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Elder Law: New Pa. law recognizes digital assets in estates

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More of our lives are now online, especially during this COVID-19 pandemic. Photographs in the cloud, Facebook and Instagram accounts, bank and other financial accounts, and a host of other accounts and data are at our fingertips on electronic devices.

But what happens when we become disabled or die and a personal representative needs to access these accounts on our behalf?

Until recently, this could be a very difficult process. Pennsylvania recently passed Act 72 of 2020, which should make accessing these digital assets (aka online accounts) much easier. The official name of the act is the Revised Uniform Fiduciary Access to Digital Assets Act, or RUFADAA.

It was signed into law by Gov. Tom Wolf on July 23 and takes effect in January. Pennsylvania is one of the last states in the country — 48th, to be exact — to adopt this type of legislation.

Why was this legislation necessary? Until now, Pennsylvania law did not give concrete authority to access digital information to fiduciaries (persons or organizations that act on behalf of another person or persons to manage assets, whether that person is dead or alive).

The ability to access the information was, and still is, subject to the service agreement that a user has with the online provider (How many of us have ever actually read that stuff before you “accept” a new app?). Online service providers give deference to “legacy contacts” that a user may name in the event authority needs to be transitioned to a third party to access online accounts.

The problem is that most people never read the fine print, nor do they name a successor to have access to the online account.

It’s similar to dying intestate (with no will and no one knows what you really wanted done with your assets).

But it’s actually worse. If you die without a will, the state does have a process to administer the assets and identify the legal heirs of the estate.

Until Act 72, private industry regulated the process and that process could vary greatly among different online providers.

Here are the common examples of fiduciaries as recognized under Act 72:

1. An executor or administrator under a will.
2. An agent acting under a power of attorney.
3. A court-appointed guardian.
4. A trustee under a trust agreement.

The language of Act 72 is quite convoluted, but one thing is clear: The custodians of online information value the privacy of their users. The terms under which a fiduciary can actually access the digital information, even after this law, are still limited by private service contracts between users and the digital host.

One accomplishment of this new law is that if the user does not make use of an online tool or one is not offered, the user can dictate the terms of access or nonaccess to his online accounts through his estate planning documents, such as a will, trust or power of attorney.

Going forward, here are some tips to help avoid confusion and to accomplish your goals of disclosure or non-disclosure of your digital assets:

1. Make a list of all of your online accounts with usernames and passwords and make sure someone you trust knows how and where to find them. You may be surprised how many you actually have. Update your passwords periodically.
2. Check each online custodian's terms of service to see if you have the ability to use an online tool to confirm your preferences for third party access.
3. Check your estate planning documents to make sure they mesh with your service contract preferences. Does your power of attorney specifically mention access to your digital accounts? How about your other estate planning documents? Depending on how important these digital assets are to you and the ability to pass them onto your loved ones, you may want to revise your estate plan accordingly.

And remember, what's yours is yours — but if it can't be accessed, it may be nobody's!

Julian Gray and Frank Petrich are certified elder law attorneys who practice in the Pittsburgh area at Gray Elder Law. Send questions to elderlawguys@grayelderlaw.com or visit www.grayelderlaw.com.