

To: Drafting Committee on Fiduciary Access to Digital Assets (FADA)
From: Suzanne Brown Walsh and Naomi Cahn
Re: Uniform Fiduciary Access to Digital Assets Act, First Working Draft
Date: November 11, 2012

We have structured the first draft of the Act in a way which makes some tentative choices, but which displays (in “Alternatives” sections) some alternatives the Committee might consider.

There are particular issues that predictably will – and should – be the focus of conversation during our upcoming meeting. They are set out throughout the draft. A summary of those issues follows:

1. What is a coherent definition of digital assets, accounts, and property?
2. Which fiduciaries should be covered by this Act? Should it cover only court-appointed fiduciaries (personal representatives, conservators, and court-appointed trustees) or should it also include trustees and agents acting pursuant to a power of attorney, who are not subject to court supervision unless there is some abuse? All of these fiduciaries are covered in the current draft. One additional group not addressed in the draft, but which the Committee may wish to consider, is the possibility of granting authority to anyone other than personal representatives, conservators, agents, and trustees.
3. Should the fiduciary’s authority with respect to digital property be part of an implicit grant of power, or should it require special authorization? For example, for powers of attorney, must the written document grant the agent the explicit authority to manage digital assets, or is it assumed as part of an agent’s responsibilities? (Note that the draft is written to require specific authority for the agent.)
4. Should the fiduciary’s authority include the ability to own, manage and distribute digital property or only to seek copies from the provider? The Committee may also want to distinguish between access and ownership¹ throughout the Act. The Terms of Service control the subscriber’s rights, and each article of the Uniform Act,

¹ See Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINNIPIAC PROB. L.J. 376, 384-86 (2011); see also *Arkansas Smelting Co. v. Belden Co.*, 127 U.S. 379, 389-90 (1888)(noting that assignment by operation of law to an executor differs from voluntary assignment).

consequently, may need to include a provision explicitly establishing that the Act overrides the Terms of Service. *See, e.g.*, Section 3-715A(d) of the draft.

5. How will laws that prohibit unauthorized access to computers and computer data be affected by state law grants of authority to the fiduciary?

Many Committee members have already raised concerns about this last issue in light of the existence of both federal and state laws criminalizing unauthorized access to digital property. The draft attempts to deal with this subject directly by establishing the fiduciary as an individual who is authorized to access digital property. For further details, please see the Comment in Article I to Section 3-715A, Digital Property Recovery.

We look forward to seeing you on November 30.