

Introduction to Estate Planning for Digital Assets

**By Jeffrey R. Gottlieb
Palatine, Illinois**

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The topic of what happens with a person's "digital assets" and accounts after death or disability has been the subject of increasing debate and importance over the past several years. Facebook and Twitter, e-mail, iTunes, blogs, YouTube, Kindle books, websites, Flickr photos, Ebay businesses — the list goes on and is growing. Our online lives are growing as complex and diverse as our offline lives. A 2011 McAfee study revealed that people in the U.S. value their digital assets at an average of nearly \$55,000. Beyond monetary value, digital assets in estates involve issues of privacy, security and legacy planning. For many people, planning for digital assets is now an important piece of the estate planning puzzle.

Digital assets and accounts includes (with examples):

E-Mail accounts (Gmail, Yahoo, AOL, etc.)
Picture (Flickr, Picasa, Instagram) and Video (YouTube, Vimeo)
Document Accounts (Google docs, Scribd) and Files (Word/Excel, Health Records)
Websites, Domain Names, Blogs and Web Hosting Accounts
Social Networking Accounts (Facebook, Twitter, LinkedIn, Google+, etc.)
Music (iTunes, Amazon) and Books (Kindle, e-books)
Devices, such as laptops, smartphones, tablets and associated accounts
Shopping accounts and online businesses (Ebay, Amazon, affiliate links)
Bill payment accounts (Bank, Paypal, etc.) and asset account login management

Have you considered:

Who can access and control these accounts upon your death or incapacity?
How do your desired representatives get access when that time comes?
How do (or can) digital assets get transferred to your beneficiaries?
How can your online legacy be protected and preserved?
And how do fiduciaries discover all of the information when the need arises?

There aren't any perfect or comprehensive answers to these questions at this point. Laws tend to lag behind technology, so current statutes and case law are of little to no help at this point, and many service providers are wary to seriously address the thorny issues.

First, here are some of my favorite recent major publication articles written on the subject:

The New York Times: Bequeathing the Keys to Your Digital Afterlife

The Wall Street Journal: Passing Down Digital Assets
Kiplinger: Protect Digital Assets After Your Death
MSN Money: Estate Planning for your Digital Assets

I won't rehash all of the excellent points made in these articles, but certainly one of the major complexities is that each service provider has its own policies, which are not necessarily uniform across even the same industry. Individuals arguably subject themselves to each company's unique policy through Terms of Service ("TOS") Agreements. You know, those boxes that pop up with thousands of words of tiny text that you never read followed by a box that you are required to check that says 'I Agree'. Yeah, those. Somewhere buried in there is language that likely allows the service provider to pretty much dictate whatever they want if you abandon your account, whether due to death, disability or otherwise.

So what can you do? Again, no perfect solutions, especially until laws move closer to the technology and these issues are more fully fleshed out, but at this point for starters we recommend a two-pronged approach:

1. Make a Dynamic Inventory of your Digital Accounts and Assets — List all accounts and assets, including the website's domain name, your username, password, security questions and other identifying information that may help allow your successors to discover information. Update this list frequently and take steps to ensure that your designated successors will have convenient and safe access to this list when they need it. A basic spreadsheet can go a long way. There are also a number of online password storage services*, such as 1password, KeePass and my-iWallet. You may also want to include basic instructions for your fiduciaries on suggested actions to take for each asset or account (close account, memorialize it, monetize, etc.). Be sure to protect the privacy and security of this list to avoid providing a roadmap for identity theft.

2. Include Digital Asset Provisions in Estate Planning Documents — We insert enabling provisions in our clients' Wills, Trusts and Powers of Attorney for Property to cover both management and succession for accounts, as well as distribution of digital assets. Can anyone guarantee that such provisions will work in every instance? No. Again, what happens when provisions conflict with a TOS Agreement? It's not entirely clear. But, we certainly think it's better to be proactive in stating your wishes rather than relying entirely on TOS Agreements and non-existent legal precedent. To be clear, such provisions inside estate planning documents are general enabling provisions and should never list the specific accounts or passwords because Wills become public record after death, and trusts and powers of attorney could fall into the hands of someone you would not want to have this information.

TheDigitalBeyond.com maintains a list of so-called 'online afterlife' companies* that have come online over the past several years. More will certainly emerge over time. The reliability and effectiveness of these services are somewhat untested and probably uncertain at this point, and if you choose this route it's certainly wise to ensure that any designations don't clash with your offline estate plan. A few of these online afterlife companies include:

AssetLock — an online safe deposit box that allows users to upload files, passwords, and instructions to be released to designated individuals upon death

Legacy Locker — provides a way to assign a beneficiary to entrust your digital assets for the future. Currently running at \$29.99 a year or \$299.99 lifetime.

SecureSafe — an online service that allows you to securely list digital assets (online accounts and files on your computer), and decide if you'd like them transferred to heirs or deleted when you pass away.

Finally, it is also worth keeping an eye on:

Legal developments, such as the Uniform Law Commission's Committee drafting model legislation for Fiduciary Access to Digital Accounts. However, as noted, legal developments relating to technology move slowly. Very few states have attempted to address the issues and I have not yet seen any significant proposed legislation in Illinois in this area, so it should not be expected that Illinois will move on similar comprehensive legislation anytime soon.

Individual solutions provided by major service providers such as Google's Inactive Account Manager and Facebook Memorialized Accounts.

For a comprehensive and sophisticated legal discussion on digital asset estate planning, download and read "Estate Planning in the Digital Age" (April 21, 2013; 34 Pages) written by Texas Tech University School of Law Professor Gerry W. Beyer.

* I have not yet personally tested any of these online service providers, so I can't vouch for their effectiveness. If anyone has an experience with one of these services or a similar provider, please feel free to leave a comment.