



FROZENA LAW<sup>LLC</sup>

# Digital Property and Post-Death Access to Electronic Accounts


Racine Kenosha Estate Planning Council  
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The presenter has tried to provide accurate quotations and citations throughout the presentation. However, please double check statutory language and citations yourself.




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## Our Journey Tonight...

- Other Relevant Statutes
- History of Legislation on Fiduciary Management of Digital Assets/Property
- Key Terms
- User Direction for Disclosure
- Access for Personal Representatives
- Access for Digital Property in Trust
- Method of Disclosure and Other Administrative Matters
- Fiduciary Duty and Authority
- Questions




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## Other Relevant Statutes

Electronic Communications Privacy Act of 1986 (ECPA)  
Criminal Fraud and Abuse Act



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## I thought this presentation was about the Wisconsin Digital Property Act...



- A reason we need the Wisconsin Digital Property Act (and the uniform law it was modeled on) is the Electronic Communications Privacy Act of 1986
- A basic understanding of the ECPA will help the framework of the Wisconsin Digital Property Act make more sense
- Multiple provisions of the ECPA are incorporated into the Wisconsin Digital Property Act by reference
- We will revisit the ECPA at various points during the presentation

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## What is the ECPA?



- The ECPA is primarily concerned with government surveillance
  - Amendment to Wiretap Statute from 1968
  - Sought to add protections to computer and other digital and electronic communications that previously existed for landline telephones
  - Has been amended a few times since passage, including by USA PATRIOT Act
- Also covers what may and may not be shared by service providers with non-governmental entities without the consent of the subscriber

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## Three Titles to the ECPA



- Title I – Wiretap Act (18 U.S.C. §§2510-2523)
  - Prohibits intercepting or trying to intercept any wire, oral or electronic communication (with some exceptions)
- Title II – Stored Communication Act (SCA) (18 U.S.C. §§2701-2712)
  - Protects content of files stored by service providers and records about subscribers held by a service provider such as name, billing records and IP addresses
- Title III – Re: pen register & trap and trace (18 U.S.C. §§3121-3127)
  - Monitoring outbound numbers called from a phone line (pen register)
  - Monitoring inbound numbers calling a monitored line (trap & trace)

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## More on the SCA



- The Stored Communications Act is the most relevant title of the ECPA to digital property.
- When the SCA applies, the service provider is prohibited from disclosing account content absent one of several exceptions
  - Applies to providers of “electronic communication service” and “remote computing service” “to the public” (18 U.S.C. §2702 (a)(1) and (2))
- The SCA is what service providers primarily cite for their risk aversion to releasing content unless one of the nine exceptions applies
- Even if an exception applies, a provider is not required to, but **may**, disclose content.

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## Criminal Fraud and Abuse Act (CFAA)

- Passed in 1986 with intent of covering “hacking or trespassing into computer systems and data”
  - The Matthew Broadrick film *War Games* was cited in the House report to the original 1984 bill that the CFAA amended
- Original scope of computers covered was more narrow, has grown over time to basically cover most computers and phones
  - Basically, if the device is connected to the internet, it is in scope
  - Although non-connected devices that “affect” interstate or foreign commerce are also included
- Law is very broad

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## Criminal Fraud and Abuse Act (CFAA)

- Criminal and civil violations
- Violation to access without authorization or exceed authorized access
  - Usually accessing without authorization is committed by an outsider and exceeding authorized access is confined to insiders
- Lack of specific definitions have led to inconsistency in application
  - In the extreme - violating terms of service potentially being viewed as accessing “without authorization”

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## A Brief History

Uniform Law and Wisconsin's Statute

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## Uniform Law Commission – Take One

- 2012 – Work begins on legislation regarding fiduciary access to digital assets
- July 2014 – Uniform Fiduciary Access to Digital Assets Act (UFADAA) approved by ULC
  - Proposed in 25 states, enacted only in Delaware
  - Strong opposition from technology companies prevents adoption in other states
    - Default access in conflict with ECPA
    - Belief that UFADAA required custodian to provide “full online access”

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## Uniform Law Commission – Take Two

- July 2015 – Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) approved by ULC
  - Took concerns of technology companies into consideration
  - RUFADAA is an opt-in statute
  - Adopted by 20 states in 2016 and 17 in 2017
  - As of 2/16/2020
    - Fully or substantially enacted in 44 states and the US Virgin Islands
    - Partially enacted in CA
    - Introduced in MA, PA, KY, OK, and DC
    - No adoption or introduction in LA and PR

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## Wisconsin

- Sept 2013 - State Bar's Real Property, Probate and Trust Law section approved the formation of a Digital Property Committee
- Jan 2016 - RUFADAA introduced in Assembly (2015 AB 695)
- Feb 2016 – Substantive Amendments proposed
  - Moved bulk of proposed act from Ch. 112 – Fiduciaries to new Ch. 711
  - Changed phrasing from “asset” to “property”, including re-titling to Wisconsin Digital Property Act
  - Provided priority system

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## Wisconsin (con.)

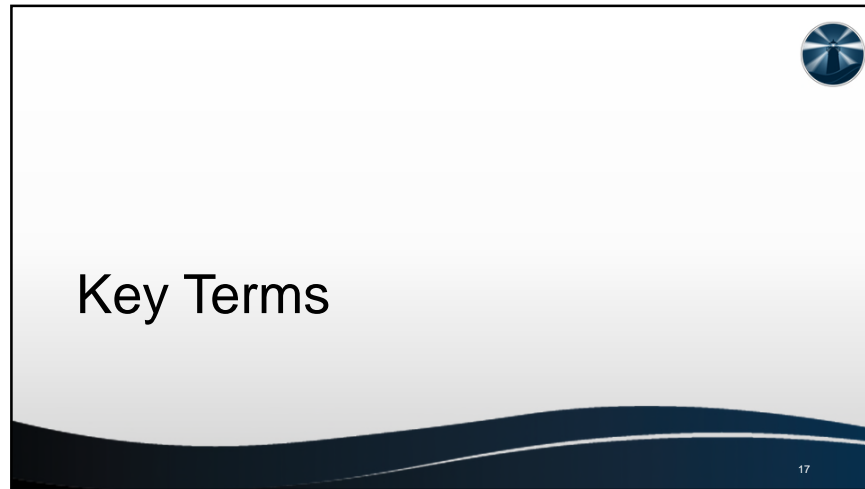
- March 30, 2016 – 2015 Wisconsin Act 300 enacted
  - Amends and adds provisions to
    - Chapter 54 – Guardianship and conservatorships
    - Chapter 244 – Uniform power of attorney for finances and property
    - Chapter 701 – Trusts
    - Chapter 851 – Probate – definitions and general provisions (amend only)
    - Chapter 853 – Wills
    - Chapter 943 – Crimes against property (amend only)
  - Creates Chapter 711 – Digital Property
- April 1, 2016 – Effective date of 2015 Wisconsin Act 300
  - Execution or effective date of will, trust, POA, etc. is irrelevant (Wis. Stat. §711.16)

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## Before we move on...

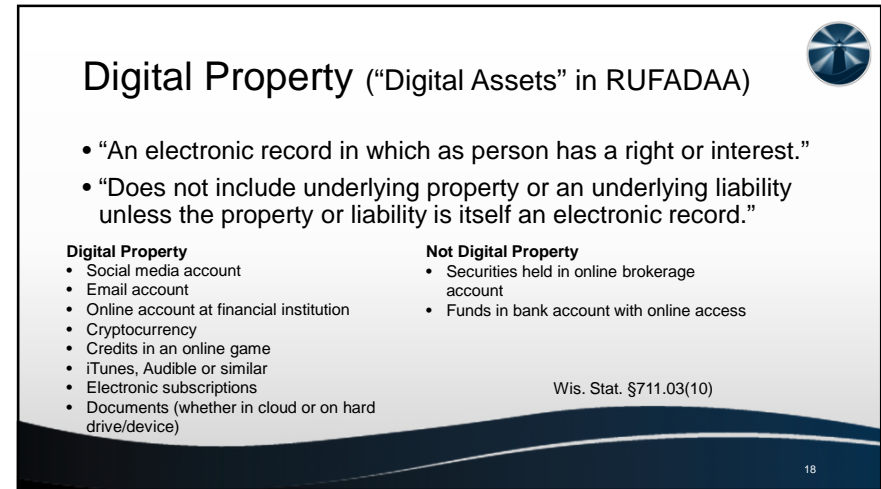
- With the exception of a “designated recipient”, the Act only applies to **fiduciaries** – not friends and family (unless they are acting as fiduciaries)
- Intent was (as much as possible) to give fiduciaries the ability to manage digital property in the same way they can manage tangible personal property and financial accounts
- Does not apply to private systems (e.g. an individual's employee email at their employer)
- Does not apply to digital property of employer used by employee in normal course of business (Wis. Stat. §711.16(3))

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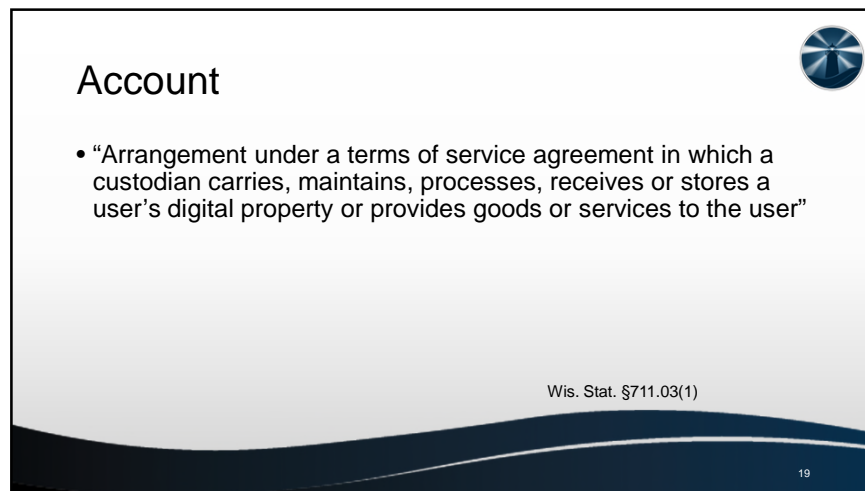
A slide titled "Key Terms" with a blue circular logo in the top right corner. The background is light gray with a dark blue wavy footer. The number 17 is in the bottom right corner.

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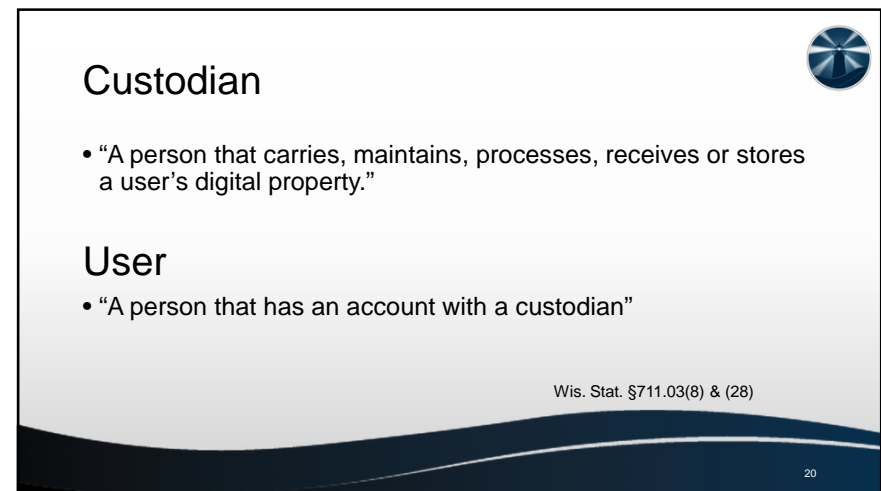
A slide titled "Digital Property ('Digital Assets' in RUFADAA)" with a blue circular logo in the top right corner. It contains two bullet points defining digital property, two columns of examples (Digital Property and Not Digital Property), and a citation to Wis. Stat. §711.03(10). The background is light gray with a dark blue wavy footer. The number 18 is in the bottom right corner.

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A slide titled "Account" with a blue circular logo in the top right corner. It contains one bullet point defining an account and a citation to Wis. Stat. §711.03(1). The background is light gray with a dark blue wavy footer. The number 19 is in the bottom right corner.

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A slide with two sections: "Custodian" and "User". The "Custodian" section has one bullet point defining a custodian. The "User" section has one bullet point defining a user. It includes a citation to Wis. Stat. §711.03(8) & (28). The background is light gray with a dark blue wavy footer. The number 20 is in the bottom right corner.

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## Electronic Communication

- “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, but does not include—
  - Any wire or oral communication
  - Any communication made through a tone-only page device
  - Any communication from a tracking device
  - Electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds

Wis. Stat. §711.03(1) → 18 U.S.C. §2510(12)

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## What does that mean practically?

Electronic Communication	Not Electronic Communication
<ul style="list-style-type: none"><li>• Email</li><li>• SMS/MMS</li><li>• Instant message</li><li>• Social media</li></ul>	<ul style="list-style-type: none"><li>• Pictures (photo storage)</li><li>• Files</li></ul>

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## Catalogue of Electronic Communication

- “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”
- In email or similar context, definition does not include the subject line of the communication

Wis. Stat. §711.03(4)

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## Content of an electronic communication

- “Information concerning the substance or meaning of a communication that satisfies all of the following:
  - Information was sent or received by a user
  - Information is electronically stored by a custodian that provides an electronic communication service to the public or is carried or maintained by a custodian that provides a remote computing service to the public
  - Information not readily accessible to the public.”

Wis. Stat. §711.03(6)

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## Re: “not readily accessible to the public”

- This is an important part of the definition of content when it comes to social media
- Information that is accessible to the public, is not protected content under the ECPA and is also not considered content for purposes of the Wisconsin Digital Property Act
  - No restrictions on who can view – not protected
  - Any restrictions on who can view – protected

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## Let’s revisit the ECPA for a minute...

- The distinction between catalogue and content has a statutory home in the ECPA
  - ECPA distinguishes between disclosure of customer communications (content) and customer records
  - Content disclosure is highly restricted
  - Customer records have minimal restrictions – “any person other than a governmental entity”
- The envelope (record) /letter (content) concept goes back to the 1800s and the ability of the government to inspect what was written on the outside of the envelope, but not what was inside the envelope.
  - See *Ex parte Jackson* 96 US 727, 732-3 (1878)

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The difficulty attending the subject arises not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement, a distinction is to be made between different kinds of mail matter -- between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter purposely left in a condition to be examined.

**Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles.** The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution. -*Ex parte Jackson* 96 US 727, 732-3 (1878)

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## Record

- “Information that is inscribed on a tangible medium or is stored in an electronic or other medium and is retrievable in perceivable form.”
- The record is not just what the user sees on the screen (or heard), it also refers to the coding and programming that underlies what is seen on the screen (or heard).

Wis. Stat. §711.03(24)

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# An individual with digital property has passed away, now what?

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# User Directions for Disclosure

Where to look for direction on the handling of an individual's digital property and the order of priority for methods of direction.

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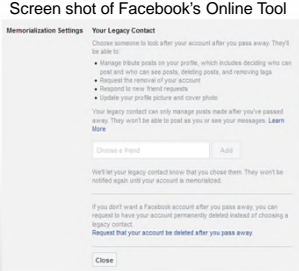
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# Online Tool

“Setting provided by a custodian that allows the user, by an agreement between the custodian and user that is **distinct from the user's assent to the terms of service**, to provide direction for disclosure or nondisclosure of digital property to a **designated recipient.**”


Screen shot of Facebook's Online Tool



Wis. Stat. § 711.03(18)

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# Designated Recipient

- “A person chosen by the user using an online tool to administer the user's digital property.”
- A designated recipient is not a fiduciary

Wis. Stat. §711.03(9)

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## Governing Instrument

- “Governing instrument” means a will; a deed; a trust instrument; an insurance or annuity policy; a contract; a pension, profit-sharing, retirement, or similar benefit plan; a marital property agreement under s. 766.58 (3) (f); a beneficiary designation under s. 40.02 (8) (a); an instrument under ch. 705; an instrument that creates or exercises a power of appointment; or any other dispositive, appointive, or nominative instrument that transfers property at death.”

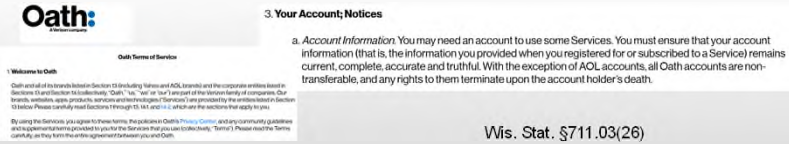
Wis. Stat. §711.03(15) → Wis. Stat. §854.01(2)



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## Terms of Service Agreement

- “An agreement that controls the relationship between a user and custodian”
- May also be called “TOS agreement”, “click-wrap agreement”, “click-through agreement”, or something similar.



The screenshot shows the Oath Terms of Service document. It includes a header with the Oath logo and the title 'Oath Terms of Service'. Below the header, there are sections for 'Welcome to Oath' and '3. Your Account/Notices'. The '3. Your Account/Notices' section contains a sub-section 'a. Account Information' which states: 'You may need an account to use some Services. You must ensure that your account information (that is, the information you provided when you registered for or subscribed to a Service) remains current, complete, accurate and truthful. With the exception of AOL accounts, all Oath accounts are non-transferable, and any rights to them terminate upon the account holder's death.'

Wis. Stat. §711.03(26)




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## Statutory Order of Priority Wis. Stat. §711.04

1. Online Tool
2. Will, Trust, Power of Attorney or other Governing Instrument
3. Terms of Service Agreement
4. Default provisions of the Act if fiduciary access is not covered in the Terms of Service Agreement

**IMPORTANT:** Directions in an Online Tool supersede appointments or directions in estate planning documents/governing instruments.




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## Before we move on...

- An individual can choose to prohibit access to some or all of its digital property.
  - If the individual has prohibited access to digital property, that should be honored absent court order




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## General Access Issues

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## Criminal and Data Privacy Laws

- As discussed earlier, there are laws penalizing unauthorized access to computers
- Federal data privacy laws like the ECPA prohibit the disclosure of content unless one of the exceptions are met
  - Massachusetts' highest court permitted estate administrator's access to content, but as you may recall, they have not enacted RUFADAA. The case was denied cert by the SCOTUS.

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## Terms of Service Agreements

- Do the terms of service permit the continued use of, or access to, the service after the death of the user?
  - License agreements for services like iTunes, Audible, and Kindle provide the user a right of use, not ownership of the music, books, etc.
  - Some individuals may have made copies of "purchased" materials from these or similar providers, but those materials may also be subject to digital rights management (DRM) which will likely make the materials inaccessible even if the fiduciary or family member has the files
- Strictly speaking continued use of username and password after death is often a violation of the terms of service and the provider could terminate the account.

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## Username and Passwords

- You know the decedent had an account, but you don't know the user name or the password for the account
  - However, having the user name and password without appropriate authority to use it can also cause problems
- If a fiduciary is entitled to access, some service providers may be able to reset the password to an account for the fiduciary to gain access (although that might also require access to the associated email account)

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## Encryption

- Devices such as phones, laptops, hard drives, and the like may be encrypted and without the password the data is unusable (assuming a strong password and strong encryption)
- This is definitely an issue with cryptocurrency – if you don't have the key, you cannot access the property
  - However, it is also vital to protect the key to protect the property during life

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## Access for Personal Representatives

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## Scenarios for Personal Representatives and default access

Scenario	Default Access
Decedent died intestate	Catalogue only
Decedent died testate – silent on digital property	Catalogue only
Decedent dies testate – mentions digital property, but not content	Catalogue only
Decedent dies testate – mentions digital property, permits access to content	Catalogue & content
Decedent dies testate – prohibits access to digital property	None
Decedent dies testate – prohibits access to digital property content	Catalogue only

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## How does PR get access?

- There is information that must be provided to gain access and a second subset of information that the custodian can request from the PR.
- 3 items are required whether requesting catalogue or content:
  - **Written** request for disclosure in physical or electronic form
  - Certified copy of user's death record
  - Documentation to establish PR's authority
    - Certified copy of letters of appointment of PR or special administrator
    - Original or copy of affidavit under Wis. Stat. §867.03 (Transfer by affidavit)
    - Original or copy of application under Wis. Stat. §867.046 (Summary confirmation)


Wis. Stat. §711.03(5)(1) & (2)

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## How does PR get access? (con.)

- Custodian may request PR provide any of the following:
  - An identifier assigned by the custodian to the user's account to identify the account
  - Evidence that links the user to the account
  - Affidavit stating that disclosure of the user's digital property is reasonably necessary for administration of the estate
  - A court order with the following findings:
    - User had a specific account with the custodian and it is identifiable by provided identifier
    - Disclosure is reasonably necessary for administration of the estate

Wis. Stat. §711.05(1)(d)




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## How does PR get access to content?

- If seeking content access, must also provide evidence of user's consent to disclose content.
  - Will, Certification of trust under Wis. Stat. § 701.1013 or other governing instrument
  - This additional information is not needed if an online tool was used

Wis. Stat. §711.05(2)




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## Custodian has option to ask for more information when it is a content request

- May ask for any of same items as a catalogue request, but court order has additional options:
  - "Disclosure of content of electronic communications of the user does not violate 18 U.S.C. §2701 et. seq. (Stored Communications Act), 47 USC §222 (Privacy customer information for telecom carriers), or other applicable law"
  - "Unless the user provided direction using an online tool, the user consented to disclosure of the content of the electronic communications"
  - Disclosure of content is reasonably necessary for administration of the estate

Wis. Stat. §711.05(2)(3)(b)-(d)



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## Access for Digital Property in Trust



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## Relevant Wisconsin Trust Code Provisions

- Digital property was specifically added to the definition of “property” (Wis. Stat. §701.0103(20))
- Transfers to a trust via an online tool are treated consistently with other transfers to trusts in regard to order of execution (Wis. Stat. §701.0419(2))
- Obtaining digital property (as provided under the Digital Property Act) is a default specific power of a trustee (Wis. Stat. §701.0816(28))




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## How Trustee access differs from PR

- Generally, if the Trustee is the original user, it will have full access to the account (catalogue and content)
  - This means the digital property was acquired within the trust to start
- Trustee who is not the original user must supply to the custodian:
  - Written request for disclosure in physical or electronic form
  - Certification of trust under Wis. Stat. §701.1013
  - Certification by trustee, under penalties of perjury, that the trust exists and the trustee is currently acting trust under the trust
- The custodian can also request the account identifier and evidence linking the account to the trust

Wis. Stat. §711.07(1) & (2)




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## Trustee access to content

- To access content, the certification of trust provided must include an original or successor user’s consent to disclosure of the content of the electronic communication to the trustee.
- The comment to the relevant section of RUFADAA notes “there should be no question that the trustee with legal title to the digital asset was authorized by the settlor the access the digital assets so transferred, including both catalogue and content...this provides ‘lawful consent’...”
  - Catalogue and content are still addressed separately in case there is a question as to whether there is “lawful consent”

Wis. Stat. §711.07(3)




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## Alternative if Content is Not Available

- Use the catalogue information to seek information from the sender or recipient of the communication
  - A financial institution, like a bank, that you know has sent/received information to/from the decedent can provide the fiduciary the content of the information sent because it is not subject to the ECPA.
  - Additionally, disclosure of content to a sender or recipient is permitted under the ECPA, so even if someone no longer has the communication you are looking for, they could request it
    - However, the custodian is not required under ECPA to disclose it



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## Method of Disclosure & Other Administrative Matters

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## Custodian has sole discretion on method

- The custodian chooses how the digital property will be disclosed to the fiduciary:
  - Full access to the user's account
  - Partial access that is sufficient to perform the needed tasks
  - A copy in a record of the digital property that the user could have accessed if on the date the request for information was received the user was...
    - Alive
    - Had full capacity
    - Had full access to the account

Wis. Stat. §711.09(1)

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## Additional Administrative Matters

- A reasonable administrative fee can be charged for the cost of disclosing catalogue or content information
- If the user deleted digital property, the custodian does not have to disclose
  - If the user deleted, that's pretty reflects intent that they didn't want it accessed
- Custodian's do not need to comply with undue burdensome requests

Wis. Stat. §711.09(2)-(4)

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## Unduly burdensome requests

- If segregating the request property for the whole of the property the custodian has is an undue burden, the custodian does not need to disclose the property
- In that case, either party can seek a court order to resolve and require disclosure as follows:
  - Providing a subset limited by date
  - Providing all of the digital property under the control of the custodian
  - Providing none of the digital property
  - Providing all of the digital property for the court to review in camera

Wis. Stat. §711.09(4)

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## Fiduciary Duty & Authority

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## Fiduciary Duty & Authority

- Any duties the fiduciary has to manage tangible personal property apply to digital property
- A fiduciary or designated recipient may not use their authority to impersonate the user
- The terms of service and other applicable law (e.g. copyright) apply to the fiduciary or designated recipient
  - Provisions in the online tool or governing instrument may override some provision in the terms of service (order of priority discussed earlier)

Wis. Stat. §711.09(1) & (2)

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## Fiduciary Duty & Authority

- A fiduciary is an authorized user under computer fraud and unauthorized computer access laws, **if** the fiduciary remains within the scope of their authority
  - If the user only granted catalogue access and the fiduciary is exceeding that, it is not protected
- A fiduciary that has authority over property of the decedent has the right to access digital property that is not held by a custodian or is subject to a term of service
- If the fiduciary has control over tangible personal property, it also has right to access digital property stored in the tangible personal property and is an authorized user of that digital property

Wis. Stat. §711.12(3) - (5)

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## Terminating Accounts

- A custodian can disclosure information in the user's account when the information is needed to terminate the account for property **licensed** to the user
- A fiduciary may request the termination of a user's account in writing
  - Required documentation is consistent with catalogue access
  - May request a court order with a finding that the account planned for termination belonged to the decedent

Wis. Stat. §711.09(6) & (7)

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## A bonus for Wisconsin fiduciaries

- Wisconsin's digital property act includes a fiduciary provision that is not in the uniform law
- Included with encouragement of the WBA (bankers)
- Provides limits around what a fiduciary needs to reasonably do in regard to digital property

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## What does a fiduciary need to do or not do?

- No duty to review, secure, or preserve any digital property that is not in the possession of the fiduciary UNLESS...
  - It has knowledge or reason to believe the digital property has economic value
    - Common digital property with value: Domain names, short or unique social media handles, blogs, cryptocurrency (IRS treats as personal property)
  - It receives a written request from a beneficiary who has an interest in the digital property
- "Reasonable efforts" will meet a duty to review, secure, or preserve

Wis. Stat. §711.09(8)(a) & (b)

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## Addressing some digital property does not mean you need to address it all

If there is not a duty to review, secure, or preserve otherwise, addressing some of the decedent's digital property does not create a duty to review, secure, or preserve the decedent's remaining digital property.

Wis. Stat. §711.09(8)(c)

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## Liability for failure to address

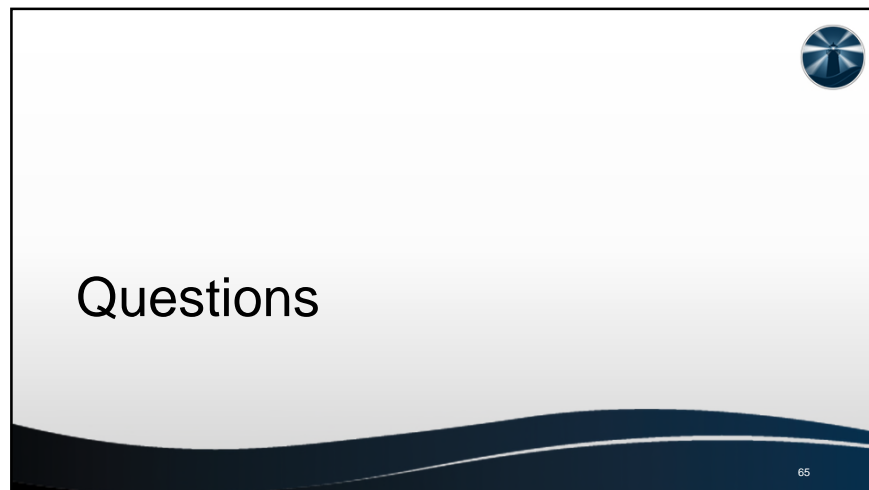
Fiduciary will not be liable for a failure to review, secure, or preserve any digital property unless it had a duty to do so.

Wis. Stat. §711.09(8)(d)

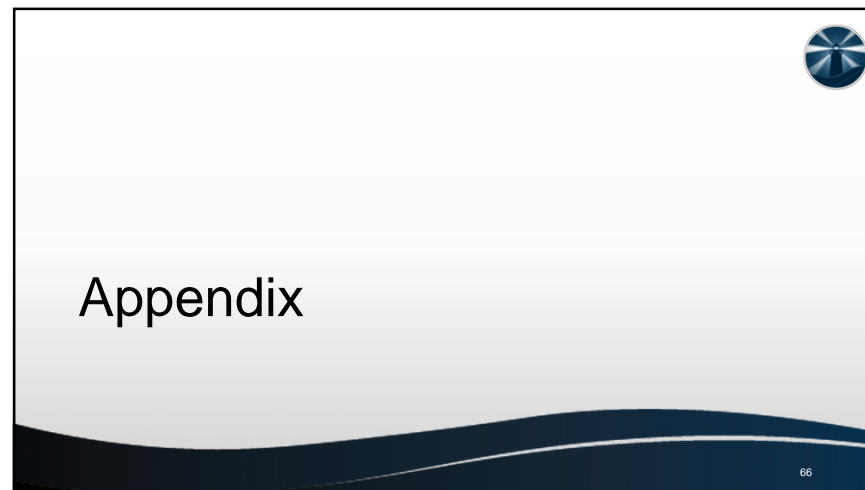
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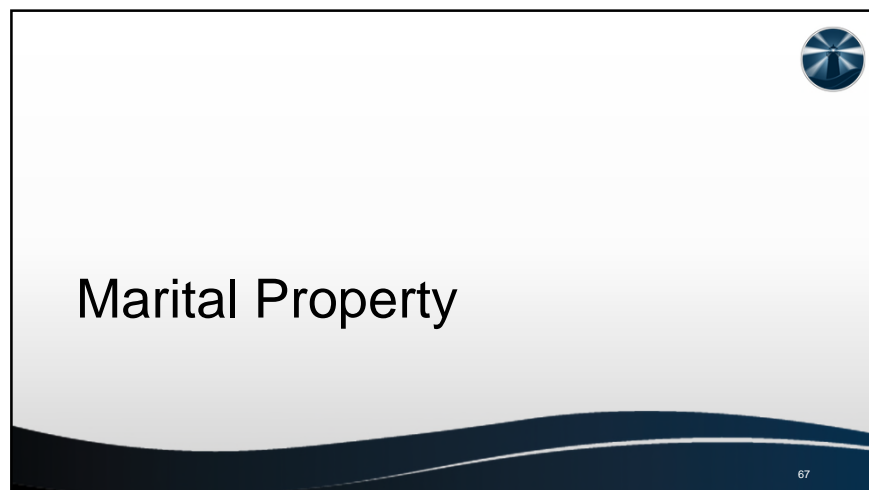




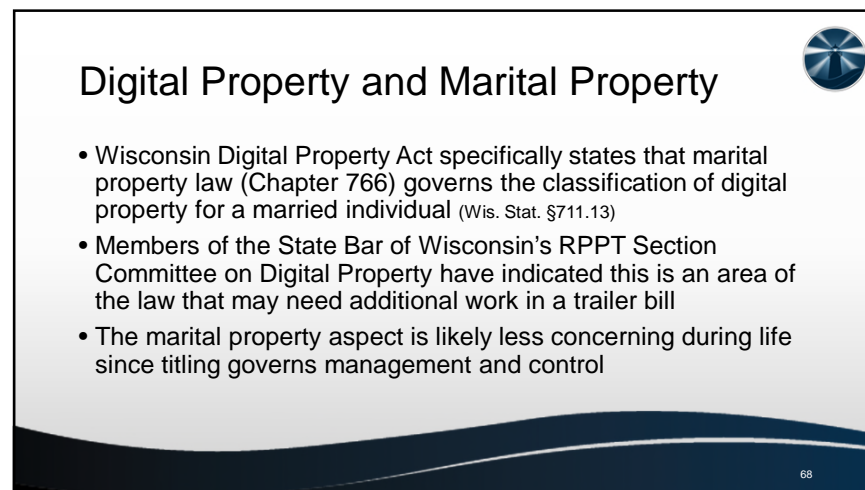
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# Distribution of Digital Property

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## Where should fiduciary look for direction?

- Online tool
  - An online tool is like a beneficiary designation, start there first (Wis. Stat. §853.18(1)(d))
- Will or trust
  - As with other property, the decedent could provide direction in dispositive provisions of a will or trust
- Intangible personal property memorandum
  - Similar to a tangible personal property memorandum, if referenced in a will a separate writing can be used to distribute intangible personal property (Wis. Stat. §853.32(2)(a)2.)
- If not distributed elsewhere, include in residue

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# Oath Holdings, Inc v. Ajemian

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## Oath Holdings, Inc. v. Ajemian

previously Yahoo!, Inc. v. Ajemian

- Massachusetts case referenced earlier in the presentation
  - Origins of case pre-date both UFADAA and RUFADAA
  - Decedent, John Ajemian, died in 2006
- SCOTUS denied cert on March 26, 2018
- Amicus brief filed by Facebook Inc, Google LLC, Dropbox Inc, Evernote Corp, Glassdoor, Inc, The Internet Association and Netchoice
- Docket Number 17-1005
- Oath Holdings and amicus brief provide insight into thinking of service providers/custodians

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