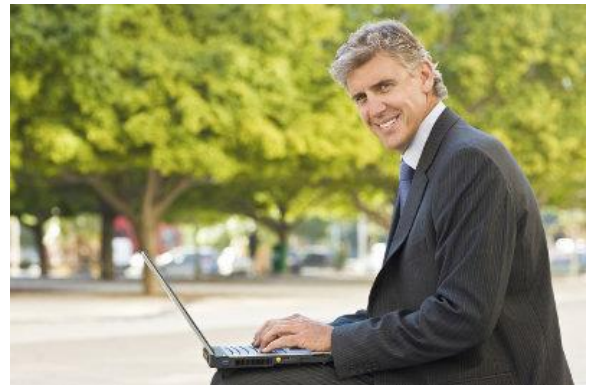


## Estate Planning To Protect Client Digital Assets In North Carolina

Estate planning documents are designed to protect clients' wishes both during life and after death. In a durable power of attorney document, a client may pick an agent to help him manage his finances and legal affairs should he become mentally incapacitated during life. And in both will and trust documents, the client may determine how he wants his assets used or distributed after death.



But in the Internet age, it can be difficult to separate certain assets such as financial accounts from the computers, websites, and software used to operate, manage, manipulate, and convey information about those accounts. Thus without proper estate planning incorporating the client's digital assets, it is a mistake to assume that client fiduciaries such as agents, guardians, executors, and trustees will have the tools they need to perform their obligations.

### Existing Laws Do Not Provide Automatic Fiduciary Access To Digital Accounts And Digital Information

In North Carolina, statutory law does not support automatic fiduciary access to digital accounts and digital assets. An NC proposal addressing estate planning and digital accounts was removed from the statute S.L. 2013-91 (N.C. Gen. Stat. 30-3.1) before the Governor signed on March 12, 2013. A few other states have passed digital assets legislation.

Without clear direction from NC state law, controlling law is still mostly dictated by two 1986 Federal statutes which predate the commercial Internet. Although these Federal statutes are outdated, they still guide court decisions.

The overriding purpose of both the 1986 Stored Communications Act (SCA) and the Computer Fraud and Abuse Act (CFAA) is to protect the computer user's privacy and to prevent unauthorized access to the user's digital assets. As a result, the computer service providers subject to the SCA and CFAA maintain service agreements that include only one user, and strictly prohibit "unauthorized access." Some service agreements also state that the individual user's rights are "nontransferable." Thus, when a user becomes mentally incompetent or dies, fiduciaries may have difficulty getting access to his online accounts.

In addition, many online services will refuse to release the password information from a deceased user, even in the face of a judicial order or civil lawsuit.

## **Best Practices Require Both Authorization And Transfer Of Log-on Data Including Passwords**

In the absence of a modern statute controlling fiduciary access to digital assets, best estate planning practices require both 1) clear authorization from the principal, grantor, or testator in the estate documents authorizing the fiduciary to access the digital accounts; 2) the actual transfer of account information including log-on information and passwords.

Although these preparations may not work forever and may not work with every digital account, these steps may be the best that NC estate planners can do until controlling laws are modernized. Some digital providers have revised their rules to permit fiduciaries to access online accounts when the proper authorization is included in the primary user's estate planning documents.

### **Authorization Language and Definition**

Estate planner Jean Gordon Carter and colleagues provide sample authorization language, which may be included in a will:

"Digital Assets. My executor shall have the power to access, handle, distribute and dispose of my digital assets."

They also advocate including a broad definition of “Digital Assets” in the will.

Proper authorization to use digital assets language should additionally be included in the durable power of attorney document, in order for the agent to be fully able to conduct an incapacitated grantor’s business and legal affairs.

### **Transfer of Account Administrative Information**

In addition to the digital assets authorization language needed in the estate documents, the grantor must also physically transfer to the proper fiduciaries the administrative information required for using the digital assets. This includes account information, log-on information, and passwords.

Randy Siller, a registered representative of Lincoln Financial Advisors Corporation, shares the following seven best practices for clients transferring digital access information to fiduciaries as part of an estate plan:

- **Digital Hardware.** List all digital hardware, including desktops, laptops, smartphones, iPads, USB flash drives, and external hard drives.
- **Financial Software.** List all financial-related software programs used, such as Quicken, QuickBooks, and Turbo Tax, which may include important tax and business information, as well as passwords.
- **File Organization/Passwords.** Provide an outline of the file organization on digital devices so fiduciaries will know where to find important files, as well as any passwords they may need to gain file access.
- **Social Media.** List all social media accounts, such as Facebook, LinkedIn, Twitter, and Cloud websites, as well as the information needed to access each one.
- **Online Accounts.** Prepare a list of all online accounts including bank accounts, investment accounts, retirement accounts, e-commerce accounts (Amazon, PayPal), credit card accounts, and insurance accounts. It is critical for fiduciaries to have access to these providers.
- **Subscriptions.** Ensure that a list of online subscriptions such as Netflix, Norton Anti-Virus, credit reporting/protection subscriptions, and streaming music subscription services are documented so fiduciaries can access or cancel those services.

- **Email.** List all personal and business-related email accounts, and how to access them.

## Social Media

It is easy for estate planners to focus on protecting monetary assets. But the control of a client's "digital legacy" on social media may also be important.

Geoffrey Fowler, writing for the Wall Street Journal, has noted: "The digital era adds a new complexity to the human test of dealing with death. Loved ones once may have memorialized the departed with private rituals and a notice in the newspaper. Today, as family and friends gather publicly to write and share photos online, the obituary may never be complete."

To deal with the desire for users to allow their loved ones to memorialize them through their Facebook accounts at death, Facebook recently decided to allow members to designate a "legacy contact" to manage parts of their accounts posthumously. Members may now also choose to have their presence deleted entirely at death.

## On The Horizon

Likely the most complete proposal addressing the need of clients to effectively give fiduciaries access to their digital estate has been written under the auspices of the Uniform Law Commission. The Uniform Law Commission approved the recent Uniform Fiduciary Access to Digital Assets Act (UFADAA) on July 16, 2014 in Seattle, WA.

The Commission states:

The UFADAA gives people the power to plan for the management and disposition of their digital assets in the same way they can make plans for their tangible property: by providing instructions in a will, trust, or power of attorney. If a person fails to plan, the same court-appointed fiduciary that manages the person's tangible assets can manage the person's digital assets, distributing those assets to heirs or disposing of them as appropriate.

Until such reforms become law, the best strategy for passing down digital assets to fiduciaries requires both including proper fiduciary authorization language in

the estate documents, and the physical transfer of digital asset user information to fiduciaries.

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