

FREQUENTLY ASKED QUESTIONS

*What You Need to Know
About Developing a
Digital Estate Plan*



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What will happen to your Facebook profile after you're gone?

If you didn't include provisions in your estate planning documents – and, in some cases, even if you did – the answer to that question may not be in line with your wishes.

What is a digital estate plan?

A digital estate plan, like a traditional plan, involves anticipating and arranging for the distribution of your digital assets during your lifetime. It allows you to direct how and to whom your digital property will be distributed after your death.

What are digital assets?

Your digital assets are the items that you own that are stored in a digital format. They can include your photos, files, emails, online subscriptions, social media accounts, airline miles, and credit card reward points that you accumulate over your lifetime.

Why should you plan for your digital assets?

Chances are, your digital assets are worth more than you think. The following are four reasons to include your digital media in your estate plan:

1. *Protect and distribute the financial value of assets.*

Are you a member of a credit card rewards or frequent flyer program? Do you have a digital currency account? Those programs and accounts have real value that is retained after your incapacitation or death. Planning for your digital assets can help you determine who should have access to and receive those benefits.

2. *Avoid losing personal belongings.*

Though they may not have inherent value, your photographs, social media profiles and videos would likely hold great sentimental value to your family members. There are a number of obstacles that fiduciaries or agents face when trying to retrieve these items from online service providers (outlined below), and not knowing what assets exist can impede the protection and recovery of those assets.

If you don't let your agents and fiduciaries know which accounts, albums, and social media channels you maintain, they will have a difficult time retrieving the information if you are not around to help them.

3. *Protect your privacy.*

Some individuals may have photos, e-mails or other information stored on their computers that could be considered inappropriate or unflattering. How can heirs or others be prevented from accessing and publicizing this information after your death? Planning for your digital assets allows you to direct your agent, personal representative, and trustee to delete the content you'd rather keep private.

4. Help your family members to tie up the loose ends.

Before the digital age, fiduciaries looking to pay bills, close accounts, and tie up associated loose ends simply needed to check the incoming mail every day. Today, many individuals handle bill pay and account maintenance online, making it difficult for uninformed agents and heirs to identify, access, and manage or close accounts in order to help the estate avoid financial losses.

If you are still living but are rendered incapacitated – a coma, for example – your agent, appointed by your durable power of attorney (POA), will need to continue to pay your bills and maintain your assets until you recover and are able to continue those duties yourself.

How is digital estate planning different from planning for a traditional estate?

Digital assets are a relatively new consideration for estate planners and agents appointed in POAs– and varying laws and other challenges make digital estate planning more complicated than developing a traditional estate plan.

What are some obstacles to creating a digital estate plan?

A number of obstacles can make it challenging for fiduciaries or agents to obtain, protect, and distribute your digital assets.

Password Protection

While we often remind our clients about the importance of creating strong passwords to help protect their data online, the password protections that can keep your personal information safe can be one of the biggest obstacles for those who need to obtain that information after you pass away.

Fiduciaries rarely have all of the password information they need to access your accounts and, without it, many online service providers will refuse access to your information. And even if your fiduciary has the password information for an account, he or she may not have legal rights to access your account on some websites.

Federal Law

The federal laws surrounding digital assets, the [Stored Communications Act \(SCA\)](#) and the [Computer Fraud and Abuse Act \(CFAA\)](#), were both drafted in 1986 and are out-of-step with today's rapidly-evolving technological landscape.

The SCA penalizes unauthorized distribution of electronic communication, including to an heir, unless there is lawful consent. However, “lawful consent” under the SCA permits disclosure from an online service provider to a fiduciary, but it doesn’t require that the service provider cooperate.

The U.S. Department of Justice declared that under the CFAA, it is a crime to “knowingly access a computer without authorization or exceeding authorized access” from the owner of the digital assets, or when that access is in violation of a website’s terms of service agreement (even if you have authorization from the owner). In other words, even if an heir was given the account information by the owner before he or she passed away, accessing that account may be a violation of federal law.

Varying State Laws

According to the American Bar Association, all 50 states have criminal laws that [prohibit unauthorized access to digital assets](#). Only nine states have enacted statutes that grant fiduciary access to digital assets and eliminate criminal liability at the state level.

The Uniform Law Commission, a non-profit association that reviews state laws to determine which areas of law should be uniform, recently released the [Uniform Fiduciary Access to Digital Assets Act](#). This draft legislation clarifies the application of existing digital asset laws and specifies new procedures and privacy protections for fiduciaries. Specifically, the act addresses how a representative can legally locate and address the assets an individual stores or leaves behind online. It offers solutions for a decedent’s reasonable expectation of privacy and outlines the circumstances that a fiduciary or agent can disclose communication.

States can choose to adopt the act as-is, or use it as an outline for future legislation. Delaware adopted this legislation on January 1, 2015, in spite of calls from Facebook and Google for the Governor to veto the bill.

User Agreements

Admit it; you’ve hit “I Accept” on a website’s terms of service agreement without reading the fine print. We all have. But most of the time, those terms of service agreements contain clauses that prohibit a user from allowing another person to access his or her account. Fiduciary access to a deceased person’s online account may be a crime under the CFAA if it’s in violation of the website’s user agreement. The problem is compounded for heirs because each website’s terms of service agreement is different.

[Facebook recently changed its user agreement](#) to allow a user to name an heir to his or her profile, and other social media sites are likely to follow suit. But until they do, fiduciaries may have a difficult time carrying out the wishes you outlined for your estate.

How can I simplify the digital estate planning process for my beneficiaries?

If you want to protect your digital assets should you no longer be able to manage them yourself, the first step is to speak to your attorney and accountant about how you can incorporate digital asset planning into your estate plan. Below are three additional steps you can take to help simplify things for your beneficiaries.

1. Create an inventory

Regularly update a list of all your digital assets to include the information you value, the corresponding websites, and the instructions for protecting or disposing of it.

2. Designate a fiduciary and a POA agent

Provide those individuals with a way to access to your digital assets. For example, updating an account so that multiple users have access can help your fiduciaries to obtain your digital assets if they are legally within their rights to do so.

3. Update legal documents

Consider adding language to your Last Will and Testament, Revocable Trust, and Durable Power of Attorney to identify your fiduciaries and give them written permission to access your information. Although this provision may not be legally binding yet, it's possible that future law changes could allow this information to provide legal protection.

About the Author



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Before joining Kaufman Rossin, Mark was a practicing attorney with an estate and trust firm in Boca Raton. Mark is a member of The Florida Bar, including the Tax Section's Executive Council; the Estate Planning Council of Greater Miami; the Greater Miami Tax Institute; the Dade County Bar Association; the Miami Foundation's GLBT Community Projects Committee; and is a Mount Sinai Medical Center Young Founder.

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