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

Section 1: Overview  Pages 1-2
- 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  Pages 2-5
- 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  Pages 6-7
- 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: Digital Asset Definitions and Precedents  Pages 8-9
- Sample definitions and precedents

Section 5: Where Can I Get Help?  Page 10
- Contact form, useful links and email address
Section 1: Overview

What is a digital asset?
Digital assets are electronic records that are transmitted or stored on the internet or on digital services, such as smartphones, tablets and computers. Digital assets can include items such as documents (MS Word, Adobe PDF, Excel spreadsheets, etc); internet sites, such as domain names or blogs; social media accounts (Facebook, LinkedIn, Instagram, etc); intellectual property rights; gaming characters; online user accounts (banks, PayPal, brokerage, utilities, creditors, etc.); business information, such as customer and inventory databases, client records, and internal business accounting information; digital currency, such as bitcoin; artistic content, such as online photographs. The majority of these digital assets possess monetary and/or sentimental value.

The disposition of digital assets is controlled by state law in the United States. Many states have enacted or introduced legislation, based on the Revised Uniform Fiduciaries Access to Digital Assets Act (“Revised UFADAA”) published by the Uniform Law Commission. This guide is based on the Florida Fiduciary Access to Digital Assets Act (the “Florida Act”) which follows the Revised UFADAA.

Up-to-date information on the status of legislation in the individual states is available at the Uniform Law Commission website:

The Florida Act defines Digital Asset as an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

Digital assets are most commonly classified as intangible personal property, although they may also be classified as intellectual property. A digital asset is the content contained on a physical device (computer, smartphone, or tablet), but not the physical device itself. A digital asset, such as a document or photo, may change from intangible to tangible personal property if printed.

Why STEP practitioners need to be aware of digital assets when advising clients

Digital assets can be just as precious and important as physical assets that your clients can touch. They can possess considerable value and have become central to many areas of people’s lives.

For this reason, it is now recommended that all discussions with clients about estate planning and estate administration now include a discussion about digital assets.

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
Key terminology used in this guide

In this guide:

1. the term ‘custodian’ means a person or service provider that carries, maintains, processes, receives, or stores a digital asset of a user; and
2. the term ‘fiduciary’ includes the original, additional or successor roles of personal representative, trustee, guardian, conservator, or agent under power of attorney;
3. the term ‘user’ means a person who has an account with a custodian.
How to raise the topic of digital assets with your clients

The first and most important task is to raise the subject of digital assets. Ask your client:

- whether they have a computer, smart phone or similar type of device;
- whether they use any internet services or have any online accounts (such as an email account); and
- whether they have any specific wishes about what they want to happen to those devices (and any of the information that is stored on them) and those services or accounts if they lose mental capacity or die.

If they answer no (or if they instruct you that they do not wish to make provision for them), then a written file note, and potentially a letter of confirmation, should be made to that effect and no further action need be taken.

If they answer yes, then a discussion will be needed about who they want to manage and have control over their digital assets and what they want to happen to their digital assets when they lose capacity or when they die.

Specific questions when taking instructions for estate planning

During the discussion with a client who wishes to make provision for their digital assets, the following questions may be relevant:

- will they prepare a digital asset inventory/log and if so, how will it be securely stored?
- how will their relevant fiduciary find, and if necessary access, the inventory/log upon their incapacity or death?
- if they plan to store their logins and passwords with a password manager, have they reviewed the security protocols that will apply to their data?
- how are the digital assets owned (whether outright by the client, on trust for another person, under a licence type arrangement or by a third party such as a custodian)?
- are there confidentiality issues relating to their digital assets (e.g. do they contain information relevant to their employer or their clients)?
- do they wish to make, and are they legally able to make, gifts of any or all of their digital assets?
do any of the relevant terms and conditions of the custodian prohibit or limit how the accounts can be accessed or controlled by a relevant fiduciary?

do they wish to direct that any or all computers and other devices be cleared of content before being gifted to the recipients/beneficiaries?

do they have specific wishes about any online accounts – should they be closed or continued in a form allowed by a particular custodian (such as permitting a Facebook account to be memorialized)?

do they have any digital assets that they wish to be kept confidential (e.g. destroyed after their death)?

do any of the custodians offer online tools for the user to direct post-death or incapacity disposition of the account (e.g. Google Inactive Account Manager)?

is their appointed relevant fiduciary an appropriate person to manage and have control of their digital assets? Or should an appointment of a specific “digital estate” relevant fiduciary be made?

**Drafting considerations for estate planning**

After taking your client’s instructions, the following drafting considerations may be relevant:

- do you need to review the relevant terms and conditions of the custodian to determine what is permitted on the incapacity or death of your client (as the account user)?

- do you need to define ‘digital assets’ in the Will, Power of Attorney or other related document?

- do you need to draft a clause in the Power of Attorney authorizing the relevant fiduciary to access, use, delete, control, transfer, distribute or dispose of the client’s digital assets?

- do you need to draft clauses in the Power of Attorney that gift specific digital assets (those that are able to be gifted) to particular recipients?

- do you need to draft a clause in the Will authorizing the relevant fiduciary to access, use, delete, control, transfer, distribute or dispose of the client’s digital assets?

- do you need to draft clauses in the Will that gift specific digital assets (those that are able to be gifted) to the beneficiaries?
Other specific steps to advise your clients to consider

☐ **Regularly download/save/backup their digital assets.** Considering the difficulty in recovering digital messages, pictures and videos from certain cloud services, such as Facebook, these digital assets should be regularly downloaded from such sites and saved on other personal devices.

☐ **Prepare a Memorandum of Wishes** with instructions about the digital assets and how they are to be dealt with. In particular, it is important to note which assets must be preserved, and which can be (or should be) deleted or destroyed at their death or incapacity to help their relevant fiduciary focus on items that are most important.

☐ **Prepare an inventory:** list of their digital assets, including: online accounts (grouping these by category); devices (such as personal computers, laptops, tablets, smart phones, storage devices, backup disks, USB drives etc.); important information stored on or accessed through devices; computer programs which their relevant fiduciary will need to operate in order to access their important information. This will provide their relevant fiduciary with details of these assets and where to find them.

☐ **Manage Usernames and Passwords.** Most digital assets will have an associated login username and password. A relevant fiduciary will need to know this information in order to manage these assets on their behalf. It is more important that their relevant fiduciary know how to reset a password (e.g. the email account where a password reset link would be sent) since their passwords should be changed frequently. Some people keep a physical listing of their passwords or use a Password Manager as an electronic “master key” which can be shared with their relevant fiduciary under the “terms of service” (TOS) agreement for that custodian. Bear in mind that some TOS agreements may not allow for access by anyone other than the account user and, if then, only with clear authorization.

Further information on how to advise clients to plan for their digital legacy is available from [Digital Assets: A STEP Guide for Professionals](http://www.step.org/digital-assets)
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:

☐ did the individual have a digital asset inventory/log or other document listing the digital assets?

☐ if there is no inventory/log or list available, should the relevant 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 or other device?

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

☐ does the relevant fiduciary need to take any steps to protect the confidentiality of the digital assets, particularly if the confidentiality is not that of the deceased but of employers or clients?

☐ does the relevant fiduciary need to determine who owns the digital accounts, whether access to them is regulated or prohibited, whether they should be deleted, transferred to another person, sold or cashed out (if they have financial value or if provided as an option “memorialized”)?

☐ does the relevant fiduciary need to consider whether, and when, it is appropriate to inform the custodian that the account user has lost capacity or died;

☐ before closing online accounts used by the deceased before death, does the relevant fiduciary 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 administration?

☐ where specific provision has been made for the digital assets, does the relevant fiduciary need to determine in what form they should be given to the recipients/beneficiaries (for example should a computer or other device be cleared of content)?

☐ if no specific provision has been made for the digital assets, how will the digital assets be distributed, and as above, in what form they should be given to the recipients/beneficiaries?
does the relevant fiduciary need to determine whether there are any liabilities relating to the online accounts and pay them together with other liabilities?

After a death, it is important for the relevant fiduciary to take control of the computer and other 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 the deceased's computer or other devices are protected by passwords that are not available to the relevant fiduciary, the services of an expert may need to be used to gain access to the devices. If the relevant fiduciary is not sufficiently acquainted with the operation of the various devices, again the services of an expert may be required.
In the United States, the Revised Uniform Fiduciary Access to Digital Assets Act (2015)\(^1\), as drafted and adopted by the Uniform Law Commission in July 2015, provides the following definition of a Digital Asset:

“digital asset” means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.”

Notwithstanding any contrary provisions hereunder, my attorney-in-fact shall lawfully have the authority to exercise only those specifically numerated powers regarding digital assets listed below which I have initialed (provided the exercise is consistent with my attorney-in-fact’s duties):

(a) **(initial here)** Right to receive, access, transfer or otherwise exercise ownership right over all digital assets (excluding the catalog or content of any electronic communications sent or received by me), including but not limited to: (1) any information stored on a computer or other digital device, (2) content uploaded onto any websites, including photos, documents, or other content, and (3) rights in digital property, such as domain names and blogs.

(b) **(initial here)** Right to receive and access a catalog of electronic communications sent or received by me.

(c) **(initial here)** Right to receive and access the content of electronic communications sent or received by me.

Notwithstanding any contrary provision in the Florida Statutes, my Personal Representative and any successor shall lawfully have the following powers and authority regarding electronic communications and other digital assets:

(a) My Personal Representative shall have the right to receive, access, transfer, or otherwise exercise ownership rights over all digital assets (excluding the catalog or content of any electronic communications sent or received by me), including, but not limited to: (1) any information stored on a computer or other digital device, (2) content uploaded onto any websites, including photos, documents, or other content, and (3) rights in digital property, such as domain names and blogs.

(b) My Personal Representative shall have the right to access the catalog or content of electronic communications sent or received by me.

Digital Asset Inventory Precedent

An example digital asset inventory will be made available shortly at www.step.org/digital-assets.
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
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.