

# THE PROBATER

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## PLANNING CONSIDERATIONS FOR DIGITAL ASSETS

By Suzana Popovic-Montag and Nick Esterbauer

A 2013 global survey by McAfee suggests that the average North American holds digital assets valued at approximately \$46,000.00 US.<sup>1</sup> Some digital assets carry sentimental value, like a photograph, while other digital assets carry monetary value, like a digital currency such as a Bitcoin. As estate practitioners, it is time to provide digital assets with the due consideration that they warrant with respect to both estate planning and estate administration.

### The Rise of Digital Assets

Only in recent years have digital assets begun to receive the attention that they warrant. In practical terms, a digital asset is a document or other form of information that is stored on a computer or online. Given this broad definition, digital assets may include those which frequently come to mind during discussions of digital assets, such as cryptocurrencies, written documents, emails, photographs, videos, and other information stored electronically, as well as a number of other types of online accounts and the interests held through them – for example:

- Bank and brokerage accounts (Financial Institutions, Independent Trading Platforms);
- Social media accounts (Facebook, LinkedIn, Twitter, Google+, Instagram, Pinterest, Tumblr, YouTube);
- Point reward programs (Shoppers Optimum Points, Aeroplan/Air Miles);
- Digital libraries (iTunes, Dropbox);
- Online sales accounts (Amazon, Etsy, eBay, Craigslist, Kijiji);
- Online gaming accounts (Poker); and
- Account withdrawal authorizations – monthly payments (cell phone, utilities, memberships, subscriptions).

One of the most fundamental roles of an estate trustee is the identification of all assets and liabilities of the estate. Without a digital estate plan, it is possible (or even likely) that certain assets may remain undiscovered and unadministered for many years after death, to the detriment of the estate beneficiaries.<sup>2</sup>

### Steps for Planning and Administering a Digital Estate Plan

When creating an estate plan for a client, the lawyer should

be sure to properly account for both planning and administrative considerations. First, planning considerations include how to recognize a digital asset, how to access a digital asset, the client's wishes in regards to preserving or deactivating the digital asset, and whether a digital estate trustee should be appointed. A digital estate trustee may be appropriate in circumstances where the named estate trustee may be unfamiliar and uncomfortable handling digital assets. Second, administrative considerations include how the estate trustee can access the digital assets, ownership of the assets, how to properly evaluate these assets, and whether their value should be included in the calculation of probate fees.

The simplest plan is a password-protected Excel spreadsheet that provides relevant information, which typically includes the following:

- A description of the assets, including the web addresses, user IDs, passwords, account numbers, and any other relevant information or instructions required to locate and/or access the content;
- The appointment of a digital estate trustee – someone technologically savvy, who can handle the responsibility, but who is also trusted to handle personal and/or confidential affairs; and
- Instructions outlining what the testator would like to be done with his or her digital assets – i.e. whether it is intended that they be transferred, memorialized, or destroyed.

### Estate Issues Related to Digital Assets

Due to privacy concerns and identity theft, user agreements are generally structured to prohibit users from disclosing their passwords to anyone, including their executors. To avoid this kind of issue, lawyers should encourage clients to transfer, save, or remove content prior to death to ensure their survivors have access to these assets. An owner's best course of action, especially with a heavily secured asset like Bitcoin, is to either transfer the asset prior to death or have a comprehensive plan in place for the transfer of the asset upon death.<sup>3</sup>

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## Suggested Checklist for Digital Assets

The following is a Checklist of things to consider with clients when canvassing their digital footprint and planning for the transition or management of their digital assets:

### General

Do you have any of the digital assets listed below, or any other asset that is not listed?

1. Devices: Computer (Laptop/iPad); E-Reader (Kindle, Kobo); Cell Phone; Music Storage (Mp3 player, iPod).
2. Electronic Mail: Email accounts (Rogers, Bell, Yahoo, Gmail).
- 3 Online Accounts & Content Holders:
  - a. Social Media: Facebook, Twitter, Instagram, Snapchat;
  - b. Sales: Amazon, eBay;
  - c. Banking: CIBC, Scotiabank, RBC, TD;
  - d. Content Holders: iTunes (digital music library), iCloud (digital photo library);
  - e. Loyalty Programs: Air Miles, Aeroplan; and
  - f. Gaming: Poker, StarCraft, Xbox Live.
4. Virtual: Currencies (Bitcoin); Property.
5. Other: Domain Names; Trade Secrets; Business Information.

### Access

Do you wish your survivors to have access to any of the digital assets?

Have you put any plans in place to transfer the information that is stored digitally?

### Deactivation/Preservation

Do you have online accounts that you wish to be deactivated upon your death?

Have you used any of the tools used to implement wishes regarding account preservation or deactivation after death, such as Facebook's Legacy Contact Option, or Google's Inactive Account Manager?

### Digital Estate Trustee


Does your Estate Trustee or Attorney for Property have the requisite level of knowledge and skill to access digital assets? YES or NO?

If the answer is no, is there another individual who can be trusted to administer digital assets during your incapacity or after death?

## Login Information

In order for the Digital Estate Trustee to access the digital accounts, the Digital Estate Trustee should have the requisite login information (username and password).

## Conclusion

Despite their potential sentimental and/or financial value, digital assets are often neglected during the estate planning process. A digital estate plan can ensure that potential invaluable assets can be identified, accessed and administered in accordance with one's wishes - and can be included within one's Last Will and Testament (and Power of Attorney for Property), or be outlined within standalone documents. The importance of these assets should not be overlooked. However, even when proper consideration is given to digital estate planning, jurisdiction issues, privacy rights, and terms of user agreements may restrict the authority of a fiduciary to access digital assets as contemplated by the digital estate plan. While Canada and other jurisdictions continue to introduce legislation to facilitate fiduciary access to digital assets, it nevertheless remains important to consider this issue during the estate planning process. 

<sup>1</sup> Robert Sicilano, "How Do Your Digital Assets Compare?" (14 May 2013), McAfee (blog) online:

<<https://securingtomorrow.mcafee.com/consumer/family-safety/digital-assets/>>.

<sup>2</sup> Similar to the authority of an estate trustee, an attorney for property may be involved in the administration of an incapable's digital assets during incapacity. Many of the comments herein apply to this type of fiduciary as well.

<sup>3</sup> Abigail J. Farmer and Cory Elizabeth Tyzska, Virtual Currency Estate Planning: Bit by Bit, (2014) 40:249, *Actech Law J.* at 265, citing Charlies Linn & Renee Gabbard, Estate Planning for Digital Currencies, Bryan Cave (Feb. 25, 2015), online: <http://trustbryanecave.com/estate-planning-for-digital-currencies>.



**HULL & HULL LLP**  
Barristers and Solicitors

*Trust Experience™*

**Editor: Suzana Popovic-Montag**

141 Adelaide St. W., Suite 1700

Toronto, Ontario M5H 3L5

**Tel: (416) 369-1140 Fax: (416) 369-1517**

**spopovic@hullandhull.com | www.hullandhull.com**

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