



Digital Assets Clauses for Will or Trust Agreement

These Standard Clauses for use in a will or trust agreement allow a personal representative, an executor, or a trustee to access and manage digital assets, such as online accounts and electronic files. They include integrated notes with important explanations and drafting tips.



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PROVISIONS AND DRAFTING NOTES

DRAFTING NOTE

READ THIS BEFORE USING DOCUMENT

Individuals increasingly rely on online accounts and electronic devices and often own assets that exist only on the internet or are stored on an electronic device. These digital assets may include online bank accounts, internet-based business accounts, social media accounts, photographs, documents, and other digital files. Each of these assets may require a different username and password to access and manage.

When an individual becomes incapacitated or dies, digital assets may be difficult or impossible for the individual's fiduciary representative to access and manage. These Standard Clauses for a will or trust agreement are designed to enable a personal representative, an executor, or a trustee to have authority over digital assets.

Estate planning for digital assets is an evolving area of law. The effectiveness of these provisions in a will or trust agreement is untested at this time and is subject to each state's laws regarding fiduciary access to digital assets.

Some states may enact legislation to provide fiduciaries, such as personal representatives, executors, and trustees, with access to certain digital assets by default. If a client specifically does not wish to allow the fiduciary to have management authority over certain digital assets, the client's will or trust agreement should state this intent.

There are three areas in a will or trust agreement where counsel could potentially address digital assets:

- The definitions section.
- The disposition of assets section.
- The fiduciary powers section.

Counsel should always address digital assets in the definitions section and in the

section describing the fiduciary powers. However, counsel may also decide to address digital assets in the disposition of assets section.

One category of digital assets that counsel should specifically address in a will or trust agreement is the content of electronic communications. The model acts addressing digital asset management distinguish between the content of electronic communications and other digital assets (see, for example, Privacy Expectation Afterlife and Choices Act (PEAC) § 1-7 (NetChoice); Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) § 1-21 (Unif. Law Comm'n 2015)).

Because the content of electronic communications is generally the most controversial digital asset, more stringent requirements must be met before a fiduciary is granted access to the content of electronic communications. Therefore, the client's will or trust agreement should specifically address access (or denial of access) to the content of electronic communications, in addition to addressing digital assets generally. These Standard Clauses address electronic communications in the fiduciary powers section.

When including these Standard Clauses in a will or trust agreement, counsel should modify them as appropriate, considering the estate plan as a whole and the client's planning goals.

These Standard Clauses assume that capitalized terms are defined elsewhere in the will or trust agreement, as applicable.



Search [Planning for Digital Assets](#) for more on key issues that impact the creation of an estate plan that addresses digital assets, including federal and state legislation and model acts relating to digital assets.

Definitions. Digital Assets are electronic records in which [I have/a Trust created hereunder has] a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record. For purposes of this definition, “electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities, and “record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

DRAFTING NOTE

DEFINITIONS

It is important to have a strong definition of the term digital assets. There is no universally accepted definition of digital assets, and counsel should draft the definition as broadly or as restrictively as is appropriate. The definition provided in these

Standard Clauses combines definitions from RUFADAA.

In the definition, alternative language is provided in internal brackets. The first option is for use in a will. The second option is for use in a trust agreement.

[Disposition of Digital Assets.] My [Personal Representative/Executor] shall distribute my Digital Assets (as defined in [Article/Section] [NUMBER]) outright and free of trust to my issue, per stirpes.

OR

[Disposition of Digital Assets.] The Trustee shall distribute the Settlor’s Digital Assets (as defined in [Article/Section] [NUMBER]) outright and free of trust to the Settlor’s issue, per stirpes.]

DRAFTING NOTE

DISPOSITION

Many digital assets are not transferable on death, so addressing digital assets in the disposition section may not be effective for every digital asset in which the client has a right or interest. For example, some online service providers’ Terms of Service Agreements specifically prohibit postmortem transfer altogether, and some digital assets are not owned by the account holder but are instead just licenses to use them during the account holder’s life.

However, adding language to the disposition section allows a client to specify his wishes regarding the disposition of digital assets, even if these wishes may not always be followed. Depending on the type of fiduciary, the statute enacted in the client’s state, and the classification as a digital asset, catalogue, or content, the default may be disclosure or it may be non-disclosure, so it is important to

address the client’s wishes. The presence of this language in estate planning documents makes it more likely that the client’s wishes will be followed, where possible.



Search [Planning for Digital Assets](#) for more on obstacles that affect estate planning for digital assets, including limitations on postmortem transfer imposed by online service providers’ Terms of Service Agreements.

These Standard Clauses offer two options. The first option is for use in a will. The second option is for use in a trust agreement.

As an alternative to adding a separate section addressing the disposition of digital assets, as in these Standard Clauses, counsel could instead add “Digital Assets of little to no financial value” to the list of personal effects in the disposition of personal property section in a will or trust agreement.

[Personal Representative/Executor] Powers. Management Power Over Digital Assets. The [Personal Representative/Executor] has the power to [have access to the catalogue and the contents of all electronic communications (as defined in 18 U.S.C. § 2510(8)) of mine, as well as] access, utilize, manage, close, and control any and all Digital Assets (as defined in [Article/Section] [NUMBER]) in which I have a right or interest. This authorization is intended to be construed to be lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state data privacy law or criminal law.

OR

Trustee Powers. Management Power Over Digital Assets. The Trustee has the power to [have access to the catalogue and the contents of all electronic communications (as defined in 18 U.S.C. § 2510(8)) of the Settlor, as well as] access, utilize, manage, close, and control any and all Digital Assets (as defined in [Article/Section] [NUMBER]) in which a Trust created hereunder has a right or interest. This authorization is intended to be construed to be lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state data privacy law or criminal law.]

DRAFTING NOTE

MANAGEMENT POWER OVER DIGITAL ASSETS

These provisions specifically authorize a personal representative, an executor, or a trustee to manage digital assets. Counsel should modify them as necessary to reflect the level of access and control the client desires to grant.

These authorizations are intended to provide consent under the Electronic Communications Privacy Act of 1986 (ECPA) (18 U.S.C. §§ 2510-22, 2701-12, 3121-37)

and the Computer Fraud and Abuse Act of 1986 (CFAA) (18 U.S.C. § 1030). The ECPA and CFAA establish criminal penalties to be imposed on anyone who intentionally accesses computers or facilities that provide electronic communication services without authorization or who exceeds authorized access.

These Standard Clauses offer two options. The first option is for use in a will. The second option is for use in a trust agreement.



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