

## Digital Asset Planning A Talk with Professor Naomi Cahn

- Digital assets and digital asset planning
  - Digital assets
    - Includes social media and email accounts, online banking accounts, data stored online, virtual currencies, digital copyrights and trademarks, and others.
    - The Revised Uniform Fiduciary Access to Digital Access Act (RUFADAA) defines “digital asset” as a digital record to which someone has a right or interest. Digital assets are typically stored in accounts bound by terms-of-service agreements.<sup>1</sup>
  - Digital asset planning
    - When a person passes, fiduciary is often assigned to wind up the estate and handle financial matters.
    - Importance of digital asset planning: fiduciary needs access to the accounts and information to:
      - Create inventory of person’s assets
      - Wind up financial accounts
      - Ensure disposition of assets
      - Ensure continuity in managing assets
      - Prevent identity theft
      - Console loved ones
- Challenges to fiduciary access without RUFADAA and digital asset planning
  - Passwords and encryption
  - Terms of service agreements of the online platforms
    - Dictate whether fiduciaries have a right digital to assets under a particular online service provider after password has been entered
    - Different online service providers have different postmortem options. Some online service providers prohibit the transfer of accounts or order for their deletion when the account holder can no longer use it. Others provide online tools that allow account holders to choose what happens to their account after they can no longer manage it.
      - Google’s Inactive Account Manager
        - Allows the account holder to select someone (a “trusted contact”) to be notified after a period of inactivity. The

---

<sup>1</sup> Revised Uniform Fiduciary Access to Digital Assets Act, Uniform Law Commission 2015, <https://www.uniformlaws.org/viewdocument/final-act-no-comments-33?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22&tab=librarydocuments>.

account holder can also select what data they would like the trusted contact to have access to.<sup>2</sup>

- Facebook's Legacy Contact
  - Account holders can choose a legacy contact to manage their account once it is memorialized . The legacy contact is given a limited scope of action, including writing a pinned final post, responding to friend requests, and requesting account removal. Legacy contacts cannot log into the account, read messages, remove friends, or make new friend requests.<sup>3</sup>
- Privacy policies of online platforms
- Federal and state statutes
  - Stored Communications Act (SCA) 18 U.S.C. § § 2701-2712.
    - Part of the Electronic Communications Privacy Act
    - SCA prohibits public communications services from content disclosure of user communications
    - Service providers can only divulge information if the provider has the consent of the original account owner
- RUFADAA
  - Approved by the Uniform Law Commission in 2015. Revised UFADAA (2014).
  - Adopted in 45 states as of mid-2021.
  - Governs access to person's online accounts when account owner loses ability to manage account. Extends fiduciary power to manage digital assets. Restricts fiduciary access to electronic communications, e.g. email or text contents, without account owner's consent.
  - Key provisions
    - Defines digital assets
    - Provides default rules
    - Deters to account holder intent
    - Encourages fiduciary compliance
    - Provides that if SCA permits online service provider to disclose, RUFADAA requires the provider to do so
    - Fiduciaries are entitled to the catalogue of electronic communications, but not the content.
- Digital asset planning best practices
  - Inventory of digital assets, including where they're held and how to access them (usernames, passwords, and password prompts)

---

<sup>2</sup> Google Account Help, About Inactive Account Manager, <https://support.google.com/accounts/answer/3036546?hl=en>.

<sup>3</sup> Facebook Help Center, Legacy Contact, <https://www.facebook.com/help/1568013990080948>.

- Address digital assets in estate planning documents
  - Express grant of fiduciary access to and power over digital assets
  - Include disposition of assets with value
- Decide how you want your digital assets handled and indicate that through estate documents
- Take advantage of online service providers' planning tools
- Consolidate digital assets (e.g. password manager)
- Take measures to protect against identity theft

### **Additional Resource**

- Cahn, Naomi R., Kunz, Christina L., Brown Walsh, Suzanne. "Digital Assets and Fiduciaries." Research Handbook on Electronic Commerce Law, John A. Rothschild, ed., Edward Elger, 2016. George Washington Law School, 2016, <https://ssrn.com/abstract=2603398>.