Digital Assets in an Estate: Fiduciary or Computer Hacker?

By Kirsten Waldrip, JD, LLM

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State administration, probate, and fiduciary laws were codified before the digital age. Technological advances have surpassed the often dusty federal and state legislation that directs the estate administration process, privacy laws, and computer fraud laws. Fiduciaries are responsible for performing their state-mandated guardian and/or conservator and estate administration duties, which include protecting, collecting, inventorying, and distributing assets of a decedent. However, most state statutes do not specifically grant fiduciaries access to digital accounts.1 When estates consisted primarily of tangible assets, fiduciaries were able to collect and inventory estate assets without violating privacy and computer fraud statutes. Decedents kept bank statements and bills in paper form, allowing fiduciaries to locate the accounts easily. With paperless statements, the fiduciary must play a guessing game as to where the decedent had property. It is access to this digital property that is the cause for concern for fiduciaries, because fiduciaries are being charged with illegal computer hacking.

What are these digital assets? Before the digital age, we received bills in the mail, movies and music were stored on DVD or CD, photographs were printed in albums, and financial records were in hard copy. Digital assets are those computer-based items and records that most every person alive today will acquire, because technological advances have made society increasingly reliant on digital assets for daily living. It has been estimated that the average person has approximately 90 online accounts (Steele 2016). Facebook, iTunes, Shutterfly, e-Bay, PayPal, Bitcoin, e-mail accounts, online dating accounts, online gaming accounts, and airline miles are just a few examples of digital assets. Even medical records are being transformed into digital assets. As an advisor, you will have clients serving in fiduciary roles as well as account holders who should be aware of these legalities.

Federal Laws and Regulations

The Stored Communications Act, created under the Electronic Communications Privacy Act of 1986, makes it unlawful for a person to access another user’s content stored on a facility providing electronic communications to the public without the authorization of that user (Code, 18 USC 2701: Unlawful access to stored communications 2016). It is this private content that would be of interest to the fiduciary. To access the account and retrieve the content, the fiduciary must pursue a court order granting authorization or obtain a grant of access pursuant to another law.

Computer fraud and abuse laws further restrict access to digital information. These laws make it unlawful for anyone to intentionally access a computer without authorization, or exceed authorized access, and obtain information stored within (Code, 18 U.S. Code Section 1030 - Fraud and related activity in connection with computers 2016).

Terms of service (TOS) agreements are something every computer user has come into contact with and automatically clicks “accept.” Without reading the agreement, how do you know if you are violating the terms? What happens if the account owner gives a fiduciary authorization to access an account, but the agreement requires further consent of the provider? That fiduciary will be in violation of the TOS agreement and the computer abuse and fraud laws.

There is a vast difference in the way online companies are managing their TOS agreements. For example, Facebook includes a section regarding access to a deceased person’s account and states: “In rare cases, we consider requests for additional account information or content … Please keep in mind that sending a request or filing the required documentation doesn’t guarantee that we’ll be able to provide you with the content of the deceased person’s account” (Facebook, Facebook Help Center 2016). Facebook also has added an additional feature allowing its users to add a “legacy contact” to an account (Facebook, Facebook Help Center: What is a legacy contact? 2016). This is a first step toward fiduciary
access to digital assets; however, this does not address the issue of incapacity because the legacy contact is not valid until the user’s death.

Google’s TOS agreement is silent about what happens to, or who has access to, a user’s account at death (Google, Google Terms of Service 2014). However, Google allows a user to designate a person to receive user-specified data when the account becomes inactive (Google, Account Help: About Inactive Account Manager 2016). If a Google user does not set up the inactive account manager, Google specifies that it will “work with immediate family members and representatives to close the account of a deceased person where appropriate. In certain circumstances we may provide content from a deceased user’s account” (Google, Accounts Help: Submit a request regarding a deceased user’s account 2016). Privacy is important, but it is uncertain what type of information will be provided, who will have priority to receive such data, and the circumstances that must be present to provide a user’s account information. The TOS agreement of Yahoo! states, “You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death” (Yahoo! 2016). This agreement is straightforward as to the procedure upon the death of a user, but what if the decedent's online statements are sent to that e-mail account? Finding a balance between the privacy of the decedent and allowing the fiduciary to complete his job is no easy feat.

In light of these laws, how does an agent collect a decedent’s online data and carry out duties as the appointed agent? The agent is unlikely to have the decedent’s username and password, and even if he did have this information, the agent would be illegally accessing the account without authorization. The restrictiveness of these agreements has resulted in numerous lawsuits between fiduciaries and online providers. Both have had victories and defeats, but these legal battles are resolved on a case-by-case basis and have not produced clear legal precedent.

**The Solution**

The Fiduciary Access to Digital Assets Act, Revised (hereinafter “RUFADAA”) was approved by the Uniform Law Commission in 2015. RUFADAA complements existing law, thereby enabling a fiduciary to carry out his legal duties during incapacity and upon the death of an individual. RUFADAA incorporates specific terminology and definitions from federal legislation that creates some uniformity among laws. “The general goal of the act is to facilitate fiduciary access and custodian disclosure while respecting the privacy and intent of the user” (Laws 2015). RUFADAA recognizes the supreme importance of an individual’s wishes regarding fiduciary access and requires that it be determined whether a decedent designated a legacy contact with an online service provider or authorized a fiduciary to access digital assets in estate planning documents prior to otherwise granting or denying access to digital assets.

Section 4 of RUFADAA creates a hierarchy of the right to access digital assets. Accordingly, first priority is given to any express directions of the user as to permissible access to the online account. If the user has documented online whether fiduciaries have access to an account, such as Facebook’s legacy contact, then that expression will be honored by RUFADAA (Laws 2015). The current problem is the lack of general knowledge that such options exist. Further, numerous online providers have not implemented such features.

If the user did not complete online directions, then second priority is given to estate plan provisions addressing digital assets (Laws 2015). In light of this, it will be of the utmost importance for such provisions to be included in estate planning documents. What if an account has a conflicting legacy contact and estate plan provision? RUFADAA gives priority to the legacy contact form. Because of this, it will be imperative that individuals review legacy contact selections and ensure such selections will have the desired effect upon death.

Lastly, if an individual has not provided direction in either of these methods, then the TOS agreement will govern, assuming it addresses fiduciary access. If the agreement does not address fiduciary access, then RUFADAA’s default provisions will govern and restrict access to digital content unless consent of the user was given.

The access granted by RUFADAA depends on two variables: (1) the type of fiduciary appointment (i.e., the personal representative, trustee, agent under power of attorney, or conservator), and (2) the type of information sought (i.e., communication content or other digital assets).

First, the personal representative is entitled to receive digital content if the decedent consented to disclosure or if the court ordered the disclosure. For digital assets not involving content, the personal representative is automatically entitled to such assets unless the decedent or a court prohibits disclosure (Laws 2015, Section 8). This emphasizes the importance of the decedent’s privacy because a personal representative is not automatically entitled to the content.

Second, a power of attorney must have specific authorization in the power of attorney to access the content of digital assets (Laws 2015, Section 9). Accordingly, it will be important to revisit power of attorney documents to ensure this provision is included. For non-content digital assets, the agent will have automatic authority to access the assets unless otherwise stated by the account user, the court, or the power of attorney document (Laws 2015, Section 10). There is a trend toward securing communication content more so than other non-content-based assets.

Third, the nature of a trust owning property and being managed by a trustee creates an implied authorization for that trustee to have access to all trust assets. Pursuant to RUFADAA, if the trust agreement consents to the trustee having access to the digital assets, content-based or otherwise, the trustee is authorized to access a digital account (Laws 2015, Sections 11–12). Again, if the trustee is seeking non-content-based assets, the trustee is
entitled to such unless prohibited (Laws 2015, Section 13).

Lastly, a conservator’s access to digital assets must be court-ordered. It is well-settled that a protected person is to maintain some privacy despite having a conservator appointed. As such, a court order is required for a conservator to access the protected person’s content-based digital assets, but the conservator is permitted access to non-content assets unless prohibited (Laws 2015, Section 14).

**Online Service Providers’ Responsibilities**

The online custodian does have some discretion with RUFADAA. The custodian may determine whether account access is full access, partial access, or a copy of a record of the digital asset (Laws 2015, Section 6). This allows the company to create its own policies that are conducive to its business model. However, the custodian is responsible to respond to a request for access within 60 days (Laws 2015, Section 16).

Section 6 of RUFADAA does not require an online custodian to release digital assets that have been deleted, it permits the custodian to charge a reasonable fee for disclosure requests, and it provides remedies should the disclosure request be overly burdensome. Also, to incentivize online custodians to comply with RUFADAA, the act provides that the custodian is immune from liability for good-faith compliance. (Laws 2015, Section 16).

**Fiduciary Duty**

The fiduciary administering an estate or otherwise accessing and collecting these digital assets is required to abide by the following fiduciary duties: (1) the duty of care, (2) the duty of loyalty, and (3) the duty of confidentiality (Laws 2015, Section 15). RUFADAA further enables a fiduciary to complete his duties by affirming that the fiduciary is indeed an “authorized user” for computer-fraud laws and has the same authority of the user (Laws 2015, Section 15). In light of this, the fiduciary no longer should be charged with illegally accessing online services.

**Ongoing Challenges**

There is an overdue need to bring estate planning, administration, and fiduciary law into the 21st century. Despite the approval of RUFADAA, only 19 states have adopted RUFADAA and 12 states have introduced the act for discussion (see figure 1).

Those states that have adopted RUFADAA have taken a major step in easing the estate administration process. However, it is up to individuals to ensure that their fiduciaries are authorized to access digital assets. The general public needs to be educated about transferring these assets and the consequences of failing to plan.

As a financial advisor, update your client questionnaire and periodic review discussion points to include digital assets. This will initiate a conversation to determine

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**Figure 1: Enactment Status Map**

what type of legacy planning should be implemented. When determining whether to grant access to digital accounts, keep RUFADAA’s access hierarchy in mind. Depending on the company, completing a legacy form may be sufficient to meet your needs or it could be detrimental to your estate plan. These legacy contact forms should be revisited periodically and updated as needed.

Estate plans should be updated to include powers to access, modify, transfer, archive, control, and delete digital assets. When updating the will, trust, and/or power of attorney, consider who is appointed as fiduciary to collect this information, because these people will have access to the private content of digital accounts, unless restricted. Also, you can advise your clients to keep a log of online accounts, usernames, and passwords. This log should be kept with the estate planning documents. The drawback of this method is updating the log every time a password is changed.

Technology streamlines many activities in daily life, but online providers no longer should be permitted to hold a decedent’s digital assets hostage and/or leave them exposed to the risk of theft. Bank and financial institutions have complied with fiduciary law for years, and RUFADAA now provides fiduciaries with the authority they need to fulfill their administrative duties and provide closure to the decedents and their families. As our daily activities increasingly rely on digital accounts, the need for legislation to address the administration of these accounts will become more prevalent. RUFADAA is a first step to addressing this issue and brings our estate administration laws into the digital age.

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Endnote
1. Access to digital assets affects those who are incapacitated as well as deceased. For ease, I refer to these individuals collectively as “decedents.”

References

Code, U. S. (2016, July 18). 18 USC 2701: Unlawful access to stored communications. http://uscode.house.gov/view.xhtml?h=1&f=false&edition=prelim&req=granuleid%3AUSC-prelim-title18-section2701&num=0&saved=%7CKHUpqGx1OJ4HNNY3Pb246McpwMBZ30dWhbOnybZVQpbQ%3D%3D%7C%7C%7C%7Cfalse%7Cfalse%7Cfalse%7Cfalse%7Cfalse%7Cfalse%7Ctrue%7Cfalse&req=granuleid%3AUSC-prelim-title18-section2701&num=1871805&req=granuleid%3AUSC-prelim-title18-section2701&num=1870160&req=granuleid%3AUSC-prelim-title18-section2701&num=1871805&req=granuleid%3AUSC-prelim-title18-section2701&num=1870160.


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