

Is the Cloud Finally Lifting?

Planning for and Administering Digital Assets in Ohio



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Ohio Now Allows Fiduciaries to Access Digital Assets

- January 4, 2017, Governor Kasich signed House Bill 432, making the “Revised Uniform Fiduciary Access to Digital Assets Act” [RUFADAA] law in the State of Ohio.
- Prior to this act, Ohio had no legislation addressing a fiduciary’s ability to access digital assets of a decedent, ward, or principal under a power of attorney.
- The act is “Revised” not because of changes in Ohio, but because of changes at the Uniform Law Commission level.

Today we will discuss:

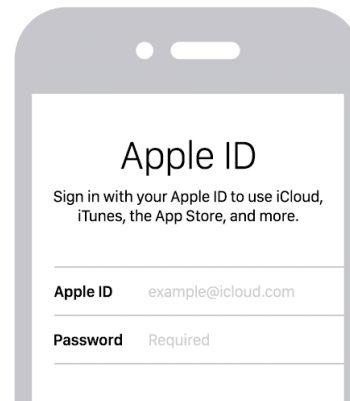
- What are digital assets and why should we care about them?
- What is the legal background behind RUFADAA?
- What does the Ohio version of RUFADAA actually say?

Prevalence of Digital Assets and Devices

- Smartphone ownership has increased from 35% of American adults in 2011 to 68% in 2015.
 - Tablet ownership has increased from 3% of American adults in 2010 to 45% in 2015.
 - Desktop or laptop ownership has held steady around 72% of American adults
 - For every minute of reality that passes, 60 hours of video are uploaded to YouTube.
 - 79% of American adults internet users are on Facebook; and 62% of senior adult internet users
 - It is estimated that as many as 10,000 Facebook users die per day.
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Digital Assets in the News



Peggy Bush:

- Peggy knew her husband's iPad passcode, but not her husband's Apple ID
- She could not re-download her favorite card game
- Apple required a court order initially, but worked it out informally after media pressure.
- "From Apple, I couldn't even get a silly little password, it just seems like nonsense."

Syed Farook (San Bernadino shooter):

- iPhone became the subject of dispute between FBI and Apple, when Apple could not provide passcode
- Apple claims to be unable to provide passcodes to devices running iOS 8 or later.

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- A light gray silhouette of the Philadelphia skyline, featuring prominent buildings like the Comcast Center and the Liberty Bell. The skyline is positioned in the background, spanning the width of the slide.
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- Schneider Smeltz
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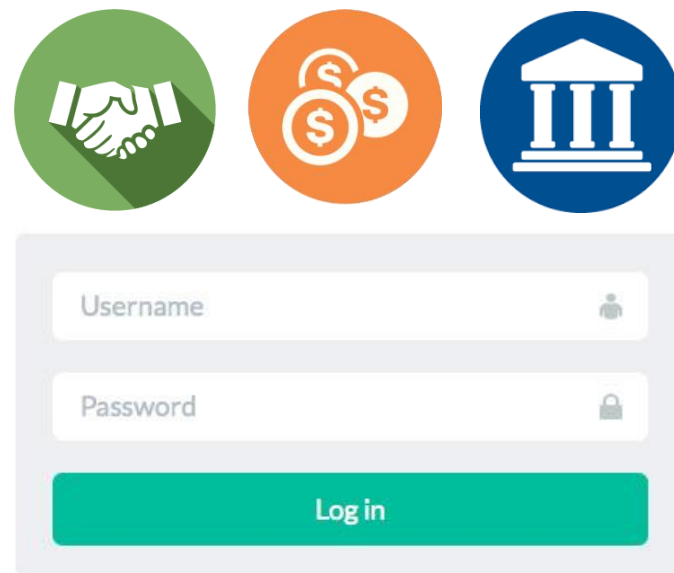
Types of Digital Assets: Access to Financial Information

Examples:

- Logins for bank and brokerage accounts
- Logins for credit cards or insurance
- TurboTax, Quicken, or other financial software
- Personal Spreadsheets

Key Question:

- How will the executor get access?



Types of Digital Assets: Digital Items with Real Monetary Value

Examples:

- Website Domain Names - Can be purchased and registered easily and then sold for a high price when they become significant
- BitCoin or other electronic currencies
- World of Warcraft and similar games allow accounts to be transferred for value
- PayPal, eBay, or similar accounts may have stored value

Key Questions:

- How can they be identified and maintained?
- Should they be liquidated or distributed in-kind, and to whom?



Types of Digital Assets: Other Digital Resources



Examples:

- Websites and Blogs
- Cloud-based backup (e.g., Dropbox)
- Photo and video sharing (e.g., YouTube, Snapfish)
- Web-based medical records
- Digital hobby archives (e.g., recipes)
- Files relating to nonprofit organizations
- Ancestry or personal records
- Digital Death Planning (e.g., mywonderfullife; IfIDie)

Key Questions:

- How can we identify them?
- Who gets access to them?

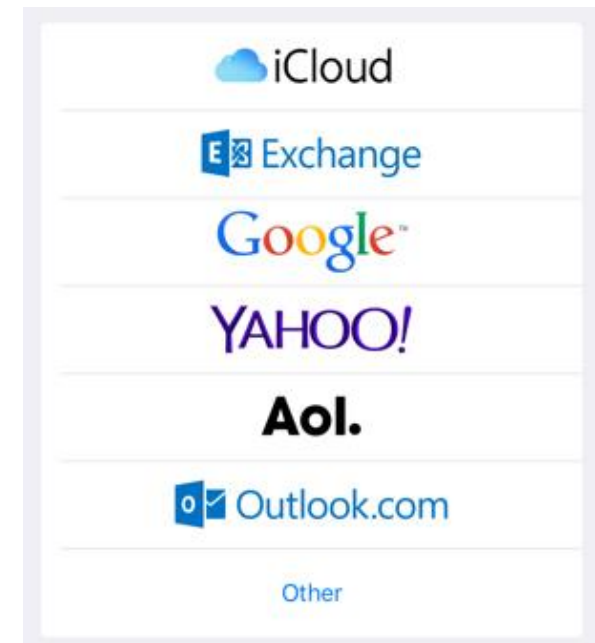
Is Digital Communication Different from Other Communication?

Old greeting cards and letters are tangible personal property, which likely pass through probate.

- For most people, the default is to save only significant items

The email account may be an archive of more than a decade of communications

- For most people, the default is to archive and save everything.
- Is all of that communication an asset or a liability?
- How much information does the executor need to do his or her job? Full access to contents, or “outside of the envelope”?
- How much access would you want your executor to have?



Digital Communications: No Longer One-to-One

Facebook conversation has shifted communication from one-to-one to one-to-many. It's no wonder that many people want to leave a parting message:

- “Now [my wife] has to go on without me, and while a cynic might observe she's better off, I know that this is a terrible burden I have placed on her, and I would give almost anything if she would not have to bear it. It seems that is not an option.”
- “Don't cry for me, Argentina, the truth is that i didn't even know where u are on the map!! Geography was never my strong point!!”
- “He respectfully requests six Cleveland Browns pall bearers, so the Browns can let him down one last time.”



Types of Digital Assets: Means of Communication



Examples:

- E-Mail: Work, Personal, other
- Social Media: Facebook, LinkedIn, Twitter, Pinterest, etc.
- Note that social media has both public posts and private messages

Key Questions:

- Does something need to be done with the account (e.g., a final away message)?
- Who should (or should not) have access to the these accounts?
- What access should they have?

Federal Law Keeps Digital Communications Private



Stored Communications Act 18 U.S.C. § 2701 et seq.

- 2701(a): A person cannot access electronic communications without authorization
- 2702: A service provider may not disclose communications unless to an agent or with the lawful consent of the originator or recipient
- Distinction between content of communication and record of communication

Computer Fraud and Abuse Act 18 U.S.C. § 1030 et seq.

- Prohibits accessing a computer without authorization

Contract Law Keeps Digital Communications Private

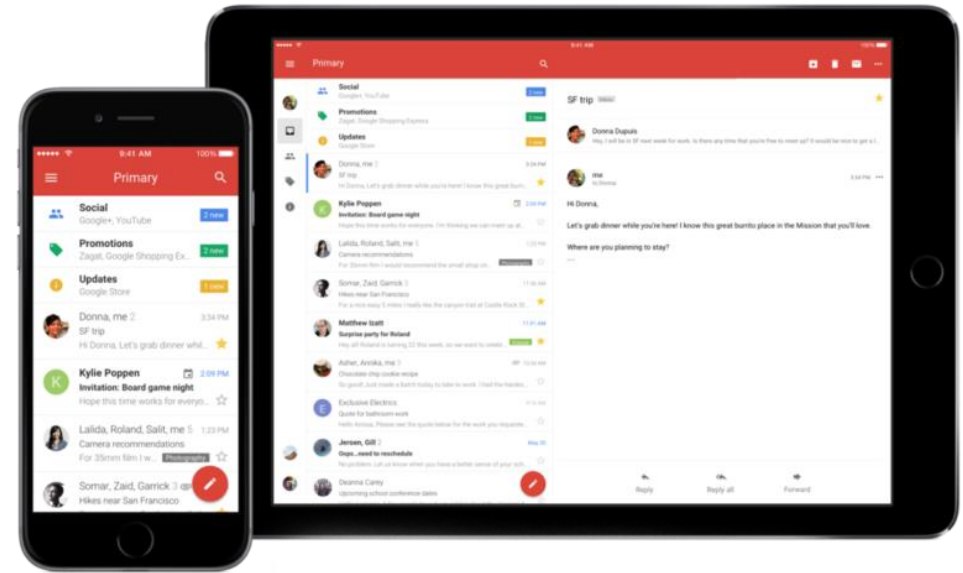
Privacy is key to online providers, so their rules are designed to protect the user's information

Google:

- “People expect Google to keep their information safe, even in the event of their death.”
- “We cannot provide passwords or other login details.”
- “I understand that, if my request to get information from a deceased person's account is approved, I will need to get a court order issued in the United States.”

Yahoo!:

- Account terminates at death and contents are deleted.



Account Termination at Death



Twitter: Has a process to deactivate the account, but will not provide “access” to anyone.



LinkedIn: Will remove profile on notice of death. No provision for access.



Instagram: Will “memorialize” on notice from anyone; will remove an account only on request of a verified immediate family member.



Pinterest: Will deactivate account on notice from a family member; will not give access.



iTunes: Account terminates at death

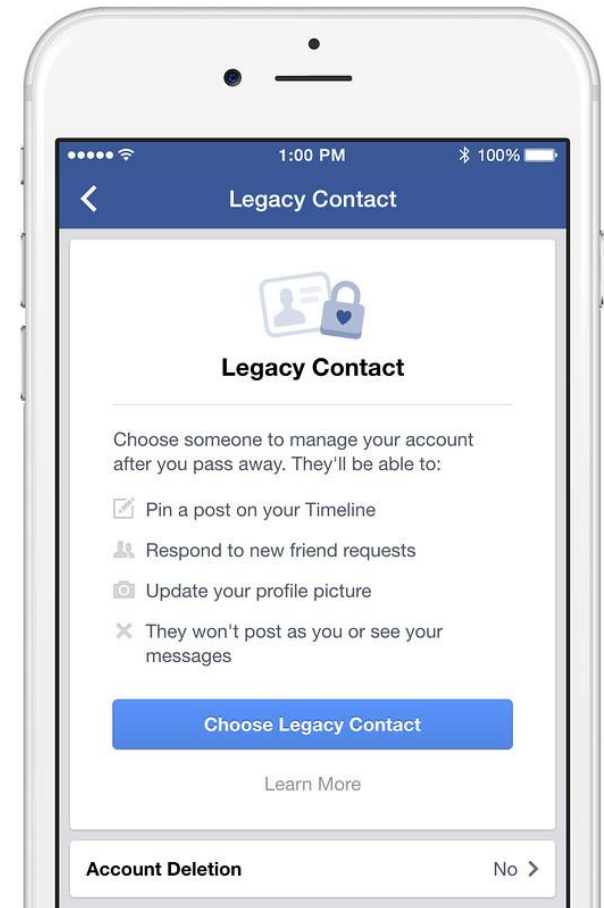
Digital Assets with Beneficiary Designations

Google: In Spring 2013 introduced its “Inactive Account Manager”

- Designate up to 10 contacts to receive information
- Set the time period of inactivity to receive the notice (3 to 18 months)
- Write a message to your trusted contact

Facebook: In February 2015, allowed users to name a “Legacy Contact”

- They can post messages, accept friends, and, if you allow them, download information
- They cannot read messages, change past posts, or remove friends



Evolution of State Law Solutions to Give Family Access

Access to copies of email:

- Connecticut (2005), Rhode Island (2007)

Access or copies of any electronically stored documents:

- Indiana (2007)

Take control of or conduct email, social networking, or microblogging:

- Oklahoma (2010), Idaho (2011)

Access accounts of minors only:

- Virginia (2013)

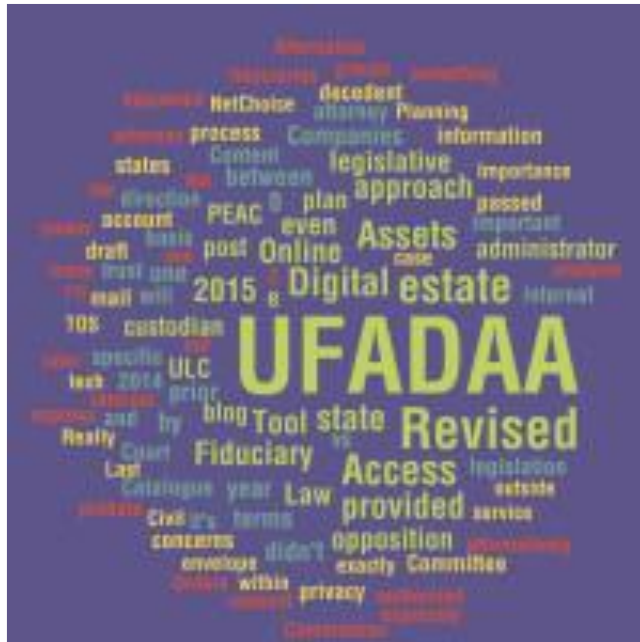
Terminate deceased user's account:

- Nevada (2013)

Comprehensive Approaches:

- Delaware (2014), Louisiana (2014)

Uniform Fiduciary Access to Digital Assets Act (“UFADAA”) - July 2014



- Provided different access for different fiduciaries
- Intended to give executors complete access to all digital assets, including content of communications
- Provided that restrictions in terms of service against fiduciary access are against strong public policy
- Deals with “access” to digital assets, not with “transfer” of digital assets

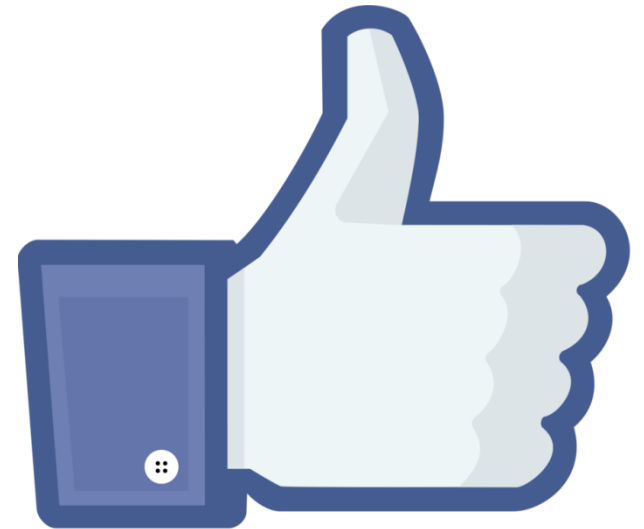
Not Everyone “Liked” UFADAA

NetChoice placed UFADAA as #1 on its “iAWFUL” list of legislation:

“States want your privacy to die with you.”

Privacy Expectations Afterlife and Choices Act (“PEAC Act”)

- Applied only to Executors
- Granted access to content of communications only if specific language in Will
- Granted access to other assets only as needed to administer estate and no more than 18 months prior to death
- Allowed custodians 60 days to move to quash a court order authorizing access.



Legislative Scoreboard as of Summer 2015

UFADAA 2014

- Introduced in 27 states in the year after proposal
- Enacted in zero states.

PEAC

- Introduced in at least 3 states in 2014-2015
- Enacted in one—Virginia, effective July 1, 2015.

Other Acts

- Eight other states still had some other digital asset law on the books.



Revised UFADAA - 2015 (aka “RUFADAA”)

The significant changes include:

- Online Tools: Custodians may allow users to designate a beneficiary
- Content of Communication: Access only given if the user elects to grant access through an online tool, power of attorney, will, trust, or other document
- Terms of Service: Preserved unless the user directs otherwise
- Legislative Success:
 - Enacted in 21 states including Ohio
 - Introduced in at least 5 more

Ohio RUFADAA - How is it structured?

Sections 2137.01, 2137.02:

- Definitions and scope; Applies to estates, guardianships, trusts, and POAs, regardless of date

Sections 2137.03 - 2137.05:

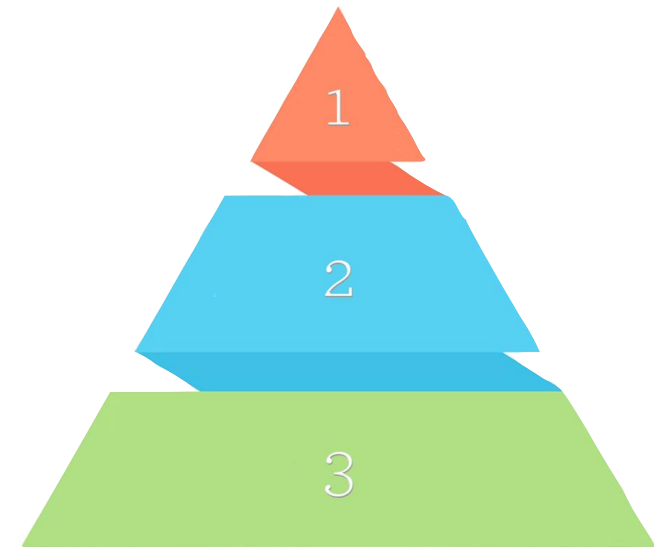
- Priority of access, impact on terms of service, and procedure for disclosure

Sections 2137.06 - 2137.13:

- Procedures for various fiduciaries.

Sections 2137.14 - 2137.16:

- General provisions concerning fiduciary duties, custodian compliance, and uniform interpretation of statute.



What Happens to Assets?

O.R.C. §§ 2137.04, 2137.05:



- Did decedent use an online tool?
If Yes, that will be followed.
- No online tool used or offered? Look for direction in the user's planning documents. A direction in the documents can override terms of service clauses restricting access.
- Nothing in the documents? Terms of service are preserved and state and federal law apply.

“Personal Representative” Powers



“Personal Representative” includes executor, administrator, commissioner in release from administration and applicant in summary release.

Content of Communication (§ 2137.06):

- Only disclosed if user elects or court directs
- Executor must provide
 - Death certificate;
 - Letter of authority (or small estates document)
 - Copy of Will authorizing disclosure
 - If requested, information about the account

Other digital assets (§ 2137.07):

- Must be disclosed unless direction otherwise in Will or by Court
- Executor need not provide a copy of the Will

Attorney-in-Fact Powers

Content of Communication (§ 2137.08):

- Disclosed only if the POA expressly grants authority
- Agent must provide
 - Copy of POA authorizing disclosure
 - Certification that the POA is in effect
 - If requested, information about the account

Other digital assets (§ 2137.09):

- Must be disclosed unless direction otherwise in POA or by Court
- If the POA is a general power of attorney, authority is presumed
- If the POA is limited, it must specifically grant power over digital assets

Statutory Form POA Amended to acknowledge digital assets and content of communication



Trustee Powers

If Trustee is the original digital asset owner, the Trustee may have full access (§2137.10).

If not, Content of Communication (§ 2137.11):

- Only disclosed if user elects or court directs
- Trustee must provide
 - A certified copy of the Trust or a certification of Trust that shows consent to disclosure
 - A certification that the trust is in effect
 - If requested, information about the account



Other digital assets (2137.12):

- Must be disclosed unless direction otherwise in Trust or by Court
- Trustee still must provide the Trust or a certification, but it need not include consent to disclosure

Guardian Powers

Applies to Guardians of the Estate and Guardians of the Person (§2137.01(N))

Content of Communication (§ 2137.13):

- Never

Other digital assets (§ 2137.13):

- Not an inherent part of the office; disclosure only allowed after Court hearing and order
- Guardian must provide a copy of the order and, if requested, information about the account.

Guardians may suspend or terminate an account without a Court hearing



How Should Custodians Respond? (§2137.15)

- Fiduciary may be given full access, partial access, or copies of files.
- Custodian may charge a reasonable fee for responding to request.
- Custodian need not disclose deleted files.
- Custodian may request information from the fiduciary linking the user to the account (e.g., username) or, if unavailable, a court order stating that the access is necessary.
- Custodian is relieved from liability for good-faith compliance.



How Should Fiduciaries Act? (§2137.14)



- Duties of care, loyalty, and confidentiality still apply
- Copyright law still applies
- Fiduciaries are “authorized users” of the decedent’s tangible personal property for purposes of computer fraud and unauthorized access laws
- Fiduciaries are not authorized to impersonate the user
- Fiduciaries may terminate accounts under the same general standard under which they may access general digital assets

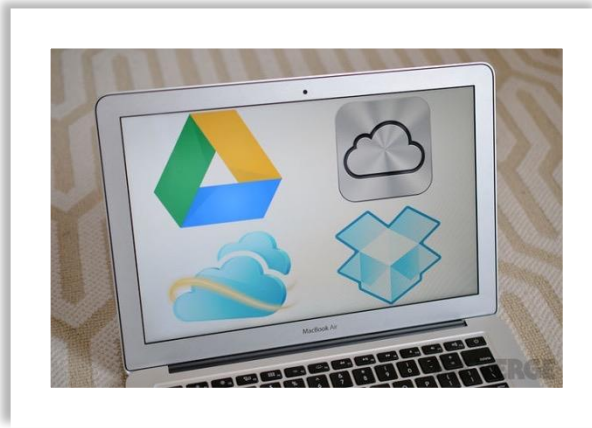
What Can Individuals Do to Plan for Digital Assets?



Create a digital inventory

- List important usernames and passwords
- Consider applications for this:
 - Password Vaults (Keeper, LastPass, 1Password)
 - Password Transfer (Password Box, EverPlans)
- List where to find important files
- Express wishes concerning what should or should not happen to electronic assets
- Use online tools like Google Inactive Account Manager and Facebook Legacy Contact

Think About Tangible Assets to Access Digital Assets



Where do the digital assets live?

- Home Computer
- Cloud-based services (Dropbox, OneDrive, iCloud)
- External Hard Drives, Flash Drives, Memory Cards
- Tablets
- Smartphones



Are these items password protected? Organized?

What Can Estate Plan Documents Do?



Documents should include digital asset powers:

- Powers of attorney, Wills, maybe Trusts
- Note use of “authorized user” and “lawful consent”
- Specifically authorize content of communications if that’s what you want.
- Provide clear delegation powers to allow an agent to manage on fiduciary’s behalf if you want a “digital executor”
- Reference a “digital property” memorandum in addition to a personal property memorandum



Thank You!

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