

## ACCESS TO DIGITAL ASSETS UPON DEATH OR INCAPACITY

**H**ave you ever wondered how your social media accounts will be managed if you die or become incapacitated? What about handling online banking or bill paying? Or transferring photos from your phone or cloud-based storage to surviving family members after you have died?



In mid-2016, the Michigan legislature passed the "FIDUCIARY ACCESS TO DIGITAL ASSETS ACT"<sup>i</sup> (hereinafter "FADAA") to provide for fiduciary access to digital assets. Specifically, under FADAA you "**may allow or prohibit** in a will, trust, power of attorney, or other record [the] **disclosure to a fiduciary of some or all of [your] digital assets**, including the contents of electronic communications sent or received by [you]."<sup>ii</sup> Note: FADAA does not apply to a digital asset of an employer used by an employee in the ordinary course of business.

Under FADAA, a fiduciary means: "a person who is an original, additional, or successor personal representative, conservator, agent, or trustee" under a Last Will and Testament, Durable Power of Attorney, Trust or conservatorship.<sup>iii</sup>

The benefits of providing your fiduciary access to your digital assets include:

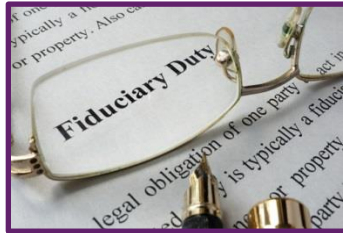


- Authority to access your online accounts, email, social media and cloud-based storage and anything stored in the account, including content.<sup>iv</sup>
- Immunity for liability for an action done in good faith in compliance with FADAA.<sup>v</sup>
- Using online banking and online bill pay.
- Continuing or terminating automatic deposits and/or recurring payments; terminating an online account.<sup>vi</sup>
- Providing information to determine other assets, sources of income or creditors -- this is especially important if you've gone "paperless" with banking, investments and credit cards. Your fiduciary will have access to account numbers, balances and transactions.
- Control of your personal property such as blogs, ancestry data, photographs and digital music.
- Protection of your identity and privacy from third parties.

In addition to giving your fiduciary use and control of your assets and digital devices (i.e., phones, tablets, computers, removable storage and similar digital devices), we recommend you maintain a list of online accounts with login information and a separate list with online account passwords -- do not list or store them together, as this increases the risk of fraud and identity theft. If stored electronically, these lists should be password protected. In either event, notify your fiduciary and/or trusted advisor (attorney, CPA or financial advisor) as to the location and remember to update the list periodically. At a minimum, this should be done annually, if not more often, as some passwords are required to change every 30 to 90 days. TIP: Tie the review

date to a payday, birthday, anniversary, holiday or special event to remember to review and update the list periodically.

Finally, if you have specific wishes regarding the use of your social media accounts and transfer of your digital assets (blogs, photographs, music), make sure to include those in a separate writing and provide copies to your next-of-kin and estate planning attorney, so that your attorney can verify that the writing is enforceable under Michigan law. Please note, if you have used an online digital asset planning tool such as Facebook Legacy Contact or Google Inactive Account Manager, those tools will supersede any separate writing with respect to such programs.



If you do not specifically authorize your fiduciary access to your digital devices in your Will, Trust and/or Power of Attorney, your fiduciary may petition the court for an order to allow them access under FADAA. However, this can be costly and time-consuming and does not guarantee the court will grant your fiduciary such access; nor does it guarantee use of the *content* of your digital assets. Our recommendation is to include a specific power in each of your estate planning documents, so that your fiduciary can deal directly with the digital custodian without the necessity of court intervention.

Most Couzens Lansky estate plan documents drafted after mid-2016 not only contain specific language to allow your fiduciaries to use and control your digital assets (including but not limited to accessing, modifying, deleting, deactivating, controlling, managing, copying, distributing or transferring), but also the use and control of your digital devices.

If you have not reviewed or updated your estate plan since 2016 and you desire your fiduciaries to have access to your digital assets and devices, we recommend your documents be revised to incorporate these powers. Please contact attorney [Jennifer K. Johnson](#) or your [Couzens Lansky estate planning attorney](#) to discuss the changes or answer any questions you may have regarding your digital assets and digital devices.

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<sup>i</sup> PA 59 of 2016; MCLA 700.1001 *et. seq.*

<sup>ii</sup> MCLA 700.1004(2) *emphasis added*

<sup>iii</sup> MCLA 700.1002(p)

<sup>iv</sup> MCLA 700.1015(5)(a)

<sup>v</sup> MCLA 700.1015(8)

<sup>vi</sup> MCLA 700.1015(7)