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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By
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DRAFTING COMMITTEE ON FIDUCIARY ACCESS TO DIGITAL ASSETS

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

SUZANNE BROWN WALSH, P.O. Box 271820, West Hartford, CT 06127, Chair
DAVID BIKLEN, 799 Prospect Ave., West Hartford, CT 06105
STEPHEN CHOW, 125 Summer St., Boston, MA 02110-1624
VINCE DELIBERATO, JR., Legislative Reference Bureau, Main Capitol Bldg., Harrisburg, PA 17120-0033
MARC FEINSTEIN, 431 N. Phillips Ave., Suite 301, Sioux Falls, SD 57104
GENE HENNIG, 500 IDS Center, 80 S. 8th St., Minneapolis, MN 55402-3796
STAN KENT, 90 S. Cascade Ave., Suite 1210, Colorado Springs, CO 80903
SUSAN KELLY NICHOLS, North Carolina Dept. of Justice, P.O. Box 629, Raleigh, NC 27602-0629
LANE SHETTERLY, 189 S.W. Academy St., P.O. Box 105, Dallas, OR 97338
NAOMI CAHN, George Washington University School of Law, 2000 H St. NW, Washington, DC 20052, Reporter

EX OFFICIO

MICHAEL HOUGHTON, P.O. Box 1347, 1201 N. Market St., 18th Floor, Wilmington, DE 19899, President
GAIL HAGERTY, South Central Judicial District, P.O. Box 1013, 514 E. Thayer Ave., Bismarck, ND 58502-1013, Division Chair

AMERICAN BAR ASSOCIATION ADVISOR

KARIN PRANGLEY, 500 N. Dearborn St., Suite 200, Chicago, IL 60654-3372, ABA Advisor
VICKI LEVY ESKIN, 1732 N. Ronald Reagan Blvd., Longwood, FL 32750-3409,
ABA Section Advisor
CHRISTINA KUNZ, William Mitchell College of Law, 875 Summit Ave., St. Paul, MN 55105,
ABA Section Advisor
DAVID SHULMAN, 401 E. Las Olas Blvd., Suite 130-491, Fort Lauderdale, FL 33301-2210,
ABA Section Advisor

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, Executive Director

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org
# 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. Section 10 addresses relief from liability for compliance. Sections 11-14 address miscellaneous

⁴ A memo summarizing these laws and legislative proposals is available on the shared Google Drive.
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.
FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Fiduciary Access to Digital Assets Act.

SECTION 2. DEFINITIONS. In this [act]:

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

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

(3) “Conservator” means a person that is appointed by a court to manage the estate of an individual. The term includes a limited conservator.

(4) “Court” means the [court] in this state having jurisdiction in matters relating to the content of this [act].

(5) “Custodian” means a person that electronically stores digital property of an account holder or otherwise has control over digital property of the account holder.

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

(7) “Digital asset” means information created, generated, sent, communicated, received, or stored by electronic means on a digital service or digital device; the term includes a username, word, character, code, or contract right under the terms-of-service agreement.

(8) “Digital device” means an electronic device that can receive, store, process or send digital information.

(9) “Digital property” means the ownership and management of and rights related to a
digital account and digital asset.

(10) “Digital service” means the delivery of digital information (such as data or content) and transactional services (such as online forms and benefits applications) across a variety of platforms, devices and delivery mechanisms (such as websites, mobile applications, and social media).

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

(12) “Fiduciary” includes a personal representative, conservator, agent, or trustee.

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

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

(15) “Interested person” means heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding. In a conservatorship proceeding, it also includes any governmental agency paying or planning to pay benefits to the ward or protected person and any public or charitable agency that regularly concerns itself with methods for preventing unnecessary or overly intrusive court intervention in the affairs of persons for whom protective orders may be sought and that seeks to participate in the proceedings.
(16) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(17) “Personal representative” means an executor, administrator, successor personal representative, special administrator, or a person that performs substantially the same function under the law of this state other than this act.

(18) “Power of attorney” means a writing or other record that grants an agent authority to act in the place of a principal.

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

(20) “Property” means all property, whether real, personal, or mixed, or tangible or intangible, or any interest therein. The term includes digital property.

(21) “Protected person” means an individual for whom a protective order has been made.

(22) “Protective order” means an order appointing a conservator or another order related to management of a protected person’s property.

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

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

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

(26) “Will” means any testamentary instrument and includes a codicil and any
testamentary instrument which merely appoints an executor or revokes or revises another will.

Comments for the Committee

The definitions of agent, conservator, court, electronic, fiduciary, governing instrument, information, interested person, person, personal representative, power of attorney, principal, property, protected person, protective order, record, and will are based on those in the Uniform Probate Code. The other definitions are new for this act, although the definition of digital service comes from the White House Digital Government Strategy:


The Committee indicated it would like to reconsider the definitions of digital assets and digital accounts, as well as the necessity of a separate definition for digital property. There are important issues concerning what rights can be obtained by the authorized when it comes to digital property; for example, what about licensing agreements governed by Terms of Use that prevent transferability?

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

SECTION 3. APPLICABILITY. This [act] applies to a grant of authority over digital property only to a fiduciary.

Comment

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

SECTION 4. CONTROL OF DIGITAL PROPERTY OF DECEDENT BY PERSONAL REPRESENTATIVE. Except as a testator otherwise provided by will or until a court otherwise orders, a personal representative, acting reasonably for the benefit of the interested persons, may exercise control over the decedent’s digital property to the extent permitted under applicable law and a terms-of-service agreement.
Comments for the Committee

This section establishes the default rule that the personal representative is authorized to administer the decedent’s digital property. It is modeled on the formulation of the personal representative’s default power set out in UPC Sec. 3-715.

The Committee has a variety of issues to consider when it comes to the personal representative’s authority. First, does the section cover any personal representative, whether appointed pursuant to formal or informal probate? With formal probate proceedings, a personal representative is appointed pursuant to a court order issued by a judge. E.g., UPC Sections 3-401-402. Through informal probate, by contrast, a personal representative may be appointed by the Registrar (a judge or a court clerk, see UPC Section 1-307), or similar nonjudicial officer. In either case, an additional subsection may need to specify the meaning of the personal representative’s obligations as a fiduciary. For example, UPC Section 3-703 states that the personal representative “is a fiduciary who shall observe the standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this [code], and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this [code], the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.”

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

SECTION 5. CONTROL OF DIGITAL PROPERTY OF PROTECTED PERSON BY CONSERVATOR.

(a) At the initial hearing on an application to appoint a conservator, or later application by a conservator, the court may expressly authorize the conservator to do one or more of the following, subject to the provisions of the applicable terms-of-service agreement:

(1) exercise control over digital property of the protected person;

(2) exercise a right in digital property of the protected person; and

(3) change a governing instrument affecting the digital property of the protected person.
(b) In authorizing a conservator’s powers under subsection (a), the court shall consider the protected person’s intent with respect to those powers to the extent that intent can be ascertained.

Comments for the Committee

This section establishes that the conservator must be specifically authorized by the court to access the protected person’s digital property. Each of the three different levels of access must be specifically granted by court order. As with the other types of fiduciaries covered by the act, the Committee needs to consider what specific rights are granted through the terms “exercise control” and “exercise rights.” These may need to be defined in the general definitions section at the beginning of the act. We need to insure that the requirement in Section 5 for express authority over digital property does not limit the fiduciary’s authority over the underlying “bricks and mortar” asset, such as a bank account.

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

SECTION 6. CONTROL OF DIGITAL PROPERTY BY AGENT UNDER POWER OF ATTORNEY. If a power of attorney grants authority to an agent and exercise of authority is not otherwise prohibited by a terms-of-service agreement or governing instrument to which the digital property of the principal is subject, the agent may:

(1) exercise control over the digital property;

(2) exercise any right in the digital property; and

(3) change a governing instrument affecting the digital property.

Comments for the Committee

This section establishes that the agent must be specifically authorized by the principal to access the principal’s digital property, and it is modeled on UPC Sec. 5B-201(a).

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

Do we want to restrict an agent’s access to a bank or financial account that is accessible
online? Because of the danger of fraud and influence inherent in the use of powers of attorney,
we should discuss whether or not an agent’s control should differ from that granted to other
fiduciaries.

SECTION 7. CONTROL OF DIGITAL PROPERTY BY TRUSTEE. A trustee may
exercise control over and rights in any digital property according to the terms of the trust.

Comment

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

SECTION 8. DIGITAL PROPERTY RECOVERY FROM CUSTODIAN.
(a) A fiduciary with authority over digital property of another individual under the act
has the lawful consent of the account holder and is an authorized user under all applicable state
and federal statutes.
(b) On receipt of a written request by a fiduciary for access to digital property,
ownership of digital property, or a copy of a digital asset, a custodian with control of the digital
property or asset shall provide the fiduciary the requested access, ownership, or copy, if the
fiduciary complies with subsection (c).
(c) If a written request under subsection (b) is made:
(1) by a personal representative, the request must be accompanied by a certified
copy of the letter of appointment of the personal representative which grants authority over the
digital property;
(2) by a conservator, the request must be accompanied by a certified copy of the
court order that gives the conservator authority over the digital property;
(3) by an agent, the request must be accompanied by a certified copy of the power
of attorney that authorizes the agent to exercise authority over the digital property; or
(4) by a trustee, the request must be accompanied by a certified copy of the trust
instrument that authorizes the trustee to exercise authority over the digital property.

(d) A custodian shall comply not later than [60] days after receipt of the request made
under subsection (b). If the custodian fails to comply, the fiduciary may apply to the court for an
order directing compliance.

(e) A certified copy of a trust or power of attorney means a copy accompanied by an
affidavit by which the affiant attests that the copy is a true, exact, complete and unaltered
photocopy of the original, and that to the best of the affiant’s knowledge, said document remains
in full force and effect.

Subsection (a) is designed to establish that that the fiduciary is authorized to exercise
control over digital property in accordance with other applicable laws. The language mirrors that
used in the Stored Communications Act (SCA), 18 U.S.C. Section 2701 et seq., and clarifies that
the fiduciary is “authorized” under the two federal statutes that prohibit unauthorized access to
computers and computer data, the SCA and the Computer Fraud and Abuse Act, as well as
pursuant to any comparable state laws criminalizing unauthorized access.  

The Stored Communications Act contains two relevant prohibitions.

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

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§ 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).

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).
of that service with respect to a communication of or intended for that user.”\(^7\)

2) 18 USC Sec. 2702, “Voluntary disclosure of customer communications or records,” concerns actions by the service provider. It prohibits an electronic communication service or a remote computing service from knowingly divulging the contents of a communication that is stored by or carried or maintained on that service unless disclosure is made “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.”\(^8\)

The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers. 18 U.S.C. 1030.\(^9\)

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

By defining the fiduciary as an authorized user: 1) the fiduciary has authorization to access the files under the first section of the SCA, 18 U.S.C. 2701 as well as under the CFAA; and 2) the fiduciary has “the lawful consent” of the originator/subscriber so that the provider can voluntarily disclose the files pursuant to the second relevant provision of the SCA, 18 U.S.C. 2702.\(^10\) Moreover, this language should be adequate to avoid liability under the state unauthorized access laws.

For an example of a certification procedure that would not require that the entire trust or power of attorney be produced, see Uniform Trust Code Section 1013.

SECTION 9. OBJECTION TO RECOVERY OF FIDUCIARY’S DIGITAL PROPERTY BY FIDUCIARY.

(a) An interested party may file with the court with jurisdiction over the account holder or the fiduciary [under applicable state law] a written objection to the fiduciary’s request for

\(^7\) 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.
control over or the fiduciary’s exercise of continued control over digital property.

(b) On the filing of an objection under subsection (a), the court shall order a hearing on
the objection at least [15] days and not later than [60] days after the filing.

(c) At a hearing under subsection (b), the court shall consider the objection and may
order the fiduciary not to exercise control or any other right over the digital property.

Comments for the Committee

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

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

SECTION 10. CUSTODIAN IMMUNITY.

(a) A custodian is immune from liability for an action done in compliance with this [act].

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

Comment

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

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

SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND
NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the federal
but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
U.S.C. Section 7003(b).

SECTION 13. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

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