

FACILITATING THE INTENT OF DECEASED SOCIAL MEDIA USERS

Yael Mandel[†]

TABLE OF CONTENTS

INTRODUCTION	1909
I. BACKGROUND: TRADITIONAL WILLS AND ESTATE PLANNING	1916
II. ANALYSIS: CURRENT MODES OF SOCIAL MEDIA ASSET DISTRIBUTION.....	1920
A. <i>Social Networking Sites' Post-Life Policies</i>	1920
1. Facebook	1921
2. Instagram	1925
3. LinkedIn.....	1926
4. Twitter	1927
5. Comparison with Traditional Trusts and Estates Law.....	1927
B. <i>Current Proposals to Facilitate Handling of Digital Assets</i>	1932
1. The UFADAA to the RUFADAA.....	1932
2. The PEAC	1937
III. PROPOSAL: A MORE COMPREHENSIVE APPROACH	1938
A. <i>Concerns</i>	1941
CONCLUSION.....	1943

INTRODUCTION

Social networking¹ websites and their mobile applications are constantly discovering new ways to encourage users to incorporate

[†] Associate Editor, *Cardozo Law Review*. J.D. Candidate (May 2018), Benjamin N. Cardozo School of Law; B.A., Stern College, 2012. I would like to thank Dean Melanie Leslie for her guidance and feedback on this Note and for teaching an exciting course on Trusts and Estates; all the editors of *Cardozo Law Review*, especially the Executive Board and Kimberly Barr for carefully editing this Note; and all my friends and family for their support. A very special thank you to my husband, Ephie, for his constant love and encouragement, including reading this Note numerous times throughout the Note writing process. All mistakes are my own.

¹ See *Social Media*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/>

social media services into their daily lives.² As a result of their prevalence in everyday life, social media accounts are filled with personal information, communications, photographs, and other content, which are all eventually left behind by deceased users. Despite the ubiquitous use of and value placed on social media platforms, the laws regarding asset distribution of digital assets and access rights to social media pages of deceased users are still in the process of being formulated.³

Without additional laws governing social media assets, family members of deceased loved ones can petition to a court to try to gain access to the deceased's account(s).⁴ For example, when college student Loren Williams was killed in a motorcycle accident in 2005, his mother tried to gain access to his Facebook page to see his correspondences and understand her son better.⁵ After being denied access to Loren's account, his parents filed a lawsuit against Facebook, Inc. in 2007.⁶ The

social%20media (last updated Jan. 14, 2018) (“[F]orms of electronic communication . . . through which users create online communities to share information, ideas, personal messages, and other content (such as videos).”); *Social Networking*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20networking> (last updated Feb. 27, 2018) (“The creation and maintenance of personal business relationships especially online.”); see also Fauzia Burke, *Social Media vs. Social Networking*, HUFFINGTON POST: THE BLOG (Oct. 2, 2013, 4:10 PM), http://www.huffingtonpost.com/fauzia-burke/social-media-vs-social-ne_b_4017305.html (explaining that while the terms “social media” and “social networking” are often used interchangeably, the former relates to content users upload, while the latter refers to engagement and communication with an online audience; regardless, the most popular platforms, such as Facebook, integrate both aspects). In this Note, I will use both terms to refer to the online platforms discussed.

² See Richard Nieva, *Facebook Really Wants to Be Your One-Stop Shop*, CNET (Oct. 19, 2016, 6:00 AM), <https://www.cnet.com/news/facebook-tickets-events-recommendations/> (“On Wednesday, [Facebook] added several new features that let you buy tickets to movies and events like concerts or festivals, get a price quote from a plumber, or let friends make restaurant suggestions—complete with a map—right in a Facebook comment . . . [T]he updates build on other recent efforts around events and commerce.”); Kurt Wagner, *Instagram Is Stealing More Tips from Facebook's Advertising Playbook*, RECODE (Mar. 9, 2016, 7:40 AM), <http://www.recode.net/2016/3/9/11586796/instagram-is-stealing-more-tips-from-facebooks-advertising-playbook> (listing features that Instagram is currently building).

³ See John Bonazzo, *Do You Need to Control Your Online Identity After Your Death?*, OBSERVER (Feb. 22, 2016, 4:23 PM), <http://observer.com/2016/02/how-to-control-your-online-life-after-you-die/> (“The laws on the books when it comes to digital assets offer varying degrees of clarity.”).

⁴ See Kendal Dobra, *An Executor's Duty Toward Digital Assets*, PRAC. LAW., Oct. 2013, at 30 (“If a service provider refuses to provide an executor with access to digital assets upon request, it might be necessary for the executor to seek a court order compelling the service provider to reveal the information. The success of these types of actions has varied . . . An executor should balance the wishes of the heirs of the estate with the potential cost of litigation for the release of digital assets to determine if this step is reasonable.”).

⁵ See Ada Kulesza, *What Happens to Your Facebook Account When You Die?*, LAW: INTERNET L. (Feb. 3, 2012), <http://blogs.lawyers.com/2012/02/what-happens-to-facebook-account-when-you-die>.

⁶ See James Pitkin, *Access Denied: A Beaverton Woman's Fight for Her Dead Son's Website Ends in a First-of-a-Kind Lawsuit Against Facebook.com*, WILLAMETTE WK. (Apr. 17, 2007), <http://www.wweek.com/portland/article-6889-access-denied.html>.

Williams's attorney said this lawsuit was just a formality, since Facebook already agreed to give access once an official court order was obtained.⁷

Another similar case took place in 2011 when fifteen-year-old Eric Rash committed suicide, and the explanation in his letters to his family members was vague, leaving them to search for answers.⁸ The Rashes contacted Facebook to obtain Eric's password but were denied access to the account.⁹ After continuing to plead with Facebook, Facebook agreed to provide a CD with Eric's correspondences prior to his death.¹⁰ However, Eric's parents continued to remain locked out from Eric's account.¹¹

In contrast, when twenty-one-year-old Benjamin Stassen committed suicide without leaving a note, his parents were not granted access to the contents of his Facebook account.¹² Benjamin's parents were also looking for answers about their son's death and some source of peace amidst their grief.¹³ Despite a judge granting the family a court order directing Facebook to give the Stassen family access to Benjamin's account in 2012, a Facebook spokesperson stated that their policies do not allow access to a dead user's account, but would not comment on the specific case.¹⁴

These cases highlight the tension between giving access to grieving family members, who can argue they would be able to access non-electronic notes or messages left behind, and those who feel strongly about maintaining a sense of privacy after death, including the social media platforms that want to preserve the right of privacy to their users.¹⁵ Although a social media platform can decide, on its own, that

⁷ *Id.*

⁸ See Tracy Sears, *Facebook Sends Family Information About Son's Page Before His Suicide*, WTVR, <http://wtvr.com/2011/11/04/facebook-sends-family-information-about-sons-page-before-his-suicide> (last updated Apr. 19, 2012, 8:27 AM) ("He just said if life after high school was worse than high school, then he didn't want to be in it.").

⁹ *Id.* ("Facebook, citing user privacy policies, informed the Rashes that they could deactivate Eric's account or memorialize it, but they couldn't gain full access to it, even though Eric was a minor.").

¹⁰ *Id.*

¹¹ See Fredrick Kunkle, *Virginia Family, Seeking Clues to Son's Suicide, Wants Easier Access to Facebook*, WASH. POST (Feb. 17, 2013), https://www.washingtonpost.com/local/va-politics/virginia-family-seeking-clues-to-sons-suicide-wants-easier-access-to-facebook/2013/02/17/e1fc728a-7935-11e2-82e8-61a46c2cde3d_story.html.

¹² See Emily Anne Epstein, *Family Fights to Access Son's Facebook Account After His Suicide to Finally Gain Closure Over Tragic Death*, DAILYMAIL, <http://www.dailymail.co.uk/news/article-2153548/Family-fights-access-sons-Facebook-Gmail-accounts-suicide.html> (last updated June 1, 2012, 7:18 PM); Jessica Hopper, *Digital Afterlife: What Happens to Your Online Accounts When You Die?*, NBC NEWS: ROCK CTR. (June 1, 2012, 7:53 AM), http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite.

¹³ Epstein, *supra* note 12.

¹⁴ *Id.*

¹⁵ See *id.* ("But some civil liberties groups say it's not always obvious what someone would want after they pass."); Pitkin, *supra* note 6 ("When a young man dies, his parents walk into

the requestors may consent on behalf of a deceased user, they are often unwilling to do so.¹⁶ While most website policies could look to the decedent's intent, there is no requirement for any type of testamentary formality to gain access to someone else's social media page(s) after they die.¹⁷ Moreover, the three cases above involve people who were capable of spending the time and money to hire lawyers,¹⁸ but this process should not be expensive or time-consuming for those who are, and should be, entitled to have access to a deceased user's account. The current policies make it very difficult to obtain access to everything in a deceased user's account.

Social networking platforms have grown quickly and steadily in recent years and have reached over two billion users worldwide.¹⁹ Although not the first social networking site, Facebook has maintained itself as the most popular²⁰ with 2.07 billion active monthly users as of September 30, 2017.²¹ Instagram became increasingly popular in recent years, with over 800 million global users.²² LinkedIn boasts over 530 million registered members,²³ and Twitter maintains approximately 328

his room and take the shoebox full of letters out from under his bed But in the electronic world, it's just very difficult to do under the law.' That leaves online companies with a tough choice—give access to grieving parents, or possibly face anger from friends who expected privacy when they posted.”).

¹⁶ See *In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1206 (N.D. Cal. 2012) (“Having agreed with Facebook that the Section 1782 subpoena should be quashed, the court lacks jurisdiction to address whether the Applicants may offer consent on [the deceased user]’s behalf so that Facebook may disclose the records voluntarily Of course, nothing prevents Facebook from concluding on its own that Applicants have standing to consent on [the deceased user]’s behalf and providing the requested materials voluntarily.”).

¹⁷ See *infra* Section II.A.

¹⁸ Hopper, *supra* note 12 (quoting the father of Benjamin Stassen, stating, “[m]any people don’t have that knowledge . . . and unless they have the financial means to hire an attorney to do this for them, they are very likely to feel stuck and not know what to do”); Pitkin, *supra* note 6 (“Emails between Facebook officials and Williams show that until the family got a lawyer, the company refused to give them access.”).

¹⁹ See Kit Smith, *Marketing: 105 Amazing Social Media Statistics and Facts*, BRANDWATCH (Nov. 18, 2017), <https://www.brandwatch.com/2016/03/96-amazing-social-media-statistics-and-facts-for-2016> (stating that there are 3.03 billion active social media users); *Number of Social Network Users Worldwide from 2010 to 2021 (in Billions)*, STATISTA, <http://www.statista.com/statistics/278414/number-of-worldwide-social-network-users> (last visited Sept. 12, 2016).

²⁰ See Erin Richards-Kunkel, *15 Social Media Statistics That Every Business Needs to Know*, YAHOO! SMALL BUS., <https://www.aabacosmallbusiness.com/advisor/15-social-media-statistics-every-business-needs-know-001509118.html> (last visited Oct. 14, 2016) (listing statistics from 2012 that state Facebook is the most visited website of all websites, and that more than half of Facebook’s users check Facebook on a daily basis).

²¹ See *Company Info*, FACEBOOK, <http://newsroom.fb.com/company-info> (last visited Nov. 11, 2017).

²² See *About Us*, INSTAGRAM, <https://www.instagram.com/about/us> (last visited Nov. 11, 2017).

²³ See *About Us*, LINKEDIN, <https://press.linkedin.com/about-linkedin> (last visited Nov. 11, 2017).

million monthly users.²⁴ While the number of users on social networking sites is growing, the number of users that have died is growing as well. Although estimates vary, hundreds of thousands of Facebook users were estimated to die in 2016.²⁵

A social media or social networking site enables users to create profiles, form relationships with other users, and publish content so that a specific group of users can access it.²⁶ However, Facebook and other social networking sites are often used for much more, such as to strategically market and promote products or a person's brand.²⁷ Because of the sheer volume of traffic to many social networking websites, businesses and organizations have made a strong effort to create and strengthen their social media profiles.²⁸ Facebook and Instagram have pages dedicated to instructing how creating an account can help businesses.²⁹ However, businesses are not the only ones that stand to profit from using social media. Individuals can earn a profit by being sponsored to promote a product or service, or by using a social media platform to market their own personal information products in an area of expertise.³⁰

²⁴ See Seth Fiegerman, *Twitter Stock Surges on Surprise User Growth*, CNN: MONEY (Apr. 26, 2017, 9:44 AM), <http://money.cnn.com/2017/04/26/technology/twitter-earnings/index.html?iid=EL>.

²⁵ See Brandon Ambrosino, *Facebook Is a Growing and Unstoppable Digital Graveyard*, BBC (Mar. 14, 2016), <http://www.bbc.com/future/story/20160313-the-unstoppable-rise-of-the-facebook-dead> ("Some estimates claim more than 8,000 [Facebook] users die each day."); Evan Carroll, *972,000 U.S. Facebook Users Will Die in 2016*, DIGITAL BEYOND (Jan. 22, 2016), <http://www.thedigitalbeyond.com/2016/01/972000-u-s-facebook-users-will-die-in-2016> (estimating that 972,000 U.S. Facebook users would die in 2016, up from the 2010 estimate of 385,968 U.S. Facebook user deaths).

²⁶ See Vangie Beal, *Social Networking Site*, WEBOPEDIA, http://www.webopedia.com/TERM/S/social_networking_site.html (last visited Oct. 14, 2016); *Social Networking Site*, DICTIONARY.COM, <http://www.dictionary.com/browse/social-networking-site> (last visited Oct. 14, 2016).

²⁷ Burke, *supra* note 1; see also Brandi Ball, *Social Media for Business: 2016 Marketer's Guide*, MEDIUM (Mar. 1, 2016), <https://medium.com/@increasetwitt/social-media-for-business-2016-marketer-s-guide-14e729c9cdfc> ("Facebook is not only the biggest network, but it's arguably the most versatile one. In the 12 years since it launched, Facebook grew from a simple website . . . into a multifaceted Web and mobile social platform where anyone can connect with not just their friends and family, but also with celebrities, organizations, businesses, and more, thanks to the Pages feature.").

²⁸ See Erik Janitens, *Social Media Property Rights*, SOC. MEDIA L. BULL. (July 25, 2016), <http://www.socialmedialawbulletin.com/2016/07/social-media-property-rights>.

²⁹ See *Marketing on Facebook*, FACEBOOK, <https://www.facebook.com/business> (last visited Sept. 12, 2016); *Business*, INSTAGRAM, <https://business.instagram.com> (last visited Sept. 12, 2016).

³⁰ See Thomas Smale, *How to Make Money with Social Media*, ENTREPRENEUR (Apr. 27, 2016), <https://www.entrepreneur.com/article/274687> (listing tips on how social media can be lucrative when someone has amassed a sizeable group of followers who "trust" the individual they are following, because "they'll be more inclined to check out . . . recommendations and the links . . . share[d]"); see also Susan Shain, *Want to Make Money on Instagram? Here's What You Need to Know*, PENNY HOARDER (Mar. 24, 2015), <http://www.thepennyhoarder.com/how-to-make-money-on-instagram> ("Most people earn money on Instagram by publishing sponsored

There are a variety of ways users interact using social media platforms. When a user posts content, other users can respond in several different ways, depending on the platform.³¹ For example, on Facebook, people can comment, share, or react to others' posts.³² Twitter posts, which are limited to a certain amount of characters, can be "liked" or "retweeted."³³ Most social media platforms also allow users to direct message each other, which makes the content private so that it is only visible to the sender and recipient(s).³⁴ In addition, these platforms frequently add new features, such as the recent additions of Facebook Live and Instagram Stories.³⁵

While people generally draft wills to pass money and other tangible property to others after they die, the handling of digital assets has joined the list of things to consider when determining how to handle assets after death.³⁶ In order to determine the value that social media assets can have, some companies have researched the value of a "like."³⁷ Some

posts, which are images featuring and tagging a product or service. If you have a large and engaged following, brands will pay you handsomely for this publicity.”).

³¹ See Tyler Thursby, *6 Tips to Increase Your Social Media Shares*, SOC. MEDIA EXAMINER (June 14, 2016), <http://www.socialmediaexaminer.com/6-tips-to-increase-your-social-media-shares> (listing tips on how to create, publish, and post content to social media to maximize exposure).

³² See Karisa Egan, *The Difference Between Facebook, Twitter, LinkedIn, Google+, YouTube, & Pinterest*, IMPACT (Feb. 10, 2017), <https://www.impactbnd.com/blog/the-difference-between-facebook-twitter-linkedin-google-youtube-pinterest>; Chelsea Hunersen, *How Facebook's New 'Reactions' Feature Works & What It Means for Marketers*, HUBSPOT (Mar. 2, 2016), <http://blog.hubspot.com/marketing/facebook-reaction-buttons#sm.001faxipb1a18d9pwau1xfzwnx4s2> (explaining Facebook's "Reaction" feature, which added five more emotive reactions to the preexisting "Like" button: Love, Haha, Wow, Sad, and Angry).

³³ See *How to Like a Tweet or Moment*, TWITTER, <https://support.twitter.com/articles/20169874> (last visited Jan. 19, 2017); *Retweet FAQs*, TWITTER, <https://support.twitter.com/articles/77606> (last visited Jan. 19, 2017); Egan, *supra* note 32.

³⁴ See *What Is a Direct Message and When to Use It*, BIGCOMMERCE, <https://www.bigcommerce.com/ecommerce-answers/what-is-a-direct-message> (last visited Jan. 19, 2017).

³⁵ See Cameron, *Instagram's Live Video Feature to Rival Facebook's Live Video: What's New?*, ITECHPOST (Nov. 11, 2016, 7:15 PM), <http://www.itechpost.com/articles/52979/20161111/instagrams-live-video-feature-rival-facebooks-whats-new.htm> (stating that Facebook Live was initially introduced in 2015 for celebrities only, but then became available to the public, and providing an explanation of how to use the Facebook Live feature); Mathew Ingram, *Facebook Shows Its Snapchat Envy as Instagram Launches Stories*, FORTUNE (Aug. 2, 2016, 12:51 PM), <http://fortune.com/2016/08/02/facebook-instagram-snapchat> (explaining that the Instagram Stories feature, which was modeled after Snapchat's Stories feature, seems to be an attempt to increase engagement on Instagram).

³⁶ See Arden Dale, *More Estate Plans Account for 'Digital Assets'*, WALL ST. J.: WEALTH ADVISER (June 13, 2013, 9:19 AM), <http://www.wsj.com/articles/SB10001424127887323734304578543151391292038> (explaining that clients are asking their financial advisors more questions about what will happen to their digital assets after they die, because a good estate plan preserves family heritage, which can be partially kept on an online social media account).

³⁷ Results ranged from one estimate valuing \$214.81 per "like" for the first twelve months following the acquisition of the "like" to \$0.00 per "like" but concluding that a "like" is better viewed as "potential energy." Jim Edwards, *What Is a Facebook 'Like' Actually Worth in Dollars?*, BUS. INSIDER (Mar. 27, 2013, 10:06 AM), <http://www.businessinsider.com/what-is-a->

organizations are willing to pay to increase their “likes,” including the State Department, which spent over \$630,000 on advertising initiatives to increase fan numbers between 2011 and March 2013 as a way to engage with foreign audiences.³⁸ While this may not be as lucrative as earning true “likes” that people actually expressed by pressing the “like” button, it speaks to the emphasis and value people place on having “likes.”³⁹ In addition, a 2013 McAfee survey found that United States consumers estimated the value of all their digitally stored personal memories at \$16,581.⁴⁰ While the average person’s digital assets may or may not actually be of great monetary value, they still need protection from exploitation and abandonment after a person dies.⁴¹ Thus, properly planning with these assets in mind is ideal.

This Note will proceed in four parts. Part I will discuss the background of general testamentary principles of trusts and estates law. Part II will address the existing post-life policies of Facebook, Instagram, LinkedIn, and Twitter⁴² and the implications of the recently drafted acts addressing the disposition of digital assets. Part III will propose adding some type of testamentary formalities for the distribution of access to a deceased user’s social media accounts, such as adding an electronic signature line and requiring the user to re-enter their password before saving their selections. In addition, Part III proposes the application of certain trusts and estates principles, including allowing the user to make alternate selections of people who can access the account, the application of rules relating to time-gap issues that arise from the time a selection is made until the time the user dies, and a default testamentary scheme, where in the absence of a will or adequate instructions, the default scheme will dictate who, if anyone, has access to the account or to specific content held in the account. Part III also anticipates and responds to potential counterarguments of this proposal, including laws protecting the privacy of private electronic communications, the

facebook-like-actually-worth-in-dollars-2013-3 (stating that potential energy only has value when someone engages with it, as it can lead to a profit).

³⁸ See Josh Hicks, *IG Report: State Department Spent \$630,000 to Increase Facebook ‘Likes’*, WASH. POST (July 3, 2013), <https://www.washingtonpost.com/news/federal-eye/wp/2013/07/03/ig-report-state-department-spent-630000-to-increase-facebook-likes>.

³⁹ See N. Kimron Corion, *5 Reasons Why Buying Facebook Likes Is a Waste of Time and Money for Your Business*, HUFFINGTON POST: BLOG, http://www.huffingtonpost.com/nelson-kimron-corion/5-reasons-why-buying-face_b_5901392.html (last updated Nov. 30, 2014), for an opinion on why buying “likes” is not worthwhile.

⁴⁰ Dale, *supra* note 36 (the survey further found that U.S. consumers estimate their digital assets at nearly \$30,000 per individual, with an estimate of \$6,100 on personal records, \$2,847 on hobbies and projects, and \$1,689 on career information).

⁴¹ See Larry Harvey, *Estate Planning for Your Digital Assets*, LINKEDIN (Nov. 6, 2015), <https://www.linkedin.com/pulse/estate-planning-your-digital-assets-larry-harvey?forceNoSplash=true>.

⁴² This Note focuses on social media websites, rather than all digital assets, and will specifically address the policies of Facebook, Instagram, LinkedIn, and Twitter.

potential burden on social media platforms, and the potential divergence from trust and estate law, where there is a push to specifically lower testamentary formalities.

I. BACKGROUND: TRADITIONAL WILLS AND ESTATE PLANNING

Before a person dies, she can create a will containing her wishes for how her property should be distributed after her death.⁴³ In order for a will to be deemed valid and probated, its execution generally must meet certain requirements, called will formalities.⁴⁴ The required will formalities vary from state to state.⁴⁵ Some examples of the most frequently required formalities are that a will be in writing, signed by the testator,⁴⁶ and witnessed and signed by at least two other individuals.⁴⁷ Formalities focus on the following four functions: (1) the protective function; (2) the ritual function; (3) the evidentiary function; and (4) the channeling function.⁴⁸ In addition, the will formalities serve as a therapeutic function for clients by ensuring that their assets will be distributed in the manner they desire.⁴⁹ These functions are equally relevant to digital asset distribution, and specifically to social media accounts. A practical system for handling digital assets is necessary to ensure a decedent's intent is met, and these functions help accomplish that.

The protective function ensures that a testator is protected from fraud, undue influence, mistake, and fraudulent suppression of a valid

⁴³ See JAMES KENT, COMMENTARIES ON AMERICAN LAW 874 (WM. Hardcastle Browne ed., 1894) (“A will is a disposition of real and personal property to take effect after the death of the testator.”).

⁴⁴ See GORDON BROWN & SCOTT MYERS, ADMINISTRATION OF WILLS, TRUSTS AND ESTATES 4 (5th ed. 2012) (“Even a handwritten will written on a greeting card may actually be valid in some states, under certain circumstances.”).

⁴⁵ See STEWART E. STERK & MELANIE B. LESLIE, ESTATES & TRUSTS: CASES AND MATERIALS 213–15 (5th ed. 2015) (discussing the number of formalities required in the Texas statute for a will to be enforceable, and comparing the Texas statute with the Uniform Probate Code (UPC) § 2-502, which has been adopted by North Dakota); see also BROWN & MYERS, *supra* note 44, at 4.

⁴⁶ See *Testator*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“Someone who has made a will; esp., a person who dies leaving a will.”).

⁴⁷ See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 2018); NEV. REV. STAT. ANN. § 133.040 (West 2017); TEX. EST. CODE § 251.051 (West 2017).

⁴⁸ STERK & LESLIE, *supra* note 45, at 213; see also Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5–11 (1941) (identifying the protective, ritual, and evidentiary functions); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 493–94 (1975) (stressing the channeling function).

⁴⁹ See Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 176 (2012) (arguing that “testamentary formality enhanced the overall therapeutic potential of the estate planning process by bolstering the positive psychological consequences of preparing an estate plan and diminishing the process's antitherapeutic qualities”).

will.⁵⁰ The ritual of a will signing, which requires the testator's and witnesses' signatures, confirms the will was created thoughtfully and best reflects the testator's intent, rather than as a spontaneous document reflecting the testator's temporary thoughts or an allocation of assets resulting from coercion.⁵¹ This requirement is universal, but satisfaction of it can be rather lenient.⁵² The will formalities also provide evidentiary documentation of the testator's wishes, as well as witnesses who can testify about the validity of the will.⁵³ The channeling function allows a will to travel through the legal system efficiently, and also directs individuals to trained lawyers who assist them in preparing a well-drafted will.⁵⁴

When a person with a will dies, their will must be submitted for probate in order to be effectuated.⁵⁵ When someone who does not have a valid will dies, that person's assets are distributed via intestate succession.⁵⁶ Each state has its own default statutes that determine intestate heir distribution, but similar matters arise from the varying statutes.⁵⁷ For instance, most states give a surviving spouse the bulk of the decedent's estate because legislatures assume that such distribution is likely in line with what most decedents would have wanted.⁵⁸ Issues still arise in some cases, such as where the status of a marriage is arguably unclear.⁵⁹ In such cases, courts look to circumstantial evidence that the parties bring;⁶⁰ nevertheless, courts often also give a lot of consideration to who the parties are.⁶¹

⁵⁰ STERK & LESLIE, *supra* note 45, at 214.

⁵¹ *Id.*

⁵² *Id.* at 222–23 (“A testator must sign his will. Almost any imaginable signature will do if it makes a visible impression on the paper and the testator intended the impression to be his signature.”).

⁵³ *Id.* at 214.

⁵⁴ *Id.*

⁵⁵ *Id.* at 39–40 (explaining that the personal representative of the testator will offer the will for probate, and she will have to notify people who might have a reason to contest the will and prove the will was properly executed in order to distribute the assets in accordance with the will after paying taxes, any creditor claims, and expenses of administration of the estate).

⁵⁶ *Intestate Succession*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* BROWN & MYERS, *supra* note 44, at 78–79.

⁵⁷ STERK & LESLIE, *supra* note 45, at 60 (“Although intestate succession statutes differ significantly from state to state, a number of issues recur.”).

⁵⁸ *Id.* at 60–61.

⁵⁹ *See In re Estate of Goick*, 909 P.2d 1165 (Mont. 1996) (where the decedent and surviving spouse had begun divorce proceedings but never finalized); *Zimmerman v. Zimmerman*, 579 N.W.2d 591 (N.D. 1998) (where physical separation alone was insufficient to accomplish waiver, and the prenuptial agreement was only relevant in the case of divorce).

⁶⁰ *See, e.g., Estate of Goick*, 909 P.2d at 1170; *Zimmerman*, 579 N.W.2d at 598.

⁶¹ *See* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996) (“[M]any courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent. Those courts impose upon testators a duty to provide for those to whom the court views as having a superior moral claim to the testator's assets, usually a financially dependent spouse

In order to establish uniformity among states, the Uniform Law Commission (ULC) was established to provide states with well-drafted legislation about important areas of statutory law.⁶² The ULC completed the Uniform Probate Code (UPC) in 1969,⁶³ and has made significant revisions since, with the most recent version in 2010.⁶⁴ The UPC has made noteworthy contributions to the law reform movement for the relaxation of strict testamentary formalism.⁶⁵ This movement has been in process for over thirty-five years, with limited success.⁶⁶ Professor Langbein, who triggered the movement, argued that small, often inconsequential, defects should not void a will.⁶⁷ Rather, such defects should lead to further inquiry into whether the document expresses the decedent's testamentary intent and whether the form substantially complies with formalities.⁶⁸ Substantial compliance enables the court to probate the will to be consistent with the purposes of the Wills Act.⁶⁹ The UPC both simplified will formalities and created what is known as the "dispensing power" provision.⁷⁰ This provision, which is supported by the Restatement (Third) of Property, permits courts to excuse non-compliance with will formalities, so long as there is "clear and convincing evidence" of testamentary intent.⁷¹ Clear and convincing evidence requires a level of subjective certainty about factual

or persons related by blood to the testator.”).

⁶² See *About the ULC*, UNIFORM L. COMM'N, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Nov. 23, 2016).

⁶³ See *Acts, Probate Code*, UNIFORM L. COMM'N, <http://www.uniformlaws.org/Act.aspx?title=Probate%20Code> (last visited Feb. 12, 2017).

⁶⁴ *Id.*

⁶⁵ Leslie, *supra* note 61, at 236 (discussing three types of reforms, two of which are reflected in the original UPC and the 1990 revision of the UPC).

⁶⁶ See Glover, *supra* note 49, at 177 n.238 (“This law reform movement began with Professor John Langbein’s proposal in 1975, for the adoption of the substantial compliance doctrine Since that time only a handful of states have adopted the harmless error rule, which is the successor to Langbein’s substantial compliance doctrine.”). See generally Lawrence W. Waggoner, *The UPC Authorizes Notarized Wills*, 34 ACTEC J. 83 (2008); Langbein, *supra* note 48.

⁶⁷ Langbein, *supra* note 48, at 489.

⁶⁸ *Id.*

⁶⁹ *Id.* (this concept is referred to as the doctrine of substantial compliance).

⁷⁰ UNIF. PROB. CODE §§ 2-502–503 (amended 2010); see also STERK & LESLIE, *supra* note 45, at 215 (“The Uniform Probate Code has streamlined, but not eliminated, the formalities necessary for execution of a will Note in particular that the most recent version of the UPC allows the testator to dispense with witnesses altogether if the testator arranges to have her signature notarized. At least one state has followed the UPC’s lead—North Dakota has amended its will execution statute to allow the notary option.”); Leslie, *supra* note 61, at 236 (“The Revised UPC contains the revolutionary ‘dispensing power,’ currently championed by Langbein, which would enable courts to validate defectively executed documents when presented with clear and convincing evidence that the document reflects testamentary intent.”).

⁷¹ See UNIF. PROBATE CODE § 2-503 (UNIF. LAW COMM'N 2010); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (AM. LAW INST. 1999); Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 454 (2002).

conclusions that is necessary to satisfy due process.⁷² The clear and convincing evidence requirement has been met in a number of cases where small oversights would be a bar to probate when the formalities were substantially complied with and the testamentary intent is clear.⁷³

The rationale of the substantial compliance doctrine is to dispose of a person's assets in a way that reflects testamentary intent, even if the formal writing of the will is slightly contradictory of that intent.⁷⁴ There may not be a way to adequately compromise this conflict between satisfying the formalities and ensuring adjudicative justice.⁷⁵ Nevertheless, both are extremely important considerations when attempting to determine what to do with a person's assets. Ideally, a balance would be struck between maintaining formalities that serve the aforementioned functions, and providing justice in individual cases, so that the principles and purposes of the formalities are served.⁷⁶ The clear and convincing standard is intended to maintain the functions of will formalities while ensuring adjudicative justice and the implementation of the testator's intent.⁷⁷ Some courts have judicially replaced the requirement for strict compliance with will formalities for the doctrine of substantial compliance.⁷⁸ Outside of determining whether a will can

⁷² See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (“We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.”).

⁷³ See, e.g., *In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991) (holding that a will with the signatures of two witnesses were on the attached self-proving affidavit, but not on the will itself, may be admitted to probate if the trial court is satisfied that the execution of the will substantially complied with the statutory requirements); *In re Estate of Celso*, No. A-6191-05T3, 2007 WL 4105277, at *6 (N.J. Super. Ct. Appt. Div. Nov. 20, 2007) (holding that there is clear and convincing evidence of the witness's intent to attest the will, although they only signed the self-proving affidavit and not the attestation clause); *In re Estate of Gerhardt*, 763 A.2d 1289 (N.J. Super. Ct. 2000) (holding that a will with the signature of one attesting witness and a notary public substantially complies with the requirement to have two witnesses).

⁷⁴ Sherwin, *supra* note 71, at 476.

⁷⁵ *Id.* (“This suggests that the conflict between formality and adjudicative justice is very difficult, if not impossible, to resolve.”); see also Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt out of Intestacy*, 53 B.C. L. REV. 877 (2012) (suggesting that if the testamentary process was simplified by attaching an optional form will to state individual income tax returns, more people would take advantage of their testamentary freedom, and wills would be less susceptible to tampering or misplacement).

⁷⁶ Sherwin, *supra* note 71, at 474 (“In any legal system, there is pressure to maintain the benefits of formalities and provide justice in individual cases—to secure the benefits of rules and also to honor the more general principles or purposes of the law. Accordingly, it is natural to seek a compromise between these contrary objectives.”).

⁷⁷ See *In re Will of Ranney*, 589 A.2d 1339, 1345 (N.J. 1991) (“Our adoption of the doctrine of substantial compliance should not be construed as an invitation either to carelessness or chicanery. The purpose of the doctrine is to remove procedural peccadillos as a bar to probate.”).

⁷⁸ See Leslie, *supra* note 61, at 236; see, e.g., *Beth El Jacob Synagogue v. Lubavitch of Iowa, Inc.* (*In re Estate of Fordonski*), 678 N.W.2d 413, 416 (Iowa 2004) (“Because the witnesses' signatures in the present case appear on a document attached to the dispositive provisions of the will, we deem that sufficient to satisfy the formalities of execution set forth”); *Estate of*

be probated, the notion of testator intent is often at play.⁷⁹ Despite this, the intent of individual social media users has not played enough of a role in the determination of what happens to their account after they die.

II. ANALYSIS: CURRENT MODES OF SOCIAL MEDIA ASSET DISTRIBUTION

A. *Social Networking Sites' Post-Life Policies*

The right of family members to access the social media accounts of a deceased individual depends on which state the family lives in.⁸⁰ Some states, such as Illinois, have enacted laws that require social media websites to offer users the opportunity to name a beneficiary for their account.⁸¹ However, for states that do not have a law allowing an executor to access online accounts, the only way an account can be accessed is by following the procedures of each social media platform.⁸² This makes it difficult for many people to access the accounts of loved ones or even know what their options are, especially if the deceased user did not list a beneficiary.

The issue of a lack of laws and procedures is amplified by the quantity of social media platforms that exist. Most people who use social media sites use multiple social media sites⁸³ and therefore have multiple

Dellinger v. 1st Source Bank, 793 N.E.2d 1041, 1045 (Ind. 2003) (“If the statute [setting forth the substantial compliance doctrine] as it currently reads had been in effect when Dellinger’s will was executed, there would be no question that the will was properly witnessed.”). Cf. *In re Last Will & Testament of Palecki*, 920 A.2d 413, 422–23 (Del. Ch. 2007) (“[Respondent] may believe it would be better policy to relax the formality of an independent signature requirement . . . and he can cite to learned scholars whose writings buttress that view. But he is addressing his argument to the wrong branch of government.”).

⁷⁹ See *Fitchie v. Brown*, 211 U.S. 321, 330 (1908) (“It is the intention of the testator that is to be sought, and such intention is not always found to have been directly, and in so many words, expressed in the will. An intention, which is implied from language actually used and from facts actually appearing in the will, is to be carried out, provided it does not violate the law.”).

⁸⁰ See *State-by-State Digital Estate Planning Laws*, EVERPLANS, <https://www.everplans.com/articles/state-by-state-digital-estate-planning-laws> (last visited Dec. 5, 2016) (providing a breakdown of the laws passed in each state, and citing to laws effective as early as 2005 in Connecticut and 2007 in Rhode Island).

⁸¹ See Jamey Dunn, *New Law Improves Access to Social Media Accounts for Family Members of Deceased*, N. PUB. RADIO (Sept. 6, 2016), <http://northernpublicradio.org/post/new-law-improves-access-social-media-accounts-family-members-deceased>.

⁸² See Aaron Rubin, *Who Will Update My Status When I’m Dead?: The Biggest Social Media Platforms’ Policies on Deceased-User Accounts*, SOCIALLY AWARE BLOG (Mar. 10, 2015), <http://www.sociallyawareblog.com/2015/03/10/who-will-update-my-status-when-im-dead-the-biggest-social-media-platforms-policies-on-deceased-user-accounts> (giving an overview of many social media platforms’ policies for management of deceased user accounts).

⁸³ See *More People Use Multiple Social Media Sites*, PEW RES. CTR.: INTERNET & TECH (Jan. 9, 2015), http://www.pewinternet.org/2015/01/09/social-media-update-2014/pi_2015-01-09_

accounts where they develop, post, and keep personal content, which compounds this issue, because each website has different post-life policies.⁸⁴ Some policies only offer a memorialization or account deletion of the deceased user's account.⁸⁵ This is a major issue for users who may want someone to have access to their social media account(s) after they die without disclosing their login information prior to their death, or want to avoid constantly informing one or more people of password changes while they are alive.⁸⁶ Even if someone does have login information for another user, most social media platforms do not allow anyone to login to an account after an account has been memorialized.⁸⁷ The next Sections will discuss the after-death policies of Facebook, Instagram, LinkedIn, and Twitter.

1. Facebook

Facebook has the most comprehensive policy of all social media platforms.⁸⁸ Despite this, a legacy contact's access does not encompass all aspects of a user's account. A legacy contact cannot access a user's Page or personal communications, even if the user may have wanted the legacy contact to have access to those materials.⁸⁹ Facebook also fails to account for various changes that could be caused by the time-gap between when the user selects a legacy contact and when the user dies.⁹⁰

social-media-new_03 (showing that in 2014, users are more likely to use two to five sites, than one site).

⁸⁴ Rubin, *supra* note 82.

⁸⁵ *Id.*

⁸⁶ There are services that act as password managers, so that passwords can be provided to a person's digital executor after they die. Mariella Moon, *What You Need to Know About Your Digital Life After Death*, ENGADGET (Dec. 10, 2014), <https://www.engadget.com/2014/12/10/online-life-after-death-explainer> ("You could choose a password manager like LastPass, sign up for a separate cloud storage account or look up one of the services that offer to keep your credentials under virtual lock and key for this very purpose—just make sure it can be trusted.").

⁸⁷ See *How to Contact Twitter About a Deceased Family Member's Account*, TWITTER, <https://support.twitter.com/articles/87894> (last visited Oct. 21, 2016) ("Note: We are unable to provide account access to anyone regardless of their relationship to the deceased."); *What Happens When a Deceased Person's Account Is Memorialized?*, INSTAGRAM, <https://help.instagram.com/231764660354188> (last visited Oct. 21, 2016) ("Instagram doesn't allow anyone to log into a memorialized account."); *What Will Happen to My Facebook Account If I Pass Away?*, FACEBOOK, https://www.facebook.com/help/103897939701143?helpref=faq_content (last visited Oct. 21, 2016) ("No one can log into a memorialized account.").

⁸⁸ See Haley Tsukayama, *Facebook Will Now Let You Manage What Happens to Your Account After You Die*, WASH. POST (Feb. 12, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/02/12/facebook-will-now-let-you-manage-what-happens-to-your-account-after-you-die> ("Google already offers a similar tool to let you decide what to do with the trove of e-mail and other data it has on its users . . . Facebook is a bit of a different animal, however, since it's social by design.").

⁸⁹ See sources cited *infra* notes 101–04, 108–11.

⁹⁰ See Vanessa Callison-Burch, Jasmine Probst & Mark Govea, *Adding a Legacy Contact*, FACEBOOK: NEWSROOM (Feb. 12, 2015), <http://newsroom.fb.com/news/2015/02/adding-a->

On February 12, 2015, Facebook added a new feature called a “legacy contact.”⁹¹ A Facebook product manager stated that she and her team see this as the first version of the feature.⁹² This means that new features are likely to be released in the future, and states with laws that defer to online policies will depend on how the feature operates. The legacy feature was an addition to the previously existing option for memorialized accounts, which was initiated for other Facebook users to use to remember those that have passed away.⁹³ Facebook stated that after speaking to people who experienced loss, they realized there was more they could do to support grieving family members who want to have a say in what happens to their loved one’s account after death.⁹⁴ Key features of memorialized accounts include: (1) the word “Remembering” is shown next to the deceased user’s name on their profile; (2) content that the deceased user shared on Facebook remains visible to the audience it was shared with; (3) the memorialized profile does not appear in public spaces such as birthday reminders; (4) no one can log into a memorialized account; and (5) memorialized accounts that do not have a legacy contact cannot be changed.⁹⁵

A Facebook user chooses a legacy contact by going to their account’s Security Settings and choosing a Facebook friend, who will be notified once that account is memorialized.⁹⁶ A user has a limited choice of options and specific delegations to give their legacy contact. A user can decide whether to grant the legacy contact permission to download an archive of photos, posts, and profile information that was shared on Facebook.⁹⁷ The user also has a choice of sending a message to the legacy contact they chose on Facebook to inform them that they have made this decision.⁹⁸ If a user chooses to send a message to their legacy contact, that message appears with a timestamp.⁹⁹ Otherwise, no

legacy-contact.

⁹¹ *Id.*

⁹² Tsukayama, *supra* note 88.

⁹³ See *Memorialized Accounts*, FACEBOOK, <https://www.facebook.com/help/1506822589577997> (last visited Oct. 19, 2016) (“Memorialized accounts are a way for people on Facebook to remember and celebrate those who’ve passed away.”).

⁹⁴ Callison-Burch, Probst & Govea, *supra* note 90.

⁹⁵ *Memorialized Accounts*, *supra* note 93 (explaining what happens to a user’s Facebook account after they die).

⁹⁶ See *How Do I Add, Change, or Remove My Legacy Contact on Facebook*, FACEBOOK, <https://www.facebook.com/help/1070665206293088?helpref=related&ref=related> (last visited Dec. 3, 2016); see also *Can I Choose Someone Who Isn’t My Facebook Friend as My Legacy Contact?*, FACEBOOK, <https://www.facebook.com/help/1585126361706709?helpref=related&ref=related> (last visited Oct. 21, 2016) (stating that only a Facebook user and friend can be added as a legacy contact).

⁹⁷ Callison-Burch, Probst & Govea, *supra* note 90.

⁹⁸ *Id.*

⁹⁹ Some have claimed that Facebook’s time stamps are not always accurate. See Marie Notcheva, *The Privacy (You Don’t Realize) You’re Giving Up on Facebook*, WORDPRESS (Aug. 31, 2015), <https://marienotcheva.wordpress.com/2015/08/31/the-privacy-you-dont-realize->

notification is sent to the legacy contact at the time that they are selected by the user, so no documentation of the event is kept by anyone other than Facebook and possibly the user who chose the legacy contact.¹⁰⁰

If named a legacy contact, that person is allowed to: (1) write a post that will appear at the top of the deceased user's memorialized page; (2) respond to new friend requests who had not yet connected with the deceased user on Facebook; and (3) update the deceased user's profile picture and cover photo.¹⁰¹ However, Facebook makes it clear that the legacy contact will not be able to log in as the person who passed away or see that person's private messages.¹⁰² Moreover, a legacy contact will not gain access to messages, ads clicked by the user, pokes, security and settings information, or photos the user synced but did not post.¹⁰³ However, Facebook does say that they "*consider* requests for additional account information or content . . . Please keep in mind that sending a request or filing the required documentation doesn't guarantee that we'll be able to provide you with the content of the deceased person's account."¹⁰⁴ Therefore, Facebook has complete discretion over whether they choose to comply with any given request, even a valid will, that presumably was probated in court, expressing the clear consent of the testator.

In addition to delegating a specific legacy contact, a Facebook user may also choose to have their Facebook account permanently deleted after they die.¹⁰⁵ Facebook will remove the account once someone provides the death certificate of that user, or proof of their own authority and proof the user passed away.¹⁰⁶ These choices are completely optional, so a user is not obligated to make any of their preferences known, nor will an account be deleted if it is not reported.¹⁰⁷

In addition to having a personal Facebook account, a person can be

youre-giving-up-on-facebook ("As absurd as it sounds, this timestamp has led to fights, paranoia, and even breakups—and it's not even accurate. By 2013, a glitch in how the servers were gathering data was well known to Facebook."). If timestamps are truly not always accurate, then there can be an issue with relying on the timestamp as an indicator of when the user chose to select that person as a legacy contact.

¹⁰⁰ Callison-Burch, Probst & Govea, *supra* note 90; *see also* Tsukayama, *supra* note 88 ("Users who designate a legacy contact will be reminded each year about their decision, in case they want to make any changes.").

¹⁰¹ Callison-Burch, Probst & Govea, *supra* note 90.

¹⁰² *Id.*

¹⁰³ *Memorialized Accounts*, *supra* note 93.

¹⁰⁴ *Id.* (emphasis added).

¹⁰⁵ *See* Callison-Burch, Probst & Govea, *supra* note 90.

¹⁰⁶ *See How Do I Request the Removal of a Deceased Family Member's Facebook Account?*, FACEBOOK, <https://www.facebook.com/help/1518259735093203?helpref=related&ref=related> (last visited Oct. 21, 2016). Facebook does not make it clear whether someone can request an account be deleted if the user *had* utilized the option for a legacy contact, which would show the user prefer the memorialization method.

¹⁰⁷ *See* Callison-Burch, Probst & Govea, *supra* note 90.

an administrator of a Page on Facebook.¹⁰⁸ If an individual is the sole administrator of a Page and their personal account is memorialized, the Page will be removed from Facebook upon a valid request.¹⁰⁹ Even if a Page was not removed, no one would be able to have administrator access to the Page since the sole administrator died.¹¹⁰ Even when someone designates a legacy contact, that person is not granted access to Pages for which the deceased user was an administrator.¹¹¹ This may not be clear to the user who delegates a legacy contact, because the underlying assumption is that their legacy contact will be able to have access to the user's entire account, including the user's Pages. The only way to ensure someone else has access to your Pages after you die is to make them an administrator while you are alive, which users may not want to do if they prefer to maintain sole control over the Page until they die.

Facebook's legacy contact feature is similar to the concept of allowing a testator to select someone in his will to administer or have access to something that belonged to the testator after the testator dies. Although Facebook has a page for special requests regarding a deceased person's account,¹¹² it does not provide a default system, similar to intestate succession, for selection of a legacy contact in absence of specific contrary intent.¹¹³ Therefore, if a user does not select a legacy contact, no one can assume that role. If the selected legacy contact informs the user that they do not want to serve as a legacy contact, the user can select someone else, if the user wishes to do so.¹¹⁴ However, if a legacy contact did not know they were selected or simply chooses not to

¹⁰⁸ See *How Do I Create a Page?*, FACEBOOK, <https://www.facebook.com/help/104002523024878?helpref=search&sr=2&query=%22Pages%20are%20for%20brands%2C%20businesses%2C%20organizations%22> (last visited Jan. 7, 2017) ("Pages are for businesses, brands, organizations and public figures to share their stories and connect with people. Like profiles, Pages can be customized with stories, events and more.").

¹⁰⁹ *What Will Happen to My Facebook Account If I Pass Away?*, *supra* note 87.

¹¹⁰ See *What Are the Different Page Roles and What Can They Do?*, FACEBOOK, <https://www.facebook.com/business/help/289207354498410> (last visited Oct. 21, 2016).

¹¹¹ *Id.*

¹¹² See *Special Request for Medically Incapacitated or Deceased Person's Account*, FACEBOOK, <https://www.facebook.com/help/contact/228813257197480> (last visited Dec. 4, 2016).

¹¹³ See *How Do I Add, Change, or Remove My Legacy Contact on Facebook?*, FACEBOOK, <https://www.facebook.com/help/1070665206293088?helpref=related&ref=related> (last visited Dec. 3, 2016); see also *My Friend's Facebook Profile Is Already Memorialized. Can I Add a Legacy Contact to It?*, FACEBOOK, <https://www.facebook.com/help/764712286927215?helpref=search> (last visited Dec. 4, 2016) ("A legacy contact is chosen by the account holder, so it's not possible to add a legacy contact to an account that's already memorialized.").

¹¹⁴ See *What Should I Do If Someone Chose Me as Their Legacy Contact on Facebook but I Don't Want to Be?*, FACEBOOK, https://www.facebook.com/help/1597354833817144?helpref=uf_permalink (last visited Dec. 4, 2016) ("If someone let you know they chose you as a legacy contact and you don't want to be, we suggest letting them know by sending them a message or talking to them in person. Please keep in mind that everything you can do as a legacy contact is optional.").

act as the legacy contact once the user dies, there is no option for an alternate selection that could be put in place by the user.¹¹⁵ The same issue could arise if the legacy contact dies soon before or simultaneously with the user that selected them. This is problematic for any user who would want someone else to act as legacy contact if their first selection was not able to do so.

Without a default system or the ability to select an alternate, a relative or close friend would have to revert to contacting Facebook directly or going to court and might still be denied access to the decedent's account.¹¹⁶ Allowing a user to select an alternate or multiple alternate legacy contacts provides the user with an opportunity to ensure that someone has access to their social media platforms when they die. In addition, there should be policies that account for certain circumstances, such as marriage or divorce.¹¹⁷

2. Instagram

In contrast with Facebook, Instagram has a more limited approach, and does not provide any options for users to select before they die, despite Facebook's ownership of Instagram L.L.C.¹¹⁸ On Instagram, there are two options available for a deceased user's account.¹¹⁹ The first option is memorializing the account, which anyone can request for a deceased user's account, by contacting Instagram and showing proof of death.¹²⁰ When an account is memorialized on Instagram, no one can log into it, nor can memorialized accounts be changed in any way.¹²¹ The memorialized account and posts remain visible to the audience with whom they were shared, and people can continue to send photos or videos to that account using Instagram Direct.¹²² The second option Instagram provides is removal of the account, which can only be requested by verified immediate family members, who must submit a request for removal with proof that the requestor is an immediate family member of the deceased person.¹²³ These options do not provide any

¹¹⁵ Callison-Burch, Probst & Govea, *supra* note 90.

¹¹⁶ See *supra* text accompanying notes 4–17.

¹¹⁷ See *infra* text accompanying notes 202–04.

¹¹⁸ See *The Facebook Companies*, FACEBOOK, <https://www.facebook.com/help/111814505650678> (last visited Oct. 21, 2016).

¹¹⁹ See *How Do I Report a Deceased Person's Account on Instagram?*, INSTAGRAM, <https://help.instagram.com/264154560391256> (last visited Oct. 21, 2016).

¹²⁰ *Id.*

¹²¹ See *What Happens When a Deceased Person's Account Is Memorialized?*, INSTAGRAM, <https://help.instagram.com/231764660354188> (last visited Oct. 21, 2016).

¹²² *Id.* Instagram Direct allows users to communicate with other users in a direct message. *Instagram Direct*, INSTAGRAM, <https://help.instagram.com/400205900081854?helpref=breadcrumb> (last visited Feb. 12, 2017).

¹²³ See *How Do I Report a Deceased Person's Account on Instagram?*, *supra* note 119.

assignment of access rights to an individual's account, such as Facebook's legacy contact feature.¹²⁴

Since Instagram's options are limited to memorialization and deletion of an account, there is no feature allowing someone else to gain access to a deceased user's account, even if the user wanted someone in particular to access their account after they died. This would leave someone to either contact Instagram directly, or go to court in order to try and gain access to a loved one's Instagram account. Instagram does not state whether or not it would honor a provision in a valid will that designates an individual as the beneficiary of their Instagram account. The options provided by LinkedIn and Twitter are even more limited than those provided by Instagram.

3. LinkedIn

LinkedIn allows someone to request that a profile of a deceased user be removed after gathering and providing basic information about the deceased user, the requestor's relationship to the deceased user, and the deceased user's LinkedIn account.¹²⁵ LinkedIn offers no other options for accounts that belong to deceased users.¹²⁶ There is a LinkedIn feature that exports a user's connections, and one social media expert suggests using this feature to export a deceased user's connections, thereby storing the contact information for those connections.¹²⁷ However, this is only a viable option for someone who has the username and password of the deceased user, because they need to log into the account of the deceased user in order to use this feature to export the deceased user's connections on LinkedIn.¹²⁸ Even if a user chooses to leave his login credentials with someone, that person may not have the opportunity to log into the account until after the deceased user's profile has already been removed. Although a user can take advantage of this feature at any point in time before they die and leave the exported information for whomever they want, it would be difficult

¹²⁴ See *id.*

¹²⁵ See *Deceased LinkedIn Member—Removing Profile*, LINKEDIN, <https://www.linkedin.com/help/linkedin/answer/2842/deceased-linkedin-member-removing-profile?lang=en> (last visited Oct. 21, 2016) (listing the following information that needs to be gathered in order for LinkedIn to remove the profile: (1) the member's name; (2) the URL to the member's LinkedIn profile; (3) the requestor's relationship to the deceased member; (4) the member's email address; (5) the date the member passed away; (6) a link to an obituary of the deceased member; and (7) the company where the deceased member most recently worked).

¹²⁶ See Evan Carroll, *What Happens to Your LinkedIn Account When You Die?*, DIGITAL BEYOND (May 2, 2014), <http://www.thedigitalbeyond.com/2014/05/what-happens-to-your-linkedin-account-when-you-die>.

¹²⁷ *Id.*

¹²⁸ *Id.*

to ensure the information remained accurate at the time of the user's death.

4. Twitter

Twitter also offers removal of an account of a deceased user; although, requests can only come from a person authorized to act on behalf of the deceased user's estate or a verified family member of the deceased user.¹²⁹ Unlike the other social media platforms discussed in this Note, Twitter's policy makes express reference to the deceased user's other estate planning devices by referring to the person authorized to act on behalf of the estate.¹³⁰ While Twitter does not define that term precisely, it is likely referring to the person named the executor or administrator of the estate.¹³¹ Twitter also allows immediate family members or other authorized individuals for a deceased individual to request that Twitter remove imagery of deceased individuals in certain circumstances.¹³² However, Twitter retains the discretion to approve or deny such requests, based on "public interest factors."¹³³

5. Comparison with Traditional Trusts and Estates Law

While all these policies provide avenues for an individual's account to be removed, there are many shortcomings. In order for a person to properly plan for their digital assets and ensure that their intent will be effectuated when they die, it is imperative that the laws of social media accounts—and other digital assets—are clearly laid out. To remedy the

¹²⁹ See *How to Contact Twitter About Media Concerning a Deceased Family Member*, TWITTER, <https://help.twitter.com/en/rules-and-policies/contact-twitter-about-media-on-a-deceased-family-members-account> (last visited Jan. 15, 2017).

¹³⁰ *Id.*

¹³¹ See *How to Contact Twitter About a Deceased Family Member's Account*, TWITTER, <https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account> (last visited Apr. 13, 2018) ("In the event of the death of a Twitter user, we can work with a person authorized to act on behalf of the estate, or with a verified immediate family member of the deceased to have an account deactivated."); see also STERK & LESLIE, *supra* note 45, at 70–71 ("Generally, a personal representative is appointed to administer an estate—to collect assets, to pay debts and expenses, and to distribute the estate. When decedent leaves a will, the will generally appoints an 'executor' to perform these functions. When decedent dies intestate, the court will generally appoint a personal representative, often called an 'administrator' to perform the same functions.").

¹³² *How to Contact Twitter About Media Concerning a Deceased Family Member*, *supra* note 129.

¹³³ *Id.* ("When reviewing such media removal requests, Twitter considers public interest factors such as the newsworthiness of the content and may not be able to honor every request.").

issue, laws governing social networking sites' policies for deceased users may be appropriately handled at the federal level.¹³⁴ As argued by Professor Jason Mazzone, social networking sites are not likely to reflect the individual and collective interests at stake, while state laws are likely to be problematic, because the activity on social media sites are not contained within state or national boundaries.¹³⁵ Professor Mazzone's prediction regarding social networking sites' policies holds true, because each policy contains very few, if any, options for control by a user before they die.¹³⁶ In addition, state laws cannot fully address digital asset distribution without a clear establishment of ownership rights of digital assets.¹³⁷ Because social media websites can be accessed from any state, a non-uniform system can complicate administration from the perspective of users trying to plan for their death, as well as the beneficiary of a digital estate plan and the social media websites that need to comply with various states' laws.¹³⁸ Although federal law would provide uniformity, there is the outstanding issue that estate law is generally administered on the state level, and bringing in federal law for digital estate planning may be overstepping.¹³⁹

The foregoing social networking policies do not consider the system of intestate succession¹⁴⁰ for right of access to a deceased user's account. This can especially be an issue for Facebook Pages, since these

¹³⁴ See Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643, 1681 (2012).

¹³⁵ See *id.* at 1681, 1685.

¹³⁶ See discussion *supra* Sections II.A.1–4.

¹³⁷ See Jamie P. Hopkins, *Afterlife in the Cloud: Managing a Digital Estate*, 5 HASTINGS SCI. & TECH. L.J. 209, 241–42 (2013) (“[F]ederal legislation should be passed, clarifying digital asset ownership rights Ultimately, clearly defined digital asset rights regarding ownership and transferability would enable better and more efficient digital estate planning.”).

¹³⁸ See *Why Your State Should Adopt the Revised Uniform Fiduciary to Digital Assets Act (2015)*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Revised%202015/Revised%20UFADAA%20-%20Why%20Your%20State%20Should%20Adopt%20-%20Sep%202015.pdf> (last visited Feb. 12, 2017) (“Digital assets travel across state lines nearly instantaneously. In our modern mobile society, people relocate more often than ever. Because state law governs fiduciaries, a uniform law ensures that fiduciaries in every state will have equal access to digital assets and custodians will have a single legal standard with which to comply.”).

¹³⁹ See Matt Borden, Note, *Covering Your Digital Assets: Why the Stored Communications Act Stands in the Way of Digital Inheritance*, 75 OHIO ST. L.J. 405, 436 (2014) (“Each state has a set of laws determining how wealth is transferred from one generation to the next. The federal government, on the other hand, is largely absent from estate law, especially the process of transfer and determining what can be transferred.”). The purpose of the UPC is, in part, to solve this issue by encouraging uniformity so that a will can be probated similarly in any state and permits distribution of property that a decedent holds in a different state than where the will was probated. *Probate Code Summary*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Probate%20Code> (last visited Feb. 12, 2017) (“UPC 1969 marked the first major effort at serious promotion of the policy of uniformity among state family property laws. Its success to date has nurtured a growing acceptance of uniformity as a desirable and achievable goal, and UPC 1991 encourages a greater trend toward useful uniformity of family property law.”).

¹⁴⁰ See *supra* text accompanying notes 56–58.

Pages are generally created to promote brands.¹⁴¹ This could become an even bigger issue for an account on Instagram, since Instagram released similar business tools to Facebook¹⁴² and does not have a similar feature to the legacy contact that Facebook has in place.¹⁴³ An individual might have garnered a following for a specific area of interest, such as fashion, food, or baby products, and that account holder may want to pass ownership of the lucrative account to a relative or close friend.¹⁴⁴ If companies often reach out to that account and offer to pay for that account to advertise because the account has a large, trusting follower base, the account may hold a sizeable value.¹⁴⁵ Accounts with such a purpose, rather than one that is used solely as a personal account, should be able to be passed to someone else, especially where there is value or potential value in the account, and when the account holder would have wanted someone else to have such access.

While an account holder can simply inform a beneficiary of her account information, there are a few issues with this approach. First, an account holder may not want to share account information before her death. Second, even if a beneficiary has the information and can access the account, under the Facebook and Instagram policies, if someone else shows proof of death, the account may be memorialized or removed.¹⁴⁶ This would result in a complete inability to log into the deceased user's account, even if someone had all the login information for that account. Third, giving account information to others while alive may cause strife if multiple people have the account information when the deceased user dies and one person claims that the account holder intended that she be the sole beneficiary.

Meanwhile, Twitter and LinkedIn, which do not have memorialization features, can be subject to spam-bots,¹⁴⁷ or even

¹⁴¹ See *supra* text accompanying notes 27–30.

¹⁴² See *Instagram Business Tools*, FACEBOOK, <https://www.facebook.com/business/help/897631030335607> (last visited Nov. 13, 2017); see also Wagner, *supra* note 2 (stating that one of the features that Instagram is working on is “[s]pecific profiles for businesses (imagine the Instagram equivalent of Facebook’s Brand Pages)”).

¹⁴³ See James Peckham, *This Is What Happens to Your Social Network Accounts After You Die*, TECHRADAR (July 17, 2016), <https://www.techradar.com/news/internet/this-is-what-happens-to-your-social-network-accounts-after-you-die-1324948> (“But some social networks don’t have simple plans for when you die. Instagram for example, which is owned by Facebook, lacks such a scheme.”).

¹⁴⁴ See Smale, *supra* note 30 (listing some ways to make money with a social media account).

¹⁴⁵ See *supra* notes 36–39 and accompanying text.

¹⁴⁶ See *What Will Happen to My Facebook Account If I Pass Away?*, FACEBOOK, https://www.facebook.com/help/103897939701143/?_tn__=%2As-R (last visited Mar. 4, 2018); *How Do I Report a Deceased Person’s Account on Instagram?*, INSTAGRAM, <https://help.instagram.com/264154560391256> (last visited Oct. 21, 2016).

¹⁴⁷ See Kashmir Hill, *The Invasion of the Twitter Bots*, FORBES (Aug. 9, 2012, 10:52 AM), <http://www.forbes.com/sites/kashmirhill/2012/08/09/the-invasion-of-the-twitter-bots/#4ed294c83273> (explaining that spam-bots are fake accounts).

accidental posts by someone who has access to a deceased user's account that has not been removed.¹⁴⁸ This could also happen to the account of a deceased user that others chose not to memorialize, in order to be able to access the account if they have the necessary login credentials.

Even with the legacy contact option on Facebook, there is no option on the website for a user to decide that *all* information be delivered to the legacy contact, except possibly if the user has a will clearly stating that desire.¹⁴⁹ In addition, there is no way to list an alternate legacy contact on Facebook, which is already limited to Facebook users.¹⁵⁰ In contrast, a will allows a testator to be much more thorough by accounting for various possibilities. When creating a will, lawyers advise clients to provide for every contingency, including unlikely ones, such as the death of a young beneficiary.¹⁵¹ Wills are also subject to rules of construction for issues that arise from the time-gap between will execution and the testator's death.¹⁵² Circumstances may change significantly during that time, which could affect the distribution of a testator's estate.¹⁵³ Accordingly, courts and legislatures created abatement, ademption, and anti-lapse rules.¹⁵⁴ Anti-lapse statutes solve difficulties that arise when a will beneficiary dies before the testator's

¹⁴⁸ See Abby Ohlheiser, *A Question We Never Thought We Would Have to Ask After Someone Dies*, WASH. POST (May 20, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/05/20/what-happens-when-a-deceased-persons-twitter-account-starts-posting-spam/> ("For about an hour on Thursday morning, the verified Twitter account of the late New York Times media columnist David Carr belonged to an apparent spambot. The accounts name changed to 'Miranda Davis,' and 'Miranda' tweeted, 'I love role-playing games and sex.' The tweet shocked many of Carr's hundreds of thousands of followers: Carr died in 2015."). The article also discusses an "account handover," which led to a mistaken tweet that was intended to be a private message. *Id.*

¹⁴⁹ See *supra* text accompanying notes 103–05.

¹⁵⁰ See *Can I Choose Someone Who Isn't My Facebook Friend as My Legacy Contact?*, FACEBOOK, <https://www.facebook.com/help/1585126361706709?helpref=related&ref=related> (last visited Oct. 21, 2016).

¹⁵¹ See Leanna Hamill, *The Importance of Naming an Alternate Beneficiary in Your Will*, HAMILL L. OFF. (Apr. 29, 2008), <http://www.hamilllawoffice.com/estate-planning/the-importance-of-naming-an-alternate-beneficiary-in-your-will/> ("Unfortunately, you will not be around to explain what you wanted, and the statutes which dictate how the funds will pass without your direction will not necessarily match your wishes. When thinking about your Will, you must always think 'What if this person passed away before me, where would I want their share to go?'); *Why Naming Alternate Beneficiaries in Your Will Is So Important*, NOLO, <http://www.nolo.com/legal-encyclopedia/why-naming-alternate-beneficiaries-your-will-is-so-important.html> (last visited Oct. 21, 2016) ("The best way to plan for this unlikely scenario is to name an alternate (contingent) beneficiary for each of your first-level beneficiaries.").

¹⁵² See STERK & LESLIE, *supra* note 45, at 270. The rules of construction address other issues, as well, such as vague or inconsistent provisions. *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* Abatement rules apply when the value of the estate is no longer sufficient to satisfy all the devises written in the will, while ademption rules apply when a particular piece of property was disposed of after the testator executed the will. *Id.* Neither of these rules are particularly applicable to this discussion of social media asset distribution.

death.¹⁵⁵ Since an anti-lapse statute is a constructional rule, it is only followed if the will does not precisely delineate what should happen if a beneficiary predeceases the testator.¹⁵⁶ Therefore, the death of a beneficiary of a will prior to the death of the testator will either devise a gift according to anti-lapse statutes, or according to the detailed instructions left in the will that was specifically drafted to govern this situation. The testator's bequest will not simply dissipate and be forgotten. Whereas with the Facebook legacy tool, anti-lapse statutes do not apply, and there is no way for a user to leave specific instructions for a situation where the person selected as a legacy contact dies before the user.

Although a seemingly simple solution would be to add multiple alternate legacy contacts, Facebook does not have this feature.¹⁵⁷ If a person forgets to change their legacy contact after being predeceased by that user, or dies simultaneously¹⁵⁸ with their legacy contact, then she does not have the option to select what happens next.¹⁵⁹ A user may feel that they only want their spouse to have access to their Facebook content, and if not, they would want their account to be deactivated. Facebook, while having the most extensive post-life policy, does not accommodate this.¹⁶⁰ In contrast, Google's "Inactive Account Manager" tool allows users to select up to ten "trusted contacts" and share their data with them.¹⁶¹ Many users are likely to list their spouse or a close

¹⁵⁵ *Id.* at 292 ("In every American state except Louisiana, the legislature has enacted an 'antilapse' statute The theory behind antilapse statutes is that when a testator leaves property to a sufficiently close relative, testator would want the issue of that devisee to take the property if the devisee predeceases the testator.").

¹⁵⁶ *Id.* at 297. What constitutes clear expression of a testator's intent to the contrary is often at issue. *See, e.g., In re Estate of Niehenke*, 791 P.2d 562, 566–67 (Wash. Ct. App. 1990) (holding that the anti-lapse statute should operate because seven years passed between the death of one of the beneficiaries and the testator, so it is presumed that the testator would have amended his will if he intended a contrary result to the operation of the anti-lapse statute); *Kubiczky v. Wesbanco Bank Wheeling*, 541 S.E.2d 334, 339–40 (W. Va. 2000) (holding that the burden is on the party claiming the anti-lapse statute is inapplicable, since the intention for a different disposition needs to be clearly expressed by the testator, and since this will did not require survivorship or include an alternate distribution, the anti-lapse statute takes effect).

¹⁵⁷ *See Can I Add More Than One Legacy Contact?*, FACEBOOK, <https://www.facebook.com/help/community/question/?id=10153808361347204> (last visited Mar. 4, 2018) ("You can only add one legacy contact to your account."); *see also* Callison-Burch, Probst & Govea, *supra* note 90.

¹⁵⁸ *See* STERK & LESLIE, *supra* note 45, at 138–44 for a discussion on simultaneous death.

¹⁵⁹ Callison-Burch, Probst & Govea, *supra* note 90.

¹⁶⁰ *Id.*

¹⁶¹ *See* Rebecca J. Rosen, *Google Death: A Tool to Take Care of Your Gmail When You're Gone*, ATLANTIC (Apr. 12, 2013), <http://www.theatlantic.com/technology/archive/2013/04/google-death-a-tool-to-take-care-of-your-gmail-when-youre-gone/274934/>; *see also* Geoffrey A. Fowler, *Google Lets Users Plan 'Digital Afterlife' by Naming Heirs*, WALL ST. J. (Apr. 11, 2013, 12:22 PM), <http://blogs.wsj.com/digits/2013/04/11/google-lets-users-plan-digital-afterlife-by-naming-heirs>; Andreas Tuerk, *Plan Your Digital Afterlife with Inactive Account Manager*, GOOGLE: PUB. POL'Y BLOG (Apr. 11, 2013), <https://publicpolicy.googleblog.com/2013/04/plan-your-digital-afterlife-with.html> ("We hope that this new feature will enable you to plan your

family member as a legacy contact, and spouses or close family members may die simultaneously, which would leave no legacy contact for that user if they did not specify one in their will. Thus, social media websites' online policies are not doing enough to allow a user's account to be handled in a way that effectuates their users' intent.

B. *Current Proposals to Facilitate Handling of Digital Assets*

Although estate planning is administered on the state level,¹⁶² federal laws have an impact on the laws surrounding distribution of digital assets.¹⁶³ The Federal Stored Communications Act (SCA)¹⁶⁴ and Computer Fraud and Abuse Act (CFAA)¹⁶⁵ were passed in 1986, but were aimed at internet service providers, rather than social networking websites that did not exist at that time.¹⁶⁶ There is no federal law that specifically addresses what online services can do with a deceased user's social media account.¹⁶⁷ Meanwhile, many states have not yet or just recently addressed the subject with legislation.¹⁶⁸

1. The UFADAA to the RUFADAA

While a few states had already begun to address some aspects of digital asset protection,¹⁶⁹ there was a clear need for some uniformity of laws regarding digital assets. The ULC¹⁷⁰ attempted to address this issue and completed the Uniform Fiduciary Access to Digital Assets Act

digital afterlife—in a way that protects your privacy and security—and make life easier for your loved ones after you're gone.”)

¹⁶² See Michael H. Tow, Note, *Estate of Love and § 2053(a)(2): Why State Law Should Control the Determination of Deductible Administration Expenses*, 12 VA. TAX REV. 283, 286 (1992) (noting that “the estate is administered under state law”).

¹⁶³ Dobra, *supra* note 4, at 24 (“Even with the decedent’s authorization, accessing a decedent’s digital assets through the use of their existing passwords could potentially violate federal law.”); see, e.g., *In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1206 (N.D. Cal. 2012) (“The case law confirms that civil subpoenas may not compel production of records from providers like Facebook. To rule otherwise would run afoul of the ‘specific privacy interests that the [SCA] seeks to protect.’”).

¹⁶⁴ Stored Communication Act, 18 U.S.C. §§ 2701–12 (2012).

¹⁶⁵ Computer Fraud & Abuse Act, 18 U.S.C. § 1030 (2012).

¹⁶⁶ Bonazzo, *supra* note 3 (“[T]hese laws were passed in 1986 and were aimed solely at Internet service providers, not the myriad of social networks that did not exist when Mark Zuckerberg was two years old.”).

¹⁶⁷ Mazzone, *supra* note 134, at 1673 (noting the limited relevant legislation regarding what online services can do with a deceased user’s account and no federal law that specifically addresses the issue).

¹⁶⁸ Bonazzo, *supra* note 3 (stating that only nine states allow representative access to social media accounts and of those nine states, only one outlines a fiduciary’s specific rights).

¹⁶⁹ See *State-by-State Digital Estate Planning Laws*, *supra* note 80.

¹⁷⁰ See *supra* text accompanying note 62.

(UFADAA) in 2014.¹⁷¹ The UFADAA was designed to ensure that fiduciaries have the access needed to carry out duties in accordance with the account holder's estate plan, and if there is none, in the deceased account holder's best interest.¹⁷² The UFADAA's provisions extended a fiduciary's existing authority to include digital assets with a dependable process throughout the United States.¹⁷³ These provisions granted an estate representative access to all of a decedent's electronic communications and other digital assets unless the decedent opted out while alive.¹⁷⁴

The UFADAA was met with opposition from internet and telecommunications companies that felt the Act raised privacy questions, conflicted with federal law, and undermined contract rights.¹⁷⁵ As a result, the enactment of the UFADAA was stalled in many states that introduced the legislation.¹⁷⁶ In 2015, the ULC approved the Revised Fiduciary Access to Digital Assets Act (RUFADAA), which has been enacted in the U.S. Virgin Islands and thirty-seven states,¹⁷⁷ including New York,¹⁷⁸ and was introduced in eight other states and the District of Columbia in 2018.¹⁷⁹ The RUFADAA, which revised several

¹⁷¹ *Fiduciary Access to Digital Assets Act, Revised (2015)*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited Dec. 5, 2016).

¹⁷² See Victoria Blachly, *Uniform Fiduciary Access to Digital Assets Act: What UFADAA Know*, 29 PROB. & PROP. 8, 9, 20 (2015).

¹⁷³ *Id.*

¹⁷⁴ See *Comparison of the Uniform Fiduciary Access to Digital Assets Act (Original UFADAA), the Privacy Expectations Afterlife and Choices Act (PEAC Act), and the Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA)*, UNIFORM L. COMMISSION, at 1 [hereinafter *Comparison of the UFADAA, PEAC, and RUFADAA*], <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Comparison%20of%20UFADAA%20PEAC%20and%20Revised%20UFADAA.pdf> (last visited Apr. 13, 2018) (listing the UFADAA's provisions on pertinent issues).

¹⁷⁵ See *States Struggle to Adopt Uniform Access to Digital Assets Act*, ARMA WASH. POL'Y BRIEF (Apr. 8, 2015), <http://www.arma.org/r1/news/washington-policy-brief/2015/04/08/states-struggle-to-adopt-uniform-access-to-digital-assets-act> ("Industry opposition was noteworthy during a March 6 hearing in the Connecticut Legislature on a bill (SB 979) to adopt the UFADAA. 'While we support the idea of clearly defining the rules governing access to a decedent's digital assets, we have serious concerns with this bill's complete disregard for the privacy of other persons who communicated with the decedent, as well as the privacy of the decedent, and its potential conflicts with federal law and the laws of other states that grant greater privacy protection to online accounts[.]'").

¹⁷⁶ *Id.*

¹⁷⁷ See *Legislative Fact Sheet—Fiduciary Access to Digital Assets Act, Revised (2015)*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited April 13, 2018).

¹⁷⁸ 2016 N.Y. Sess. Laws 820 (McKinney).

¹⁷⁹ See *Fiduciary Access to Digital Assets Act, Revised (2015)*, *supra* note 171 (showing an Enactment Status Map and Legislative Tracking for all 2017 Introductions and Enactments of the RUFADAA); see also *Comparison of the UFADAA, PEAC, and RUFADAA*, *supra* note 174, at 3–5 (listing issues that are addressed in the RUFADAA that were not addressed in the UFADAA).

provisions of the UFADAA, provides a more comprehensive approach to issues that arise regarding digital assets ownership.¹⁸⁰

The RUFADAA's provisions do not permit an estate representative access to the content of a decedent's electronic communications¹⁸¹ unless the decedent consented to disclosure.¹⁸² If the decedent did consent to disclosure, the custodian¹⁸³ can then request a court order specifically identifying the account and finding consent before providing the content to the estate representative.¹⁸⁴ The RUFADAA's provisions do permit an estate representative access to other digital assets of a decedent unless the decedent opted out or the court directs otherwise.¹⁸⁵ These provisions resolve some of the issues that Facebook, Instagram, Twitter, and LinkedIn face by ensuring that an estate representative has access to all digital assets except electronic communications.¹⁸⁶ However, for electronic communications, the user still needs to provide consent in an estate-planning document, unless an "online tool"¹⁸⁷ provides a mode for them to do so.¹⁸⁸ It is unclear whether Facebook's legacy contact is an "online tool" as defined by the RUFADAA, although it likely does fall into that category.¹⁸⁹ Facebook's legacy contact feature does not have an option allowing the user to consent to providing electronic communications. In addition, if a user chooses to have their account deleted when they die rather than naming a legacy contact, it is unclear whether or not that will be considered opting out of permitting access to their estate representative. If it is considered opting out, the question remains as to whether the user

¹⁸⁰ See Stephanie Reid, *Estate Planning in the Digital Age*, DIGITAL BEYOND (June 16, 2016), <http://www.thedigitalbeyond.com/2016/06/estate-planning-in-the-digital-age>.

¹⁸¹ REVISED UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 2(12) (UNIF. LAW COMM'N 2015) [hereinafter RUFADAA] ("Electronic communication" has the meaning set forth in 18 U.S.C. Section 2510(12) [as amended]."); see also 18 U.S.C. § 2510(12) (2012) ("[E]lectronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce.").

¹⁸² See RUFADAA, *supra* note 181, § 7; *Comparison of the UFADAA, PEAC, and RUFADAA*, *supra* note 174, at 1.

¹⁸³ See *id.* § 2(8) ("Custodian means a person that carries, maintains, processes, receives, or stores a digital asset of a user.").

¹⁸⁴ See *id.* § 7; *Comparison of the UFADAA, PEAC, and RUFADAA*, *supra* note 174, at 1.

¹⁸⁵ See sources cited *supra* note 184.

¹⁸⁶ See sources cited *supra* note 184.

¹⁸⁷ See RUFADAA, *supra* note 181, § 2(16) ("Online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.").

¹⁸⁸ See *id.* § 7; *Comparison of the UFADAA, PEAC, and RUFADAA*, *supra* note 174, at 1.

¹⁸⁹ See Morgan Wiener, *Colorado's New Digital Assets Act*, HOLLAND & HART: FIDUCIARY L. BLOG (July 5, 2016), <http://www.fiduciarylblog.com/2016/07/colorados-new-digital-assets-act.html> ("One of the main ways in which RUFADAA incorporates the Person's intent into the rules governing the fiduciary's access is through the concept of 'online tools.' . . . Examples of online tools include Google's inactive account manager and Facebook's legacy contact.").

opted out of permitting access to Facebook or if that decision will be seen as indicative of the user's intent for all their digital assets.

The prefatory note of the RUFADAA defines digital assets as "electronic records in which individuals have a right or interest."¹⁹⁰ When a user directs for disclosure of digital assets, section 4 of the RUFADAA states that a direction using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.¹⁹¹ Meanwhile, if a user did not use an online tool, the user can provide direction regarding disclosure in a will or other listed document.¹⁹² Under section 5(c), a fiduciary's access to digital assets can be modified or eliminated by the user, federal law, or the terms-of-service agreement if the user did not provide direction under section 4.¹⁹³

By applying these sections of the RUFADAA to Facebook's policy, one overarching concern is that a few clicks of the mouse can override contrary intent in a document with testamentary formalities. If the deceased user's will stated the user wanted their mother to handle their digital assets, but the online tool indicated the user's spouse as a legacy contact, the RUFADAA does not take into consideration the timing of each decision nor what the user's intent was, because any direction from the online tool will supersede the conflicting directives from a valid will.¹⁹⁴ This means that someone whom the user initially selected without any testamentary formalities could gain access, rather than someone who was later selected with testamentary formalities and with the purpose of replacing the person initially selected with the online tool. This is counter to traditional trusts and estates law because, generally, a testator's intention is dictated by the will, and extrinsic evidence is only looked to where there is an ambiguity.¹⁹⁵

Moreover, the RUFADAA's approach to the online tool does not factor in the time gap between when a user selects a person to serve as a legacy contact and that user's death.¹⁹⁶ The RUFADAA creates a blanket

¹⁹⁰ See RUFADAA, *supra* note 181, at prefatory note.

¹⁹¹ See *id.* § 4(a); Steven Orloff & Matthew J. Frerichs, *Digital Assets After Death: RUFADAA and Its Implications*, BENCH & B. MINN. (Dec. 6, 2016), <http://mnbenchbar.com/2016/12/digital-assets-after-death> ("If a user has provided direction through the online tool, it will supersede conflicting directives, including those in a will.").

¹⁹² See RUFADAA, *supra* note 181, § 4(b).

¹⁹³ See *id.* § 5(c).

¹⁹⁴ See sources cited *supra* note 191.

¹⁹⁵ See STERK & LESLIE, *supra* note 45, at 316 ("Courts often say that extrinsic evidence is admissible to shed light on testator's intent only when the will itself is ambiguous."); see, e.g., *Mahoney v. Grainger*, 186 N.E. 86, 87 (Mass. 1933) ("A will duly executed and allowed by the court must under the statute of wills be accepted as the final expression of the intent of the person executing it." (citations omitted)); *Estate of Carroll*, 764 S.W.2d 736, 740 (Mo. Ct. App. 1989) ("A testator's intention must be determined by the will itself, and not by attempting to guess at what the testator may have meant.").

¹⁹⁶ See sources cited *supra* note 191.

rule that may be frustrating the actual intent of the decedent, instead of taking the timing of contradictory designations into consideration.¹⁹⁷ The timing of the selection can be very relevant, and such timing is often taken into account in other areas of traditional trusts and estates law, such as with the UPC's pretermitted child¹⁹⁸ statute.¹⁹⁹ In certain circumstances, section 2-302 of the UPC specifically provides for children that are born or adopted after the execution of the will.²⁰⁰ This approach to omitted children touches on the timing of two actions that can potentially conflict, if the assumption is that parents generally do not want to disinherit their children.²⁰¹ Another example where the UPC takes timing into consideration is revocation on divorce.²⁰² Section 2-508 was the UPC's first version of this provision, and it revoked dispositions of property made to a former spouse if the couple divorces or their marriage is annulled after the testator's will is executed.²⁰³ In an effort to recognize dispositions not covered by section 2-508, the UPC changed the provision and drafted section 2-804, which applies to nonprobate assets, as well as dispositions made to relatives of the ex-spouse.²⁰⁴ Just as with the underlying assumption for the revocation on divorce statutes for standard dispositions,²⁰⁵ the assumption is that most decedents would not want their former spouse to have access to their digital assets.

A related issue is that online tools are separate from wills. Therefore, individuals who are altering their estate plan must also remember to go back and modify any online tools they have elected to use, rather than redrafting one document, such as a will, which the testator may assume will encompass everything. Moreover, since the Facebook legacy feature is considered a first version of this feature, Facebook will likely modify the tool,²⁰⁶ while the RUFADAA, where

¹⁹⁷ See sources cited *supra* note 191.

¹⁹⁸ *Pretermitted Heir*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A child or spouse who has been omitted from a will, as when a testator makes a will naming his or her two children and then, sometime later, has two more children who are not mentioned in the will.—Also termed (more specif.) *pretermitted child*; *pretermitted spouse*.").

¹⁹⁹ Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83, 84 (2004) ("A court will not attempt to ascertain a decedent's actual testamentary intent, but under certain circumstances statutes will modify or revoke a will when family circumstances have changed in the time since the testator executed the will.").

²⁰⁰ UNIF. PROBATE CODE § 2-302 (amended 2010).

²⁰¹ Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 84 (1994) ("The natural objects of a decedent's bounty are traditionally thought to be his spouse and children.").

²⁰² UNIF. PROBATE CODE § 2-804 (amended 2010).

²⁰³ See Gary, *supra* note 199, at 85. UPC section 2-508 exemplifies many state statutes. *Id.*

²⁰⁴ See *id.* at 101–02; see also UNIF. PROBATE CODE § 2-804 (amended 2010). Many states have adopted similar or identical state statutes to section 2-804. Gary, *supra* note 199, at 102.

²⁰⁵ See Gary, *supra* note 199, at 101–02.

²⁰⁶ See *supra* text accompanying note 92.

enacted, currently gives preference to its designations.²⁰⁷ Instagram, Twitter, and LinkedIn do not have an online tool to which the RUFADAA applies.²⁰⁸

When disclosing digital assets under the RUFADAA terms, section 6 gives the custodian of digital assets sole discretion to determine whether to grant a fiduciary or designated recipient full access, partial access, or a copy in a record of digital assets that the user could have accessed if the user were alive.²⁰⁹ Section 8 states that a custodian shall disclose a catalogue of electronic information other than the content of electronic communications²¹⁰ if the representative gives the custodian certain required documentation.²¹¹ The comment on section 8 further clarifies that this section is designed to give personal representatives default access to the catalogue of electronic communications and other digital assets not protected by federal privacy law.²¹²

Given the discretionary powers allotted to custodians of information, such as social media platforms, many people may still need to go to court in order to obtain access to, and information on, their loved one's account. Similarly, allowing a terms-of-service agreement to modify or eliminate a fiduciary's access to digital assets where the user did not provide direction is extremely unpredictable. As a result, the RUFADAA may lead to more litigation, rather than achieve its goal of aiding personal representatives in obtaining access to their loved one's digital accounts.²¹³

2. The PEAC

NetChoice,²¹⁴ an opponent of the UFADAA, drafted the Privacy Expectation Afterlife Choices Act (PEAC), which was adopted only by Virginia in 2015, with some modifications.²¹⁵ However, Virginia later

²⁰⁷ See *supra* text accompanying notes 190–92.

²⁰⁸ See *supra* text accompanying notes 119–33.

²⁰⁹ See RUFADAA, *supra* note 181, § 6.

²¹⁰ See *id.* § 2(4) (“Catalogue of electronic communications’ means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.”).

²¹¹ See *id.* § 8.

²¹² See *id.* § 8 cmts.

²¹³ See *id.* at prefatory note (“The general goal of the act is to facilitate fiduciary access and custodian disclosure while respecting the privacy and intent of the account holder.”).

²¹⁴ See *About Us*, NETCHOICE, <https://netchoice.org/about> (last visited Jan. 5, 2017) (“NetChoice is a trade association of eCommerce businesses and online consumers all of whom share the goal of promoting convenience, choice, and commerce on the net.”). Members of NetChoice include Facebook and Google. *Id.*

²¹⁵ Anne W. Coventry, *Update on Fiduciary Access to Digital Assets*, PASTERNAK & FIDIS: REP. (Feb. 12, 2016), <http://www.pasternakfidis.com/update-on-fiduciary-access-to-digital-assets-2>.

adopted the RUFADAA in 2017.²¹⁶ The PEAC is a less comprehensive approach to digital assets than the RUFADAA.²¹⁷ If the decedent affirmatively opts in, the PEAC allows a court to order a provider to disclose a record or other information²¹⁸ about a deceased user to the executor or administrator of the deceased user's estate.²¹⁹ A provider is required to disclose contents of a deceased user's account only if the executor or administrator provides certain required documentation.²²⁰

As a result, accessing a deceased person's social media platform under the PEAC is very difficult. The PEAC's requirement for a court order in every case where a fiduciary seeks access to digital assets of a deceased user would cause undue burden on fiduciaries and probate courts.²²¹ The PEAC also allows the custodian to quash the court order or refuse disclosure after a court order is obtained, and it does not limit the amount of time that a provider can take, even to the extent that it may require re-opening estates that were previously closed.²²² Because only a modified version of this statute was adopted in one state for a short period of time, its provisions and potential burdens on courts and estates have not been tested.

III. PROPOSAL: A MORE COMPREHENSIVE APPROACH

Many Americans die without a will.²²³ This means that most people have not spent the time to determine who will receive their money, jewelry, personal property, or other tangible valuables, without even

²¹⁶ VA. CODE ANN. §§ 64.2-116 to -132 (2018).

²¹⁷ Coventry, *supra* note 215 ("When less than half the population bothers to make a will at all, and only a very few of those would think to include in their wills an express authorization for managing digital assets . . . the PEAC Act would help in only a very, very small number of cases."); *see also Comparison of the UFADAA, PEAC, and RUFADAA*, *supra* note 174.

²¹⁸ Information as laid out in 18 U.S.C. § 2702, but not the contents of communications or stored content. *Privacy Expectation Afterlife and Choices Act (PEAC)*, NETCHOICE, § 1(A) [hereinafter *PEAC*], <https://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac> (last visited Oct. 21, 2016); *see also* 18 U.S.C. § 2702 (2012).

²¹⁹ *See PEAC*, *supra* note 218, § 1(A); *see also* Coventry, *supra* note 215 (discussing the reasons the ULC and state bar associations opposed the PEAC, specifically noting that requiring an affirmative opt-in will mean that the PEAC will only help a very small number of cases).

²²⁰ *See PEAC*, *supra* note 218, § 1(B) (listing the required documentation, which includes a written request for the contents of the deceased user's account, a copy of the death certificate of the user, and an order of the court of probate that has jurisdiction of the estate of the deceased user and contains seven other specifically listed facts).

²²¹ *See* Karin Prangle, *War and PEAC in Digital Assets: The Providers' PEAC Act Wages War with UFADAA*, 29 PROB. & PROP. 40, 42-43 (2015).

²²² *See id.* at 44.

²²³ *See* Richard Eisenberg, *Americans' Ostrich Approach to Estate Planning*, FORBES (Apr. 9, 2014, 11:04 AM), <http://www.forbes.com/sites/nextavenue/2014/04/09/americans-ostrich-approach-to-estate-planning/#72a2a03bf07b> (stating that a 2014 survey showed that sixty-four percent of Americans do not have wills, up from fifty-seven percent in 2011).

brushing the surface of digital assets, or social media accounts, specifically. For those who die intestate, the state laws determine who inherits their assets.²²⁴ But the importance of distributing digital assets has not gone unnoticed. In fact, in 2012 the U.S. government had a blog post recommending that people consider creating a social media will in order to spell out how individuals want their online identity to be handled.²²⁵ The U.S. government even had to deal with its own form of this issue of passing digital assets in determining how to handle the digital assets of the Obama Administration for the next administration.²²⁶ One complication of this issue is that the laws concerning property ownership of certain aspects of social media are unsettled, though many suggestions have been made over what approach is best suited to determine ownership of social media accounts.²²⁷ These ownership determinations could impact what is part of a decedent's estate when a social media account holder dies.

However, even without those determinations, the RUFADAA, and the states that adopted it, should amend their provisions in the following ways. First, the RUFADAA should require an electronic signature and reentering of the user's password when using online tools to select a distribution of digital assets. Although this may not reach the stringent level of other testamentary formalities, it is in line with the trend to lower formalities, and it provides some assurance that the functions are served.²²⁸ It will also demonstrate the significance of selecting someone as a legacy contact and may help users, who later draft a will or other estate planning documents, remember the designation they previously made using an online tool. Second, instead

²²⁴ See *id.*

²²⁵ See Rebecca J. Rosen, *The Government Would Like You to Write a 'Social Media Will'*, ATLANTIC (May 3, 2012), <http://www.theatlantic.com/technology/archive/2012/05/the-government-would-like-you-to-write-a-social-media-will/256700>. However, there have already been significant changes to some of the options available, such as the creation of a Facebook legacy contact, discussed in Section II.A.1 of this Note.

²²⁶ See Kori Schulman, *The Digital Transition: How the Presidential Transition Works in the Social Media Age*, WHITEHOUSE BLOG (Oct. 31, 2016, 4:00 PM), <https://www.whitehouse.gov/blog/2016/10/31/digital-transition-how-presidential-transition-works-social-media-age> ("Summary: Take a look at how we plan to preserve and pass on the digital history of the Obama administration."). As an example, when accessing this very article after President Trump took office, a notification appears at the top of the page stating, "This is historical material 'frozen in time.' The website is no longer updated and links to external websites and some internal pages may not work." *Id.*

²²⁷ See generally Zoe Argento, *Whose Social Network Account? A Trade Secret Approach to Allocating Rights*, 19 MICH. TELECOMM. & TECH. L. REV. 201 (2013); Nathan Hale, *11th Circ. Ponders Who Owns Facebook 'Likes' in BET Case*, LAW360 (Oct. 6, 2015, 6:40 PM), <http://www.law360.com/articles/710682/11th-circ-ponders-who-owns-facebook-likes-in-bet-case>; Thaddeus Hoffmeister, "Liking" the Social Media Revolution, 17 SMU SCI. & TECH. L. REV. 507 (2014); Susan Park & Patricia Sánchez Abril, *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*, 53 AM. BUS. L.J. 537 (2016).

²²⁸ See *supra* text accompanying notes 48–52.

of having the online tool take precedence over a will or other estate document, the RUFADAA should implement similar provisions to the UPC section 2-507(a)(1), which allows partial revocation of a will if a subsequent will revokes that part either expressly or by inconsistency.²²⁹ This will ensure that the preference later indicated, which is likely to accurately reflect what the deceased user wanted, will have precedence, unless there is an indication of contrary intent. Third, the RUFADAA should be amended to factor in time-gap issues, with a specific provision that revokes a designation to an ex-spouse if the designation was made before the couple divorced.

Social media platforms should also implement practical digital asset planning measures that help users clarify their intent without using other estate planning documents. Like Google's Inactive Account Manager, social media platforms should allow users to list multiple people to receive their data.²³⁰ Since having multiple people receive access to a social media account may be more complicated than giving multiple people access to the content of a Google account,²³¹ social media platforms could also allow users to select multiple people in the alternate. Lastly, social media platforms' online tools should offer an opt-in feature that allows a user to easily indicate whether or not they want their electronic communications shared, and whether or not they want their other digital assets shared. Users should also be able to indicate whether they want access to be limited to the people listed using the tool, or if they permit such disclosure according to the default scheme, where the default scheme matches the intestate succession of their state's law. These options should be listed as boxes that users could click to opt in, and require reentering the user's password as well as the user's electronic signature to save the selections made. As is often done with new policies and updates, social media platforms that create such features can send a notification to their users notifying them that these selections are now available.²³²

These amendments to statutes and social media policies would allow users to easily select and modify their preferences, as necessary, while incorporating a simple addition that functions as a formality to users' selections. Moreover, users will not have to be concerned with certain contingencies, such as their primary selection predeceasing

²²⁹ UNIF. PROBATE CODE § 2-507(a)(1) (amended 2010).

²³⁰ See Rosen, *supra* note 161 ("Google will notify your 'trusted contacts'—you can list up to 10—and share your data with them if you have so chosen.").

²³¹ For example, Facebook's legacy contact feature allows the legacy contact to do certain actions, such as post on the user's profile and update the user's profile picture. See *supra* text accompanying note 101.

²³² See *About: Notifications*, FACEBOOK, https://www.facebook.com/help/1036755649750898?helpref=hc_global_nav (last visited Feb. 13, 2017) ("Notifications are updates about activity on Facebook.").

them, because the user would be able to indicate whether or not they have an alternate selection, or would then prefer that their account be deleted altogether. The default scheme of selections, if the user chooses to opt in, and the consequences resulting from the timing of the user's selections will both operate more closely to the trend of existing trust and estates laws, rather than on their own separate wavelength.

A. Concerns

Although privacy issues are a major concern regarding access to digital assets, this proposal does not further implicate those privacy issues.²³³ The UFADAA struggled to be adopted and was opposed by many, including NetGear, because of concerns that the statute would violate individuals' privacy rights and federal laws regarding electronic communications.²³⁴ These issues were raised notwithstanding that the federal laws regarding internet privacy were not put in place with social media websites in mind.²³⁵ However, default laws are often put in place to achieve what most people would want.²³⁶ One digital legacy expert claims that four out of five people believe that privacy matters to them more than others being able to access their accounts after their death.²³⁷ Yet there is no privacy afforded with tangible communications such as letters, diaries, or physical documentation of similar sensitive nature.²³⁸

²³³ See Elizabeth Holland Capel, *Conflict and Solution in Delaware's Fiduciary Access to Digital Assets and Digital Accounts Act*, 30 BERKELEY TECH. L.J. 1211, 1232–33 (2015); Leslie A. Gordon, *Delaware Leads the Way in Adopting Legislation Allowing Estate Executors Access to Online Accounts*, A.B.A. J. (July 2015), http://www.abajournal.com/magazine/article/delaware_leads_the_way_in_adopting_legislation_allowing_estate_executors (“Privacy advocates . . . argue that broad laws like Delaware’s prioritize convenience for executors at the expense of privacy of the deceased and third parties. ‘My instinct is there’s no good way to manage that,’ says Deven Desai, a law and ethics professor at the Georgia Institute of Technology. Despite the privacy concerns, Delaware’s approach to digital assets ‘makes some sense,’ says Desai, who notes that traditional letters could similarly contain confidential information.”).

²³⁴ See *States Struggle to Adopt Uniform Access to Digital Assets Act*, *supra* note 175 (explaining that the UFADAA aims to remove the barriers of the Computer Fraud and Abuse Act and the Stored Communications Act section for the Electronic Communications Privacy Act by declaring fiduciaries as authorized under these statutes that generally prevent providers from disclosing certain electronic communications without the sender or recipient’s consent).

²³⁵ See *supra* text accompanying notes 169–72.

²³⁶ See Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1423 (2014) (“Under the most influential default-rule theory . . . default rules are aimed at decreasing transaction costs. In order for default rules to achieve this goal, they should generally track most people’s preferences and desires.”).

²³⁷ See Evan Carrol & Lee Poskanzer, *Privacy Afterlife Preferences: The People Have Spoken*, DIGITAL BEYOND (Aug. 15, 2016), <http://www.thedigitalbeyond.com/2016/08/privacy-afterlife-preferences-the-people-have-spoken> (“When it comes to our online accounts, we’ve come to expect a certain amount of privacy. It’s an expectation that people won’t be able to have access to our files, communications and other activities that we conduct.”).

²³⁸ See Gerry W. Beyer & Kerri M. Griffin, *Estate Planning for Digital Assets*, EST. PLAN. STUD. 1, 3 (July 1, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1879950

Similarly, users of the internet must beware that anything sent or posted on the internet is never truly private.²³⁹ Nevertheless, this proposal, like the RUFADAA, requires an opt-in for users to allow access to electronic communications, and merely simplifies the process for users to declare their preferences.²⁴⁰ Unlike other assets, which either go to a designated beneficiary, intestate heir, or escheat to the state, the social media assets will have the option to be permanently deleted, which accounts for the heightened privacy concerns for digital assets.²⁴¹ In addition, requiring the user's electronic signature and re-entering the user's password should further assuage privacy concerns.

Another potential criticism is the introduction of some level of formalities when the current trend has been moving farther from strict formalism.²⁴² Despite the recent trend away from strict formalism for will execution, the formalities proposed for social media assets are much less burdensome than the will execution requirements of most states.²⁴³ This will ensure that the basic functions²⁴⁴ of the formalities are served without imposing a large burden on users who are interested in allowing their beneficiaries to have access to their social media accounts after they die.

Another point of criticism is that, while proposed amendments to the RUFADAA are reasonable given the goal of the RUFADAA,²⁴⁵ it is unreasonable to expect social media platforms to take it upon themselves to assist with their users' digital estate planning. However, there are two reasons that providing a more thorough online form would be beneficial for social media platforms. First, companies have a general interest in keeping their customers or users satisfied, and Facebook even made a statement when it announced the legacy contact feature regarding its desire to do more for those who are grieving as well

("Historically, people kept special pictures, letters, and journals in shoeboxes or albums for future heirs. Today this material is stored on computers or online and is often never printed.")

²³⁹ Matthew Guay, *Screenshot Tools, Tips, and Shortcuts: How to Capture Anything on Your Screen: The Best Screenshot Apps and Shortcuts*, ZAPIER (Sept. 4, 2017), <https://zapier.com/blog/best-screen-capture-tool> ("Screenshots are the perfect way to save a picture of anything on your screen Thanks to these screenshot tools, it's simple to share the exact contents of your screen with anyone across the globe."); see also Tom Risen, *The Illusion of Online Privacy*, U.S. NEWS (Aug. 25, 2015, 12:01 AM), <http://www.usnews.com/news/articles/2015/08/25/the-illusion-of-online-privacy> ("In the post-Snowden era, there should no illusions of privacy of the Internet." (internal quotation marks omitted)).

²⁴⁰ See *supra* text accompanying notes 181–84.

²⁴¹ See Kristina Sherry, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185, 235 n.333 (2012) ("Although studies might suggest that the 'average testator' wants the bulk of his or her property to pass to a spouse . . . the same has not been established for the unique category of social-media assets.")

²⁴² See *supra* text accompanying notes 65–78.

²⁴³ See sources cited *supra* note 47.

²⁴⁴ See sources cited *supra* notes 44–54.

²⁴⁵ See sources cited note 213.

as users who have preferences regarding what happens to their accounts after they die.²⁴⁶ Second, giving users a simpler way to make these decisions may lessen the likelihood of being taken to court or subpoenaed for records from a deceased user's account.²⁴⁷ As a result, in addition to the users who will benefit from a more comprehensive approach, social media platforms will also benefit from assisting their users in creating a digital estate plan for their social media accounts.

CONCLUSION

These steps will allow users without estate plans to easily plan for their digital assets by selecting their preferences regarding privacy after their death. Given that there is no default intestate scheme for distribution of digital assets, users should be granted access to a simple method that allows them to choose what happens to their assets after they die. This process will ensure that users can confidently select their privacy preferences without leaving grieving loved ones to struggle to contact social media platforms or petition for court orders to obtain access to the deceased user's account. Moreover, this comprehensive approach is in line with traditional trust and estates law doctrines.

²⁴⁶ Callison-Burch, Probst & Govea, *supra* note 90 (“By talking to people who have experienced loss, we realized there is more we can do to support those who are grieving and those who want a say in what happens to their account after death.”).

²⁴⁷ See *supra* text accompanying notes 4–14; see also *In re Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal. 2012).