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GETTING A HANDLE ON DIGITAL ASSETS DURING LIFE AND AFTER DEATH

St. Joseph County Bar Association Local Practice Seminar

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I. Introduction

- A. Over the past several years estate planners have begun to recognize the significant issues posed by the digital assets possessed by our clients. *See, for example*, Naomi Kahn, *Estate Planning For Digital Property, Passwords And Online Accounts in 38TH ANNUAL NOTRE DAME TAX & EST. PLANNING INSTITUTE* (2012) and Gerry W. Beyer, *An Estate Planning Trilogy: Digital Assets, Guns, And Pets*, 39TH ANNUAL NOTRE DAME TAX & EST. PLANNING INSTITUTE (2013).
- B. The fundamental changes stemming from the increased use of the internet as a means of communication and commerce require both clients and their advisors to ask new questions about property interests that have existed for less than fifty years.
1. What is a digital asset?
 2. Who has access to emails and electronic financial records if the client dies or becomes incapacitated?
 3. Who has the legal right to the information contained in the digital asset?
- C. A recent American Bar Association Practice Alert illustrated how these questions can arise in our practices:
- A decedent received his bills, bank statements, and 1099s only by email rather than by U.S. mail. The only way for his personal representative to ascertain the estate's assets, liabilities, and critical tax information is to gain access to the decedent's online data.
 - A decedent set up automatic, recurring payments from a bank account during his life. His personal representative needs online access in order to shut those automatic payments off promptly after death, to avoid overdrawing the account or risking liability for paying creditors out of order.

. • An incapacitated individual is unable to change passwords when her accounts get hacked. Her court-appointed guardian needs online access in order to take remedial action to secure and monitor accounts to protect against identity theft or damage to the individual's reputation.

• An incapacitated individual is unable to conduct her personal ecommerce business and fill purchase orders. An agent acting under her power of attorney needs online access to ensure that customers' orders are filled on time, to preserve the value of the business

. • A decedent owned domain names, a valuable blog, and Bitcoins. These assets have monetary value and should be reported as part of the taxable estate. The personal representative needs access to ensure that valuable assets of the estate are not lost to the decedent's heirs, and in order to pay appropriate estate taxes.

http://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2015/3-May/practice_alert.authcheckdam.pdf ["Practice Alert"].

C. This presentation discusses the treatment of digital assets under current Indiana law and the changes being proposed in such treatment under the recently Revised Uniform Fiduciary Access To Digital Assets Act.

II. Indiana's Digital Asset Statute.

A. Ind. Code 29-1-13-1.1 became effective as of July 1, 2007 and reads as follows:

Electronically stored documents of deceased

Sec. 1.1. (a) As used in this section, "custodian" means any person who electronically stores the documents or information of another person.

(b) A custodian shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of any documents or information of the deceased person stored electronically by the custodian upon receipt by the custodian of:

- (1) a written request for access or copies made by the personal representative, accompanied by a copy of the death certificate and a certified copy of the personal representative's letters testamentary; or
- (2) an order of a court having probate jurisdiction of the deceased person's estate.

(c) A custodian may not destroy or dispose of the electronically stored documents or information of the deceased person for two (2) years after the custodian receives a request or order under subsection (b).

(d) Nothing in this section shall be construed to require a custodian to disclose any information:

- (1) in violation of any applicable federal law; or
- (2) to which the deceased person would not have been permitted access in the ordinary course of business by the custodian.

B. The Indiana statute imposes a duty on any custodian who electronically stores the documents or information of another person to provide to the personal representative of a decedent who was domiciled in Indiana at the time of death access to or copies of any stored documents or information.

C. Issues

1. What about incapacitated individuals? Does a court appointed guardian have the same rights as the personal representative? How about an attorney in fact under a durable power of attorney? Answer: Ind. Code 29-1-1-3(a)(22) defines the term “personal representative” as including “executor, administrator, administrator with the will annexed, administrator de bonis non, and special administrator.” Neither guardians nor attorneys in fact would appear to come within this definition.
2. What about the effect of the provisions of the terms of service agreements signed electronically by the decedent by clicking “I accept” when first signing on? Can the decedent be said to have waived the Indiana statute granting access to the decedent’s information? Answer: It depends on the agreement. For example, Facebook earlier this year introduced an option called Legacy Contacts which allows users to designate a family member or a friend who can be given permission “to download an archive of the photos, posts and profile information they shared on Facebook.” However, the Legacy Contact will not be able to see the person’s “private messages.” <http://newsroom.fb.com/news/2015/02/adding-a-legacy-contact/>. If the user creates a Legacy Contact, the restriction on accessing private messages would appear to prevent the personal representative from gaining access to them.
3. What federal laws might override the right of a personal representative to the decedent’s electronic information being stored by the custodian? Answer: The Stored Communications Act, 18 U.S.C. § 2701 *et seq.* imposes civil liability and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.* imposes criminal liability for unauthorized persons who access electronically stored information. Some commentators have pointed out that even if the personal representative has the *de facto* or *de jure* consent of the account holder to access such information, the Computer Fraud and Abuse Act also requires the consent of the service provider to avoid a violation.

III. Proposed Solution: Uniform Fiduciary Access To Digital Assets Act

A. Background.

1. In 2012 the National Conference of Commissioners on Uniform State Laws (“Uniform Law Commissioners”) approved the formation of a committee to draft a proposed uniform law on fiduciary access to digital assets.
2. The committee’s draft was approved by the Commissioners in July, 2014 under the name of the Uniform Fiduciary Access To Digital Assets Act (UFADAA).
3. Delaware quickly adopted a modified version of UFADAA and it was thought that most other states would quickly follow suit. However, no other state has since adopted any version of UFADAA.

B. Opposition to UFADAA

1. The principal reason why no other states have adopted UFADAA involves a concern for the privacy rights of the deceased or incapacitated individual.
2. The Practice Alert summarizes the opposition that arose to UFADAA as follows:

Although there is usually some opposition to every uniform act, UFADAA has been subject to far more opposition than is typical and it has been alarmingly difficult to get UFADAA enacted anywhere in 2015 thus far. Representatives from several large tech companies (e.g., Yahoo, Facebook and the tech trade association Netchoice) were heavily involved in the UFADAA drafting process, where it appeared that there was at least a consensus that UFADAA was a workable solution to providing fiduciaries with legal access to digital assets. But these same representatives have now mobilized to fight hard against UFADAA in each state where it has been introduced, and have argued that granting broad fiduciary access to certain digital assets such as email messages violates the user’s federally protected privacy rights. In some states, the American Civil Liberties Union has also entered formal opposition to UFADAA, although usually when the ACLU learns that UFADAA does provide mechanisms to honor a person’s wish that his/her electronic communications will not be disclosed following death or disability, the ACLU withdraws its opposition. The opposition is well-funded and is backed by paid lobbyists. It is speculated that the opposition has been using campaign contributions as a carrot and a stick to garner (sic) support against UFADAA.

3. One of the opponents to UFADAA provided the following rationale for the opposition to UFADAA:

“State legislatures are persuaded toward the ULC model by grieving loved ones who want things like the deceased’s pictures,” explains Alethea Lange, a policy analyst at the Center for Democracy & Technology. “But because of their sheer volume and searchability, digital assets are distinct from other possessions. Casual conversations that used to happen on the phone or in person are now written down in email.” As a result, sensitive or confidential communications sent by, say, an Alcoholics Anonymous sponsor or member of the clergy, can be unwittingly exposed to heirs.

Privacy advocates at Lange’s organization, along with the Internet trade association Net Choice, argue that broad laws like Delaware’s prioritize convenience for executors at the expense of privacy of the deceased and third parties.

Leslie A. Gordon, *Delaware Leads The Way In Adopting Legislation Allowing Estate Executors Access To Online Accounts*, ABA J. (July 2015).

4. To address the perceived defects in UFADAA, NetChoice promulgated its own model legislation called the Privacy Expectation Afterlife And Choices Act (PEAC) which has been adopted by the Commonwealth of Virginia and may be found at <http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/>.

C. Revised UFADAA

1. In July, 2015 the Uniform Law Commissioners promulgated a Revised Uniform Fiduciary Access To Digital Assets Act which can be found at [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)).
2. Revised UFADAA attempts to address the concerns raised by the opposition to the original version of UFADAA. The Uniform Law Commissioners summarized the provisions of Revised UFADAA in their Prefatory Note as follows:

With regard to the general scope of the act, the act’s coverage is inherently limited by the definition of “digital assets.” The act applies only to electronic records in which an individual has a property right or interest, which do not include the underlying asset or liability unless it is itself an electronic record.

The act is divided into 21 sections. Section 2 contains definitions of terms used throughout the act.

Section 3 governs applicability, clarifying the scope of the act and the fiduciaries who have access to digital assets under Revised UFADAA, and carves out an exception for digital assets of an employer used by an employee during the ordinary course of business.

Section 4 provides ways for users to direct the disposition or deletion of their digital assets at their death or incapacity, and establishes a priority system in case of conflicting instructions.

Section 5 establishes that the terms-of-service governing an online account apply to fiduciaries as well as to users, and clarify that a fiduciary cannot take any action that the user could not have legally taken.

Section 6 gives the custodians of digital assets a choice for disclosing those assets to fiduciaries. A custodian may, but need not, comply with a request for access by allowing the fiduciary to reset the password and access the user's account. In many cases that will be the simplest method of compliance. However, a custodian may also comply without giving access to a user's account by simply giving a copy of all the user's digital assets to the custodian. That method may be preferred for a social media account when a fiduciary has no need for full access and control.

Sections 7-14 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different rules for the content of communications protected under federal privacy laws and for other types of digital assets. Generally, a fiduciary will have access to a catalogue of the user's communications, but not the content, unless the user consented to the disclosure of the content.

Section 15 contains general provisions relating to the rights and responsibilities of the fiduciary. Section 16 addresses compliance by custodians and grants immunity for any acts taken in order to comply with a fiduciary's request under this act. Sections 17-21 address miscellaneous topics, including retroactivity, the effective date of the act, and similar issues.

3. In the context of estate planning the issue of the scope of the fiduciary's access is addressed in Section 4 of Revised UFADAA as follows:

SECTION 4. USER DIRECTION FOR DISCLOSURE OF DIGITAL ASSETS. (a) A user may use an online tool to direct the custodian to disclose or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(b) If a user has not used an online tool to give direction under subsection (a) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure

to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(c) A user's direction under subsection (a) or (b) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

4. Section 4 allows the client to grant the fiduciary access to the client's digital assets using either an online tool of the service provider or the client's estate planning documents. Section 4 also explicitly allows the access to be limited or comprehensive. The mere existence of an online tool does not override the client's estate planning documents unless the client has affirmatively used the online tool.
5. Assuming that some form of the Revised UFADAA will become law in Indiana in the not too distant future, Section 4 emphasizes the importance in ascertaining the client's intent about how much access should be given to the fiduciary and then expressing such intent in the appropriate parts of the client's estate plan. For any major assets it will be necessary to also find out if an online tool exists and whether the client has made any affirmative use of it.

IV. Planning Suggestions

- A. The standard boilerplate in your client's estate planning documents should be updated to include language about digital assets. The following sample language is provided for analysis purposes and is based on sample language found on www.digitalestateresource.com modified for Indiana:

1. Power of Attorney:

Each of my Agents is authorized to exercise all powers granted to an attorney-in-fact under IC 30-5-5-2 through 30-5-5-15 inclusive, IC 30-5-5-18, and IC 30-5-5-19. Such powers are incorporated by this reference. In addition, each of my Agents shall have (i) the power to access, use and control my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops or such comparable items as technology develops for the purpose of accessing, modifying, deleting, controlling or transferring my digital assets, and (ii) the power to access, modify, delete, control and transfer my digital assets, including but not limited to, my emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts and similar

digital items which currently exist or may exist as technology develops or such comparable items as technology develops. The term "digital assets" means, unless and until governing law provides otherwise, the same as such term in the Revised Uniform Fiduciary Access To Digital Assets Act proposed by the National Conference Of Commissioners On Uniform State Laws in July, 2015.

2. Last Will and Testament:

I specifically intend that the personal representative shall have the power to sell, mortgage, lease, or exchange property of the estate without court order, the power to access, handle, distribute and dispose of my digital assets, and the power to deal with matters involving the actual, threatened, or alleged contamination of property held in my estate including real estate, oil, gas, and minerals, collateral for secured loans/mortgages and interests in closely held entities (sole proprietorships, partnerships, limited liability companies or corporations and any assets owned by such business entities) by hazardous substances, or involving compliance with environmental law(s). For purposes of this Will, the term "digital assets" means, unless and until governing law provides otherwise, the same as such term in the Revised Uniform Fiduciary Access To Digital Assets Act proposed by the National Conference Of Commissioners On Uniform State Laws in July, 2015.

3. Trust.

I specifically intend that the Trustee shall have the power to access, handle, distribute and dispose of my digital assets. For purposes of this Trust, the term "digital assets" means, unless and until governing law provides otherwise, the same as such term in the Revised Uniform Fiduciary Access To Digital Assets Act proposed by the National Conference Of Commissioners On Uniform State Laws in July, 2015.

B. Client Digital Assets Inventory

1. Doing updated estate planning documents without information about the location of the client's digital assets, user names, and passwords may not be very helpful.
2. The client needs to be advised about creating the necessary information as part of the estate planning process
 - a. The client can be responsible for the digital asset inventory or the client can use an online service. The Sample Digital Estate Planning Forms in the appendix to Professor Naomi Cahn's article in Chapter 6 of Book 1 of the 2012 Notre Dame Tax and Estate

Planning Institute described above offer excellent examples of what can be done

- b. The market for products and services designed to address digital asset estate planning continues to grow. One source among many that provides current information about such items is www.TheDigitalBeyond.com. See also Sasha A. Klein and Mark R. Parthemer, *Where Are Our Family Photos—Planning for a Digital Legacy*, 29 PROBATE & PROPERTY 45, 47 (January/February 2015) discussing the security risks inherent in using online applications to store passwords and other digital information.

C. Written Confirmation Of Advice Given To Client About Planning For Digital Assets

1. Sending the client a letter to confirm the completion of the estate planning engagement is always a recommended practice.
2. Update your client closing letter by inserting language about the need to plan for digital assets. For example:

There is one additional step that you should take as part of updating your estate plan. Due to the widespread use of the Internet and web-based technologies as part of every day life, you may have created a number of passwords for accessing your on-line information. Please consider putting together and keeping current a list of such on-line accounts, user names, and passwords and the accounts to which they provide access. It is very difficult and in some cases impossible to find passwords after a person dies. Creating a list now could prove to be immensely helpful in the future.

V. Conclusion

A 21st century estate plan that ignores digital assets is at best incomplete and at worst a possible disaster for the client's family and the attorney who helped prepare it.