a list of the digital assets, including these financial accounts will alert your estate representatives to their existence and location.

While digital assets have been around for several decades it has only recently become a topic of discussion in the area of estate planning. Many states do not have any laws governing the transfer of digital assets, and the state laws that have been enacted are often limited in their scope. Further, many digital assets are controlled by terms of service that often subject the user to the laws of the state of the service provider. To begin preparing for the transfer of your digital assets, keep a thorough list of your digital assets and update it frequently; review the terms of service of your providers for procedures to backup and transfer those assets; and discuss your options for the transfer of these assets with your estate planner.

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