

# ESTATE PLANNING FOR DIGITAL ASSETS

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## **Introduction**

Estate planning is a carefully considered process by which we accumulate wealth, acquire what is necessary to achieve our aspirations, preserve what is necessary to maintain a comfortable lifestyle now and in the future and provide for our loved ones in the event of our incapacity or death. As part of your estate plan, you will want to express your wishes with regard to the disposal of your cash, shares, house and other property and personal effects (i.e. your assets) in the event of your death. The conventional way to express such wishes is to make a will.

Each estate comprises a smorgasbord of different types of assets including:

- our homes, real estate investments, interests in stocks, shares and other financial investments;
- intellectual-property such as copyright, trademarks and patents; and
- our digital assets, something which has evolved in recent years with the growth of the Internet, our heavy reliance on the Internet for our personal communications, commercial transactions and social networking and huge advances in electronics technology.

Different types of assets may require different and specific treatment in the overall estate plan, especially if you have substantial digital assets, which, as a broad category, call for additional estate planning treatment from conventional assets. A conventional will, in particular, may not deal or properly deal with digital assets.

## **How Conventional Estate Planning is Unsuitable for Digital Assets**

Digital assets comprise information, documents, literary works, images and even money in electronic form stored in computers, hard disks, cloud storage services online digital accounts, and other forms of media capable of storing electronic information. Being in electronic form, digital assets are intangible and it can become complicated and cumbersome for the executor of your will to call-in your entire estate (including the digital assets) upon your death because the digital assets, being protected by passwords, may be beyond the reach of the executor. A conventional will is therefore unsuitable for dealing with your digital assets adequately.

To deal with most digital assets, the executor must not only be aware of their existence but also must have access to your digital accounts and/or hardware where the digital assets are stored. Otherwise, the executor would not be able to retrieve the digital assets stored therein, and may not even look for them. Under a conventional will, the executor may deal with certain assets such as monies held in bank accounts by obtaining a grant of probate from the court and producing it to the bank to claim and distribute the monies in the bank accounts. However, the same procedure cannot be used for digital assets if the digital

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account username and password or even the very existence of the digital asset is not known. Yet, the solution is not as easy as stating the information and details of certain digital accounts in a will as the will would potentially be open to public inspection in an application for a grant of probate, thereby posing a significant risk to the digital assets and, in any event, we are all likely to change our passwords and digital accounts more often than we would change our will. If the existence and access to the digital assets are not dealt with appropriately, the digital assets may not be distributed according to your wishes.

Furthermore, even if the executor obtains access to your digital accounts, it may turn out that you are not the actual owner of the digital assets stored in some of your digital accounts. The ownership of the content in the digital accounts would depend on the terms of use of the respective digital accounts, which may differ amongst service providers. You ought to be prudent to understand the ownership rights governing your digital assets and not assume that you own all digital assets in your digital accounts. If the ownership rights are not determined to be yours, the title to the digital assets would not pass to your beneficiaries.

Therefore, a different approach has to be used in estate planning for digital assets.

## Digital Assets Estate Planning

In proper estate planning, digital assets should be reviewed and the unique issues arising from dealing with digital assets in a will need to be identified and understood. These issues include the identification of your valuable digital assets, access rights to your digital accounts and ownership rights.

First, **identify** which digital assets are of value and are worth calling-in to be distributed to loved ones or other persons who would want them. You may also wish to ensure that even if some of your digital assets are not of significant value now, they may become valuable in the course of time and you should think of dealing with them in your will. Not every digital asset may have financial value but consider if any of such digital assets may have other types of value (e.g. publicity or social media value to name a couple). You may therefore also wish to consider if certain digital assets may need to be terminated, expunged or deleted upon your death for the preservation of your privacy or because of redundancy. Digital assets include online digital accounts opened by you for purchasing, acquiring, storing, or publishing music, photographs, digital art or media, original or copyrighted materials, including novels, textbooks, short stories, poetry, blogs, business plans, processes, etc.

Some examples of digital accounts that may contain or store digital assets include:

- content holders (e.g. Google, Amazon, iTunes, YouTube, Vimeo);
- blogs (the author owns the copyright to original content on blogs, which may be of value);
- domain names and websites (e.g. if you are the registrant of sites and/or domain names which may be of value if they can be transferred to a beneficiary);
- content stored in cloud storage services, online backup services, online file synchronization and storage services (e.g. Dropbox, Livedrive) as well as on your computer; and
- digital assets such as photos, music, movies, electronic books, client lists, personal business plans, etc.

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Once the digital assets of value or significance to you have been determined, consider the **ownership** issue of the digital assets. This will require a review of the terms of use of the relevant digital account. You should check the terms of use to determine whether your digital assets stored online with the service provider belong to you and what the terms of use provide upon death. Otherwise, your digital assets may be put out of reach of the executor although you may have created or acquired a right to use the digital assets during your lifetime. Therefore, a careful examination of the terms of use of the digital accounts would be very crucial especially if the digital assets are valuable.

You may also have certain digital accounts that do not contain digital assets but nonetheless hold significant sentimental value to you. You may intend for these digital accounts to be maintained, memorialised or deleted by your executor after your demise. In this respect, some examples of digital accounts include social media (Facebook, Twitter, Instagram, Tumblr, Google+, Path) and voice-over-IP / instant messaging clients (Whatsapp, Skype, Viber, iMessage). The ability of the executor to maintain and memorialise the digital account would also depend on the terms of use of the digital account.

Next, consider providing access to your digital accounts to the executor, without which the executor may not personally deal with your digital assets. The digital account username and password may be kept somewhere secure or with a trusted third person. However, this measure may not be effective if the digital account passwords are changed frequently unless the details kept with the third party are updated immediately upon any change. This may be dealt with by a digital executor (explained below), who may write to the relevant service providers for special or ad hoc access rights.

Further, specifically drafted clauses addressing digital assets should be included in your will. You may appoint a **digital executor** in your will with explicit authority to deal with digital assets only (if you feel that the main executor may not be tech-savvy). Your digital executor should be someone who is tech-savvy, capable of navigating the digital account with ease and keep abreast with the current social and legal issues surrounding a particular digital account where your digital assets are held. This is so that the digital executor may easily overcome any practical or legal problems.

## Use of Private Trusts to Deal with Substantial Digital Assets

Due to the shortcomings of conventional estate planning in dealing with your digital assets due to the complications in determining and calling-in your digital assets, gaining access to your digital accounts, and determining the ownership rights of the digital accounts, do consider establishing a private trust for your digital assets.

A private trust is created upon a transfer of your assets to another person or a professional trust company as a trustee on the basis that the trustee shall hold the assets for the benefit of another (i.e., the beneficiary).

Before the trust is established, you are the absolute legal and beneficial owner of the assets. This means that you have the right to deal with the assets how you please, including disposing of such assets and can

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also enjoy the use of the assets for your own benefit. An example is that you have full access to your digital accounts and the rights to commercially exploit all your information stored therein. Once a trust of the digital assets is set up, the trustee becomes the legal owner of the digital assets (so only the trustee has the authority to operate your online accounts) and the beneficiary (which may be your goodself) becomes the beneficial owner (the person entitled to the benefit of use including any proceeds of the commercialisation of, the digital assets). Upon your death, the legal ownership of the digital assets will remain with the Trustee who will hold and distribute them according to the terms of the trust whilst still being kept in strict confidence.

The main benefit in transferring your digital assets to a private trust is that the trustee may be given the passwords and other means to access your digital accounts (perhaps in a sealed envelope or encrypted form) and for some digital assets, such as websites, the trustee may even be allowed to operate your digital accounts while you are living so that they may understand and appreciate the extent of your digital assets, which makes their dealing in your digital assets smoother upon your death.

Another feature that makes a private trust a feasible solution in dealing with your digital assets is that private trusts are not open to public inspection, unlike wills which have to be proved in court after the death of the testator when the executor applies for a grant of probate and thereby become public documents. Therefore any confidential information, digital account usernames and passwords may be accessible to the trustee according to terms stated in the trust deed establishing the trust, provided this is kept in a safe and secure place to which only the trustee has access.

In deciding whether to establish a private trust for this purpose, consider the size and value (financial or otherwise) of the digital assets and weigh this against the cost of setting up the trust including legal costs and the costs of appointing a professional trust company, if one is required. It would also be necessary to appoint one or more suitably qualified and trusted persons who may maintain the confidentiality of your digital assets during your lifetime and continue as trustees of your digital assets thereafter.

## Conclusion

Proper estate planning is holistic and requires a thoughtful approach to properly deal with all your various types of assets including digital assets. The two most important means of dealing with digital assets as part of an overall estate plan in consultation with your legal advisor and wealth management professionals are: (1) a will with specific provisions dealing with digital assets and (2) a private trust to deal with important digital assets.

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