

To: Drafting Committee on Fiduciary Access to Digital Assets (FADA)  
From: Suzanne Brown Walsh  
cc: Professor Naomi Cahn, Reporter  
Re: Fiduciary Access to Digital Assets Drafting Committee November 2013 Meeting; Summary of Changes and Issues  
Date: October 22, 2013

**A. Changes to the Annual Meeting Draft**

We have restructured the draft, with the able assistance of David Biklen and Vince Deliberato. In order of appearance, the changes are:

1. We combined the definitions of digital account and property into the digital asset definition in Section 1. We were initially inclined to use digital property, but then our Act's acronym would be "FADP" which is not exactly catchy or marketable. We also eliminated some unnecessary parts of the definition of electronic communication (which was in turn, lifted from ECPA). Finally, we moved definitions that were only used once into the sections in which they are used, per ULC convention.

2. We moved the provisions governing the fiduciary's authority from Section 3 into what is now Section 8, leaving Section 3 as a pure "Scope" provision. This addresses some comments from the floor, and seemed to make sense.

3. We reworded the title of Section 4 and in accordance with our conference call, eliminated the second alternative, retaining the bifurcated approach to access to electronic communications records and content. Note that in (b), we changed the phrase "to the extent not inconsistent with" to read "to the extent consistent with 18 U.S.C. Section 2702(b)."

4. We modified Section 5 in the same manner as Section 4. In addition, we moved the definitions of protected person and protective order from Section 1, revised subsection (c) to address the floor comment that a court should be able to grant the authority at any hearing, not just a first hearing on a conservatorship, and reworded a few sentences. Finally, we retained the language “to the extent that intent can be ascertained” in 5(b), which came from UPC Section 5-411(c).

5. We slightly modified Section 6, to reflect the revised definition of digital assets. It still requires that the agent’s authority over digital assets be expressly granted by the principal, so that an agent’s authority over digital assets will not be assumed (thus, it is not a “default” power). This will make the ACTEC State Laws Committee unhappy, but should give agents “lawful consent” under ECPA. That, in turn, should eliminate any privacy concerns about an agent’s accessing the contents of the principal’s electronic communications.

6. Section 7 is largely unchanged (as the immortal Johnny Most would have said, we merely fiddled and diddled with it). As with an agent, the Act does not give a trustee default authority over a settlor’s digital assets; the settlor must expressly grant it.

7. Section 8 contains much of what used to be in Section 3, significantly revised and reworded, but substantively the same. In (b), we added “under this act” in order to differentiate between a fiduciary who is using a password and one who does not have any other authority, other than that granted in the act.

Naomi has added a comment to better explain the extent of the fiduciary’s authority to transfer digital assets to beneficiaries or to sell them to third parties. Because the TOSA controls the rights of the account holder (settlor, principal, incapacitated person, decedent),

if the TOSA limits the rights of the account holder to transfer account content, then the fiduciary may be subject to the same limitation and be unable to transfer the content to the beneficiaries. See David Horton's article on "Indescendibility", available for download at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2311506](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311506).

8. Section 9, which was entitled "Digital Property Recovery from Custodian" is now simply called "Compliance".

9. The rest of the Act is the same.

**B. Issues for Discussion at our Fall Meeting**

1. **Definitions.** Do we need to define "digital"? Do we need to define "account"?

2. **Fiduciary authority over digital assets.** We say (for example, in Sections 4 and 5) that the fiduciary may "access, manage, deactivate and delete" the digital asset over which the fiduciary has authority. Is it correct to say that ownership rights can be "deleted"? Are "powers" and "authority" synonymous? Also, we do not expressly give fiduciaries the authority or power to open new accounts or acquire digital assets--do we need to include such a provision? Jim Lamm raised this question during our e-discussions about trustee authority, and it's a good point. We should also discuss the level of specificity required to give the trustee authority over digital assets in a trust instrument.

3. **Privacy considerations.** Some believe that the contents of electronic communications (and perhaps all digital assets) should be treated differently than "traditional" assets and not be as readily available to a fiduciary, at least where the account holder has not expressly granted the fiduciary access while alive or capable. By virtue of Section 8, we have "deemed" the fiduciary acting with authority under our Act to have the account holder's lawful consent. This deeming of lawful consent is intended to work

around ECPA, which does not address fiduciaries. Some may be dissatisfied with anything short of express consent granted by a capable adult account holder, which is what the act requires for agents and trustees. Trusts and estates practitioners, familiar with the reality that the deceased or protected person enjoy little, if any, privacy, are acutely aware of the danger of dissipation and waste when the personal representative or conservator's access to information necessary to marshal, collect and preserve assets is limited.

Who benefits from the assets unclaimed as a result of this inability to collect an asset? Do we need to provide for fiduciary immunity when a digital asset remains undiscovered because of the inaccessibility of the account holder's email content? Should a court be allowed to override the account holder's expressed intent and allow the fiduciary to access the digital property? We have decided that the fiduciary's duty to collect digital assets will yield to will provisions directing that virtual property be destroyed or of powers of attorney directing that accounts be closed or not accessed at all. In other words, we decided that the account holder's express request for privacy is paramount.

I am concerned with equating a user's "click through" consent to a provider's privacy policy with a user's express request for privacy, which we have agreed would prevent fiduciary access. We should discuss under what circumstances the fiduciary might be able to override the contract terms on public policy grounds, and whether that is an appropriate way for the Act to deal with privacy policies that would prevent fiduciary access.

4. **Social Media Accounts**. We need to decide whether and how (under what circumstances, and for how long) a fiduciary can "manage" or continue to access and "run" a personal social media account on behalf of another. For example, a Facebook profile

(not a fan page, which is different and could be maintained indefinitely) will be “frozen” or “memorialized” when the account holder stops using it, or dies. When should or could a fiduciary be granted access to the content of the profile? What will a conservator or guardian be allowed to access on behalf of an incapable adult?

5. Should Section 8(d) allow a fiduciary to access “any record” or “any accessible record” stored on a device?

6. **Compliance, Section 9**. As we know, under ECPA, even when a public provider of electronic communications is allowed or permitted to disclose the contents of a customer’s communications to a third party, that disclosure is *permissive* and not mandatory. Section 9 mandates that the provider disclose the content of electronic communications to the fiduciary. Sections 4 and 5 require disclosure “to the extent consistent with 18 U.S.C. Section 2702(b).” I realize we must reconcile these provisions, but I would like the committee to consider how best to do that. We don’t want to dilute the compliance mandate.