

Maryland Fiduciary Access to Digital Assets Act – What Does This Mean For Your Estate Plan?

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Upon a person's death, he or she would expect the Personal Representative (i.e. Executor) named in the Will to gain access to his or her bank accounts and private financial information. The law is not so clear with respect to the authority which may be granted to a Personal Representative or other fiduciary over digital accounts.

Both houses of the Maryland legislature passed the Maryland Fiduciary Access to Digital Assets Act in early April of 2016, and the bill was signed by Governor Hogan on May 10, 2016. The Act, which becomes effective on October 1, 2016, allows Maryland residents to name a fiduciary, during incapacity and upon death, to access the resident's online accounts. A similar bill failed to pass in 2015.

Currently, each website has its own Terms of Service (TOS) which dictate what happens to your account upon death or incapacity. Consequently, your Agent under your Power of Attorney, Trustee under your Trust, Guardian or your Personal Representative under your Will may not access these accounts, even to terminate them, unless the TOS authorizes the naming of an Agent and you named an agent for this purpose.

With the passage of the Act, custodians of these online accounts will need to provide an Online Tool, which is an agreement separate from the TOS, allowing you to dictate, in a limited fashion, your instructions regarding the disclosure or non-disclosure of the account. Most websites do not allow a user to name someone to access the account, although Facebook came out with its Legacy Contact and Google allows users to grant a named individual limited access to an account through its Inactive Account Manager. Both of these are Online Tools. You can read more about Facebook's Legacy Contact and Google's Inactive Account Manager in our previous blog.

If the Online Tool allows the user to modify or delete a direction at any time, the terms of the Online Tool will trump a Will, Trust or Power of Attorney. However, if the user does not elect to use an Online Tool or if the website fails to offer an Online Tool, then the user may, under a Will, Trust, Power of Attorney or other record, allow or prohibit disclosure to a fiduciary of some or all of the user's digital assets.

As a result of this legislation, we expect that more custodians will create Online Tools since they will prefer to interpret the terms of the Online Tool that they wrote rather than review the Wills, Trusts and Powers of Attorney of their users. Websites could require users to fill out an Online Tool in order to access the website. Moreover, the Online Tool could provide users the options only for limited or no disclosure of the account, without offering an option for full disclosure or an ability to modify the disclosure terms. Even if the website does not make use of the Online Tool mandatory, users may perceive the Online Tool as required in order to access the website. Users may inadvertently sign an Online Tool in an effort to open a new account quickly.

To the extent the website allows, a user may opt out of creating an Online Tool, and **opting out may be the best course of action because the user can provide more customized directions regarding disclosure of an account via his or her estate planning documents** rather than the Online Tool created by the website. After creating an estate plan, a user may spend substantial time trying to figure out how to undo the choices he or she previously selected when filling out the Online Tool.

Now that the legislation has been enacted, we encourage all Maryland residents to update their estate plans to provide or restrict access by a fiduciary to online accounts.