

# Minors and Digital Asset Succession

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*ABSTRACT: Minors who die in the United States hold a property interest in an asset that did not exist when the law established 18 as the age of legal capacity to devise. These assets are digital assets: email, social networking, documents, photos, text messages, and other forms of digital media. Minors use these assets with a fluidity and ease unrivaled by older generations. Under the current law, minors have no right to decide what happens to their digital property at death. Despite the fact that minors have the capacity to contract with online businesses, make health care decisions, marry, have sex, and seek employment, minors are denied one of the most basic rights of property ownership—the right to devise. This Article is the first to explore how minor capacity law should change to accommodate the changing nature of property and grant minors the right to devise their digital assets. It explores historical capacity standards imposed upon minors in order to own and use property and argues that these standards are no longer adequate to regulate digital assets. It demonstrates how applying succession law instead of an arbitrary age requirement safeguards minors’ interests, protects property and privacy rights, and promotes the freedom of succession. This Article argues that granting minors the ability to devise digital assets is a logical evolution of minor capacity standards seen in other areas of the law. Granting minors capacity to devise their digital assets promotes minors’ autonomy and their dignitary interests in their expressions of identity on social media. It has been 40 years since we have considered the age of legal capacity to devise property and with the proliferation of digital assets, the time is ripe for a reassessment of minors’ capacity to devise digital property.*

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## I. INTRODUCTION

On average about 16,000 teenagers die in the United States each year.<sup>1</sup> The 14 teenagers who were killed in a school shooting in Parkland, Florida, on February 14, 2018 are a testament to the tragic and sobering ways that minors unexpectedly and prematurely die in our nation.<sup>2</sup> As of now, minors do not have the right of succession, that is, they are legally incapable of deciding how their property is distributed at death. The law governing minors' legal capacity to devise property is based on precedent that extends into the early 19th century and has been relatively unchanged in our nation. For many of the 16,000 teenagers who die each year their inability to devise property will not be problematic. Most minors do not own significant property interests, and if they do, the default rules of intestacy laws operate to give their property to their parents, which is probably what most minors would want

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1. ARIALDI M. MINIÑO, NAT'L CTR. FOR HEALTH STATISTICS, DATA BRIEF NO. 37, MORTALITY AMONG TEENAGERS AGED 12–19 YEARS: UNITED STATES, 1999–2006, at 1 (2010), <https://www.cdc.gov/nchs/data/databriefs/db37.pdf>.

2. Eric Levenson & Joe Sterling, *These Are the Victims of the Florida School Shooting*, CNN, <https://www.cnn.com/2018/02/15/us/florida-shooting-victims-school/index.html> (last updated (Feb. 21, 2018, 11:56 AM)).

anyway.<sup>3</sup> But minors' property interests are changing in the digital world because they hold a significant number of digital assets.

Minors who die in the United States hold a property interest in assets that did not exist when the law established 18 as the age of legal capacity. The majority of minors own digital assets—email, social networking, documents, photos, text messages, and other forms of digital media.<sup>4</sup> Minors' digital assets hold a treasure trove of information about their daily lives, information and memories that would be much more valuable to surviving friends and families if a minor were to die as well as information that perhaps a minor would prefer to be deleted upon her death.<sup>5</sup> Children's toys are becoming more interactive. The toys respond to a child's questions, tell jokes, listen and create a record of interaction with the child as soon as they can talk.<sup>6</sup> The category of digital assets that minors use, control, and create is only going to increase in the coming years as new toys, apps, and forms of entertainment and education for minors are developed.

Under the current law, minors have no right to decide what happens to their digital assets. They lack legal capacity to execute a testamentary document that would have controlling effect upon their death. Giving minors the right of succession over their digital property gives them the ability to decide whether these assets should be deleted or transferred at their death and who should be able to obtain access. In many cases, minors might choose their parents, but in some situations, minors would choose someone else. Granting the right to devise digital assets gives a minor the power to choose.

Minors' inability to devise digital assets needs to be reexamined in light of the prevalence of digital assets and minors' command and fluency in understanding the nature of digital assets. From a young age, children become proficient users of new technology. These "digital natives," or children that grow up in the digital age, have different expectations relating to their digital property and a significant amount of familiarity with digital assets throughout their lives than the generation before them. According to Pew Research Center, "[n]early two-thirds of youth and parents agree that the

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3. Intestacy law is based on the presumed intent of a testator and tries to do what an ordinary testator would do if she had executed a testamentary instrument. See ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 65 (10th ed. 2017).

4. See, e.g., Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RES. CTR. (May 31, 2018), <http://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018> ("Some 45% of teens say they use the internet 'almost constantly,' a figure that has nearly doubled from the 24% who said this in [a study from] 2014-2015.").

5. Imagine a scenario where a closeted gay or trans teenager is exploring their identity on social media. If that teenager dies, their family could decide to destroy their posts and pictures at their death, and that might be expressly against what the teenager would have wanted.

6. Zoë Corbyn, *The Future of Smart Toys and the Battle for Digital Children*, GUARDIAN (Sept. 22, 2016, 6:00 AM), <https://www.theguardian.com/technology/2016/sep/22/digital-children-smart-toys-technology>.

children know more about the Internet than their parents do.”<sup>7</sup> In a quarter of American families who have access to the Internet, young children are more digitally proficient than their parents.<sup>8</sup> With their increased familiarity with the Internet and technology, minors create and possess digital assets with troves of information, pictures, and writings about their young lives. This information is valuable to surviving family members as well as potential marketers and industries. Minors have a sizeable footprint in the marketplace and contribute value to the economy.<sup>9</sup> It is estimated that teenagers have a purchasing power of \$118 billion in North America.<sup>10</sup> Despite the purchasing power of minors and the prevalence of minors using digital assets, minors are unable to control what happens to their digital assets at their death.

The age of majority is a malleable concept in law and has changed depending on the needs of society and the nature of the dispute. Digital asset succession presents a ripe area for reconsidering whether an age requirement should be applied to allow a minor to make her intent known regarding her digital assets. Applying succession law safeguards concerns about minors’ perceived vulnerability or lack of understanding. Contract doctrines and the mature minor doctrine create templates where the law is already considering minors’ capacity on a case-by-case basis. Minors have a significant digital presence online, which raises questions of property rights and the enforceability of contracts entered into by minors. Although scholarship has addressed minors’ contractual rights and the use of the infancy defense to disaffirm online contracts<sup>11</sup> (and has touched on a broader concern about

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7. KATHERINE ALLEN & LEE RAINIE, PEW INTERNET & AM. LIFE PROJECT, PARENTS ONLINE 11 (2002), [http://www.pewinternet.org/wp-content/uploads/sites/9/media/Files/Reports/2002/PIP\\_Parents\\_Report.pdf.pdf](http://www.pewinternet.org/wp-content/uploads/sites/9/media/Files/Reports/2002/PIP_Parents_Report.pdf.pdf).

8. *Id.*

9. David Randall, *Marketers Are Already Targeting Generation Z*, MONEY (May 25, 2016), <http://money.com/4348414/generation-z-marketing> (discussing the importance to major U.S. corporations of marketing to minors, hitting on the point that minors are a sought-after and vital community to businesses); Bob Tedeschi, *Online Retailers Pursue Teenagers*, N.Y. TIMES (Feb. 28, 2005), <https://www.nytimes.com/2005/02/28/technology/online-retailers-pursue-teenagers.html>.

10. Christina Sommer, *Purchase Power of Global Teens Tops \$819 Billion*, MASTERCARD: PAYMENTS PERSP. (Nov. 21, 2012), available at <https://web.archive.org/web/20160329174806/https://insights.mastercard.com/2012/11/21/purchase-power-of-global-teens-tops-819-billion> (discussing the global purchase power of teenagers worldwide; in North America, there are 37 million teenaged consumers with a purchase power of \$118 billion, making them a formidable asset in the marketplace); see also Courtney Reagan, *Piper Jaffray Survey Shows What Teens Like: Chick-fil-A, Amazon, and Athleisure*, CNBC (Apr. 10, 2017, 5:01 AM), <https://www.cnbc.com/2017/04/09/survey-shows-what-teens-like-chic-fil-a-starbucks-amazon-and-nike.html> (demonstrating that companies concentrate on soliciting teens’ business).

11. Wayne R. Barnes, *Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent*, 76 MD. L. REV. 405, 438–43 (2017) (advocating for a higher age for minors to contract); Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 61–80 (2016) (assessing the age of majority); Wallace J. Mlyniec, *A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1900–15 (1996) (evaluating minors’

minors' testamentary capacity),<sup>12</sup> scholars and commentators have been silent regarding property interests that minors may have in digital assets and whether those property interests give rise to the right to devise. With the advent of a digital marketplace and with the significant participation of minors in that marketplace, capacity standards for minors have begun to evolve, especially in contract. Like contracts, property is transitioning to a digital form, and the law needs to transition with it. Granting minors the right to devise this new form of property accommodates the changing nature of property in a technological world.

Fortunately, the law has begun to address adults' succession rights over their digital assets. A majority of states recently adopted the Revised Uniform Fiduciary Access to Digital Assets Act ("The Act" or "RUFADAA"), which granted fiduciaries legal authority to manage digital assets if an individual left express permission to do so in her testamentary instruments.<sup>13</sup> The Act is limited in scope and expressly does not change other areas of law.<sup>14</sup> By maintaining the status quo, RUFADAA denies minors the ability to have protected property or a contractual interest in their digital asset accounts, despite an acknowledgement in most states that digital assets are part of a decedent's estate and should be managed by a fiduciary upon death.<sup>15</sup> In addition, the Act requires that in order for a fiduciary to access a decedent's digital assets, a decedent must leave an express testamentary document granting her fiduciary consent to manage her digital assets.<sup>16</sup> Because minors lack legal capacity, it is unclear whether minors can consent under RUFADAA to allow fiduciaries to access their account at death. It is also unclear whether parents will be able to consent on behalf of their deceased children. A minority of states mentioned minors in their versions of RUFADAA by explicitly defining guardians of a minor to act under the law.<sup>17</sup> The statutes,

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decision-making capacity); Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1156–64 (2012) (recommending a more legally and culturally cohesive understanding of maturity).

12. Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 110–16 (2014) (suggesting reform of the testamentary capacity of minors).

13. REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 4 (UNIF. LAW COMM'N 2015).

14. *Id.* Prefatory Note ("The act removes barriers to a fiduciary's access to electronic records and property and leaves unaffected other law, such as fiduciary, probate, trust, banking, investment securities, agency, and privacy law.").

15. *Id.*

16. *Id.* § 4.

17. See FLA. STAT. ANN. § 740.002(14) (West Supp. 2019) (defining guardian); GA. CODE ANN. § 53-13-2(20) (Supp. 2018) (defining "protected person" to include a minor); KAN. STAT. ANN. § 58-4802(p) (West Supp. 2018) (defining guardian); MD. CODE ANN., EST. & TRUSTS § 15-601(n)(1) (West Supp. 2018) (defining guardian); MICH. COMP. LAWS SERV. § 700.1002(ee)(iii) (LexisNexis Supp. 2018) (defining "protected persons" as "[a] minor for whom a guardian has been appointed"); MO. ANN. STAT. § 472.405 (West 2018) (defining conservator to include a "person appointed by a court to have the care and custody of the estate of a minor"); N.J. STAT. ANN. § 3B:14-61.2 (West Supp. 2018) (defining guardian); TENN. CODE

however, do not grant minors any right to control their digital assets after death through a guardian and seem to reinforce guardianship law already in place, in one situation, giving the guardian the right to authorize disclosure (absent any inquiry as to what the minor would have wanted).<sup>18</sup> By retaining old guardianship principles, the passage of RUFADAA prompts a renewed analysis of minors' capacity to devise their digital assets.

Our succession rules regarding minors are severely outdated and stem from norms from the middle ages. Unfortunately, RUFADAA does nothing to clarify the rights of minors regarding their digital assets. In a world suffused with technology, the 18th-century norms for capacity no longer make sense. It is time that our succession rules changed to accommodate minors' desires about their online accounts in the event of their premature deaths. Unless there are extenuating circumstances, the law should honor the wishes of minors who are fluent in creating digital media and who can show the capacity to determine what they want to have happen to that media in the event of their deaths.

First, this Article explores the historical capacity standards imposed upon minors in order to use property. It demonstrates that the categorical age limit for property ownership has shifted depending on the circumstances of the era and the creation or accessibility of new assets. It argues that historical capacity standards are no longer adequate in the face of digital assets. It considers property rights of minors generally and argues that minors should have a right to devise digital assets.

Part III looks to children's capacity in other areas of the law, specifically contract law and medical decision-making. It argues that to the extent minors have a limited right to contract with Internet custodians, make health care decisions, marry, and have sex, they should also have a limited right to digital asset succession. It highlights that minors are able to contract with digital asset providers to destroy or transfer their digital assets upon death but do not have the right to execute a testamentary document that would have the same result. Because minors have the capacity to contract and make personal decisions about their health, they should also have the power to devise digital assets as a matter of contract and in expressing their personal identity on social media platforms. Using the evolution of the law in other areas, this Article argues that it is time for succession law to evolve in a similar direction and grant minors the ability to devise digital assets.

Part IV analyzes how applying the doctrines of succession law safeguards minors' interests and addresses concerns about minors' perceived vulnerabilities. Succession law provides a capacity standard that will ensure

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ANN. § 35-8-114 (West 2017) ("Disclosure of digital assets to guardian or conservator of a minor or person with a disability.").

18. See N.C. GEN. STAT. ANN. § 35A-1252(2a) (2017) (granting guardians the power to request and authorize disclosure of minors' digital assets).

that a minor understands the legal act of devising property in order for a devise to be valid. Regardless if capacity is given to minors generally or specifically only for digital assets, succession law has mechanisms to protect minors from undue influence, fraud, duress, or abuse in testamentary dispositions. This Article advocates that states remove the requirement of legal capacity to execute a testamentary instrument relating to digital assets and instead rely solely on the protective doctrines of succession law. It argues that digital assets reopen the door for reconsidering capacity standards for minors in general.

Part V considers policy reasons for changing the law to allow minors succession rights over their digital assets. In many cases, the younger generation is more fluent in digital assets than their parents are. Policy reasons denying minors legal capacity to devise no longer apply when confronted with the paradigm of digital assets. In addition, this Article considers how allowing digital asset succession promotes minors' best interests, self-determination, and privacy rights. It has been 40 years since we have considered the age of legal capacity to devise property and with the proliferation of digital assets, the time is ripe for a reassessment for minors' capacity to devise property.

## II. MINORS' CAPACITY STANDARDS

This Article first explores the evolution of capacity standards imposed on minors for managing property and entering into contracts. It demonstrates that a categorical age limit for capacity and property ownership has shifted depending on the circumstances of the era and the creation or accessibility of new assets. Although the age of capacity has increased and decreased, the underlying structure of the common law has not. Under the common law, children can own property, but their capacity to deal with that property, to contract or devise, is limited based on their age.<sup>19</sup> When a child reaches the age of majority, these limitations are removed and he may freely buy, sell, trade, or devise his property. The age of majority has varied depending on the jurisdiction, circumstance, and time.<sup>20</sup> What is clear about the history of capacity standards is that the law has taken a pragmatic approach. So, too, should the law now take a pragmatic approach when it comes to the existence of digital assets and minors' succession rights of digital assets.

### A. THE CHANGING AGE OF MAJORITY

Historically, children reached the age of majority at an earlier age than they do today. Under the early common law, children were much more

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19. JOSEPH W. MADDEN, MADDEN ON PERSONS AND DOMESTIC RELATIONS § 114 (1931).

20. T.E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 22 (1960). For example, in order to become a sovereign in England, one needed to turn 18; in Denmark, the sovereign attained majority at 14; and in France, the age of majority was 17. *Id.*

engaged in civic life. They could marry at age seven, be hanged at age eight for committing a crime, and serve on a jury at age twelve.<sup>21</sup> Children could vote if they owned property; teenagers were elected to Parliament.<sup>22</sup> In the early common law of England, children were able to contract, own property, and devise personal property by the age of four.<sup>23</sup> In one recorded case in England, it was found that a child attained the age of majority at birth.<sup>24</sup> Children consented to contracts by placing a mark on the documents that deeded land or goods, devised property in a will, or bound that child to years of an apprenticeship.<sup>25</sup> English treatises from the 16th century state that a child who had attained the age of four could make a will for his or her goods and chattels.<sup>26</sup> Treatise authors such as Henry Swinburne wrote that the minimum age to write a will was 14 for boys and 12 for girls, and this was reinforced in more modern treatises.<sup>27</sup> More modern treatise writers believed that the age of four must have been a misprint for age 14, but this could have been merely due to their disbelief that the law found young children to have the competency to devise property.<sup>28</sup>

Any child over the ages of 12 for girls or 14 for boys had sufficient mental capacity to devise their property until the mid-16th century.<sup>29</sup> When the Statute of Wills was passed in 1540, it originally permitted real and personal property to be devised by minors,<sup>30</sup> following the tradition noted by treatise writers that young children's testamentary devises for personal property would be valid upon their deaths.<sup>31</sup> The Statute of Wills was later amended, however, to declare that a minor under the age of 21 could not make a valid

21. HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 1, 140 (2005).

22. *Id.* at 1.

23. *Id.*

24. James, *supra* note 20, at 23.

25. BREWER, *supra* note 21, at 239.

26. *Id.* at 241.

27. HENRY SWINBURNE, *A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS* 61 (1635) ("A boye cannot make his Teftament before hee haue accomplished the age of 14 yeares, nor a wench before fhe haue accomplished the age of 12 yeares."); *see also* THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 50, at 229 (2d ed. 1953) ("The civil law rule was that males of fourteen and females of twelve had the age capacity to make a will.").

28. BREWER, *supra* note 21, at 338. Professor Brewer notes her surprise at one particular finding:

To see the mark of a young child on a labor contract or to run across evidence that a child of four or nine married makes us think that something must be wrong with the evidence. I was astonished, even after extensive work on these subjects, to discover that an "executor" of an estate could be a young child—even, as the treatises stated, one in its mother's womb.

*Id.*

29. ATKINSON, *supra* note 27, § 50, at 230.

30. *Id.*; Paula A. Monopoli, "Deadbeat Dads": Should Support and Inheritance Be Linked?, 49 U. MIAMI L. REV. 257, 289 n.112 (1994).

31. ATKINSON, *supra* note 27, § 50, at 229.



will for real property.<sup>32</sup> The law thus made a distinction between personal property and real property. Minors under the age of 21 could still make a will for personal property. This did not change in England until the Wills Act was passed in 1837, establishing the age of 21 as the age of capacity to devise personal property.<sup>33</sup> The age of 21 had roots in medieval law—it was commonly understood to be the age that an Englishman could become eligible for knighthood.<sup>34</sup> Thus, by 1837, for both real and personal property, England settled on the age of 21 as the age of majority.<sup>35</sup>

Early colonists in America applied English laws and norms regarding children, allowing children younger than 21 to engage in civic life and to consent to various legal acts. Massachusetts, Pennsylvania, and Virginia, passed laws before the Revolutionary War that allowed boys who were 16 to serve in the military.<sup>36</sup> A 15-year-old boy enlisted in the Continental Army over his grandfather and guardian's objections.<sup>37</sup> By 1776, the first draft of the Pennsylvania Constitution gave the right to vote to anyone who served in the militia.<sup>38</sup> By 1792, almost ten years after the end of the Revolutionary War, the colonies established the ages of 18 for militia service and 21 for the right to vote.<sup>39</sup>

Children were able to consent to labor contracts in early America.<sup>40</sup> For example, a two-year old consented to an indentured servant relationship by placing her mark on a contract in 1811.<sup>41</sup> Eventually, American law adopted higher ages of consent and capacity for children to serve in the militia, contract for their labor, or devise their property.<sup>42</sup> The age for majority relating to testamentary devises also gradually changed from 12 and 14 to 21.<sup>43</sup> By the 18th century, treatise writers had reigned in the rights of children to deal with property. Instead of the age of puberty being the age limit for minors to contract, Thomas Wood's *Institute of the Laws of England*, which was used in American colonies, stated that a 21 year old could alienate his real and personal property, but not before that age.<sup>44</sup>

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32. *Id.* § 50, at 230.

33. *Id.*

34. James, *supra* note 20, at 28.

35. *Id.* at 30–31; see 5 WILLISTON ON CONTRACTS § 9:3 (4th ed. 2018).

36. BREWER, *supra* note 21, at 138.

37. *Id.* at 129–30.

38. *Id.* at 139.

39. *Id.* at 140.

40. *Id.* at 271.

41. *Id.* at 1.

42. See *id.* at 1, 139, 275.

43. See *id.* at 132.

44. *Id.* at 265; THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 12 (9th ed. 1763).

The law for testamentary devises remained inconsistent in the United States. Many states adopted the common law age of majority as 21.<sup>45</sup> Some opted for the testamentary age to be 18 years of age, others allowed “females to make wills at a lower age than males,” and some jurisdictions maintained the distinction between real and personal property, allowing those under the age of 21 to dispose of their personal property but not their real property.<sup>46</sup> Some states also allowed a married person to devise property but would not allow an unmarried person of the same age to devise.<sup>47</sup>

The United States underwent its most recent shift in the concept of majority by reducing the age limit of capacity from 21 to 18.<sup>48</sup> In 1942, during World War II, Congress lowered the age of conscription from 21 to 18 in order to obtain more soldiers to fight the war.<sup>49</sup> The decision to change the age for the draft was likely not fueled by an analysis of capacity, but rather by logistical needs in fighting a war. After the age for conscription was lowered, constitutional amendments to lower the voting age were proposed over 100 times in Congress for the next 30 years.<sup>50</sup> None of the amendments was successful until 1971 when a senator introduced the amendment in January, Congress passed it in March, and states ratified it by June 1971.<sup>51</sup> During these 30 years and after the amendment was passed, states reduced the legal age of majority from 21 to 18.<sup>52</sup> The American concept of adulthood shifted to allow the status of adulthood to be conferred at a younger age but still an older age than was seen in the early 1800s. This shift had many implications, but most relevant for purposes of this Article is that it meant that 18-year-olds instead of 21-year-olds have the legal capacity to execute a will. Today, not as much variation exists in the states as it did in our early history. All but a few states have changed the age of majority to 18 by legislative act.<sup>53</sup>

Recent developments in the law have again demonstrated the shifting concept of the age of majority. The Affordable Care Act requires health

45. *Thomas v. Couch*, 156 S.E. 206, 209 (Ga. 1930) (“One becomes of full age on the day preceding the twenty-first anniversary of his birth, on the first moment of that day.”); *Bainter v. Bainter*, 590 N.E.2d 1134, 1136 (Ind. Ct. App. 1992) (“[I]n 1849 a person’s legal disabilities were removed the day preceding his or her twenty-first anniversary of birth.” (citing *Wells v. Wells*, 6 Ind. 447, 448 (1855))); RESTATEMENT (SECOND) CONTRACTS § 14 cmt. a (AM. LAW INST. 1981).

46. ATKINSON, *supra* note 27, at 230; *see also* *Holzman v. Wager*, 79 A. 205, 206 (Md. 1911) (“[T]he right of a male, of sufficient discretion, under the age of 21 years and over the age of 14 years, to dispose of his leasehold property has always been recognized and acted upon in this state . . .”).

47. ATKINSON, *supra* note 27, at 230.

48. Barnes, *supra* note 11, at 418.

49. Hamilton, *supra* note 11, at 64–65.

50. Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1184 (2012).

51. U.S. CONST. amend. XXVI; Fish, *supra* note 50, at 1184, 1194.

52. 5 WILLISTON, *supra* note 35, § 9:3; RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. a (AM. LAW INST. 1981).

53. 5 WILLISTON, *supra* note 35, § 9:3; RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. a.

insurers to allow children to remain on their parent's health insurance plans until they turn age 26.<sup>54</sup> The Affordable Care Act provision, of course, does not change minors' legal status as adults at age 18, but it does show a consensus that young adults still rely on their parents for financial aid well after they obtain the age of majority. Our conceptions of adulthood and capacity have never been static. They continue to evolve to meet our needs, expectations, and understanding of the world. Digital assets require us to reassess the concept of minority and ask whether an 18-year-old capacity standard is justified in a digital world. In order to execute a testamentary document, an individual must have legal capacity. Legal capacity is determined by statute, and state statutes generally require that an individual be at least 18 years old in order to validly execute a will.<sup>55</sup> This age requirement is a vestige of English common law. As discussed above, the "age of majority" has changed throughout time for various reasons.<sup>56</sup> The age of legal capacity has ranged from four to 21, settling at 18.<sup>57</sup> Louisiana allows a 16-year-old minor to execute a will, and Georgia allows a 14-year-old minor to execute a will.<sup>58</sup> Several jurisdictions grant legal capacity to those under the age 18 if they are members of the armed forces or if they are married.<sup>59</sup> Moreover, if a minor obtains emancipation, jurisdictions allow her to execute a valid will.<sup>60</sup> The standards for maturity have changed throughout history and continue to change in the context of a modern world. In assessing whether a minor should be able to devise digital assets, we should not defer to capacity age limits set by the age of eligibility for knighthood.<sup>61</sup> Instead, we should assess the nature of the property at issue and the abilities of children in using this new property. Age limits are imperfect, arbitrary, and unnecessary factors in assessing capacity.

Legal capacity has historically been a tool of repression, disfavoring certain groups of people and prohibiting them from devising property. For example, married women used to lack legal capacity to execute wills because of the doctrine of coverture.<sup>62</sup> Slaves and felons were legally incapable of

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54. Patient Protection and Affordable Care Act § 1001(5), 42 U.S.C. § 300gg-14 (2012).

55. See, e.g., FLA. STAT. ANN. § 743.07(1) (West Supp. 2019); IND. CODE ANN. § 29-1-5-1 (LexisNexis 2016); IOWA CODE ANN. § 633.264 (West Supp. 2015); TEX. EST. CODE ANN. § 251.001 (West 2017); VA. CODE ANN. § 16.1-333, 64.2-401 (West Supp. 2018).

56. See *supra* Section II.A.

57. See *supra* Section II.A.

58. GA. CODE ANN. § 53-4-10 (2011); LA. CIV. CODE ANN. arts. 1476-1477 (2012).

59. IND. CODE ANN. § 29-1-5-1; N.H. REV. STAT. ANN. § 551:1 (LexisNexis 2014); OR. REV. STAT. ANN. § 112.225 (West 2016); TEX. EST. CODE ANN. § 251.001.

60. CAL. PROB. CODE §§ 6100 cmt., 6220 cmt. (West 2013); IDAHO CODE § 15-2-501 (2009).

61. James, *supra* note 20, at 28.

62. 1 JAMES SCHOULER, LAW OF WILLS EXECUTORS AND ADMINISTRATORS § 45 (5th ed. 1915); see also WILLIAM HERBERT PAGE, A CONCISE TREATISE ON THE LAW OF WILLS §§ 89-90 (1901) ("The original Statute of Wills conferred testamentary capacity in such general terms that married women were apparently included. It was, however, doubtful if, under the common law

executing a testamentary document.<sup>63</sup> Although the barriers of sex, race, and conviction of a felony have been removed as an element of legal capacity to execute a will, the age requirement remains. The result of this age limit is that the law categorically prevents all minors from executing a will no matter their mental ability or social maturity. This bright-line rule comes at an immense cost of preventing the majority of teenagers from enjoying the freedom of succession, a cherished property right in the American system. It is a more pressing issue today than in the past because of the rise of digital assets. Now, most minors have at least something of value to distribute among family and friends or to delete according to their wishes.

Legal capacity has changed to accommodate different cultural and social norms, and it must now change to reflect our acceptance that minors create, own, and control digital assets. A historical precedence of disallowing minors to devise is not a compelling reason to continue the prohibition. It is still a form of repression. Legal capacity for testation is outmoded and unnecessary. Digital assets are a unique form of property that minors exercise a great deal of control over and a form of property they understand well. To the extent that adults can devise their digital assets under the Digital Asset Act,<sup>64</sup> minors should be accorded the same right if they meet the standard for testamentary capacity. Legal capacity prohibiting minors from devising assets has little justification in a modern world that is continuing to transform itself with technology. Any change will require legislative action, preferably an amendment to the Digital Asset Act giving minors legal capacity to devise digital assets.

### B. MINORS' RIGHTS UNDER CONTRACT

Under the common law, children who reached puberty were able to give, sell, and purchase their property by contract, but often contracts entered into with children were voidable.<sup>65</sup> Whether an English court would uphold a contract with a minors would turn on whether the contract was beneficial to the child.<sup>66</sup> If a contract was not beneficial to a minor, it was void, if it were possibly beneficial to a minor the contract was voidable, (if the minor chose to disaffirm it), and if a contract were definitely beneficial to a minor then it

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theory of the absolute merger of her identity in law with that of her husband, such testamentary power could be exercised." (citation omitted)).

63. See 2 ISAAC F. REDFIELD, *THE LAW OF WILLS: DEVISES, LEGACIES, AND TESTAMENTARY TRUSTS* 5 (2d ed. 1870) (stating that any felony conviction "defeated all rights of action of every kind" including wills, meaning that any property attempted to be devised would escheat to the crown); Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 307 (2006) (stating that slaves lacked contractual capacity to hold or transfer property via intestacy or wills); David Rand Jr., Annotation, *Convict's Capacity to Make Will*, 84 A.L.R.3d 479 § 2[a] (1978) ("[T]he convicted criminal was precluded from transmitting his estate to his heirs.").

64. REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 4 (UNIF. LAW COMM'N 2015).

65. BREWER, *supra* note 21, at 242-43, 245.

66. 5 WILLISTON, *supra* note 35, § 9:5 ("Infant's contracts are generally voidable, not void.").

was valid.<sup>67</sup> Determining whether a contract was beneficial to a minor was often difficult and, instead of making this distinction, courts adopted what is known as the infancy doctrine.<sup>68</sup> Under the infancy doctrine, a minor has the ability to void a contract she enters into on her own election. The infancy doctrine is aimed at protecting “minors from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace.”<sup>69</sup>

Thus, minors have the right to contract in many jurisdictions, but a minor may later disaffirm a contract under the infancy doctrine.<sup>70</sup> Some jurisdictions find that minors do not have the right to contract because they lack capacity altogether.<sup>71</sup> Similar to all common law doctrines, the infancy doctrine is riddled with exceptions and is state specific, but it can generally be used to some extent in any jurisdiction.<sup>72</sup> A minor must usually return the benefit of a contract in order to properly disaffirm it.<sup>73</sup>

Modern courts continue to apply the infancy doctrine as a method to protect minors from their own foolishness.<sup>74</sup> As a practical matter, the voidability doctrine results in businesses requiring that a parent or guardian co-sign any contract entered into by a minor, which in turn severely limits the freedom of minors to independently enter into a binding contract.<sup>75</sup> The same practical limitations, however, do not exist for online contracts. Companies are more than happy to have minors use their services online and allow them to agree to the terms of services without parental permission if they are over the age of 13. Congress established 13 as the age for minors to

67. *Pinnell v. St. Louis-S.F. Ry. Co.*, 263 S.W. 182, 185 (Mo. 1924) (applying the benefits test); 5 WILLISTON, *supra* note 35, § 9:5.

68. 5 WILLISTON, *supra* note 35, § 9:5.

69. *Halbman v. Lemke*, 298 N.W.2d 562, 564 (Wis. 1980).

70. *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473, 481 (E.D. Va. 2008), *aff'd in part and rev'd in part sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009) (explaining the infancy doctrine); *Lemke*, 298 N.W.2d at 564 (“[T]he ‘infancy doctrine,’ is one of the oldest and most venerable of our common law traditions.”); RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. LAW INST. 1981).

71. *Compare Kelly v. United States*, 809 F. Supp. 2d 429, 434 (E.D.N.C. 2011) (finding that minors lack capacity to contract “unless it is for necessities” (quoting *Creech ex rel. Creech v. Melnik*, 556 S.E.2d 587, 591 (N.C. Ct. App. 2001))), *with Florida v. Stokes*, 944 So. 2d 598, 603 (La. Ct. App. 2006) (“The presumption is that all persons have the capacity to contract. The exception being that unemancipated minors . . . lack legal capacity to contract.” (citation omitted)).

72. Robert G. Edge, *Voidability of Minors’ Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 207 (1967) (stating that contracts for necessities are the major exception to the doctrine used in courts); Megan Diffenderfer, Note, *The Rights of Privacy and Publicity for Minors Online: Protecting the Privilege of Disaffirmance in the Digital*, 54 U. LOUISVILLE L. REV. 131, 146–47 (2016).

73. *A.V.*, 544 F. Supp. 2d at 481 (“In other words, ‘[i]f an infant enters into any contract subject to conditions or stipulations, he cannot take the benefit of the contract without the burden of the conditions or stipulations.’” (alteration in original) (quoting 5 WILLISTON, *supra* note 35, § 9:14)).

74. Edge, *supra* note 72, at 222.

75. See *Todres*, *supra* note 11, at 1126.

contract with online businesses when it passed legislation limiting the types of information online businesses can obtain about minors under age 13 without parental consent in 1998.<sup>76</sup>

In 1998, Congress passed the Children's Online Privacy Protection Act ("COPPA"), a bipartisan act, in three months with little debate or discussion.<sup>77</sup> The purpose of the bill was to allow parents to supervise the information collected by online business providers. It applies to children under the age of 13 and gives the Federal Trade Commission ("FTC") regulatory power to ensure that online service providers do not collect information from children under the age of 13 without parental consent.<sup>78</sup> In 2013, amendments to COPPA regulations were implemented by the FTC; these changes considered technological advances and children's increased use of apps on mobile devices and social networking.<sup>79</sup> Online businesses or services are required "to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children."<sup>80</sup>

COPPA again demonstrates lawmakers' response to the concern that online businesses will take advantage of minors in the marketplace. Some argue that COPPA's age limit of 13 is too young and that older children need similar protection.<sup>81</sup> These arguments follow the traditional capacity conception that adults will exploit minors under 18 and that minors do not have the decision-making skills necessary to decide what information they should give to online providers and what they should protect.<sup>82</sup> Congress, through COPPA, creates a new capacity standard for minors at age 13. Many websites require users to certify that they are over 13 in an attempt to demonstrate compliance with COPPA's data accumulation age limits. COPPA also demonstrates an understanding that minors age 13 to 18 have economic power in the marketplace—COPPA does not restrict companies' accumulation of information about teenagers. There is an implicit understanding in COPPA that minors are going to continue to contract and engage in creating digital assets.

The infancy doctrine or privilege ceases to exist once a minor turns 18. At the age of 18, a minor becomes an adult under the law and is free to

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76. Joseph B. Fazio, *Children's Privacy—Children's Online Privacy Protection Act of 1998 (COPPA)*, 2 INTERNET LAW AND PRACTICE § 19:25 (2018).

77. See Laurel Jamtgaard, *Big Bird Meets Big Brother: A Look at the Children's Online Privacy Protection Act*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 385, 387 (2000).

78. 15 U.S.C. §§ 6501(1), 6502(a)–(b) (2012).

79. 16 C.F.R. § 312.2 (2018).

80. 15 U.S.C. § 6502(b)(1)(D).

81. Lauren A. Matecki, Note, *Update: COPPA is Ineffective Legislation! Next Steps for Protecting Youth Privacy Rights in the Social Networking Era*, 5 NW. J. L. & SOC. POL'Y 369, 399–400 (2010).

82. See generally *Complying with COPPA: Frequently Asked Questions*, FTC, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions> (last updated Mar. 20, 2015) (providing information on the Children's Online Privacy Protection Rule for laypersons and small entities).

contract.<sup>83</sup> But there are exceptions. For example, Congress delved into the area of minors and contracts in 2009 by passing the Credit Card Accountability, Responsibility, and Disclosure Act (“CARD Act”) which, in part, prohibits individuals under 21 from entering into a contract for a credit card unless certain conditions are met.<sup>84</sup> An adult under the age of 21 must find an adult over the age of 21 to co-sign the account or show that he or she has enough income to repay any debt incurred in order to obtain a credit card.<sup>85</sup> The justification for this law was to curb credit card companies’ marketing to students on college campuses and to protect college students from themselves.<sup>86</sup> The CARD Act demonstrates the high degree of flexibility in the law of capacity. Lawmakers always have the ability to enact a different age for capacity for a specific activity. Thus, in the world of contracts, 18 to 20-year-olds have the capacity to enter into any contract except for credit card contracts.<sup>87</sup>

The CARD Act demonstrates how digital asset succession could work as well. By making an exception to legal capacity requirements for digital assets, minors would have the ability to devise digital assets but no other forms of tangible property. At the end of the day, capacity for a certain activity is up to lawmakers and their constituents. As contract interests continue to change with the rise of digital assets and other technological advances, capacity standards need to change to as well.

### C. MINORS’ PROPERTY OWNERSHIP

A recent study revealed that children between the ages of two to four believed that a person who played with a toy first owned the toy.<sup>88</sup> Even at a young age, children are able to conceptualize property ownership and claim property for themselves. The common law allowed children to acquire property and hold it against her parents or any other third party, as long the property was not acquired through compensation.<sup>89</sup> If minors earn wages, a parent or guardian is entitled to garnish the minor’s wages.<sup>90</sup> But some states

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83. See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.3 (3d ed. 2004).

84. Credit Card Accountability Responsibility and Disclosure Act of 2009 § 301, 15 U.S.C. § 1637(c).

85. *Id.*; see Andrew A. Schwartz, *Old Enough to Fight, Old Enough to Swipe: A Critique of the Infancy Rule in the Federal Credit CARD Act*, 2011 UTAH L. REV. 407, 423.

86. Barnes, *supra* note 11, at 433.

87. 15 U.S.C. § 1637(c)(8).

88. Ori Friedman & Karen R. Neary, *First Possession Beyond the Law: Adults’ and Young Children’s Intuitions About Ownership*, 83 TUL. L. REV. 679, 685–86 (2009).

89. *Banks v. Conant*, 96 Mass. (14 Allen) 497, 498 (1867) (“Whatever therefore an infant acquires which does not come to him as a compensation for services rendered, belongs absolutely to him, and his father cannot interpose any claim to it, either as against the child, or as against third persons who claim title or possession from . . . the infant.”); *Kreigh v. Cogswell*, 21 P.2d 831, 833 (Wyo. 1933).

90. 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 8:14 (2d ed. 2005).

protect a minors' ability to put those funds in a savings account. For example, states allow banks to protect any deposit made in the name of a minor for the minor's use.<sup>91</sup> As a practical matter, many parents do not choose to garnish the wages of their child, but as a legal matter, they have the right to do so.<sup>92</sup> Their right to garnish a child's wages is supported by the principle that parents owe a duty to provide for their children. If a parent does not garnish a child's wages, then wages are the property of a child.

A parent does not have the right to take property of their child when the property is received as a gift or inheritance.<sup>93</sup> This property is the minors' property and not the property of a parent. Even though a parent is required to care for a child, a parent does not have title or claim to a minor's property.<sup>94</sup> A parent cannot sell or transfer a child's property or enter into contracts with the child's property.<sup>95</sup> Thus, children have a protectable property interest in their assets and this right should extend to their creations as well.

State law controls the transfer of property to minors and requires a form of property management. There are four property management options for a minor child: guardianship, conservatorship, custodianship, and trusteeship.<sup>96</sup> A guardian of the estate or guardian of the property arises when a minor owns property.<sup>97</sup> A guardian of the property must be court appointed; parents of a child lack the ability to control a minor's property without court appointment as a guardian of the property.<sup>98</sup> When a minor owns valuable property, a guardian must be appointed in order to care for the property until a minor reaches the age of majority.<sup>99</sup> Guardians do not own a minor's property, instead they must act pursuant to fiduciary duties in order to protect the

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91. See, e.g., MINN. STAT. ANN. § 48.30 (West 2012).

92. See, e.g., MINN. STAT. § 181.01 (West 2018) (providing that a parent may claim a minor's wage).

93. *Banks*, 96 Mass. (14 Allen) at 498 ("[A parent] has no title to the property of the child, nor is the capacity or right of the latter to take property or receive money by grant, gift or otherwise, except as a compensation for services, in any degree qualified or limited during minority.").

94. CAL. FAM. CODE § 7502 (West 2013) ("The parent, as such, has no control over the property of the child."); *Emery v. Emery*, 289 P.2d 218, 225 (Cal. 1955) ("[A] minor child's property is his own and not that of his parents."); *Fassitt v. Seip*, 95 A. 273, 279 (Pa. 1915) (holding that legal title was held by the infant); Scott J. Shackelford & Lawrence M. Friedman, *Legally Incompetent: A Research Note*, 49 AM. J. LEGAL HIST. 321, 322 (2007) ("Nor do parents, legally, have an automatic right to control their children's property, even though they are the 'natural guardians' of their children . . .").

95. *Bombardier v. Goodrich*, 110 A. 11, 11 (Vt. 1920) ("[A parent] cannot bind the minor by contracts made in his behalf, and has no authority to sell, pledge, or transfer the latter's property.").

96. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 117 (7th ed. 2005).

97. Thomas R. Young, *Guardianship as a Form of Protection of the Property of a Child*, 1 LEG. RTS. CHILD. REV. 2D § 8:9 (3d ed. 2018).

98. *Id.*

99. DUKEMINIER ET AL., *supra* note 96, at 117–18.



property for the minor and use it solely for a child's enjoyment and benefit.<sup>100</sup> A parent may have physical custody of a child, but that custody alone does not give a parent the right to contract with a child's property.<sup>101</sup> Only an appointed guardian, conservator, or a trustee may deal with the property of a minor.<sup>102</sup>

In many states, probate courts are responsible for overseeing the guardianship of minors.<sup>103</sup> Guardians come in two forms—guardians of the person, who are responsible for the care of a minor, and guardians of the property, who are responsible for managing the property of a minor during a minor's life.<sup>104</sup> Oftentimes, a court appoints the same person for both responsibilities.<sup>105</sup> Guardians of the property protect and manage a minor's estate until a minor reaches the age of capacity or dies. A guardian is bound by fiduciary duties in order to use the property for the benefit of the minor.<sup>106</sup> Allowing a guardian to manage an estate of an incompetent minor protects a minor, protects property, and allows property to be used and invested in the market.<sup>107</sup> The American legal system has used guardianships since colonial times as a method to manage property of minors.<sup>108</sup> Guardianships have worked relatively seamlessly throughout our history. They are rarely challenged and not much is published about them.<sup>109</sup> They are relatively uncontroversial arrangements.

Guardianships make sense for transactions in real estate, stock accounts, mutual funds, bank accounts and other investments of real or intangible property, but guardianships make less sense for managing a minors' digital assets. In fact, because of the lack of financial value, guardianships are superfluous when it comes to a minors' ownership of digital assets during a minor's life. Minors have full rights over digital assets and manage the property, opening and deleting accounts, on their own under contractual terms entered into by the minor and digital asset provider. If the law were to

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100. *In re Tetsubumi Yano's Estate*, 206 P. 995, 1001 (Cal. 1922) (explaining duties of a guardian).

101. *DUKEMINIER ET AL.*, *supra* note 96, at 117; *MADDEN*, *supra* note 19, § 145.

102. *DUKEMINIER ET AL.*, *supra* note 96, at 117–18.

103. *See, e.g., In re Estate of Bednarczuk*, 609 N.E.2d 1310, 1313 (Ohio Ct. App. 1992) ("It is well settled that a probate court has broad discretion in appointing guardians and that decisions regarding the appointment of guardians will not be reversed absent an abuse of discretion."); *DUKEMINIER ET AL.*, *supra* note 96, at 118–20.

104. *DUKEMINIER ET AL.*, *supra* note 96, at 117–20; *see, e.g., Hynes v. Jones*, 167 A.3d 375, 377–78 (Conn. App. Ct. 2017) (finding that under Connecticut law, a probate court may appoint guardians for minors).

105. *See DUKEMINIER ET AL.*, *supra* note 96, at 117–20.

106. *See, e.g., In re Estate of Swiecicki*, 477 N.E.2d 488, 490 (Ill. 1985).

107. Lawrence M. Friedman et al., *Guardians: A Research Note*, 40 AM. J. LEGAL HIST. 146, 166 (1996).

108. *Id.* at 146.

109. *Id.*

allow minors to leave a will concerning their digital assets or other property, an executor would be required to distribute or delete the assets according to a minor's wishes expressed in her testamentary instrument.

As discussed above, several states in adopting RUFADDA expressly mentioned that the act covered those who had been appointed guardians of a minor in order to petition for access to digital assets.<sup>110</sup> Guardians have the authority to consent to property transactions of a minor, and thus presumably have the authority to consent to disclosure of digital assets after a minor's death. RUFADDA does not change the commonly accepted role of a guardian in managing the property of a minor or the executor's role in managing a minor's estate that would be inherited by a minor's parents.

State law controls minors' property rights and decides which property arrangements will be the default. Guardianship rules have long provided protection to minors' property until they reach an age of majority. By granting minors the right to devise digital assets, guardianships are not altered. Guardianships would remain the main instrument to help minors manage complex property interests until they reach the age of majority. Allowing the right to devise digital assets would not interfere with existing instruments designed to protect minors' interests while empowering minors with regard to a form of property that they uniquely have the capacity to understand and value. Many states have replaced the common law guardianship system with a conservatorship.<sup>111</sup> Conservators have the same fiduciary obligations as a guardian and still must be appointed by a court, but they have less supervision by the court.<sup>112</sup> Functionally, conservatorships and guardianships are very similar.<sup>113</sup> A custodianship under the Uniform Transfer to Minors Act was established in order for people to make a gift to a minor without establishing a guardianship or a conservatorship.<sup>114</sup> All states have adopted some version of the Uniform Gift for Minors Act or the Uniform Transfers to Minors Act ("UTMA").<sup>115</sup> The UTMA attempts to address a concern that minors mismanage or fail to manage their property and to ensure that a minor will truly benefit from the gift instead of a minor's guardian.<sup>116</sup> Donors may transfer real, personal, tangible, or intangible property to a minor under the

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110. See *supra* notes 16–18 and accompanying text.

111. *Id.*

112. *Id.*

113. Young, *supra* note 97, § 8:9.

114. ANN LAQUER ESTIN, DOMESTIC RELATIONSHIPS: A CONTEMPORARY APPROACH 557 (2013).

115. S.C. CODE ANN. §§ 63-5-500 to -600 (West 2010) (codifying the current version of the Uniform Gifts to Minors Act in South Carolina); *Transfers to Minors Act*, UNIF. LAW COMM'N, <https://www.uniformlaws.org/committees/community-home> (last visited Mar. 16, 2019) (showing that the Uniform Transfers to Minors Act has been enacted in the other 49 states and the District of Columbia).

116. Jani Maurer, *Uniform Transfers to Minors Act Accounts—Progress, Potential, and Pitfalls*, 28 NOVA L. REV. 745, 746–47 (2004).

UTMA.<sup>117</sup> The transfer is irrevocable, and the property is properly seen as the minor's, under the protection of a custodian who is bound by fiduciary duties to care for the property until the minor reaches the age of capacity.<sup>118</sup> Under the UTMA, a donor creates a custodianship for the minor's behalf, and often a donor names herself as custodian.<sup>119</sup> A court does not supervise a custodianship.<sup>120</sup>

The fourth kind of property management for a minor is a trust. A trusteeship can be established allowing a trustee wide and flexible powers over a minor's property and allows a donor to put any restrictions she sees fit.<sup>121</sup> Guardians of the property, conservators, custodians, and trustees are all subject to fiduciary duties in managing the property of a minor.<sup>122</sup> Imposing fiduciary duties on anyone who manages the property of a minor gives minors legal rights and protections. Minors can enforce fiduciary duties against their guardians or trustees including their ability to repudiate, ratify, or reclaim property in a transaction.<sup>123</sup>

None of these property arrangements provide for a minor to devise any of the property held on their behalf. For example, state law usually requires that any assets remaining in a custodianship account when a minor dies must be distributed to the minor's estate.<sup>124</sup> If a minor dies before the age of legal capacity, any property owned by a minor will descend via the laws of intestacy. Intestacy is meant to accomplish the presumed intent of a testator, had he or she executed a will. Minors are treated the same as unmarried individuals without children: property descends to their parents.<sup>125</sup> The property would not return to the donor upon the death of a minor, and the minor, because she lacks capacity, would have no power to control who would take the property.

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117. UNIF. TRANSFERS TO MINORS ACT Prefatory Note (UNIF. LAW COMM'N 1986); Maurer, *supra* note 116, at 748.

118. UNIF. TRANSFERS TO MINORS ACT §§ 12, 20; Maurer, *supra* note 116, at 749 (discussing irrevocability).

119. UNIF. TRANSFERS TO MINORS ACT § 3.

120. DUKEMINIER ET AL., *supra* note 96, at 119.

121. *See id.* at 119–20.

122. *Id.* at 117–20; MADDEN, *supra* note 19, § 166, at 482. Professor Madden explains the obligations thus:

Equity requires the utmost good faith in all transactions between guardian and ward. The guardian must protect the ward's estate, and is not allowed to make any profit on it outside that which is lawfully allowed him for conducting the trust. He may not trade with himself on account of the ward, or use or deal with the ward's property for his own benefit.

*Id.* (footnotes omitted).

123. *Id.* at 481.

124. FLA. STAT. ANN. § 710.123(1)(c) (West Supp. 2019).

125. UNIF. PROB. CODE §§ 2-102 to -103 (UNIF. LAW COMM'N 2010); Glover, *supra* note 12, at 105.

Thus, as the law currently stands, minors are allowed to own property if the property is gifted, inherited, or if parents do not garnish a minor's wages. Digital assets should not be treated differently as they are created by a minor. A minor's creations belong solely to a minor regardless of parental consent, just as assets that are gifted or inherited. As discussed in the next Section, there is little reason to prevent minors from devising their property, especially when it comes to digital assets.

*D. NON-TESTAMENTARY ACTS AND NON-PROBATE TRANSFERS*

Succession law allows minors a small degree of control over their assets in two ways: minors may engage in a legal act that shifts their property distribution, and minors can use non-probate transfers in order to effectuate their desires. First, succession law applies the intestacy statute to minors.<sup>126</sup> As a general matter, this means that minors' parents each take one-half of a minor's property.<sup>127</sup> If a minor changes her familial status by marrying or having a child, she can change her disposition of property. Under the Uniform Probate Code, if an individual has a spouse, the spouse and surviving parents take.<sup>128</sup> If a minor is married and has one or more children with his spouse, his spouse will take all of the property.<sup>129</sup> If a minor is unmarried but has one or more children, all of the decedent's property will go to her children.<sup>130</sup> The fact that minors are able to marry before they are able to exercise testamentary intent is another example of the incongruity in the law. Some adults have married or adopted a child solely for the purpose of altering their testamentary disposition under the law.<sup>131</sup> It is harder to overturn a marriage or an adoption than it is to overturn a will.<sup>132</sup> Thus, adults have changed their familial status to bolster their testamentary plan. If we continue to refuse minors testamentary intent, they could be driven to extreme measures in order to devise. It is doubtful that a minor would marry or have

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126. See, e.g., *In re Estate of Rozet*, 504 A.2d 145, 146, 148 (N.J. Super. Ct. Law Div. 1985) (stating that if minor child dies intestate with no spouse or children, the parents of the child are to split the estate evenly); *In re Wright*, 859 N.Y.S.2d 864, 865, 868 (Sur. Ct. 2008) (refusing to disqualify a father from his share of unmarried minor's estate).

127. UNIF. PROB. CODE § 2-103(a)(2).

128. *Id.* § 2-102; see, e.g., *Emerson v. Cutler*, 31 Mass. (14 Pick.) 108, 113 (1833) (explaining how a husband took a share of his minor wife's estate); *McWhorter v. Gibson*, 84 S.W.2d 108, 109-10 (Tenn. Ct. App. 1935) (finding that a mother could not collect damages on behalf of minor son because he was married).

129. UNIF. PROB. CODE § 2-102(a)(1).

130. *Id.* § 2-103(a)(1).

131. *Otto v. Gore*, 45 A.3d 120, 136-37 (Del. 2012) (discussing the adoption by a woman of her ex-husband for inheritance purposes); *Minary v. Citizens Fid. Bank & Trust Co.*, 419 S.W.2d 340, 341 (Ky. 1967) (detailing that a man adopted his wife so she could take under a trust).

132. *Hoffman v. Kohns*, 385 So. 2d 1064, 1068-69 (Fla. Dist. Ct. App. 1980) (detailing how the decedent married his housekeeper and willed everything to her and holding that, while his will was invalid, his marriage was not), *overruled on other grounds by* Fla. Nat. Bank of Palm Beach City v. Genova, 460 So. 2d 895, 897-98 (Fla. 1984).

a child for the sole purpose of altering her testamentary plan, but it remains a possibility in a legal landscape that does not allow minors the right to exercise testamentary capacity but does allow them to marry and have children.

Second, minors can make use of non-probate transfers in order to engage in estate planning and effectuate their desires. If they are able to obtain a life insurance agreement or open a retirement account, a minor can by private contract name a beneficiary to these assets and avoid the state statute that denies them testamentary capacity and dictates how their property will transfer. A minor may also hold title to property in a joint tenancy with right of survivorship, thus ensuring that if a minor died, the other owner of the property would take. When opening a bank account, a minor could open the account with a pay on death contract and name a beneficiary as a contractual matter. Such transfers do not fall under the probate code and can theoretically be accomplished by a minor.<sup>133</sup>

As it relates to digital assets, a minor could possibly marry or reproduce in order to ensure that her digital assets are transferred to the person they choose. More likely, it is possible that a minor could create some kind of transfer on death agreement with her digital assets or a joint tenancy agreement with another who would have rights of survivorship.<sup>134</sup> It is unlikely that a minor could create a trust without an appointed guardian for her digital assets because a valid trust requires a trustee to have legal capacity.<sup>135</sup> Regardless, non-testamentary acts and non-probate transfers are two different ways a minor could alter her estate plan without legal capacity. Although the law protects a minor's testamentary desires through these limited non-probate transfers, these protections are not enough. A minor's testamentary intent would be much better served if the law expressly granted a minor legal capacity to execute a valid testamentary document disposing of her digital assets.

### III. MINORS' CAPACITY IN OTHER AREAS OF LAW

Minors' rights continue to evolve under the common law and state statutes. This Part looks at the changing rights of minors generally and then focuses on minors' capacity determinations in other areas of the law. In

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133. DUKEMINIER ET AL., *supra* note 96, at 296; John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984).

134. People can open digital asset accounts jointly and both be joint users of the account, which would allow the joint user to access the account after the other user's death. This technique is popular among some couples. See Alia Hoyt, *Why Couples Share a Facebook Profile—And Why It Bugs the Rest of Us*, HOWSTUFFWORKS (Mar. 23, 2016), <https://computer.howstuffworks.com/internet/social-networking/networks/why-couples-share-a-facebook-profile-why-it-bugs-the-rest-us.htm>.

135. Mark R. Parthemer & Sasha A. Klein, *Client Dilemma—Whom Can I Trust?*, PROB. & PROP. 48, 49 (2017).

certain situations, minors have capacity to make contracts, to have an abortion, to refuse life-sustaining treatment, to work, and to have sex. To the extent minors have a limited right to contract with Internet custodians and make serious, personal health care decisions, they should also have a limited right to succession of digital assets. Digital assets involve both a minor's right to contract and make personal decisions about the expression of their identity on social media after death. Using the evolution of the law in our treatment of minors, this Part argues that legislation is needed to protect minors' succession right for the limited purpose of digital assets.

#### A. CHANGING RIGHTS OF MINORS

Children may not have been classified as "property" of their fathers under the common law, but fathers had expansive powers over their children.<sup>136</sup> Fathers had absolute control and custody over their marital children.<sup>137</sup> A father made determinations regarding a child's education, religion, and vocational training.<sup>138</sup> Fathers were entitled to the children's wages.<sup>139</sup> From the beginning of our nation, the law treated children as valuable economic commodities and producers and protected a father's interest in his children's labor.<sup>140</sup> If a child left home, a father could sue any person who encouraged the child to leave on the grounds that he was deprived of his child's earnings.<sup>141</sup> Children made up an important and sizeable part of the workforce in the America colonies.<sup>142</sup> Many of the children who came to the American colonies in the 1700s were orphans or impoverished and did not come voluntarily.<sup>143</sup> In a land without enough labor, children could be indentured or hired out by their fathers to other masters.<sup>144</sup>

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136. Carter Dillard, *Future Children as Property*, 17 DUKE J. GENDER L. & POL'Y 47, 79 (2010) ("[T]he right to procreate, the privacy or liberty right, . . . left without further definition[,] has the rather illiberal consequence of tending to treat a class of persons, albeit future persons, as property."); Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 CARDOZO L. REV. 225, 237 (2010).

137. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 6 (1994).

138. Henry H. Foster & Doris Jonas Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321, 322 (1978).

139. MASON, *supra* note 137, at 5-6, 14; 5 WILLISTON, *supra* note 35, § 9:4; Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for American Jurisprudence and Domestic Policy*, 24 CAL. W. INT'L L.J. 193, 199 (1994).

140. MASON, *supra* note 137, at 3, 6 ("In labor-scarce America the services or wages of a child over ten was one of the most valuable assets a man could have.").

141. *Id.* at 6; *see* Brown v. Brown, 61 N.W.2d 656, 659 (Mich. 1953) ("The damages recoverable . . . are not limited to the loss of services. The parent wrongfully deprived of the custody of his child may recover for the loss of society of his child and for the emotional distress resulting from the abduction.").

142. MASON, *supra* note 137, at 2 ("More than half of all persons who came to the colonies south of New England were indentured servants, and . . . most servants were less than nineteen years old.").

143. *Id.* at 32.

144. *Id.* at 6.

The 1800s brought changes to the legal situation of children. Where they were seen primarily as economic producers in colonial days subject to the custody of their fathers or masters, American courts started recognizing that children had interests of their own to be protected under the law.<sup>145</sup> A father's favored status under the common law changed gradually as courts considered the interests of a child and adopted rules like the tender years doctrine.<sup>146</sup> As early as 1809, in *Prather v. Prather*, for example, the court gave custody of a five-year-old girl to her mother instead of her father because it was in the child's best interest.<sup>147</sup>

Although custody decisions seemed to look at the best interest of the children, the property interests and rights of children did not change. Fathers were still entitled to a child's wages and earnings under the common law.<sup>148</sup> A father could bring an action against an employer for a child's wages directly.<sup>149</sup> In return, fathers were expected to support children and provide protection.<sup>150</sup>

Today, an individual can enter into the workplace at a much younger age than an individual can enter into a binding contract or have the ability to independently control the wages earned from employment. The Fair Labor Standards Act prevents children from working under 16 in a formal position, but there are exceptions for agricultural, entertainment, or family business employment as well as informal positions such as babysitting.<sup>151</sup> It also limits the employment of minors under age 16 in hazardous occupations.<sup>152</sup> State laws vary in placing fewer or more restrictions on children working.<sup>153</sup>

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145. *Id.* at 50.

146. *See* *Miner v. Miner*, 11 Ill. 43, 49–50 (1849) (“[T]he best interest of the child must be primarily consulted. It is upon this consideration that an infant of tender years is generally left with the mother . . . even when the father is without blame . . .”).

147. *Prather v. Prather*, 4 S.C. Eq. (4 Des. Eq.) 33, 39–40, 44 (S.C. App. Eq. 1809); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 237–38 (1985) (discussing *Prather*).

148. MADDEN, *supra* note 19, § 120, at 403–04 (“[T]he father is entitled to its services and earnings. The right to a child's services is generally said to be based on the parent's duty to support the child.” (footnotes omitted)).

149. *Id.* § 120, at 406.

150. *Id.* at 397.

151. *See* 29 U.S.C. § 213 (2012); 29 C.F.R. § 570.2 (2017).

152. 29 U.S.C. §§ 212–213.

153. MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 482 (8th ed. 2015). The authors explore some possible causes of the variations in state law:

There is no clear pattern of state regulation [of child labor]: some states have higher standards than the FLSA and others have lower ones. Local conditions are often reflected in state regulations: Maine has special laws regarding the employment of children in the ski industry, while Nevada has specific restrictions on employment in casinos.

*Id.*

In many states, parents are still entitled to the wages minors earn from their employment in return for the parent's support and maintenance of the child.<sup>154</sup> As a practical matter, this means that a parent's creditor may reach a child's wages to pay the parent's debt.<sup>155</sup> A parent may relinquish a child's wages to protect them from a creditor.<sup>156</sup> There is a fine balance between property owned by a minor and property earned by a minor but owned by his parents. In one case, for example, a court held that parents had relinquished their rights to their son's earnings when the son had purchased a car with those earnings.<sup>157</sup> If a parent knows about a child's employment, permits the employment to continue, and does not garnish the child's wages, the child will own those wages.<sup>158</sup>

A child may be emancipated by a judicial order, which ends the obligation of a parent to support a child and allows a child the right to contract and manage her own property without limitation.<sup>159</sup> Depending on state law, marriage or military service may produce emancipation as a matter of law.<sup>160</sup> Oftentimes, child actors and athletes take advantage of emancipation in order to have control over their wages and earnings.<sup>161</sup>

In the last 40 years, the law has continued to adjust to the changing rights of children. In 1979, the Supreme Court held that a child is protected by the Constitution and has constitutional rights to enforce, thus expanding the protections of the common law into a constitutional law framework.<sup>162</sup> As the Court stated in *Planned Parenthood of Central Missouri v. Danforth*, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."<sup>163</sup> Although the Supreme Court has declared that children have constitutional

154. See, e.g., *N.A.H. v. S.L.S.*, 9 P.3d 354, 359 (Colo. 2000); *Rohm v. Stroud*, 194 N.W.2d 307, 308 (Mich. 1972); *Biermann v. Biermann*, 584 S.W.2d 106, 108 (Mo. Ct. App. 1979); *Peot v. Ferraro*, 266 N.W.2d 586, 588 (Wis. 1978).

155. See Jillian Benbow, *Under My Roof: Parents' Rights to Children's Earnings*, 16 J. CONTEMP. LEGAL ISSUES 71, 75 (2007).

156. *Id.* at 75-76; see also *Atwood v. Holcomb*, 39 Conn. 270, 274 (Conn. 1872) ("[T]he law does not permit creditors to control the father's freedom in the important matter of dealing with his son's time and employment as the best interest of his son may seem to require."); *Smith v. Simpson*, 133 S.E.2d 474, 481 (N.C. 1963) ("But where a father permits his minor son to work for himself and receive the earnings of his own labor to do with as he wishes, there has been an emancipation with respect thereto.").

157. *Slater v. Cal. State Auto. Ass'n*, 19 Cal. Rptr. 290, 291 (Dist. Ct. App. 1962).

158. *Lottinville v. Dwyer*, 27 A.2d 305, 309 (R.I. 1942); *Atkins v. Sherbino*, 4 A. 703, 706 (Vt. 1886).

159. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 282-83 (2011).

160. *Id.*

161. *Id.*

162. *Bellotti v. Baird*, 443 U.S. 622, 639-51 (1979).

163. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).



rights, the rights are applied “with sensitivity and flexibility to the special needs of parents and children.”<sup>164</sup>

Scholars have advocated for changing capacity standards for minors in various aspects of law.<sup>165</sup> Professor Emily Buss’s theory is that children should be able to make their own decisions when they have demonstrated a capacity to initiate choice and the potential harm arising from the choice is minimal.<sup>166</sup> She argues that allowing children decisional autonomy will increase their “decision[-]making skills,” enhance their sense of “identity,” and “increase their competence” as citizens who have rights in the future.<sup>167</sup> Having developmentally aware children, in turn, benefits society.

The rights of children continue to develop on the world stage as well. The United Nations Convention on the Rights of the Child promulgated a standard that “assure[d] to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child.”<sup>168</sup> The United States has failed to ratify this Convention because of concerns that it might endanger parental rights.<sup>169</sup> As we will see in this Part, state courts apply a similar concept of “age appropriate” standards for minors’ rights. A similar standard needs to be applied to minors’ property interests, especially when it comes to digital assets.

#### B. INFANCY DOCTRINE AS APPLIED TO DIGITAL ASSETS

Perhaps one of the closest legal doctrines to testamentary capacity is contractual capacity. Minors’ ability to contract is significant to their ownership of digital assets for several reasons. First, one creates digital assets pursuant to a contract. Social media and email accounts exist pursuant to a contract that minors have to agree to in order to use the platform.<sup>170</sup> As we saw above, the law grants minors contractual capacity.<sup>171</sup> Certain exceptions exist, but, generally, a minor has the ability to contract but can disaffirm a contract under the infancy doctrine.<sup>172</sup>

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164. *Bellotti*, 443 U.S. at 632.

165. Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 84–85 (2011).

166. Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 34–35.

167. *Id.*

168. G.A. Res. 44/25, Convention on the Rights of the Child art. 12(1) (Nov. 20, 1989).

169. GROSSMAN & FRIEDMAN, *supra* note 159, at 280.

170. See Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799, 816–17 (2014).

171. See *supra* Section II.B.

172. See *supra* Section II.B; see also Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 672 (1999) (Kennedy, J., dissenting) (“The law recognizes that children—particularly young children—are not fully accountable for their actions because they lack the capacity to exercise mature judgment.”).

Recent instances of the infancy doctrine in the world of online contracting demonstrate a shifting conception of minors and their ability to contract online. Where minors try to disaffirm a contract in online contracting cases, courts are less willing to allow it, especially if a minor has obtained a benefit from their use of the online platform.<sup>173</sup> Although cases are few, courts that have confronted the issue of minors contracting online have considered minors more capable of protecting themselves by making wise decisions in the online marketplace.<sup>174</sup> In *A.V. v. iParadigms*, four minors sued iParadigms for copyright infringement of their work submitted on its anti-plagiarism software.<sup>175</sup> Each of the minors were required by their teacher to submit their papers through iParadigm's program.<sup>176</sup> The minors assented to the terms of service agreement but added written disclaimers on their submitted papers.<sup>177</sup> They later sought to void the contract by asserting the infancy doctrine.<sup>178</sup> The court held that the students could not disaffirm the contract because they retained the benefits of using the program, namely a graded submitted paper as required by their teachers.<sup>179</sup> The court strictly applied the infancy doctrine and saw any use of the online platform as a benefit to the minor.

Similarly, in *C.M.D. v. Facebook Inc.*, a court dismissed a case brought by minors alleging that Facebook could not use their likeness in advertisements because they had not legally entered into a contract with Facebook.<sup>180</sup> The court found that the minors had continued to use Facebook after filing suit and therefore manifested an intention not to disaffirm the contract.<sup>181</sup> Again, the benefit of using social media was enough to prevent minors from disaffirming under the infancy doctrine. A federal court followed suit in *E.K.D. ex rel. Dawes v. Facebook, Inc.*, finding that minors who were alleging privacy violations could not disaffirm a contract with Facebook, because they retained the benefits of the contract by using the platform.<sup>182</sup>

If such interpretations continue, it would be difficult for any minor to void a contract with online providers because they would have had to use the

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173. *C.M.D. v. Facebook, Inc.*, No. C 12-1216 RS, 2014 WL 1266291, at \*4 (N.D. Cal. Mar. 26, 2014); *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894, 900 (S.D. Ill. 2012); *A.V. v. iParadigms, Ltd. Liab. Co.*, 544 F. Supp. 2d 473, 480-81 (E.D. Va. 2008), *aff'd in part and rev'd in part on other grounds sub nom. A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

174. *C.M.D.*, 2014 WL 1266291, at \*4; *E.K.D.*, 855 F. Supp. 2d at 900; *A.V.*, 544 F. Supp. 2d at 480-81.

175. *A.V.*, 544 F. Supp. 2d at 477-78.

176. *Id.* at 478.

177. *Id.*

178. *Id.* at 480-81.

179. *Id.*

180. *C.M.D. v. Facebook, Inc.*, No. C 12-1216 RS, 2014 WL 1266291, at \*1, \*4 (N.D. Cal. Mar. 26, 2014).

181. *Id.*

182. *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894, 900 (S.D. Ill. 2012).

service in order to have a claim. Courts' hesitation to apply the infancy doctrine to online service agreements demonstrates an assumption that minors do have the requisite capacity to contract online because of their familiarity with the services rendered. For example, in the cases involving Facebook, the courts assume that the minors are capable of understanding that they have a contract with Facebook and that they receive a benefit in the form of being a Facebook member.<sup>183</sup> The infancy doctrine is one that is meant to protect minors, but courts' decisions do not reflect the idea that minors are in need of protection, because minors understand what it means to use online platforms. Minors may not understand the contractual repercussions of using an online service, but courts are unwilling to allow minors to use online services and then later disaffirm the agreement. In this way, courts hold minors to the same standard as adults. The contract stands.

Because courts have been upholding contracts between minors and online companies, it stands to reason that if a minor contracts with a company for the disposal of his or her assets at death that his instructions will control the distribution. Popular platforms such as Google and Facebook allow account holders to designate what should happen to their accounts when they die.<sup>184</sup> Such designations are part of the contractual agreement between an account holder and a company. These contractual provisions are an encouraging demonstration of companies honoring the testamentary wishes and desires of their clients, in accordance with the aims of succession law.

Contracts controlling the disposition of goods are non-probate transfers and thus a minor is not required to have capacity under succession law to enter into such a contract.<sup>185</sup> A minor's ability to contract, in conjunction with courts' hesitation to allow disaffirmance, should encourage courts to uphold a contract after death for minors, even if that contract has a testamentary purpose. Digital asset companies could thus circumvent legal capacity age requirements and give minors more control over their assets by enacting some kind of contractual way to dispose of the assets upon death. Although this seems like a tempting solution to the problem of minors' succession rights over their digital assets, it puts a minor at the mercy of a digital asset provider. Many online providers of digital assets do not provide this service as part of their contractual agreement, so the only way for minors to dispose of the assets would be through a testamentary document for which they would need legal capacity to execute.<sup>186</sup> In addition, even if the companies do provide a contractual way to distribute digital assets at death, a minor would be wholly

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183. *See id.*

184. *About Inactive Account Manager*, GOOGLE, <https://support.google.com/accounts/answer/3036546> (last visited Mar. 16, 2019); *How Do I Report a Deceased Person or an Account on Facebook That Needs to Be Memorialized?*, FACEBOOK, <https://www.facebook.com/help/150486848354038> (last visited Mar. 16, 2019).

185. Banta, *supra* note 170, at 804-07.

186. *See infra* Section III.A (discussing the need for legal capacity to change).

dependent on the method, scope, and rules established by the company. A minor could not opt out of those rules like an adult can under RUFADAA.<sup>187</sup>

The infancy doctrine will continue to evolve as minors enter into contracts with online companies. Our doctrine concerning minors' testamentary capacity should follow the example of digital contracting. Minors are able to enter into these contracts and they are enforceable. If minors have the capacity to enter into enforceable contracts concerning their digital assets, they should also have the capacity to choose what happens to these assets upon their death. Although testamentary capacity and contractual capacity are historically different, they are remarkably similar in substance. A minor has the ability to understand she is entering into a contract, consenting to the terms, and receiving a benefit that bars her from disaffirming it in the future. A minor also has the ability to understand she is executing a will that will transfer her digital assets upon death.

### C. MATURE MINOR DOCTRINE AS APPLIED TO DIGITAL ASSETS

Healthcare decision-making is another area that shows the evolving capacity doctrine of minors. Under the common law, minors are incapable of giving consent for medical treatment or refusing medical treatment.<sup>188</sup> A parent or legal guardian makes medical decisions for a minor.<sup>189</sup> There are a number of exceptions in many states for certain medical conditions. Minors, for example, can receive treatment for sexually transmitted diseases, substance abuse, and mental health disorders without parental permission.<sup>190</sup> In addition, minors may obtain contraceptives or pregnancy tests without parental consent.<sup>191</sup> Some states have enacted what are called "mature minor" statutes.<sup>192</sup> These statutes allow minors who show they are mature to consent to some medical procedures. A finding of "maturity" in this context is very much like a finding of capacity. The statutes do not define what it means to be "mature." Individual judges and/or doctors in the case at hand make a determination of what it means to have mature judgment.

Minors' rights and capacity took a constitutional turn when courts considered whether minors could obtain an abortion without parental consent. In *Planned Parenthood v. Danforth*, a Missouri law required written

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187. See REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 4 (UNIF. LAW COMM'N 2015).

188. *Cardwell v. Bechtol*, 724 S.W.2d 739, 743-45 (Tenn. 1987) (holding that, under common law, parental consent is required before a physician can treat a minor).

189. *Browning v. Hoffman*, 111 S.E. 492, 497 (W. Va. 1922) ("Except in very extreme cases, a surgeon has no legal right to operate upon a patient without his consent nor upon a child without the consent of its parent or guardian.").

190. See, e.g., ALA. CODE § 22-8-6 (LexisNexis 2015).

191. Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 354-55 (2006).

192. ALASKA STAT. § 25.20.025 (2016); ARK. CODE ANN. § 20-9-602(7) (2014); DEL. CODE ANN. tit. 13, §§ 707, 710 (WEST 2005); IDAHO CODE § 39-4503 (2011); KAN. STAT. ANN. § 38-123b (2000).

consent of a parent for a minor under the age of 18 to obtain an abortion.<sup>193</sup> The Supreme Court held this statute unconstitutional because it allowed parents power to prohibit a minor from obtaining a constitutionally-protected abortion.<sup>194</sup> Similarly, in *Bellotti v. Baird*, a Massachusetts statute prohibited a minor from obtaining an abortion without the consent of both parents. If consent could not be obtained, a minor could petition a judge to grant permission “for good cause shown.”<sup>195</sup> The Supreme Court issued two plurality opinions on the case. Justice Powell held that the statute violated minors’ constitutional right to an abortion because it allowed a judge to withhold consent from a mature minor and did not provide an avenue for a minor to seek a judicial hearing without first obtaining parental consent.<sup>196</sup> Justice Stevens held that the statute was unconstitutional for the same reason it was unconstitutional in *Planned Parenthood v. Danforth*—it gave the right to forbid an abortion to a third party.<sup>197</sup>

States have followed Justice Powell’s opinions in formulating statutes concerning minors’ obtaining abortions. Statutes must provide some kind of procedure for minors to bypass parental consent in which a minor can petition a court or other neutral body like an administrative agency. A court must consent to an abortion if it finds that a minor “is mature enough and well enough informed” or if an abortion would be in her best interest.<sup>198</sup> Although many courts leave this concept of maturity undefined, some state courts have attempted to give further context. The Kansas Court of Appeals, for example, instructed courts to determine whether a minor has “the intellectual capacity, experience, and knowledge necessary to substantially understand the situation at hand and the consequences of the choices that can be made.”<sup>199</sup> At its root, the test for maturity is very much like the test for testamentary capacity. Both question whether a minor understands what she is doing and whether she has the information and judgment to make an informed and voluntary decision.

The mature minor doctrine thus allows courts to bypass parental permission if a minor convinces a court that she is mature enough to grant her own informed consent to the procedure. The Supreme Court has required this capacity determination for minors seeking an abortion because obtaining an abortion is a constitutional right.<sup>200</sup> Similarly, the right to devise property is presumably protected as a constitutional right. In *Hodel v. Irving*, the Supreme Court considered a congressional act that prohibited Native

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193. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 85 (1976).

194. *Id.* at 71.

195. *Bellotti v. Baird*, 443 U.S. 622, 625 (1979).

196. *Id.* at 651.

197. *Id.* at 643.

198. *Id.* at 643, 647–48.

199. *In re* Petition of Doe, 866 P.2d 1069, 1074 (Kan. Ct. App. 1994).

200. *Bellotti*, 443 U.S. at 651; *Roe v. Wade*, 410 U.S. 113, 164–66 (1973).

Americans from devising shares of their land.<sup>201</sup> The Court found “that the right to pass on valuable property to one’s heirs is itself a valuable right,” which “has been part of the Anglo-American legal system since feudal times” and “total abrogation of the right to pass property is unprecedented and likely unconstitutional.”<sup>202</sup> States’ constitutions also protect the right to devise property.<sup>203</sup> The right to an abortion and the right to devise property are protected by the Constitution and should be treated similarly when it comes to assessing minors’ capacity. Allowing some kind of bypass to consider whether a minor understands the legal acts she is taking promotes the integrity of the constitutional rights at stake. As discussed above, succession laws provide this case-by-case determination in the concept of testamentary capacity, which can be employed to assess whether a minor devising digital assets understood the repercussions of such actions. Consent from a parent or guardian should not be necessary when a right protected by the Constitution is at issue.

Another area of medical decision-making that is informative for our digital assets discussion is the treatment of a minor’s desire to end life-sustaining medical treatment. Adults use what we call living wills or advance directives to make their intent known regarding life support and other life sustaining measures.<sup>204</sup> If an adult formally executes a document stating her wishes about medical treatment at death or appointing someone to make those decisions, physicians are required to follow them.<sup>205</sup> Because minors lack legal capacity, they cannot execute a living will. Nonetheless, some courts have applied the mature minor doctrine in end of life decisions. For example, in *In re Swan*, a court found that a 17-year-old minor could decide to refuse further treatment for his condition.<sup>206</sup> In *In re E.G.*, a court found that a minor was mature enough to refuse a blood transfusion that could save his life.<sup>207</sup> The trial court judges were able to consider evidence in these cases about whether the child was fully informed, including the minor’s own testimony. In two other cases where a minor refused a blood transfusion, the court found that the minors did not have the “maturity” to reject life-sustaining treatments.<sup>208</sup>

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201. *Hodel v. Irving*, 481 U.S. 704, 706–07 (1987).

202. *Id.* at 715–16.

203. ARK. CONST. art. 2, § 20; KAN. CONST. BILL OF RTS. § 17; NEB. CONST. art. 1, § 25; TEX. CONST. art. XVI, § 52.

204. Gregory G. Sarno, *Living Wills: Validity, Construction, and Effect*, 49 A.L.R.4th § 1, at 812 (1986).

205. *Id.*; see, e.g., *Saunders v. State*, 492 N.Y.S.2d 510, 516–17 (Sup. Ct. 1985).

206. *In re Swan*, 569 A.2d 1202, 1206 (Me. 1990).

207. *In re E.G.*, 549 N.E.2d 322, 323–24 (Ill. 1989).

208. *In re Long Island Jewish Med. Ctr.*, 557 N.Y.S.2d 239, 243 (Sup. Ct. 1990); *O.G. v. Baum*, 790 S.W.2d 839, 842 (Tex. App. 1990).

No matter which way the court came out, the process of the courts' decision-making is significant. The question was always about whether the minor in his or her individual situation had the capacity to decide to die and refuse life-sustaining treatments. A minor's life is at issue, and even so, courts do not apply a blanket rule depriving these minors of legal capacity to make the decision. Instead, courts seriously consider whether a minor can make this decision for herself—courts hear testimony, consider the issues and facts of the specific case, and rule whether a minor had capacity.<sup>209</sup> This same model should be applied in deciding whether a minor had testamentary capacity to devise his or her digital assets. The stakes do not get much higher than deciding whether to continue life sustaining treatments. If we are willing to apply the mature minor doctrine in health care decisions, we should also apply the doctrine to testamentary decisions regarding digital assets. Both relate to extremely personal decisions regarding identity and expression. Honoring a minors' intent after death regarding the identity she has created through her digital assets shows respect for her dignity and autonomy that the law has granted in medical decision-making cases.

#### D. CAPACITY TO CONSENT TO SEX AND MARRIAGE

In many states, the law grants capacity to minors to marry before it grants capacity to devise digital assets. Similar to testamentary rights, the common law historically granted consent to minors to marry earlier than the law allows today.<sup>210</sup> While 18 is still the age minors may consent to marry without parental permission, most states allow marriage between 16 and 17 with parental consent, and allow minors to marry younger in special circumstances with judicial approval.<sup>211</sup> As discussed above, once a minor marries intestacy law will control in the event of a minor's death giving a large portion or even all of the decedent's property to her spouse.<sup>212</sup> Marriage, then, becomes the only way to sidestep the lack of capacity for a minor to make a will. Marrying an individual should not be the only way a minor can ensure that property goes to his or her spouse. Under the common law, once a minor marries, she is considered emancipated and thus has legal capacity to make a will and

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209. *In re Long Island Jewish Med. Ctr.*, 557 N.Y.S.2d at 243; *O.G.*, 790 S.W.2d at 842.

210. Erin K. Jackson, *Addressing the Inconsistency Between Statutory Rape Laws and Underage Marriage: Abolishing Early Marriage and Removing the Spousal Exemption to Statutory Rape*, 85 UMKC L. REV. 343, 347–48 (2017).

211. Todres, *supra* note 11, at 1143–44; *see, e.g.*, ALASKA STAT. § 25.05.171(b) (2016) (allowing a minor to marry as early as 14 if parents consent or if a judge finds that it is in the best interest of the child over the objection of the parents).

212. UNIF. PROB. CODE § 2-102 (UNIF. LAW COMM'N 2010); *see supra* notes 129–30 and accompanying text.

manage and own property.<sup>213</sup> Many states have codified this common law doctrine.<sup>214</sup>

Underage marriages are a glaring example of the incongruity of the law when it comes to capacity. It shows that courts and legislatures believe that minors have some sort of capacity that should be honored before they turn 18. We should apply this to a determination that minors have legal capacity to at least devise digital assets in the event of their death. Allowing a minor to marry before allowing a minor to devise is not sound policy.

Statutory rape laws provide another interesting piece of the puzzle when it comes to minors' capacity. In most states, minors cannot consent to sex, no matter express consent or conduct that indicates otherwise.<sup>215</sup> A partner who has sex with a minor is guilty of statutory rape.<sup>216</sup> The only exception, of course, is if the minor marries his or her partner with parental consent.<sup>217</sup> Jurisdictions do not permit a defendant to argue that he or she mistakenly believed the minor was older.<sup>218</sup> Minors, however, consent to sex with peers without criminal charges being brought all the time. Some states have altered statutory rape laws to not apply where minors are peers.<sup>219</sup> The larger the gap in age, the more likely there will be a finding of statutory rape.<sup>220</sup> This is more of an issue of undue influence than capacity. We perceive that an older partner is taking advantage of a younger partner. Nonetheless, in certain situations, a minor does have the consent or at least will not be punished for engaging in sexual activities with a peer if he or she demonstrates capacity to make this decision.

If a minor has capacity to marry, to have sex, and to have an abortion, it does not seem unreasonable to grant minors capacity to make a testamentary devise. Devising digital assets involve the same exercises of autonomy, personhood, and dignity involved in allowing minors to marry, have sex, or have an abortion. The law gives minors capacity in these serious and personal

213. Jackson, *supra* note 210, at 356.

214. Glover, *supra* note 12, at 117–18 (listing which states have codified the doctrine).

215. Jackson, *supra* note 210, at 361–65.

216. *Id.* at 361.

217. *Id.* at 362.

218. *Id.* at 361–62.

219. *Id.* at 364.

220. MODEL PENAL CODE § 213.3 cmt. 2 (AM. LAW INST. 1980), *in* 2 AM. LAW INST., MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) 385 (1980). The commentators explain:

It will be rare that the comparably aged actor who obtains the consent of an underage person to sexual conduct . . . will be an experienced exploiter of immaturity. The more likely case is that both parties will be willing participants and that the assignment of culpability only to one will be perceived as unfair.

*Id.* (footnote omitted); *see* MINN. STAT. § 609.342–.345 (2014) (defining first, second, third, and fourth degree sexual assault and demonstrating that a large age difference creates a presumption that a minor was coerced by a perpetrator).



situations and shows its willingness to allow minors to engage in the legal act of making a will as well, at least for the limited purpose of devising digital assets.

#### IV. SUCCESSION LAW SAFEGUARDS MINORS

Under the law, minors lack or have diminished capacity to make legal decisions. The Supreme Court has recognized that the law must accommodate minors because of “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”<sup>221</sup> Capacity laws of minors are meant to protect them and ensure that scheming adults do not take advantage of a child’s vulnerability, naiveté, or ignorance. This is a paramount policy concern of capacity, but using an age limit for testamentary capacity is an inadequate way to ensure that the law honors an individual’s desire concerning property. Succession law has adopted a better way to ensure freedom of succession for individuals who may have a diminished mental capacity through its doctrines of testamentary capacity, undue influence, and slayer rules. Applying the common law rules of testamentary capacity, undue influence, and slayer rules to minors’ digital assets will protect a minor’s interests and promote freedom of succession.

Applying the principles of succession law would better protect the interests of minors and provide a solution more closely tailored to the situation presented. Succession law safeguards minors’ interests and addresses concerns about minors’ perceived vulnerabilities. The next section addresses the testamentary capacity standard that minors would need to satisfy in order to distribute digital assets at their deaths.

##### A. TESTAMENTARY CAPACITY

In order to enter into a valid testamentary instrument, an individual must have testamentary capacity. The capacity standard for executing a testamentary instrument is intentionally low to encourage freedom of succession. It is lower than the capacity to enter into a contract.<sup>222</sup> Capacity is required at the time of the execution of the will.<sup>223</sup> If a testamentary instrument is executed with proper formalities, then a presumption of capacity arises in most states and under the Uniform Probate Code.<sup>224</sup> This presumption can be overcome by showing that the testator was not aware of

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221. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

222. *See, e.g., In re Estate of Pringle*, 751 N.W.2d 277, 284 (S.D. 2008) (“[I]t is not necessary that a person desiring to make a will have the capacity to make contracts and do business.”); *DUKEMINIER ET AL.*, *supra* note 96, at 141.

223. *RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS* § 8.1 (AM. LAW INST. 2003); *see, e.g., Stevens v. Vancleve*, 23 F. Cas. 35, 38 (C.C.D.N.J. 1822) (No. 13,412).

224. *UNIF. PROB. CODE* § 3-407 (UNIF. LAW COMM’N 2010).

what he was doing at the time he executed his will. In order to execute a testamentary instrument an individual

[M]ust be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.<sup>225</sup>

A totality of circumstances approach applies in determining whether a certain factor gives rise to a lack of testamentary capacity when an individual executed a testamentary document.<sup>226</sup> Testators who are suffering from physical illness, mental illness, or who are eccentric are still held to have capacity if at the time of execution they were aware of what they were doing and to whom they were giving their property.<sup>227</sup> Courts have found testators lacked testamentary capacity in situations where they were disoriented because of disease or old age and lacked the ability to comprehend they were engaging in a testamentary act.<sup>228</sup> Old age or diseases are not determinative factors; courts have been clear “that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity.”<sup>229</sup> The test for testamentary capacity is a substantive one that looks to a testator’s ability to understand that she is committing a legal act that will have effect to

225. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.1 (b).

226. *In re Estate of Byrd*, 749 So. 2d 1214, 1217–18 (Miss. Ct. App. 1999) (considering the totality of the circumstances to find that decedent’s illness, paired with the effects of his medication, made his will void due to lack of capacity); *In re Last Will & Testament of Erde*, No. W2017-00551-COA-R3-CV, 2017 WL 6622817, at \*9–10 (Tenn. Ct. App. Dec. 28, 2017) (considering totality of circumstances to determine if decedent recognized her bounty).

227. *Pace v. Steele*, 524 S.W.3d 420, 428–30 (Ark. Ct. App. 2017); *Wisowaty v. Baumgard*, 629 N.E.2d 624, 628–31 (Ill. App. Ct. 1994) (stating that the fact that decedent was hospitalized immediately after executing a will was not enough to establish lack of capacity); *In re Ferguson’s Estate*, 215 N.W. 51, 53–55 (Mich. 1927); *Vaughan v. Malone*, 211 S.W. 292, 293 (Tex. Civ. App. 1919) (stating that Testator’s eccentric personality and child-like tendencies were not enough to invalidate her will).

228. *See, e.g., Fletcher v. DeLoach*, 360 So. 2d 316, 319 (Ala. 1978) (finding lack of testamentary capacity for a testator with depression and disorientation); *In re Estate of Killen*, 937 P.2d 1368, 1374 (Ariz. Ct. App. 1996) (finding the same because testator was experiencing insane delusions); *In re Succession of Keel*, 442 So. 2d 691, 693 (La. Ct. App. 1983) (finding the same because testator had a brain tumor); *In re Rounds’ Will*, 54 N.Y.S. 710, 711, 713 (Sur. Ct. 1898) (finding the same because of testator’s mental illness).

229. *In re Selb’s Estate*, 190 P.2d 277, 279 (Cal. Dist. Ct. App. 1948); *see also Bourgeois v. Hano (Succession of Bush)*, 292 So. 2d 915, 917 (La. Ct. App. 1974) (holding that despite physical disability and deteriorating health, the decedent possessed testamentary capacity); *In re Estate of Adams*, 101 P.3d 344, 348 (Okla. Civ. App. 2004) (“[A]dvanced age or physical infirmity alone do not render one incapacitated to make a will.”).

distribute her property when she dies. Age is not determinative in this analysis, but of course can be a factor in assessing a testator's ability to know the nature and extent of her property and the disposition she is making.

In regards to digital assets, minors could easily meet the substantive standard for testamentary capacity. Age would not be determinative in the analysis but could be a factor in assessing whether a minor truly knew the nature and extent of his digital assets. In most cases, minors know the nature and extent of what they have posted on social media or in their email accounts. They understand that their families and friends are the natural objects of their bounty. Minors understand digital assets in a way that even their parents perhaps do not understand. Minors are digital natives, and they have grown up with email and social networking as part of their every-day life.<sup>230</sup> Many minors today probably had their first picture posted on social media when they were babies. Minors who are using digital assets will most likely be capable of understanding that they are making a disposition of digital assets in the event of their death. They are capable of understanding that if they die they can choose to have their accounts deleted or transferred. Lastly, they are able to make a plan for an orderly disposition of their digital assets at death. Their capacity should be presumed if they properly execute a testamentary document expressing their wishes for their digital asset accounts. The presumption, of course, is rebuttable. If evidence shows that a particular minor did not have the ability to understand what he or she was doing when she made a testamentary disposition concerning digital assets, then her intention as expressed in her testamentary document will be invalid and the laws of intestacy will control.

A presumption of testamentary capacity balances the interests of a deceased minor and her parents who may want access or control of the accounts at their child's death. If parents can show that their child was too young, sick, or distraught to understand what she was doing when she executed a testamentary document controlling her digital assets, then the document will be invalidated. Testamentary capacity ensures that if a testator is suffering from mental distress or illness that causes him to not understand what he is doing when executing a will, the execution will be invalid.<sup>231</sup> If a minor's parents are unable to make that showing of incapacity, then under succession law, minors' digital asset accounts should be treated like an adult's digital asset accounts and the intent of the individual should be honored. A

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230. AMANDA LENHART, PEW RESEARCH CTR., TEENS, SOCIAL MEDIA & TECHNOLOGY OVERVIEW 2015, at 3, 16 (2015), [http://www.pewresearch.org/wp-content/uploads/sites/9/2015/04/PI\\_TeensandTech\\_Update2015\\_0409151.pdf](http://www.pewresearch.org/wp-content/uploads/sites/9/2015/04/PI_TeensandTech_Update2015_0409151.pdf) (reporting that 92% of teens go online daily and 71% of teens use more than one social networking site).

231. *In re Estate of Killen*, 937 P.2d at 1374 (finding lack of capacity where testator had insane delusions about her family); *In re Rounds' Will*, 54 N.Y.S. at 713 (finding a will to be invalid because the testator suffered for years with mental illness and there was no clear and convincing proof that the will expressed her wishes).

minor, like an adult, should be able to choose whether she wants the accounts deleted upon her death or devised to parents, friends, or other family members. A rebuttable presumption of testamentary intent provides the needed protection that the law requires for minors and respects the role of parents.

Testamentary capacity is an intentionally low standard. It aims to protect those who are unable to understand that they are engaging in a legal act that will dispose of their property when they die. A fact dependent analysis is more helpful in assessing whether an individual has that understanding regarding her digital assets than an arbitrary age. It makes no more sense to deny capacity to those under 18 years old than it would be to deny capacity to those over age 90. Age is irrelevant in the determination of actual testamentary capacity. The true test is whether an individual knew he was engaging in a testamentary act that would have legal effect at his death. Someone who is emotionally or mentally distraught may not be able to satisfy this standard in light of available evidence. Their age, be it 13, 33, 63 or 93 does not have a bearing on the analysis. Only a case-by-case analysis of the individual's capacity fairly assesses whether they meet the standard imposed by succession law.

*B. UNDUE INFLUENCE, FRAUD, AND SLAYER RULES*

Like testamentary capacity, the doctrine of undue influence would provide protection for minors who may have had testamentary capacity when they executed a testamentary document but were nonetheless unduly influenced by another. Undue influence invalidates a testamentary instrument if it is shown that the desire of a testator was overcome and replaced by the desires of another and for their benefit.<sup>232</sup> The Restatement standard of undue influence requires a showing of a confidential relationship and suspicious circumstances.<sup>233</sup> Once this is met, a proponent of a will is required to overcome the presumption of undue influence by evidence of good faith.<sup>234</sup> The doctrine of undue influence is aimed at protecting vulnerable elderly or sick individuals from those who would exploit them.<sup>235</sup> Thus, the doctrine of undue influence is already tailored to assuage any concerns about minors' vulnerability. Undue influence tries to protect those who are susceptible to manipulation. In the case of a minor, the confidential relationships in question encompass a variety of individuals who could possibly take advantage of a minor's good will in a testamentary disposition.

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232. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.3(b) (AM. LAW INST. 2003).

233. *Id.* cmt. f.

234. *Id.* cmts. f–g.

235. *Id.* cmt. e; see *In re Ferrill*, 640 P.2d 489, 493–94 (N.M. Ct. App. 1981) (finding undue influence where testator had a terminal cancer diagnosis); *In re Van Ness' Will*, 139 N.Y.S 485, 490–91, 500–01, 521–22 (Sur. Ct. 1912) (finding that an octogenarian testator was taken advantage of by a 30-year-old).

Trustees, custodians, doctors, teachers, siblings, relatives, lovers, friends, or even parents, could unduly influence a minor for nefarious ends. If such a situation exists, the doctrine of undue influence invalidates a will. The doctrine aims to protect the minors' heirs under the law and attempts to effectuate the true intent of a testator by applying intestacy laws instead of the intent of an undue influencer.

Undue influence is hardly a sleek doctrine of law that guarantees a just outcome. It is not a perfect solution to address concerns of others taking advantage of minors. Courts are inconsistent in their definitions of what constitutes undue influence, and it is very difficult to predict whether a court will find undue influence in a certain case. Oftentimes, undue influence findings are reflective of the court's view of the appropriateness of a challenged relationship than whether the testator was unduly influenced.<sup>236</sup> As juries determine whether an individual was vulnerable and taken advantage of by an interloper, social norms and behaviors take center stage in the determination. For example, until recently, courts found wills in which individuals gave property to a same-sex partner to be products of undue influence because the family objected to the testator's relationship and juries found such relationships "unnatural."<sup>237</sup> Unsurprisingly, several scholars have attacked the doctrine as one that is repressive, keeps wealth in families, and fails to help a testator during his life.<sup>238</sup>

In a legal landscape where legislators are wary of giving minors the legal capacity to execute a will, perhaps the undue influence doctrine will mitigate their concerns. Parents will likely be more successful in contesting a minors' will as a product of undue influence if a minor has devised digital assets to someone with whom he or she engaged in socially inappropriate or illegal activities. For example, if a minor devises digital assets to an adult with whom he or she is having sexual relations, it is likely that such a conveyance would be struck down under undue influence. Moreover, in the realm of digital assets, there is less fear that the monetary value of the digital assets will motivate litigation. The broader concerns about the efficacy or impact of undue influence are not as relevant to minors' digital asset succession.

The law of succession also invalidates a will if it is shown to be procured by fraud or duress.<sup>239</sup> Undue influence is distinguishable from fraud because undue influence does not require a material misrepresentation or omission

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236. See Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 245 (1996).

237. Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 227 (1981).

238. See Leslie, *supra* note 236, at 243–58; Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576–77 (1997); Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should be Abolished*, 58 U. KAN. L. REV. 245, 261, 263 (2010).

239. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.3(c)–(d) (AM. LAW INST. 2003).

of fact.<sup>240</sup> If a testator executes a will due to misrepresentations, courts would overturn the testamentary document because of fraud.<sup>241</sup> Likewise, if a testator executes a will under threat of a wrongful act, courts would overturn the testamentary document because of duress.<sup>242</sup> Both of these doctrines protect the intent of a testator and ensure that misrepresentation or threats do not limit freedom of disposition. These doctrines will serve to protect a minor's interests and a minors' testamentary intent. This may be especially relevant in the world of digital assets as minors are confronted with fraud or threats of predatory adults who use the Internet as a platform to give themselves access to minors. If there is any evidence of acts that would be threatening to minors, a disposition to those individuals involved would not be upheld. Again, the doctrines of succession law serve to protect the testamentary intent of testators, no matter their age, if there is some kind of wrongdoing that influenced their disposition.

If our policy denying minors' succession rights is to protect children from harm, from disreputable adults, and from unwise decisions, then policy interests favor granting minors succession rights and challenging suspicious circumstances under the doctrine of undue influence. Undue influence takes care to show that an individual is not harmed, not vulnerable to scheming adults, and not making unwise decisions because of the coercion of someone else. Granting minors succession rights will not harm children; rather, they will be enabled to act more autonomously. Honoring minors' intent regarding their digital assets grants them a measure of protection under the law and demonstrates respect for carrying out their intent after their death. If there is some indication of coercion, interference, or bizarre collusion, the doctrines of undue influence, fraud, or duress can be applied to protect the minors' interests.

Testamentary intent and undue influence do not yet apply to minors' succession rights because as explained above, the law imposes an age requirement to have legal capacity to execute a will. There are other doctrines in succession law, however, that limit an individual's right to inherit from someone that they abused, deserted, or failed to support regardless of age.<sup>243</sup>

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240. *Id.* § 8.3(d); *see* *Howe v. Palmer*, 956 N.E.2d 249, 253–54 (Mass. App. Ct. 2011); *In re Estate of Raedel*, 568 A.2d 331, 335 (Vt. 1989).

241. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.3(d); *id.* cmts. j–k; *see, e.g.,* *McDaniel v. McDaniel*, 707 S.E.2d 60, 65 (Ga. 2011) (upholding a jury's finding that the testator altered his will based on misrepresentations made by one of his sons).

242. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.3(c).

243. KY. REV. STAT. ANN. § 392.090(2) (West, Westlaw through 2018 regular session) (“If either spouse voluntarily leaves the other and lives in adultery, the offending party forfeits all right and interest in and to the property and estate of the other, unless they afterward become reconciled and live together as husband and wife.”); *In re Estate of Talerico*, 137 A.3d 577, 581 (Pa. Super. Ct. 2016) (explaining that abandonment can limit a spouse's right to inherit); *In re Estate of Evans*, 326 P.3d 755, 759–61 (Wash. Ct. App. 2014) (explaining that financial abuse can limit the right to inherit).

These limits are often applied to children who mistreat their parents but also apply to parents who mistreat their minor children.<sup>244</sup> The law of succession attempts to effectuate the intent of a minor decedent by prohibiting parents who abandon, fail to care for, or do not maintain custody of their children to inherit under intestacy.<sup>245</sup> In a New Jersey case, for example, a court did not allow a mother to inherit \$1 million the state had paid to her son's estate because the court found she had abused and neglected her son.<sup>246</sup> New Jersey then passed legislation to statutorily prohibit a parent who had abused or neglected a child from inheriting from their child.<sup>247</sup> Similarly, in an unpublished decision in Kentucky, a court found that a father had willfully abandoned his two minor children and thus did not have a right to inherit from his children.<sup>248</sup> Laws that prevent abusive or absent parents from inheriting from their children are a step in the right direction, but do not entirely address the problems that result from refusing to allow minors to decide what happens to their digital property at death.

Standards for abandonment or abuse vary from state to state and may not provide the results a child would have wanted. For example, in *In the Matter of the Estate of Michael D. Fisher, II*, a parent inherited from his 15-year-old son even though he had a distant relationship with his son.<sup>249</sup> The father had not seen his son in the last four years before the child's death, and a court had forbidden him from having unsupervised time with the child until he completed an anger management class.<sup>250</sup> Perhaps this is not what the 15-year-old would have intended, but under current law the boy had no way to legally indicate his intent that would be honored by the courts. Similarly, in *In re Estate of Fuller*, the court found that a parent who had regular visitation with his teenage daughter was allowed to inherit from her estate, even though his daughter did not want to see him on multiple occasions.<sup>251</sup> Whether a parent abandoned or deserted a child is a determination that the probate court has

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244. It usually does not apply to a parent's treatment of a child after the child reaches the age of majority. Thus, a parent's failure to pay child support or establish a parent-child relationship with the child during the child's minority does not later bar the parent from inheriting from their child when the child dies after he or she has reached the age of majority. See, e.g., *In re Estate of Shellenbarger*, 86 Cal. Rptr. 3d 862, 865 (Ct. App. 2008).

245. CAL. PROB. CODE § 7822 (West 2013); N.J. STAT. ANN. § 3B:5-14.1(b)(1) (West 2018); 20 PA. STAT. AND CONS. STAT. ANN. § 2106(b) (West 2016).

246. N.J. Div. of Youth & Family Servs. v. M.W., 942 A.2d 1, 20 (N.J. Super. Ct. App. Div. 2007) (upholding the decision to retroactively terminate parental rights so the mother did not inherit).

247. See N.J. STAT. ANN. § 3B:5-14.1; *In re Estate of Fisher*, 128 A.3d 203, 213 (N.J. Super. Ct. App. Div. 2015).

248. *Calhoun v. Sellers*, No. 2008-CA-001311-DG, 2009 WL 3231506, at \*1-3 (Ky. Ct. App. Oct. 9, 2009).

249. *In re Estate of Fisher*, 128 A.3d at 216.

250. *Id.*

251. *In re Estate of Fuller*, 87 A.3d 330, 335-36 (Pa. Super. Ct. 2014).

to make, and as these cases demonstrate, is usually muddled by family dynamics and distrust between parents.<sup>252</sup>

Succession law prohibits parents who are guilty of misconduct from inheriting from their children in order to protect the presumed intent of a minor. Presumably, a child who was abandoned, abused, or even killed by their parents would not want their parents to inherit. This presumption, however, is inadequate to protect the true intent of a minor, because a minor's testamentary intent likely depends on a myriad of factors that may not be readily apparent to a probate judge. The only way to be certain that the law is safeguarding testamentary intent is to allow minors to execute a testamentary document. Minors will be able to choose for themselves whether a parent is worthy of their assets.

In addition, the slayer rules in succession law prevent a person who feloniously kills another from inheriting from the decedent.<sup>253</sup> The law does not distinguish between whether a decedent is an adult or a minor and applies the same rule to both. This includes a parent who causes the death of a minor and a minor who causes the death of a parent.<sup>254</sup> The slayer rule is based on the underlying theory that an individual should not benefit from wrongdoing as well as a belief that a decedent would not intend to give her property to her murderer.<sup>255</sup> Most states have adopted legislation to prevent a slayer from inheriting.<sup>256</sup> In *Matter of Demesyeux*, a woman murdered her children but was not held criminally liable due to a successful insanity defense.<sup>257</sup> Even though no criminal conviction occurred, the court still found that she could not inherit from her children because she killed them.<sup>258</sup> Slayer statutes usually require intent to kill—mere negligence does not satisfy the standard. For example, in *Carrasco v. State*, an Arizona court held that a mother could inherit

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252. *In re Wright*, 859 N.Y.S.2d 864, 865, 867–68 (Sur. Ct. 2008) (holding that a father's failure to properly secure his child in a car seat, and his falling asleep while driving, leading to the child's death, were not themselves grounds that barred the fathers' inheritance from the child); *In re Estate of Lunsford*, 610 S.E.2d 366, 373 (N.C. 2005) (father's absence and sporadic contacts with daughter established abandonment within the meaning of the statute); *KeyBank Nat'l Ass'n v. Hanns*, No. 22692, 2009-Ohio-1935, 2009 WL 1111255, at \*1, \*5 (Ohio Ct. App. Apr. 24, 2009) (determining that a father had not abandoned minor within meaning of statute).

253. UNIF. PROB. CODE § 2-803 (UNIF. LAW COMM'N 2010) (codifying long-standing common law rule that a killer should not profit from his or her own wrongdoing); *Property Acquired by Killing Another*, BOGERT'S TRUSTS AND TRUSTEES § 478 (2018).

254. *In re Estates of Swanson*, 187 P.3d 631, 638 (Mont. 2008) (holding that a mother would be precluded from inheriting from her children if the trial court found that she "feloniously and intentionally" killed her children (quoting MONT. CODE ANN. § 72-2-813)); *In re Sengillo's Estate*, 134 N.Y.S.2d 800, 802 (Sur. Ct. 1954) (holding that a minor who had killed his father could not collect a share of his father's estate); *Bosley v. Hawkins*, 494 N.E.2d 460, 466–67 (Ohio Ct. Com. Pl. 1985) (holding that a minor who had killed her father could not inherit from the father).

255. See *In re Sengillo's Estate*, 134 N.Y.S.2d at 802.

256. BOGERT'S TRUSTS AND TRUSTEES, *supra* note 253, § 478.

257. See *In re Demesyeux*, 978 N.Y.S.2d 608, 609–10 (Sur. Ct. 2013).

258. *Id.* at 614–15.



from her child even though the mother's negligence in failing to seek medical attention for the child caused the child's death.<sup>259</sup> Without the required intent to kill, the slayer statute does not apply. The slayer rules and unworthy heir doctrine apply equally to minors and demonstrate a willingness in the law to honor a minors' testamentary intent in extraordinary circumstances. The same respect should be given to a minor's testamentary wishes concerning digital assets.

The slayer statute may be especially important to ensuring minors' digital assets are protected if a parent murders a child. In this situation, a child's digital assets could serve as evidence against a parent for prior abuse or neglect of the child. It would be troubling to allow an abusive or murderous parent to access or delete their children's digital assets. The slayer rule potentially prevents a parent in that situation from legally accessing those digital assets. Like testamentary capacity and undue influence, slayer statutes are protective in nature. Succession law applies and could continue to apply to minors in order to ensure that courts and families carry out their dispositive decisions after their deaths.

Succession principles protect minors in a more tailored and case-specific manner than does a specific age requirement. If state law applies succession law to minors, succession law will ensure that only those minors who understand their legal act will have capacity. Principles such as undue influence, slayer rules, and unworthy heirs mitigate concerns that parents, guardians, or anyone in a confidential relationship may take advantage of a child's good will. Just as we apply these doctrines to adults, who have capacity but may be weakened intellectually, these doctrines can apply to minors in order to prevent others from taking advantage of them. We could apply succession laws to respect minors' property interests in digital assets.

## V. POLICY INTERESTS FAVOR DIGITAL ASSET SUCCESSION

Maturity is a positivist legal construction that has common law roots but is ultimately a malleable concept that changes depending on the issue at hand and supporting policies. As a cultural construct, maturity needs to be reassessed when circumstances change. This Article argues that the legal capacity standard to devise digital assets should be reassessed because of our changing technological world and minors' fluency in understanding their digital assets. Currently, scholars are engaging in a broader reexamination of children's rights in our nation. Some advocate for a higher age to be applied in certain circumstances and some favor a lower age.<sup>260</sup> Digital assets succession for minors is an area where the law is sorely outdated and has failed

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259. *Carrasco v. Arizona*, 19 P.3d 635, 636, 639 (Ariz. Ct. App. 2001) (allowing the negligent mother to receive wrongful death damages rather than the child's estate, even though the mother was not "a desirable beneficiary for practical purposes").

260. *Barnes*, *supra* note 11, at 438–43 (advocating returning the contract age to 21).

to keep up with technology and cultural norms. Very little scholarship, if any, has considered this important point. We have seen a variety of different standards for minors in this Article, and of course, there are many more circumstances in civil and criminal law where a minors' capacity is an issue. Reconciling the many different capacity standards given in the law is beyond the scope of this Article but we can use those capacity standards to see how the law accommodates changing cultural norms.

The age of maturity does not need to be the same for all purposes. As we have seen above, the law treats minors as adults in certain contexts. In other circumstances, the law creates different ages for majority such as the legal drinking age of 21,<sup>261</sup> the legal smoking age of 21,<sup>262</sup> and the legal age to operate a motor vehicle of 16.<sup>263</sup> All of these determinations are all dependent on various policies promoting the well-being, health, and safety of minors as well as the demands of living in a modern society.

Minority determinations are state-specific and should continue to be, as this has always been the purview of state legislation. Although some have argued that minors' testamentary rights should be more generally revamped and adjusted to the demands of a modern world,<sup>264</sup> this Article has focused on a minor's ability to devise digital assets. The policies to allow digital asset devises may very well apply to broader property interests but are especially salient in a digital world. States should amend their respective Digital Asset Acts or pass a digital assets act that allows minors to devise their assets as long as the minors have testamentary capacity. Minors would not be disqualified because of their age. This will protect those minors who elect to preserve or destroy their digital assets and honor their desires.

A different rule makes sense for digital property because digital property itself is a new form of property interest that will always be a part of minors' lives.<sup>265</sup> Minors understand how to use it, what it is, and how to manage it perhaps better than their parents do. We are in the process of defining what kind of property interests we have in our email, social networking, pictures, texts, and online accounts.<sup>266</sup> As we contemplate the rights that individuals have in their digital assets, we should also contemplate extending those rights to minors. The law needs to accommodate the reality of children owning

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261. *Id.* at 431.

262. *Id.* at 435.

263. *Teenagers: GDL Requirements by State*, INS. INST. FOR HIGHWAY SAFETY & HIGHWAY LOSS DATA INST., <https://www.iihs.org/iihs/topics/laws/graduatedlicensestatelaws?topicName=teenagers> (last visited Mar. 16, 2019) (compiling data on minimum ages to obtain learners' permits and driver licenses).

264. See Glover, *supra* note 12, at 70.

265. See, e.g., *The Net Generation, Unplugged*, ECONOMIST (Mar. 4, 2010), <http://www.economist.com/node/15582279>.

266. See generally Natalie M. Banta, *Property Interests in Digital Assets: The Rise of Digital Feudalism*, 38 CARDOZO L. REV. 1099 (2017) (arguing that digital assets are property under the traditional conception of property law, with attendant rights such as the right to devise).

digital assets and protect their interests at death. A majority of states have passed RUFADAA, and amending this Act to include the right of minors to devise is a logical extension. One of the rationalizations not allowing minors under age 18 to have legal capacity is that they are unable to make the best decisions regarding their property. As we have seen, this rationalization is a remnant of the common law that still does not allow children to manage property.<sup>267</sup> Digital property is different because children know much more about creating, managing, and deleting digital assets.

Digital property is also different because of the power it allows minors to express their identity and develop their autonomy. As we have seen above, the law recognized minors as having sufficient autonomy to make serious life decisions.<sup>268</sup> Allowing testamentary devise of digital assets would complete that recognition of minors' capacity and provide dignitary respect by the law.

If a minor does not go to the effort of creating a will, our intestacy statutes will transfer their assets to their parents. However, if a minor has expressed his or her testamentary intent for her digital assets, the law should honor that intent no matter the age of a minor.

#### A. *BEST INTEREST OF CHILD*

The law regarding children is based on the principle that the best interests of the child control. Many factors come into play when we try to determine the best interest of a child and among them are protecting children from harm and preserving the stability of the family unit.<sup>269</sup> As we consider the property rights that a minor should have in his or her digital assets and any testamentary control over those assets, this principle should be in the forefront of our minds. By denying minors the right to devise, we are benefitting their parents rather than the minors themselves. The law favors freedom of succession—honoring a minor's right to devise the digital assets to someone else or only one parent or to delete them entirely is in the best interest of minors.

There is no denying that many minors would meet the low standard of testamentary capacity required under succession law, especially as it relates to digital assets, and we must ask whether we are protecting children from harm in denying them the right to control their digital assets after death. Because the testamentary question only arises when the child has died, there is no further harm from which to protect the child. Honoring a minor's testamentary wishes certainly can do no harm to the minor who has died. In fact, there may be evidence of harm done to the child that could be uncovered

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267. See *supra* notes 96–102 and accompanying text.

268. See *supra* Part III.

269. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (“We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”).

through an examination of a minor's digital assets. Just like adults, if there is evidence of foul play or suspicious circumstances regarding a death, the adult's digital assets could most likely be subpoenaed and examined.

One of the first states to address the digital assets of minors was Virginia.<sup>270</sup> A minor had committed suicide and parents requested Facebook to allow them access to their child's account. Facebook refused. The minor's parents then sought legislative action to require Facebook to release their son's Facebook page.<sup>271</sup> Virginia passed legislation to accommodate parents seeking access to their child's account.<sup>272</sup> Virginia has since adopted the Uniform Act, which applies to everyone's digital assets, not just minors.<sup>273</sup> By enacting the Uniform Act and repealing the previous Act, it is again unclear in Virginia whether parents may insist on obtaining access to their deceased child's digital assets if the terms of service agreement forbids access. The law requires an express statement of consent by the decedent and it is unknown whether minors will be able to grant this permission during their lives or whether parents can do so on behalf of their children after their children's death.

Granting minors legal capacity to devise digital assets will not necessarily change the outcome in a significant number of cases for several reasons. First, if we can use adults as a comparison, only 50% of adults exercise their right to devise property.<sup>274</sup> Perhaps minors would not exercise their right to devise property, and so parents would still take under intestacy statutes and be able to access their assets under RUFADAA.<sup>275</sup> Second, if a minor devised her digital assets to someone else under suspicious circumstances, there would be a claim of undue influence that could override testamentary intent.<sup>276</sup> Third, states could acknowledge an exception for extenuating circumstances. Extenuating circumstances would include deaths that result from foul play or suicide. In such circumstances, parents would have access to the accounts even if the minor had testamentary capacity and devised it to others or decided to have it deleted at death. In this limited situation, minors' testamentary desires would be overridden because of the nature of their deaths.

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270. VA. CODE ANN. § 64.2-110 (West) (repealed 2017).

271. 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](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).

272. VA. CODE ANN. § 64.2-110 (repealed 2017).

273. VA. CODE ANN. § 64.2-116 to -129 (2017); *see* Uniform Fiduciary Access to Digital Assets Act, 2017 Va. Laws ch. 80 (codifying the UFADAA in Virginia and repealing, *inter alia*, section 64.2-110).

274. *See* DUKEMINIER ET AL., *supra* note 96, at 59.

275. REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT, Prefatory Note (UNIF. LAW COMM'N 2015).

276. *See supra* Section IV.B.

The danger of this exception would be that the leading causes of death for children aged five to fourteen, those who would most reasonably be able to manifest testamentary capacity, are accidents and unintentional injuries.<sup>277</sup> Oftentimes, accidents will have some sort of foul play, which would open the door to overriding a minor's testamentary intent. In order to honor a minor's testamentary intent as well as provide exceptions when necessary, a parent challenging a minor's intent should be required to show that there is a reasonable nexus between a minor's digital assets and learning about the suspicious circumstances of the child's death. For example, just because a child dies in a car accident, does not mean that the child loses their right to devise. Parents would need to show why it was necessary to ignore a minor's testamentary intent in the specific situation. In situations where a minor killed himself or was murdered, parents would have a presumption that they could access a minor's digital assets accounts, unless of course, one of the parents was the perpetrator. As we saw above, there are situations where murder allows the court to depart from the will of a testator.<sup>278</sup> The slayer statutes forbid murderers from inheriting from their victims based on the idea that a victim never would have intended to bequeath to his murderer.<sup>279</sup> A case-by-case analysis would resolve a situation where a minor died due to murder or suicide and where the parents needed answers from his digital asset accounts in order to protect other children from similar harm. Granting minors legal capacity to devise digital assets does not harm their interests.

There may be resistance to granting minors legal capacity to dispose of digital assets at death simply out of a concern that doing so undermines parental control and authority and then disrupts a family unit. A minor's right to devise digital assets is hardly an interference with parenting, as the right will only be exercised if a child unexpectedly dies.

#### B. SELF DETERMINATION

The decision about a minor's capacity comes down to how far parental authority extends in certain matters. In the situation of devising digital assets, a minor may be able to demonstrate testamentary capacity and therefore legally exercise this authority herself without threat of damaging her interests. If there are concerns about a minors' ability to make sound decisions, succession law provides various mechanisms to address those concerns on a case-by-case basis.

Age limits on the right to devise are arbitrary and random and do not easily translate into the digital realm. Lowering the age limit of legal capacity would produce the same problem of failing to recognize some minors'

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277. JIAQUAN XU ET AL., CDC, DEATHS: FINAL DATA FOR 2016, at 34 (2018), [https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67\\_05.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_05.pdf).

278. See *supra* Section IV.B.

279. See *supra* notes 253–59 and accompanying text.

interests when they have demonstrated testamentary capacity. By allowing all minors to devise digital property if they demonstrate testamentary capacity, the law recognizes both the changing nature of property as well as honoring the developmental achievements of minors. If they have the wherewithal to desire a disposition of property and the law applies the proper safeguards through succession law to show that minors meet the minimum capacity requirements, their wills should be upheld unless there are exceptional circumstances. Minors deserve the autonomy of property ownership to symbolize their autonomy of person and to encourage responsible growth and development. Any other result tends to give parents too much authoritarian control over their children, hearkening back to the common law's understanding that children were property of their fathers.

Allowing minors legal capacity to determine the fate of their digital assets accommodates the changing nature of property in a digital world. Maturity is a cultural conception and the technological proficiency of minors affects our cultural conception. Minors show capacity and maturity over the digital world from a young age, and should be able to manage those accounts as they see fit in the event of their death.

Allowing children the control over their digital assets is a form of emancipation. When a parent allows a minor to acquire social media networking, it operates in a way as a partial emancipation. Minors have the ability to manage their own affairs online and exercise sole ownership over these assets. The law has yet to consider parental rights over minors' digital assets during life, but it could easily address the concern after death by honoring the testamentary wishes of a minor who has gone to the trouble to make them known.

### C. *PRIVACY*

Minors, like adults, have a privacy interest worth protecting in their digital assets. Granting them legal capacity to decide the fate of their digital assets is synonymous with granting them privacy interests in their digital assets after death. Although the law generally does not protect privacy interest at death, digital assets require us to reconsider the protections we will grant after death.<sup>280</sup> By upholding testamentary intent, both minors and adults can decide whether to transfer their assets to someone else or delete them upon their death. Preserving privacy after death goes hand in hand with enforcing testamentary freedom.

Parents post images and videos of their children on social networking every day, and some observers are worried about the lack of consent that minors have in this process and future consequences of sharing so many

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280. Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. REV. 927, 948 (2016).

personal moments of somebody else's life.<sup>281</sup> Minors often have a presence online before they are born when parents post sonogram pictures on social media.<sup>282</sup> The prevalence and intimacy of posts on social media by minors and about minors raise serious privacy concerns.<sup>283</sup> At the very least, the law can protect minors' privacy interests after death by honoring testamentary intent if they have demonstrated testamentary capacity.

Minors may have reduced privacy interests in their digital assets. Parents may elect to access and monitor their children's digital asset accounts during life as they have been allowed to do under federal wiretapping laws.<sup>284</sup> In *Smith v. Smith*, for example, a mother sued a father for recording a conversation between her and her daughter.<sup>285</sup> The court found that the father had satisfied an exception to the wiretapping laws because he, in good faith, had consented on behalf of the child and reasonably believed it was in the child's best interest that the conversation be recorded.<sup>286</sup> Courts have found that such monitoring by parents does not violate federal wiretapping laws. Parents may monitor their child's Internet use under federal law in order to safeguard their interests in a reasonable manner. Just because parents do not violate federal law by monitoring their children's accounts, does not give them a property interest in their children's assets. Minors may have decreased privacy interests but not decreased property interests. During their lives, it may be in their best interest for their parents to monitor their assets, but at their death, we should allow their intent to control under succession law. Parents should only have an interest in the account if they jointly open and use a shared account with their children.

## VI. CONCLUSION

Digital assets are pervasive in society and the number of digital assets is growing at an ever-increasing pace. Minors own digital assets, and they should be able to devise them. Minors have testamentary capacity to understand the nature and extent of digital assets and the fact that they are deciding how the assets will be treated at their deaths.

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281. Amy Webb, Opinion, *Give Your Children a Chance at Privacy*, N.Y. TIMES (Aug. 18, 2014), <https://www.nytimes.com/roomfordebate/2014/08/17/children-and-digital-privacy/give-your-children-a-chance-at-privacy>.

282. *Digital Birth: Welcome to the Online World*, BUS. WIRE (Oct. 6, 2010, 1:02 PM), <http://www.businesswire.com/news/home/20101006006722/en/Digital-Birth-Online-World>.

283. Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 843 (2017).

284. See, e.g., *Smith v. Smith*, 923 So. 2d 732, 743-44 (La. Ct. App. 2005); Daniel R. Dinger, *Should Parents be Allowed to Record a Child's Telephone Conversations When They Believe the Child is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 SEATTLE U. L. REV. 955, 969-76 (2005) (collecting cases).

285. *Smith*, 923 So. 2d at 736.

286. *Id.* at 737-38, 740.

The law has cobbled together maturity doctrines depending on the issue at hand. The result is that the law regarding the maturity of minors and their capacity to engage in legal acts is disparate. If minors have capacity to enter into a contract and choose not to disaffirm the contract, they should also have capacity to devise digital assets before they turn 18. Contract and property law are incongruous when it comes to minors and mired in tradition that no longer makes sense in a world where property and contracts are changing and transitioning to a digital world. A limited right to succession does not upend the law prohibiting minors from owning property or contracting. Similarly, in limited circumstances the law allows a minor to make important decisions about health care, employment, and sex. Likewise, we should allow minors to decide where they want their property to go after their death, especially their digital property. If we disregard the age of legal capacity and rely solely on whether a minor has testamentary capacity to devise digital assets, succession law will continue to protect the interests of a minor through our doctrines of undue influence, fraud, and the slayer statutes. Granting minors the right to devise digital property is in their best interest and promotes freedom of succession, property rights, and privacy interests.

We cannot continue to apply traditional rules for physical property in a digital age. The law needs to adapt to the digital reality and the understanding that minors own and use digital assets. By allowing minors to devise digital assets, the law will accommodate digital ownership and technological change as well as recognize minors' maturity accompanying the fast-paced changing nature of assets.