

# Why digital legacy planning should now be part of every estate plan

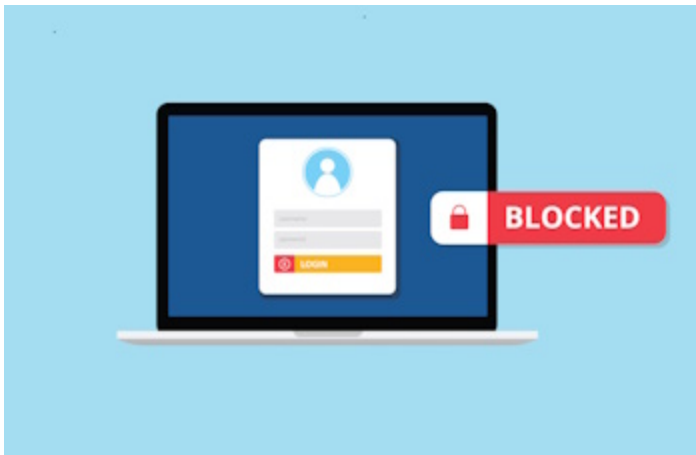
By **Daniel Nelson**

Law360 Canada (November 18, 2024, 12:39 PM EST) -- We've all seen the Facebook profiles of departed friends that appear on our timelines, floating by like digital zombies. Although social media platforms like Facebook have introduced procedures such as memorialization and legacy contact to manage the accounts of deceased or incapacitated users, many remain in cyber-limbo due to a lack of a proactive digital legacy plan, as any estate planning lawyer will tell you.

There is no question that everyone's "digital legacy" — all the online accounts we have ever opened — will be a major headache for executors. We leave behind a trail of digital exhaust that our executors will have to deal with.



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A developing area of law, digital legacy planning is growing fast, partly because the associated technology is constantly updating and urban legends rather than facts prevail on matters involving how to recover a loved one's online assets after death — if it's been thought about at all. For instance, the belief that cryptocurrency accounts are impenetrable without the private key is being challenged by emerging digital inheritance platforms and blockchain solutions designed to recover these funds.

Ok, but just *try* accessing a decedent's iPhone without the passcode, Apple ID credentials or a court order.

Well, how many of us realize we should designate a legacy contact and include digital asset details in our estate plans while we're alive, so our executors can access the device when we're gone?

In Canada, the *Uniform Access to Digital Assets by Fiduciaries Act* (UFADAA) provides fiduciaries with the authority to access the digital assets of deceased or incapacitated individuals. Despite this, only four jurisdictions have enacted legislation based on UFADAA, and Ontario has yet to follow suit. Legislative gaps remain, and the evolving nature of digital assets necessitates ongoing legal

discussions and updates.

One significant development is Bill C-27 (*Digital Charter Implementation Act*), an Act to enact the *Consumer Privacy Protection Act*, the *Personal Information and Data Protection Tribunal Act* and the *Artificial Intelligence and Data Act*. Introduced in 2022 and receiving second reading in 2023, Bill C-27 is still winding its way through the process, to the frustration of many estate planning lawyers.

Why is this so important? Canadians are shifting so many aspects of their lives online that the concept of legacy now encompasses more than just physical holdings and personal mementos. Every year, computers, video gaming and Internet usage penetrate deeper into the lives of Canadians and by default what they leave behind:

- **Internet usage:** Approximately 94.3 per cent of Canadians use the Internet.
- **Daily Internet use:** Over 50 per cent of Canadians spend more than five hours online each day.
- **Social media:** One in seven Canadian social media users are on them daily.
- **Facebook usage:** Canadians are among the most active on Facebook with 29.44 million users or 77 per cent of the population; users are predicted to hit 35 million by 2027. The Messenger app is used by 62 per cent.
- **Banking:** More than three in four Canadians (78 per cent) use the Internet for general online banking, and one in six (16 per cent) manage investments on the net, such as stocks, mutual funds and cryptocurrencies.
- **Instagram usage:** Instagram usage is at 50.5 per cent of the population.
- **Toxicity:** 40 per cent of Canadians consider Facebook the most toxic social media platform.

Meanwhile, during this turbulent time of change, every estate planning lawyer should be encouraging clients to ensure their estate plan not only includes a digital legacy clause, but an annual check-up should be performed to keep it current.

With all this comes a new language that often people use interchangeably — wrongly. The main ones are:

- **Digital footprint:** The trail of information and data left by online interactions, including social media posts, online shopping, emails, browsing history and cookies.
- **Digital legacy:** The electronic data, online accounts and digital assets left behind after death or incapacity.
- **Digital assets:** Falling under the legacy umbrella, digital assets are intangible personal property stored online that can be owned or controlled by an individual. Digital assets include:
  - Cryptocurrencies
  - Digital currencies
  - Online accounts (bank accounts, investment accounts)
  - Digital media (photos, videos, music)
  - Domain names
  - Subscription services (Netflix, Spotify) and,
  - Intellectual property rights (copyrights, trademarks, blogs, digital artwork, eBooks).

Every estate planning lawyer will tell you that digital assets are integral to an estate and can hold significant sentimental, financial and intellectual value, making it essential to address them in planning. They encompass:

- **Financial value:** Online gaming currencies and game achievements (secondary/resale market), intellectual property copyright in digital works like books and images, domain names, online businesses and gambling accounts.
- **Sentimental value:** Preserving the work and memories of the deceased.
- **Reputational aspects:** Managing accounts or data associated with potentially damaging content like an Ashley Madison account, pornography, child abuse or other illegal or unethical

behaviour.

Digital assets fall into two categories:

1. **Physically Controllable Digital Assets (PCDA):** Stored on physical devices like hard drives or flash drives, which are corporeal and can be possessed and owned. It's important to differentiate between the ownership of the digital asset and the storage device itself.
2. **Controlled Access Digital Assets (CADA):** Stored online and accessible through authentication processes, such as usernames and passwords. Ownership typically rests with the user and usage is governed by the service provider's terms of service.

For digital estate planning lawyers, the mission is straightforward: create a smart, seamless plan to ensure clients' digital legacies live on with their loved ones — not lost forever in purgatory.

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