

A Digital Afterlife? Estate Planning for Your Digital Assets

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Estate & Succession Planning for the
Family Farm - 2018
Indiana Agricultural Law Foundation

Lisa M. Adler



Digital Lives

Technology Is a Part of American Lives!

- 89% of Americans use the internet
- 99% of Americans age 18 to 34 use the internet.
- 77% of Americans go online on a daily basis (up from 73% in 2015)
- 26% go online “almost constantly” (up from 21% in 2015)

Source: Pew Research Center, March 14, 2018.

Digital Lives

- 43% of Americans go online several times a day
- Younger generation: 39% of 18- to 29-year-olds now go online “almost constantly” and 49% go online multiple times per day.
- But, 11% of Americans do not use the internet at all

Source: Pew Research Center, March 14, 2018.

Digital Lives

Computer Ownership

- Almost 75% of Americans own a computer (down from a high of 80% in 2012)
- About 50% of Americans own a tablet
- 1/5th of Americans own an e-reader device

Source: Pew Research Center, February 5, 2018.

Digital Lives

Cell Phone Ownership

- 95% of Americans own a cell phone
- 77% of Americans own a smartphone (up from 35% in 2011)
- Smartphones are the growing primary means of internet access, with 1/5th of Americans relying solely on smartphones for internet access

Source: Pew Research Center, February 5, 2018.

Digital Lives

Social Media Use

- As of 2018, more than two-thirds of U.S. adults report they are Facebook users, with three-quarters of those users logging onto Facebook at least daily.
- 78% of 18- to 24-year-olds use Snapchat, and 71% of those users visit it multiple times per day.

Source: Pew Research Center, March 1, 2018.

Digital Lives

Social Media, cont.

- 71% of 18- to 24-year-olds use Instagram and close to half (45%) are Twitter users.
- 41% of U.S. women use Pinterest (16% of men).
- LinkedIn remains popular with college graduates and high-income households. 50% of Americans with a college degree use LinkedIn.

Source: Pew Research Center, March 1, 2018.

Digital Farming

Estimate that “70% of growers are using some kind of digital, or ‘precision,’ agriculture tools.”

Source: CNNTech, “Hacking The Farm: How Farmers Use 'Digital Agriculture' To Grow More Crops,” August 3, 2016.

Digital Farming

- 70–80% of the new farm equipment sold today has an precision agriculture component
- In 2015, \$661 million were invested in precision ag companies, increasing 140% from 2014 (\$276 million)

Source: Bayer, Digital Farming Facts & Figures, September 2016

Digital Farming

Predicted growth in:

- Government support of precision farming
- Cloud-based software
- GPS innovations
- Drones expected to have “enormous growth” for use in monitoring irrigation systems
- Soil monitoring

Source: Grand View Research, Inc., Precision Farming Market Worth \$10.23 Billion By 2025 | CAGR: 14.2%, July 2017

Digital Farming

“Digital data will be getting collected at a rate of 40 zettabytes (ZB—the equivalent of 40 trillion gigabytes, or GB) per year by 2020.”

Source: Harold Van Es & Joshua Woodard, “Innovation in Agriculture and Food Systems in the Digital Age,” The Global Innovation Index 2017

We Value our Digital Assets

Survey: \$55,000 worth of assets stored on our devices:

- Personal Memories: photos and videos
- Entertainment: music, video games, movies, tv, ebooks
- Personal Records
- Personal Communications
- Hobbies & Projects
- Career information.

Source: McAfee Digital Assets Survey, May 14, 2013.

Irreplaceable

55% of Americans store digital assets on devices that would be impossible to recreate, re-download or re-purchase

Source: McAfee, How Do Your Digital Assets Compare?, May 14, 2013.

Digital Lives

Contrast this with how we held our assets only a couple decades ago

- “Hard copy,” tangible form
- Photos developed, stored in photo books
- Music on tapes or CDs; video game cartridges; dvds
- Physical files stored in filing cabinets

“Traditional” Estate Planning

- Focused on transfer of:
 - Tangible personal property
 - items you can feel and touch
 - Real Estate
 - Household goods, collectables, automobiles, farm equipment
 - Intangible personal property
 - Bank accounts, investments, retirement accounts
 - Securities, financial products, life insurance
 - Business entities and business assets

“Traditional” Estate Planning

- Decision makers (“fiduciaries”) appointed to make decisions regarding tangible and intangible assets
 - Personal Representative / Executor
 - Trustee
 - Guardian
 - Attorney-in-Fact

“Traditional” Estate Planning

- Fiduciary given powers under the law and under legal documents to access, transfer, manage, and use assets of the principal or beneficiary.
- But, how does a fiduciary access, utilize, transfer, and manage a digital asset?
- And does the fiduciary have legal authority to do so?

Challenges for Fiduciaries

- How do we know the asset exists?
- Locked behind a password.
- Federal and state laws make it a crime to access someone else’s account. Protecting us against digital crime.
- Click-through end user agreements – Default to Privacy.
- Until recently, we had little guidance or authority under the law.

Indiana's Adoption of RUFADAA

- Indiana adopted the Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA"), effective **July 1, 2016**
- New Article 39 of Title 32: IC 32-39

What Are Digital Assets?

"Digital asset" means an electronic record in which an individual 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. IC 32-39-1-10

What Are Digital Assets?

Digital “Account” means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user. IC 32-39-1-2

What Are Digital Assets?

“Terms-Of-Service Agreement” (“TOSA”) means an agreement that controls the relationship between a user and a custodian. IC 32-39-1-25.

- TOSAs govern and control your account and access and use of data stored there.
- Often “click through,” with no review or consideration by user

What Are Digital Assets?

“Custodian” means a person that carries, maintains, processes, receives, or stores a digital asset of a user. IC 32-39-1-8.

“User” means a person that has an account with a custodian. IC 32-39-1-27.

What Are Digital Assets?

“Person” means:

- (1) an individual;
- (2) an estate;
- (3) a business or nonprofit entity;
- (4) a public corporation;
- (5) a government or subdivision, agency, or instrumentality of a government; or
- (6) another legal entity.

IC 32-39-1-18.

What Are Digital Assets?

Popular Accounts:

- Email – gmail, outlook, hotmail, yahoo, etc.
- Social Media: Facebook, Instagram, Twitter, Pinterest, etc.
- Photos: Snapfish, Shutterfly, Google Photos
- Video: YouTube, Vimeo
- Shopping/Businesses: Amazon, Ebay, Etsy
- Data storage: Dropbox, Google Drive, iCloud
- Word Processing: Microsoft 365, Google docs

What Are Digital Assets?

- Physical Equipment: smartphones , computers, tablets, e-books.
- Physical equipment is commonly locked behind passwords subject to TOSAs

What Are Digital Assets?

- Bank Accounts
- Bitcoin
- Domain Names
 - Can be transferred
 - Usually leased; take steps to make sure lease does not lapse
- Webpages and Blogs

What Are Digital Assets?

Farming Digital Data:

More than 81% of surveyed farmers believe they retain ownership of their farm data

Source: American Farm Bureau, "American Farm Bureau Survey Shows Big Data Use Increasing, Big Questions Remain," October 21, 2014.

History of UFADAA

- In 2014, Uniform Law Commission passed the Uniform Fiduciary Access to Digital Assets Act (“UFADAA”)
- Provided broad power to fiduciaries to access digital assets.
- Similar to the power a fiduciary has with other (non-digital) assets.

History of UFADAA

- Required the custodian (the information service provider) of the account to grant access to the fiduciary.
- Default presumption was that fiduciary should be given access to all of the principal’s digital assets unless contrary to decedent’s expressed intent or other applicable law.

History of UFADAA

- Immediately criticized and attacked by the tech industry and privacy groups.
- Argument that digital assets are different than physical records.
- Concern that because online accounts are accessed privately and with passwords, users intend the information to remain private, even upon incapacity or after death.

History of UFADAA

- Industry surveys showed that 70% of Americans want their online accounts to remain private after death. NetChoice Survey, 2015.
- Concerns raised about the privacy of third parties whose communications would be disclosed by granting access
- In response, tech industry proposed its own act, which defaults to protect privacy after death.

History of UFADAA

- Although considered by many state legislatures, after the tech industry/privacy group attack, UFADAA only adopted by one state (Delaware).
- The Uniform Law Commission worked with the tech industry input and drafted a revised uniform law in 2015, RUFADAA.

Key Components of RUFADAA

- Applies to four fiduciaries: Attorney-in-Fact, Personal Representatives, Guardians, and Trustees. IC 32-39-1-1 & -12.
- Default rule is **privacy** of the **content** of a digital account, rather than access to content, **unless the user consents**.
- Fiduciaries, by default, have access to a **catalogue** of electronic communications
- Incorporates the use of “**online tools**”

Fiduciary's Access to Digital Assets

Three Levels of Priority:

1. Online Tools offered by a custodian. IC 32-39-2-1(a).

A direction made via an online tool overrides a contrary direction made by will, trust, power of attorney or other record.

Fiduciary's Access to Digital Assets

"online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person. IC 32-39-1-17.

Fiduciary's Access to Digital Assets

2. User's written direction in a will, trust, power of attorney, or other record. IC 32-39-2-1(b).

May **allow or prohibit disclosure** of some or all of the user's digital assets, "including the **content** of electronic communications sent or received by the user."

Fiduciary's Access to Digital Assets

3. Terms of service or other applicable law controls, including the access provisions of RUFADAA.
- Catalogue of Electronic Communications
 - Court order for Personal Representative to gain access
 - Other situations

Impact on TOSAs

The user's direction via an online tool or a provision in a will, trust, power of attorney, or other record:

“**overrides** a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.” IC 32-39-2-1(c).

Impact on TOSAs

In contrast, however, if the user did not use an online tool or provision in a written document,

“A fiduciary's access to a user's digital assets may be modified or eliminated:

- (1) by the user;
- (2) by federal law; or
- (3) by a terms-of-service agreement.”

IC 32-39-2-2(c).

Disclosure of Catalogue of Electronic Communications

Even without use of an online tool or written direction, unless the user prohibited disclosure or a court directs otherwise, a custodian shall disclose “a **catalogue of electronic communications** sent or received by the user and digital assets, other than the content of electronic communications...”

Disclosure of Catalogue of Electronic Communications

IC 32-39-1-10: “**Catalogue of electronic communications**” means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

Estate Planning with Digital Assets

1. Utilize “online tool” if available (See handout)
Not all providers allow such options and some are very strict
2. Have your attorney draft language into Wills, Trusts, and Power of Attorney documents
3. Do you want your fiduciary to access **content**?

Estate Planning with Digital Assets

How much authority and access to grant your fiduciary?

- (1) Gain access to any computer, storage device, network, communications device, or other computing machinery.

Estate Planning with Digital Assets

- (2) Gain access to any user account.
- (3) Access, retrieve, copy, or store:
 - (A) the **content** of an electronic communication
 - (B) a catalogue of electronic communications
 - (C) any other digital asset

Estate Planning with Digital Assets

- (4) Perform any act in connection with the preparation, execution, filing, storage, or other use of electronic records, reports, and statements

Estate Planning with Digital Assets

But:

1. How does your fiduciary know your digital assets exist?
2. How does your fiduciary find them and access them?
3. Will the custodian (ie., Google, Apple) give timely access?

Estate Planning with Digital Assets

Record of Digital Assets – Hard Copy?

- Make records of your digital accounts/assets and how to access them?
- Prof. Gerry W. Beyer's Digital Estate Information Sheet (see handout)

Estate Planning with Digital Assets

Record of Digital Assets – Hard Copy?

- Where to store this record?
- How to keep current?
- How to record on paper the sheer volume of our digital lives?

Estate Planning with Digital Assets

Online Record of Digital Assets

- Digital Gatekeeper / Online Afterlife System
- Password Managers, for example:
 - [LastPass.com](https://www.lastpass.com)
 - [Dashlane.com](https://www.dashlane.com)

Estate Planning with Digital Assets

Online Record of Digital Assets

- How to evaluate the security and reliability of these programs?
- Will it go defunct?
- Is this a legal way to allow access to your accounts?

Estate Planning with Digital Assets

Future of Passwords?

- Passwords obsolete?
- Fingerprint and facial recognition
- Other bio-indicators
- Google's Future-Lab: multi-sensor

How does a fiduciary access digital assets accessed with bio-indicators?

Online Tool: Google

- User can designate an Inactive Account Manager (“IAM”)
 - <https://www.google.com/settings/account/inactive>
- IAM gets access to the account, but cannot edit it or act as if it is his/her account.
- User can also set a default for account to be deleted after a certain period of time
- If no user settings in place, Executor can contact Google directly to gain access

Online Tool: Facebook

- Memorialized Account
 - Option to select, under account settings, to opt for upon death either a memorialized account or to have your account permanently deleted.

Online Tool: Facebook

- Legacy Contact
 - Designate someone to manage your memorialized account
 - Facebook Settings” choose Security, and then select Legacy Contact at the bottom of the page.
 - User can authorize this person for authority to download archive of FB photos, posts, and profile information

No Online Tool: Apple

- No options to pre-designate or pre-authorize
- Apple is strict on privacy
- Case-by-case basis. Apple’s customer support number: 1-800-275-2273
- Headline stories
- Apple says virtually impossible to hack an iphone

No Online Tool: Twitter

- No access by anyone else
- Twitter will work with fiduciary to shut down the account after death

No Online Tool: Instagram

- Memorial Accounts available upon request after death

No Online Tool: Yahoo

- Strict policies
- No access by anyone else; Non-transferable
- Fiduciary can request that the account be closed

No Online Tool: Photo Accounts

- Flickr: part of Yahoo, so non-transferable
- Shutterfly: access upon Court order
- YouTube: owned by Google and subject to same policies described above
- Vimeo: allows fiduciary to deactivate or transfer the account. Death or incapacity

No Online Tool: Ebooks, Music

- End User License Agreements (EULA) control
- Most EULAs provide the user does not “own” the book/song but are leasing it.
- Non-transferrable
- GooglePlay is not part of its IAM
- What if fiduciary or heir gains access and uses the content?
- Digital Trusts

Trust & Estate Litigation

- Communication Failures!
- Unresolved past hurts
 - “Mom loved you best”
 - Sights – known and discussed, or not
- Disparities between siblings
 - Income
 - Education
 - Power or reliance upon one sibling over another
 - One involved in family business/farm, other not

Trust & Estate Litigation

- Lack of transparency
- Stress of caregiving
- Blended families
- Geographical separation
- Failure to keep good records and account
- Failing to understand and appreciate fiduciary responsibilities
- Communication Failure!

Tips for Avoiding Conflict

1. Retain and regularly consult with legal counsel!
2. Communication!
3. Identify and anticipate conflict and seek professional help to plan for it
4. Understand your fiduciary duties and responsibilities

Tips for Avoiding Conflict

5. Maintain records and accountings – everything in writing!
6. Consider alternatives
 - Corporate fiduciary
 - Find a less controversial solution

Tips for Avoiding Conflict

7. Obtain informed consents (ideally with all parties represented by counsel)
8. Through legal counsel, obtain Court instruction

Questions?