

# DIGITAL ASSETS IN ESTATE PLANNING AND SUCCESSION

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## WHAT IS IT?

Digital assets encompass communications, data, documents, photographs, intellectual property and other materials that are committed to digital format, confer a right of use and have an intrinsic or acquired value. Today, nearly everyone, irrespective of class or age owns some type of digital assets which include (1) accounts on or other sites for such as photo-sharing, genealogy research, online genetic testing services or fantasy sports; (2) blogs and publications; (3) email (whether housed locally or on a cloud-based service such as gmail), photos, video and other writings; (4) online businesses; (5) cloud-based storage and (6) financial assets, such as online bank accounts, credit card account and cryptocurrencies. Digital assets may be housed on a user's local machine, or on third party platforms owned by third parties.

## WHY NOW?

Increasingly, individuals of all ages and classes have digital assets. Five years ago, a [McAfee Report](#) found that average consumers value their digital assets at around \$37,000; that number is likely to skyrocket over the next five to ten years. Yet many individuals fail to realize that unless they make arrangements for disposition of digital assets within their estate plans, the value will be lost to heirs and

beneficiaries. The problems associated with transfer of digital assets is further complicated because of the involvement of third party hosts (e.g., Facebook, Gmail, etc...) which may have their own policies in place for transferring digital assets (much in the same way that Retirement Plans each have their own practices for designating beneficiaries). Many estate planning attorneys fail to inquire about clients' digital assets or are unfamiliar with practices of individual platforms or new laws that apply to disposition of digital assets in estate planning.

Moreover, because digital asset disposition is so specialized, it can even be pursued as a stand-alone niche rather than bundled as part of an estate planning practice. In other words, an attorney interested in the digital asset field can gain expertise and serve as a consultant to other law firms, and potentially advise some of the emerging companies that hold online assets (e.g., Everplans.com, Safebeyond.com) on compliance with applicable data storage and digital asset requirements.

State of Law: Currently, there is some guidance for practitioners on estate planning for digital assets. A site called [DeadSocial.org](#) (note the site was moving at the time of publication) contains "death guides" for five top sites with information on designating legacy contacts, and accessing content post-death. (Each individual site contains the information but it's handily aggregated at Dead Social).

The National Conference of Commissioners on [Uniform State Laws also devised the Revised Uniform Fiduciary Access to Digital Assets Act \(UFADAA\)](#), which has been adopted by 21 states as of this writing (states listed at above link). This Act extends the traditional power of a fiduciary to manage tangible property to include management of a person's digital assets. The act allows fiduciaries to manage digital property like computer files, web domains, and virtual currency, but restricts a fiduciary's access to electronic communications such as email, text messages, and accounts unless the original user consented in a will, trust, power of attorney, or other record.

In states that have not adopted the UFADDA, fiduciaries generally have much more limited authority over digital assets. Heirs may be unable to access password protected accounts, or may be locked out by platform-specific terms of service which generally prohibit access to an account by anyone by the original user.

### KEY LEGAL ISSUES:

**Conflict between UFADDA and Other Federal Laws:** Although the UFADDA allows for designation of a fiduciary, some uncertainty remains over whether the fiduciary's access to a user's account,

even if authorized potentially violates the Electronic Communications Protection Act (ECPA) which prohibits interception of communications by third parties.

*Does UFADDA Void End User Agreements?* In most cases, the company that issues the user's electronic account retains control of the content - for example, Apple retains a user's itunes collection after his death. UFADDA gives authorized fiduciaries control of the decedent's account - but this control may conflict with user agreements and terms of service. This potential conflict remains unresolved. Likewise, it is unclear whether a fiduciary can continue to operate or use a decedent's account (which may also violate a platform's terms of service) - or if the fiduciary's activities are limited to winding down and memorializing the account and preserving the content.

### Other Matters:

- How should digital assets be valued for estate planning purposes?
- What kind of guidance should estate planning lawyers provide on digital assets?
- How should account passwords be handled to avoid opening them to public scrutiny as in a will?

**Future Trends & Opportunities:** The demand for attorneys with digital asset expertise will continue to grow. Not only will clients increasingly keep assets online, but the types of assets that can be reduced to digital format will grow.