



Fiduciary Access to Electronic Communications and Digital Assets

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The Montana Legislature passed the Revised Uniform Fiduciary Access to Digital Assets Act in 2017. The Act allows Montanans to give consent to trusted individuals to access their electronic communications and other digital assets.

IN TODAY'S WORLD, METHODS OF COMMUNICATION HAVE changed dramatically. A generation ago, the post office delivered paper mail. Printed pictures were kept in photo albums. Important documents were stored in file cabinets. Deposits were made “in person” to checking and savings accounts at local banks or credit unions.

Those methods are gone for many of us, some by choice or circumstance and others because of technological changes. Today we store pictures, documents, and communications in digital libraries on computers, servers, and cell phones. We often access them via the internet with our smartphones or other electronic devices. And many people keep only electronic copies of communications and documents. As the transition from paper to digital data continues, estate planning for accessing electronic communications and documents has become essential.

This MontGuide explains **WHY** estate planning for digitally-stored information has become important. The MontGuide also clarifies what legal documents can be prepared to enable your fiduciary to access the content of your electronic communications.

A **fiduciary** includes the:

- **personal representative** of the estate,
- **trustee** of the trust, or
- **agent** named as a financial power of attorney.

Importance of estate planning for electronic communications and digital assets

ACCESS: TO ENABLE A FIDUCIARY TO ACCESS THE CONTENT OF ELECTRONIC COMMUNICATIONS OF A DECEASED OR INCAPACITATED PERSON.

Some Montanans have chosen to no longer receive paper statements or bills. Instead, they receive them electronically or by logging on to the online account with the bank, credit union, retailer, or utility provider. If there are no records of specific websites and associated usernames and passwords, finding, paying, and examining a deceased person's accounts to settle the estate could be extremely burdensome and time-consuming.

The personal representative of an estate or the trustee of a trust is a fiduciary who needs access to financial documents and accounts to settle an estate or administer a trust. Suppose a living person becomes incapacitated (for instance, because of a form of dementia or a debilitating brain injury from a stroke or accident). In that case, an agent under a financial power of attorney will need access to the content of digital financial assets to efficiently manage financial affairs on a person's behalf.

LOSS PREVENTION: TO PREVENT FINANCIAL LOSSES TO THE ESTATE.

The fiduciary will need to quickly discover electronic bills so the fiduciary can pay them when due to prevent late fees, cancellations, foreclosures, and repossessions. The personal representative or trustee may also want to cancel services of the deceased such as cell phones, landline telephones, and automatic payments for health insurance premiums, long-term care, or life insurance policies.

LEGACY: TO AVOID LOSING THE DECEASED'S PERSONAL STORY.

While certain electronic communications are not financially valuable, they may be a treasure to family members who attribute meaning to objects and “words” the deceased left behind. Historically, people kept special letters, journals, and pictures in shoeboxes, scrapbooks, or albums for future family members to view, read, and appreciate.

Today, many people store these materials online, on hard drives, and on other electronic devices. Family members with cell phones may never print the photographs they take, only sending pictures to friends and relatives. Facebook, Instagram, personal blogs, and Twitter feeds have replaced physical diaries for some people. For others, emails and texts have replaced handwritten letters.

Without alerting family members to the existence of electronically-stored information and explaining how to access the information, someone’s life story could disappear forever. If using social media accounts, make a conscious decision about what will happen to these accounts at death. There are options to make remembrance pages, or accounts can be deactivated or deleted.

Keep in mind that the long-term monitoring of accounts could be time-consuming. Would the responsibility become a burden for the selected family member or fiduciary to check accounts and pages regularly for content? If it is decided to remove an account after death, who will oversee the process?

WHAT TERMS ARE IMPORTANT FOR A FIDUCIARY TO KNOW FOR ACCESSING DIGITAL ASSETS?

User means a person who has an internet account. For example, a user is someone who has an account with an internet service provider.

Custodian means a company that carries, supports, processes, receives, or stores a user’s digital assets. Examples include Facebook, Google, LinkedIn, Twitter, and Pinterest.

Terms of service agreements control the relationship between a user and a custodian. The agreement could be a “click-wrap” agreement, a “click-through” license, or a similar term. This type of online agreement allows users to click a button or check a box that says “I agree” to the terms of service.

An **online tool** means an electronic service provided by a custodian allowing the user, in a document different from a terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person.

WHY DID THE LEGISLATURE PASS THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT?

Personal representatives who were settling estates found custodians denied their requests for access to documents and photographs stored “in the cloud,” as well as social media accounts and emails. In response, the Montana Legislature passed the **Revised Uniform Fiduciary Access to Digital Assets Act** in 2017 (referred to hereafter as ‘Act’).

The Act treats “electronic communications” differently from other digital assets. Electronic communications include the content of email messages, text messages, instant messages, and social media posts sent to a select group of people, as opposed to the general public, and other electronic communications between private parties. The provisions of the Act provides a fiduciary does not have access to the **content** of electronic communications *unless* the user consents in a will, a trust, a financial power of attorney or an online tool.

Therefore, the Act gives legal authority to plan for managing and distributing personal electronic communications, just as one can make plans for other property such as homes, land, savings accounts, stocks, bonds, and mutual funds.

WHAT ARE THE CHOICES FOR GRANTING PERMISSION TO A FIDUCIARY TO ACCESS THE CONTENT OF PERSONAL ELECTRONIC COMMUNICATION?

To give fiduciary access to the content of personal electronic communications, there are two options:

1. Using an **online tool** for each custodian where there is stored information; or
2. Using the proper language in a **will, trust, or financial power of attorney.**

WHAT IS THE ADVANTAGE OF USING A WILL, A TRUST, OR A FINANCIAL POWER OF ATTORNEY TO GRANT A FIDUCIARY ACCESS TO THE CONTENT OF PERSONAL ELECTRONIC COMMUNICATIONS?

Montanans may prefer to include consent provisions in their legal documents rather than using an online tool for each custodial website on which they have stored information for two reasons.

First, custodians may not have a provision in their online tools to name **successor fiduciaries**. What happens if the designated person dies or is otherwise unable to serve? In a will, a successor personal representative can be named if the designated person be unable to serve. Similarly, one can choose a successor trustee in a trust or a successor agent in a financial power of attorney.

Second, most Montanans use a variety of custodians without realizing it. For example, Facebook, Google, LinkedIn, Twitter, Pinterest, a bank, and investment funds are all custodians. A Montanan would need to read and understand each separate **online tool** for each custodian. Imagine reading and trying to understand the “legalese” in the online tool for 30 to 50 accounts. How many of us can say we have read each online agreement in detail?

By using a provision in a will, trust, and power of attorney, one can grant permission for a fiduciary to access the content of all personal accounts. Giving permission in estate planning documents saves time and money. It can assure that the same person will have access to all accounts if that is one’s preference.

HOW DOES A FIDUCIARY ACCESS A DIGITAL ASSET UNDER THE ACT?

To gain access to digital assets, the Act requires the fiduciary to send an access request to the custodian by email or on the custodian’s website. The fiduciary must provide a certified copy of the document granting fiduciary authority, such as a letter of appointment as the estate’s personal representative, a copy of the financial power of attorney, or a certificate of trust. A **certificate of trust** is a brief document upon which custodians may rely. The certificate provides information about the trust, the trustee, and the power and authority of the trustee to gain access to assets, which, if stated in the trust agreement, can include access to the content of personal electronic communications.

Remember, the appointment of a fiduciary does NOT automatically give the fiduciary legal access to the **content** of electronic communications unless the user expressly consents to such content in a will, trust, power of attorney or online tool. Without express consent, however, the fiduciary has only limited access to digital assets. Although the fiduciary cannot access the content of electronic communications, the fiduciary can access a **catalog** of the deceased or incapacitated user’s communications. The catalog lists each person or entity to whom the deceased had an electronic communication. Included are the time and date of the communication and the electronic address of the person or entity.

Access to a catalogue of a deceased’s or incapacitated person’s communications may prove helpful when the fiduciary is managing or settling an estate. For example, by reviewing the emails of a deceased person, a personal representative could see monthly communications from a bank. This would alert the personal representative to the possibility that the deceased kept one or more accounts at that bank. Of course, the

personal representative could more easily get the information needed to settle an estate if the user had expressly consented to access to electronic communications in the user’s will. Such permission would save the personal representative time and probably could save the estate money.

WHAT INFORMATION SHOULD BE PREPARED FOR A FIDUCIARY?

Would a personal representative, trustee, or agent know how to access the online accounts? If the answer is no, then now is the time to make a list identifying accounts, usernames, and passwords. Explain to the fiduciary where to find the list. Consider whether a password manager would be right for the situation.

There are many useful articles on the web about the best password managers. As an example, *PC Mag* publishes a Best Password Managers list annually. Evaluate the information to see if one would be suitable at a reasonable cost.

Another option is an APP in which people can download to put all their passwords in one place. Keep the list in a safe place and update it as sites are added (i.e., usernames and passwords). Always back up the data. Store data to a local computer or a storage device.

MSU Extension has a Digital Assets Inventory Worksheet fillable form available (montana.edu/estateplanning/digitalassetsworksheet.pdf). Use the form to list usernames and passwords for personal use as well as for family and fiduciaries.

Summary

After death or if you become incapacitated during life, who will have access to the **content** of your electronic communications? Who will have access to other personal digital assets? Ask an attorney to add proper wording for consent when updating a will or trust. Consider similar wording in a financial power of attorney so the agent will have access in case of incapacitation while you are alive.

If one has not reviewed estate planning documents since the passage of the **2017 Montana Revised Uniform Fiduciary Access to Digital Assets Act**, now is the time to update those documents.

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Acknowledgment

Representatives of the Business, Estates, Trusts, Tax and Real Property Section, State Bar of Montana, reviewed this MontGuide for legal accuracy. They recommend its reading by individuals interested in learning about the Montana Revised Uniform Fiduciary Access to Digital Assets Act.

Disclaimer

This MontGuide is based on current state laws about digital assets and the examples are for illustration purposes only. Readers should not interpret the information provided in this MontGuide as legal advice about electronic communication or digital assets, which may vary based upon personal specific circumstances.



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