

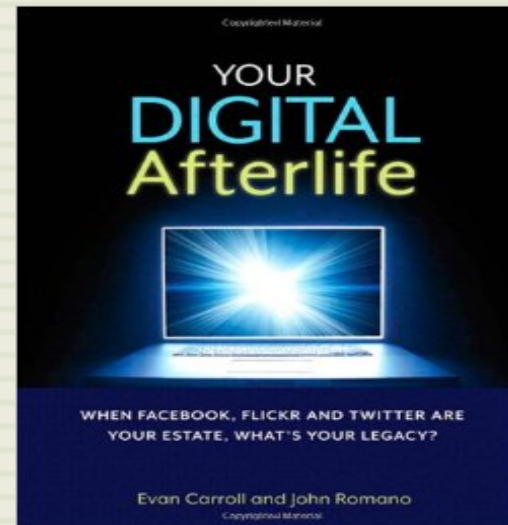
DIGITAL ASSETS: THE WAVE OF THE FUTURE IN ESTATE ADMINISTRATION

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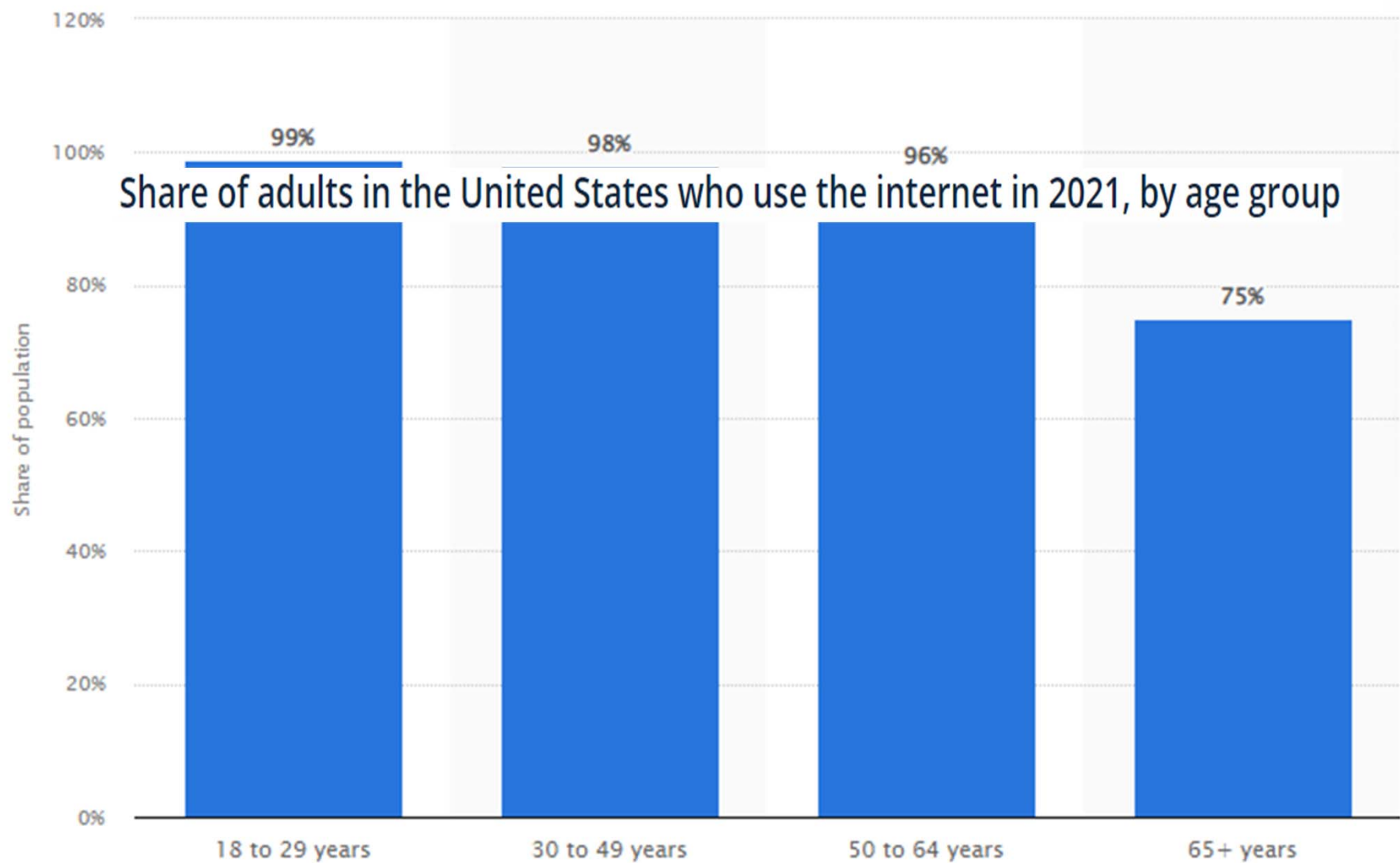
Your Digital Afterlife

“While you may have many collections, all the things you own combined create a greater personal collection where the theme is you. You are the arbiter of what belongs or does not belong. Increasingly, the things you gather for that collection are digital.”

– Evan Carroll, Author of “Your Digital Afterlife”

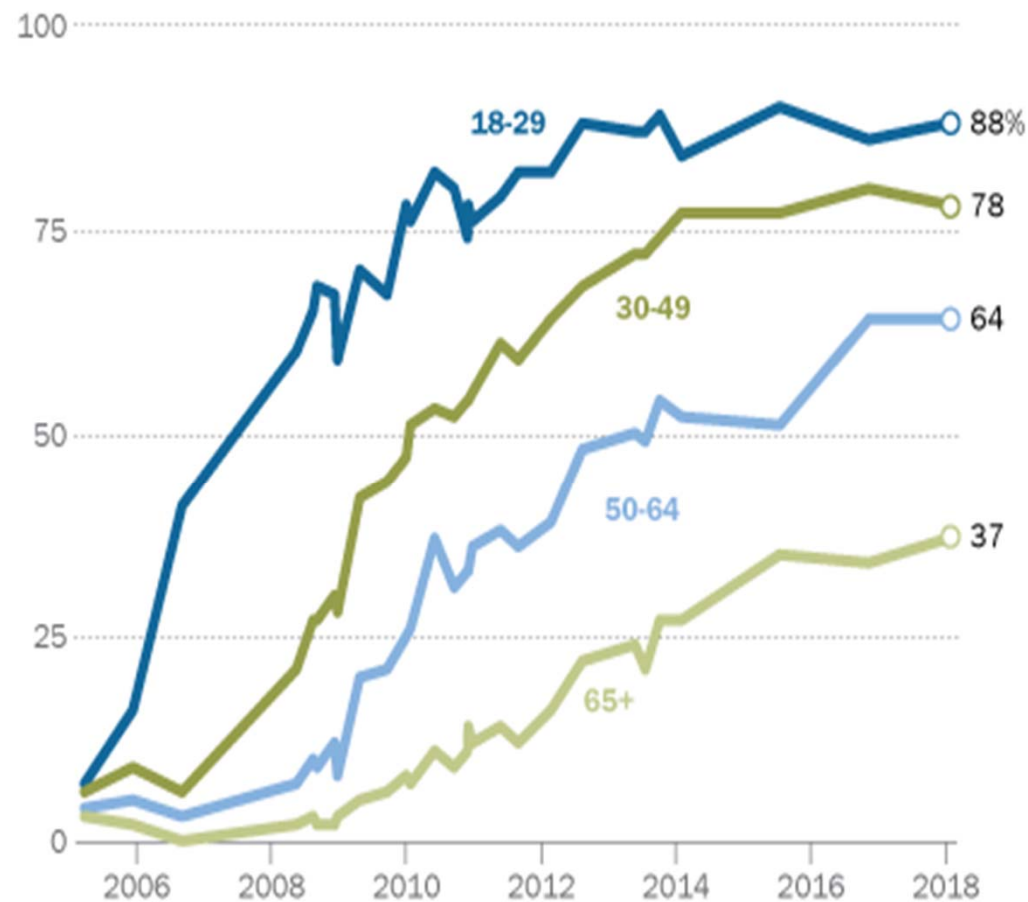


<http://www.yourdigitalafterlife.com/book/>



Source: Pew Research Center

% of U.S. adults who say they use social media sites, by age



Source: Survey conducted Jan. 3-10, 2018.

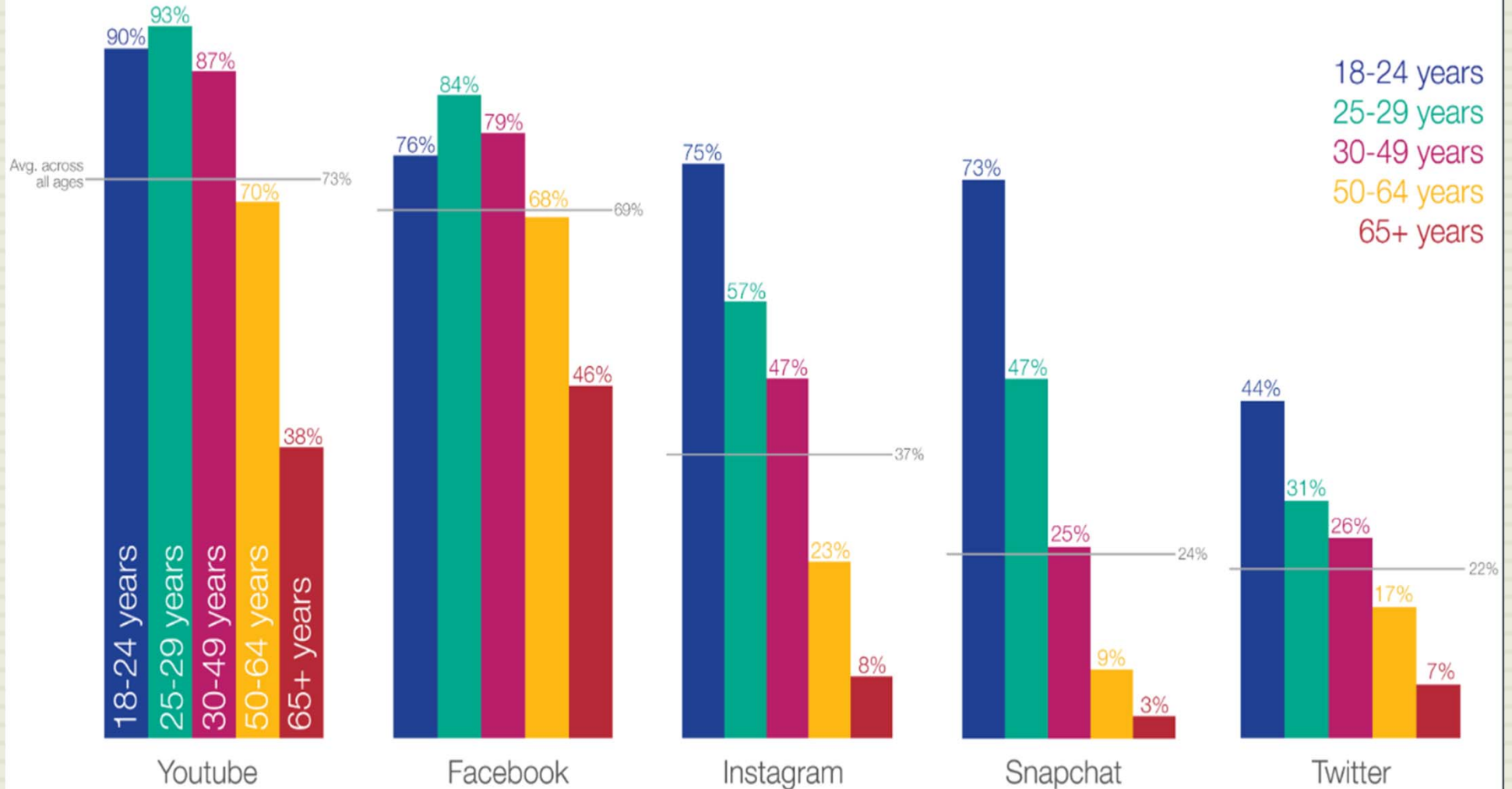
PEW RESEARCH CENTER

Source: Pew Research Center

Use of social media platforms by age group in the US

The share of adults in the United States who say they ever use the following online platforms or social media apps in 2019. This is shown by age group.

Our World
in Data



Data source: Pew Research Center (2019).

Source: Pew Research Center (2019)



Origin unknown – Thanks Vin Lee

What are Digital Assets?

- Digital assets come in a variety of forms, and are constantly changing, along with technology and social trends.
- An individual may have a property ownership interest in an asset, or merely a license.
- The term “digital assets” means, but is not limited to, files, including but not limited to, **emails, documents, images, audio, video, and similar digital files which currently exist or may exist as technology develops** or such comparable items as technology develops, stored on digital devices, including, but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smart phones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops, regardless of the ownership of the physical device upon which the digital asset is stored.

Excerpt from: The Elder Law Report, Vol. XXV, Number 1

Categories of Digital Assets

- Personal
 - Stored on computers, smart phones, or other devices, or are uploaded to a Web site or digital service
 - Photographs, videos, emails, and music playlist
- Social Media
 - May involve photos, videos and other electronic files stored on these accounts
- Financial
 - Online banking, online bill-paying activities
 - Online accounts with no connection to a brick-and-mortar establishment (Amazon, eBay, PayPal and BitCoin)
- Business
 - Varies by types of business and extent of its computer or Internet associated activities, which may include blogs, domain names, credit card and financial data

What Happens When a Person Becomes Incapacitated or Dies?



Could someone else,
acting on your behalf, gain access to
your digital assets?

What if the person was deceased?

Would you want them to be able to?

**Access to Digital Assets
would be challenging, if
not impossible, without a
Fiduciary Access to
Digital Assets law**



Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws

- In 2011, the Uniform Law Commission established the **Fiduciary Access to Digital Assets Committee** to draft
- July 2014 the ULC introduced 1st version of a **Uniform Fiduciary Access to Digital Assets Act (UFADAA)**
- Only Delaware adopted law based on 2014 version
- In July 2015, the ULC developed a revised UFADAA



Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws

The UFADAA:

- Gives Account Holder control over whether digital assets should be preserved, distributed or destroyed
- Authorizes access to digital assets that would not violate the Federal Stored Communications Act, 18 USC 2701 and Computer Fraud and Abuse Act, 18 USC 1030



Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws

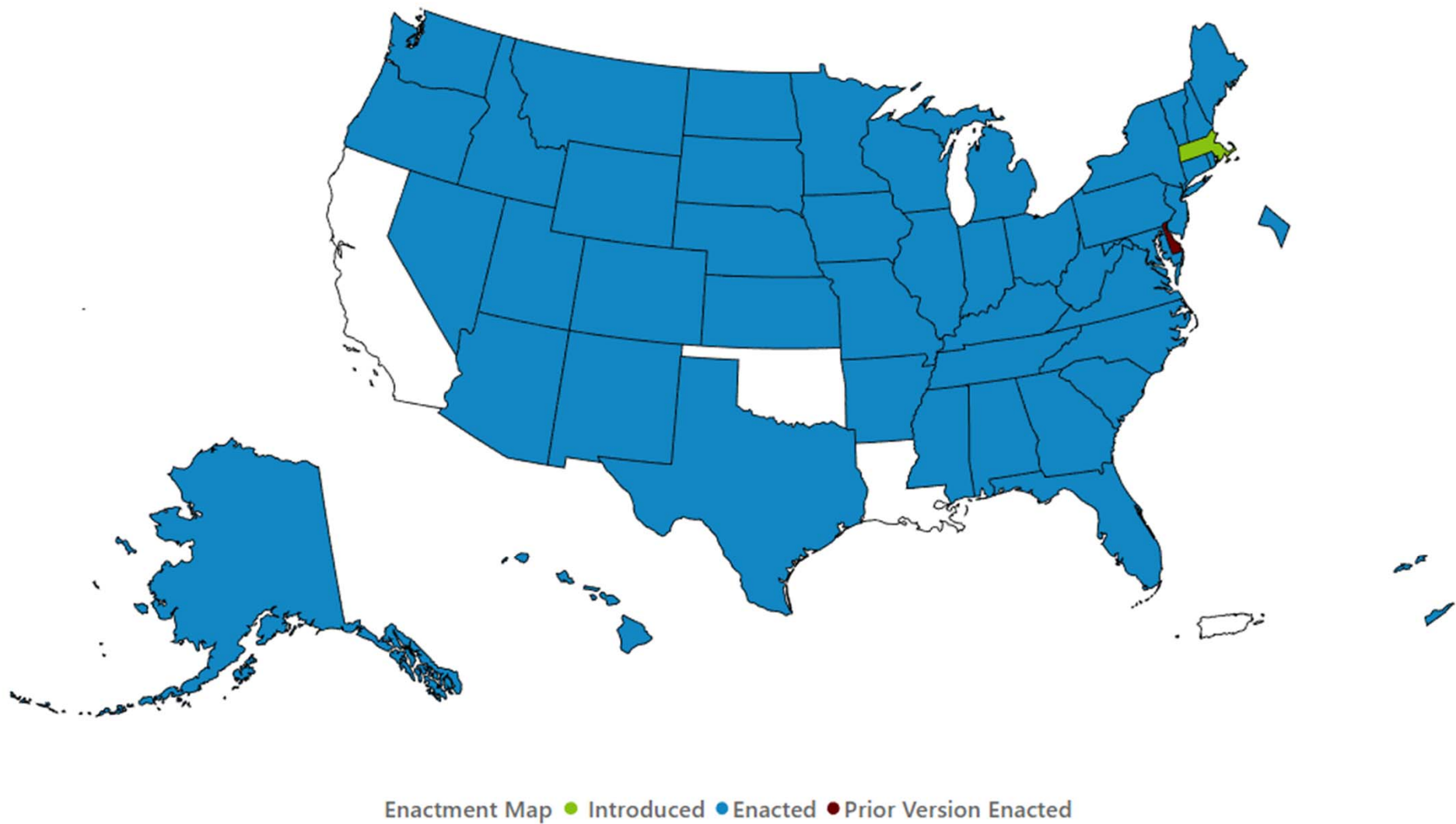
The UFADAA:

- If widely adopted, provides consistency throughout the country
- Authorizes access by:
 - Agent under Power of Attorney
 - Conservator
 - Personal Representative
 - Trustee

Where Are We Now?

- As of Fall 2022, Forty-seven states and the Virgin Islands have currently passed some form of Fiduciary Access to Digital Assets Act.
- Massachusetts has introduced but not yet enacted the Act.

- Benjamin Orzeske, Chief Counsel of the Uniform Law Commission



From The National Conference of Commissioners on Uniform State Laws

Slide 16

HCO

UPDATE THIS MAP AND INCLUDE A CITE

Howard Collens, 2022-09-01T16:42:50.993

Michigan and FADAA



- HB 5034 was introduced October 28, 2015
- Based on the ULC revised approach, HB 5034 offered a comprehensive approach to Fiduciary Access to Digital Assets for Michigan
- Joint Efforts of Elder Law and Disability Rights Section and Probate and Estate Planning Sections to represent the interests of end users

Michigan and FADAA



- HB 5034 became law in March 2016
- Effective as of June 27, 2016
- Codified at MCL 700.1001 et seq.
- <https://tinyurl.com/MichiganFADAA>

Michigan's Fiduciary Access to Digital Assets Act

FADAA Applies to:

- Fiduciary acting under a will or power of attorney
- Personal representative acting for a decedent estate
- Proceeding involving a conservator
- Trustee acting under a trust
- Digital custodian if the user resides in this state
- Does not apply to a digital asset of an employer used by an employee in the ordinary course of business

Michigan's Fiduciary Access to Digital Assets Act

- **What is a Digital Asset?** - An electronic record in which a user has a right or interest. Does not include an underlying asset or liability unless the asset or liability is itself an electronic record.
 - Access to the bank account vs. the money in the bank

Catalogue and Content – Why it Matters

- Those who plan will be rewarded
- Those who don't will be punished

Michigan's Fiduciary Access to Digital Assets Act

Accessing Content vs. Catalogue

- **Personal Representative** has access to the catalogue of communications. Has access to content only if Will provides for it or Court orders it.
- **Power of Attorney** has access to the catalogue of communications. Has access to content only if the power of attorney provides for it.
- **Trustee** has access to catalogue of communications and content IF the Trustee is the “original user”. If Trustee is not the original user, then only catalogue of communications unless Trust provides for access to content.
- **Conservator** has access to digital assets only if the Court order appointing him/her provides for it.

Michigan's Fiduciary Access to Digital Assets Act

HOW MUCH ACCESS DOES THE DIGITAL CUSTODIAN NEED TO PROVIDE?

- At the Digital Custodian's SOLE DISCRETION, they may
 - Grant a fiduciary or designated recipient **full access** to the user's account.
 - Grant a fiduciary or designated recipient **partial access** to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged.
 - Provide a fiduciary or designated recipient **a copy** in a record of any digital asset that, on the date the digital custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

Michigan's Fiduciary Access to Digital Assets Act

HOW MUCH ACCESS DOES THE DIGITAL CUSTODIAN NEED TO PROVIDE?

- A digital custodian may assess a reasonable administrative charge
- A digital custodian is not required to disclose a digital asset deleted by a user
- If only a request for some but not all of the digital assets and if segregation would impose an undue burden on the digital custodian, the digital custodian **may seek a court order to disclose some, all or none** of the digital assets.

Michigan's Fiduciary Access to Digital Assets Act

- Digital custodians shall comply with the requests for disclosure by Fiduciary within 56 days of receipt of required information.
- If the digital custodian fails to comply, the fiduciary may petition the court for an order directing compliance.
- A fiduciary as well as digital custodian are immune from liability for any action done in good faith in compliance with this act.

Michigan's Fiduciary Access to Digital Assets Act

- A digital custodian may require a fiduciary or designated recipient who requests disclosure or termination of an account to **obtain a court order** that:
 - Specifies that an account belongs to the protected person or principal.
 - Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure.
 - Contains a finding required by law other than this act.

Michigan's Fiduciary Access to Digital Assets Act

- An interested person may petition the probate court to limit, eliminate, or modify the personal representative's powers with respect to the decedent's digital assets.
- Except for good cause, hearing shall be held within 14 and 56 days of filing the petition.

Facebook



Memorializing the account

Memorialized accounts are a place for friends and family to gather and share memories after a person has passed away. Memorializing an account also helps keep it secure by preventing anyone from logging into it.

It's our policy to memorialize an account for someone who has passed if a family member or close friend lets us know. Learn more about [what happens to a memorialized account](#).

Please keep in mind that we can't provide login information for someone else's account even under these circumstances. It's always against Meta's policies to log into another person's account.

To request memorialization for a profile, please [contact us](#).

Removing the account

Verified immediate family members may [request the removal](#) of a loved one's account from Facebook.

From: [Facebook](#)

Facebook

Legacy Contact is someone you choose to look after your account if it's memorialized. Once your account is memorialized, your legacy contact will have the option to do things like:

- Write a pinned post for your profile (ex: to share a final message on your behalf or provide information about a memorial service)
- Respond to new friend requests (ex: old friends or family members who weren't yet on Facebook)
- Update your profile picture and cover photo
- You also have the option to allow your legacy contact to download a copy of what you've shared on Facebook, and we may add additional capabilities for legacy contacts in the future.

Your legacy contact can't:

- Log into your account
- Remove or change past posts, photos and other things shared on your Timeline
- Read messages you've sent to other friends
- Remove any of your friends

From: Facebook



Twitter



“If an account owner has passed away or become incapacitated, [we can work with a person authorized to act on their behalf to close a Twitter account.](#)”

In order for us to process an account deactivation, please provide us with all of the following information:

- The username of the deceased user's Twitter account (e.g., @username or twitter.com/username)

- A copy of the deceased user's death certificate

- A copy of your government-issued ID (e.g., driver's license)

- A signed statement including:

 - Your first and last name

 - Your email address

 - Your current contact information

 - Your relationship to the deceased user or their estate

 - Action requested (e.g., 'please deactivate the Twitter account')

 - A brief description of the details that evidence this account belongs to the deceased, if the name on the account does not match the name on death certificate.

 - A link to an online obituary or a copy of the obituary from a local newspaper (optional)”

From Twitter: [How to Contact Twitter About a Deceased User](#)

Twitter



In the event a Twitter user is **incapacitated**, due to medical or other reasons, we can work with a person authorized to act on the behalf of the user to have an account deactivated.

[Request the removal of an incapacitated user's account.](#) After you submit your request, we will email you with instructions for providing more details, including information about the user, a copy of your ID, a copy of the account holder's ID, and a copy of a Power of Attorney authorizing you to act on the account holder's behalf. This is a necessary step to prevent false and/or unauthorized reports. Be assured that this information will remain confidential and will be deleted once we've reviewed it.

From Twitter: [How to Contact Twitter About a Deceased User](#)

Apple



Appoint a Legacy Contact

A Legacy Contact is someone you choose to give access to the data stored in your Apple account after death.

- Does include things like photos, messages, notes, files, apps, device backups, etc. Update your profile picture and cover photo
- Does not include things like movies, music, books, or subscriptions purchased with Apple ID, and data stored in Keychain (e.g., payment info and passwords)

Can be anyone you choose (they do *not* need an Apple ID or Apple device). For them to file a request, they need only:

- Access key that you generate when you choose them as your contact; and
- Your death certificate

When approved, they receive a special Apple ID they can setup and use to access your account

From Apple: [How to Add an Apple Legacy Contact](#)

TikTok



What Happens to Your TikTok?

TikTok doesn't have a policy for memorializing an account upon the accountholder's death. There is no policy for deleting an inactive account.

The accountholder can delete the account ahead of time or leave instructions in a will and allow the personal representative of the estate to either delete the account or make other changes.

Will FADAA be enough to gain access?

Tik Tok

Google Inactive Account Manager

- Can be set up through Google Settings
- Lets Google know what to do with some or all Google related accounts after a specified period of inactivity
- Services that can be controlled: +1s; Blogger; Contacts and Circles; Drive; Gmail; Google+ Profiles, Pages and Streams; Picasa Web Albums; Google Voice and YouTube
- Google sends a warning text and email before action is taken
- Can have Google delete the accounts
- What about items bought on Google Play?



Provide Access

- Create a document and note if the property is personal or has monetary value

Examples of note

Digital Property	
Name/Address: _____	
Social Security No.: _____	Date of Birth: _____
List of Online Accounts / Automatic Payment Accounts	
Account Provider: _____	Internet Address: _____
User ID: _____	Password: _____ Email: _____
Information / Notes: _____	
[Account number; paid or free account; paid to date; personal or valuable]	
[Death instructions: who should have access to the account; delete at death?]	
Authorized Representative (and Alternative) for Access to Accounts in the event of Death or Incapacity: _____	
Date: _____	Signature: _____
Source: SALAM Research	© 2009 TheTrustAdvisor.com

Provide Instructions:

- If you want a site to continue, for example if you have a website or blog, you need to leave instructions for keeping it up or having someone take it over and continue it.
- If a site is currently producing or could produce revenue (e-books, photography, videos, blogs), make sure your successor knows this.
- If there are things on your computer or hard drive that you want to pass on (scanned family photos, ancestry research, a book you have been writing), put them in a “Do Not Delete” folder and include it on your inventory list.

Excerpt from: [Estate Planning for Digital Assets and Social Media](#)

Inventory Checklist



- Make sure you include everything from your computer, other devices, and the “virtual world” (i.e. cloud, internet)
- All email accounts
- All social websites you participate in
- Financial and commerce accounts
- Make a simple spreadsheet with passwords to access assets

Digital Assets Inventory						
Asset		Access			Wishes	
Name	Contents	Location	Username	Password	Instructions	Recipient

Who is in Charge?

- After you inventory your digital assets, you must decide who to give the access to in the event of your death or disability.
- Make sure you indicate whether you want your digital executor to **archive** your content, **share** your content with others, or **delete** your content (and/or secure privacy of some content which may be harmful).
- Make sure to include any special instructions (Think sensitive and/or embarrassing content).

Incorporating Digital Estate Planning into Your Estate Plan

- To help the process, complete a questionnaire to list all digital assets and the value of those assets
- Discuss if any of the assets have financial value
- Keep a record of all passwords and profiles
 - There are websites specifically designed to release account information after death to designated beneficiaries but they may be here today gone tomorrow.
- Protect significant data with strong encryption
- Speak to an Estate Planning Attorney about your legal needs

Cases Under FADAA (sort of)

- Matter of Serrano, 56 Misc. 3d 497, 54 NYS3d 64 (2017) - PR granted access to Google calendar of the decedent, but not the content of the emails of the decedent's email account.
- Guardianship & Alternatives, Inc. v. Jones (In re Estate of Horton), 325 Mich. App. 325 (2018) – Not a FADAA case – but, in my opinion, it should have been

Using The Law

- Now that FADAA is here in Michigan:
 - What Works?
 - What Needs Improving?
 - Have You Been Able To Use The New Law To Access Someone Else's Digital Assets?
- I would love to hear how you experience Fiduciary Access to Digital Assets

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