This practitioner’s guide has been prepared to assist English and Welsh practitioners with the issue of digital assets when taking instructions from clients for estate planning or estate administration.
Contents

Section 1: Overview
- What is a digital asset?
- Why STEP practitioners need to be aware of digital assets when advising clients
- Key terminology used in this guide

Section 2: Pre-Death Considerations
- How to raise the topic of digital assets with your clients
- Specific questions when taking instructions for estate planning
- Drafting considerations for estate planning
- Other specific steps to advise your clients to consider

Section 3: Post-Loss of Capacity & Post-Death
- How can STEP Practitioners deal with the issue of digital assets when taking instructions for administration of estates (either deceased or inter vivos)?

Section 4: Drafting
- Sample clauses and precedents

Section 5: Where Can I Get Help?
- Contact form, useful links and email address
What is a digital asset?

The expression “digital asset” is ambiguous and caution should be exercised when using it. It is commonly used to describe two different concepts that have different legal consequences.

(a) Digital assets can describe digital records that exist on computer devices (and connected cloud services) and which represent text, images, sounds, videos and other information, generally converted from analog, or non-digital, events. These records are contained in digital files and are not part of the estate of a deceased person within section 25 of the Administration of Estates Act 1925; they do not vest in the personal representative.

(b) The expression is also used to described digital property rights and interests that are associated with digital records. These rights and interests are part of a deceased person’s estate.

Accordingly, when administering the estate of a deceased person or planning for the devolution of a person’s estate after his death, it is necessary to distinguish between digital records (which will not pass under a will or intestacy) and digital property rights and interests (which do so pass). Similarly, digital records do not vest in trustees; only digital property rights and interests will so vest, to be administered on behalf of their beneficiaries and distributed amongst them in accordance with the provisions of the trust arrangement.

The use of the expressions “digital asset” and “digital assets” should therefore be confined to general descriptions relating to computer use, where the ambiguity of the expressions is not material.

Digital records are part of the computing device in which they are recorded, in the sense that they form part of the fabric of the memory or storage apparatus of that device and they exist only as a result of the electronic configuration of that apparatus. Accordingly, they pass with, and as part of, the device. Many people today access photographs, videos, music, e-books, blogs, movies, emails, conversations, social media, games, bank accounts, medical records, and even maintain their identity - all online. These digital records can be just as precious and important as physical assets, and can have just as much sentimental value, but they have no separate proprietary existence or value. The digital property rights and interests that are associated with them, however, do have separate proprietary existence and may have monetary value.

For further information about the importance of discussing digital assets with clients, please view:

- Digital Assets: A STEP Guide for Professionals -->
  www.step.org/digital-assets
Why STEP practitioners need to be aware of digital assets when advising clients

Within just a few years, digital assets have become important to many areas of our clients’ lives. Estate planning can involve arrangements for clients’ digital property rights and interests on death or incapacity or when settled on trust. A client can also make arrangements for dealing with available digital records that are on computing devices.

Key terminology used in this guide

In this guide:

Computing devices include devices such as desktop or laptop computers, tablets (such as an iPad or a Samsung Tab), mobile telephones and gaming devices.

Cloud accounts provide computing services to users who agree to abide by certain terms and conditions as required by the service providers. Examples are email services, online file storage services and social networking services such as Facebook and Twitter.

Digital property rights include intellectual property rights such as copyright, rights associated with patents, design rights and rights involving trademarks and reputation; contractual rights such as those with online cloud service providers, including financial services accounts, online storage, email, document and image manipulation and web-hosting; online gaming accounts; domain names; and online publications such as websites, blogs, vlogs and podcasts. These rights can be given by will or a lifetime gift and they can be settled on trust.

Digital property interests include bitcoin and other cryptocurrency and blockchain tokens and gaming property tokens. These interests can be given by will or as a lifetime gift and they can be settled on trust, provided (particularly in the case of gaming property tokens) there is no prohibition in the relevant terms and conditions governing their use, thereby preventing any purported transfer being enforceable against the other party to the relevant agreement.

Digital records include computer files, such as videos, photos and emails stored on computing devices or using cloud accounts. They do not have a separate proprietary character but, when our clients die or if they become incapable and no one can control or access these treasured memories, the emotional impact on family and friends can be significant.

In this Guide the word “fiduciary” will be used to refer to a personal representative, trustee, attorney or deputy.
Section 2: Pre-Death Considerations

How to raise the topic of digital assets with your clients

When advising about estate planning, practitioners should first ask their clients:

a) whether they have any computer devices; and
b) whether they use any internet services.

Clients who do not know precisely which internet services they are using might need assistance in identifying them. They are likely to be aware of any that they use for a fee. As to social networking sites, there is a Wikipedia article listing most of them: https://en.wikipedia.org/wiki/List_of_social_networking_websites

If, after discussing the nature of computing devices and cloud accounts, the client answers no to both a) and b) above, then a file note should be made to that effect and no further action need be taken.

If a client does have computing devices or cloud accounts (or both) those devices and accounts should be identified. The client should be asked to make a note of the password to open each of the computing devices and the note should be stored in a safe place. If any of the passwords is changed, the note should be altered accordingly (as to the use of cloud account passwords, see under Inventory below).

If the client has one or more computing devices, it is likely that they use cloud services as well (particularly if they have a smart phone, such as an iPhone or a Galaxy phone) and, even if they do not want anything done with those services after death or incapacity, it is still a good idea to identify any accounts that are used so that the personal representative is aware of them. If the client is unwilling to discuss the cloud accounts, a file note should be made to that effect.

The computing devices and digital property rights and interests can pass under a will or the rules relating to intestacy and will be administered after the client’s death by their personal representative(s). It is not necessary to appoint a “digital executor” unless the client wishes to appoint someone they trust and who is sufficiently knowledgeable about computing devices and cloud services that an expert will not need to be instructed as well.

Digital records that were under the control of the client can be managed after death either by the executor or by someone else as digital manager but, as digital records are not property, the executor or digital manager will not be entitled to an indemnity out of the estate for expenses incurred in managing digital records unless its payment is expressly or impliedly authorised by the testator. As the digital records are a functional part of the containing computer device, they pass with it.

As to lasting attorneys (and court-appointed deputies), they will have the authority of the client to make decisions on their behalf about their personal welfare or their property and affairs (or both). The property of the principal does not usually need to be
vested in an attorney for the proper exercise of that authority. Digital property rights and interests will be dealt with by a property and affairs attorney (or deputy). Digital records may be managed (if permitted by the relevant terms and conditions) by a personal welfare attorney (or deputy). In both cases, the terms of the relevant instrument establishing the power of attorney and the provisions of the Mental Capacity Act 2005 will apply.

**Inventory.** Clients should be encouraged to prepare an inventory containing a list of their computing devices, their cloud accounts and the fact of their ownership of any cryptographic tokens. They should also include the passwords that they use to access their computing devices, the usernames of any cloud accounts and the public and private keys for any cryptographic tokens. Including passwords for cloud accounts in the list can be problematic if their use by the fiduciary is not authorised by terms and conditions applicable to the individual cloud accounts; it can have criminal consequences under the Computer Misuse Act 1990 if the fiduciary accesses the cloud service computer without the authority of the service provider and knows that he is unauthorised. Clients should be warned about the care that should be taken with security and storage of such a list.

**Specific questions when taking instructions for estate planning**

During the discussion with clients, the following questions may be relevant:

- **Will the client prepare a digital asset inventory/log and if so, where, and how securely will it be stored?**
- **How will their fiduciary find, and if necessary access, the inventory/log upon their incapacity or death?**
- **If they store logins and passwords with a third party password manager or website, have they reviewed the security protocols that will apply to their data?**
- **How are the digital property rights and interests owned (whether outright by the client, on trust for another person, under a licence type arrangement or by a third party such as a service provider)?**
- **Is the confidentiality of any of their digital assets that of any other person (such as their employer or their own clients)?**
- **Do they wish to make, and are they legally able to make, gifts of any or all of their digital property rights and interests?**
- **Do any of the relevant terms and conditions of relevant service providers prohibit or limit how the cloud accounts can be accessed or controlled by their fiduciary? Does the relevant cloud services agreement survive the death of the testator?**
- **Do they wish to direct that any or all computer devices be cleared of any content before being distributed to the recipients/beneficiaries?**
Do they have specific wishes about their cloud accounts – should they be closed or continued in a form allowed by a particular service provider? For instance, Facebook offers memorialisation and the appointment of a legacy contact and Google offers its Inactive Account Manager.

Is their fiduciary the appropriate person to manage and have control of the digital estate?

Should a separate digital manager be appointed for digital records?

**Drafting considerations for estate planning**

After taking clients' instructions, the following drafting considerations may be relevant:

- Is there a need to review the terms and conditions of relevant cloud services used by the client in order to determine what is permitted on the incapacity or death of the client?

- It is necessary to bear in mind the difference between digital records, which are not in the nature of property, cannot be bequeathed and do not vest in the personal representative after death (for instance, “my files and information, including my digital photographs”), and digital property rights and interests, which are property and do vest in the personal representative (for instance, “my domain names”).

- Bank accounts that are in credit are debt arrangements between the client and the bank. The existence of an online facility to manipulate the bank’s electronic ledgers does not create a new digital property right that is capable of being gifted or held on trust.

- As well as a lasting attorney for property and affairs, should the client consider appointing a lasting attorney for their personal welfare, authorising that attorney to take part in social activities and leisure and enter into correspondence on behalf of the client, so far as authorised by the terms and conditions of the client’s cloud accounts?

- Is there a need for a clause in the will or a side letter authorising the digital manager to access, use, delete, control, transfer, distribute or dispose of the client’s digital records and for him to be indemnified for costs incurred in doing so?

**Other specific steps to advise your clients to consider**

- **Regularly download their digital records.** Considering the difficulty in recovering digital messages, pictures and videos and other digital records from
certain cloud services, such as Facebook, digital records should be regularly downloaded from such sites and saved on computing devices or external hard drives.

- **Prepare a Memorandum of Wishes** for the digital manager with instructions about digital records and how the client wishes them to be dealt with; this would ordinarily be incorporated into the will. It is important to note which files must be preserved, and which can or should be deleted or destroyed at death or incapacity. This will help the digital manager to focus on items that are most important (for instance, they might want their digital photos copied and distributed amongst their children; they may want their Facebook page changed to an “in memoriam” page after their death). Similarly, for digital property rights such as cloud contracts, wishes can be expressed for the use of the personal representative (for instance, they will likely want their PayPal and eBay accounts closed once any open bills are settled, etc.).

- **Prepare and keep up to date an inventory** list of their digital assets, including: cloud accounts (grouping these by category); devices (such as personal computers, laptops, tablets, smart phones, storage devices, backup disks, thumb drives etc.); important information stored on or accessed through devices; computer programs which their fiduciary will need to run in order to access their important information.

- **Usernames and passwords**. Most cloud accounts will have an associated login and password. The fiduciary will need to know the login user name but not necessarily the password, particularly if their access to the account is not authorised by the terms and conditions. It is important for the fiduciary to ensure that all passwords are secure. If a fiduciary uses his principal’s usernames and passwords to access his cloud accounts without the authority of the cloud service provider (either expressly or under the relevant terms and conditions) he may be committing an offence under the Computer Misuse Act 1990.
Section 3: Post-Loss of Capacity & Post-Death Considerations

How can STEP Practitioners deal with the issue of digital assets when taking instructions for administration of estates (either deceased or inter vivos)?

Upon the incapacity or death of a client, the following considerations may be relevant:

☐ Does the deceased or principal have a digital asset inventory/log or other document listing their cloud accounts and user names?

☐ If there is no inventory/log or list available, should the fiduciary create one by contacting friends or family, reviewing hardcopy records such as bank account statements for payment relating to online assets and/or accessing their computer devices?

☐ If the fiduciary is unable to access the computing devices of the deceased or principal, they should instruct a digital forensic expert to identify all digital assets by (if necessary) obtaining access to computer devices and cloud accounts, taking care to record the precise steps taken in doing so (so that it can be demonstrated that terms and conditions were breached only to the extent necessary to identify the digital property rights and interests of the deceased or principal).

☐ Does the fiduciary need to take any steps to protect the privacy of the deceased or principal and the security of their assets, including determining whether it is appropriate to change passwords (and if it is, to do so as soon as possible)?

☐ Does the fiduciary need to take any steps to protect the confidentiality of the digital records, particularly if the confidentiality is not that of the deceased or principal but of employers or clients/customers?

☐ Does the fiduciary need to identify the owner of any rights in cloud accounts, and whether access to them is regulated or prohibited, whether they can or should be deleted, transferred to another person, sold or cashed out?

☐ Does the fiduciary need to consider whether, and when, it is appropriate to inform a cloud service provider that the account user has lost capacity or died?

☐ Before closing cloud accounts used by the deceased before death, does the personal representative or digital manager need to download files, including documents, pictures and videos, onto a portable hard drive to ensure that the content stored with those accounts are available for appropriate distribution or other processing?
Where the deceased or principal has made specific provision for computer devices and digital property rights and interests, does the fiduciary need to determine in what form they should be given to the recipients/beneficiaries (for instance, should devices be cleared of content)?

If no such specific provision has been made, after identifying the persons to whom the assets and digital property rights and interests will be distributed, should the personal representative determine how they should be given to the recipients/beneficiaries?

Does the fiduciary need to determine whether there are any liabilities relating to the cloud accounts and pay them together with other liabilities?

**Control:** After a death, it is important for the personal representative to take control of the computing devices of the deceased as soon as practicable. Such devices often provide access to valuable and/or confidential information that can be used to manipulate financial and other cloud accounts, with the possibility of loss to the estate if they fall into the hands of someone other than the personal representative.

**Access:** If the deceased’s computing devices are protected by passwords that are not available to the personal representative, the services of a digital forensic expert should be used to gain access to the devices and to identify the digital assets of the deceased.

**Identity Theft:** recent statistics estimate that more than 20 people have their identity stolen through online hacking every minute of every day. The fiduciary should monitor the use of the digital assets of the deceased or principal so as to reduce the risk of identity theft.
Section 4: Drafting

Draft will clauses

The following definition of digital property rights can be used:

“My Digital Property Rights” means such property rights and interests as are associated in any way with my Digital Records and to which I am entitled at the time of my death and which devolve upon my personal representative(s).

Specific rights and interests could be framed as follows:

“… including:

“My business carried on under the name [ ] and using the [ ]cloud service (‘my [ ]business’);

“Such of my literary works as are only in digital form (“my Digital Literary Works”);

“The benefits associated with my [ ]store account; insofar as I am permitted to transfer them;

“The balance owing to me at the date of my death under the terms of the contract between me and [ ]betting.com;

“My domain name [ ].co.uk; and

“All my bitcoin”.

The following definition of Digital Record can be used:

“Digital Record” means an electronic record with which I am concerned in any way on any computing device (whether they be my Devices or devices used by me in connection with any of my Cloud Services) at my death, but excluding all of my Digital Property Rights. For this purpose, ‘electronic’ is a reference to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities and ‘record’ means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. The expression ‘my Digital Records’ has a corresponding meaning.

Specific records could be included (bearing in mind that these would be managed by a digital manager and not the personal representative, as such—they may, of course, be the same person), such as:

1 © 2017 Leigh Sagar
“This will include part or the whole of the content of any message sent and received by me, and other digital text, music, images, videos, books, and other similar media whatsoever.”

If the Will contains references to cloud services used by the testator, the following definition could be used:

“My Cloud Services” means the services of such cloud service providers as were used by me during my lifetime and/or at the time of my death.

If the testator wishes to appoint a digital executor to administer his digital property rights and interests, the following can be used:

I appoint [ ] (“my Digital Executor”) to be my executor in respect only of my Digital Property Rights.

If the testator wishes to appoint a digital manager in the will:

I appoint [ ] (“my Digital Manager”) to manage my Digital Records and authorise her to carry out all actions and incur such costs and expenses as may be reasonable for the recovery, preservation and transfer of my Digital Records.

Examples of administrative directions:

I direct my [Digital] Executor to terminate my cloud accounts with [ ] and [ ], to memorialise my Facebook account named “[ ]” and to delete my Digital Records from all my Devices and my Cloud Services PROVIDED THAT:

(a) he shall have taken adequate control of such of my Digital Property Rights as may be associated with any digital records existing in relation to such accounts; and

(b) he shall have afforded my Digital Manager sufficient opportunity to recover such of my Digital Records as may be available to her.

Gifts of devices could be take the following form:

I give my laptop to [ ] but I direct my [Digital] Executor, before distribution of this gift:

(a) to transfer such of my Digital Records as represent my Digital Literary Works from such laptop to an external storage device (and delete the same from such laptop), which (as set out in clause [ ] below) I give to [ ]

(b) to afford my Digital Manager the opportunity to recover my Digital Records

A residuary gift of digital property rights and interests could be:
Subject to clause [ ] above I give my Digital Property Rights to [ ] absolutely

The personal representative should be given authority to indemnify the Digital Manager for expenses incurred:

“My [Digital] Executor shall have power to pay or apply up to £[ ] to or for my Digital Manager to secure access to and recovery of my Digital Records and to transfer the same from any of my Cloud Services.”

Powers of Attorney

The standard LP1F form for a property and affairs lasting power of attorney is in the following form:

“I appoint and give my attorneys authority to make decisions about my property and financial affairs, including when I cannot act for myself because I lack mental capacity, subject to the terms of this LPA and to the provisions of the Mental Capacity Act 2005.”

An unrestricted property and affairs attorney has authority (subject to the provisions of the Act) to decide on any or all of the donor’s Digital Property Rights and this authority need not be expanded by adding further language.

As to the donor’s Digital Records (and the operation of social networking cloud accounts), these are not covered by a property and affairs power of attorney but rather by a health and welfare power, under which an unrestricted attorney will have power (subject to the provisions of the Act) to make decisions about whether the donor should take part in social activities or leisure (which will include the operation of social networking accounts, if permitted by the relevant terms and conditions) and the donor’s personal correspondence and papers (including email correspondence). Section 7 of the prescribed form LP1H provides the donor with the opportunity to state their preferences or specific instructions about how the attorney should make decisions.
Section 5: Where Can I Get Help?

Laws in this area of law are unsettled and vary between countries and even between states within a country. Legislative reforms are currently underway in various countries which are intended to resolve some of the uncertainty around digital assets. However, the Terms of Service agreements your clients have entered into with various service providers may govern how their fiduciary can work with their digital assets.

For information and advice, please refer to the Digital Assets section of the STEP website at www.step.org/digital-assets where you will find more information and links to other knowledgeable professionals who can help guide you through this process.

STEP Digital Assets Special Interest Group (SIG)

Website: www.step.org/digital-assets
Committee: www.step.org/digital-assets-committee
Contact form: www.step.org/sigs-contact

For any further assistance, please contact digitalassets@step.org

Key resource for further information

PUBLICATION:
Disclaimer

© 2017 Society of Trust and Estate Practitioners (STEP)

Best Practice Information and Guidance on the STEP website (including Guidance Notes, FAQs, Briefing Notes, Templates and Toolkits) is not intended to be directional in nature but informative. It does not represent legal advice. Whilst reasonable endeavours are taken to ensure that information is accurate and up-to-date as at the date of publication, STEP and its contributing authors do not accept liability or responsibility for any loss or damage occasioned to any person acting or refraining from acting on any information contained therein. Specialist legal or other professional advice should be sought before entering (or refraining from entering) into any specific transaction.

All rights in and relating to this publication are expressly reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means without written permission from the Society of Trust and Estate Practitioners (STEP). Whilst the publishers have taken every care in compiling this publication to ensure accuracy at the time of going to press, neither they nor STEP accept liability or responsibility for errors or omissions therein however caused.