

TO: Committee of the Whole, 2014 ULC Annual Meeting, Seattle

FROM: Suzanne Brown Walsh, Chair

DATE: May 27, 2014 SUBJECT: **UNIFORM FIDUCIARY
ACCESS TO DIGITAL ASSETS
ACT, FINAL READING**

Purpose of the Act

Whether we like it or not, our communications, books, shopping, games, photographs, videos, movies, music and business and personal records and files have by and large been digitized. Nonbelievers need only visit their local Starbucks and compare the number of patrons paying with their cell phones to the number paying with cash and they, too, will agree.

Despite that sea change, existing state probate laws that govern the actions of fiduciaries largely fail to address digital assets. Federal privacy laws, together with state and federal computer fraud and abuse acts, impede or prevent fiduciary access to the digital assets and records needed to manage and collect assets. A uniform act governing fiduciary access to digital assets will allow personal representatives, conservators/guardians, agents acting under powers of attorney and trustees to access digital assets, regardless of the location of the fiduciary or the company providing the digital service, asset or account. Uniformity is also crucial for national banks and trust companies who act as fiduciaries in many states, and for the national providers of various digital services and accounts.

Few state laws address this subject. Currently, only seven states (Connecticut, Idaho, Indiana, Oklahoma, Rhode Island, Nevada and Virginia) have statutes governing any aspect of fiduciary authority over digital assets, although many legislators have introduced bills in the past two years. The Uniform Fiduciary Access to Digital Assets Act (UFADAA) is broader than any existing state FADA law, as it includes personal representatives, who act on behalf of decedents, and agents, trustees and conservators, who act for those who are living.

Logically there should be no difference between a fiduciary's right to access information from an online bank or business and from one with a brick and mortar storefront. In practice, however, businesses are refusing to recognize fiduciary authority over digital assets. UFADAA seeks to close that gap.

Coordination with Data Privacy, Criminal and Copyright Law

There are federal and state laws (the Electronic Computer Privacy Act, the Stored Communications Act, which is part of ECPA, and various Computer Fraud and Abuse Acts) that criminalize, or at least, penalize, the unauthorized access of computers and digital accounts, and that prohibit certain providers of digital accounts from disclosing most account information to anyone without the account holder's consent. These laws prevent public communications providers from disclosing certain electronic communications content without the sender or recipient's consent. Unfortunately, neither the Stored Communications Act nor the other statutes that prevent electronic communications disclosure expressly mention fiduciaries. However, Section 2702(b) does allow for disclosure to "an agent of such address or intended recipient" and the legislative history of the Stored Communications Act says that "authorized agents" may consent to such disclosure. UFADAA codifies that fiduciaries, who "step into the shoes of" the persons they represent, are authorized to consent to electronic communications disclosures under federal privacy laws. This allows the public communications provider to disclose or allow access without liability, and places electronic assets and communications on the same footing as traditional assets and communications ("asset neutrality").

UFADAA satisfies privacy concerns by condoning the account holder's ability to *prevent* fiduciary access to a digital asset, in the same manner that individuals may mandate the destruction of their traditional assets or communications under existing law. This is another manifestation of the premise of asset neutrality.

Finally, UFADAA protects content providers by specifying in Section 7(a)(1) that fiduciary authority does not exceed that of the account holder under the Terms of Service Agreement ("TOSA") or under copyright law.

Content of the Act

UFADAA is simple, yet comprehensive. It governs only *access* to digital assets. It defers to other law to determine the *ownership* of the assets. Likewise, it leaves intact the existing law of contract, copyright, banking, securities, agency, employment, privacy and trusts. It contains fifteen sections. Sections 1-2 contain general provisions and definitions, including those relating to the scope of the fiduciary's authority. The key definition is that of a "digital asset", which broadly covers all electronic or digital assets, and both the content and catalogue of electronic communications, but excludes underlying assets or liabilities that are not, themselves, digital. Thus, a digital asset includes a virtual currency, but not a tangible asset such as gold bullion.

In Sections 3 to 6, each type of fiduciary's authority is separately considered and addressed, and each is subject to different opt-in and default rules based on the presumed intent of the account holder and the applicability of other state and federal laws. Sections 3 and 4 govern the authority of the two types of court appointed fiduciaries (personal representatives of estates, and conservators). A personal representative is presumed to have access to all of the decedent's digital assets unless that is contrary to the decedent's will or

to other applicable law. Similarly, a conservator may access the assets pursuant to a court order. An agent acting pursuant to a power of attorney is presumed to have access to all of a principal's digital assets not subject to the protections of other applicable law. If another law (such as the Stored Communications Act) protects the asset, then the power of attorney must explicitly grant the agent access. A trustee may access any digital asset held by the trust unless that is contrary to the terms of the trust or to other applicable law.

Section 7 contains procedures governing and delineating the nature of fiduciary access to digital assets under the Act. It 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 subject to a restrictive terms-of-service agreement). 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.

Section 7(a) establishes the fiduciary's rights to access and control under other applicable laws, such as electronic privacy protection and any applicable computer fraud and abuse acts. Section 7(b) requires an account holder wishing to bar fiduciary access affirmatively to make such an election in the TOSA; other provisions in the agreement broadly barring fiduciary access are void, and choice of law provisions governing the effect of the TOSA that prevent fiduciary access are unenforceable under Section 7(c). Some providers believe that custodians' terms of services agreements should control what happens to a user's accounts when they die, whether the terms of service provision is default, opt--out, or opt--in. The drafting committee disagreed, believing that such latitude would neutralize the effectiveness of the Act.

Section 8 addresses compliance, requiring disclosure and access to fiduciaries who are otherwise entitled to access, control or a copy of the asset under the Act. Some custodians object to this state law mandate, because disclosure under the federal privacy laws is permissive. They prefer that custodians be given the option to disclose stored communications to fiduciaries. The drafting committee disagreed. Section 9 grants immunity to custodians who comply with its provisions. Again, some custodians are not satisfied with immunity from civil liability; they would like fiduciaries to indemnify and hold them harmless from all civil and criminal actions when the custodian complies with a mandatory request for access. The drafting committee rejected that approach.

Section 13 makes FADAA applicable to virtually all existing or future fiduciary relationships.

