

DRAFT
FOR DISCUSSION ONLY

FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For February 15-16, 2013 Drafting Committee Meeting

With Prefatory Note and Comments

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ON UNIFORM STATE LAWS

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January 18, 2013

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FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

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FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

Prefatory Note for the Drafting Committee

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 laws exist on the rights of fiduciaries over digital assets. 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. While an earlier draft focused on amendments to existing uniform laws in this area, this draft is designed to be a stand-alone act. The draft is divided into eleven sections. Sections 1-3 contain general provisions and definitions. Sections 4-7 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Sections 8-9 contain provisions relating to the rights of the fiduciary to recover property, and the rights of interested parties to object to fiduciary access.

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.

Section 10 addresses relief from liability for compliance. Sections 11-14 address miscellaneous issues, including the effective date of the act and similar issues.

After many of the proposed sections, a Comment to the Committee discusses the drafting of the section and raises issues for Committee consideration. The Comments should be read in conjunction with the proposed statutory text. Some of the major issues for Committee consideration include: 1) the definitions of “custodian” and “digital property” set out in Section 2; 2) the type and nature of control that can be exercised by a fiduciary, raised initially in Section 4; and 3) the process and standards for objecting to a fiduciary’s control that are addressed in Section 9.

1 **FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Fiduciary

3 Access to Digital Assets Act.

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Account holder” means a decedent, protected person, principal or settlor who has a
6 terms of service agreement with a custodian.

7 (2) “Agent” means an attorney-in-fact acting under a durable or nondurable power of
8 attorney.

9 (3) “Authorized user” means a fiduciary who is deemed to have the lawful consent of
10 the account holder.

11 (4) “Conservator” means a person who is appointed by a court to manage the estate of a
12 protected person. The term includes a limited conservator.

13 (5) “Court” means the [. . . Court or branch] in this state having jurisdiction in matters
14 relating to the content of this act.

15 (6) “Custodian” means any person that electronically stores digital property of the
16 account holder or that otherwise has control over the digital property.

17 (7) “Digital account” means an electronic system for creating generating, sending,
18 receiving, storing, displaying, or processing information that provides access to a digital asset or
19 a digital service.

20 (8) “Digital asset” means information created, generated, sent, communicated,
21 received, or stored by electronic means on a digital service or digital device and includes,
22 without limitation, any usernames, words, characters, codes, or contract rights pursuant to the
23 terms of service agreement that controls access to a digital account.

1 (9) “Digital Property” means a digital account and digital assets and consists of the
2 ownership, management, and rights related to the digital asset and account.

3 (10) “Electronic” means relating to technology having electrical, digital, magnetic,
4 wireless, optical, electromagnetic, or similar capabilities.

5 (11) “Fiduciary” means a personal representative, conservator, agent, or trustee.

6 (12) “Governing instrument” means a will, trust, instrument creating or exercising a
7 power of attorney, or other dispositive, appointive, or nominative instrument of any similar type.

8 (13) “Information” means data, text, images, sounds, codes, computer programs,
9 software, databases, or the like.

10 (14) “Person” means an individual, corporation, business trust, estate, trust, partnership,
11 limited liability company, association, joint venture, public corporation, government or
12 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

13 (15) “Personal representative” means an executor, administrator, successor personal
14 representative, special administrator, and persons who perform substantially the same function
15 under the law governing their status.

16 (16) “Power of attorney” means a writing or other record that grants authority to an
17 agent to act in the place of the principal, whether or not the term power of attorney is used.

18 (17) “Principal” means an individual who grants authority to an agent in a power of
19 attorney.

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

22 (19) “Protected person” means an individual for whom a conservator has been appointed
23 or other protective order has been made.

1 (20) “Protective order” means an order appointing a conservator or other order related to
2 management of a protected person’s property.

3 (21) “Record” means information that is inscribed on a tangible medium or that is stored
4 in an electronic or other medium and is retrievable in perceivable form.

5 (22) “Terms of service agreement” means a contract that controls the relationship
6 between an account holder and the custodian. The term includes a terms of use agreement.

7 (23) “Trustee” means the fiduciary with legal title to assets pursuant to an agreement that
8 creates a beneficial interest in others.

9 (24) “Will” includes any testamentary instrument.

10 **Comments for the Committee**

11 The definitions of agent, conservator, court, electronic, fiduciary, governing instrument,
12 information, person, personal representative, power of attorney, principal, property, protected
13 person, protective order, record, and will are based on those in the Uniform Probate Code. The
14 other definitions are new for this act. The Committee indicated it would like to reconsider the
15 definitions of digital assets and digital accounts, as well as the necessity of a separate definition
16 for digital property. There are important issues concerning what rights can be obtained by the
17 authorized when it comes to digital property; for example, what about licensing agreements
18 governed by Terms of Use that prevent transferability?

19 The definition of “custodian” is an issue that that the Committee may want to consider.
20 The definition potentially goes well beyond internet service providers. For example, some
21 employers might be considered custodians, because they provide employees with e-mail
22 addresses. If the Committee decides to retain the existing definition, then this may affect
23 Section 8, which sets out the standards for obtaining digital property from custodians.

24 The definition of authorized user establishes the fiduciary’s authority with respect to
25 digital property. The language mirrors that used in the Stored Communications Act (SCA),
26 18 U.S.C. Section 2701 *et seq.*, and is designed to ensure the fiduciary is “authorized” under the
27 two federal statutes that prohibit unauthorized access to computers and computer data, the SCA
28 and the Computer Fraud and Abuse Act,⁵ as well as pursuant to any comparable state laws

⁵ 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).

1 criminalizing unauthorized access.⁶

2 The Stored Communications Act contains two relevant prohibitions.

3 1) 18 USC Sec. 2701(a), which concerns access to the digital property, makes it a crime
4 for anyone to “intentionally access[] without authorization a facility through which an electronic
5 communication service is provided” as well as to “intentionally exceed[] an authorization to
6 access that facility.” Thus, someone who has authorization to access the facility is not engaging
7 in criminal behavior. Moreover, this section does not apply to “conduct authorized . . . by a user
8 of that service with respect to a communication of or intended for that user.”⁷

9 2) 18 USC Sec. 2702, “Voluntary disclosure of customer communications or records,”
10 concerns actions by the service provider. It prohibits an electronic communication service or a
11 remote computing service from knowingly divulging the contents of a communication that is
12 stored by or carried or maintained on that service unless disclosure is made “with the lawful
13 consent of the originator or an addressee or intended recipient of such communication, or the
14 subscriber in the case of remote computing service.”⁸

15 The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers.
16 18 U.S.C. 1030.⁹

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

18 By defining the fiduciary as an authorized user: 1) the fiduciary has authorization to
19 access the files under the *first* section of the SCA, 18 U.S.C. 2701 as well as under the CFAA;
20 and 2) the fiduciary has “the lawful consent” of the originator/subscriber so that the provider can
21 voluntarily disclose the files pursuant to the *second* relevant provision of the SCA, 18 U.S.C.
22 2702.¹⁰ Moreover, this language should be adequate to avoid liability under the state

⁶ 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).

⁷ 18 U.S.C. §§ 2701(a), (c)(2).

⁸ 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.”

⁹ 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).

¹⁰ 18 U.S.C. Section 2702.

1 unauthorized access laws.

2 **SECTION 3. APPLICABILITY.**

3 (a) This act applies to any grant of authority over digital property to a fiduciary.

4 (b) This act does not apply to any other effort by one person to transfer authority over
5 digital property to another person.

6 **Comment**

7 This section distinguishes the authority over digital property of fiduciaries, which are
8 subject to this act, from any other efforts to access the digital property. Family members or
9 friends may seek access to the digital property of others, but such efforts are subject to other laws
10 and are not covered by this act.

11 **SECTION 4. CONTROL OF DIGITAL PROPERTY OF DECEDENT BY A**
12 **PERSONAL REPRESENTATIVE.**

13 (a) Except as [the decedent has] otherwise provided by will or by an order in a formal
14 proceeding a personal representative, acting reasonably for the benefit of the interested persons,
15 may properly exercise control over the decedent’s digital property to the maximum extent
16 possible under applicable law and under the terms of any applicable and enforceable Terms of
17 Service Agreement.

18 (b) The court order appointing the personal representative must explicitly include
19 authority over digital property.

20 **Comments for the Committee**

21 This section establishes the default rule that the personal representative is authorized to
22 administer the decedent’s digital property. It is modeled on the formulation of the personal
23 representative’s default power set out in UPC Sec. 3-715. The Committee has a variety of issues
24 to consider when it comes to the personal representative’s authority. First, does the section cover
25 any personal representative, whether appointed pursuant to formal or informal probate? With
26 formal probate proceedings, a personal representative is appointed pursuant to a court order
27 issued by a judge. E.g., UPC Sections 3-401-402. Through informal probate, by contrast, a
28 personal representative may be appointed by the Registrar (a judge or a court clerk, see UPC
29 Section 1-307), or similar non-judicial officer. In either case, an additional subsection may need
30 to specify the meaning of the personal representative’s obligations as a fiduciary. For example,

1 UPC Section 3-703 states that the personal representative “is a fiduciary who shall observe the
2 standards of care applicable to trustees. A personal representative is under a duty to settle and
3 distribute the estate of the decedent in accordance with the terms of any probated and effective
4 will and this [code], and as expeditiously and efficiently as is consistent with the best interests of
5 the estate. He shall use the authority conferred upon him by this [code], the terms of the will, if
6 any, and any order in proceedings to which he is party for the best interests of successors to the
7 estate.”

8 Second, what does “exercise control” mean? This may need to be defined in the general
9 definitions section at the beginning of the act because it is an issue for all fiduciaries. It could
10 include everything from a simple request for information to maintaining ongoing access to
11 terminating the digital property. If, for example, an authorized user has stored a governing
12 instrument on the internet, then the fiduciary may only want access to that. Or does access to
13 assets stored under a licensing agreement enable the fiduciary to copy the assets or to control and
14 dispose of them?

15 **Comment**

16 The power of the personal representative is conceived to embrace all possible
17 transactions which the account holder might undertake in connection with digital property.

18 **SECTION 5. CONTROL OF DIGITAL PROPERTY OF A PROTECTED**
19 **PERSON BY A CONSERVATOR.**

20 (a) At the initial hearing on the conservatorship application, or upon later application by
21 the conservator of the estate, the court may expressly authorize the conservator to [do any or all
22 of the following]:

- 23 (1) exercise control over the digital property of a protected person;
24 (2) exercise rights in digital property of a protected person; and
25 (3) change governing instruments affecting the digital property of a protected
26 person.

27 (b) The court, in approving a conservator’s exercise of the powers listed in
28 subsection (a), shall consider primarily the decision with respect to those powers that the
29 protected person would have made, to the extent that the decision can be ascertained

1 **Comments for the Committee**

2 This section establishes that the conservator must be specifically authorized by the court
3 to access the protected person’s digital property. Each of the three different levels of access
4 must be specifically granted by court order. As with the other types of fiduciaries covered by the
5 act, the Committee needs to consider what specific rights are granted through the terms “exercise
6 control” and “exercise rights.” These may need to be defined in the general definitions section at
7 the beginning of the act.

8 Subsection (b) repeats the introductory language in UPC Section 5-411(c), and is
9 designed to clarify that decision by the court to grant powers to the conservator under this
10 section must be based primarily on the decision that the protected person would have made, if of
11 full capacity. The protected person’s personal values and expressed desires, past and present, are
12 to be considered when making decisions about the conservator’s authority. Existing state law
13 may also set out the requisite standards for a conservator’s actions, and the bracketed language
14 allows for reference to those laws.

15 **SECTION 6. CONTROL OF DIGITAL PROPERTY BY AN AGENT UNDER**
16 **POWER OF ATTORNEY.**

17 (a) An agent under a power of attorney may do the following on behalf of the principal
18 only if the power of attorney expressly grants the agent the authority, and exercise of the
19 authority is not otherwise prohibited by a terms of service agreement or governing instrument to
20 which the property is subject:

- 21 (1) exercise control over the digital property of a principal;
- 22 (2) exercise rights in digital property of the principal; and
- 23 (3) change a governing instrument affecting digital property of the principal.

24 **Comments for the Committee**

25 This section establishes that the agent must be specifically authorized by the principal to
26 access the principal’s digital property, and it is modeled on UPC Sec. 5B-201(a). Unlike other
27 fiduciaries, the agent is only able to exercise authority where this is not contrary either to the
28 terms of service agreement or to another governing instrument.

29 Each of the three different levels of access must be specifically granted by the power. An
30 affirmative grant of authority to an agent is required because of the risk those acts pose to the
31 principal’s property and estate plan, and it is consistent with the agent’s lack of supervision by a
32 court. As with the other types of fiduciaries covered by the act, what specific rights are granted
33 through the terms “exercise control” and “exercise rights”? These may need to be defined in the

1 general definitions section at the beginning of the act.

2 **SECTION 7. CONTROL OF DIGITAL PROPERTY BY A TRUSTEE.** Without
3 limiting the authority otherwise conferred by law other than this act, a trustee may exercise
4 control over, and rights in, any digital property according to the terms of the trust.

5 **Comment**

6 The Committee needs to consider what, if any, limits can be imposed on the trustee's
7 actions.

8 **SECTION 8. DIGITAL PROPERTY RECOVERY FROM A CUSTODIAN.**

9 (a) A custodian shall provide a fiduciary with access to and ownership of any digital
10 property, and copies of any digital assets, under the control of a custodian, upon receipt of a
11 written request for such access, as follows:

12 (1) if requested by a personal representative, the written request must be
13 accompanied by a certified copy of the death certificate and a certified copy of the letter of
14 appointment of the personal representative granting authority over the digital property;

15 (2) if requested by a conservator, the written request must be accompanied by a
16 certified copy of the court order that gives the conservator authority over the digital property;

17 (3) if requested by an agent, the written request must be accompanied by a
18 certified copy of the power of attorney authorizing the agent to exercise authority over the digital
19 property; or

20 (4) if requested by a trustee, the written request must be accompanied by a
21 certified copy of the trust instrument authorizing the trustee to exercise authority over the digital
22 property.

23 (b) The custodian shall comply not later than [60] days after receipt of the request made
24 under subsection (a). If, not later than [60] days after receiving a request made under

1 subsection (a), the custodian fails to comply, the fiduciary may ask the court for an order
2 directing compliance.

3 **SECTION 9. OBJECTIONS TO FIDUCIARY'S DIGITAL PROPERTY**
4 **RECOVERY.**

5 (a) At any time before the fiduciary is discharged by the court, any interested party may
6 file with the court a written objection to the fiduciary's request for control, or the fiduciary's
7 exercise of continued control, of the digital property, explaining the basis for the objection.

8 (b) Upon the filing of the objection, the court shall order a hearing on the objection
9 within sixty days and not less than fifteen days after the filing of the objections.

10 (c) At the hearing, the court shall consider the objections and may prevent the fiduciary
11 from exercising control over, or any other rights, over the digital property.

12 **Comments for the Committee**

13 This section is modeled on C.G.S.A. § 45a-343 (2012). The goal of the section is to
14 protect the account holder's intent by preventing the fiduciary, at least in limited situations, from
15 accessing the digital property. Note that this section includes only court-appointed fiduciaries,
16 so agents and trustees are excluded.

17 The Committee may want to provide guidance on when a court might preclude access,
18 including evidentiary standards and the type of evidence to be considered. In the absence of any
19 explicit statement, the evidentiary standard is preponderance of the evidence. For example, what
20 if a will provides that the digital property is to be destroyed upon death; under what
21 circumstances, based, for example, on public policy against burning Rembrandts, could the court
22 override the will?

23 **SECTION 10. CUSTODIAN IMMUNITY.**

24 (a) A custodian acting in compliance with this act is immune from liability for an action
25 done in compliance with the act.

26 (b) A custodian acting in good faith is immune from civil liability for the custodian's
27 accidental destruction of any digital property subject to this act.

1 **Comment**

2
3 This section establishes that custodians are protected from liability when they act in
4 accordance with the procedures of this act and in good faith.

5 **SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
6 applying and construing this uniform act, consideration must be given to the need to promote
7 uniformity of the law with respect to its subject matter among states that enact it.

8 **SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
9 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
10 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
11 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
12 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
13 U.S.C. Section 7003(b).

14 **SECTION 13. REPEALS; CONFORMING AMENDMENTS.**

15 **SECTION 14. EFFECTIVE DATE.** This [act] takes effect