TO: Committee of the Whole, 2013 ULC Annual Meeting, Boston

FROM: Suzanne Brown Walsh, Chair
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DATE: May 23, 2013 SUBJECT: **FIDUCIARY ACCESS TO DIGITAL ASSETS, INITIAL READING**

Background/Summary of the Committee's Work

Minnesota Commissioner Gene Hennig and his law partner Jim Lamm first proposed this project to the Scope and Program Committee in May 2011, and a drafting committee was approved in July 2012. The Committee was authorized to draft either a freestanding act, or to amend other ULC acts, in order to vest fiduciaries (executors, guardians, conservators, agents acting under powers of attorney, and trustees) with authority to manage and distribute digital assets, copy or delete digital assets, and access digital assets.

State legislation is urgently needed on this topic because fiduciaries, more and more frequently, are finding it necessary to access e-mail and to marshal and collect digital accounts and assets, and few state laws address the subject. In addition, there are federal and state privacy laws that criminalize the unauthorized access of computers and digital accounts, and that apply to certain providers of digital accounts to prohibit the disclosure of account information to anyone without the account holder's consent. Logically there should be no difference between a fiduciary's right to access an online bank or business and one with a brick and mortar storefront. In practice and reality, however, anecdotal evidence indicates that businesses sometimes refuse to recognize fiduciary authority over digital assets. It is these gaps that the Act seeks to close.

Currently, only five states (Connecticut, Idaho, Oklahoma, Rhode Island and Indiana) have statutes governing fiduciary authority over digital assets. (Virginia recently enacted a similar law governing parental access to minors' accounts.) The subject of fiduciary access to digital assets has received widespread attention in the press and in state legislatures. As Jim Lamm reported on his blog (http://www.digitalpassing.com/2013/02/13/list-state-laws-proposals-fiduciary-access-digital-property-incapacity-death/), as of February 25, 2013, there had been bills raised in 19 states on this topic. Uniformity is crucial not only for national banks and trust companies who act as fiduciaries in many states, but also for the national providers of various digital services and accounts.

At its first meeting in late fall 2012, the drafting committee considered a draft act that would have amended the Uniform Probate Code, the Uniform Guardianship and Protective Proceedings Act, the Uniform Power of Attorney Act, and the Uniform Trust Code to address fiduciary authority over digital assets. The current draft is structured instead as a stand- alone act.

Scope

None of the existing state laws move beyond the authority of personal representatives. The proposed Act is much broader and includes agents, trustees and conservators, who unlike personal representatives may act for those who are living. This is a concern to some observers, because, among other issues, most social media platforms are structured to prevent non-account owners from using another person's account, and because the rights of joint account owners could be affected by the fiduciary's access.

Issues for Consideration

In addition to drafting definitions of digital accounts, assets and other references in a manner that will not immediately become obsolete, the Committee is considering many issues, such as:

1. Whether and how the act should differentiate between the authority of the various fiduciaries based, for example, on whether they are court-appointed and subject to court supervision, or whether they are appointed by the account holder;

2. Whether each fiduciary's authority with respect to digital property should be part of an implicit grant of power, or require special authorization;

3. Whether the fiduciary's authority should include the ability to manage digital property and digital accounts, which particularly concerns social media and media content subscription providers;

4. Whether state law grants of authority to the fiduciary will eliminate the risk of violation of state and federal laws that criminalize unauthorized access to computers and electronic data; and

5. To what extent fiduciaries should be allowed to ignore an account holder's expressed intent to keep digital communications or assets private, or even to destroy them.

Approach and Coordination with Federal Copyright and Privacy Law

A primary purpose of the Act is to allow providers to provide information to fiduciaries without fear of violating potentially relevant federal laws. Section 3 of the Act immediately establishes that fiduciaries "step into the shoes" of account holders and thereby have the same, but no greater, access and rights to digital accounts and assets as the account holder does pursuant to the internet service provider's Terms of Service Agreement.

Consequently, the Act will not allow a fiduciary to sell or transfer rights that an account holder cannot himself or herself sell or transfer (such as e-books or digital music files). Likewise, the Act would not give a fiduciary access of or control over any digital content and accounts that were not lawfully obtained by a decedent, incapacitated person, principal or settlor. Act, Section 3(b). Section 3(b) of the Act also says that fiduciary access, by itself, cannot be deemed to be a violation of a Terms of Service Agreement or unauthorized transfer of the account. Beyond that, the Terms of Service Agreement would govern the fiduciary's exercise of the account holder's rights.

To ensure compliance with federal privacy laws, the Act looks to the federal Stored Communications Act (SCA) for some definitions, such as "electronic communications" and the "contents" of such communications. Section 3(c) refers to the account holder's "lawful consent" and the fiduciary's being an "authorized user" and thus mirrors language in the SCA and the federal Computer Fraud and Abuse Acts.

Structure of the Proposed Act

Each type of fiduciary's authority is separately considered and addressed. Sections 5 and 6, governing the authority of the two types of court appointed fiduciaries (personal representatives of estates, and conservators), each contain alternative approaches. The first version of each section responds to the concerns of internet service providers who are subject to the Stored Communications Act. The SCA permits them to disclose "customer records" when the account holder lawfully consents, or to a person other than the government. Thus, unlike the contents, the provider is permitted to disclose the non-content records of the electronic communications to anyone except the government, without consent. In addition, the provider may disclose the records to the government with the customer's lawful consent or in certain emergencies.

Because federal law treats records and content differently, the providers who are subject to the SCA want the provisions of the Act governing court appointed fiduciaries to likewise separately address them. That way, they reason, they could immediately comply with requests for data not protected by the federal law.

The second version of Sections 5 and 6 creates a broad default rule that the personal representative or conservator is authorized to administer all digital property, unless prohibited by the will or contraindicated by evidence of the protected person's intent. While cleaner and simpler, this version ignores the SCA's distinction between records and communications content. The Committee is interested in input and comments on these alternatives and their structure.

Section 7 is quite simple, providing that a trustee may deal with digital property held in trust as the trust expressly provides. In our view, there should not be any doubt that if a trust's settlor has expressly authorized a trustee to access or control digital property held in the trust, the trustee has the settlor's "lawful consent" as required by the SCA. The idea is to allow a settlor to set up her nonfinancial digital accounts in the name of her revocable

trust, so that control of the accounts would then pass to the successor trustee upon the settlor's death or incapacity. Again, this would not bypass existing terms of service agreements and copyright protections; rather, it would simply allow the trustee the same access and control as the settlor had, where the terms of the trust so provide.

Section 8 contains compliance procedures that were loosely modeled after the UPC and UTC (Section 1013). Unresolved issues with those include how best to address the respective rights of joint account holders, and the need for fiduciary access in informal estate administrations where it would be difficult or even impossible to obtain certified copies evidencing fiduciary authority.

Section 9 is vital, as it provides custodians with immunity when custodians comply with fiduciary requests for access to digital accounts and assets.