

Digital Assets

THE BASICS OF CYBERSPACE ESTATE PLANNING.

BY GERRY W. BEYER

The 85th Legislature enacted the Texas Revised Uniform Fiduciary Access to Digital Assets Act as Chapter 2001 of the Estates Code, which adds clarity to the steps you need to take when planning and administering estates. This article aims to provide the basic information you need to be well informed about the cyberspace estate planning interface.

What terms of art do I need to know before we start our discussion?

To have a common ground for discussing the Texas Revised Uniform Fiduciary Access to Digital Assets Act, or TRUFADAA, you need to know the definitions of several key terms of art.

Digital assets are electronic records (think binary 1s and 0s) in which a person has a right or interest. Examples include emails; text messages; photos; digital music and video; word processing documents; social media accounts (e.g., Facebook, LinkedIn, Twitter); online financial, utility, credit card, and loan accounts; and gaming avatars.¹

A *fiduciary* means a personal representative of an estate (executor or administrator), an agent under a non-medical power of attorney, a guardian of an estate, and a trustee of a trust.²

A *user* is a person who has an account dealing with digital assets such as the decedent, principal, ward, or trustee.³

The *custodian* is the person who carries, maintains, processes, receives, or stores a digital asset (e.g., the user's email provider such as Yahoo, Google, or Suddenlink; the hosts of the user's social media accounts such as Facebook or LinkedIn; and the user's financial accounts maintained online in banks, brokerage firms, utility providers, credit card issuers, and mortgage companies).⁴

Why does a fiduciary care about the digital assets of the person represented?

There are many reasons why a fiduciary would desire access to the user's digital assets.

(1) Many people forego paper statements for financial accounts such as bank accounts, retirement accounts, and brokerage accounts. A personal representative may seek access to the contents of the decedent's email messages to ascertain where these accounts are located and to gain the information necessary to complete the estate inventory, pay bills, and distribute the funds appropriately. Likewise, an agent or guardian may need this information for similar purposes.

(2) Many people forego paper statements for utilities, credit cards, car loans, and home mortgages. The fiduciary

may need to give notice to and pay these creditors and thus needs to be able to access email messages to determine the names of the creditors and the amounts owed.

(3) Some digital assets like domain names, customer lists, manuscripts, and compositions may have significant economic value. The personal representative needs to have access to these assets for management, inventory, and distribution purposes.

(4) Some digital assets like family photos and videos do not have monetary value but they have great sentimental value and need to be preserved or transferred to the proper heirs or beneficiaries.

Does it matter when the decedent died, the power of attorney, will, or trust executed, or guardianship opened?

No. TRUFADAA applies to a fiduciary regardless of when the decedent died, the power of attorney or will executed, the guardianship commenced, or the trust created.⁵

How is priority for access to a decedent's digital assets determined?

First priority is given to the user's instructions using the custodian's online tool, that is, the custodian's service that allows the user to provide directions for disclosure (or nondisclosure) of digital assets to a third person.⁶ Examples include Google's Inactive Account Manager and Facebook's Legacy Contact.

Second priority is given to the user's instructions in the user's will, power of attorney, or trust.⁷

If the user has not provided instructions through an online tool or other writing or electronic record, then the service provider's terms of service agreement (the "I agree" button) will govern the rights of the decedent's personal representative. Typically, these provisions will prohibit access by third parties.

Is there anything special about "access" that I need to know?

Yes! There is a major difference between two types of access. The first type is access to the contents of electronic communications, which refers to the substance or meaning of the communication such as the subject line and text of email messages.

The second type of access encompasses both the catalogue of electronic communications (e.g., the name of sender, the email address of the sender, and the date and time of the message but *not* the subject line or the content), and other digital assets (e.g., photos, videos, material stored on the user's computer, etc.).

I am drafting a client’s will. How do I proceed with regard to digital assets?

You need to address digital assets from two perspectives. First, you need to ascertain if your client owns any digital assets that are transferable upon death. If so, you need to determine whom your client wants to receive them just as you would any other type of property. If you do not make a specific gift of digital assets, they will pass under the residuary clause.

Second, you need to find out your client’s desires regarding the executor reading the substance of email messages, texts, and private social media postings. If your client wants the executor to have this access, express language granting access must be included in the will.

I am drafting a client’s durable power of attorney for property. How do I proceed with regard to digital assets?

You should ask whether the client wants the principal to have access to contents of electronic communications and/or the catalogue of those communications and other digital assets. Under the statutory durable power of attorney form (power “N”), the agent will have full access to digital assets including contents.⁸ If this is not the principal’s intent, the principal should *not* initial powers “N” or “O” (the power that grants all powers listed on the form). The principal may also cross out clause “N.” If the principal wishes to grant partial access, you should include appropriate language in the “special instructions” section.

I am applying to the court for my client to be appointed as the guardian of the estate of a ward. How do I proceed with regard to digital assets?

Access to digital assets is not automatically granted to a guardian by virtue of the fact that the person is appointed as a guardian. If there is a hearing on the matter, a court may grant a guardian complete access to the ward’s digital assets.⁹ Without a hearing, a guardian may obtain access to the catalogue and digital assets other than the content of electronic communications but a court order is still required.¹⁰

I am the executor of a decedent’s estate. How do I get access to the contents of the decedent’s electronic communications?

Section 2001.101(a) enumerates what you need to provide to the custodian to obtain access to the contents of electronic communications. The custodian will also have the right to request additional information and even court findings under § 2001.101(b). If the deceased user did not consent to the disclosure of contents (e.g., no express language in the will or died intestate), you will not be able to obtain access to the contents.

I am the executor of a decedent’s estate. How do I get access to the catalogue of decedent’s electronic communications and other digital assets?

Unless prohibited by the user or court order, the personal representative is granted access to the catalogue and digital assets other than the content by default upon providing the custodian with the specified required documentation.¹¹

Is there a practical problem for a personal representative to gain access to a decedent’s digital assets?

Yes! The ability of a custodian to request a court order under any circumstance makes access very burdensome for personal representatives as well as the courts. This author has heard from custodian representatives that they will *always* require a court order for fear of liability for improper disclosure.

Because of the likelihood that a custodian will require a court order before granting access, include the appropriate language in the earliest possible pleading in the administration of the estate of a deceased user such as the application for an independent administration, determination of heirship, or admission of a will as a muniment of title. (Note: It is uncertain how judges will react to being asked to make these findings in these proceedings.)

I am an agent for a principal. How do I get access to the principal’s digital assets communications?

The rules for agents under powers of attorney are similar to those for personal representatives of decedents’ estates and are detailed in § 2001.131 (contents) and § 2001.132 (catalogue and other digital assets).

I am a trustee. How do I obtain access to digital assets?

If the trustee is the original user, meaning that the trustee, in his or her capacity as the trustee, opened an online account or procured a digital asset, the custodian must provide the trustee with all content, catalogues, and digital assets of the trust under § 2001.151. If the trustee is not the original user (for example, a settlor has a digital asset and then transfers it to a trust, either during life or at death), then different rules apply based on whether the trustee is requesting content or non-content material.¹²

How long does the custodian have to comply with my disclosure request?

The custodian must comply with a request to disclose not later than 60 days after receipt of a proper request along with the required documentation.¹³

If the user is alive, will the custodian notify the user of my request?

The custodian may, but is not required to, notify the user, e.g., the principal or ward, that a fiduciary made a disclosure request.¹⁴

The custodian may properly deny a disclosure request if the custodian is aware of any lawful access to the account following the receipt of the request. Thus, if the principal or ward is still using the account, the custodian may properly deny your request for access.¹⁵

How does a custodian disclose the information I requested?

The custodian may grant disclosure completely or partially in writing or electronically, charge a reasonable fee, and even refuse if the request imposes an undue burden.¹⁶

What if the custodian ignores my request or refuses to disclose?

If the custodian does not disclose, the fiduciary may apply to the court for an order directing compliance.¹⁷

Once I obtain access, what fiduciary duties do I have with regard to the information?

The legal duties imposed on the fiduciary normally also apply to digital assets such as the duty of care, loyalty, and confidentiality.¹⁸

Once I obtain proper access, am I treated as an authorized user under the law?

Yes. A fiduciary acting within the scope of the fiduciary's duties is deemed an authorized user "for the purpose of applicable computer fraud and unauthorized computer access laws, including all laws of [Texas] governing unauthorized computer access."¹⁹

Where can I get more information about TRUFADAA?

Comments to the Uniform Act are found at uniformlaws.org and a more detailed discussion with sample language for documents is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166422. **TBJ**

Notes

1. Tex. Est. Code § 2001.002(8).

2. Tex. Est. Code § 2001(12).
3. Tex. Est. Code § 2001.002(24).
4. Tex. Est. Code § 2001.002(6).
5. Acts 2017, 85th Leg., R.S., Ch. 400, § 7, eff. September 1, 2017.
6. Tex. Est. Code § 2001.051(a).
7. Tex. Est. Code § 2001.051(b).
8. Tex. Est. Code § 752.051.
9. Tex. Est. Code § 2001.171(a).
10. Tex. Est. Code § 2001.171(b).
11. Tex. Est. Code § 2001.102.
12. See Tex. Est. Code §§ 2001.152 & 2001.153A.
13. Tex. Est. Code § 2001.231(a).
14. Tex. Est. Code § 2001.231(c).
15. Tex. Est. Code § 2001.231(d).
16. Tex. Est. Code § 2001.053.
17. Tex. Est. Code § 2001.231(a).
18. Tex. Est. Code § 2001.201(a).
19. Tex. Est. Code § 2001.201(d).



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