

# Estate Planning for Digital Assets

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When developing a comprehensive estate plan for the transfer of assets, it's important to understand and obtain informed guidance on an often overlooked group of assets: your digital assets. These assets are constantly and rapidly changing, and are increasingly subject to cyber threats. That's why it's so important to understand not only how digital assets work, but also the best way to finalize and safely dispose of them once you are gone.

Most of us probably don't have an itemized, up-to-date inventory of all the "apps" that we've downloaded or the many online profiles we've created. While we're alive, we're responsible for our actions, including our "virtual ones." However, real issues of valuation, safekeeping, identity protection, privacy and distribution may occur upon our incapacity or death, leaving our power of attorney and/or executor to "deal" with our digital footprint. The following four steps can help navigate and make sense of our digital lives and assist in planning for a smooth estate administration.

## 1. Know the scope of your digital assets

The famous adage "know thyself" can be applied to digital assets as well. As a digital user, it's imperative that we understand what we own. Today, our world is as much online as it is in the physical realm. To fully understand the extent to which we're exposed to our digital capital, take a 360 degree panoramic view of your day-to-day life: Digital assets have invaded the work place, the home office, gyms, social gatherings, end of life celebrations, high school graduations, pharmaceutical refills, disease diagnosis, dinner deliveries and grocery shopping, and home security systems, to name just a small number of activities and daily tasks that are now routinely managed digitally. Think of an activity or interest, and you'll probably find an "app for it." While digitalization is taking over our routine activities and experiences, tracking of our digital footprint and ad hoc targeting of products and services is also getting smarter, causing our digital personas to grow exponentially.

The **Uniform Access to Digital Assets by Fiduciaries Act** ("the Canadian Model Act"), is Canada's model legislation regarding digital assets. In Canada, the disposition of digital assets is controlled by provincial law. Each province may choose to enact the Canadian Model Act in whole or in part. In Canadian Model legislation, a "digital asset" is defined as a "record that is created, recorded, transmitted or stored in a digital or other intangible form

by electronic, magnetic or optical means or by any other similar means." This definition does not include title to an underlying asset, such as securities and digital assets, and does not define the terms "information" or "record."

In the Canadian Model Act, the term "fiduciary" restricts the application of the model legislation to five kinds of fiduciary: 1) personal; 2) representatives; 3) guardians; 4) attorneys appointed under a power of attorney for property; and 5) trustees appointed to hold a digital asset in trust. Additionally, Section 3 of the legislation states that a fiduciary's right of access is subject to the terms of the instrument appointing the fiduciary, being the power of attorney for property, last Will and Testament, or court order. The Canadian Model Act provides a more robust right of access to fiduciaries to administer the disposition of digital assets.

## 2. Inventory your digital assets

As the Canadian Model Act definition suggests, digital assets can include:

- Documents (i.e., Microsoft Word, Adobe PDFs, Excel spreadsheets);
- Social Internet sites (i.e., Facebook, Instagram, LinkedIn);
- Intellectual property rights;
- Gaming avatars;
- Online user accounts (i.e., PayPal, online banking);
- Business information (i.e., online inventory, client records);
- Digital currency (i.e., Bitcoin); and
- Artistic content (i.e., photographs and selfies) with monetary or emotional value.

Unless you list all of your digital possessions in your Will, the person who will ultimately be in charge of the administration will not know about them, they may never be found, or worse they may be found by the "wrong people." That is why organizing and keeping an updated inventory of your digital presence is important.

The online storage of sensitive information raises the need for specific powers of trustee for accessing and appropriating, and there may be limitations imposed by the “Service Agreements” of each unique provider (i.e., Apple, Google, Steam); that is, the ones we sign and never read. Also consider security updates and the potential for an A.I.-driven lock mechanism that may get triggered after prolonged non-use, for example.

It is important to not only know the extent of what we own in a digitized format but also how to access that information. To help you capture important information about your digital assets for your executor and your legal professional, ask your BMO financial professional for a copy of our publication, *Estate Information Organizer*.

### 3. Consider a digital executor

Once you understand the extent of your digital assets arsenal and have created a plan for tracking, updating and securing them, you need to select and then formally appoint a person who will administer your digital estate. This should be a trusted person who can take charge of dealing with these assets after your death.

Often, we pick our spouses, family members or close friends to be our power of attorney(s) and/or executor. While they may be very capable of dealing with paying taxes or selling property, they may not have the experience or knowledge to handle the intangible assets. In this case, it is prudent for the Will or the power of attorney appointment to have a representative for the more “classic” estate tasks and a digital advisor/executor specifically named to take care of the virtual assets. Alternatively, one may appoint a professional with the experience required to deal with the entire estate.

Diligence in this respect is a critical investment in the successful administration of the final estate and protection against the risk of identity theft, breach of privacy and loss of value in assets due to a delay in their safeguarding and valuation. The wrong decision may raise the overall financial, human and reputational costs of the estate administration.

In the choice of trustee, trust and subject matter expertise are the new desirable guiding principles, and you may want to consider a corporate executor, such as BMO Trust. For more information, ask your BMO financial professional for the publication, *Top 10 Reasons to Consider a Corporate Executor*.

### 4. Engage a legal professional to prepare your plan

After choosing the “right” digital advisor, you should design and execute a comprehensive “during-life and after estate plan” in conjunction with a legal professional. Estate lawyers specializing in digital assets can help select the right clauses and powers for digital assets, and highlight potential pitfalls, issues and alternatives. They will also be instrumental in framing the proper controls and directions to be formalized in the final documents. The documentation for inter-vivos or testamentary trust administration should be drafted with specific language that will ensure the appointed representative is granted the necessary powers to deal with your digital assets.

#### Seek professional advice

Choosing the right estate planners and legal professionals is very important in ultimately making sense of all the steps outlined and preparing final robust and well drafted documentation that will ensure the efficient and effective administration of an entire estate. No one will ever criticize a testator for doing due diligence, picking the right trustees and legal professionals to set up the proper legal documentation to deal with your complete estate, including our digital assets.

**For more information, speak with your BMO financial professional.**



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