

A teal-tinted image of a hard drive with binary code overlaid. The hard drive is shown from a top-down perspective, with its platters and read/write heads visible. The background is a dark teal color with a pattern of binary code (0s and 1s) scattered throughout. The text "digital assets in estates" is written in a white, sans-serif font, with "digital assets" on the top line and "in estates" on the bottom line. A horizontal line is positioned below the word "estates".

digital assets in estates

OVERVIEW AND PLANNING TOOLS

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Estate and Probate practitioners routinely advise clients on how to protect and devise assets in the most beneficial ways relative to the client's needs and circumstances.

TRADITIONAL ESTATES

In a traditional estate, after the death of a person, the personal representative or trustee is responsible to inventory the estate, gain control over, secure and preserve the assets, and eventually turn over the assets to the heirs, devisees or beneficiaries.

DIGITAL ESTATES – A NEW PROCEDURE

Today, however, with the advent of Digital Assets, a new procedure for handling these assets must be created. Because of the intangible nature of Digital Assets and the ever growing complexity of our client's "digital footprint", developing comprehensive plans, requires having a good understanding of the world of Digital Assets. A few definitions may be helpful.

"**Digital Assets**" in this context means (i) intangible or tangible items that are stored digitally on "Hard Goods" and such assets include information, financial records, rights to income, passwords, bank accounts, personal memorabilia, and contractual and intellectual property rights (such as copyrighted works); and (ii) assets that **only** exist in a digital form (and only stored digitally on Hard Goods) and are, by their very nature, intangible. They may have value in the digital worlds or environments in which they exist and that value may be converted to or exchanged for real cash currency (USD).

"**Hard Goods**" are the physical devices or equipment that digitally store or contain the client's or decedent's Digital Assets.

"**Cloud**" for purposes of this analysis means a network of computer servers or Hard Goods and related software owned, managed and maintained by a third party.

EMERGENCE OF A NEW STANDARD OF DUE DILIGENCE

A new standard of due diligence for personal representatives and trustees is in the process of being formulated as these new Digital Assets gain greater recognition and appreciation by clients and their attorneys. Our digital footprint will continue to grow as digital technologies are adopted at incredible rates. You will be expected to understand how these new Digital Assets impact estate planning and estate administration after death.

Why is it important that legal practitioners know and advise clients about Digital Assets? A surprising number of people own Digital Assets, including the elderly and baby boomers, *i.e.*, your client base. We store family photos and other important information on a growing array of online sites. We access our financial assets, such as bank accounts and brokerage accounts, over the internet. We pay our bills electronically. We own internet domain names. In the aggregate, these "virtual assets" have tremendous aesthetic, sentimental and perhaps, financial value.

The categories of these Digital Assets include

1. email accounts
2. financial accounts that are accessible only online
3. information contained in programs such as TurboTax or Quicken that may be stored in the Cloud
4. online bill payments that can only be paid online (such as mortgages)
5. online businesses from simple Ebay businesses to web-based businesses
6. PayPal accounts that may have stored value
7. web pages and blogs that contain ads that generate revenue for the estate
8. social networking accounts
9. registered domain names held for sale
10. intellectual property of the decedent that may only be stored digitally (such as mp3 files)
11. video games and virtual worlds where stored value may exist through currency conversion or from assets that can be sold out of those games

While this list of Digital Assets scratches only the surface of the many different kinds of digital property, you can begin incorporating digital asset planning into your estate planning documents *now*.

DIGITAL ESTATE PLANNING STEPS IN A NUTSHELL

Here are 6 Steps in Digital Estate Planning that may be incorporated into the attorneys' traditional estate planning process to provide a roadmap for the personal representative or trustee during the planning and administration of an estate or trust.

STEP

WHERE IS YOUR CLIENT'S DIGITAL HOUSE? – IDENTIFYING "HARD GOODS"

Most Digital Assets are stored on some form of "Hard Goods", including desktop computers, laptop computers, smartphones, tablet computers, hard drives, computer media (CD, DVD etc.) and USB devices or other portable drives or on someone else's hard goods including network servers and "Cloud" sites.

A logical starting point in developing a plan for disposition of Digital Assets is to identify and list the various hard goods that the client or decedent uses along with the type of information that is stored on each device.

STEP

HOW BIG IS YOUR CLIENT'S "DIGITAL FOOTPRINT"? – CREATING A DIGITAL INVENTORY LIST

Once the client has identified his or her Hard Goods, they can begin listing the various Digital Assets that make up their digital footprint. The list can include email accounts, financial, social, and business accounts.

STEP

KEYS TO YOUR CLIENT'S DIGITAL HOUSE – PROVIDE FOR ACCESS

Passwords are the keys to the client's digital house. By including all passwords in the digital inventory, the client provides a tool for access to his or her Digital Assets that, with proper planning, can be used by the client's personal representative or trustee to meet the client's financial and personal wishes. Some key questions to consider are:

Where do you keep your passwords?

Who else knows your passwords?

Does anyone else know where you keep your passwords?

STEP

SELECTING A DIGITAL FIDUCIARY

The personal representative or trustee selected by the client to manage his or her estate in the event of disability or death may or may not have the technical skills or understanding of Digital Assets sufficient to administer Digital Assets effectively. The client may want to consider what skills and knowledge level will be needed to administer his or her Digital Estate based upon the size and extent of the client's digital footprint. Family members, friends or associates may be in a unique position to assist the client's personal representative or trustee with regard to the client's Digital Estate.

Preparing a list of "digital fiduciaries" that the personal representative or trustee can turn to, may significantly streamline the administrative process.

STEP

PROVIDE INSTRUCTIONS

Providing instructions for management and distribution of Digital Assets involves potentially balancing contract (license), property and probate law. Estate planning should include consideration of:

Instructions for account access

Notifications in the event of death or disability

Instructions for continuing or closing sites

Realizing Value for Digital Assets with financial value

Determining Do Not delete items

Bequeathed information

Coordinating beneficiary designation in wills or trusts

STEP

GIVE APPROPRIATE AUTHORITY

There are a number of commercial sites such as Entrustet, Legacy Locker, and Datainherit that are attempting to provide plans and systems to handle digital asset transfers. We will see over the next few years how well these services will fit into our system of contract, property and probate laws. For now, these sites and the services they provide are untested, unproven, and may not be financially stable to "outlive" the people to whom the information is entrusted.

Clients will need to work closely with their estate planning attorneys to assure that proper authority is given to appropriate fiduciaries who have tools and knowledge of Digital Assets to identify, secure, and distribute those assets.

CONCLUSION

Digital Assets are here to stay. Estate and Probate practitioners must incorporate Digital Estate planning into their practices in order to better serve clients and in order to ensure that all digital due diligence has been properly performed as a part of their law practice management.

[DIGITAL ASSET-ESTATE QUESTIONNAIRE]

WHERE IS YOUR "DIGITAL HOUSE"?

- Desktop Computer
- Laptop Computer
- Hard Drives
- Thumb Drives
- Media (CD/DVD etc.)
- Smart Phone
- Tablet
- Cloud

ACCESS

- Who else has access to your computers or cloud services?
- Who else knows your passwords?
- Where do you keep your passwords?

INVENTORY OF DIGITAL ASSETS

- What email providers do you use (Gmail/Aol/Cox etc.)?
- What social media sites do you use (Twitter, Facebook etc.)?
- Do you belong to any online clubs or organizations?
- Do you buy and sell goods on Ebay?
- Do you have a PayPal account?
- Do you use online banking?
- Do you use online bill paying services?
- Do you pay your mortgage online?
- Do you have online investment accounts?
- Do you use any cloud services for storage of files?
- Do you participate in any online collaboration services?
- Do you use accounting software, such as Quicken or Quickbooks?
 - Where is the data located?
 - Do you use any online accounting services?
- Do you use any tax preparation software?
 - Where is the data located?
 - Do you use any online tax preparation software?
- Do you have an online business?
 - Who is your website administrator?
 - Do you sell goods or services online?
 - What payment processing services do you use?
 - Who else knows your business passwords?
 - Who would you want to manage/windup your online business?

SELECTING A DIGITAL FIDUCIARY

- Will your fiduciary (Agent, Trustee or Personal Representative) know what to do with your digital estate?
- Who can your fiduciary turn to sort through your "Digital House"?
- Select someone who:
 - understands your digital footprint – systems, passwords, inventory; and
 - knows how to lock up, inventory, value and distribute your digital assets.



about the authors

REX M. ANDERSON practices in the area of estate planning. He helps clients develop comprehensive estate plans through the use of wills, trusts and other planning tools.

Rex received a Bachelor of Science degree from Kansas State University and a Juris Doctorate from the University of Kansas School of Law. He is also a graduate of the Conservatory of Recording Arts in Tempe Arizona. Rex is a member of the Kansas and Arizona Bars.

Rex has extensive experience in the Trust, Investment Management and Private Banking Industry. He began his career as an Estate Planning Specialist with the Federal Land Bank and continued as a Trust Officer, Business Development Officer and Private Banking Officer with Brenton Banks, Security Pacific and Bank of America.

In addition to his law practice, Rex is active in film, music and podcast production through his company Rexomatic Productions. From 2000 to 2005 he served as Director of Operations for Livinghead Audio Recording, a recording studio located in Phoenix, Arizona.

He was one of the executive producers of the award winning film, *Jesus the Driver*. Rex has numerous music production credits, and is a songwriter/musician and performs with his band, Big For His Age.

CONNIE J. MABLESON, ESQ., is a nationally recognized attorney with over 28 years of experience emphasizing Intellectual Property, Copyright, Trademark, Arts & Entertainment and Computer and Internet Law. She was voted one of the top 10 Intellectual Property lawyers in Arizona as "Best of the Bar." Her clients include Stephanie Meyers (author of the *Twilight* books and films) and Allison DuBois, the real life medium portrayed in the prime time show *Medium*.

Connie is also known for her leading edge representation of clients who are early adopters of technology and digital platforms. She represented Cantor & Siegel when they made internet history in 1994 as the first people to commercialize the Internet (at the time they were the "most hated" people in the online world for doing so). She also made history as the first attorney to open a law practice in a virtual world when she launched her Intellectual Property Resource Center in Second Life in 2005. In Spring 2010, Connie taught the first class of its kind at Arizona State University's Sandra Day O'Connor School of Law called "Governance of Virtual Worlds."