

ESTATE PLANNING FOR DIGITAL ASSETS THEY HAVE THEIR OWN SPECIAL RULES



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By

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What is a “Digital Asset”, you may ask. Do you have any Digital Assets? Should Digital Assets enter into your estate planning?

There is a legal definition of Digital Assets under a law known as the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), adopted in almost every state with minor nuances. According to RUFADAA, a Digital Asset is an electronic record, an electronic communication, or record of electronic communications.

That definition is a bit technical. Here’s a simpler definition I believe is just as broad and effective.

Any information which, to access, view, use, download, or transfer, requires five things - a keyboard, a screen or monitor, the internet or some electronic connection, a login name, and a password – is a Digital Asset.

This latter definition fits a great deal of what we do and use in our everyday lives. Even those people whose use of computers is minimal are likely to have transactions or accounts that fit this definition and they may not even realize it.

We have an ever-expanding digital online footprint. Online accounts and websites store sensitive personal and financial information. The most obvious examples of Digital Assets that come to mind are the following:

- Email accounts
- Financial accounts
- Personal and business documents stored in the cloud
- Facebook
- Twitter
- LinkedIn
- Instagram

- TikTok
- Pinterest
- YouTube
- Amazon
- iTunes
- Online bill paying services
- Online shopping accounts
- Social media sites (countless!)
- Data storage sites such as Drop Box, Google Drive, OneDrive, OneNote, and so on.
- PayPal
- Venmo
- Rewards programs (credit cards, airlines, retail businesses, etc.)
- eBay,

The list of offerings grows daily. It is impossible to name every possible Digital Asset. It would be obsolete the minute it is written.

In the home, it seems that every appliance, electrical device, computer accessory, and home device comes with an online application for control and management through a smartphone application. Plus, who can say what Digital Assets you will have tomorrow? Next month? Next year?

The contents of all of these accounts are your private property, which is why they must be protected by usernames and passwords. It is important to realize that someday someone else will need to access your Digital Assets when you are no longer capable of managing them. For this reason, your estate plan must include plans for Digital Assets in the event of your death or incapacitation.

For example, you may pay your bills online, manage financial accounts online, rely on email for information and to communicate with people in your life or to send and receive documents, and rely on online communications with your doctors and access to online accounts for your medical records. You may store photos and videos online and may use other Digital Assets in your life without a second thought. If you were to become incapacitated, you will need someone else to do manage and monitor all that.

After your death, you will want a trusted loved one to access your email accounts or your Facebook page to notify your friends and contacts.¹ Bill pay services and auto deduction payments for subscription services may need to be terminated. You might want playlists or photos downloaded and preserved for your children or other family members. And you would want to provide access to your online financial accounts to your executor or trustee

¹ Facebook and other social media sites have a “memorialization” process. Memorialized accounts are a place for friends and family to gather and share memories after a person has passed away. Memorializing an account also helps keep it secure by preventing anyone from logging into it. Login to a memorialized account will be restricted.

for hassle-free administration of your estate. That may be the only way to identify and access those accounts if you have gone paperless, like many people today.

Some Digital Assets have real financial value, such as eBay, PayPal, iTunes, and Kindle accounts, not to mention online bank accounts. You'll want to ensure the person you leave in charge of these is legally obligated and empowered to manage them as you have instructed. The trustee of your Trust is an obvious choice for this responsibility.

Virtually everyone has at least one Digital Asset – the Gateway Asset

The need for your future fiduciaries to have access to your email accounts cannot be overstated. Email is a gateway Digital Asset. Think about it. If you cannot access an online account because you have forgotten your password or username, what happens? You connect to the website for the account and when your login attempt is rejected or if you cannot remember your password, you ask to reset your password or username. Then you receive an email with a code or number and instructions on what to do next.

Also, financial account statements and other account information is sent by email. If your future fiduciaries are locked out of your email, there can be a cascade of unanticipated consequences.

For these reasons and more that could be listed if desired, it is imperative that your estate planning documents, namely your Will, your Living Trust, and your Property Power of Attorney, give your future fiduciaries appointed under those documents the necessary powers to access, manage, and transact in your Digital Assets if you were to become incapacitated or die. This chapter will explain how that is done today under the RUFADAA laws.

A second part of Digital Assets estate planning is storing login names and passwords securely and making them available to your future fiduciaries when needed. Your passwords and login information must be effortlessly available on demand when you wish to log on to an account. Each Digital Asset should have a distinct set of credentials; that's a universal recommendation by experts on the topic. If you have a lot of Digital Assets, how can you keep all that information straight? How can you keep the login credentials fresh through regular updating?

You've heard the line, "We have an app for that!" That holds true for Digital Asset credentials. There are numerous online applications available for use with smart phones and computer devices that are effective for these purposes. An online search for key words such as "password programs" and "online digital asset repositories" will be productive. User reviews and testimonials abound. Print media often publish reviews and recommendations of applications to store and retrieve passwords, and to make them available to future fiduciaries.

I recommend using a highly rated application that works across all your devices – computers, laptops, smartphones, and tablet computers such as iPads. In the event of your death or disability, access to this information is granted to a person (or people)

designated by you, allowing for a smooth transition of your digital assets. All other options in my opinion are not effective and may even be risky. This chapter will not go into depth on this aspect of Digital Assets, but it is definitely part of the process of estate planning for Digital Assets.

What if your estate plan does not address Digital Assets?

The worst thing you can do when it comes to planning for Digital Assets is nothing. Without a plan in place, email providers, website administrators, and Digital Asset custodians may have policies that provide for locking of accounts when the owner dies, or worse yet, deletion of the account data. It is even possible that website policies could include deletion of all account contents after a specified period of inactivity.

Leaving your digital assets in limbo can mean that your loved ones may lose access to invaluable data and precious personal records and might be forced to spend time and money jumping through hoops to get to your information – if that is even possible. (Digital Asset custodians zealously protect the privacy of their customers as required by privacy laws and good business practice. The right to privacy does not disappear when the customer dies.)

If there is a bricks-and-mortar business behind a Digital Asset, your future fiduciaries may get some help the old-fashioned way – visiting a branch and talking to a manager or assistant manager. But many people have online accounts with financial institutions that are only in the cloud, and do not have a bricks-and-mortar office where you can get personal service. If you have such accounts and do not receive hard copy account statements by email – then there would be no paper statements and no bricks-and-mortar office to go to for help. Valuable assets could be lost.

Sometimes the estate fiduciary after death can only access financial accounts by reading the decedent's email. Monthly and annual statements may be stored on the decedent's computer devices that are locked, and if family and future fiduciaries are not left with login names and passwords that information is inaccessible. If email accounts are locked or your future fiduciaries cannot legally access them after your death or incapacitation, then valuable assets could be lost.

The inaccessibility of your future fiduciaries to your Digital Assets can have unpredictable impacts on your estate plan and your family. This chapter touches on only a few of the more obvious consequences. Valuable information and precious memories in the form of pictures and videos can become untouchable. Court relief may not be available. Over time, we are sure to see stories of great hardships and losses.

If I have login names and passwords for my departed or incapacitated loved one, is that not enough?

In a word, no – not legally. There are federal and state privacy laws that protect you while you are alive and that also apply after your death. They include criminal sanctions for

unauthorized access to protected online accounts. Even if you use login credentials given to you by a deceased loved one, you may violate those laws by impersonating them.

Also, as mentioned, accounts can be shut down by website administrators when they learn of an account holder's death.

What is the solution?

The RUFADAA laws strike a balance between your rights to privacy, protections for custodians of your Digital Assets (website administrators and companies that store or provide Digital Assets to the consumer public), and the need for future fiduciaries after account owner death or incapacitation to access, manage, and pass Digital Assets to heirs as directed by Wills and Trusts.

The RUFADAA laws provide a very specific blueprint to follow when drafting Wills, Living Trust Agreements, and Property Powers of Attorney. Unless you explicitly include wording in your Will, Trust, and Power of Attorney authorizing your Digital Assets, your Executors under your Will, the Trustee(s) under your Living Trust, and the Agents under your Property Power of Attorney will not have authority to access your Digital Assets after your death or incapacitation.

Absent those powers in the governing legal documents, custodians can rely on the terms-of-services agreements users must accept in order to use an online account (sometimes called EULA or End User Licensing Agreement). Essentially, online account users are licensed by the custodian to use its website or services to access the user's data, and as such, the custodian gets to make the rules. Users must play by those rules, or they cannot use the system.

There are protections for custodians as well, and detailed rules in the RUFADAA laws for court actions and court orders. There are rules restricting access to deleted accounts, and processes to be followed by your future fiduciaries to access your Digital Assets accounts.

A complete discussion of RUFADAA is outside the scope and intent of this chapter. Rather, the purpose is to explain how to make access to Digital Assets available to your future fiduciaries – if that is what you want.

The concept of writing specific powers and authority into those legal documents to authorize fiduciary access to Digital Assets is not a complex idea. But the wording must meet the criteria of the RUFADAA statutes. If it fails that, then the fiduciary's access is denied.

As stated RUFADAA is a blueprint, which means it provides clear instructions about what language is needed in a Will, Trust, and Property Power of Attorney in order for a fiduciary to have the right to access Digital Assets. In other words, if you want your Executor/Personal Representative under your Will, the Trustee(s) under your Trust, and the Agent(s) under your Property Power of Attorney to access your Digital Assets, then include provisions in those documents as spelled out in the RUFADAA statutes.

Accordingly, if you are just now making your estate plan, insist your attorney include RUFADAA provisions in your documents and get assurances that the statutory provisions and authorizations are clearly spelled out. If you have an existing estate plan, check with your lawyer to see if your Will, Trust, and Property Power of Attorney include RUFADAA provisions. If they do not, your Will and Trust can be amended to include RUFADAA provisions. It is best practice to make a new Property Power of Attorney to add RUFADAA, rather than amending a Power of Attorney.

How can you know if you have Digital Assets wording that complies with your state's RUFADAA laws? Consulting an estate planning lawyer who is familiar with these laws is the best way. But there is a shortcut. If you are an Ohio resident and your Will, Trust, and Property Power of Attorney were made before April 6, 2017, then they likely will not have valid and effective RUFADAA provisions because that was the date the law became effective. Digital Assets provisions in documents made before that date, if any, will likely not work because they will not follow the RUFADAA blueprint. If you are not an Ohio resident, an online search will tell you the date your state adopted RUFADAA, and you can run the same diagnostic.

In the interest of full disclosure, RUFADAA is not a magic wand that your fiduciaries can waive and get instant access to your Digital Assets. There are still steps to be followed and documentation to be produced to each account custodian. But if you and your future fiduciaries follow the statutory blueprint, then your Digital Assets will not be locked up.

One more point. As mentioned above, organizing and storing your login names and passwords in a secure manner and making it accessible to your future fiduciaries is critical. RUFADAA does not require custodians to bypass those protocols or disclose that information to you. Your documents can have all the proper wording but if your future fiduciaries cannot find your login credentials and identify the appropriate websites, then RUFADAA will do them no good.

Which legal documents need RUFADAA provisions?

There are four situations in which a future fiduciary may need to access, manage, or transact in digital assets, as follows:

1. When you are serving as Trustee under your Living Trust, and a Successor Trustee must take over management of your Trust and Trust Estate assets because you have died.
2. When you are serving as Trustee under your Living Trust and a Successor Trustee must take over because you are incapacitated.
3. If you become incapacitated and your Property Power of Attorney Agent takes over management of your financial and legal affairs.
4. If you were to die with Digital Assets titled to your name and your estate were to pass through your Will.

Thus, RUFADAA provisions must be included in your Living Trust, your Will (either a simple will that distributes to your heirs or a Pour Over Will that distributes to your Trust), and your Property Power of Attorney.

The RUFADAA statutes provide clear directives for each type of situation.

Is there an easier way?

Yes. RUFADAA authorizes use of an “online tool” that may be offered by a custodian of Digital Assets under which the user can direct the custodian to disclose or not to disclose some or all the user’s Digital Assets to a fiduciary, including electronic communications to or from the user. The directives in an online tool will supersede the authority given a fiduciary under the user’s legal documents. In other words, an effective online tool means your future fiduciaries do not have to follow the protocols of RUFADAA. (You still need to include RUFADAA provisions in your legal documents, however.)

Which custodians have online tools? Among others, Google and Facebook have online tools. The list is growing. For your Digital Asset custodians, find their EULA or terms-of-use on their website, and look or search for provisions that apply on the death of the user. Or search the internet with your web browser.

Each custodian will have its own protocol. There is no one size fits all. Be sure the RUFADAA wording in your legal documents include the authority to follow an online tool.

What if you do not want your future fiduciaries to have access to all your Digital Assets?

For example, if you have an email or other online account that you use for personal or business reasons, you may not wish the contents of communications or the communications themselves to be disclosed if you were to die.

Or you may have personal email accounts or other accounts that you do not want disclosed to certain individuals. There could be a myriad of reasons why you may want privacy in the afterlife of your Digital Assets.

Online tools can be used for this. If an account custodian does not have online tools, your estate planning lawyer can provide options to protect your privacy, including provisions in your will or Trust that prohibit access to certain Digital Assets. Or you can set up a Trust that appoints a trusted person to protect and manage those Digital Assets for you.

Is it worth it to include RUFADAA in your estate plan?

The RUFADAA laws require a custodian to comply with a request from a fiduciary not later than 60 days after it is made. If the request is not complied with, the Act provides for court-ordered relief. Without RUFADAA wording in your documents, the custodian has all the control, and your future fiduciaries will be handicapped in accessing Digital Assets or locked out. Expect delays, frustrations, legal proceedings and impediments in administration and distribution of your estate. The job of your Executor or Trustee will become complicated. There is the real possibility that Digital Assets will be forever lost to your family and heirs.

Thanks to the RUFADAA laws, your future fiduciaries can have the same access to and powers over your digital assets as any other asset—if your Trust Agreement, Will, and Property Power of Attorney include the proper terms. You can even control how much authority and access to the contents of Digital Assets your future fiduciaries will have. They will have the tools they need to identify and access your Digital Assets and online accounts so that they can properly settle your estate. If necessary, you can compel Digital Asset custodians to cooperate through the powers of the courts.

If you have Digital Assets that have value in and of themselves that you created and own (intellectual property), e.g., literary or audio/visual works, photographs, etc., you can pass those to heirs just like non-digital “things”. They can be divided and distributed to your heirs under your Will or Living Trust like any other asset. There are exceptions based on facts and circumstances and that discussion is outside the scope of this chapter.²

Digital Assets planning is a part of Legacy Wealth Planning. It is one more area where traditional estate planning may fail, or estate planning by non-specialist lawyers may fall short.

If you don't think you use the internet much and don't have Digital Assets, then apply the 5-part test described above to yourself. You may be surprised. Financial institutions of all sorts encourage customers to switch to online statements of account and forsake hard copy paper account statements sent by mail. Some charge extra to send hard copy statements. Some only send statements by email. It is not inconceivable that someday paper statements may be totally a thing of the past, like pay phones, video tape movies, and a multitude of other past practices and protocols displaced by digital technology. The point is not to argue for or against this trend, but to encourage facing reality and being prepared.

Finally, if you believe you do not have Digital Assets and never will, consider those people you have named in your Will, Trust, and Power of Attorney to take care of your affairs if you are no longer capable. Chances are that you named younger people, and those people probably embrace and rely on digital technology and the internet without a second thought. They will probably want to rely on that technology to do their jobs for you one

² Cryptocurrency and its offspring are unique Digital Assets that pose their own issues. This is a developing area for estate planning purposes and will not be covered in this chapter.

day. If your legal documents do not allow this, they may be limited to 20th century technology which will make their jobs tougher. Don't you owe it to them to give them access to the latest tools to do their jobs efficiently and with the least imposition on their own lives?

How to make your Digital Assets estate plan

Step 1. Create and sign your basic estate planning documents that apply to managing and passing on your property – a Will, Living Trust, and Property power of Attorney. Include RUFADAA wording in the documents.

If you already have these documents, talk to your lawyer to see if RUFADAA is included. If not, execute legal documents to amend your Will and Trust, and execute a new Property Power of Attorney, with the required wording.

Step 2. Create a record of websites, login names, and passwords. Store it in a protected and secure manner and make it available to your future fiduciaries. *Better idea:* Use an online application that works on all your devices to securely store login names and passwords. One set of credentials will control access to that application, which has login credentials for all your other Digital Assets. Today's applications also make login names and passwords instantly available on demand to access Digital Assets and allow instant updating. Provide login information for that application to your future fiduciary who will settle your estate. Keep your Digital Asset login credentials fresh, changing them from time to time. Do not use the same login credential across all Digital Assets platforms.

Step 3. Research the websites you most commonly use and rely on to see if they have online tools that will allow you to appoint a "Digital Executor" or "Digital Trustee" to access and manage or terminate the account. Use online tools when available. They replace RUFADAA processes.

ABOUT THE ZIMMER LAW FIRM

Zimmer Law Firm, LLC is a charter member of the American Academy of Estate Planning Attorneys. It is the only member firm in Southwestern Ohio. The Firm has been providing quality estate planning services since it was founded in 1993. The fastest growing demand for its services has been asset protection from the cost of long term nursing care. Whether you need an Elder Law attorney, an attorney for general estate planning with trusts or wills, or an attorney to help settle an estate, our team of qualified staff are here to help you and your loved ones.

In these turbulent times, access to an experienced lawyer to protect your estate and accomplish your goals is more important than ever. If you or your family would like a complimentary consultation to discuss your estate plan or how to protect your estate from

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A MESSAGE FROM THE FIRM FOUNDER



The goals of Zimmer Law Firm are to make asset protection and estate planning pleasant, easy, and understandable processes for clients. We believe that planning is much more than just creating legal documents. Rather it is about establishing relationships with clients and their family by providing a continuum of services through the passages of their lives. What we do makes an important difference and we take great professional pride and satisfaction in that.

If you or your loved ones would like a complimentary consultation to review your estate plan or to implement a plan, visit our website at www.zimmerlawfirm.com or call us today at 513-721-1513 (Toll-Free 1-866-799-4050) to schedule an appointment. See for yourself why *Cincinnati Magazine* has recognized the Firm as a Five Star Wealth Manager. For the latest news about estate planning or upcoming law firm events, subscribe to our blog and “like” us on Facebook. Check our website for upcoming educational events. We continue to expand our capabilities and services to meet the demands of a complex and changing estate planning world. Our experience has shown us what was a solution yesterday may no longer be adequate to fully protect our clients today.

This report reflects the opinion of the Zimmer Law Firm. It is based on our understanding of state and federal laws and is intended only as a simple overview of the planning issues. We recommend you do not base your own planning on the contents of this report alone. Review your estate planning goals with a qualified estate planning attorney.

ABOUT THE ACADEMY

The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services. The Academy expects members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects.. The Academy has also been recognized as a consumer legal source by *Money*

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