STEP

Digital Assets
SPECIAL INTEREST GROUP

Digital Assets: Practitioner's Guide Canada

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

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Section 1: Overview

Background

In August 2016 The Uniform Law Conference of Canada adopted the *Uniform Access to Digital Assets by Fiduciaries Act (2016)* (the "Canadian Act") that draws from the 2014 United States UFADAA. The disposition of digital assets is controlled by provincial law in Canada, just as it is controlled by state law in the United States. Each province may choose to enact (or not), in whole or in part, the Uniform Law. This guide is based on the Canadian Act. Up-to-date information on the status of legislation in Canada is available at the Uniform Law Conference of Canada's website:
www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts

What is a digital asset?

The Canadian Act defines 'digital asset' as a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

Examples of digital assets

1. Files stored on digital devices, including but not limited to desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones and any similar digital device which currently exists or may exist as technology develops; and

2. Emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, banking accounts, domain registrations, domain name system (DNS) service accounts, web hosting accounts, tax preparation service accounts, online stores, loyalty programs, affiliate programs, other online accounts and similar digital items which currently exist or may exist as technology develops, regardless of the ownership of the physical device upon which the digital item is stored.

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. They have become central to many areas of our clients' lives and all discussions with clients about estate planning and estate administration should 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 '**account holder**' means an individual who has entered into a service agreement with a custodian.
2. The term '**custodian'** means a person (or service provider) who holds, maintains, processes, receives, or stores a digital asset of an account holder.
3. The term '**fiduciary**' means a personal representative for a deceased account holder, a guardian appointed for an account holder, an attorney appointed for an account holder who is the donor of a power of attorney, or a trustee appointed to hold in trust a digital asset or other property of an account holder.

Section 2: Pre-Death Considerations

How to raise the topic of digital assets with your clients

When taking instructions for estate planning clients, first 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 social media or 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 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 this discussion, 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

- ☐ 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 holder)?
- ☐ 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

You may also wish to consider advising your clients to take the following specific steps.

- ☐ **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 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 devices, and the important information stored on or accessed through the digital devices; digital assets, including: online accounts (grouping these by category) 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 -->**
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 holder has lost capacity or died?
- ☐ before closing online accounts used by the deceased before death, does the personal representative 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 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 personal representative, the services of an expert may need to be used to gain access to the devices. If the personal representative is not sufficiently acquainted with the operation of the various devices, again the services of an expert may be required.

Section 4: Digital Asset Definitions and Precedents

Definition (The Canadian Act)

> *"digital asset" means a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.*

Precedent language is not needed in Wills and Power of Attorneys when:

- An attorney may do anything that the donor may lawfully do by an attorney; and
- A personal representative has the authority in regard to the property included in the estate of the deceased person:
    a. To take possession and control of the property;
    b. To do anything in relation to the property that the deceased person could do if he or she were alive and or full legal capacity;
    c. To do all things concerning the property that are necessary to give effect to any authority or power vested in the personal representative.

Power of Attorney Precedent example

My Attorney, to the maximum extent permitted by the law, may:

(a) *access, modify, delete, control, use, transfer and otherwise dispose of my Digital Assets, and obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my Digital Devices and Digital Assets.*

Will Precedent example

My personal representative, to the maximum extent permitted by the law, may:

(a) *access, modify, delete, control, use, transfer and otherwise dispose of my Digital Assets, and obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my Digital Devices and Digital Assets.*

(b) *If I have given any Digital Devices as part of my personal property to any beneficiary under my will, such gift is conditional upon my personal representative having access to my Digital Devices for the purpose of accessing my Digital Assets.*

Digital Asset Inventory Precedent

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

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

Disclaimer

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