



## More Guidance on Planning For Digital Assets

Digital assets consist of anything that is stored electronically: music and entertainment accounts, photographs, documents stored in cloud storage accounts, cryptocurrencies, digital storefronts, domain names, social media accounts, email accounts, online financial accounts and much more. They may hold great sentimental value or great monetary value.

California recently adopted a law clarifying how digital assets may be administered at your death. The new law, set forth in the California Probate Code sections 870 through 884, makes it clear that you (the “user”) may authorize the company that stores your digital asset (the “custodian”) to disclose the asset to a designated fiduciary (your trustee or personal representative) or a recipient (under an online tool – see below). Unfortunately, the new law does not apply if you are living but incapacitated. Under the new law (known as “Cal-RUFADAA”), you may grant or restrict access to your digital assets using one of three different methods that are prioritized under a tiered hierarchy.

**Tier 1:** Any instructions you provide in an “online tool” will take precedence over any other instructions you may provide. The online tool is provided by the custodian of a digital asset; it allows you to appoint a person who will be able to access and manage the particular digital asset. Conversely, an online tool may allow you to prohibit all access. Google Account Manager and Facebook Legacy Contact are examples of online tools. Note that, at this point, most custodians do not provide an online tool.

**Tier 2:** If there is no online tool, the instructions to grant or restrict access to these types of assets set forth in your estate planning documents will control access to your digital assets.

**Tier 3:** If you have not addressed this issue in your estate planning documents, the custodian’s default provisions in its “Terms of Service” agreement will control. These agreements are drafted by the custodians and generally grant little or no control or discretion to you.

As you plan your estate and attempt to provide for a smooth transition at your death, it is more important than ever to consider your digital assets. In your estate planning documents, you may have granted access to a digital account to a particular child of yours. But what if you also designated a different child to have access to that account under an online tool? Or perhaps you have done neither of these things – does the Terms of Service agreement allow access by your fiduciary or does it require that your account be deleted by the custodian?

If you have not already done so, you should create (and keep current) an inventory of your digital assets, including usernames, and whether you think the asset may have an independent value (e.g., an unpublished book). Store the inventory in a secure location and let your named fiduciaries know where it is. If you use a password management tool, or otherwise store your inventory electronically, keep in mind that this itself is a digital asset and you will need to let somebody know how to access it when the need arises. Be cautious of protecting passwords, and keep in mind that even though



fiduciaries may not be allowed online access to certain digital assets, the inventory will assist them to gain access as needed later.

As you compile the inventory, note which assets are controlled by an online tool, and think about which assets you would like to have accessed after your death (and by whom). Conversely, if there is a digital asset for which you would like to restrict access or require deletion (due to privacy concerns, for example), that should also be noted. If you wish to leave a digital asset to a particular person at your death, in addition to arranging for access to the asset you must direct the distribution of the asset in your estate planning documents. Review these issues with your estate planning attorney so she can advise you further about any required changes to your estate planning documents.

If you are an executor or trustee administering an estate, you will need to investigate and resolve these issues as they relate to the decedent's digital assets. Do your best to locate the decedent's inventory, if any, and identify all digital assets. Look for digital keys (usually long strings of numbers and letters) and bank statements showing automatic debits and the like. Review your own social media accounts to discover similar accounts held by the decedent.

Once you have identified a custodian, you are required to submit certain documentation to the custodian; the required documentation depends on the type of digital asset. Typically, you will need a death certificate, evidence of your authority as a fiduciary, and evidence of the decedent's consent to disclose the digital asset (or delete the digital account). If the custodian does not respond within 60 days of your request for disclosure (or deletion), you may seek a court order to compel the custodian to cooperate.

While Cal-RUFADAA does not address all the issues that may come up when planning for digital assets, it is a step in the right direction and we are grateful to have a bit more clarity and certainty.