

The Times They Are A-Changin': Digital Assets and Your Estate Plan

By Jesse T. Coyle and W. Y. Alex Webb

For time immemorial, estate planners never had to worry about digital assets. But with the ever increasing reliance on and use of technology in the daily lives of the average American, estate planners must now consider the importance of digital assets along with more traditional asset classes. And in response to this new need, big changes have occurred recently. On July 16, 2014, the Uniform Fiduciary Access to Digital Assets Act (UFADAA) (“the Act”) was passed by the Uniform Law Commission. The final review by the Committee on Style has not occurred yet, but once it does, then state legislatures will finally have the opportunity to vote on the law (if the state so chooses, and North Carolina definitely should).

The Act empowers personal representatives, trustees, attorneys-in-fact (“AIFs”), and guardians to access and control the digital assets of the person for whom they are serving in a fiduciary capacity. This is more vital than ever as many individuals do their banking online, save documents in electronic files, communicate with loved ones (and maintain their contact information) in email, save photographs to a computer, etc. When they pass away, become ill, or incompetent, they need to make sure that their chosen fiduciary can properly access, use and distribute these items. Allowing a fiduciary to step in to the “digital shoes” of the principal is now a necessity, especially since unauthorized access of digital information is a crime under the Computer Fraud and Abuse Act.

But as with all powers, there is a potential for abuse, and the Act attempts to mitigate this by allowing a digital account holder to limit how much access the fiduciary may have. This can be done by an expression in a document, such as a will, trust or power of attorney (“POA”). In addition, the fiduciary will still violate his or her responsibilities if the fiduciary chooses to disseminate information beyond what is required by his or her duty.

Regardless of whether or not North Carolina passes the Act and turns it into state law, there are some things that every estate planner should recommend: in a safe location list (1) all accounts, logins, passwords and security information; (2) social media (i.e. Facebook, LinkedIn); (3) sites frequently used to purchase or sell items; and (4) online banking and bill pay services. After this information is safely stored, the fiduciaries should be notified of its location. In addition, the fiduciary should be informed of whether or not the account owner wants the accounts closed or transferred at death, or otherwise any special treatment that may be desired.

The Act | The Act is composed of fifteen sections. Section 1 is the short title of the Act (“Uniform Fiduciary Access to Digital Assets Act”). Section 2 contains the definitions of the Act.

Sections 3 through 6 are where the different types of fiduciaries receive their abilities to access and handle digital assets. Section 3 provides that *unless the will of the deceased says otherwise*, the personal representative of the deceased has the right to *access* the content of electronic communications sent from (or received by) the decedent (whether or not controlled by the Electronic Communications Privacy Act) and any

other “digital asset” in which the decedent had a right or interest. “Digital asset” is broadly defined as an electronic record in Section 2. Section 4 provides a guardian the same authority as a personal representative under Section 3, except that obviously there is no reference to a will and a hearing under state conservatorship law must occur first. Section 5 concerns agents (i.e. AIFs) working on behalf of a principal (i.e. via a POA) and states that an AIF can by default access the catalogue of electronic communications of a principal and the digital assets, *but that the principal must specify in the POA that the AIF can access the content of electronic communications before that power is given*. Section 6 permits a Trustee to access the electronic communications and content thereof for any digital asset which Trustee is the *initial account holder* (i.e. the Trustee opened the account) or the *successor account holder* (i.e. from an *inter vivos* transfer of a digital asset into a trust, a transfer into a testamentary trust, or a transfer via a pour over will).

Section 7 describes the rights of the fiduciaries discussed in Sections 3 through 6 and in essence permits the fiduciary to have the same authority as the account holder unless the account holder explicitly opts out of fiduciary access. But if the account holder had agreed to or signed a terms-of-service agreement that limits a fiduciary’s access to the digital assets of the account, the terms-of-service agreement will be valid. It is further clarified in this section that the fiduciary can access digital assets stored on tangible personal property, including laptops, computers, smartphones, etc.

Compliance is covered under Section 8. This Section provides the fiduciary the right to access, control and copy the asset, with “control” meaning that the fiduciary can do what the account owner could have. In addition, this Section also states that a custodian must comply with a fiduciary’s lawful request within 60 days.

Lastly, Section 9 provides a custodian with immunity for any act done in good faith in compliance with the Act, such as providing a fiduciary with requested information. Sections 10-15 are of lesser importance.

With electronic communication and digital assets only increasing in prevalence for the foreseeable future, North Carolina should quickly consider passing the Act once the Committee on Style has finished the final touches needed to make the Act official.

Jesse Thomas Coyle, J.D., LL.M., is a Partner at Webb & Coyle, P.L.L.C. in Moore County and licensed to practice law in Illinois and North Carolina, Secretary and Founding Member of the North Carolina Captive Insurance Association, investment advisor representative and North Carolina life, health and long term care insurance agent.

W. Y. Alex Webb, J.D., C.P.A., P.F.S., Board Certified Specialist in Estate Planning and Probate Law, is Managing Partner at Webb & Coyle, P.L.L.C. in Moore County and licensed to practice law in North Carolina, Chairman and Founding Member of the North Carolina Captive Insurance Association, investment advisor representative and North Carolina life insurance agent.

