

Who Inherits My Facebook Account? Estate Planning for Digital Assets

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What are digital assets?

Technically, digital assets are intangible personal assets formatted into a binary source. This includes all files and information stored in any online accounts, such as e-mail accounts, social networking sites, blogs, photo- and video-sharing sites, online music, online video games, online storage accounts such as “cloud” storage, and online sales accounts. It also includes domain names and any intellectual property rights (such as copyrights, patents, trademarks, and trade secrets) associated with your digital property.

Do digital assets have value?

Some digital assets, such as blogs with advertising revenue or PayPal™ accounts, have economic value. Other digital assets, such as photo-sharing sites, have only sentimental value. Finally, some digital assets, such as video game accounts, have neither economic nor sentimental value.

How prevalent are digital assets?

Until just a few years ago, most of us stored our important documents in a filing cabinet or in a safety deposit box at a bank. But now, with computers and easy access to the Internet, many of us store our important papers solely in digital form, on a hard drive or an Internet storage site. In addition, we are creating new digital assets at an extraordinary rate. According to 2011 estimates, every 60 seconds: (a) over 168,000,000 e-mails are sent; (b) over 695,000 FaceBook status updates are written; (c) over 6,600 digital photos are added to Flickr®; (d) about 600 digital videos are added to YouTube; (e) about 320 new Twitter accounts are created; (f) over 100 new LinkedIn® accounts are created; (g) about 70 new Internet domain names are registered; and (h) over 60 new blogs are created. Digital assets are not only being created by us, but also are being purchased by



us at extraordinary rates. In July 2010, Amazon reported that Kindle books outsold all hardcover book sales. By May 2011, Amazon reported that Kindle books outsold all books, both hardcover and paperback combined. The number one seller of all music (not just digital music) is iTunes®. In February 2010, the iTunes store sold its 10 billionth song.

Why is identifying digital assets important?

If you become incapacitated, your appointed agent must be able to maintain your digital assets. This means continuing to pay bills that arrive in paperless form, maintaining registered domain names, and being able to contact and communicate with your friends and family. Likewise, when you pass away, your personal representative (a.k.a. your executor) must inventory all of your assets and distribute them as your will instructs. As more

of us manage our finances and maintain records, data, and music online, finding these assets is becoming increasingly difficult. By identifying your digital assets for your agent or your personal representative, you save your estate time and expense and minimize the possibility that your online photo sites or your blogs (today's version of photo albums, diaries, and shoeboxes full of love letters) will be lost forever.

Lost forever? Don't I own my digital assets?

Most digital assets have both a license element and a property-right component. For example, with e-mail accounts, social networking sites, and photo-sharing sites, the user often has a license from the Internet service provider to access the e-mail system, the social network site, or the photo-sharing site in accordance with the Terms of Use Agreement.

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RESOURCES FOR PLANNING

Gmail provides instructions for gaining access to the deceased user's account and, in some instances, may be able to provide the account content to an authorized representative of the deceased user.

Hotmail will send a copy of any email messages that may be stored on a decedent's account, along with any existing contact lists, and will ultimately close the account upon request.

Yahoo's policy is to permanently delete all content and terminate the account upon receipt of a copy of a death certificate.

Facebook, upon request, will memorialize a decedent's account to allow

friends and family to write on the decedent's wall in remembrance. The account may be closed upon a formal request from the decedent's next of kin or upon a legal request.

LinkedIn will remove a decedent's account, after receiving a verification of death form, along with the email address registered to the deceased member's account.

Twitter allows family members to remove the decedent's account or save a backup of the decedent's public Tweets.

YouTube permits the personal representative to access a decedent's account.

PayPal allows only the Personal Representative to close the account. If there are funds in the PayPal account, a check will be issued in the account holder's name.

iTunes. Apple states that when you purchase digital files (music, movies, and books) you have merely purchased a license for personal use. Apple's Terms of Service has a provision covering nuclear weapons (“You also agree that you will not use these products for any purposes prohibited by United States law, including, without limitation, the development, design, manufacture, or production of nuclear, missile, chemical or biological weapons.”), but nothing specifically about the transfer of your media on death. It appears that legally, for now, there is no way to transfer iTunes media on death.

The user generally retains a property interest in e-mails in the inbox, all user-generated content, and contact lists. Contrast this with music directory sites, such as iTunes. With these sites, the user has a license from the Internet service provider to access the music system in accordance with the Terms of Service, no different from an e-mail site. However, unlike e-mail, the licensed copy of lawfully downloaded music is not categorized as property, per se. Instead, the user has purchased an indefinite license to use one copy of the file.

What happens to my e-mail when I die?

The answer to this depends on the state in which you reside and your e-mail provider. Most states are far behind the times, providing little or no legislation or case law regarding accessing and transferring digital assets at death. Only a

handful of states have attempted to address this issue. Connecticut and Rhode Island require e-mail service providers to grant a personal representative access to a decedent's e-mail account, upon a written request and substantiating documents. Oklahoma (effective November 2010) and Idaho (effective July 2011) have taken a much broader stance and have passed laws giving a personal representative of an estate “the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website, or any e-mail service websites.”

If I'm not a resident of those states, what happens to my digital assets?

Regardless of where you live, when you set up an online account, you are

initially presented with a “clickwrap agreement.” These are the Terms of Use and the conditions upon which the account is offered. In order to use the service, the user must click an “Agree” or “Accept” button. While each site's clickwrap agreement contains different provisions, almost all sites contain language stating that the offered accounts are solely for the individual account holder's use and are not assignable. Therefore, once an account holder dies, the service provider can reclaim the username and all information.

Can you give me some examples?

After a period of inactivity, most free online e-mail accounts such as Yahoo!® and Hotmail® will delete a user's data and/or account. In addition, certain sites are beginning to adopt policies to specifically deal with the death of an account holder.

For example, upon receipt of a copy of a death certificate, Yahoo!'s policy is to permanently delete all content and terminate the account. This policy extends to other companies owned by Yahoo! including the popular photo-sharing website Flickr. Once deleted, all information that could have been useful to notify friends and family, to settle the estate, and to pay bills, would be lost.



How do I preserve my digital assets and provide for a smooth transition following my death or incapacity?

Preserving your digital assets and providing for a smooth transition is a five-step process:

1. Identify and inventory your digital assets.

To get started, try answering the following questions:

- (a) If your computer and all peripherals (e.g. back-up drives and flash drives) were stolen, what valuable or sentimental digital assets would you lose?
- (b) If all of your passwords were deleted, what are the valuable or sentimental digital assets to which you would no longer have access?
- (c) If you died today, what valuable or sentimental digital

assets would you want your family or friends to have?

- (d) If you were in an accident and became incapacitated today, who, if anyone, would be able to access your digital assets and continue to pay your bills online?

When compiling a list of your digital assets, include all hardware and flash drives (and their

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location), all software (including Quicken®, Turbo Tax®, and other programs where you may store financial and tax information), your online presence (online document and photo storage sites, social media accounts, blogs), online shopping accounts (wherever your credit card information may be stored so your agent can delete this information and prevent fraud), and online licenses (newspapers and other subscriptions that should be cancelled).

2. Identify the person best-suited to take control of your digital assets following death or incapacity.

Many people name their spouse or adult child as personal representative of their estate. However, if this person is not computer savvy, he or she might not be the right person to

handle your digital assets. Make sure you have someone technologically inclined to assist with the inventorying, accessing, and distributing your digital assets.

3. **Provide access.** While we are frequently told never to write down passwords and PIN numbers, the reality is that without this information, your computer and accounts may not be accessible to your agent. This may cause delay, frustration, inconvenience, and expense. Many websites now exist that will store passwords which are then accessible through a master password. However you choose to store them, providing access to your passwords is extremely important.

4. Provide instructions.

There are a number of areas where you can provide advance instructions to your agent. If you have a social network site where friends and followers communicate regularly, let your agent know if there is any particular way you wish to have your illness or death communicated. Additionally, let your agent know if you prefer to have your site shut down or have a memorial page created in your honor. If you have a regular blog, you may want to write your own final goodbye post. Finally, if you have digital photos, let your agent know if they should be copied and distributed and to whom.

5. **Update your estate plan.** Most estate plans are silent as to the disposition of your digital assets. In your will, you should provide clear instructions to your personal representative. It is no longer sufficient to say, "I leave my computer to my son

and all of my other personal property, including my photos, to my daughter." Does this mean that your computer with all of your files, online music, digital photos, and loaded software should be given to your son and everything else given to your daughter? Or should all of those digital assets be downloaded and given to your daughter and a clean computer given to your son? Should copies of your digital assets be made and given to each child? A specific bequest of digital assets is imperative for today's online generation.

The law has a long way to go to catch up with our use of technology. While states are slowly taking steps to define the legal standing of a digital executor, the burden remains on each of us to inventory our digital assets and ensure access for a smooth transition or risk losing these assets forever.

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Tips for Preventing Estate Tax Planning Disputes

Tax issues involving estate tax are frequently prone to disputes and claims. Estate tax claims usually involve estate tax planning issues, late filing or payment penalties.

In estate tax planning, there is generally a long period between the time that estate planning decisions are made and the time when the results of the decisions are known. Memories of the CPA's advice and the client's decisions fade over time, making documentation of the advice and decisions all the more important. Making matters worse, heirs typically aren't involved in the planning and may allege that the decisions weren't understood by the deceased.

If the CPA is dealing with disappointed, litigious beneficiaries after a client dies, documentation of the original planning and decision-making process becomes the CPA's primary line of defense. To ensure that he or she has some protection from and during litigation, a CPA should implement a policy to detail all planning advice in informed-consent letters that outline the pros, cons and options in terms the client will understand.

A CPA should always obtain client consent as well. Effective informed-consent letters clarify that the CPA advised and informed and the client decided. With this letter, it is difficult for claimants to make a case that the CPA made the decisions rather than the client.

Tax professionals must be certain of their competency in this area and must be sure to document reliance upon the attorney's drafting of the estate plan. Also be sure to document which professionals are responsible for each aspect of the plan.

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