

# TECHNOLOGY PROBATE

## Online Tools under RUFADAA: The Next Evolution in Estate Planning or a Flash in the Pan?

Over the past five years, the estate planning process for digital assets has dramatically transformed. Much of this transformation is the result of the Uniform Law Commission's introduction of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) in September 2015, which a majority of US states and territories have adopted with some variations. RUFADAA, like its predecessor, UFADAA, was drafted with the intent to unify and clarify state laws with respect to a fiduciary's ability to access an individual's digital assets and electronic communications. However, unlike UFADAA, which presumed a decedent's consent for the decedent's personal representative to access her digital assets, RUFADAA places the burden on the decedent to provide express consent through the decedent's will or another mechanism. Under RUFADAA, an individual may use an "online tool," which is an account-specific feature that an online custodian (e.g., Apple, Google, Yahoo) may offer that enables its users to provide directions for disclosure or nondisclosure of digital assets to a designated person. Online tools are account-specific—in other words, using Google's online tool will not dictate how information held in the decedent's Apple account should be shared. Any assets that are not addressed with an online tool are subject to the terms of a testator's estate planning documents. When digital assets are not addressed by an online tool or an estate planning document, a provider's terms of service agreement will dictate access and

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**Technology—Probate** provides information on current technology and microcomputer software of interest in the probate area. The editors of *Probate & Property* welcome information and suggestions from readers.

disclosure of a decedent's digital assets and electronic information.

### The Slow Adoption of Online Tools

While numerous commentators have explored the importance of including digital asset clauses in estate planning documents and the need to inventory digital assets, very little attention is paid to the incorporation of online tools in an estate plan. This lack of attention may be primarily because online tools are new, few digital-asset custodians provide online tools, and currently many users are not aware of the existing tools. The two most prominent online tools available today (but by no means the only online tools) are Google's Inactive Account Manager and Facebook's Legacy Contact (each of which will be explored in greater detail below). The authors predict that in the coming years many more digital asset custodians will offer online tools. As time progresses and custodians are forced to deal with issues surrounding deceased owners, custodians may be more inclined to create online tools as a cost-effective solution to the transfer of and access to a deceased owner's digital assets. And, as is common with online providers, once a handful of providers adopt a particularly

useful feature, competitors may quickly employ similar techniques.

### The Importance of Online Tools in an Estate Plan

As the prevalence of online tools grows, attorneys will need to become familiar with the way online tools may impact an estate plan. First, for practitioners who are still reluctant to include a digital-assets clause in planning documents, an online tool may be an appropriate way to address the planning gap that is created when assets are not explicitly addressed in wills or trusts. Additionally, since an important part of estate planning is the education of clients, both planners and clients must be comfortable discussing, using, and understanding online tools. Clients are better positioned than their attorneys to know the location and value of their digital assets, and they must be armed with the knowledge of the benefits and disadvantages of using online tools in conjunction with their estate plans. Finally, in light of the hierarchal importance placed on online tools in RUFADAA, online tools are analogous to beneficiary designations that will impact the access, use, and transfer of digital assets. It is therefore vital for attorneys to understand how online tools work, what effect they have on a client's estate plan, and perhaps most importantly, what their limitations are in both the planning and administration of an estate. Just as a client may use a payable-on-death account or make a change in title to or from joint ownership without alerting the client's attorney (possibly disrupting the operation of a well-crafted estate plan), an individual's use of online tools can have a similarly dramatic effect on the access to digital assets. For better or worse, online tools place a significant amount of planning power directly into clients' hands.

### Specific Online Tools Under RUFADAA

RUFADAA defines an online tool as “an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.” To give a clearer picture of what an online tool looks like and how it may be used, below are two real-world examples:

#### Google—Inactive Account Manager

According to Google, the Inactive Account Manager “is a way for users to share parts of their account data or notify someone if they’ve been inactive for a certain period of time.” This feature provides Google account information to a designated recipient, but the recipient has the ability to download account information only. The designated recipient does *not* have complete access to the original user’s account.

Once a user signs up for the Inactive Account Manager process (<https://support.google.com/inactive>), Google will monitor a user’s online activity on a Google account, including the last sign-in and use of Gmail, regardless of whether it is on a computer or a smartphone. After an account has been inactive for a certain period of time (between three and 18 months, as set by the user), an inactivity plan is triggered. Google will warn the user that the end of the inactivity period is approaching before the term has expired through email, a backup email, and text messages to a designated phone number.

Once the designated inactivity time limit has expired, Google will notify up to ten individuals (identified by the user providing a separate email address for each) that the user’s account has gone dormant. Google will also allow those designated individuals to download some or all the user’s Google Account information, as designated by the user, for a period of time. When choosing what information to share, users can individually select from up to 52 separate categories including Gmail, YouTube (which Google owns), Contacts, Calendar, and Google Drive.

activity and information. After a selection is made, the user has an opportunity to add a personal message the recipients will receive when account access is granted. Finally, Google provides the option for the user’s entire Google account to be deleted after the recipient’s three-month access expires. Once the process is completed, the user can change the settings at any time.

#### Facebook—Legacy Contact

Upon Facebook learning of a user’s death, it will either memorialize the account or permanently delete it. Facebook will only delete the account if a living user instructs Facebook that it should do so upon death. As for memorialized accounts, according to Facebook they “are a place for friends and family to gather and share memories after a person has passed away.” No one

can log into a memorialized account, but before passing, the user may select a Legacy Contact to do things such as:

- Write a post on the decedent's profile (e.g., a final message from the decedent or information about a memorial service),
- Update cover photos and the decedent's profile picture,
- Request the removal of the account, and
- Download a copy of what the decedent publicly shared on Facebook.

However, there are also significant restrictions on the Legacy Contact, which limit its usefulness. Legacy Contacts are not permitted to log into the account, read the decedent's messages, remove or change past posts or photos, or add new or remove old friends. Legacy Contacts are easy to add or change on any Facebook account by simply adding a name under the Manage Account option on the Settings page. Facebook will also notify the Legacy Contact of the user's selection if desired.

### **Lack of Uniformity in Online Tools**

A Google or Facebook user who hopes to rely on online tools to transfer full account access to a personal representative or a loved one after the user's death will be very disappointed with the lack of options currently available. Neither Google's nor Facebook's online tools provide full access to a decedent's account, and without a further change to RUFADAA-based statutes, it is unlikely that custodians will develop online tools that permit the complete transfer of a decedent's account. Instead, what is provided is the ability for a designated individual to receive information from the decedent's account, and in the case of Facebook, make minor changes to the public appearance of a memorialized account. This is moderately useful to the executor and to beneficiaries, but some users won't consider this to be sufficient.

Further complicating matters, there is no universal online tool currently available for all of a user's accounts and digital assets. It is unlikely that such a universal tool will be developed any time soon because each online custodian has its

own protocol on how its information is stored, controlled, and shared. Therefore, even if every digital asset custodian offered an online tool (an unrealistic goal in itself), a user would still need to log into each account to make account-specific elections as to who may access the user's accounts upon the user's death.

### **Shortcomings of Online Tools**

Although RUFADAA has elevated the use of online tools in the fiduciary access hierarchy, online tools may not be the panacea to digital asset planning that they were hoped to be. Online tools have several shortcomings, which may further complicate the planning and administration of estates with digital assets. First, every online tool is created differently. Some online tools are designed to provide access, some are designed to transfer assets, and some simply trigger a protocol for addressing digital assets. As the advent of online tools increases, it will be impossible for users and their attorneys fully to understand the workings of every online tool. This lack of uniformity will increase the burden on users and their

attorneys to monitor and coordinate each custodian's online tool in conjunction with a user's overall estate plan.

Second, online tools have the potential to disrupt complex estate plans. Because online tools are given priority over the terms of an individual's will, it is quite possible that the terms of the online tool will conflict with the terms of a decedent's will—just as a client's completion of a beneficiary designation or creation of a transfer-on-death titling may alter an estate plan. An online tool could inadvertently create a “digital executor” separate and apart from the executor named in a will. Conceivably, a different individual may control each asset, with the executor named in a will shut out of access to many digital assets.

Third, the sharing of passwords may serve to thwart the effectiveness of online tools. Putting aside the fact that the sharing of passwords may, at a minimum, violate the custodian's terms of service agreement for a digital asset, and at a maximum, create civil and criminal liability under state and federal anti-hack-ing laws, users in fact frequently share their passwords. Users are often encouraged to create a list of their passwords and provide this list to their executor or loved ones so that digital assets may be accessed after a user's death. Giving a personal representative or a loved one a password to an account circumvents the limits of providing access with an online tool or a digital asset clause. For example, with Google's online tool, if an executor was to access the decedent's Google account with the decedent's passwords (presumably a violation of the Computer Fraud and Abuse Act), such access would restart the inactivity clock on the online tool. Thus, if the executor continually accesses the Google account, every login resets the online tool's clock. If the “digital executor” named in the online tool is different from the executor named in the will, the digital executor's access to the online tool will continually be delayed. During such time, it is possible that the digital assets could be transferred in contradiction to the decedent's intentions.

Fourth, upon the decedent's death, it is unclear who is responsible for searching for online tools. Ideally, online tools

would automatically contact the account-specific digital executor, but, as discussed above, the triggering of the online tool could be intentionally or unintentionally delayed by the actions of the executor.

Fifth, it is also unclear as to whether estate planning attorneys have any responsibility for monitoring a decedent's use and modification of online tools if the online tools affect the structure of an estate plan. Analogizing online tools to beneficiary designations could impose greater duties on the estate planning attorney, but, as mentioned above, it would be impossible for the attorney to

monitor each and every one of a client's digital accounts.

Ultimately, although online tools may become the next important piece in the estate planning puzzle to address digital assets, they have a number of shortcomings that limit their usefulness unless properly managed. Even though online tools are not perfect and potentially create a host of problems, estate planners must educate themselves on the advantages and disadvantages of online tools so that they may properly advise their clients as to the disposition of their digital assets. ■