

CONNECTICUT DELEGATION OF AUTHORITY OVER DIGITAL ASSETS

With the rapid expansion of the Internet and electronic information in the last twenty years, your digital footprint has likely grown dramatically. Most of us have at least some form of electronic presence, whether it be a social media page, a collection of e-mails, or documents saved to the cloud. You can access and control that electronic presence in varying degrees while you are alive and capable. However, it has become important to plan for someone else to be able to access and control your electronic presence in the event of your incapacity or death.

Until recently, each custodian of your electronic presence (e.g., each email provider, each social media provider, each provider of digital storage) simply made up its own rules to govern access to your electronic presence upon your death or incapacity. These rules were sometimes arbitrary and capricious, and there was little consistency among custodians.

In May of 2016, the Connecticut General Assembly passed a new law, effective October 1, 2016, known as the Connecticut Revised Uniform Fiduciary Access to Digital Assets Act, or "UFADAA". UFADAA provides guidance on when and how your digital assets may be accessed by (i) your fiduciaries during your lifetime, such as your agent under a Power of Attorney, or your Conservator, and (ii) your fiduciaries after your death, such as your Executor. UFADAA will only apply to those residing in Connecticut, or those who resided in Connecticut at the time of their death.

A "digital asset" is any electronic record in which you have a right or interest, regardless of whether it is a file saved on your hard drive or uploaded to the Internet. Examples of an electronic record include the contents of an e-mail, a photo uploaded to the "cloud," or even a video game character. However, only electronic records are considered to be digital assets; any physical assets related to the electronic records are not digital assets. For example, while an e-mail sent by your bank containing an e-statement of your savings account is a digital asset, the underlying funds in that account are not digital assets.

Under UFADAA, digital assets fall into three distinct categories: (i) the content of an electronic communication, (ii) a catalogue of electronic communications, and (iii) other assets. A "catalogue of electronic communications" and "other assets" are generally available to any fiduciary. But, the "content of an electronic communication" is available to your fiduciary only if you give your express consent to such access.

The "content of electronic communications" includes the subject line and body of an e-mail, text, instant message, or other medium. Whether a digital asset is considered the

protected content of an electronic communication depends on whether that asset is publicly accessible. If a digital asset is not publicly accessible by others, then it can be accessed by a fiduciary only with your express consent. For example, a tweet which can be read only by those who have specifically been granted access to view your tweets is considered the content of electronic communication. Contrast this with a public tweet that is generally viewable by anyone, without restriction or limitation. Public tweets are not considered the content of electronic communication, but instead fall into the category of digital assets called "other assets".

A "catalogue of electronic communications" is simply a record of each person with whom you have had an electronic communication; the time and date of each communication; and the e-mail address, phone number, or other identifier of those you have communicated with.

"Other assets" is a catch-all category, not defined in UFADAA, which loosely includes all other electronic records, from electronic personal or business files to photos uploaded to social media or stored on your computer.

Under UFADAA, your fiduciary has default access to both the catalogue of your communications and your other digital assets when given either specific authority over your digital assets or general authority to act on your behalf. For example, if you grant your fiduciary general authority to act on your behalf regarding your business files, that fiduciary will have access to any of your business files, regardless of whether they are physical folders in a file cabinet or documents saved to the cloud.

Your digital assets may be stored on the hard drive of your personal laptop. They may also may be stored, maintained, processed, received, or carried by a "custodian" such as Google, Facebook, Apple, Verizon, or AT&T via accounts governed by terms-of-service agreements.

If your digital assets are maintained in an online account, UFADAA provides that the custodian may provide an online tool to name a person to administer your digital assets under that account in certain situations. That person is called a "designated recipient". For example, Facebook currently offers what it calls "Legacy Contact" service which allows you to name a designated recipient, and give that designated recipient authority to access and manage your account on your behalf. This authority may include managing your account while you are capable, while you are incapable, or after your death. Naming a designated recipient using a custodian's online tool will override any inconsistent provision in a Will, Power of Attorney, or other record that you create.

If you fail to name a designated recipient using a custodian's online tool, or if the custodian does not provide an online tool, you can grant your fiduciary (e.g., agent under a

Power of Attorney or Executor of your estate) authority to access and administer your digital assets in your best interests. Without granting your fiduciary this power, the custodian's terms-of-service agreement will dictate who has access to and authority over any electronic records.

UFADAA does not apply to the digital assets of an employer used by an employee in the ordinary course of the employer's business. For example, a fiduciary (e.g., agent or Executor) cannot force a company that maintains an internal email system that only employees can access to reveal the content of an electronic communication or a catalogue of electronic communications of an employee who became incapable or died.

A fiduciary seeking disclosure of any digital asset must deliver to the custodian a written request for that disclosure, along with a copy of the document granting authority over that digital asset. Either a grant of generalized authority to act on your behalf, or a specific authority over your digital assets and their contents, will suffice where the request is for a "catalogue of electronic communications" or "other assets". But, a specific grant of authority over your digital assets and their contents is required where the request is for the custodian to disclose the "contents of a communication".

Where a fiduciary has authority over digital assets and their contents, the custodian of your account may, at its discretion, grant your fiduciary full access to your account, grant partial access to your account sufficient to perform the fiduciary's duties, or provide your fiduciary with a digital copy of all digital assets that you could have otherwise accessed. Note that a custodian is under no obligation to disclose to your fiduciary or designated recipient any information you have deleted from your account, even if the custodian has record of it.

Your fiduciary has a fiduciary duty to act in your best interest in administering your digital assets with care, loyalty, and confidentiality. The fiduciary may not impersonate you using your account, nor may the fiduciary violate the terms-of-service agreement that you may have with your custodian. If your fiduciary believes it is in your interest, your fiduciary may terminate your account with a custodian.

Under UFADAA, a general grant of authority to your Executor or agent under a Power of Attorney may not be sufficient to provide your fiduciary with access to all of your digital assets. While a general grant of authority to act on your behalf will allow your fiduciary default access to the catalogue of your communications and your other assets, the content of your electronic communications, including emails and private Facebook posts, will be unreachable without a specific grant of authority over your digital assets.

We suggest that you review your online accounts to determine if the account custodian offers an online tool which will allow you to name a designated recipient to have access to the account. If you do designate a designated recipient, we suggest you keep a copy of the designation with copies of your estate planning documents. If the account custodian does not provide an online tool allowing you to name a designated recipient to access your account, you may wish to update your estate planning documents to grant a fiduciary (such as an agent under a Power of Attorney, or an Executor of a Will) access your digital assets in the event of your incapacity or death.

This outline is intended as a broad overview, and does not constitute legal advice. Whether or not a delegation of authority over your digital assets is appropriate for you, and if so, the form of the delegation, must be determined on the basis of your specific circumstances and desires.