

DRAFT
FOR DISCUSSION ONLY

FIDUCIARY ACCESS TO DIGITAL ASSETS

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAW

For November 30 – December 1, 2012 Drafting Committee Meeting

With Prefatory Note and Comments

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November 13, 2012

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FIDUCIARY ACCESS TO DIGITAL ASSETS

TABLE OF CONTENTS

GENERAL PREFATORY NOTE..... 1

**ARTICLE 1
AMENDMENTS TO THE UNIFORM PROBATE CODE**

SECTION 1-201. GENERAL DEFINITIONS..... 3
SECTION 3-709. DUTY OF PERSONAL REPRESENTATIVE; POSSESSION OF ESTATE. 5
SECTION 3-715. TRANSACTIONS AUTHORIZED FOR PERSONAL REPRESENTATIVE;
EXCEPTIONS..... 6
SECTION 3-715A. DIGITAL PROPERTY RECOVERY. 7

**ARTICLE 2
AMENDMENTS TO THE UNIFORM GUARDIANSHIP AND PROTECTIVE
PROCEEDINGS ACT (ART. V OF THE UPC)**

SECTION 5-411. REQUIRED COURT APPROVAL. 11
SECTION 5-425. POWERS OF CONSERVATOR IN ADMINISTRATION..... 11
SECTION 5-425A. DIGITAL PROPERTY RECOVERY. 12

**ARTICLE 3
AMENDMENTS TO THE UNIFORM POWER OF ATTORNEY ACT
(ART. 5B OF THE UPC)**

SECTION 5B-201. AUTHORITY THAT REQUIRES SPECIFIC GRANT; GRANT OF
GENERAL AUTHORITY..... 13
SECTION 5B-218. SCOPE OF AUTHORITY OVER DIGITAL PROPERTY. 14
SECTION 5B-219. DIGITAL PROPERTY RECOVERY. 15

**ARTICLE IV
AMENDMENTS TO THE UNIFORM TRUST CODE**

SECTION 103. DEFINITIONS..... 16
SECTION 816. SPECIFIC POWERS OF TRUSTEE..... 18

FIDUCIARY ACCESS TO DIGITAL ASSETS

GENERAL PREFATORY NOTE

The purpose of this Act is to vest fiduciaries with the authority to access, manage, distribute, copy or delete digital assets and accounts. It addresses four different types of fiduciaries: personal representatives of decedents' estates, conservators for protected persons, agents acting pursuant to a power of attorney, and trustees.

As the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual's death or incapacity are becoming more common. Few holders of digital assets and accounts consider the fate of their online presences once they are no longer able to manage their assets. And these assets have real value: according to a 2011 survey from McAfee, Intel's security-technology unit, American consumers valued their digital assets, on average, at almost \$55,000.¹ These assets range from online gaming pieces to photos, to digital music to client lists to bank accounts to bill-paying, etc. There are 30 million Facebook accounts that belong to dead people.² The average individual has 25 passwords. Some service providers have explicit policies on what will happen when an individual dies, others do not;³ even where these policies are included in the terms of service, most consumers click-through these agreements.

Only a minority of states have enacted legislation on fiduciary access to digital assets: Connecticut, Idaho, Indiana, Oklahoma, and Rhode Island. In addition, other states, including Massachusetts, Nebraska, New York, and Oregon, have considered, or are considering, legislation.⁴ Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, and whether the principal's death or incapacity is covered.

This draft is for review by the Drafting Committee in advance of our first meeting. The draft is divided into four Articles. Article 1 contains amendments to the first three Articles of the Uniform Probate Code, Article 2 contains amendments to the Uniform Guardianship and Protective Proceedings Act (Art. V of the UPC), Article 3 contains amendments to the Uniform Power of Attorney Act (Art. 5B of the UPC), and Article 4 contains amendments to the Uniform Trust Code.

¹ Kelly Greene, *Passing Down Digital Assets*, WALL STREET JOURNAL (Aug. 31, 2012, 8:20 PM), <http://online.wsj.com/article/SB10000872396390443713704577601524091363102.html>.

² Craig Blaha, *Over 30 Million Accounts on Facebook Belong to Dead People*, TECHNORATI (March 7, 2012, 11:05 AM), <http://technorati.com/technology/article/over-30-million-accounts-on-facebook>.

³ For a concise listing, *see, e.g.*, DECEASED ACCOUNT, <http://deceasedaccount.com> (last visited Nov. 7, 2012).

⁴ A memo summarizing these laws and legislative proposals is available on the shared Google Drive.

After each proposed Article, a Comment to the Committee discusses the drafting of the Article and raises issues for Committee consideration. The Comments should be read in conjunction with the proposed statutory text.

ARTICLE 1

AMENDMENTS TO THE UNIFORM PROBATE CODE

Prefatory Note

This Article contains four different provisions. First, it includes general definitions for digital property. Second, it sets out the right of the personal representative to take possession of the digital property. Third, it authorizes the personal representative to access and manage digital property. Fourth, it establishes a special procedure for recovery of digital property.

SECTION 1-201. GENERAL DEFINITIONS.

(11A) “Digital account” means, but is not limited to, an electronic account containing a digital asset and includes blogging, email, financial, multimedia, personal, social networking and other online account or comparable items as technology develops.

Alternative A

(11B) “Digital asset” means any text, images, multimedia information, or personal property stored in a digital or analog format, whether stored on a server, computer, or other electronic device, regardless of whether it is remotely stored, which currently exists or may exist as technology develops, and regardless of the ownership of the device upon which the digital asset is stored. Digital assets include, without limitation, any words, characters, codes, or contractual rights necessary to access the digital asset.

Alternative B

(11B) “Digital asset” means electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

1 **Comments for the Committee**

2 Subsections (11A-B) add new definitions on the meaning of digital accounts and assets.
3 The list is exemplary, not exclusive. The new definition of digital accounts (11A) and the
4 definition of digital assets (11B) in Alternative A are based on the Oregon State Bar’s
5 Legislative Proposal and a model statute proposed in an article.⁵ The definition of a digital asset
6 in Alternative B (11B) is drawn from Rule 34(a)(1) of the FRCP.
7

8 In the Comments to the new Act, it is important to note that the definition should ensure
9 that new types of digital assets are included, even if they are not specifically listed. As Internet
10 technology advances, as new digital companies develop, the forms and types of digital assets will
11 inevitably change in ways that cannot be anticipated. Moreover, the terminology must make
12 clear that digital assets are covered whether they exist solely on an individual’s computer or in a
13 cloud. Both Alternatives A and B are intended to be broad enough to cover all current types of
14 computer-based information and flexible enough to encompass future changes and developments.
15

16 Note that these definitions are general, and apply to all Articles in the UPC (including
17 guardianship and power of attorney provisions).
18

19 The question of how to define digital assets will certainly be a topic for Committee
20 discussion. The use of Alternative B has the benefit that many attorneys will already be familiar
21 with the concept of “electronically stored information” from the FRCP. Alternative A is a newer
22 definition that is more comprehensive.
23

24 (11C) “Digital property” includes a digital asset and digital account and consists of the
25 ownership and management interests of a decedent in the digital asset and account.
26

27 **Comments for the Committee**

28
29 The entirely new definition of digital property is designed to make clear that the Act
30 addresses only interests capable of ownership and management, and it also serves as an easier
31 way to refer to digital accounts and digital assets.
32

33 [(12)-(37)]
34

35 (38) “Property” includes both real and personal property or any interest therein and
36 means anything that may be the subject of ownership, including digital property.

⁵ See Chelsea Ray, *Til Death Do Us Part: A Proposal for Handling Digital Assets After Death* (unpublished manuscript on the shared Google Drive, winner of the American Bar Association Section of Real Property, Trust and Estate Law’s 2012 Law Student Writing Contest); OREGON UNIFORM TRUST CODE (Oregon State Bar Legislative Proposal, 2012), <http://bog11.homestead.com/2012/apr27/20120427bogagendaopen.pdf>.

1 **Comments for the Committee**

2
3 Subsection (38) amends the existing definition of property to include digital property.

4 [(39)-(51)]

5 (51A) “Terms of Service Agreement” includes “terms of use agreement” and a similar
6 arrangement that controls a relationship between a decedent and any person that maintains,
7 manages, or supervises the digital property of a decedent. The term includes any contract
8 between a person and the user of the person’s site or service that establishes the terms,
9 conditions, and/or privacy policy of the person’s site or service, or which otherwise defines the
10 rights and limitations of each party with regard to use of the site.

11
12 [(52)-(59)]

13 **Comments for the Committee**

14
15 Subsection (51A) is adapted from a law review article.⁶

16 **SECTION 3-709. DUTY OF PERSONAL REPRESENTATIVE; POSSESSION OF**
17 **ESTATE.**

18 (A) Except as otherwise provided by a decedent’s will, every personal representative has
19 a right to, and shall take possession or control of the decedent’s property, other than digital
20 property, and except that any real property or tangible personal property may be left with or
21 surrendered to the person presumptively entitled thereto unless or until, in the judgment of the
22 personal representative, possession of the property by him will be necessary for purposes of
23 administration. The request by a personal representative for delivery of any property possessed
24 by an heir or devisee is conclusive evidence, in any action against the heir or devisee for
25 possession thereof, that the possession of the property by the personal representative is necessary
26 for purposes of administration. The personal representative shall pay taxes on, and take all steps
27 reasonably necessary for the management, protection and preservation of, the estate in his
28 possession. He may maintain an action to recover possession of property or to determine the title

⁶ See Ray, *supra* note 5.

1 thereto.

2 (B) Except as otherwise provided by a decedent’s will, a personal representative has a
3 right to, and shall take possession or control of, the digital property of a decedent. A request by a
4 personal representative for access to, and ownership of, any digital property is conclusive
5 evidence in any action that the possession of the property by the personal representative is
6 necessary for purposes of administration. The personal representative shall pay taxes on, and
7 take all steps reasonably necessary for the management, protection and preservation of, the estate
8 in possession of the personal representative. The personal representative may maintain an action
9 to recover [possession of] digital property as specified in Section [].

10 **Comments for the Committee**

11 This creates a second part to existing Section 3-709, and the new section substantially
12 mirrors the existing language in order to set out procedures specifically applicable to digital
13 property. In a will, the decedent may limit the personal representative’s powers to collect,
14 possess, control, manage, protect, and preserve the digital property. If the decedent has by will
15 directed that digital property be destroyed upon death, then this controls the obligations of the
16 personal representative. This second part also recognizes the ability of the personal
17 representative to bring a special action concerning access and ownership of digital property.
18 While the first part addresses a request for “delivery” of the asset, the second part addresses
19 requests for access and ownership of digital property.

20
21 **SECTION 3-715. TRANSACTIONS AUTHORIZED FOR PERSONAL**

22 **REPRESENTATIVE; EXCEPTIONS.** Except as otherwise provided by the will or by an
23 order in a formal proceeding and subject to the priorities stated in Section 3-902, a personal
24 representative, acting reasonably for the benefit of the interested persons, may properly:

25 [(1)-(27)]

26 (28) access, take control of, handle, conduct, continue, distribute, dispose of, or terminate
27 the interests in digital property of a decedent unless such actions are contrary to the terms of the
28 will.

1 **Comments for the Committee**

2 This amendment makes clear the personal representative’s responsibilities with respect to
3 digital assets but also clarifies that the personal representative’s duties may be limited by the
4 will.

5 Other portions of Part 7, “Duties and Powers of Personal Representatives,” are relevant to
6 the personal representative’s responsibilities with respect to digital property, but do not need to
7 be amended. For example, Section 3-706, “Duty of Personal Representatives; Inventory and
8 Appraisal,” requires the personal representative to prepare “an inventory of property owned
9 by the decedent at the time of his death,” but given the proposed amendment to the definition of
10 property (see above) so that it explicitly includes digital property, there may be no need to
11 change Section 3-706. By contrast, the proposed amendment to Section 3-709 recognizes that
12 the personal representative may have special duties with respect to digital property. To clarify
13 these special responsibilities, Section 3-711, “Powers of Personal Representatives; In General”
14 may also need to be amended to ensure that the personal representative does not exercise the
15 same powers over digital property as the owner if the will provides otherwise.
16

17 **SECTION 3-715A. DIGITAL PROPERTY RECOVERY.**

18 (a) As used in this section, “custodian” means any person that electronically stores digital
19 property of the decedent or that otherwise has control over the digital property.

20 (b) A custodian shall provide a personal representative with access to and ownership of
21 any digital property under the control of the custodian and copies of any digital assets under the
22 control of a custodian, upon receipt of:

23 (1) a written request for such access made by the personal representative,
24 accompanied by a copy of the death certificate or a certified copy of the letter of appointment as
25 personal representative; or

26 (2) an order of the probate court that has jurisdiction over the estate of the
27 decedent that gives the personal representative authority over the digital property.

28 (c) The custodian shall comply not later than [60] days after receipt of either the request
29 or order made under subsection (b). If, not later than [60] days after receiving a request or order
30 made under subsection (b), the custodian fails to comply with the request or order, the personal

1 representative may ask the probate court for an order directing compliance.

2 (d) This section supersedes contrary provisions in the Terms of Service; provided,
3 however, that access shall not be provided if the probate court determines that the decedent
4 affirmatively declined to have the decedent’s digital property released after death.

5 (e) A custodian may not destroy, disable or dispose of any digital property of a decedent
6 for two years after a custodian receives a request or order made under subsection (b).

7 (f) For purposes of this section, the personal representative is an “authorized user” who
8 has the lawful consent of a decedent for purposes of accessing or copying the digital property of
9 a decedent.

10 (g) No person may maintain a cause of action against a custodian for acting in
11 compliance with this section.

12 **Comments for the Committee**

13 Section 3-715A sets out the procedures for the personal representative to gain access to
14 the digital property. Subsections (a) – (e) are modeled on the draft Oregon statute and the
15 proposed Massachusetts legislation. Note that this provision authorizes the personal
16 representative to access the digital property as well as to obtain copies of it, although states could
17 choose to limit the representative’s authority.⁷ It also requires that the custodian turn over the
18 records within 30 days; the original Oregon proposal requires that the custodian turn over the
19 records within 14 days.

20
21 Subsection (d) specifies that this new law supersedes the Terms of Service with any
22 electronic services provider, although it explicitly recognizes the ability of the service provider to
23 show that access would be contrary to the decedent’s intent.

24
25 The provision in subsection (e) prevents destruction of digital property once the custodian
26 receives a request from the personal representative.

⁷ State statutes vary as to whether the fiduciary can obtain access to the accounts or only copies. *See, e.g.*, IND. CODE ANN. § 29-1-13-1.1 (2011); *see* Jason Mazzone, *Facebook’s Afterlife*, 90 N. CAR. L. REV. 1643, 1673-77 (2012) (discussing state approaches).

1 Subsection (f) establishes the personal representative’s authority with respect to the
2 digital property. The language mirrors that used in the Stored Communications Act (SCA), 18
3 U.S.C. Section 2701 *et seq.*, and is designed to ensure the fiduciary is “authorized” under the two
4 federal statutes that prohibit unauthorized access to computers and computer data, the SCA and
5 the Computer Fraud and Abuse Act,⁸ as well as pursuant to any comparable state laws
6 criminalizing unauthorized access.⁹

7
8 The Stored Communications Act contains two relevant prohibitions.

9
10 1) 18 USC Sec. 2701(a), which concerns access to the digital property, makes it a crime
11 for anyone to “intentionally access[] without authorization a facility through which an electronic
12 communication service is provided” as well as to “intentionally exceed[] an authorization to
13 access that facility.” Thus, someone who has authorization to access the facility is not engaging
14 in criminal behavior. Moreover, this section does not apply to “conduct authorized . . . by a user
15 of that service with respect to a communication of or intended for that user.”¹⁰

16
17 2) 18 USC Sec. 2702, “Voluntary disclosure of customer communications or records,”
18 concerns actions by the service provider. It prohibits an electronic communication service or a
19 remote computing service from knowingly divulging the contents of a communication that is
20 stored by or carried or maintained on that service unless disclosure is made “with the lawful
21 consent of the originator or an addressee or intended recipient of such communication, or the
22 subscriber in the case of remote computing service.”¹¹

23 The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers,

⁸ Stored Communications Act, 18 U.S.C. § 2701 *et seq.* (2006); Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.* (2006); *see, e.g.*, Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004); Allan D. Hankins, Note, *Compelling Disclosure of Facebook Content Under the Stored Communications Act*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 295 (2012).

⁹ *See Computerized Hacking and Unauthorized Access States Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 21, 2009), <http://www.ncsl.org/issues-research/telecom/computer-hacking-and-unauthorized-access-laws.aspx>; Christina Kunz, Peter Rademacher, & Lucie O’Neill, 50 State Survey of Unauthorized Access (2012) (on file with the Committee and available on the Google Drive).

¹⁰ 18 U.S.C. §§ 2701(a), (c)(2).

¹¹ 18 U.S.C. Section 2702(b) provides: (b) Exceptions for disclosure of communications.— A provider described in subsection (a) may divulge the contents of a communication—

(1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;

...

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.”

1 18 U.S.C. 1030.¹²

2
3 State laws vary in their coverage, but typically prohibit unauthorized access.

4
5 Pursuant to Subsection (f): 1) the fiduciary has authorization to access the files under the
6 *first* section of the SCA, 18 U.S.C. 2701 as well as under the CFAA; and 2) the fiduciary has
7 “the lawful consent” of the originator/subscriber so that the provider can voluntarily disclose the
8 files pursuant to the *second* relevant provision of the SCA, 18 U.S.C. 2702.¹³ Moreover, this
9 language should be adequate for state laws.

10
11 Subsection (g) protects the custodian from liability with a new provision based on the one
12 set out in the Stored Communications Act, 18 USC Section 2703(e).¹⁴

13
14 While these provisions should be definitive for proceedings in state courts under state
15 law, they are not, of course, binding on the federal courts’ interpretation of the applicable federal
16 statutes. Nonetheless, they provide guidance on the scope of the fiduciary’s power for federal
17 courts considering the issue.¹⁵ This is a matter that the Committee may want to discuss further.

18 ARTICLE 2

19 AMENDMENTS TO THE UNIFORM GUARDIANSHIP AND PROTECTIVE

20 PROCEEDINGS ACT (ART. V OF THE UPC)

21 Prefatory Note

22
23 This Article contains three provisions. First, it sets out the power of the conservator to
24 take possession of the digital property. Second, it authorizes the conservator to access and
25 manage digital property. Third, it establishes a special procedure for recovery of digital
26 property. Because the general definitions set out in Article 1 of the UPC apply, there is no need
27 to amend the definitional section of the Act concerning the meaning of digital property.

28
29 Note that, unless otherwise indicated, the language used mirrors that set out in the

¹² Like the SCA, the CFAA similarly protects against anyone who “intentionally accesses a computer without authorization or exceeds authorized access.” 18 U.S.C. 1030(a).

¹³ 18 U.S.C. Section 2702.

¹⁴ That section provides: (e) No Cause of Action Against a Provider Disclosing Information Under This Chapter. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.

¹⁵ Please see the *In re Daftary* memo and briefs on the Google Drive.

1 revisions to the first three Articles of the Uniform Probate Code, so the Comments to those sets
2 of revisions have not been repeated. The Comments to this Article will focus on any procedures
3 specifically applicable to this Article.

4
5 As it considers the rights of conservators, the Committee needs to decide whether powers
6 over digital property must be explicitly granted by the court (Alternative A) or whether they are
7 implicit in the appointment of the fiduciary (Alternative B). The draft offers both alternatives.

8
9 The draft focuses on conservators rather than guardians, who have much more limited
10 duties with respect to the property of their wards. *See, e.g.*, UPC Section 5-207-208 (powers and
11 duties for guardian of minor), 5-314-315 (powers and duties for guardian of incapacitated
12 persons).

13 Alternative A

14 **SECTION 5-411. REQUIRED COURT APPROVAL.**

15
16 (a) After notice to interested persons and upon express authorization of the court, a
17 conservator may:

18 (1) make gifts, except as otherwise provides in Section 5-427(b)

19 [2-7]

20 (8) access, take control of, handle, conduct, continue, distribute, dispose of, or
21 terminate the interests in digital property of a protected person [unless such actions are contrary
22 to the terms of any governing instrument].

23 **Comment**

24 This amendment makes clear that a court must *explicitly* authorize a conservator's ability
25 to exercise responsibilities with respect to digital assets. The bracketed material clarifies that the
26 conservator's duties may be limited by any governing instrument. The Committee will need to
27 decide whether, with respect to digital assets, a conservator acts subject to the protected person's
28 governing instruments or can override them.

29 Alternative B

30 **SECTION 5-425. POWERS OF CONSERVATOR IN ADMINISTRATION.**

31 [(a)]
32

1 (b) A conservator, acting reasonably and in an effort to accomplish the purpose of the
2 appointment, and without further court authorization or confirmation, may:

3 [(1-25)]

4 (26) access, take control of, handle, conduct, continue, distribute, dispose of, or
5 terminate the interests in digital property of a protected person, [unless such actions are contrary
6 to the terms of any governing instrument, as defined in UPC Section 1-201(18)].

7 **Comments for the Committee**

8 This section establishes rights to digital property as an *implicit* part of a grant of authority
9 to the conservator, and is identical to the power accorded personal representatives in
10 Section 3-715.

11 **SECTION 5-425A. DIGITAL PROPERTY RECOVERY.**

12 (a) As used in this section, “custodian” means any person that electronically stores digital
13 property of the protected person or that otherwise has control over the protected person’s digital
14 property.

15 (b) A custodian shall provide a conservator with access to, and ownership of, any digital
16 property under the control of the custodian and copies of any digital assets under the control of a
17 custodian, upon receipt of a written request for such access made by the conservator,
18 accompanied by a copy of the court order that gives the conservator such authority over the
19 protected person’s digital property.

20 (c) The custodian shall comply not later than [60] days after receipt of the request made
21 under subsection (b). If, not later than [60] days after receiving a request made under
22 subsection (b), the custodian fails to comply with the request, the conservator may ask the court
23 for an order directing compliance.

24 (d) This section supersedes contrary provisions in the Terms of Service; provided,
25

1 however, that access shall not be provided if the court determines that the protected person,
2 while capable, affirmatively declined to have the protected person’s digital property released to
3 another.

4 (e) A custodian may not destroy, disable or dispose of any digital property of a protected
5 person for two years after a custodian receives a request or order made under subsection (b).

6 (f) For purposes of this section, the conservator is an “authorized user” who has the
7 lawful consent of a protected person for purposes of accessing or copying the digital property of
8 a protected person.

9 (g) No person may maintain a cause of action against a custodian for acting in
10 compliance with this section.

11 **Comments for the Committee**

12 This provision is similar to the one established for personal representatives, so please see
13 comments to 3-715A, *supra*.

14 **ARTICLE 3**

15 **AMENDMENTS TO THE UNIFORM POWER OF ATTORNEY ACT**

16 **(ART. 5B OF THE UPC)**

17 **Prefatory Note**

18 This Article contains three different provisions. First, it establishes the power of an agent
19 to take control of a principal’s digital property *only upon* a specific grant of authority (it does not
20 offer a statutory option of making access to digital property a presumed, implicit aspect of the
21 agent’s authority). Second, it sets out the scope of the agent’s responsibilities with respect to
22 digital property, providing parameters for the agent to act in the principal’s best interests. Third,
23 it sets out a procedure that allows the agent to access digital property.
24

25 **SECTION 5B-201. AUTHORITY THAT REQUIRES SPECIFIC GRANT;** 26 **GRANT OF GENERAL AUTHORITY.**

27 (a) An agent under a power of attorney may do the following on behalf of the principal or
28

1 with the principal’s property only if the power of attorney expressly grants the agent the
2 authority and exercise of the authority is not otherwise prohibited by another agreement or
3 instrument to which the authority or property is subject:

4 [(1) – (8)]; or
5 (9) access, take control of, handle, conduct, continue, distribute, dispose of, or
6 terminate interests in any digital property of the principal.

7 **Comments for the Committee**

8 This section establishes that the agent’s ability to access and manage digital property
9 requires a grant of specific authority through express language in a power of attorney, and that it
10 is not part of the grant to an agent of general authority. Like other acts that require specific
11 authority, such as making a gift, amending a trust, or disclaiming property, the rationale is the
12 risk posed by handling digital property to the principal’s property and estate plan.

13
14 **SECTION 5B-218. SCOPE OF AUTHORITY OVER DIGITAL PROPERTY.**

15 Unless the power of attorney otherwise provides, language in a power of attorney
16 granting authority with respect to digital property of a principal authorizes the agent to manage
17 the digital property only as the agent determines is consistent with the principal’s objectives if
18 actually known by the agent and, if unknown, as the agent determines is consistent with the
19 principal’s best interest based on all relevant factors, including:

- 20 (1) the value, type, and nature of the principal’s digital property; and
21 (2) the principal’s personal history of actions with respect to the digital property.

22 **Comments for the Committee**

23 This section is modeled on Section 5B-217, “Gifts.” It provides default limitations on an
24 agent’s authority over the principal’s digital property. The mere granting to an agent of authority
25 over digital property does not, however, grant an agent unlimited authority. The agent’s
26 authority is subject to this section unless enlarged or further limited by an express modification
27 in the power of attorney. Without modification, the authority of an agent under this section is
28 limited.

1 It emphasizes that exercise of authority over digital property, as with the exercise of all
2 authority under a power of attorney, must be consistent with the principal’s objectives. If these
3 objectives are not known, then actions must be consistent with the principal’s best interest based
4 on all relevant factors, such as those listed. These examples are illustrative rather than exclusive.
5

6 **SECTION 5B-219. DIGITAL PROPERTY RECOVERY.**

7 (a) As used in this section, “custodian” means any person that electronically stores digital
8 property of the principal or that otherwise has control over the digital property.

9 (b) A custodian shall provide an agent with access to and ownership of any digital
10 property under the control of a custodian and copies of any digital assets under the control of a
11 custodian, upon receipt of a written request for such access made by the agent, accompanied by a
12 copy of the power of attorney authorizing the agent to have access:

13 (c) The custodian shall comply not later than [60] days after receipt of the request made
14 under subsection (b). If, not later than [60] days after receiving a request made under
15 subsection (b), the custodian fails to comply with the request, the agent may ask the court for an
16 order directing compliance.

17 (d) This section supersedes contrary provisions in the Terms of Service; provided,
18 however, that access shall not be provided if a court determines that the principal affirmatively
19 declined to have the principal’s digital property released to another.

20 (e) A custodian may not destroy, disable or dispose of any digital property of a principal
21 for two years after a custodian receives a request made under subsection (b).

22 (f) For purposes of this section, the agent is an “authorized user” who has the lawful
23 consent of a principal for purposes of accessing or copying the digital property of a principal.

24 (g) No person may maintain a cause of action against a custodian for acting in
25 compliance with this section.

1 **Comments for the Committee**

2 This provision is similar to the one established for personal representatives, so please see
3 comments to 3-715A, *supra*.

4
5 **ARTICLE IV**

6 **AMENDMENTS TO THE UNIFORM TRUST CODE**

7 **Prefatory Note**

8
9 This Article contains two different provisions. First, it includes general definitions for
10 digital assets. Second, it recognizes the right of the trustee to own and manage digital property.
11 Unlike other Articles in the Uniform Act, there appears to be no need to establish a procedure for
12 the trustee to recover digital property as it is assumed that the settlor will place the relevant
13 property in trust. Similarly, the settlor will establish the parameters of the trustee’s access
14 through the terms of the trust.

15
16 **SECTION 103. DEFINITIONS.**

17 [(1)-(5)]

18 **Alternative A**

19 (5A) “Digital account” means, but is not limited to, an electronic account
20 containing a digital asset and includes blogging, email, financial, multimedia, personal, social
21 networking and other online account or comparable items as technology develops.

22 **Alternative A**

23 (5B) “Digital asset” means any text, images, multimedia information, or personal
24 property stored in a digital or analog format, whether stored on a server, computer, or other
25 electronic device, regardless of whether it is remotely stored, which currently exists or may exist
26 as technology develops, and regardless of the ownership of the device upon which the digital
27 asset is stored. Digital assets include, without limitation, any words, characters, codes, or
28 contractual rights necessary to access the digital asset.

1 **Alternative B**

2 (5B) “Digital asset” means electronically stored information—including writings,
3 drawings, graphs, charts, photographs, sound recordings, images, and other data or data
4 compilations—stored in any medium from which information can be obtained either directly or,
5 if necessary, after translation by the responding party into a reasonably usable form.

6 **Comments for the Committee**

7 Subsections (5A-B) add new definitions on the meaning of digital accounts and assets.
8 The list is exemplary, not exclusive. (Please see the comments under the definition section of the
9 UPC, p. __, *supra*.)

10
11 (5C) “Digital property” includes a digital asset and digital account and consists of
12 the ownership and management interests in the digital assets accounts.

13 [(6)-(11)]

14 (12) “Property” includes both real and personal property or any interest therein and
15 means anything that may be the subject of ownership, including digital property.

16 [(13)-(18)]

17 (18A) “Terms of Service Agreement” includes “terms of use agreement” and a
18 similar arrangement that controls a relationship between an individual and any person that
19 maintains, manages, or supervises the individual’s digital asset(s), and encompasses all contracts
20 between the host or licensor and the user of the site or service which establish the terms,
21 conditions, and/or privacy policy and otherwise define the rights and limitations of each party
22 with regard to use of the site.

23 [(19)-(20)]

24 **Comments for the Committee**

25 These definitions are repeated from those in Article I, *supra*.

