

DELAWARE'S FIDUCIARY ACCESS TO DIGITAL ASSETS AND DIGITAL ACCOUNTS ACT

Trisha W. Hall*

On August 12, 2014, Delaware became the first state in the United States to enact comprehensive legislation authorizing personal fiduciaries to have access to the digital assets and accounts of those they serve. As new Chapter 50 to Title 12, the Fiduciary Access to Digital Assets and Digital Accounts Act (the "Act") will make it easier, less time-consuming and less expensive for personal representatives, guardians, trustees, and agents to perform their duties on behalf of estates, disabled persons, trusts, and principals, respectively. As ultimately enacted, the Act is considered to be a version of the Uniform Fiduciary Access to Digital Assets Act passed by The National Conference of Commissioners on Uniform State Laws.¹

BACKGROUND

Since 1997 to 2014, the percentage of households in the United States with access to the Internet grew from approximately 18% to 87%.² Today, 76% of Internet users report going online on a typical day, compared to 29% reporting the same in 2000.³ Along with this growth in the number and frequency of people accessing the Internet has been an exponential growth in the way people use it: corresponding⁴, purchasing⁵, banking and bill paying⁶, socializing⁷, and

* Trisha W. Hall is a partner Connolly Gallagher LLP, practicing in the area of estates and trusts. She chaired the committee of the Estates and Trusts Section of the Delaware State Bar Association that drafted H.B. 345 which, after being amended, was enacted as the Delaware Fiduciary Access to Digital Assets and Digital Accounts Act. Michael Grandy, an associate with Connolly Gallagher LLP, assisted with preparing this article for publication.

1. See *Fiduciary Access to Digital Assets*, (Dec. 31, 2014), at <http://www.uniformlawcommission.com/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets>.

2. See U.S. Department of Commerce, U.S. Census Bureau, *Computer and Internet Use in the United States*, issued May 2013, available at <http://www.census.gov/prod/2013pubs/p20-569.pdf>. See Fox, Susannah and Lee Raine, *The Web at 25 in the U.S.: Summary of Findings*, Pew Research Internet Project, Feb. 27, 2014 available at <http://www.pewinternet.org/2014/02/27/summary-of-findings-3/>.

3. *Id.*

4. See Molly Wilkens, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 *Hastings L. J.*, Vol. 1037 at 1055 (2011).

5. See Cooper Smith, *US E-Commerce Growth is Now Far Outpacing Overall Retail Sales*, BUSINESS INSIDER, APR. 2, 2014, AVAILABLE AT [HTTP://WWW.BUSINESSINSIDER.COM/US-E-COMMERCE-GROWTH-IS-NOW-FAR-OUTPACING-OVERALL-RETAIL-SALES-2014-4](http://WWW.BUSINESSINSIDER.COM/US-E-COMMERCE-GROWTH-IS-NOW-FAR-OUTPACING-OVERALL-RETAIL-SALES-2014-4).

6. See Andrea McKenna, *More Consumers Embracing Online Banking, Bill Pay*, AMERICAN BANKER, JUNE, 2010, AVAILABLE AT [HTTP://WWW.AMERICANBANKER.COM/BULLETINS/-1020520-1.HTML](http://WWW.AMERICANBANKER.COM/BULLETINS/-1020520-1.HTML).

7. Duggan, Maeve and Aaron Smith, *Social Media Update 2013*, Pew Research Internet Project, Dec. 30, 2013, available at <http://www.pewinternet.org/2013/12/30/social-media-update-2013/>.

listening to music⁸ are just a few of the personal pursuits people now conduct online, in many cases, more than or instead of in their traditional forms. In fact, these trends will continue in ways we are only now beginning to use or imagine. A survey of technology experts conducted in 2014 found that the majority believe that the use of embedded and wearable devices will be widespread by 2025 and will possibly include “subcutaneous sensors or chips [to] provide patients’ real-time vital signs to self-trackers and medical providers” and “remote control apps [to] allow users’ phones to monitor and adjust household activities”.⁹

Beginning in 2005, estate planning attorneys slowly began taking note of the impact this growing trend in internet usage could have in an estate administration with the reports of a legal battle fought by a father for access to his deceased son’s email account. John Ellsworth sought the emails his son Justin kept in his Yahoo!, Inc. (“Yahoo”) account to make copies for a scrapbook documenting Justin’s service as a Marine serving in Iraq. Because Mr. Ellsworth did not know and was unable to guess the password to Justin’s email account, he requested such access from Yahoo which it denied. Yahoo’s terms of service agreement required deletion of the account after 120 days of inactivity.¹⁰ After taking the issue to court, a probate judge for Oakland County, Michigan granted an order requiring Yahoo to provide Mr. Ellsworth access. After the court’s order, Yahoo “gave the family a CD containing more than 10,000 pages” of emails sent to Justin, but nothing he had written. It was reported that Yahoo intended to provide paper copies of the remaining emails sent by Justin.¹¹

Generally, fiduciaries are responsible for managing the affairs of a disabled person or decedent’s estate. This entails identifying, gathering and maintaining assets for the benefit of the disabled person, or for distribution to an estate’s creditors and beneficiaries. To carry out their responsibilities, fiduciaries are typically authorized by state law, federal law, or governing instruments to buy and sell property, enter into binding contracts, make gifts of property, sign income tax returns, review medical information, collect income, pay expenses, and so forth. The work of a fiduciary necessarily entails access to personal, private and sensitive information. Without this access, the critical work of a fiduciary would not get done.

Fiduciaries carry out their responsibilities subject to duties to those they serve, including the duties of impartiality, loyalty and care.^{12, 13} Failing to locate, gather or protect the assets of a disabled person or an estate may subject a fiduciary to liability for breach of duty. Further, after a fiduciary has gained control over an asset, they must manage that asset for the benefit of the person served.

8. *Digital Music Review in the United States from 2008 to 2013, by type (in million U.S. Dollars)* at <http://www.statista.com/statistics/186710/digital-music-revenue-in-the-us-since-2008/>.

9. See Anderson, Janna and Lee Rainie, *The Internet of Things Will Thrive by 2025*, Pew Research Internet Project, May 14, 2014, at <http://www.pewinternet.org/2014/05/14/internet-of-things/>.

10. See *Yahoo to Preserve E-mail of Marine Killed in Iraq*, USA TODAY, MAR. 1, 2005, AVAILABLE AT [HTTP://USATODAY30.USATODAY.COM/TECH/NEWS/2005-03-01-YAHOO-EMAIL-SAVE _ X.HTM](http://usatoday30.usatoday.com/tech/news/2005-03-01-yahoo-email-save_x.htm)).

11. See *Yahoo Gives Dead Marine’s Family Email Info*, Associated Press, Apr. 21, 2005, available at http://www.nbcnews.com/id/7581686/ns/world_news-mideast_n_africa/t/yahoo-gives-dead-marines-family-e-mail-info/#.VKMthivF_4Y.

12. See *Law v. Law*, C.A. No. 14352 (Del. Ch. Sept. 30, 1997), *aff’d in part and rev’d in part*, 753 A.2d 443 (Del. 2000); *Nash v. Schock*, 732 A.2d 217 (Del. 1999); *Stegemeier v. Magness*, 728 A.2d 557 (Del. 1999).

13. See also DEL. CODE ANN. TIT. 12 DEL. C. § 1509 (every personal representative shall take and subscribe an oath to perform its duties with fidelity); DEL. CODE ANN. TIT. 12 DEL. C. § 49A-105(c) (an agent under a personal power of attorney may not act unless and until she has executed a certification acknowledging to act in the principal’s best interest, in good faith, and only as authorized).

Because an increasing number of people are shifting more of the content of their lives online from the traditional tangible realm, fiduciaries may face a host of potential issues involving access to a person's online assets and accounts. These issues will likely become more commonplace and also more burdensome. Some of the issues that could be encountered by a fiduciary are:

Ensuring privacy. Without the Act, it is up to the discretion of technology companies whether and to what extent a fiduciary will have access to a decedent or disabled person's account. Often, this access is denied and the account may be left open or memorialized. This will result in information about a deceased or disabled person remaining in cyberspace to be accessed by third parties and continuing to be used by technology companies for profit.

Valuing and collecting assets. In some cases, an asset may only exist digitally (e.g., Bitcoin, video or audio files, photographs) or may only be accessed through digital means (e.g., emailed account statements). Without the Act, an agent or guardian for a disabled person may not be able to discover or obtain the use of an asset for the benefit of a disabled person, and a personal representative of an estate may not be able to discover or liquidate an asset for distribution to the beneficiaries and creditors of an estate.

Securing property. Fraud and theft routinely occur online. Without the ability to access and monitor a disabled person's accounts or close the accounts of a deceased person, property will be at risk to hackers and fraudsters.

Protecting people. Disabled persons are often more vulnerable to the influence of others. The ability of an agent under a power of attorney or guardian to be able to close or monitor social media and email accounts may prevent luring or other instances of taking advantage.

Many estate planning attorneys have attempted to account for the trends in Internet usage and the possible need for a fiduciary to access a person's online presence when drafting estate planning documents by including a specific authorization for a fiduciary to access and control a person's digital assets and accounts. This is only helpful, however, for the minority of adults who have basic estate planning documents in place¹⁴

The need for state legislation in this area is primarily driven by the fact that the federal law regulating access to online accounts is not clear about fiduciary access. The Electronic Communications Privacy Act / Stored Communications Act (the "ECPA/SCA") was enacted in 1986 to address government access to private information stored online and to prevent hacking.¹⁵ Because this law was enacted at a time when email was in its infancy and used primarily by businesses for business purposes, and social media and cloud computing did not yet exist, it was not written with the extensive personal use of online technologies in mind. Therefore, it does not contain the clear authorizations to fiduciary access that other federal laws do.¹⁶ Further, each state has laws criminalizing unauthorized access to a computer system or network¹⁷

14. See *In a New Era of Estate Planning Rocket Lawyer Survey Shows that Only Half of Adults Have a Will*, Rocket Lawyer News, Mar. 28, 2012, available at <https://www.rocketlawyer.com/news/article-Make-a-Will-Month-2012.aspx>.

15. 18 U.S.C. § 2701, et. seq. "The purpose of the legislation is to amend title 18 of the United States Code to prohibit the interception of certain electronic communications; to provide procedures for interception of electronic communications by federal law enforcement officers; to provide procedures for access to communications records by federal law enforcement officers; to provide procedures for federal law enforcement access to electronically stored communications; and to ease certain procedural requirements for interception of wire communications by federal law enforcement officers." House Report 99-647 (1986).

16. For example, bank records (15 U.S.C. §§ 6801 and 6802); medical records (45 C.F.R. §§ 164.502(a) and 164.510(b)); tax records (26 U.S.C. § 6103(c) and (e)(2) and (3)); other records, including mail (5 U.S. Code § 552a(b) and (h)).

17. See, e.g., DEL. CODE ANN. TIT. 11 DEL. C. § 932.

Because of the lack of clarity at the federal level, technology companies largely have been able to write their own rules for fiduciary access, if any.¹⁸ Through end user license agreements, these companies establish their own requirements for granting access to fiduciaries or other third parties, resulting in a patchwork of such requirements fiduciaries are obligated to meet before a technology company even considers granting access. The decision whether to grant access to a fiduciary, and if so, to what extent, is entirely in the discretion of the technology companies.

This means that, absent a state law or governing instrument that authorizes a fiduciary to have access to a digital asset or account, fiduciaries may be in breach of their duties to the disabled person or beneficiaries of an estate if they do not access an account, but if they do access an account, may be violating an agreement with the service provider or state and federal law restricting access. In fact, many fiduciaries have no doubt unknowingly violated these rules by accessing the digital assets or accounts of a disabled or deceased person without that person's express authorization by discovering or guessing login and password information.

Some states have passed or introduced legislation to authorize fiduciaries access to online accounts, but all are severally limited. Either the legislation only authorizes personal representatives to the exclusion of other types of fiduciaries¹⁹, or it only permits access to social media and email accounts, or both²⁰. Rhode Island's law only grants access to personal representatives of estates over email accounts, and then only with an order of the probate court.²¹ The Act is now the only state law comprehensive in terms of both the types of fiduciaries authorized and the types of digital assets and digital accounts covered.

THE ACT

The ECPA/SCA prohibits providers of "electronic communication service" and "remote computing service" from disclosing the contents or record of electronic communications to third parties with certain exceptions.²² These exceptions include disclosure to the addressee or recipient of a communication or his or her agent and with the lawful consent of the originator or addressee or recipient of such communication.²³ The Act is drafted to fall directly within these exceptions. In addition, no federal court that has examined the issue has held that the ECPA/SCA was intended to completely preempt state law.²⁴ In fact, the civil liability section of the ECPA/SCA includes as a defense a good faith reliance of a provider on "a legislative authorization, or a statutory authorization" without any indication that this was to be restricted to federal law.²⁵

18. See, e.g., Facebook will memorialize the account of a deceased person upon notice, meaning that people may continue to post to the account, but no posts or messages can emanate from the account. Facebook will not allow third parties to access any account for any reason. An account may be deleted after proof of death and authority of the person requesting deletion, in its discretion. <https://www.facebook.com/help/359046244166395/>. Yahoo provides "*No Right of Survivorship and Non-Transferability*. You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted." <https://info.yahoo.com/legal/us/yahoo/utos/en-us/>.

19. See Louisiana S.B. 461 became Act No. 758 and Indiana Code § 29-1-13-1.1.

20. See Oklahoma § 58-269; Idaho Code §§ 15-5-424 and 15-3-715; and Conn. St. § 45a-334a.

21. R.I. Code §§ 33-27-1 – 33-27-5.

22. See 18 U.S.C. § 2702(a).

23. See 18 U.S.C. § 2702(b).

24. See *Sheppard v. Google, Inc.*, 2012 WL 6086867 (W.D. Ark. Dec. 6, 2012).

25. See 18 U.S.C. § 2702(e).

The Act authorizes fiduciaries to have access to the digital assets or digital accounts of the person, trust or estate they are entrusted to serve.²⁶ An individual may opt out of the Act by not including a specific authorization for an agent to have access to digital assets and accounts,²⁷ or by denying such access in a will or trust.²⁸ In a guardianship proceeding, a court may limit the powers of the guardian to prevent access to digital assets or accounts.²⁹ The Act requires that a fiduciary provide the same proof of authority to act and to gain access to digital assets and digital accounts that is required to act with respect to bank accounts, taxes, medical information, etc.³⁰

Section 5002 sets forth several definitions key to the Act. First, an “account holder” includes a decedent, a disabled person under the guardianship provisions of Title 12 Chapter 39, a principal of a personal power of attorney under Title 12 Chapter 49A, the settlor of a revocable trust, or a trust itself. The definitions of “digital asset”, “digital account” and “digital device” are broad and although they include specific examples of each (email accounts, social media accounts, computer source codes, software, laptop, tablet), they cover those “which currently exist or may exist as technology develops or such comparable items as technology develops.” This was in recognition of the relative speed at which technology develops compared to the rate at which the law changes. Further, “digital asset” explicitly excludes an “underlying asset or liability that is governed under other provisions of this title”, taking traditional bank accounts, life insurance policies and similar assets out of the purview of the Act. The term “fiduciary” extends to personal representatives (which itself includes executors, administrators, and others³¹), guardian, agent under a personal power of attorney, a trustee, or an adviser under 12 *Del. C.* § 3313.

The Act grants a broad power over the digital assets and digital accounts of an account holder that may be restricted or limited in a governing instrument or court order.³² It excludes the digital assets and digital accounts of an employer used by an employee or contractor for business purposes.³³ A fiduciary cannot be authorized beyond what the account holder him or herself could do under state or federal law, including copyright law.³⁴ The Act does not, therefore, grant rights of inheritance to digital assets or digital accounts where none would otherwise exist.

To fall within the exception to ECPA/SCA and to address Delaware's criminal statute regarding unauthorized access to computer systems, the Act deems a fiduciary to have the lawful consent of an account holder to access a digital account or digital asset and to be an authorized agent or user under state and federal laws and end user license agreements.³⁵

26. DEL. CODE ANN. TIT. 12, § 5003.

27. DEL. CODE ANN. TIT. 12, § 5005(c)(3) AND 12, § 494-201(b)(8).

28. DEL. CODE ANN. TIT. 12, § 5004.

29. DEL. CODE ANN. TIT. 12, § 5005(c)(2) AND 12, § 3923(d)(14).

30. DEL. CODE ANN. TIT. 12, § 5005(c).

31. DEL. CODE ANN. TIT. 12, § 101(6).

32. DEL. CODE ANN. TIT. 12, §§ 5003 AND 5004(A).

33. DEL. CODE ANN. TIT. 12, § 5003.

34. DEL. CODE ANN. TIT. 12, § 5004(A).

35. DEL. CODE ANN. TIT. 12, § 5005(A).

To further satisfy the requirements of the ECPA/SCA, the Act includes specific authorization to disclose to a fiduciary the “content of an electronic communication” if the custodian would be permitted to disclose such under the ECPA/SCA and the “catalogue of electronic communications”.³⁶ The content and the catalogue of electronic communications are defined in the Act³⁷, and are intended to track the permitted disclosure provisions of the ECPA/SCA itself.³⁸

To gain access to a digital asset or digital account, a fiduciary must present to a custodian a “valid written request” accompanied by evidence of their authority to act on behalf of the disabled person or estate, for example, letters testamentary, guardianship order or personal power of attorney.³⁹ Following receipt of a valid written request, a custodian has sixty days to comply unless the custodian would not be required to respond to a similar request made by the account holder, would be a violation of state or federal law, or when it has actual knowledge that the fiduciary does not have the authority to access the account or asset.⁴⁰ Failure to comply could result in a court order requiring the custodian to provide the requested access and liability for damages, including attorney’s fees and costs incurred in confirming a fiduciary’s authority or compelling access.⁴¹ Including a provision for attorney’s fees and costs to be paid as damages should allow fiduciaries of even modest estates the ability to force a custodian to permit the fiduciary access when authorized and in compliance with the Act, thus putting proverbial teeth on such a request.

To balance technology companies’ genuine interests in users’ privacy and their own legal rights as found in their end user license agreements with the needs of fiduciaries and the interest of the State in fiduciary affairs, the Act renders void any provision of an end user license agreement that attempts to restrict or limit a fiduciary’s otherwise valid authority to access a digital asset or digital account.⁴² However, an agreement between an account holder and a custodian regarding fiduciary access will be honored if it is separate from an end user license agreement.⁴³

CONCLUSION

The Act provides some certainty to fiduciaries of disabled persons, estates and trusts who are faced with a conflict between their duties to those they serve and a lack of legal clarity regarding the extent of their authority over digital assets and digital accounts. Technologies will only continue to develop and people’s reliance on technologies will surely increase

36. DEL. CODE ANN. TIT. 12, § 5005(B)(1) AND (2).

37. DEL. CODE ANN. TIT. 12, § 5002(2) AND (3).

38. DEL. CODE ANN. TIT. 18, § 2510 AND 2702.

39. DEL. CODE ANN. TIT. 12, § 5005(C).

40. DEL. CODE ANN. TIT. 12, §§ 5005(D) AND 5006(B).

41. DEL. CODE ANN. TIT. 12, § 5006(E).

42. DEL. CODE ANN. TIT. 12, § 5004(B).

43. *Id.* For an example of such an agreement, see Google’s Inactive Account Manager service at <https://support.google.com/accounts/answer/3036546?hl=en>.

as a result. Therefore, these conflicts would continue to mount, possibility burdening our court system, in the absence of legislation. The Act seeks to prevent fiduciaries from having to face legal battles to gain access to assets and accounts that they would have clear authority to access if they were not online. In the matter of digital assets and digital accounts, David now has a larger stone to use against Goliath⁴⁴ — at least in Delaware.

44. See *Samuel* 1:17.

