With All My Electronic Goods I Do Thee Endow—Digital Asset Planning For The 2020s And Beyond

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Hey Siri, how do I get everything on this iPhone to my loved ones if something happens to me (or make sure it's deleted)? If you ask Siri this question, she will (as is all too common) not give you the right response, and point you to the Internet. Hopefully, with the addition of this blog post, Siri will now have some correct information to point you to.

Digital assets are a little bit trickier to plan with than physical assets (or even intangible assets such as uncertificated stocks, other securities, and intellectual property rights). Traditional physical assets have one concrete location, discrete ownership rights that the law assigns to them (or defaults in case the ownership is not clear), and do not depend on servers for their continued existence.

But before diving into who gets what, we should clarify what a digital asset even is (or at least what it is currently). Digital assets are those things that, for lack of a better definition (which the law is currently in search of) do not have a tangible, physical existence, or do not have a concrete legal existence (as many traditional "intangibles" do), and yet are still definite enough that we can consider them assets, but expressed through a digital medium. Examples include: email accounts, social media profiles, blog content, website ownership, online photos in the Cloud, credit card rewards points, and purely electronically-housed music, books, or financial information.

These assets are important because they can have sentimental value, monetary value, and sometimes both—who wouldn't want grandfather's first Bitcoin he ever made? Kidding aside, purely digital assets can have significant monetary value (for an extreme example, ask Arianna Huffington) and the inability to access or deal with these kinds of assets after the passing of their owner is just as bad as a bank account that can't be opened or a house that can't be sold.

The default for many custodians of these digital assets (think the Facebooks, Googles, GoDaddys, Vanguards, Chases, and Schwabs of the world) is to not allow access to a person who is not the owner. Some entities even provide, via their terms of service, that the default is the information/asset can be deleted after the owner is no longer around to access it. Read the Chase Terms of Service, they technically provide that the points go poof! (Although, in fairness, Chase's practice seems to be that they redeem the points for cash and send a check to the heirs).

To address the increasing problems resulting from these situations, nearly every state has passed the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), including Arkansas. Broadly, there is a three-part hierarchy under RUFADAA. First, if you name a person via something set up by the custodian of the digital asset (like Google Inactive Account Manager or Facebook's Legacy Contact) that provision will override any other fiduciary authority. The second level of authority is any fiduciary (executor, trustee, or

agent) under a document (such as a last will, trust, or power of attorney) where that document specifically grants that fiduciary power to deal with your digital assets. Thirdly, if you don't have a document or fiduciary in place, the fallback is the terms of service agreement of the custodian (which in practice means not helpful).

One important point: RUFADAA draws a distinction between catalogue data (time, date, addressee, etc.) of your communications/data, and content data (the actual message, the financial information, the photos, what that draft blog post said). If your fiduciary is not specifically authorized to deal with and access **the content** portion of your data, RUFADAA is not going to be nearly as helpful to your fiduciary as it could be. That is why it is critical to make sure that your fiduciary is properly authorized if you want that fiduciary to have access to the content portion of your data. (Some readers may desire the opposite, and if so, that result is much easier to achieve).

One final aspect that is often confusing is what happens if you just leave your loved ones with a list of your passwords. Although against the terms of many service agreements, the practical consequences are not likely to be grave. Further, RUFADAA authorizes the heirs of a tangible asset (such as a computer) to access that computer for purposes of obtaining the data stored on it. Nevertheless, only a properly authorized fiduciary can be sure that he or she has the authority to deal with all of the deceased's digital assets, especially those that may be stored online or in a custodian's servers.

So, how should Siri be answering the question at the beginning of this post? Hopefully, she will tell you to use Google Inactive Account Manager or Facebook Legacy Contact, and then update your will and/or trust to give your fiduciary access to your digital data, *including the content (if desired)*. As our lives move more and more into digital modes of expression and storage, as well as value accumulation, having your digital assets properly planned for will become just as important as it currently is for your physical ones.