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Will your executor have access to your computer?

Estate planning for digital assets has been heating up in recent years. A variety of items will fall under this umbrella, including e-mail, electronic files, financial accounts, digital photographs and video, social media accounts, perhaps even items with substantial value such as domain names or bitcoin. Where online access to financial accounts was once an additional luxury, more and more these accounts are becoming primarily online, even online only.

One would expect that, at one's death, the fiduciary who will be handling estate settlement would have access to all of these items. There are many reasons for such access, including:

- consoling grieving loved ones, making images and writings of the deceased available;
- identifying and marshaling the assets in the estate, especially accounts that may exist solely online; and
- heading off any postmortem attempts at identity theft.

However, the law is surprisingly unsettled in this area, and expectations may not be met. A debate is raging over the what the default assumptions should be about the wishes of the deceased, a debate that must take into account the contracts that govern access to digital assets. The topic was comprehensively explored in the July/August 2015 issue of *Probate & Property* [Vol. 29, No. 4]. Victoria Blachly wrote "Uniform Fiduciary Access to Digital Assets Act: What UFADAA Know," and Karin Prangley provided the counterpoint in "War and PEAC in Digital Assets: The Providers' PEAC Act Wages War with UFADAA." Herewith, a short summary of both sides.

UFADAA

The nonpartisan Uniform Law Commission, which has been drafting sample legislation on a variety of subjects for the states for 124 years, turned its attention in 2012 to the problems of digital assets in estate settlement. Last year it approved the *Uniform Fiduciary Access to Digital Assets Act (UFADAA)*. The sample legislation is now being considered for adoption in states around the country.

If the legislation is adopted, trustees and the executors of estates would be able to "step into the shoes" of a decedent with respect to digital assets, just as they already are able to do with financial assets. Deference to the wishes of the account holder is the goal, but where those wishes are unclear, the presumption will be to grant access to fiduciaries. Access is permitted only for purposes of carrying out fiduciary duties, not for "impersonating" the person for whom the fiduciary is acting.

Under the proposal, one also would be able to grant such access through a power of attorney, provided the access is specifically identified.

The drafters of the proposal identified several key benefits of their approach to bringing some clarity to this area of probate law:

- Account holders have control; their wishes will be respected.
- Digital assets will be treated as all other assets are treated.

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• Protections are provided for the third parties with whom the fiduciaries interact regarding digital assets.

• Efficient uniformity will be created for all concerned. This last aspect may be especially important as people move among states and work with digital providers who may not be located in their state of residence.

PEAC Act

Although most estate planners favor UFADAA and the simplification that it could bring to estate settlement, some of the providers of electronic communications services to the public are opposed. They favor competing legislation, the *Privacy Expectations Afterlife Choices Act (PEAC Act)*. This legislation takes a much more restrictive approach, in most cases requiring a court order before a fiduciary could gain access to digital assets.

The service providers are concerned that UFADAA is inconsistent with the provisions of federal law related to this area, the Electronic Communications Privacy Act, which restricts access. They believe that the default assumption should be in favor of privacy, that people don't want their fiduciaries to have access to their electronic communications. Finally, they point out that UFADDA probably conflicts with millions of "terms of service" agreements already in effect.

What's a "terms of service" agreement? That's the fine print that almost no one reads before hitting the "I agree" button when downloading computer software or establishing a new electronic account. Most of these agreements limit access to the account holder, absent a court order to the contrary.

As a practical matter, the approach outlined in the PEAC Act would create a substantial burden on the probate court system, and it would increase the costs of estate settlement, perhaps dramatically. Still, some state legislators may be sympathetic to the arguments made by service providers. Given widespread concerns over privacy, the public may feel the same.

This are issues that you should not take for granted. See your estate planning advisors to learn more.

(November 2015)