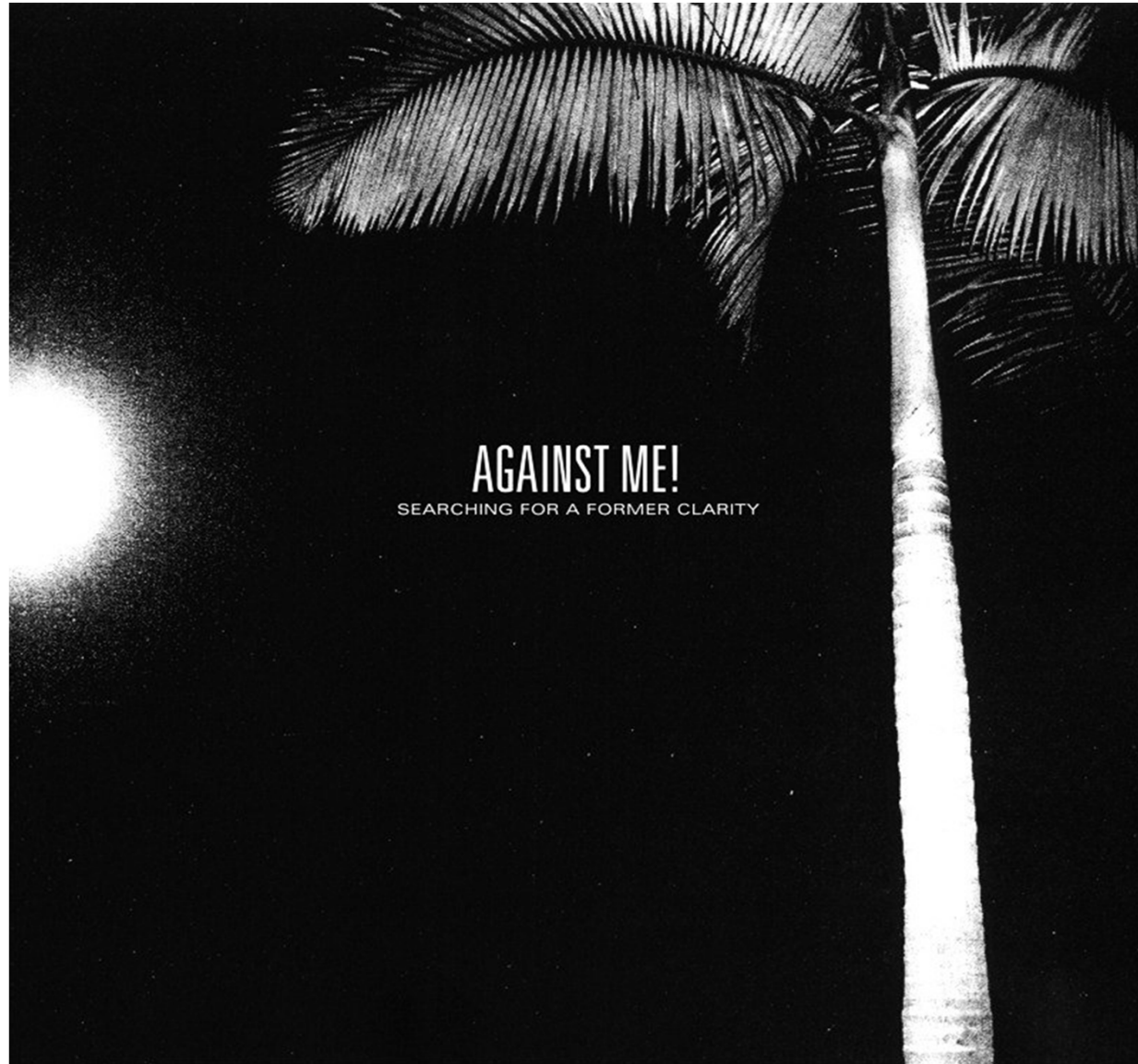




# Planning for Digital Property

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# Justin Ellsworth

- In 2004, Justin Ellsworth, a Marine, was killed by a roadside bomb in Fallujah while assisting in a civilian evacuation of the area.
- Justin's father, John Ellsworth, was appointed as the PR and tried to gain access to Justin's Yahoo! email account.
  - Only Marine officers had government accounts; Justin had to use a Yahoo! account to contact friends and family back home.
  - John wanted access to the Yahoo! account to preserve some of the last words of his son.



## Justin Ellsworth (continued)

- Yahoo! denied John, as the request violated Yahoo!'s terms of service.
- A court eventually ordered Yahoo! to give John a copy of Justin's messages.
- Companies have historically been hesitant to disclose Digital Assets to third parties due to the Computer Fraud and Abuse Act (1984).



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## Bridging the Gap

- Uniform Law Commission drafted initial Uniform Fiduciary Access to Digital Assets Act (UFADAA) in 2014.
- Revised in 2015 as Revised UFADAA.
- Utah adopted its version, which went into effect May 9, 2017.
  - Chapter 11 of the Utah Uniform Probate Code.



# Endorsements of Revised UFADAA

- Facebook
- Google
- National Academy of Elder Law Attorneys
- Center for Democracy and Technology
- Association of American Retired Persons  
– (AARP)



# Working Definitions - §75-11-102

- User:
  - a person that has an account with a Custodian
- Custodian:
  - a person that carries, maintains, processes, receives, or stores a Digital Asset of a User
- Fiduciary:
  - an original, additional, or successor personal representative, conservator, guardian, agent, or trustee





## Working Definitions (continued)

- Digital Asset:
  - an electronic record in which an individual has a right or interest
- What a Digital Asset is not:
  - Access to digital content limited by license
    - i.e. ebooks, digital music, digital comic books
  - Digital content generated on behalf of an employer



## Examples of Digital Assets

- Uploaded videos
- Electronic receipts
- Email messages
- Blogs
- Online photo albums
- Manuscripts
- Art
- Digital currency
- Virtual property



# Planning Before Revised UFADAA

Make a list of all your accounts and passwords and let a loved one know where to find the list.



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# Problems

- List can be lost or never made.
- Some accounts can be left off a list.
- Passwords can expire.
- Retrieval of passwords can get complicated.
- Custodian can delete content if it learns the User has died.



# Applying Revised UFADAA

## Three Scenarios:

1. §75-11-104(1) – A Custodian may provide an online tool in which a User directs what is to happen to the User's Digital Assets.
2. §75-11-104(2) – A User may grant access to Digital Assets to a Fiduciary in a validly executed document.
3. §75-11-105(3) – If neither scenario is used, fall back on what is allowed under the Custodian's service agreement.



## Scenario 1 - The Tool (§75-11-104(1))

Fake Name creates an account on Facebook and wants his wife to be able to access his account when he dies so as to alert his “friends” of his demise. He also wants her to get a copy of photos, videos, and posts he has shared.

Facebook has a tool for Users to appoint a “Legacy Contact” and elect what information is available to the Legacy Contact.

Facebook: Settings --> General --> Manage Account



- General
- Security and Login
- Privacy
- Timeline and Tagging
- Blocking
- Language
- Notifications
- Mobile
- Public Posts
- Apps
- Ads
- Payments
- Support Inbox
- Videos

## General Account Settings

Name	Fake Name	Edit
Username	You have not set a username.	Edit
Contact	Primary: fake@emailaddress.com	Edit
Ad account contact	fake@emailaddress.com	Edit
Networks	No networks.	Edit
Temperature	Fahrenheit	Edit

### Manage Account

#### Your Legacy Contact

A legacy contact is someone you choose to manage your account after you pass away. They'll be able to do things like pin a post on your Timeline, respond to new friend requests and update your profile picture. They won't post as you or see your messages. [Learn more](#).



Fake Name's Wife

[Remove](#) · [Message](#)

#### Data Archive Permission

☒ Allow my legacy contact to download a copy of what I've shared on Facebook. This may include posts, photos, videos and info from the About section of my profile. Messages won't be included. [Learn more](#).

If you don't want a Facebook account after you pass away, you can request to have your account permanently deleted instead of choosing a legacy contact.  
[Request account deletion](#).

#### Deactivate your account

Deactivating your account will disable your profile and remove your name and photo from most things you've shared on Facebook. Some information may still be visible to others, such as your name in their friends list and messages you sent. [Learn more](#).

[Deactivate your account](#).

Will need to check  
this box to grant  
access to Digital  
Assets



## Scenario 1 - The Tool (continued)

- Appointing a “Legacy Contact” gives the User peace of mind that their wishes can be met.
- Facebook has peace of mind, as it knows exactly what the User wants to pass at the User’s death.





## Scenario 2 - The Will (§75-11-104(2))

Fake Name creates an account on Facebook and wants his wife to be able to access his account when he dies so as to alert his “friends” of his demise. He also wants her to get a copy of photos, videos, and posts he has shared.

Completely ignores the tool for appointing the Legacy Contact but includes language in his will that grants his duly appointed Fiduciary access to all Fake Name’s Digital Assets.



## Scenario 2 - The Will (continued)

- Under §75-11-108, a Fiduciary can request from a Custodian a copy of a User's Digital Assets at User's death.
  - Fiduciary must include in the written request a certified copy of the:
    - Death certificate
    - Instrument appointing the Fiduciary
    - If for electronic communications, a copy of the User's will evidencing the User's consent to disclosure of the content of electronic communications (§75-11-107)



## Scenario 2 - The Will (continued)

- Under §§75-11-107 and 108:
  - A Custodian may request certain assurances:
    - Evidence linking the Digital Assets to the User (i.e. username, account number, description of Digital Assets, etc.);
    - Affidavit stating that disclosure of the User's Digital Assets is reasonably necessary for administration of the estate; OR
    - A finding by a court that disclosure of the User's Digital Assets is reasonably necessary for administration of the estate.



## Scenario 3 - The Nothing (§75-11-105(3))

Fake Name loves his Apple products and religiously stores all of his files in the iCloud.

Fake Name does not think to search for an online tool, nor does he address Digital Assets in his will.

Fake Name dies.



## Scenario 3 – The Nothing (continued)

Apple can fall back on its iCloud Terms and Conditions, which currently state:

### D. No Right of Survivorship

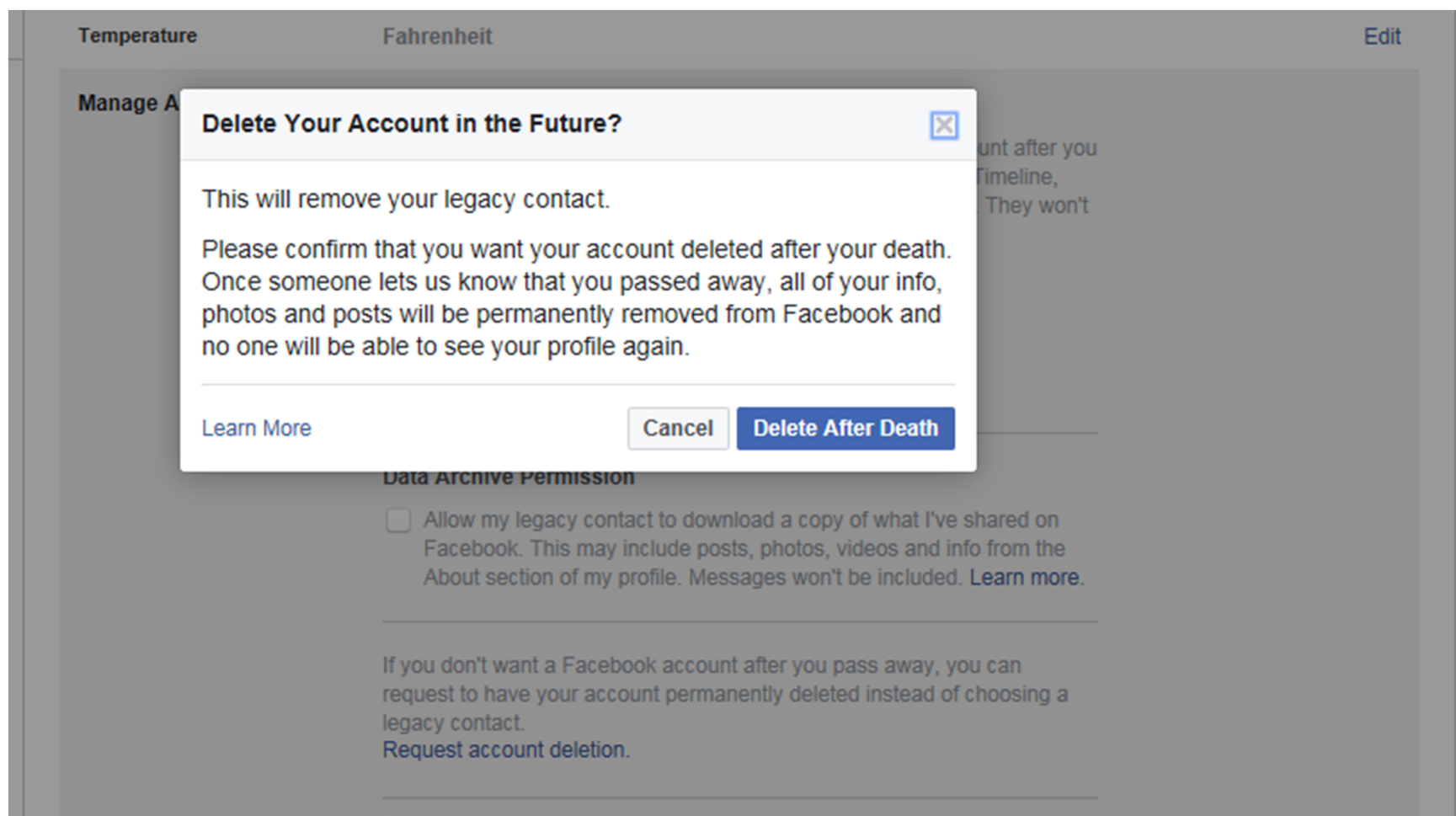
Unless otherwise required by law, You agree that your Account is non-transferable and that any rights to your Apple ID or Content within your Account terminate upon your death. Upon receipt of a copy of a death certificate your Account may be terminated and all Content within your Account deleted. Contact iCloud Support at [support.apple.com/icloud](https://support.apple.com/icloud) for further assistance.

Fake Name's content can be deleted entirely.



## Scenario 4 - The Purge

- A User may restrict access to Digital Assets.
- See §§75-11-105(3) and 108:
  - “A fiduciary's... access to digital assets may be modified or eliminated by a user”
  - “Unless the user prohibited disclosure of digital assets or the court directs otherwise”





# Planning with Revised UFADAA

Have the conversation with clients.





## Planning (continued)

- Discuss the issues surrounding Digital Assets.
  - Many clients are unaware a problem exists despite opting for the ease of a digital lifestyle.
- Explain the options in dealing with Digital Assets:
  - Look for an online tool.
  - Plan for Digital Assets in the will.



## Planning (continued)

- Using the online tool will help streamline the process.
  - Can be a headache if the client has to search several websites for the online tool.
  - Client should make a list of websites in which the tool is used.
- Expressly grant a Fiduciary the powers to control or obtain a copy of Digital Assets.
- Counsel the client to print off important things and store them with other important documents.



## Custodian Disclosures

- Pursuant to §75-11-106, a Custodian has several options as to how much it discloses to a Fiduciary, dependent on the circumstances:
  - May grant full access to an account.
  - May grant limited access to an account.
  - May provide a copy of Digital Assets that the User would have had access to on the date of the request.
    - Exempts deleted items.



## Custodian Disclosures (continued)

- A Custodian may charge a reasonable fee for its cooperation in disclosing Digital Assets.
- If only a subset of the Digital Assets are to be disclosed but such disclosure would be an undue burden on the Custodian then the Custodian can refuse to disclose the Digital Assets altogether.
  - A court can determine if any disclosure should be made in this instance.



# Applicability of Revised UFADAA

- Pursuant to §75-11-103, the Revised UFADAA applies to all wills (and other applicable documents) executed on, before, and after May 9, 2017.
- A Custodian must comply if the User was a resident of Utah at death.



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## Wider Coverage

- Revised UFADAA not only covers Fiduciaries administering an estate, but trustees, agents, and conservators and guardians.
- Each type of Fiduciary has a set of Sections in the Revised UFADAA:
  - Agent of principal: §§109 and 110
  - Trustee: §§111, 112, and 113
  - Conservator or guardian: §114



## Representing a Fiduciary - §75-11-115

- A Fiduciary:
  - Has duties of duty, loyalty, and care.
  - Cannot violate terms of service, laws (like copyright law), or impersonate the User.
  - May request that a User's account be terminated with a written request, a certified copy of the death certificate, and proof of appointment.
    - The Custodian may still request further evidences of the Fiduciary's need to access and alter the User's account.



Questions?





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