



## **Estate Planning, Wills and Trusts**

### ***Importance of Considering the Internet and “Digital Assets” in Estate Planning***

#### ***The Revised Uniform Fiduciary Access to Digital Assets Act***

**Sheppard F. Miers, Jr. and Sara E. Barry**

**April 2016**

*“Forgot your ID or password?”*

Everyone using the Internet has probably been asked and answered “Yes” to this question.

That usually means having to take the time to answer more questions or search for information needed to be able to log in, get access to and use the website or Internet service involved.

For a person who is a fiduciary, such as a personal representative of an estate, trustee, guardian, or holder of a power of attorney, getting Internet access for or about another person can be more difficult and challenging. This is because legal standards and requirements on privacy, electronic storage of information and computer systems may need to be satisfied and reconciled with those that govern the legal authority of a fiduciary.

Internet use has increased seven-fold in the last fifteen years. It has become a common day-to-day means of electronic communication and personal record keeping, including for investments, finances and insurance. In the event of illness, incapacity or death of an individual using the Internet in this way, having continued and ready access to electronically stored information in the online accounts involved will likely be needed. This makes the Internet and its use an important factor to consider in estate planning. Preparing and signing estate planning documents of an individual that give specific directions as to the authority of fiduciaries to access Internet online accounts and electronically stored information is now advisable.

#### **The Internet and “Digital Assets” of an Individual**

The increased use of the Internet has given rise to the existence of what is now referred to as and considered to be the “*digital assets*” of an individual, usually meaning information, records and data in electronic form that is created and stored on the Internet that the individual has a right to access and use. A new proposed uniform state law, discussed

below, includes a definition of the term “digital assets” and specifically provides for how a fiduciary can be given legally enforceable authority to gain access to an individual’s digital assets.

### **Issues Involved in Fiduciary Access to an Individual’s Digital Assets**

As indicated, the use of the Internet and online account, and existence of digital assets, can raise a possible legal issue for a fiduciary that has responsibility to act in a representative capacity on behalf of an individual. If that individual owns digital assets stored in an online account or a website maintained with an Internet service provider, the fiduciary may experience difficulty accessing them. Besides not knowing or remembering that individual’s user name or password, the fiduciary also may not be considered the owner of the digital assets, nor to have the legal authority or right to require that access to the online account and digital assets be given to the fiduciary. The right of a third person, including a fiduciary, to access the online account and digital assets involved may be limited or disallowed by a *terms of service agreement* governing the account that has been entered into by the individual and the Internet service provider.

This fiduciary access to digital assets problem stems from conflicting policies often involved in estate planning, and laws furthering them, which are (1) a fiduciary, such as a trustee or person who has been given a power of attorney, often needs to identify and/or take possession and control of the assets of an individual in order to act on that individual’s behalf, and (2) that individual’s privacy should be protected as to the electronic communications and records maintained by service providers for Internet online accounts, and an unauthorized disclosure and access to computer system data can be unlawful.

The development of the law in this context has involved a conflict arising from concerns expressed by Internet service providers that their allowing access to electronic information in an individual’s online account that is governed by a terms of a service agreement containing privacy provisions may directly or indirectly fail to comply with that agreement, federal or state privacy laws, or criminal laws on unauthorized access to computer hardware and data stored in computer systems. The privacy and computer access laws considered to have possible application include the federal Stored Communications Act and Computer Fraud and Abuse Act. Similar state laws also exist, including the Oklahoma Computer Crimes Act.

### **Present Law Uncertainty as to Digital Assets in an Estate Plan**

The applicable state laws governing the powers and authority of fiduciaries may not yet contain terms and provisions that clearly indicate that authority is given to a fiduciary to access and use electronic information and the digital assets in an Internet online account of an individual for whom the fiduciary is otherwise authorized and required to act. In addition, the provisions of a terms-of-service agreement entered into for an Internet online account may limit or interfere with a fiduciary getting access to digital assets involved.

Oklahoma law, by a statute enacted in 2010, does specifically provide that service providers are required to provide access to or copies of the contents of emails to the executor or personal representative of a deceased individual’s estate, and the personal representative has

the power and authority to take control of, conduct, continue, or terminate any accounts of a deceased individual on any social networking website, any microblogging or short message service website or any e-mail service websites. The statute provides such access and control as to decedent's estate to the extent indicated, but does not appear to cover or specifically provide for giving binding authority to a fiduciary in various other situations.

Oklahoma statutes providing for powers and authority of a trustee, for an individual to give a power of attorney to another person, and for a person acting on behalf of a trust beneficiary do not appear to specifically provide authority with respect to Internet online account access to digital assets of an individual. The Oklahoma statutory form for power of attorney does not explicitly mention or cover digital assets of an individual completing and signing it to appoint a person as an agent and attorney-in-fact. The form does provide for special instructions to be given to extend, increase or add to the powers granted. The statutes also state that a power of attorney can authorize a person to whom it is given to demand, receive, and obtain a thing of value to which the principal claims to be entitled, and in general, do any other lawful act with respect to the subject. This, at least by implication, could be interpreted to include power and authority to act and deal with respect to any digital assets. But, by the absence of specific mention of Internet online accounts and digital assets, the authority provided for by these laws in the present form could leave doubt as to their meaning and effect if considered in connection with a *terms-of-service agreement* containing specific and restrictive provisions concerning privacy and nondisclosure of the electronic information involved, and what is required or can be done in order to not be subject to restrictions stated.

Also by way of example, the Oklahoma statutes do provide specific procedures that govern rights, authority and liability where an individual has a safe deposit box at a bank or financial institution in Oklahoma and pursuant to a signed power of attorney instrument authorizes another person, such as the individual's child, to have access to the safe deposit box. In such a case, if the individual became ill or incapacitated, then the bank or financial institution would be authorized to allow access to the safe deposit box to the individual's child, acting pursuant to the power of attorney, unless the lease of the safe deposit box or power of attorney provided otherwise.

However, assume that individual also had used the Internet to establish an online account with an electronic information service provider ("ISP") firm that is a provider to the public of Internet email and related electronic information storage services. The online account also provides storage of correspondence, records and statements related to the individual's investments. In such a case there could be less certainty under existing law as to the individual's child, with the power of attorney, gaining access to information electronically stored in the account. The requested access to the online account and electronically stored information in or about it may be subject to conflicting provisions in a *terms-of-service agreement* between the individual with the ISP firm, or under privacy law that may appear to directly or indirectly apply. As a result, the ISP firm may be reluctant to give the child access to the online account and the digital assets involved, even though the child is a fiduciary holding a power of attorney and authorized to act for the individual.

As a practical matter, a fiduciary initially faced with these questions or challenges as to access to online accounts and digital assets may be able to work through them with a service provider such as the ISP firm by contacting it by telephone, traditional paper correspondence, or even meeting with its representatives in person. Financial institutions and investment firms providing online accounts for investment, management and other services may want to continue to provide those services as to assets involved with the account. They may conclude that the particular online account information requested is not subject to privacy laws and/or that it may be disclosed and provided to a fiduciary under applicable federal or state laws governing financial institutions and records or statements of accounts. In addition, obtaining a court order in probate and administration of a decedent's estate, or for a trust or a guardianship, could, if necessary, be a way for a fiduciary to obtain access to an online account and digital assets. However, considering online accounts and digital assets and specifically providing authority to a fiduciary to obtain access to them in estate planning documents may now be the best way to avoid this potential problem and whatever uncertainty and inconvenience might be involved in solving it.

### **Revised Uniform Fiduciary Access to Digital Assets Act to Clarify State Laws**

The Revised Uniform Fiduciary Access to Digital Assets Act (2015) ("RUFADAA") has recently been proposed by the Uniform Law Commission ("ULC") to expressly resolve these kind of digital asset access legal issues.

The stated purpose of the law is to more clearly give fiduciaries the legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts, and to give custodians of digital assets and electronic communications legal authority to deal with fiduciaries acting for other persons using the Internet.

Approximately half of the states in the U.S. have introduced legislation to enact RUFADAA. A bill to enact RUFADAA in Oklahoma has been introduced in the Oklahoma legislature in 2016.

The terms and provisions of RUFADAA, and the ULC recommending it be made a uniform law in all states, indicate the importance of now specifically providing in estate planning documents for a fiduciary to have the authority to access and act with respect to online accounts and digital assets.

The law contains definitions intended to identify and define the persons, activities and relationships involved with planning by an individual for his or her digital assets. Some of the key definitions are:

*"Account"* - an arrangement under a terms-of-service agreement in which a custodian performs its digital asset services for the user;

*"Agent"* - an attorney-in-fact granted authority under a durable or nondurable power of attorney;

“*Custodian*” - a person that carries, maintains, processes, receives or stores a digital asset for a user;

“*Digital asset*” - an electronic record in which an individual has a right or interest (but not an underlying asset or liability unless it is itself an electronic record);

“*Fiduciary*” - an original, additional, or successor personal representative, guardian, agent or trustee;

“*Online tool*” - an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person.

“*Power of attorney*” - a record that grants an agent authority to act in the place of a principal;

“*Principal*” - an individual who grants authority to an agent in a power of attorney;

“*Terms-of-service agreement*” - an agreement that controls the relationship between the user and the custodian; and

“*User*” - a person that has an account with a custodian;

So in the example of the online account mentioned above, the *account* would be the online account maintained for the individual by the ISP firm; the individual would be the *user*; the electronic and digital information about the account would be the individual’s *digital assets* (but not the underlying stocks and bonds owned by the individual); the ISP firm would be the *custodian* of those digital assets; the *terms-of-service agreement* would be whatever agreement has been entered into by the individual and the ISP firm to control their relationship; the *online tool* would be a separate electronic form of authorization, if any, by which the ISP firm would allow the individual, as the user, to direct the ISP firm to disclose digital assets of the account to the individual’s child (e.g. a link by which the individual could designate the child as a third person having authority to access the electronic records of the account maintained by the ISP firm); and the individual would a *principal* that has given a *power-of-attorney* to the individual’s child as the individual’s *agent*, who is therefore also a *fiduciary*.

In an overview, RUFADAA, if enacted by Oklahoma or another state, would specifically set out by statute how access to *digital assets* (electronic records) can be legally required to be provided by a *custodian* of an online *account* to a *fiduciary*. This is generally done through establishing a three-tiered statutory system of priorities. It would apply to the example given above as follows:

I. If the ISP firm, as *custodian*, has provided such an *online tool* for the *account* (separate and distinct from a *terms-of-service agreement*) that can be used by the individual as the *user* of the *account*, to give directions to the ISP firm, as *custodian*, that the individual’s child, as a

*fiduciary*, shall have access to the *account* and *digital assets* in it, then instructions given to the ISP firm, as *custodian*, by the individual using that *online tool* will be legally enforceable, and will control, irrespective of what is provided about access by a *fiduciary* to the *account* in a *terms-of-service agreement*, and irrespective of any contrary instructions and authority stated in the *power of attorney* given by the individual to the individual's child, as a *fiduciary*, as to access to the *account* and *digital assets* in it.

2. If the ISP firm, as *custodian*, has not provided such an *online tool* for the individual, as *user*, to give directions as to allowing a *fiduciary* to have access to the *account*, or if the individual, as *user*, declines to use an *online tool* that has been provided by the ISP firm, as *custodian*, for that purpose, then directions and authority to access an online account and digital assets stated in the *power of attorney* given by the individual, as *user*, to the individual's child, as a *fiduciary*, would be legally enforceable as to the ISP firm, as *custodian*, with respect to the *account* and *digital assets* in it, irrespective of what is provided about access to the *account* and *digital assets* in a *terms-of-service agreement*.

3. If the individual, as *user*, has not provided any direction as to access the *account* through use of an *online tool* offered by the ISP firm, as *custodian*, for that purpose, or in estate planning documents, such as a *power of attorney*, then the *terms-of-service agreement* for the *account* will determine whether the individual's child, as holder of a *power of attorney*, and a *fiduciary*, will be allowed access to the *account* and *digital assets* in it. If the *terms-of-service agreement* does not address *fiduciary* access to the *account*, then certain "default rules" under RUFADAA would apply, which provide for limited disclosure of a listing of electronic communications related to the *account* while not disclosing the content of emails and social media conversations.

The provisions of RUFADAA would therefore allow an individual to give legally enforceable directions so that a *fiduciary* would be allowed to have access to an online *account* and the *digital assets* in it. Because of the order of the priorities given by the law, it would seem that in planning for giving legally enforceable directions and authority for a *fiduciary* to be able to access online *accounts* and *digital assets*, an individual, as a *user* of an *account*, should generally make a decision to either (1) use such an *online tool*, if one is provided for an *account*, or (2) use traditional estate planning documents, such as a will, trust, or *power of attorney*, to give such directions and authority to a *fiduciary* to gain access to the *account* and *digital assets* in it, but not try to use both methods. Because the adoption and recommendation for enactment of RUFADAA is relatively recent, the concept of an *online tool* and how it is to be implemented for online *accounts* may not yet be widely recognized and understood. That suggests choosing traditional estate planning documents, such as a will, trust, or *power of attorney*, to expressly direct and authorize a *fiduciary* to have access to online *accounts* and *digital assets*, rather than trying to use such an *online tool*, may be the preferable approach at this time.

RUFADAA also appears to provide that an individual may give directions and authority to access all or only part of *digital assets*. It contains provisions that distinguish between the *content* of electronic communications (emails) and other *digital assets*, such as what is referred to as a "*catalogue of electronic communications*" sent or received by an individual, other than the content thereof. That term is defined in RUFADAA to mean information that identifies each

person with which an individual has had an electronic communication, the time and date of the communication, and the electronic address of the person; and the term “*electronic communication*” is defined to have the meaning given in the federal Electronics Communications Privacy Act of 1986. The law limits the access to *content* of an individual’s digital assets (e.g. emails) by a fiduciary in particular situations unless consent to and authorization of disclosure is established and/or specifically given by the individual. This should allow for flexibility and choices in an individual’s planning and giving *digital asset* access authority to a *fiduciary*. It also gives importance to carefully considering and specifically stating in estate planning documents the extent to which access to online *accounts* and disclosure of *digital assets* to a *fiduciary* is intended and desired.

### **Considering and Providing for Digital Assets in Estate Planning**

If RUFADAA is enacted and becomes statutory law in Oklahoma it should help clarify how digital assets and online accounts of individuals can be accessed and managed by fiduciaries. The law would be a source of statutory authority and guidance for individuals to rely on and use in their estate planning and the written documents providing for it.

Even if Oklahoma does not enact RUFADAA to be part of the Oklahoma statutes, individuals making and signing estate planning documents and their advisors should consider the terms and provisions of this new uniform law and take into account the practical and legal issues that have resulted in it being adopted and recommended by the ULC.

If an individual desires and intends for a designated fiduciary to be able to access needed electronically stored information, such as in the example of a child given a durable power of attorney, then it would seem advisable for directions and authorization for that access to be expressly stated in estate planning documents appointing the fiduciary. This should at least eliminate doubt or uncertainty about what the individual wants and intends and could help gain cooperation and granting of access by Internet custodians and service providers that control and administer electronic information involved with online accounts.

It seems without question that every individual who intends to sign estate planning documents should consider if and how digital assets may be involved.

An individual should review options available for directing and authorizing fiduciary access to and disclosure of digital assets, and how this can most effectively be done. Then it would be advisable for the written provisions of pertinent estate planning documents to specifically describe and recognize the existence of digital assets, and to include terms and provisions to carry out the planning for them intended by the individual. If it is desired and intended by the individual, the documents should include specific provisions authorizing a designated fiduciary (personal representative, trustee, person given a power of attorney) to access and use his or her online accounts and digital assets, and the extent of this access.

RUFADAA and ULC published commentary on it provide useful guidance for determining the extent to which access can be authorized, and drafting and building provisions into estate planning documents to do so effectively.

Estate planning documents that have been previously signed should be reviewed, and amended if necessary, to contain terms and provisions needed to assure access to and use of digital assets.

To the extent an Internet service provider allows users to designate another person to have access to information and electronic records by what RUFADAA refers to as an *online tool*, or otherwise, any directions given by an individual to the provider in that way should be considered and coordinated with what the individual intends to authorize and accomplish through the individual's estate planning documents in order to avoid conflict and unexpected results.

Sheppard F. Miers, Jr. is a shareholder of Gable Gotwals who assists and represents clients in the areas of taxation, estate planning, wills, trusts and estates, and employee benefits.

Sara E. Barry is a shareholder of Gable Gotwals who assists and represents clients in the areas of trusts and estates and business planning, organizations and transactions.



Sheppard F. Miers, Jr.  
(918) 595-4834  
smiers@gablelaw.com

1100 ONEOK Plaza  
100 West Fifth Street  
Tulsa, Ok 74103-4217  
www.gablelaw.com

Sara E. Barry  
(918) 595-4829  
Sbarry@gablelaw.com

*This article is provided for educational and informational purposes only and does not contain legal advice or create an attorney-client relationship. The information provided should not be taken as an indication of future legal results; any information provided should not be acted upon without consulting legal counsel.*