



ALT CTRL DELETE:

Protecting Your Digital Legacy

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Mr. Parthemer is a Managing Director and Senior Fiduciary Counsel for Bessemer Trust, responsible for working with clients and their advisors to develop practical and efficient wealth transfer plans and for guiding the firm on fiduciary issues. He joined Bessemer, an exclusive wealth management firm, in 2004 after private law practice in Pennsylvania and Florida, most recently as a Trust and Estate partner with Duane Morris LLP. He also spent several years at PricewaterhouseCoopers and was involved in private businesses.

Mr. Parthemer is a nationally recognized speaker and frequently published author. He is an ACTEC Fellow, and is in leadership of the Real Property Trust and Estate Section of the American Bar Association, the Florida Bankers Association (Board Member; Past Chair Legislation Committee) and the Florida and Pennsylvania Bar Associations. He is an Associate Editor and Columnist for the Journal of Financial Service Professionals, member of Synergy Summit (Past President), the Palm Beach County Estate Planning Council (Board Member), and the Palm Beach Tax Institute. He was awarded the 2014 Article of the Year from the American Bar Association's Probate & Property magazine and named the Florida Bankers Association 2015-2016 Banker of the Year.

He frequently is faculty for the University of Miami's prestigious Heckerling Institute, was an Adjunct Professor, Widener University School of Law, and guest lectures at the Dickinson School of Law and the University of Miami School of Law's LLM program. He has been quoted in the Wall Street Journal, Barron's, NY Times and MONEY Magazine, and has been honored by Best Lawyers in America with their Lifetime Achievement Award.

He earned a J.D. from The Dickinson School of Law, B.A. and B.S. degrees in philosophy and government from Franklin and Marshall College, conferred status of an Accredited Estate Planner, and completed MBA Phase I curriculum.

Goals for Today:

1

Section 1:

Define & Educate

What are Digital Assets

2

Section 2:

Update on the Law

Uniform Fiduciary Access to Digital Assets Act, Revised

3

Section 3:

Digital Asset Estate Planning

What Can & Should Be Done

Digital Asset Factoids



3.4 Billion users of the Internet; up 700% since 2000.

Various Uses - Financial, Social, Work, Leisure, Creative.

- Social media absorbs more than 25% of all time spent online.
- More than 39% of Americans receive PAPERLESS credit card & bank statements.



Presently, Every 60 Seconds...

- 168,000,000 emails are sent/received.
- 695,000 Facebook accounts are updated/posted.
- 600 digital videos are added to YouTube.
- 320 new Twitter accounts are created.
- 100 new people join LinkedIn.
- 6,600 photos are uploaded to Flickr.

Seniors are Online!

- More than 50% are online (email and/or social media).
- 45% of seniors online aged 70-75.
- 76+ is growing the fastest.



**92% of children
under the age
of 2 have a
digital presence!**



We clearly live in a Digital Age -
and that's not changing.



1

What are Digital Assets?

What are Digital Assets?

Digital Assets:

Information created, generated, sent, communicated, received or stored by electronic means on a system for the delivery of digital information or on a digital device.

Think Any Electronic Record

Digital Assets Examples

- **Emails**
- **Social Media Accounts** – Facebook, Twitter, LinkedIn, Instagram, MySpace
- **Documents, PDFs, Spreadsheets, Contacts, Calendars** - Office
- **Online Banking/Brokerage/Investment Accounts** – Paypal
- **Online Stores/Shopping Accounts** – Amazon, eBay
- **Digital Photos and Videos** – Flickr, YouTube, Vine
- **Online Video Games** – Game of War, Minecraft
- **Websites & Domain Names** – GoDaddy
- **Music Library** – iTunes, Pandora
- **Streaming Movie Services** – Netflix
- **Cloud Storage**
- **Blogs & Online Publishing**
- **Electronic Medical Records**
- **E-Books** – Kindle, iBooks

Barrier to access: Most require passwords.



Where are Digital Assets Found?

Simple Terms: Any device that stores electronic information.

- **Home Computer/Laptop**
- **Smart Phones**
- **I-Pads/Tablets**
- **I-Pods and MP3 Players**
- **E-Reader - Kindle, Nook, eBooks**
- **USB Flash Drives**
- **External Hard drives**
- **Digital Cameras**
- **Items stored in the “cloud” - Dropbox, iCloud**
- **CDs and DVDs**



Two Important Terms Relating to Digital Assets

Custodian:

A type of organization that stores digital assets on their servers.

Terms of Service Agreement (TOSA):

- Rules which one must agree to abide by in order to use a service.
- Legally binding agreement used by Custodians.



Terms of Service Agreements (“TOSA”)

- **Consumer must accept or decline – non-negotiable.**
- **Very one sided/self serving.**
- **Dictate who has authority to access account and/or close it.**
- **Set forth the company’s privacy policies.**
- **Impose limitations on liability and indemnification.**
- **Impose jurisdictions if disputes arise.**
- **Some allow the provider to may make unilateral changes to the TOSA without notification to the user.**

- Click-through policies are generally enforceable**
 - I just agreed to what?**

Agree

Whatever

TOSA Govern & May Inhibit Access to Fiduciaries

Twitter: “In the event of the death of a Twitter user, we can work with a person authorized to act on the behalf of the estate or with a verified immediate family member of the deceased to have an account deactivated.”



Instagram: “In the event of the death of an Instagram User, please contact us. We will usually conduct our communication via email; should we require any other information, we will contact you at the email address you have provided in your request.”



iTunes: Silent about fiduciaries. Fiduciary should get account holder’s Apple ID to access account. Cannot merge accounts.



Many web-service providers prohibit you from allowing anyone else access.

FACEBOOK'S TOSA

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a blue square background.

- ❑ Safety: You will not solicit login information or access an account belonging to someone else.
- ❑ Registration and Account Security: You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account.
- ❑ You will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission.

Federal Laws

Computer Fraud and Abuse Act (“CFAA”)

Federal CFAA* – 18 U.S.C. § 1030(a)(2)(C), enacted in 1986 to criminalize internet crime. Basically, the anti-hacking law.

This law makes **unauthorized access** to any computer, any online service or account a crime.



***Florida CFAA** – §§815.01 to 815.07 Computer-Related Crimes.

Computer Fraud and Abuse Acts (TOSA violations)

**Even with an account holder's authorization,
a potential crime exists under the CFAA.**

Example – most social media TOSAs prohibit anyone besides the account holder access to an account.

- Access to another's online account requires accessing the custodian's computers, which requires the custodian's (*i.e.*, owner of that computer or system) further authorization. It's not enough to have the account holder's authorization.
- Thus, if a 3rd party (including a fiduciary) uses the account holder's password such action would have "exceeded authorized access" under the TOSA. By violating the TOSA, the 3rd party has in turn violated the CFAA.

Computer Fraud and Abuse Acts (TOSA violations)

Federal prosecutors have used the CFAA to prosecute defendants *based solely on violations of a TOSA.*

- Aaron Schwartz – impermissibly downloaded 4.8 million academic articles from the JSTOR (Journal Storage) *digital* library system.



- Lori Drew created a fake “MySpace” profile (in violation of MySpace’s TOSA) to bully 16 year old Missouri teenager Megan Meier.



Federal Privacy Laws

Fourth Amendment:

- Strong expectation of privacy in homes.
- Prevents government from searching homes.

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause....”



Federal Privacy Laws

Do you have an expectation of privacy when using your computer network at home?

- Computer networks are not protected by the Fourth Amendment.
- They are not physically located or being accessed within computers or in homes.

To fill that gap, Congress enacted the **Stored Communications Act (“SCA”)** in 1986.



Federal Privacy Laws

Stored Communications Act (“SCA”)

18 U.S.C., §2701 – 2712, enacted in 1986, creates a RIGHT TO PRIVACY for data and information stored online by custodians.

- Prohibits public custodians from voluntarily disclosing the **content** of electronic communications to third parties unless an exception applies under §2702(b).
- Severe penalties for wrongful disclosure.
- Exceptions:
 1. Several for law enforcement.
 2. §2702(b) allows a custodian to voluntarily disclose if there is lawful consent.
 3. Sahar Daftary Estate vs. Facebook.



SCA Exception to Non-Disclosure Rules



Private Custodians Not Subject to SCA

- Private custodian is one who only provides electronic communication to a specific people, like employees or students, and not the general public.
- SCA does not prohibit fiduciary access & custodians cannot use the SCA as a shield against a fiduciary's request for communications or access.

Stored Communications Act (TOSA violations)



Civil Action under the SCA:

- A federal jury in Massachusetts awarded plaintiff \$450,000 for a violation of the SCA, despite very scarce testimony to support the damage claim.
- The defendant was given plaintiff's email password to read consultation reports when the two parties practiced medicine together.
- When the defendant left the practice and a business dispute arose, she used the plaintiff's unchanged password to access the account.
- The plaintiff successfully sued under an unauthorized access theory.

Obstacles to Discharging Fiduciary Responsibility

Fiduciaries risk civil liability if they refuse to manage the decedent's digital assets
or
criminal (or at least civil) liability if they perform their duties!



Revised Uniform Fiduciary Access to Digital Assets Act designed to vest fiduciaries with the authority to access and manage digital assets.



Update on the Law

2

Status of Federal/State Laws

Advancing the Cause

Uniform Fiduciary Access to Digital Assets Act (“**UFADAA**”)

“UFADAA does not break new legal ground; it simply applies the tried and true laws governing fiduciaries to the digital assets that are widely used today.” – ULC’s statement.

Original UFADAA

- Approved by the ULC on July 16, 2014.
- As model legislation, enacted by State not Federal legislatures.
- Delaware was the ninth state to enact such laws, but the first state law **based** on UFADAA.
- 27 states introduced the final version of UFADAA in their legislative process for 2015, including Florida. (Epic for a Uniform Act because most have 5-6 introductions in the first year.)
- Strong opposition from Custodians.
- Failed to pass in any of the 27 states.

Revised UFADAA – “RUFADAA”

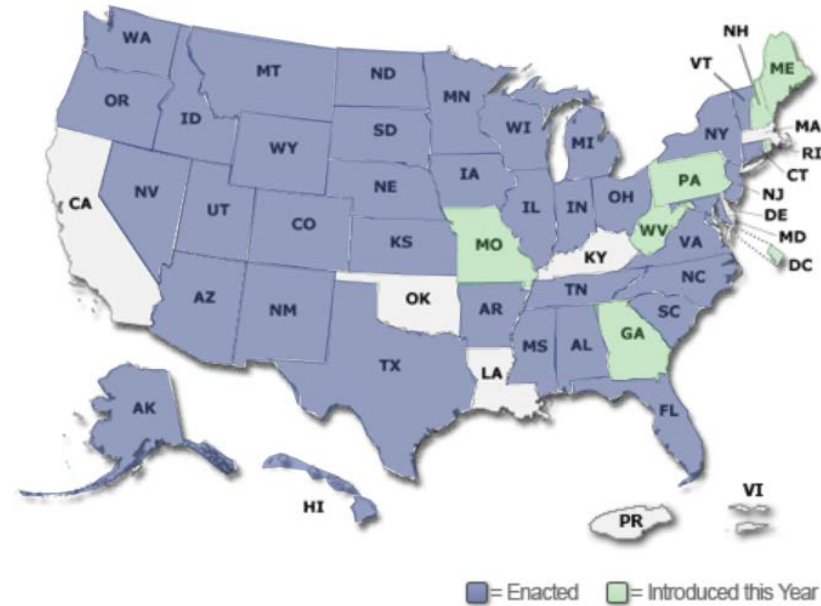
- The ULC “went back to the drawing board” and drafted the Revised Uniform Fiduciary Access to Digital Assets Act.
- Released September 28, 2015.
- Complete re-write – “opt-out” to “opt-in”.
- The Revised Act received support from the Custodians.
- Florida was the first to pass (second to enact) RUFADAA, effective July 1, 2016 (F.S. 740.001-09)*.



“When I can no longer access my assets, I need my fiduciary to be able to; otherwise, commerce stops.” – Florida Senator Dorothy Hukill.

RUFADDA Enacted in 20 States

- Alabama
- Alaska
- Arizona
- Arkansas
- Colorado
- Connecticut
- Florida
- Hawaii
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas
- Maryland
- Michigan
- Minnesota
- Montana
- Nebraska
- Nevada
- New Jersey
- New Mexico
- New York
- North Carolina
- North Dakota
- Ohio
- Oregon
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virginia
- Washington
- Wisconsin
- Wyoming



Introduced:

DC, Georgia, Maine, Missouri, New Hampshire, Pennsylvania, Rhode Island, and West Virginia.

9 Key Points

1. *Catalogue v. Content*

Catalogue is information that identifies: (i) each user who has had communication, (ii) the time and date of communication and (iii) the address. Think outside of an envelope.

Content is defined as the substance or meaning of the communication. Think inside the envelope.

Access to Content v. Catalogue – Can usually receive the catalogue without prior consent. For content: must receive express prior consent from the user to the fiduciary.

9 Key Points

2. *Online Tool Concept*

- Authorizes a custodian to offer an online tool, i.e., an electronic service for disclosure to a third party.
- The online tool is distinct and separate from the Custodian's TOSA.
- Supersedes an estate plan and the custodian's TOSA.
- User must be able to revoke designation.

9 Key Points

3. *Presumptive v. Possible Access – Fiduciaries Access Limited by creating an “Opt In” Structure*

- Greater emphasis on explicit direction provided in the estate plan with respect to digital assets.
- UFADAA attempted to vest fiduciaries with presumptive access to digital assets. Revised UFADAA in contrast provides that users may consent to disclose **content** to a fiduciary either by an online tool or record (will, power of attorney or trust), which overrides a TOSA’s prohibition against disclosure.

Without express consent, TOSA’s prohibition will control!!

9 Key Points

4. *Disclosure*

- Revised UFADAA gives the Custodian 3 options for disclosure:
 - (1) Grant the fiduciary full access.
 - (2) Grant partial access to the account sufficient enough to perform the tasks necessary to discharge duties.
 - (3) Provide a “data dump” of the information and assets in the users’ account.
- Custodians can charge a reasonable fee for disclosure.
- Custodians do not need to disclose assets deleted by the user.

9 Key Points

5. Court Orders

- Revised UFADAA arguably allows a Custodian to require a court order at its discretion.

9 Key Points

6. Protection for the Custodians

RUFADAA provides immunity to the Custodians for an act or omission done in good faith compliance with the Act.

9 Key Points

7. Employee Context

- RUFADAA does not apply to digital asset of an employer used by an employee in the ordinary course of employer's business.
- Similarly, the SCA does not prohibit such private custodian (*e.g., the employer*) from disclosing information. The SCA does not protect an employee's electronic communications at work.

9 Key Points

8. *Custodian's Compliance*

How long does a Custodian of a digital asset have time to comply?

60 days - If custodian fails to comply with request, fiduciary may apply to the court for an order directing compliance.



9 Key Points

9. *Certificate of Trust*

- Used to certify the existence of the Trust and the trustee's authority to act under the terms of the Trust.
- Can be used to avoid revealing entirety of Trust (736 F.S. §1017).
- We hereby Certify that this is a True and Correct Copy. Ward, Damon, Posner, Peterson & Bleau, P.L. By: Sasha A. Klein, Esq.



RUFADAA

- Extends the **authority of fiduciaries** to access and possess digital assets and information.
- Provides a **working definition** of digital assets.
- Does not impact the **underlying contractual relations** between the account holder and custodian.

POLICY: Allow fiduciaries to perform the obligation of identifying, marshaling and protecting the digital assets and information of a decedent, incapacitated person, ward, or trust beneficiary with greater efficiency, lower costs & no court involvement.



YAHOO!

“While we deeply sympathize with any grieving family, **protecting the privacy of our users remains our priority.** Yahoo is committed to ensuring that the activities of every person who signs up for an account is confidential, even after their death.” Yahoo further stated that a user who is worried that family members might need access to pertinent passwords to financial accounts or other important information should **“plan for this as part of their estate-planning process.”**





Digital Assets Estate Planning & Administration

3

What Can Be Done?

Digital Assets Estate Planning

3 Key Actions

1. Identify & Inventory.
2. Define The Rules & Instructions During Life.
3. Define Fiduciary Access After Death.



Identify & Inventory

Digital Assets for Estate Planning Purposes

Intangible Personal Property - Any non-physical item stored on a computer, phone, tablet, USB drive, online, etc.

Must It Remain Intangible? Once printed, it becomes tangible personal property.



Estate Planning

OWNERSHIP

- Created by Individuals:
 - Individuals own the content of emails and pictures posted online.

vs.

- Purchased by Individuals
 - Individuals obtain a license for music from a provider to access the music system or individual music file for their individual use.

Estate Planning

Sample Popular Accounts

Gmail - Provides instructions for gaining access to user accounts and can provide access for authorized Fiduciary (Inactive Account Manager).

Hotmail - Will provide copies of any emails in user accounts, provide contact lists and close account.

Yahoo! - Upon receipt of death certificate, delete all content and remove account.

Facebook - Has set up a specific procedure to memorialize an account, close account upon formal request from next of kin, or Legacy Contact.

Estate Planning

Sample Popular Accounts

LinkedIn - After receiving verification of death, will close account.

Twitter - Upon request from next of kin, will provide copy of tweets and close account.

YouTube - Allows the PR to access user's account.

PayPal - Allows PR to close account and will distribute any remaining funds via check.

iTunes - No manner to transfer iTunes music files as user only has a license to the music.

Identify & Inventory

Digital Asset Inventory Suggestions



- 3 Options:
 1. Handwritten,
 2. Stored on a Computer, or
 3. Online Afterlife Companies a/k/a Electronic Safe Deposit Boxes.
- Include all of your digital assets with user name & password information.
- Leave detailed instruction on how to access each account.
- Update Regularly - passwords & accounts change!

Planning Instructions

Online Afterlife/Storage Company

- Storage for user names and passwords, and some even include your estate planning documents.
- Send messages upon death.
- Release of information upon user's death or incapacity.
- Grants executor or guardian immediate access upon death or incapacity.
- Privacy concerns and longevity.

Warning: Investigate! Can they execute? Will they be in existence when needed? Privacy concerns?

Identify & Inventory

PASSWORDS

- Create Obstacles to Access.
- Use an Online Application for Password storage:
 - My favorite – 1Password.
 - Have an estate planning attorney retain such information?
- **Future of Passwords:**
 - We have the fingerprint.
 - Next, a pill you swallow?
 - Contains a microchip – authenticate YOU instead of typing a password...what?!?

Define The Rules & Instructions During Life

Grant Immediate Access to Another Over the Digital Estate

1. Create an account with multiple users.
2. Backup to Tangible Media: DVDs, flash drives, external hard drives, cloud computing, etc.



Define The Rules & Instructions During Life

Authorize an Agent to Access Digital Assets via a **Durable Power of Attorney**.



- Specific language granting access is required.
- Discuss privacy concerns. Client may not want spouse or beneficiary to have complete access to all digital assets.
- Consider including in the durable power of attorney as a super button. Currently there are 6 super buttons, possibly add a 7th.

Define The Rules & Instructions During Life

Digital Asset “Inter-Vivos” Trust

- Client currently transfers digital asset to trust.
 - Digital asset must be transferable.
 - Practical for valuable assets.
- Thereafter, trust buys the digital assets such as license-based assets (e.g., music) that expire upon “death”.
- Upon client’s death or disability, trustee handles the asset according to the client’s stated instructions determined during life as incorporated into the trust terms (e.g., beneficiaries may use).
- Not currently available, but Custodians have this on their short list. To allow a trust to open an online account.

Define Fiduciary Access After Death

1. Estate Planning.

- A. Will/Revocable Trust.
- B. Custodian's "Online Tool."
 - Google's Inactive Account Manager &
 - Facebook's Legacy Contact.

2. Estate Administration.

Planning

1. Will/Trust:

- Include specific language to “OPT IN” if desired.
- Key word to remember is consent.
 - Custodians more likely to grant access versus a general power.
 - Access to the catalogue without undue hassle.
 - Unclear whether any language is enough for every custodian to provide content (get a court order, as needed).
- There are certain other “trigger” words you may want to include in your documents – or may not...
- Sample language in appendix.

Example Language

Digital Devise: I hereby authorize my Fiduciary to hold, control, and have access to and the use of any asset held by any kind of computing or digital storage device or otherwise in digital form, including, without limitation, lists of passwords and account information; social media sites; blogs, e-books or other web-hosted materials of which I am the owner or author; digital albums; videos; and websites on which I conduct business transactions.

Digital Assets: **I hereby authorize** any individual or entity that possesses, custodies or controls any electronically stored information or that provides to me an electronic communication service or remote computing service, whether public or private, **to divulge to my Fiduciary** at any time: (1) any electronically stored information; (2) any record or other information pertaining to me with respect to that service; and (3) the **contents** of any communication that is in electronic storage buy that service or that is carries or maintained on that service. To employ any consultants or agents to advise or assist my Fiduciary in decrypting any encrypted electronically stored information of mine or in bypassing, resetting, or recovering any password or other kind of authentication or authorization, and I hereby authorize my Fiduciary to take any of these actions to access: (1) any kind of computing device of mine; (2) any kind of data storage device or medium of mine; (3) any electronically stored information of mine; and (4) any user account of mine. The terms used in this paragraph are to be construed as broadly as possible, including as contemplated in the Revised Uniform Fiduciaries Access to Digital Assets Act.

This authorization is to be construed as my lawful **consent** to all such access or disclosure under the Electronic Communications Privacy Act of 1986, the Computer Fraud and Abuse Act of 1986, & any other applicable federal or state data privacy law or criminal law, as they may be amended.

Planning

2. Custodian's "Online Tool" Provides Access.

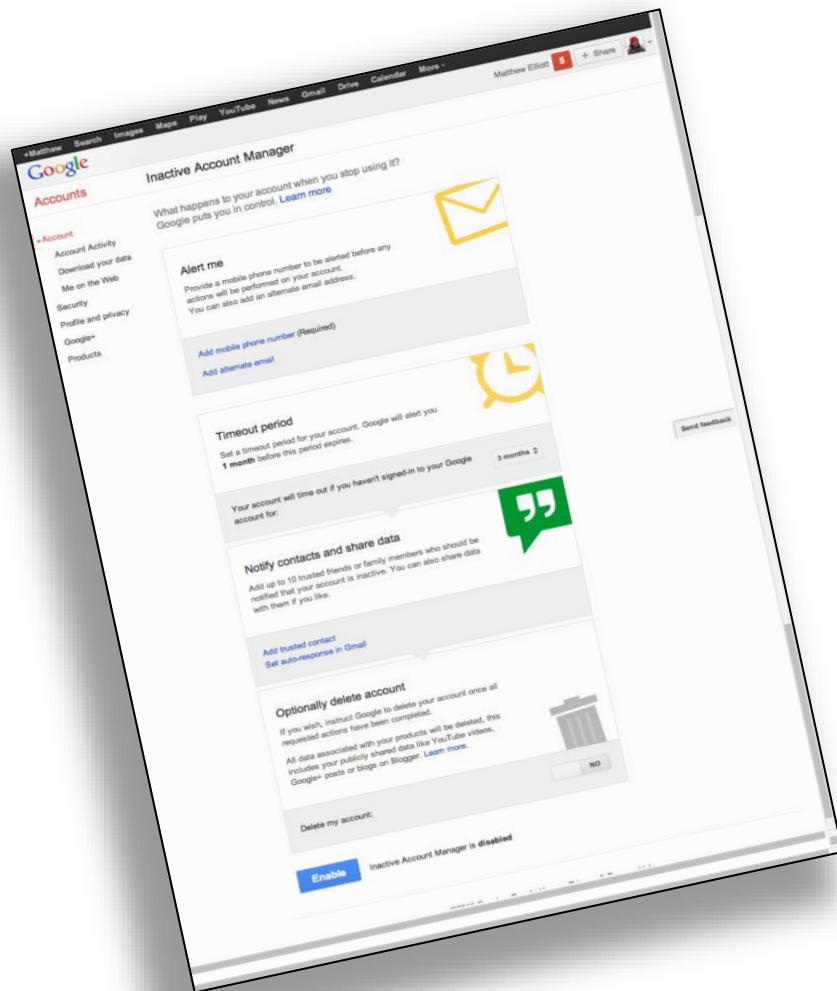
- Most TOSAs for social media and email accounts do not allow anyone else to access or modify a deceased user's account.
 - TWO exceptions: Facebook & Google!
1. Facebook Death Options:
 - Permanently Delete
 - Close
 - Memorialize
 - Establish a Legacy Contact (new)
 2. Google Death Options:
 - Close
 - Inactive Account Manager

Facebook Legacy Contact

Users Can Add a Legacy Contact to Their Facebook Account

- Legacy Contact for a Deceased User **Can:**
 - Download a copy of what was shared on Facebook (photos, videos, wall posts, profile information, contacts, events and friends).
 - Write a post to share a remembrance or final message.
 - Respond to new friend requests.
 - Update profile.
- Legacy Contact **Cannot:**
 - Read or download the messages.
 - Remove friends.
 - Change photos, postings, or other items shared on the timeline.
 - Log into the account.

Google | Inactive Account Manager



Google now allows users to send Gmail messages and other Google data to a trusted person after death or incapacity.

Select data to be shared with this trusted contact

Once your account has timed out, your trusted contact can download your data for **3 months**.

- Select all
- +1s
- Blogger
- Contacts
- Drive
- Mail
- Reader
- YouTube

Tech Savvy Fiduciary

- Many people name a spouse or sibling as Fiduciary.
- He or she may not be tech savvy enough to handle the rapidly changing digital world.
- Appoint a special fiduciary? Would a delegation be effective?



Digital Fiduciary

Duties:

- Locate and Preserve Data.
- Close E-mail and Social Network Accounts.
Do not close before ensuring important financial information has been retrieved.
- Maintain Website or Blog.
- Archive Digital Photos/Content to Flash Drive.
- Finalize Any Transactions on eBay and PayPal.

Legal authority and standing of a digital fiduciary are untested.

Digital Estate Administration

Fiduciaries Need To:

- **IDENTIFY**
- **ACCESS**
- **VALUE**
- **PROTECT**
- **TRANSFER**

State law provides little direction...
but NOW WE KNOW this is changing!!



Digital Estate Administration - Find & Protect

- Find, access, and protect voicemail, e-mails, phones, and computers as soon as possible after death.
- Gather bank, credit card & brokerage statements.
- **Time-sensitive** financial information may be delivered to e-mail address after death.
- Request credit report from each credit bureau; notify all 3 credit agencies of death by sending them the death certificate.
- Access contact lists from e-mail and social networking accounts - the “digital address book”.
- Back up all hard drives, flash drives and other data.
- When information is deleted, do so in accordance with forensic standards so data cannot be retrieved.
- Remove credit card information from shopping accounts.
- Cancel the decedent’s drivers license and ask DOMV to refuse any requests for duplicates.
- Keep e-mail, documents and photos for family.

Digital Estates Have Real Value

Monetary Value:

Recent survey showed U.S. consumers value their digital assets, on average, at \$55,000.



Sentimental Value:

Digital photo/Videos, social networking accounts, blogs, e-mail accounts, etc.

OkCoin, largest **Bitcoin** exchange transacted close to 1.9MM bitcoins (over \$1B) in one month.

Real Estate in the virtual world “**Entropia Universe**” sold for \$635,000.



ENTROPIA
UNIVERSE

Domains Have Real Value: Top 20 Sales as of 8/2016!

The 20 biggest cash domain sales ever reported by DNJournal.com				
1. Sex.com	\$13,000,000		11. IG.com	\$4,700,000
2. Fund.com	\$9,999,950		12. MI.com	\$3,600,000
3. Porn.com	\$9,500,000		13. Whisky.com	\$3,100,000
4. Porno.com	\$8,888,888		14. (tie) Sex.xxx	\$3,000,000
5. We.com	\$8,000,000		14. (tie) Vodka.com	\$3,000,000
6. Diamond.com	\$7,500,000		16. Shopping.de	\$2,858,945*
7. Z.com	\$6,784,000		17. CreditCards.com	\$2,750,000
8. Slots.com	\$5,500,000		187. KK.com	\$2,700,000
9. Toys.com	\$5,100,000		19. Social.com	\$2,600,000
10. Clothes.com	\$4,900,000		20. Investing.com	\$2,450,000

*Shopping.de sold for €1,960,000 in 2008. The dollar equivalent at that time was \$2,858,945.

Valuation

A person's gross estate includes "the value at the time of his/her death of all property, real or personal, tangible or intangible, wherever situated." - IRC §2031(a)

Challenges to Determining the Value

- **Comparables** can be difficult to find.
- **Historical Costs** may be difficult to determine.
- **Market Conditions** for digital assets can change quickly as technology evolves and is replaced.
- **Advertising Revenue Fluctuates** (Ad revenue drives valuation of many websites and blogs).
- **Consider an Appraisal** if digital asset may have a hard-to-measure financial value.

Fiduciary Access to Digital Assets

1. Other digital assets/catalogue access:
 - a) Rely on an online tool designating the Fiduciary.
 - b) Rely on specific language in the document.
 - c) Without an online tool or specific language, TOSA controls.

2. Content access:
 - a) Rely on an online tool designating the Fiduciary.
 - b) Rely on specific language in the document, *though still may be required to get a court order.*
 - c) Without an online tool or specific language, TOSA controls.

Summary on How to Preserve Digital Assets

5 Step Process

1. Identify and Inventory
2. Tech Savvy Fiduciary
3. Access
4. Instructions
5. Update Estate Plan

**“Treat Your Password
Like Your Toothbrush.
Don’t Let Anybody
Else Use It & Get A New One At
Least Every
Six Months!”**

-Clifford Stoll



B
BESSEMER
TRUST

Durable Power of Attorney

Suggested alternatives to include:

- Access to any and all digital assets to which I would be entitled, including but not limited to my passwords, user names and any and all content;
- Access to the catalogue and the content of electronic communications and digital assets, including but not limited to my username, password, and all content, as defined in Section 740.001, the Florida Fiduciary Access to Digital Assets Act.
- Access to the following digital assets:_____
- Access to all digital assets with the following exceptions:_____

Will or Trust Sample Language

Digital Devise: I hereby authorize my Fiduciary to hold, control, and have access to and the use of any asset held by any kind of computing or digital storage device or otherwise in digital form, including, without limitation, lists of passwords and account information; social media sites; blogs, e-books or other web-hosted materials of which I am the owner or author; digital albums; videos; and websites on which I conduct business transactions.

Continued on next slide...

Will or Trust Sample Language continued

Digital Assets: I **hereby authorize** any individual or entity that possesses, custodies or controls any electronically stored information or that provides to me an electronic communication service or remote computing service, whether public or private, **to divulge to my Fiduciary** at any time: (1) any electronically stored information; (2) any record or other information pertaining to me with respect to that service; and (3) the **contents** of any communication that is in electronic storage by that service or that is carried or maintained on that service. To employ any consultants or agents to advise or assist my Fiduciary in decrypting any encrypted electronically stored information of mine or in bypassing, resetting, or recovering any password or other kind of authentication or authorization, and I hereby authorize my Fiduciary to take any of these actions to access: (1) any kind of computing device of mine; (2) any kind of data storage device or medium of mine; (3) any electronically stored information of mine; and (4) any user account of mine. The terms used in this paragraph are to be construed as broadly as possible, including as contemplated in the Revised Uniform Fiduciaries Access to Digital Assets Act.

This authorization is to be construed as my lawful **consent** to all such access or disclosure under the Electronic Communications Privacy Act of 1986, the Computer Fraud and Abuse Act of 1986, and any other applicable federal or state data privacy law or criminal law, as they may be amended.

IN THE CIRCUIT COURT FOR THE
EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

IN RE: GUARDIANSHIP OF

JOHN DOE

File No.:

Division: Probate

MOTION TO AUTHORIZE GUARDIAN ACCESS
THE CONTENT OF WARD'S DIGITAL ASSET

COMES NOW, Jane Doe, as Guardian of the Property of John Doe, by and through her undersigned counsel, and moves this Honorable Court to enter an Order Authorizing the Guardian to Access the Content of the Ward's Digital Assets held by Google and in support thereof states as follows:

1. That Jane Doe is the duly appointed Guardian of the Property of John Doe (the Ward);
2. That Jane Doe believes the Ward's Google account contains information regarding a communication between the decedent, John Doe and Harry Roe, establishing the terms of a contractual agreement which is necessary to collect an asset of tangible value to John Doe;
3. That Jane Doe has no other means of accessing the information;
4. That Jane Doe believes accessing the content of the Ward's Google account and any and all communication between John Doe and Harry Roe between January 1, 2015 and June 2, 2015, is necessary to fulfilling her fiduciary duty to inventory and protect the assets of the Ward.

WHEREFORE, Jane Doe respectfully requests this Honorable Court enter an Order Authorizing the Guardian to access the content of the Ward's Google account.

Issue	Original UFADAA	Revised UFADAA
Estate representative's access to the <i>content of a decedent's electronic communications</i> .	Permitted unless the decedent opted out while alive.	Not permitted unless the decedent consented to disclosure. Custodian may request a court order specifically identifying the account and finding consent. Indemnification not required.
Estate representative's access to <i>other digital assets</i> of a decedent.	Permitted unless the decedent opted out while alive.	Permitted unless the decedent opted out or the court directs otherwise. Custodian may request a court order specifically identifying the account and finding that access is reasonably necessary for estate administration.
Guardian's access to the <i>content of a protected person's electronic communications</i> .	Permitted if access ordered by the court.	Custodian need not disclose contents without the express consent of the protected person/ward, but may suspend or terminate an account for good cause if requested by the guardian.
Guardian's access to <i>other digital assets</i> of a protected person.	Permitted if access ordered by the court.	Permitted if authorized by the guardianship order. Custodian may require specific identification of the account and evidence linking the account to the protected person/ward.

Issue	Original UFADAA	Revised UFADAA
<i>Agent's access to the content of a principal's electronic communications.</i>	Permitted if expressly authorized by principal.	Permitted if expressly authorized by the principal. Custodian may require specific identification of the account and evidence linking the account to the principal.
<i>Agent's access to other digital assets.</i>	Permitted under a grant of general or specific authority.	Permitted under a grant of general or specific authority. Custodian may require specific identification of the account and evidence linking the account to the principal.
<i>Trustee's access to the contents of electronic communications of a trust account.</i>	Permitted unless prohibited by the user, trust, or court.	Permitted when trustee is the original user. Also permitted when the trustee is not the original user if authorized by the trust. Custodian may require specific identification of the account and evidence linking the account to the trust.
<i>Trustee's access to other digital assets of the trust.</i>	Permitted unless prohibited by the user, trust, or court.	Permitted unless prohibited by the user, trust, or court. Custodian may require specific identification of the account and evidence linking the account to the trust.

Issue	Original UFADAA	Revised UFADAA
Effect of boilerplate term-of-service prohibiting fiduciary access.	A blanket prohibition on fiduciary access is void as against public policy.	Three tiered approach: <ol style="list-style-type: none"> 1. A user’s direction using an online tool prevails over an offline direction and over terms-of-service <i>if</i> the direction can be modified or deleted at all times. 2. A user’s direction in a will, trust, power of attorney, or other record prevails over the boilerplate terms-of-service. 3. If a user provides no direction, the terms-of-service control, or other law controls if the terms-of-service are silent on fiduciary access.
Effect of other terms-of-service.	Not addressed.	Unless the conflict with a user’s direction, terms-of-service are preserved and the fiduciary has no greater rights than the user.

Issue	Original UFADAA	Revised UFADAA
Procedure for disclosing digital assets.	Not addressed, but use of the term “access” throughout the act arguably contemplates the fiduciary logging on to the user’s account.	The custodian has three options for disclosing digital assets: <ol style="list-style-type: none"> 1. Allow the requestor to access the user’s account. 2. Allow the requestor to partially access the user’s account if sufficient to perform the necessary tasks. 3. Provide the requestor with a “data dump” of all digital assets held in the account.
Administrative fees.	Not addressed.	A custodian may assess a reasonable administrative charge for the cost of disclosing a user’s digital assets.
Deleted assets.	Not addressed.	Deleted assets need not be disclosed.
Unduly burdensome requests.	Not addressed.	A request for some, but not all, of a user’s digital assets need not be fulfilled if segregation is unduly burdensome. Instead, either party may petition the court for further instructions.
Fiduciary duties.	Incorporated by a generic referenced to “other law.”	Expressly incorporated.

Issue	Original UFADAA	Revised UFADAA
Account termination.	Not addressed.	If termination would not violate a fiduciary duty, the fiduciary may request account termination rather than disclosure of assets. A custodian may require specific identification of the account and evidence linking the account to the user.
Joint Accounts.	Not addressed.	Custodian need not disclose if aware of any lawful access to the account after receipt of the disclosure request.
Timely compliance.	Required within [60] days, or fiduciary may request an order of compliance	Required within [60] days, or fiduciary may request an order of compliance. The order must contain a finding that disclosure does not violate 18 U.S.C. § 2702.
Custodian immunity.	Custodian is immune from liability for an act or omission done in good faith compliance with the act.	Custodian is immune from liability for an act or omission done in good faith compliance with the act.