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Social Media Is Permanent, You Are Not: Evaluating The Digital Property Dilemma In Florida Probate

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Abstract

The *digital after life*¹ has quickly become the brave new world of probate law and estate planning.² The reason for this is because as recently as 2010, reports show that “[seventy-seven percent] of Americans use e-mail or the [I]nternet, at least occasionally.

KEYWORDS: data, social media, email

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FLORIDA PROBATE**

STORM TROPEA*

I.	INTRODUCTION.....	92
II.	HOW SOCIAL MEDIA BECOMES A DIGITAL ASSET	94
	A. <i>Pick Your Poison: The Types of Digital Assets and Digital Accounts</i>	97
	1. Devices and Data	98
	2. E-mail	98
	3. Digital Media	99
	4. Cloud Storage Accounts	99
	5. Financial Accounts	100
	6. Business Accounts	100
	7. Social Media Accounts	101
	B. <i>Terms of Service: The Social Media Contract</i>	102
III.	HITS AND MISSES: HOW SOME LEGISLATURES FELL BEHIND THE TECHNOLOGY.....	107
	A. <i>The States</i>	108
	1. Connecticut	108
	2. Idaho	109
	3. Indiana	109
	4. Nevada	109
	5. Oklahoma.....	110
	6. Rhode Island	110
	7. Virginia	111
	B. <i>The Answer? The Uniform Fiduciary Access To Digital Assets Act</i>	111
IV.	BRIDGING THE GAP: WHY FLORIDA NEEDS TO ADDRESS THE DIGITAL ASSET QUESTION.....	114
V.	CONCLUSION.....	115

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I. INTRODUCTION

The *digital after life*¹ has quickly become the brave new world of probate law and estate planning.² The reason for this is because as recently as 2010, reports show that “[seventy-seven percent] of Americans use e-mail or the [I]nternet, at least occasionally.”³ Yet, a similar study now reveals that number has increased to show that eighty-seven percent of American adults are now using the Internet.⁴ More significantly, while nearly nine out of ten Americans from the ages of eighteen through forty-five use the Internet,⁵ ninety-seven percent of young adults ages eighteen through twenty-nine are regularly using the Internet.⁶ The Internet has become so prevalent in society that fifty-nine percent of young adults ages eighteen through twenty-nine cite the Internet as their primary source for news, both nationally and internationally.⁷ Furthermore, research shows that nearly eight out of ten young adults ages eighteen through twenty-four “have created their own social networking profile.”⁸ With this expanding popularity, words like *selfie* and *social media* have now been deeply ingrained in our language,⁹ and it seems like social networking, e-mail, and microblogging are here to stay;¹⁰ unfortunately, we are not.¹¹ Therefore, this

1. Dana Parks, *Digital After Life—Social Media and the Deceased*, SAN DIEGO BURIAL AT SEA (Apr. 18, 2013), <http://www.sandiegoburialatsea.com/digital-after-life/>.

2. See Caitlin Dewey, *What Happens to Your Facebook When You Die?*, WASH. POST (May 7, 2014, 5:20 PM), <http://www.washingtonpost.com/news/the-intersect/wp/2014/05/07/what-happens-to-your-facebook-when-you-die/>.

3. PEW RES. CTR., MILLENNIALS: CONFIDENT. CONNECTED. OPEN TO CHANGE., 27 (Paul Taylor & Scott Keeter eds., 2010), available at <http://www.pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf>.

4. PEW RES. CTR., THE WEB AT 25 IN THE U.S.: THE OVERALL VERDICT: THE INTERNET HAS BEEN A PLUS FOR SOCIETY AND AN ESPECIALLY GOOD THING FOR INDIVIDUAL USERS 5 (2014), available at <http://www.pewinternet.org/2014/02/27/the-web-at-25-in-the-u-s/>.

5. See PEW RES. CTR., *supra* note 3, at 19, 27.

6. PEW RES. CTR., *supra* note 4, at 5.

7. See PEW RES. CTR., *supra* note 3, at 35.

8. *Id.* at 29.

9. *Selfie Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/selfie> (last visited Dec. 26, 2014) (selfie was first used in 2002 and emphasizes the recent impact social networking has had on our culture); *Social Media Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/socialmedia> (last visited Dec. 26, 2014).

10. See Dan Newman, *6 Reasons Social Media Is Your Secret Weapon in Customer Service*, ENTREPRENEUR (May 5, 2014), <http://www.entrepreneur.com/article/233612>.

11. See *Estate Planning: Protecting Your Digital Assets*, ALLY BANK (May 9, 2014, 9:00 AM), <http://community.ally.com/straight-talk/estate-planning-your-digital-assets/>.

continually debated legal question still exists: What happens to our digital assets when we die?¹²

There is already an excellent foundation of legal discussion developed around how digital property should be managed,¹³ what should happen to an owner's social media account when they die,¹⁴ as well as how a Uniform Act may help state legislatures address the disposition of digital property.¹⁵ This Comment will expand on this discussion by exploring how some states, the Uniform Act, and other legal scholars have attempted to address this legal issue in order to provide the groundwork for how the Florida Legislature can effectively and fairly govern digital estate planning, while staying ahead of the ever-increasing role that technology and social media plays in our lives.¹⁶ Part II of this Comment will provide a general overview of the types of digital assets and the problems that may arise when digital assets become things of value.¹⁷ Part III will outline the existing state legislative solutions and consider to what extent the Uniform Act provides for digital estate planning, and examine the possible issues that follow.¹⁸ Part IV will discuss traditional estate planning in Florida and its silence in addressing the fiduciaries' responsibilities to maintain and administer the decedent's digital estate.¹⁹ Lastly, this Comment will conclude with recommendations on how the Florida Legislature can improve on the current legislative solutions and develop a sound foundation, keeping pace with the ever changing technological world, and the legal issues arising out of digital estate planning.²⁰

12. *Id.*

13. See James D. Lamm et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. MIAMI L. REV. 385, 391–396 (2014).

14. Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643, 1644 (2012); Damien McCallig, Note, *Facebook After Death: An Evolving Policy in a Social Network*, 22 INT'L. J.L. & INFO. TECH. 107, 108 (2014); Kristina Sherry, Comment, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185, 186 (2012).

15. Samantha D. Haworth, Note, *Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act*, 68 U. MIAMI L. REV. 535, 542 (2014).

16. See discussion *infra* Parts III–IV.

17. See discussion *infra* Part II.

18. See discussion *infra* Part III.

19. See discussion *infra* Part IV.

20. See discussion *infra* Part V.

II. HOW SOCIAL MEDIA BECOMES A DIGITAL ASSET

Seeing how the use of social media, online banking, e-mail, gaming, and blogging accounts are growing at an astounding rate,²¹ there should not be any surprise in the contemporaneous rise in legal questions.²² Some reports estimate that by 2018, social networking accounts will increase from 3.6 billion to over 5.2 billion.²³ One of the first social media platforms that turned online sharing into a big business for its creative users and its advertisers was YouTube.²⁴ Some of YouTube's most popular user accounts boast upwards of one million dollars in revenue a year and over a billion views worldwide.²⁵

While the popularity of these sites and accounts rise, so does its value to their users.²⁶ One such social media platform, Vine, is also a social media website that allows "millions of people [to] post [six]-second clips and share them with the community."²⁷ Although Vine is only a year old, the platform has generated enormous popularity with teens, young adults, and advertisers.²⁸ There are several *Vine Stars*²⁹ that have gained millions of followers.³⁰ These social media celebrities use their pages as substantial sources of income and in some cases can make upwards of two thousand

21. *Computer & Internet Trends in America*, U.S. Census Bureau (Feb. 3, 2014), http://www.census.gov/library/infographics/computer_2014.html; *Internet Usage and Population Growth*, INTERNET WORLD STATS, <http://www.internetworldstats.com/am/us.htm> (last visited Dec. 26, 2014); e.g., *Facebook Reports Second Quarter 2014 Results*, FACEBOOK (July 23, 2014), <http://investor.fb.com/releasedetail.cfm?ReleaseID=861599>. Facebook reported over 1.32 billion monthly active users, "an increase of [fourteen percent] year-over-year." *Id.*

22. Lamm et al., *supra* note 13, at 387; Sherry, *supra* note 14, at 187.

23. THE RADICATI GRP., INC., EMAIL STATISTICS REPORT, 2014–2018 4 (Sara Radicati ed., 2014).

24. *See About YouTube*, YOUTUBE, <http://www.youtube.com/yt/about/> (last visited Dec. 26, 2014).

25. Harrison Jacobs, *We Ranked YouTube's Biggest Stars by How Much Money They Make*, BUS. INSIDER (Mar. 10, 2014, 9:22 PM), <http://www.businessinsider.com/richest-youtube-stars-2014-3?op=1>.

26. *See Alyson Shontell, Meet the Stars of Vine: These Kids Have Millions of Followers and Make Eye-Popping Amounts of Money*, BUS. INSIDER (Mar. 8, 2014, 11:48 AM), <http://www.businessinsider.com/vine-stars-2014-3>.

27. *Id.*

28. *See id.*

29. *Id.*

30. Jeff Beer, *Vine Star Logan Paul Brings His Six-Second Creativity to New Hanes Campaign*, FAST COMPANY (July 20, 2014, 8:14 PM), <http://www.fastcreate.com/3033265/vine-star-logan-paul-brings-his-six-second-creativity-to-new-hanes-campaign>; Shontell, *supra* note 26.

dollars per re-Vine.³¹ Therefore, social media accounts can become so popular that they generate businesses within themselves, drive revenue, and become digital assets of their own.³²

Surprisingly, on average, an everyday individual's digital assets are worth thirty-five thousand dollars to fifty-five thousand dollars.³³ There is no doubt that a digital asset can have real value.³⁴ There are several examples where digital assets can hold intellectual property rights, earn revenue from advertisers, and even put a price on digital avatars in video games.³⁵ World of Warcraft is a gaming platform that has users purchase online weapons, virtual resorts, and gaming currency through the digital realm with real money.³⁶ Several of World of Warcraft users have accounts with avatars that are part of an online gaming community and worth thousands of dollars.³⁷

Furthermore, no one will deny the sentimental value that certain digital media can have.³⁸ Photos, e-mails, instant messages, and other personal information could be some of the most important assets a family will have after their loved one passes.³⁹ This is becoming increasingly noteworthy because more and more memorabilia are uploaded to a computer or digital archive rather than physically placed in a photobook.⁴⁰ Thus, digital property can be important to protect and plan for, even if there is no financial value.⁴¹

Undoubtedly, the first step would require us to properly define digital assets and their characteristics.⁴²

31. Shontell, *supra* note 26. A re-Vine is where a user shares a sponsor's video simply by pressing the re-Vine button, and the user would be compensated for sharing that video with his or her followers. *See id.*

32. *See* Lamm et al., *supra* note 13, at 389–90; Shontell, *supra* note 26.

33. Ashley Watkins, Comment, *Digital Properties and Death: What Will Your Heirs Have Access to After You Die?*, 62 BUFF. L. REV. 193, 195, (2014); Evan Carroll, *How Much Are Your Digital Assets Worth? About \$35,000*, DIGITAL BEYOND (July 24, 2014), <http://www.thedigitalbeyond.com/2014/07/how-much-are-your-digital-assets-worth-about-35000/>.

34. *See* Watkins, *supra* note 33, at 194–95.

35. Lamm et al., *supra* note 13, at 389–90.

36. *See id.* at 390.

37. *See id.*; Watkins, *supra* note 33, at 195.

38. Lamm et al., *supra* note 13, at 390–91.

39. *Id.*

40. *Id.* at 391.

41. *Id.*

42. *See* John Romano, *A Working Definition of Digital Assets*, DIGITAL BEYOND (Sept. 1, 2011, 12:24 PM), <http://www.thedigitalbeyond.com/2011/09/a-working-definition-of-digital-assets/>.

[While] [t]he phrase digital asset is being used . . . we have yet to come to a legally-accepted definition. A simple definition is that a digital asset is content owned by an individual that is stored in digital form. But this may not be broad enough to encompass all the digital elements of an estate that have value. An expanded definition includes online accounts.

So a more inclusive definition is that a *digital asset is digitally stored content or an online account owned by an individual*.⁴³

Thus, when considering whether the account or its content is a digital asset, we have to determine its “value . . . in the connections to other online accounts or the money making potential.”⁴⁴ The digital content, which could be categorized as a digital asset, includes “images, photos, videos, and text files.”⁴⁵ Digital assets could be stored locally on the individual’s computer or can be accessed through the cloud.⁴⁶ Furthermore, “[s]ome online accounts can be considered assets in and of themselves and have value to [the] estate;” these include the aforementioned social media profiles and e-mail accounts.⁴⁷ While there are several different types of digital files, each may be considered “intangible, personal property, as long as they stay digital.”⁴⁸

Generally, property can be separated into two categories: Real property and personal property.⁴⁹ The significance of whether or not they stay digital can be an important distinction, because once a digital file such as a photo is printed, it becomes tangible personal property.⁵⁰ Interestingly, over ninety-three percent of Americans are misinformed about what will happen to their digital assets when they die.⁵¹ For this reason, it would be helpful to briefly discuss the different types of digital assets.⁵²

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Romano, *supra* note 42.

48. *Id.*

49. Nathan J. Dosch & Joseph W. Boucher, *E-Legacy: Who Inherits Your Digital Assets?*, WIS. LAW., Dec. 2010, available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=83&issue=12&articleid=1907>.

50. *See* Romano, *supra* note 42.

51. Evan Carroll, *93 Percent of Americans Unaware or Misinformed About Digital Assets*, DIGITAL BEYOND (Apr. 29, 2014, 7:54 PM), <http://www.thedigitalbeyond.com/2014/04/93-percent-of-americans-unaware-or-misinformed-about-digital-assets/>.

52. Sherry, *supra* note 14, at 193–96; *see also* discussion *infra* Part II.A.

A. *Pick Your Poison: The Types of Digital Assets and Digital Accounts*

The reason for categorizing digital assets and digital accounts is because each shares—at least on some level—an interconnectedness that is unparalleled in respect to other types of property.⁵³ It is important, however, to note that there are differences between digital assets and digital accounts, because the overlaps between the two often cause them to be used interchangeably.⁵⁴ Although the two blend together in discussion, they may be treated differently under the law.⁵⁵ Most, if not all, social media accounts require an e-mail account to act as a backup for password changes and direct communication to the user.⁵⁶ Thus, e-mail is a fundamental piece to this digital asset issue, as most users access most of their other accounts through this service as well.⁵⁷

Evan Carroll, co-founder of the Digital Beyond Blog—which heavily influences this article and is a leading online resource for legal discussion dealing with one’s digital estate—identifies “at least five *types* of digital assets.”⁵⁸ While this Comment will include the five digital assets defined by Carroll, there are some other types of assets that would be helpful if briefly discussed as well.⁵⁹ The first is devices and data, which is the decedent’s actual computer as well as what can be stored on it.⁶⁰ The second is e-mail, which includes continued access to the account and the messages stored within them.⁶¹ Digital media accounts are third, and are an important distinction from e-mail accounts because these are an expanding field of digital assets, which include music, eBooks, apps, movies, and other forms of digital media.⁶² The fourth type is cloud storage accounts, which are online databases that store digital assets online.⁶³ The fifth type, financial

53. See Sherry, *supra* note 14, at 193–94.

54. Watkins, *supra* note 33, at 198–99. This Comment also uses the term *digital asset* interchangeably with *digital account* for the purpose of simplicity, but does recognize the importance of distinguishing between the two. *Id.* at 199.

55. *Id.* at 199.

56. Sherry, *supra* note 14, at 196.

57. *See id.*

58. *Id.* at 194 (emphasis in original); *see also* Evan E. Carroll et al., *Helping Clients Reach Their Great Digital Beyond*, WEALTHMANAGEMENT.COM (Sept. 1, 2011), <http://www.wealthmanagement.com/estate-planning/helping-clients-reach-their-great-digital-beyond-0>.

59. Sherry, *supra* note 14, at 194–96; *see also* Watkins, *supra* note 33, at 198–200; *infra* Parts A.1–7.

60. Sherry, *supra* note 14, at 194–95.

61. *Id.* at 195.

62. Watkins, *supra* note 33, at 206.

63. *Id.* at 211.

accounts, includes online banking, retirement, and insurance policies.⁶⁴ Another to consider are business accounts.⁶⁵ While these assets are a type of online account, some personal businesses are run through accounts, like eBay, and present separate difficulties of their own.⁶⁶ Lastly, the final type of accounts to be discussed are social media accounts and, while they are a type of online account, they are a central focus to this Comment and require a more in-depth analysis.⁶⁷

1. Devices and Data

Devices are easily recognized as the physical computer or other tangible property—such as an external hard drive or flash drive—where several digital files can be stored.⁶⁸ These devices can and are normally “distributed as part of the estate.”⁶⁹ Therefore, what separates digital assets from the devices and data discussion is that e-mail, social media, business, and financial accounts are “stored beyond [the] individual’s personal devices.”⁷⁰

2. E-mail

E-mail has been referred to as the “crossover between local and cloud-based storage” systems.⁷¹ The service is used for a variety of reasons including business and personal communication with people all over the world.⁷² Oftentimes, important aspects of the decedent’s life can be found in his or her e-mail—including bills and other personal information—which stresses the importance of having continued access to these accounts.⁷³ Although content in e-mail ranges from personal photos and financial records to intimate private conversations, it represents a real value and deserves to be protected and managed like any other property.⁷⁴

64. *Id.* at 200.

65. *Id.* at 212–13.

66. *Id.*

67. *See* Sherry, *supra* note 14, at 198; *infra* Part II.A.7.

68. Sherry, *supra* note 14, at 197.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See* Watkins, *supra* note 33, at 202.

73. *See* Justin Atwater, *Who Owns E-Mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life?*, 2006 UTAH L. REV. 397, 399.

74. *See id.* at 399–401.

3. Digital Media

A decedent's digital media collection can include a wide variety of things.⁷⁵ A common example would be a decedent's iTunes account or Amazon Kindle.⁷⁶ Worth noting, however, iTunes only provides the user a license for its product and is generally nontransferable.⁷⁷ The *first sale doctrine* in copyright law permits a lawful owner of a CD or book to sell this material item.⁷⁸ While this applies for a material copy, the digital copies of those same songs or books may not be so easily disposed of.⁷⁹ Even with this restriction, there are other examples of digital media accounts—like ReDigi—that allow digital songs and media to be *sold* or transferred on their marketplace.⁸⁰ There has recently been a movement by larger companies to follow suit and join the selling and transfer of digital media, including iTunes and Amazon.⁸¹ This area of digital assets is growing, and with the transition from license to a digital media market, the future of these accounts becomes more uncertain.⁸²

4. Cloud Storage Accounts

There are several new online accounts that offer storage in the *cloud*.⁸³ The appeal to storing media, documents, and other files in the *cloud* is because these files can be accessed by several different devices, as long as there is an internet connection.⁸⁴ More popular examples of these types of accounts include, “DropBox, SkyDrive, iCloud, or the Amazon Cloud Drive.”⁸⁵ Cloud storage accounts create similar problems as other digital accounts for fiduciaries, including their ability to find these accounts and these accounts limiting the accounts' access and transferability in their terms of service (“TOS”).⁸⁶ As one scholar notes, “iCloud actually addresses death specifically with a ‘No Right of Survivorship’ clause. This clause states that ‘[y]ou agree that your [a]ccount is non-transferable Upon receipt of a

75. Watkins, *supra* note 33, at 206.

76. See Jim Lamm, *What Happens to Your Apple iTunes Music, Videos, and eBooks When You Die?*, DIGITAL PASSING (Sept. 4, 2012), <http://www.digitalpassing.com/2012/09/04/apple-itunes-music-videos-ebooks-die/>.

77. *Id.* at 207; see also Watkins, *supra* note 33, at 207.

78. Lamm, *supra* note 76.

79. See Watkins, *supra* note 33, at 206–07.

80. *Id.* at 208.

81. See *id.* at 209.

82. *Id.* at 210.

83. See *id.* at 211.

84. See Watkins, *supra* note 33, at 211.

85. *Id.*

86. *Id.*

copy of a death certificate your [a]ccount may be terminated and all [c]ontent within your [a]ccount deleted.”⁸⁷ Depending on the account, it seems like these storage accounts—which may hold very important data such as unpublished works, or personal communications—may not be able to be accessed by the fiduciary or passed on to the decedent’s heirs.⁸⁸

5. Financial Accounts

Seemingly more familiar types of accounts are banking and retirement accounts, which fall under the umbrella of financial accounts.⁸⁹ Historically, these did not pose much of a problem because being able to identify and access these accounts would mean waiting for the decedent’s mail to come: 1) showing that the account exists and where to find it; and 2) making it less difficult to get a court order to access the account.⁹⁰ However, recently more and more banking has gone paperless and the new age of online banking makes managing expenses more convenient for the user, but can cause a major problem for their heirs.⁹¹ Aside from being able to locate these accounts, accessing them can be near impossible without having the passwords or identification numbers.⁹² One benefit to a financial banking account is that it is governed by the state law where the decedent lived, and legislation may help with accessing the account from the bank or business, which maintains the account.⁹³

6. Business Accounts

Certain accounts, such as eBay, PayPal, Amazon, and many of the previously mentioned digital accounts, can be part of a decedent’s business.⁹⁴ Some individuals may have developed and established a trusted eBay account.⁹⁵ Some lawyers may even keep client files in a Dropbox-type service for their ease of sharing with partners.⁹⁶ Even a domain name may

87. *Id.*; *iCloud Terms and Conditions*, APPLE, <http://www.apple.com/legal/icloud/en/terms.html> (last updated Oct. 20, 2014).

88. *See* Watkins, *supra* note 33, at 211.

89. *Id.* at 200.

90. *See id.* at 200–01.

91. *Id.*

92. *Id.* at 201.

93. Watkins, *supra* note 33, at 201–02.

94. *See id.* at 213.

95. Naomi Cahn, *Postmortem Life On-line*, PROBATE & PROPERTY, July–Aug. 2011, at 36, 37.

96. *Id.*

be considered a business account that would qualify as a digital asset.⁹⁷ While the same problems could potentially arise if a decedent used these accounts for personal use, the fact that it is a business account creates a different set of possible issues for the decedent's heirs and fiduciary.⁹⁸ For example, under Florida law, it is the personal representative's fiduciary responsibility to maintain and efficiently manage the decedent's estate.⁹⁹ Therefore, the fiduciary would have to ensure that the business is maintained, and the only way this would be possible is if the personal representative of the estate knew about the business account and was able to access it.¹⁰⁰

7. Social Media Accounts

The popularity of social media accounts is uncontested.¹⁰¹ Billions of people are utilizing websites, like Facebook, Instagram, Twitter, Myspace, Pinterest, and countless others, to post the most intimate details of their personal lives on the internet.¹⁰² These websites allow users to create accounts and develop personal profiles tailored just for them.¹⁰³ The ability to then share these profiles with friends, family, and your fifth grade science teacher gives social media a defining feature.¹⁰⁴ Social media has become so popular that a recent study has shown that ninety-two percent of children in the United States have an online presence by the age of two.¹⁰⁵ On average, a social media user at age thirty already has a digital fingerprint that can span back fifteen years.¹⁰⁶ One of the most important aspects of social media is that it is increasingly popular amongst teens and young adults.¹⁰⁷ This is a considerable fact because most young adults may not draft a will in time to properly plan for their estate.¹⁰⁸ The fact that so many young adults are

97. *Id.*

98. Watkins, *supra* note 33, at 212–13.

99. FLA. STAT. § 733.602(1) (2014).

100. *See* Watkins, *supra* note 33, at 212–13.

101. *See* Sherry, *supra* note 14, at 199–200; Watkins, *supra* note 33, at 203.

102. Watkins, *supra* note 33, at 203–04.

103. *See* Sherry, *supra* note 14, at 199–200.

104. *See* Watkins, *supra* note 33, at 204.

105. Jeff Bertolucci, *Nine of Ten U.S. Kids Have Online Presence by Age Two, Study Says*, PC WORLD (Oct. 7, 2010, 2:45 PM), http://www.pcworld.com/article/207225/nine_of_ten_us_kids_have_online_presence_by_age_two_study.html.

106. *Id.* (“[T]he vast majority of children today will have online presence by the time they are two-years-old—a presence that will continue to build throughout their whole lives.”).

107. *See* PEW RES. CTR., *supra* note 3, at 29.

108. *See* Assoc. Press, *Dealing with the Digital Afterlife*, RICHMOND TIMES-DISPATCH (July 17, 2014, 8:25AM), http://www.timesdispatch.com/business/dealing-with-the-digital-afterlife/article_773fa594-0dad-11e4-af88-001a4bcf6878.html.

accumulating vast digital estates and are not properly planning for their future is what creates so much confusion for their heirs, their fiduciary, and the law once they die.¹⁰⁹

As it may already be apparent, and although this Comment will later discuss the subject, the distinction between personal and intangible property can make a substantial difference because, “[d]epending upon the law in your jurisdiction, this distinction . . . may have significant implications on how clients grant executors access to these assets, what control the executor has over these assets, and over the probate process itself.”¹¹⁰ As briefly mentioned earlier, a major problem to consider is the need for the fiduciary to identify, locate, and access assets that are only available through digital means such as e-mail or other online servers.¹¹¹ Other potential obstacles to consider mentioned earlier—although slightly outside the scope of this Comment—are copyright concerns.¹¹² More importantly, if a fiduciary is successful in accessing a particular digital asset, the fiduciary could come across a host of other legal problems attempting to transfer the digital asset.¹¹³

B. *Terms of Service: The Social Media Contract*

The access and transferability of a digital asset incorporates different aspects of property, contract, and probate law.¹¹⁴ An agreement between online services and their users is “almost always governed by a contract of adhesion.”¹¹⁵ The issues derive from the contractual agreement between the user and the Internet service provider (“ISP”).¹¹⁶ Normally, for the user to acquire a license for the service provided by the ISP, the user must adhere to

109. See Jessica Hopper, *Digital Afterlife: What Happens to Your Online Accounts When You Die?*, NBC NEWS (June 1, 2012, 7:53 AM), http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite. Cahn explains:

‘When somebody dies, the person who is responsible for taking care of the individual’s asset is supposed to be complying with what the individual wanted and protecting the individual,’ Cahn said. ‘Because so many people have not thought about this, we don’t know what the person actually wanted . . . we can all imagine what’s in internet accounts. There may certainly be cases where the person who died would not have wanted anyone to get anywhere near the person’s account.’

Id. (alteration in original).

- 110. Romano, *supra* note 42; *see also infra* Part III.
- 111. Romano, *supra* note 42; *see also supra* Part II.A.6.
- 112. Dosch & Boucher, *supra* note 49; *see also supra* Part II.A.3.
- 113. Dosch & Boucher, *supra* note 49.
- 114. *Id.*
- 115. Sherry, *supra* note 14, at 204.
- 116. Dosch & Boucher, *supra* note 49.

the TOS.¹¹⁷ In many instances, the TOS do not specify what will happen to the account upon the user's death.¹¹⁸ Additionally, TOS often include language that makes it very difficult, if not impossible, to allow the user to transfer their account to someone else, or even allow another person to access their account.¹¹⁹ Therefore, the TOS may prevent a fiduciary from being able to transfer or access the account.¹²⁰ Herein lies the primary question surrounding how a fiduciary can access a legitimate digital asset of a decedent when the contract that the decedent originally agreed to did not grant fiduciary access.¹²¹

More often than not, the user typically scans through "several screens worth of legalese, and then registers by clicking [on] a box and agreeing to the terms therein."¹²² These terms—although they qualify as a contract of adhesion—are routinely held up by the courts and are enforceable.¹²³ The TOS often dictate the law that is binding to the agreement, but the question of which law would supersede the other is unclear.¹²⁴

While there is opportunity throughout social media, some platforms have recently come across controversy in regard to who owns the rights to the videos and pictures users post.¹²⁵ The language in the TOS agreement on Instagram raised many questions in regard to what license Instagram had with its users' pictures.¹²⁶ The platform updated its TOS the very next

117. *Id.*; see also *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/legal/terms> (last updated Nov. 15, 2013).

118. Sherry, *supra* note 14, at 204.

119. Dosch & Boucher, *supra* note 49; see also *Statement of Rights and Responsibilities*, *supra* note 117.

120. Dosch & Boucher, *supra* note 49; see also *Statement of Rights and Responsibilities*, *supra* note 117.

121. Dosch & Boucher, *supra* note 49; see also *Statement of Rights and Responsibilities*, *supra* note 117.

122. Sherry, *supra* note 14, at 204–05.

123. *Id.* at 205.

124. See *id.* ("Given that not all users are situated in California, then, '[i]t's questionable whether the estate laws of a decedent's resident state would supersede the contractual agreements with the various online services,' irrespective of legislation specifically addressing social-media assets."); *Statement of Rights and Responsibilities*, *supra* note 117.

125. See Declan McCullagh, *Instagram Says It Now Has the Right to Sell Your Photos*, CNET (Dec. 17, 2012, 9:54 PM), <http://www.cnet.com/news/instagram-says-it-now-has-the-right-to-sell-your-photos/>.

126. See *Terms of Use*, INSTAGRAM, <http://instagram.com/about/legal/terms/before-January-14-2013> (last visited Dec. 30, 2014). The TOS which caused the controversy state:

Instagram does *not* claim *any* ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, applications, or any other materials—collectively, *Content*—that you post on or through the Instagram

day.¹²⁷ The new TOS give Instagram the license to use a user's content "[s]ubject to your profile and privacy settings, [therefore], any User Content that you make public [and] searchable by [another] User[] [is] subject to use under . . . Instagram API."¹²⁸ Instagram's TOS also "reserve the right to refuse access to the [s]ervice to anyone for any reason at any time,"¹²⁹ leading to a host of other potential legal questions.¹³⁰

Facebook purchased Instagram for a cool one billion dollars in 2012.¹³¹ Facebook is by far the most popular social media platform on the Internet, boasting an average of over 829 million daily active users.¹³² Even with such a position, Facebook is another social media platform that has shared in some controversy over their TOS.¹³³ One recent feature, in particular, that has aroused some serious questions is how an individual's account will be managed, if at all, after death.¹³⁴ This feature, called memorializing, is supposed to lock a deceased person's account and keep anyone from logging into it.¹³⁵ Although Facebook maintains this is to

Services. By displaying or publishing—*posting*—any Content on or through the Instagram Services, you hereby grant to Instagram a non-exclusive, fully paid and royalty-free, worldwide, limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce and translate such Content, including without limitation distributing part or all of the Site in any media formats through any media channels, except Content not shared publicly—*private*—will not be distributed outside the Instagram Services.

Id.

127. See McCullagh, *supra* note 125; Alia Papageorgiou, *Instagram Will Own Your Photos Starting Jan. 16 2013*, NEW EUROPE (Dec. 19, 2012, 18:16), <http://www.neurope.eu/article/instagram-will-own-your-photos-starting-jan-16-2013>; Kevin Systrom, *Updated Terms of Service Based on Your Feedback*, INSTAGRAM, <http://blog.instagram.com/post/38421250999/updated-terms-of-service-based-on-your-feedback> (last visited Dec. 30, 2014).

128. *Privacy Policy*, INSTAGRAM, <http://instagram.com/about/legal/privacy/> (last visited Dec. 30, 2014).

129. *Terms of Use*, INSTAGRAM, <http://instagram.com/about/legal/terms/> (last visited Dec. 30, 2014).

130. See Lamm et. al., *supra* note 13, at 386–87.

131. Evelyn M. Rusli, *Facebook Buys Instagram for \$1 Billion*, N.Y. TIMES (Apr. 9, 2012, 2:02 PM), http://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/?_php=true&_type=blogs&_r=0.

132. *Facebook Reports Second Quarter 2014 Results*, *supra* note 21.

133. Sherry, *supra* note 14, at 204–05.

134. See Hopper, *supra* note 109; *How Do I Report a Deceased Person or an Account That Needs to be Memorialized?*, FACEBOOK, <https://www.facebook.com/help/150486848354038> (last visited Dec. 30, 2014).

135. *How Do I Report a Deceased Person or an Account that Needs to be Memorialized?*, *supra* note 134.

protect the privacy of the deceased and their family and friends, there have been some setbacks.¹³⁶

Facebook has also been involved in litigation as a result of its TOS.¹³⁷ After the suicide of Benjamin, Helen and Jay Stassen, the parents of the departed, began intense litigation to gain access to their son's Facebook and e-mail accounts.¹³⁸ Because of its policy, Facebook maintains that it will not allow access by giving out the password to a dead person's account.¹³⁹ Although a local judge ordered Facebook to allow the parents of the decedent access to his account, Facebook currently has not complied and legally can appeal the decision.¹⁴⁰ Facebook's TOS restricts its users from sharing their password with anyone else.¹⁴¹ Facebook's TOS also restricts the user from transferring their account to anyone without explicitly getting permission in writing.¹⁴² If there is any violation of "the letter or spirit of this [s]tatement, . . . we can stop providing all or part of Facebook to you."¹⁴³

One of the biggest concerns facing the loved ones left behind is often trying to figure out what the deceased wanted to do with their social media accounts.¹⁴⁴ In most cases, "people [do not even] think about what will happen to their online accounts when they die."¹⁴⁵ Internet companies also take the position that users have a certain expectation of privacy and craft their TOS to represent this.¹⁴⁶ Unlike other online banking accounts that users expect to be passed on when they die, social media accounts are expected to be memorialized or deleted.¹⁴⁷

While social media is in the midst of growing pains that are posing their own set of problems, other types of online assets have had a chance to grow out of their infancy.¹⁴⁸ Google provides an e-mail service called Gmail, whose TOS states that it will, in certain circumstances, release

136. See Evan Carroll, *Deceased Man Returns on Facebook*, DIGITAL BEYOND (July 21, 2014), <http://www.thedigitalbeyond.com/2014/07/deceased-man-returns-on-facebook/>; Hopper, *supra* note 109; *How Do I Report a Deceased Person or an Account that Needs to be Memorialized?*, *supra* note 134.

137. Hopper, *supra* note 109.

138. *Id.*

139. *See id.*

140. *Id.*

141. *Statement of Rights and Responsibilities*, *supra* note 117.

142. *Id.*

143. *Id.*

144. Hopper, *supra* note 109.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See id.* ("According to Google's web site [sic], in rare cases, they may provide the content of a deceased person's account to an authorized representative of the person.").

information through the “legal process or enforceable governmental request.”¹⁴⁹ Yahoo, on the other hand, has recently changed its policy to align similarly with other e-mail service providers due to one of the most discussed and often cited cases of digital assets and ownership rights.¹⁵⁰

Justin Ellsworth, a trained demolition expert for the United States Marines, was killed in Al Anbar, Iraq while inspecting a roadside bomb.¹⁵¹ Justin utilized e-mail as a primary means to communicate with his friends and family.¹⁵² However, Justin died intestate with no spouse or child, leaving his parents as next of kin.¹⁵³ Justin’s father, John, then attempted to retrieve Justin’s e-mails from Yahoo, but the ISP initially refused to comply with his request.¹⁵⁴ At the time, Yahoo’s TOS did not allow the company to provide “e-mail passwords to anyone [except] for the account holder.”¹⁵⁵ John argued under the theory that e-mail accounts are personal property and should pass just like other property through intestacy laws.¹⁵⁶ Yahoo would eventually concede, but not before conditioning their compliance with a court order that would require them to provide Justin’s father with the e-mails.¹⁵⁷ Yahoo delivered the contents of Justin’s e-mail to his father John in a CD despite the fact that Yahoo refused to change its policy prohibiting the ISP from disclosing their users’ e-mails.¹⁵⁸

This case highlights the difficulty and uncertainty surrounding digital assets of the deceased and the TOS of the service providers.¹⁵⁹ Some experts suggest that the real legal battle will be between the “[TOS] declaring that users have no right of survivorship, and newly enacted state laws like Oklahoma’s, declaring that social-media accounts may pass like tangible property to beneficiaries and heirs.”¹⁶⁰ This conflict, as previously discussed, touches on several issues with state laws and the TOS which

149. *Privacy Policy*, GOOGLE, http://static.googleusercontent.com/media/www.google.com/en/us/intl/en/policies/privacy/google_privacy_policy_en.pdf (last updated Dec. 19, 2014).

150. Sherry, *supra* note 14, at 198; *see also Privacy Policy*, YAHOO, <https://info.yahoo.com/privacy/us/yahoo/> (last updated Sept. 25, 2014).

151. Sherry, *supra* note 14, at 214.

152. *Id.*

153. *Id.*

154. *Id.*; Stefanie Olsen, *Yahoo Releases E-mail of Deceased Marine*, CNET (Apr. 21, 2005, 12:39 PM), http://news.cnet.com/yahoo-releases-e-mail-of-deceased-marine/2100-1038_3-5680025.html.

155. Olsen, *supra* note 154.

156. Sherry, *supra* note 14, at 214.

157. *Id.*

158. Olsen, *supra* note 154.

159. *See id.*

160. Sherry, *supra* note 14, at 215 (referencing a February 1, 2012 telephone interview with Evan Carroll, Co-founder of The Digital Beyond blog).

dictate what law governs their terms.¹⁶¹ Couple this with the fact that there is little to no case law to help structure these new legislative attempts to remedy the digital asset uncertainty creates more questions than answers for the decedents' families.¹⁶²

III. HITS AND MISSES: HOW SOME LEGISLATURES FELL BEHIND THE TECHNOLOGY

There are currently seven states that have enacted laws specifically designed to help fiduciaries manage online accounts.¹⁶³ Several other states, including Florida, are currently in the process of introducing legislation that will consider and address fiduciary access to digital access.¹⁶⁴ While these are the first attempts at state legislatures creating answers for the digital asset uncertainty, experts believe that several states' digital asset "laws are too limited in scope."¹⁶⁵ On July 16, 2014, the Uniform Law Commission ("ULC") passed the Uniform Fiduciary Access to Digital Assets Act ("UFADAA").¹⁶⁶ This was the result of an ongoing effort to help guide fiduciaries and provide access to digital assets so that they can properly administer the decedent's estate "while respecting the privacy and intent of the account holder."¹⁶⁷ The following discussion of the current state laws governing fiduciary access will include: Connecticut,¹⁶⁸ Idaho,¹⁶⁹ Indiana,¹⁷⁰ Nevada,¹⁷¹ Oklahoma,¹⁷² Rhode Island,¹⁷³ and Virginia.¹⁷⁴

161. *Id.* at 215–16.

162. *See id.*

163. Jim Lamm, *August 2013 List of State Laws and Proposals Regarding Fiduciary Access to Digital Property During Incapacity or After Death*, DIGITAL PASSING (Aug. 30, 2013), <http://www.digitalpassing.com/2013/08/30/august-2013-list-state-laws-proposals-fiduciary-access-digital-property-incapacity-death/>.

164. *Id.*

165. *See id.*

166. Jim Lamm, *Uniform Fiduciary Access to Digital Assets Act (UFADAA)*, DIGITAL PASSING (July 16, 2014), <http://www.digitalpassing.com/2014/07/16/uniform-fiduciary-access-digital-assets-act-ufadaa/>.

167. *Id.*

168. CONN. GEN. STAT. § 45a-334a (2014).

169. IDAHO CODE ANN. § 15-3-715 (2014).

170. IND. CODE § 29-1-13-1.1 (2014).

171. NEV. REV. STAT. § 143.188 (2014).

172. OKLA. STAT. tit. 58, § 269 (2014).

173. R.I. GEN. LAWS § 33-27-3 (2014).

174. VA. CODE ANN. § 64.2-110 (2014).

A. *The States*

As previously mentioned, several states have created legislation that is intended to help fiduciaries and their heirs deal with digital assets.¹⁷⁵ While state legislatures draft and implement these new laws, they must take into account several factors “including: (1) passwords; (2) encryption; (3) federal and state criminal laws that penalize *unauthorized access* to computers and data—including the Computer Fraud and Abuse Act—and; (4) federal and state data privacy laws, including the Stored Communications Act.”¹⁷⁶

1. Connecticut

Connecticut’s statute begins by defining an e-mail service provider as any person who is an intermediary between the sending and receiving of e-mail between users.¹⁷⁷ The statute further defines an e-mail account as all electronic information that is recorded and stored as it relates to the user and the service provider.¹⁷⁸ Connecticut then requires the e-mail service provider to provide copies of the content in the deceased user’s e-mail account so long as the executor of the estate can provide: A written request for copies of the e-mail content, a death certificate, and “a certified copy of the certificate of appointment as executor or administrator;” or an order from the court of probate ruling that the court has jurisdiction over the estate of the deceased.¹⁷⁹ The statute ends with a catch-all stating that this section will not require an ISP to disclose information that would conflict with applicable federal law.¹⁸⁰ The most obvious restriction to this statute is that it only applies to e-mail and gives the fiduciary no control or instruction in regard to social media accounts or other types of digital assets.¹⁸¹ The statute is too limited in scope, and would need to be expanded to include assets, including social media.¹⁸²

175. Lamm, *supra* note 163.

176. *Id.*; *see also* 18 U.S.C. §§ 1030, 2701 (2012).

177. CONN. GEN. STAT. § 45a-334a(a)(1) (2014).

178. *Id.* § 45a-334a(a)(2).

179. *Id.* § 45a-334a(b).

180. *Id.* § 45a-334a(c).

181. *See id.* § 45a-344a(a)–(c).

182. *See* CONN. GEN. STAT. § 45a-334a(a)–(c); Lamm, *supra* note 163.

2. Idaho

Idaho was one of the earliest states to enact legislation that grants a personal representative authority over digital assets.¹⁸³ The Idaho statute is titled “Transactions Authorized for Personal Representatives: Exceptions”, and the only relevant language to digital assets states that the personal representative may “[t]ake control of, conduct, continue or terminate any accounts of the decedent on any social networking website, any microblogging or short message service website or any e-mail service website.”¹⁸⁴ The statute uses clear and concise language to include several types of digital assets, but grants the personal representative the right to *continue* a decedent’s social networking website, which may be in direct conflict with certain social media accounts’ TOS.¹⁸⁵

3. Indiana

Under the Indiana statute, titled “Electronically Stored Documents of Deceased”,¹⁸⁶ the custodian, or individual that stores electronic documents of another, shall provide any information or copies of any documents upon written request or a certified order of the court.¹⁸⁷ More interestingly, the statute also prohibits the custodian from disposing of the stored documents for two years after receiving the written request.¹⁸⁸ This subsection of the statute may also directly conflict with the TOS of the decedent’s service providers.¹⁸⁹ While the Indiana statute attempts to give broad power to the fiduciary’s control over the decedent’s e-mail, it does not mention social media or other digital assets.¹⁹⁰

4. Nevada

Nevada’s statute is one of the newer legislative attempts to reign in the digital asset dilemma.¹⁹¹ Interestingly, this piece of legislation does not

183. See IDAHO CODE ANN. § 15-3-715 (2014); Sherry, *supra* note 14, at 216–17.

184. IDAHO CODE ANN. § 15-3-715(28).

185. See *id.*; e.g., *iCloud Terms and Conditions*, *supra* note 87.

186. IND. CODE § 29-1-13-1.1 (2014).

187. *Id.* § 29-1-13-1.1(b)(1)–(2).

188. *Id.* § 29-1-13-1.1(c).

189. See *id.*; e.g., *iCloud Terms and Conditions*, *supra* note 87.

190. See IND. CODE § 29-1-13-1.1.

191. See NEV. REV. STAT. § 143.188 (2014); Lamm, *supra* note 163.

attempt to grant the personal representative access to the digital asset.¹⁹² The statute states the following:

[A] personal representative has the power to direct the termination of any account of the decedent, including, without limitation: (a) [a]n account on any: (1) [s]ocial networking Internet website; (2) [w]eb log service Internet website; (3) [m]icroblog service Internet website; [or] (4) [s]hort message service Internet website; or (5) [e]lectronic mail service Internet website; or (b) [a]ny similar electronic or digital asset of the decedent.¹⁹³

The statute, however, does not grant the personal representative authority to terminate a bank account.¹⁹⁴ Lastly, the final subsection to the statute declares that the personal representative's termination of the digital assets does not violate the TOS or contractual obligations of the decedent and the ISP.¹⁹⁵

5. Oklahoma

Oklahoma was the first state to enact any legislation that was specifically designed to handle social media and the decedent's digital assets in regard to estate planning and probate.¹⁹⁶ The statute currently reads, "[t]he executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites."¹⁹⁷ While this has been in effect since 2010, there have not been any cases that would require the court to interpret the statute.¹⁹⁸

6. Rhode Island

Rhode Island's statute is very similar to Connecticut's in that it only requires the ISP to provide copies of the digitally stored documents.¹⁹⁹ While Rhode Island's language allows the personal representative to possibly

192. See NEV. REV. STAT. § 143.188.

193. *Id.* § 143.188(1).

194. *Id.* § 143.188(2).

195. *Id.* § 143.188(3).

196. See Sherry, *supra* note 14, at 216.

197. OKLA. STAT. tit. 58, § 269 (2014).

198. Sherry, *supra* note 14, at 216.

199. See Watkins, *supra* note 33, at 221. Compare R.I. GEN. LAWS § 33-27-3 (2014), with CONN. GEN. STAT. § 45a-334a (2014).

gain access to the decedent's e-mail, it as well is too limited in scope because it does not incorporate social media or any other type of digital asset.²⁰⁰

7. Virginia

Currently, Virginia's statute has the most unique take on addressing the digital estate of the decedent because this statute only grants the "personal representative of a deceased minor[]" power to control the TOS of an online account.²⁰¹ The Virginia statute never mentions an adult decedent, which will lead the court to conclude the legislative intent was only to address a minor's digital estate.²⁰² While the statute grants the personal representative "the power to assume the minor's [TOS] agreement for an online account," it is solely for the purpose of disclosing the contents of the minor's communication pursuant to 18 U.S.C. § 2702.²⁰³

B. *The Answer? The Uniform Fiduciary Access To Digital Assets Act*

Fiduciaries play a vital, often unglamorous, role in probate, acting on behalf of deceased individuals.²⁰⁴ In most instances, "[f]iduciaries generally have the same power over assets that an absolute owner would have," essentially stepping in the shoes of the decedent, even when dealing with his or her digital assets.²⁰⁵ The UFADAA is the ULC's attempt to address several of the obstacles that arise for the fiduciary regarding digital assets; it addresses four major types of fiduciaries, and provides these fiduciaries the power to overcome obstacles that arise with digital estates.²⁰⁶ The Uniform Act, although complete, will need to be refined before states can begin considering incorporating it into their legislation.²⁰⁷ The question soon becomes: What exactly would states be considering with this Act?²⁰⁸

The Uniform Act is intended to provide a "consistent . . . framework to resolve conflict[] with state criminal laws, as well as supplementing federal criminal and civil laws."²⁰⁹ The first step of the UFADAA was

200. See R.I. GEN. LAWS § 33-27-3.

201. VA. CODE ANN. § 64.2-110(A) (2014); Lamm, *supra* note 163.

202. See VA. CODE ANN. § 64.2-110.

203. Lamm, *supra* note 163; see also 18 U.S.C. § 2702 (2012); VA. CODE ANN. § 64.2-110.

204. See Lamm, *supra* note 166.

205. *Id.*

206. See *id.*

207. See *id.*

208. See *id.*

209. Lamm et al., *supra* note 13, at 414.

simply defining a digital asset as a record that is electronic.²¹⁰ This broad definition is intended to include anything that can be stored digitally.²¹¹ Section 4 of the Act, titled “Access by Personal Representative to Digital Assets of Decedent,” lays out the groundwork for the personal representative to have authority to access the stored electronic communication of the decedent; it also grants the personal representative access to “any other digital asset in which at death the decedent had a right or interest.”²¹² Therefore, the Act is intending to permit the personal representative access to all of the digital assets of the decedent, unless it would be prohibited by applicable law.²¹³

In the following sections, sections 5 through 7, the UFADAA provides agents, conservators, and trustees the authority to manage and access their principal’s, protected person’s, or successor’s digital assets.²¹⁴ Section 5 is intended to establish that so long as the conservator is authorized by the court, he may access the protected person’s digital assets.²¹⁵ Section 5 is similar to section 4, as it also addresses the concerns of the ISP and is structured so that it could incorporate all forms of digital assets.²¹⁶ Section 6 establishes that unless otherwise explicitly stated in the power of attorney, the agent has authority over all of the principal’s digital assets.²¹⁷ Following basic agency principles, there should not be any question as to the authority granted by the principal to the agent.²¹⁸ Section 7 of the UFADAA deals with inter vivos transfers of digital assets, as well as testamentary transfers of digital assets, and grants authority to the trustee to access and manage the successor’s digital assets.²¹⁹

Section 8 is potentially the most important provision in the UFADAA because it provides specific authority to the fiduciary.²²⁰ In fact, section 8(b) nullifies several of the issues previously brought up in this comment regarding TOS.²²¹ The language of section 8(b) reads:

(b) Unless an account holder, after [the effective date of this [act]], agrees to a provision in a terms-of-service agreement

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210. UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 2(9) (2014).
 211. *See id.*
 212. *Id.* § 4(1), (3).
 213. *See id.* § 4.
 214. *Id.* §§ 5–7.
 215. UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 5.
 216. *See id.* §§ 4–5.
 217. *Id.* § 6(b)(2).
 218. *See id.* § 6.
 219. *Id.* § 7.
 220. UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8.
 221. *See id.* § 8(b).

limits a fiduciary's access to a digital asset of the account holder by an affirmative act separate from the account holder's assent to other provisions of the agreement:

(1) the provision is void as against the strong public policy of this state.²²²

As this reads, the statute would trump any TOS agreements in light of the strong public policy behind enforcing the statute.²²³ Section 8 has another provision, which may be interesting if an ISP decides to enforce their agreed upon TOS.²²⁴ Section 8(c) provides that the "choice-of-law provision in a [TOS] agreement is unenforceable against a fiduciary acting under this [act]."²²⁵ This portion of the UFADAA is intended to follow basic probate law by recognizing the personal representative or other fiduciary stepping into the shoes of the decedent and thus, would have the "same authority as the account holder if the account holder were the one exercising the authority."²²⁶ Although section 8 is intended to authorize fiduciary authority, it is carefully drafted so that it would not be in conflict with applicable law, such as the Computer Fraud and Abuse Act.²²⁷

Section 9 of the UFADAA enumerates how the fiduciary must properly request access to the digital assets and that compliance is necessary for access to digital property.²²⁸ It is important to note that section 9 is reinforcing the premise that the personal representative's power is limited to what the original account holder would have if he still accessed the account.²²⁹ Section 10 absolves the potential civil liability put on ISP for complying with this Act; thus, section 10 provides immunity for them.²³⁰

Ultimately, this Act, if uniformly adopted, could clear up some of the legal issues revolving around ISPs and their TOS.²³¹ This Act can potentially relieve ISP's need to protect themselves through their TOS by removing the risk involved with disclosing personal information through lawful requests by fiduciaries.²³² Furthermore, this Act could help secure

222. *Id.* (alteration in original).

223. 18 U.S.C. § 1030 (2012); *see also* UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8(b).

224. *See* UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8(c).

225. *Id.* (second alteration in original).

226. *Id.* § 8 cmt.

227. *See* 18 U.S.C. § 1030; UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8 cmt.

228. UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 9.

229. *Id.* § 9 cmt.

230. *Id.* § 10.

231. Lamm et al., *supra* note 13, at 416.

232. *See id.*

fiduciaries' access to decedent's personal information, while ensuring that the decedent's privacy and final wishes are protected.²³³

IV. BRIDGING THE GAP: WHY FLORIDA NEEDS TO ADDRESS THE DIGITAL ASSET QUESTION

The current Florida Probate Code grows from a legacy of legal debate and discussion that has been ongoing since its inception.²³⁴ Florida probate proceedings are entirely governed by statute, and the administration of estates is governed by chapter 733, beginning with the venue for probate proceedings²³⁵ and ending with the closing of estates.²³⁶ Under chapter 733, Florida requires that a personal representative be appointed to administer the decedent's estate.²³⁷ Furthermore, the personal representative typically must be a Florida resident, unless they are a lineal descendant or spouse.²³⁸ The personal representative must not have been convicted of a felony, cannot be under eighteen years of age, and must be mentally capable of performing their duties.²³⁹

The personal representative in Florida is considered a fiduciary and held to a certain standard of care.²⁴⁰ "A personal representative [must] settle and [administer] the estate . . . accord[ing] [to] the terms of the decedent[]" and must use the authority granted to him "for the best interests of interested persons."²⁴¹ To help ensure the personal representative is acting in the best interest of the parties, as long as the actions of the personal representative are in accordance with administering the estate properly, he or she will not be liable for those acts.²⁴²

Thus, the Florida Probate Code grants certain powers to the personal representative,²⁴³ so they can adequately and efficiently administer the estate, including the fiduciary duty to maintain the assets of the estate.²⁴⁴ The first issue regarding digital assets can be found in the language of Florida Probate Code chapter 733, which states:

233. See UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, Prefatory Note.

234. See Henry A. Fenn & Edward F. Koren, *The 1974 Florida Probate Code—A Marriage of Convenience*, 27 U. FLA. L. REV. 615, 616–18 (1975).

235. FLA. STAT. § 733.101 (2014).

236. See *id.* § 733.903.

237. *Id.* § 733.301(1)(a)(1).

238. *Id.* § 733.304(2)–(3).

239. *Id.* § 733.303(1)(a)–(c).

240. FLA. STAT. § 733.602(1).

241. *Id.*

242. *Id.* § 733.602(2).

243. *Id.* § 733.608.

244. *Id.* §§ 733.608, .609(1).

(1) All real and personal property of the decedent, except the protected homestead, within [the] state and the rents, income, issues, and profits from it shall be assets in the hands of the personal representative:

(a) [f]or the payment of devises, family allowance, elective share, estate and inheritance taxes, claims, charges, and expenses of the administration and obligations of the decedent's estate;

(b) [t]o enforce contribution and equalize advancement; [and]

(c) [f]or distribution.²⁴⁵

The language of the code does not mention intangible property.²⁴⁶ Furthermore, there is not a single mention of a digital asset.²⁴⁷ The silence in the statute represents some of the problems that arise between a fiduciary's attempt to gain access and control of digital assets that would clearly violate an ISP, such as Facebook's TOS.²⁴⁸ The bulk of the previous discussion regarding digital assets and the problems that arise in states with fiduciaries—and how some states have attempted to address this issue—shed light on the fact that the Florida Probate Code provides no protection to a decedent's digital estate, because through the language of the statute, digital assets do not exist.²⁴⁹ Furthermore, the Florida Probate Code does not currently authorize the fiduciary to access or control e-mail or other forms of electronic communication.²⁵⁰ Having shown that digital property can hold extraordinary sentimental value, and in some cases substantial financial value,²⁵¹ there is clearly a need for the Florida Probate Code to recognize digital assets and provide a consistent framework for fiduciaries to access these accounts and administer them accordingly.²⁵²

V. CONCLUSION

It takes some time for legislatures to hammer out a permanent solution to the issues that arise with digital estate planning and fiduciary

245. FLA. STAT. § 733.608(1).

246. *See id.*

247. *See id.*

248. *See id.*; *supra* notes 114–21 and accompanying text.

249. *See* FLA. STAT. § 733.608; Dosch & Boucher, *supra* note 49; discussion *supra* Part III.

250. *See* FLA. STAT. § 733.608.

251. Lamm et al., *supra* note 13, at 390–91.

252. *See supra* Part IV.

management.²⁵³ Legal scholars have presented several suggestions on how to properly plan for a digital estate, including taking an inventory of all accounts and listing all relevant user names and passwords.²⁵⁴ Other suggestions include regularly backing up and expressly authorizing ISP to disclose their information to their fiduciaries.²⁵⁵ This is, of course, when an account holder has planned out his digital estate; however, when no plan exists, a fiduciary should consult an attorney and so long as there is not a criminal investigation, request and create copies of the content of the digital property.²⁵⁶

While these suggestions are currently necessary in Florida, they would not be if Florida would enact the UFADAA, at least in part.²⁵⁷ Florida should establish a digital assets statute that gives direct access to the decedents' or incapacitated individuals' guardian to electronic e-mail communications, as well as any and all other digital assets, including social media accounts.²⁵⁸ To help ensure there is not subsequent litigation, Florida should adopt section 9 of the UFADAA, to ensure ISPs do not fear subsequent civil litigation.²⁵⁹ Furthermore, Florida legislators should take note of the prior states' attempt at addressing the digital assets issues and refrain from making theirs too limited in scope.²⁶⁰ Incorporating all digital assets, including social media, would help ensure they do not end up with the same latent ambiguity as Rhode Island, Virginia, and Connecticut.²⁶¹ Lastly, Florida legislators should strongly consider section 8 of the UFADAA.²⁶² This section develops strong fiduciary authority while maintaining the necessary responsibilities to ensure the decedent's privacy is maintained and their final wishes are respected.²⁶³

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253. See Lamm et al., *supra* note 13, at 416.
 254. *Id.* at 416–18.
 255. *Id.*
 256. *Id.*
 257. See UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, Prefatory Note (2014).
 258. See *id.* § 4 (2014).
 259. See *id.* § 9.
 260. See *id.* Prefatory Note.
 261. CONN. GEN. STAT. § 45a-334a (2014); R.I. GEN. LAWS § 33-27-3 (2014); VA. CODE ANN. § 64.2-110 (2014); UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, Prefatory Note.
 262. See UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8.
 263. See *id.* § 8(b).