



## Bigger than Facebook: Estate Planning for Digital Assets

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As we have begun increasingly living our lives online, the issue of managing our digital data, devices, and access rights has grown increasingly important in the estate planning context. Collectively defined as “digital assets”, the data we store online ranges from social media profiles we use in personal relationships to stored digital photos, music, and movies, to tax returns, banking records, and more. When an individual becomes incapacitated or dies, these assets may be forever lost if the estate plan does not adequately appoint and equip a fiduciary to manage the data.

The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) is making its way into legislation across the United States. Already enacted in 20 states, RUFADAA has been introduced and is pending in 12 more.<sup>1</sup> With endorsements by Facebook, Google, the National Academy of Elder Law Attorneys, the Center for Democracy and Technology, and the Association of American Retired Persons, RUFADAA seems to have the support of key interested parties. RUFADAA has the potential to impact nearly every estate plan prepared in the Internet age. It’s essential to implement estate planning solutions that ensure your wishes are carried out if you become incapacitated or after your death.

### **Living (and Dying) in the Internet Age**

It may be easy to dismiss planning for “digital assets” as inconsequential – perhaps much ado about nothing. Surely many of us will be content if our Twitter account or Flipboard feeds die with us. When streaming music and movie channels allow unlimited access for little or no money, it’s easy to associate little to no value to continued access once the account owner is gone. But to reduce the world of digital assets to transient social media and entertainment sites misses the importance of the issue.

In 2015 more than 120.2 million U.S. individual income tax returns were filed electronically. That number is a 2.4% increase over 2014 and represents nearly 88% of all individual tax returns filed in the U.S.<sup>2</sup> As more of us file taxes electronically, hardcopies of tax returns are becoming obsolete. If a custodian or trustee has to step

in when an individual becomes incapacitated or dies, a task as essential as reviewing prior years' tax returns, filing current returns, and auditing returns to manage estate assets gets increasingly complicated. For many individuals, the days in which a trustee can go through the file cabinet or a shoebox in the home office are gone.

Similarly, Americans increasingly do their banking online. A 2013 survey released by Pew Research Center revealed that 51% of all adults in the U.S., and 61% of all internet users bank online.<sup>3</sup> Not only is this number growing, the expansion of mobile banking services via smartphones has caused online banking adoption to accelerate. A 2014 survey conducted by the Board of Governors for the U.S. Federal Reserve found that 52% of all smartphone users in the U.S. consistently use mobile banking through their phones.<sup>4</sup> As routine banking moves increasingly online, far fewer individuals are receiving paper bank statements, paper bills and other hardcopy documentation from which a fiduciary can form an understanding of an individual's financial situation.

Online data comprises more than our financial lives, however. Facebook, Flickr, Photobucket, Snapfish, and many other sites host decades of a family's memories online in digital photo- and video-sharing and storage services. Other users store photos in Google Drive, Amazon, Dropbox, or other cloud services. Without continued access to these accounts after the original user dies, priceless memories may be lost forever.

One final point worth emphasizing: many individuals may have skeletons in their online closets that may bring pain to a surviving spouse or children if revealed after the client dies. In 2015 The Ashley Madison Agency, a social networking service that promoted affairs among individuals in marriages or other committed relationships, was hacked, revealing the identities of more than 32 million account owners.<sup>5</sup> While that episode may present an extreme example, many individuals have secrets they want to keep, even after death.

When it comes to managing your digital estate, we must consider not only the social and financial data that you want to maintain and manage, but also help identify any data that should be destroyed or deactivated after you're gone.

### **Managing access to a digital estate**

While it may be tempting to simply write your passwords on a sheet of paper or a sticky note on your desk, ensuring proper, authorized access to digital accounts and other electronic assets is more complicated than that. First, and perhaps most obviously, written inventories of digital assets and passwords can quickly become

outdated. It may provide a starting point for your family, but a written inventory will almost invariably omit some important information. Similarly, password files on a personal computer, or even online services like LastPass, Dashlane, PasswordBox and others run the risk of becoming outdated or the service providers being sold or decommissioned.

More importantly, unless the individual account owner has given specific access and authority to manage online accounts, whether through a hardcopy document or an online service, someone who logs in to another person's account risks liability under federal anti-hacking laws. Similarly, account custodians are generally prohibited from disclosing an individual's stored data and communication to any third party without express consent of the individual.<sup>6</sup> Moreover, standard terms-of-service agreements (TOSAs) usually state that data will be deleted or inaccessible after the individual user's death.

## **Enter RUFADAA**

The purpose behind the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) is to clarify how federal privacy laws apply to personal data and to give enforceability to an individual's instructions concerning the management of their online accounts and data. RUFADAA applies to empower fiduciaries like conservators, agents under powers of attorney, executors, or trustees to access and manage a person's digital information if that person is unable to do so personally, and to protect account custodians from claims that data was accessed without authorization.

## **Overview of RUFADAA**

RUFADAA modernizes the law to account for realities of the digital age, as well as to protect account custodians when they disclose digital information when directed by the individual account holder. The law seeks to reconcile the competing priorities of user privacy and third party access ensuring that fiduciaries have legal authority to manage digital assets pursuant to an individual's estate plan, while protecting private communications from unwarranted disclosure. Specifically, RUFADAA provides that:

- Fiduciaries for digital assets are subject to the same duties that apply to tangible assets.
- Internet users may specify whether their digital assets should be preserved, distributed to heirs, or destroyed.
- Fiduciaries in every state will have equal access to digital assets and custodians (e.g., Facebook, Google) will have a single legal standard to abide by.

- Companies that store private communications, such as email and social media conversations, may not release them to fiduciaries unless the user consented to disclosure. Companies may, however, provide a fiduciary with a catalogue of electronic communications (i.e., addresses of sender and recipient, date and time of sent messages).
- Certain default rules govern access to digital assets by four common types of fiduciaries: executors under a decedent's will, agents under a power of attorney, conservators or guardians of the estate of disabled individuals, and trustees of trusts that hold digital assets.
- Custodians are protected from liability when fiduciaries seeking access to digital assets provide certified proof of their authority.
- Key provisions of RUFADAA will specifically override service providers' terms-of-service agreements (TOSAs). *However, provisions in a TOSA will override if the individual end user has not granted authority for custodians to disclose digital assets to fiduciaries.*<sup>7</sup>

### **Integrating statutory access with planning techniques**

As the law continues to evolve, we work with clients to address digital assets during the estate planning process to make sure these important issues are handled. For example, it's important to know:

- Do you do all your banking, investing, and bill paying online, or do you keep hardcopies of bills and statements?
- Do you store copies of their tax returns? If they're stored electronically, who should be able to access them? If you keep hardcopies, will your decision maker know how to find them?
- Do you store important documents, photos, or videos online? Does your spouse and other family members know how to access them?
- What online accounts they you want someone to access and manage after your death, and which should be shut down?
- Does your estate plan...
  - Include provisions authorizing someone to access and manage digital assets?
  - Take into consideration the particular technological knowledge (or lack of knowledge) of your chosen decision maker? It might make sense to name someone specifically to handle your online accounts if your primary decision maker lacks technological savvy.
  - Include provisions allowing (or prohibiting, in some cases) custodians of digital assets to disclose some or all of the individual's digital assets,

- specifically including the *content* of electronic communications sent or received by the individual?<sup>8</sup>
- Address which digital assets or accounts that should be transferred to someone else or deleted after the your death?

Technology will always outpace the law, but new laws are taking significant steps toward closing the gap. As we increasingly live our lives online, our estate plans must address new kinds of assets like social media and streaming entertainment accounts, digital photos and videos, and digital financial and tax records. To take advantage of most of the benefits of the new laws, you must plan proactively for the management of their digital assets.

If you haven't started the estate planning process, or if your estate plan doesn't adequately address your digital assets, contact us today to get started.

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<sup>1</sup> Progress of RUFADAA, as any other model uniform law, may be tracked at [www.nccusl.org](http://www.nccusl.org).

<sup>2</sup> Treasury Inspector General for Tax Administration Report: Results of the 2015 Filing Season, <https://www.treasury.gov/tigta/auditreports/2015reports/201540080fr.html>

<sup>3</sup> Pew Research Center, "51% of U.S. Adults Bank Online, by Susannah Fox, August 7, 2013" <http://www.pewinternet.org/2013/08/07/51-of-u-s-adults-bank-online/>

<sup>4</sup> U.S. Board of Governors of the Federal Reserve System report: "Consumers and Mobile Financial Services 2015" (March 2015) <http://www.pewinternet.org/2013/08/07/51-of-u-s-adults-bank-online/>

<sup>5</sup> <http://fortune.com/2015/08/26/ashley-madison-hack/>

<sup>6</sup> See generally, the Computer Fraud and Abuse Act (18 U.S.C. §1030) and the Stored Communications Act (18 U.S.C. §2701 et seq.)

<sup>7</sup> See RUFADAA, §5(c).

<sup>8</sup> This is the language used in Section 4 of RUFADAA.