Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2300

Date: 09-Apr-15
From: Steve Leimberg's Estate Planning Newsletter
Subject: Suzanne Brown Walsh & the Status of the Uniform Fiduciary Access to Digital Assets Act

"As George Stigler espoused in his economic theory of regulation, interest groups and other political participants will use the regulatory and coercive powers of government to shape laws in a way that benefits them. Thus, the technology industry's response to the Uniform Fiduciary Access to Digital Assets Act (UFADAA) is hardly surprising. Unfortunately, if the tech industry succeeds in establishing the default access rule for many digital assets at zero, heirs and beneficiaries will no doubt be harmed as a result."

In Estate Planning Newsletter #2292, **John DeBruyn** provided members with commentary regarding the status of the Uniform Fiduciary Access to Digital Assets Act. Now, **Suzanne Brown Walsh** provides members with her perspective.

Suzanne Brown Walsh is a Partner at **Murtha Cullina LLP**, a large regional law firm with multiple offices in Connecticut and Massachusetts. Ms. Walsh represents clients in the areas of estate and tax planning, planning and administering trusts and estates for individuals with special needs, trust modifications, trustee changes and estate and trust administration. Since 2005, Ms. Walsh has served as one of Connecticut's eight Commissioners on Uniform Laws. She recently chaired the ULC's drafting Committee on Uniform Fiduciary Access to Digital Assets and is currently a member of the Trust Decanting and Divided Trusteeship Drafting Committees. She has served on the ULC's Scope and Program Committee and drafting committees for the Uniform Adult Guardianship and Protective Proceedings Jurisdiction, Uniform Insurable Interests in Trusts, Uniform Premarital and Marital Agreements and Uniform Powers of Appointment Acts. In addition, Ms. Walsh chaired the drafting committee on Amendments to the Uniform Principal and Income Act (2008), as well as a study committee on Mental Health Advance Directives. She has taught Estate Planning and Taxation at the University of Connecticut Law School.

Ms. Walsh is a past Chair of both the Connecticut Bar Association's Estates and Probate and Elder Law Sections. She serves as a James W. Cooper Fellow of the Connecticut Bar Foundation. She is a Fellow of the American College of Trusts and Estates Counsel (ACTEC). Ms. Walsh is nationally known for her speaking and writing, including the Heckerling Institute on Estate Planning, and numerous regional organizations throughout the country. She has been interviewed for On the Media, PBS Newshour Weekend and Marketplace Money. She has been quoted in the New York Times, Time

Magazine, Bloomberg BNA's Electronic Commerce Law Report and by NBC News and CBS News.

Here is her commentary:

EXECUTIVE SUMMARY:

As George Stigler espoused in his economic theory of regulation, interest groups and other political participants will use the regulatory and coercive powers of government to shape laws in a way that benefits them. Thus, the technology industry's response to the Uniform Fiduciary Access to Digital Assets Act (UFADAA) is hardly surprising. Unfortunately, if the tech industry succeeds in establishing the default access rule for many digital assets at zero, heirs and beneficiaries will no doubt be harmed as a result.

FACTS:

Most states' statutes and common law governing the actions of fiduciaries fail to differentiate digital from non digital assets, so, at first glance, digital assets appear to be treated in the same manner as non digital ones. However, specific state and federal laws protect privacy and criminalize unauthorized access to computers and data. Additional hurdles are generated by the terms-of-service agreements (TOSAs) and privacy policies that govern most digital accounts. A fiduciary has to surmount these obstacles in order to gain access to the digital assets of a deceased or incapacitated person, such as digital photographs, music, movies, electronic mail records, virtual currency and electronic documents.

The growth of digital banking, alone, has been exponential: last summer, a banking industry survey found that last year, in the United Kingdom, customers transacted $1 *billion* daily online, and downloaded 15,000 mobile banking applications every day. [i] The question is, how do we ensure that our clients' fiduciaries are able to access their digital assets during incapacity or after death? Although statutes in every state impose legal duties on fiduciaries to act on behalf of the represented person in administering that person's assets, only a few states have enacted legislation dealing with fiduciary access to digital assets, and the early laws are quite limited in scope.

To make sure that fiduciaries have the requisite access to digital assets, the Uniform Law Commission (ULC) drafted and approved the Uniform Fiduciary Access to Digital Assets Act. Its premise was asset neutrality, to ensure that digital assets were accessible to fiduciaries just as intangible assets are accessible. This is hardly a disruptive concept.

During the two year drafting process, the drafting committee worked closely with observers from many technology companies and coalitions, including internet service providers and content producers such as the MPAA and the Entertainment Software Association. After the last drafting committee meeting in March, 2014, some industry observers sent the ULC a "goodbye letter" in April, 2014, indicating they no longer considered themselves part of the committee. Despite that, one of those observers attended the 2014 Annual meeting, as several had attended the 2013 one when they were granted floor privileges. Altogether, the UFADAA drafting committee included several hundred observers, including digital assets expert Jim Lamm, ACTEC liaison Bob Kirkland and NAELA liaison Catherine Seal, and three terrific and engaged ABA Advisors, all of whom actively participated in the drafting process and whose collective input was integral to the final product.

The Delaware trusts and estates bar worked on its FADA bill simultaneously with the ULC drafting committee, and its bill, based on an earlier FADA draft, was enacted and signed by its Governor before UFADAA was finalized by the ULC's Style Committee. The ULC worked closely with the Delaware bar and the bill's sponsor (who, significantly, was leaving the legislature) to align it more closely with UFADAA, and the drafting committee used parts of the Delaware bill to make revisions requested by the floor during the 2014 annual meeting. In the end, while it is fair to say that all those involved would have

preferred to have the luxury of time and the final ULC product, the Delaware bill is substantially similar to UFADAA and credited as its first enactment.

Some technology companies instead initially cast their lot with ALEC (the American Legislative Exchange Council), creating an alternative bill they called the Model Fiduciary Access to Digital Access Act. [ii] They later parted ways with ALEC and created what they now call the "Privacy Expectations Afterlife and Choices Act"[iii], which they recently convinced the Virginia legislature to enact, to the dismay of its trusts and estates bar. [iv]

COMMENT:

Fiduciaries have always had access to all assets and virtually all information pertaining to the persons they represent. The decedent has no surviving, postmortem privacy interest, in electronic communications or anything else. [v] Fiduciaries have always administered the estates of individuals who themselves hold private information, and those fiduciaries are obligated to protect that private information. UFADAA simply seeks to continue that access, in the face of assertions that the 1986 Stored Communications Act[vi], which fails to mention fiduciaries, blocks their access to certain protected electronic communications. UFADAA's premise is therefore asset neutrality.

UFADAA is premised on the policy that first and foremost, the expressed intent of an account holder should be honored. The drafting committee strongly disagreed with industry assertions that boilerplate contract provisions denying fiduciary access should be considered as expressions of such intent. Instead, UFADAA disregards such adhesive contract provisions, while it honors contract provisions such as Google's Inactive Account manager, that present the accountholder with an actual choice.

UFADAA was drafted with industry input and as a result, it only requires disclosure of content that is otherwise protected by the federal privacy law if disclosure is authorized by the federal law. The industry requested that approach, and drafted that language. UFADAA covers more than just this protected content—it covers all digital assets, including the $635,000 virtual space station, the $35M domain name, Bitcoin, and other digital assets with economic value. Fiduciary access rules as to those assets are not included in PEAC or most existing state laws.

Most of the industry assault is premised on arguments that UFADAA's statutory default of fiduciary access infringes on privacy. To the contrary, UFADAA strengthens account holder control by allowing customers to decide what happens to their accounts upon incapacity or death—either in an estate plan, or in via a visible mechanism provided in the account terms of service. The alternative is the current situation where the account provider can determine what happens to digital assets upon the account holder's death.

Another industry complaint is that UFADAA does not state what law controls when the custodian is located in one state and the fiduciary in another. They believe that the probate law of the account holder's domicile, such as UFADAA, cannot grant the account holder's fiduciary access to a digital asset held by a company organized under the law of a different state. Assuming the digital asset is intangible personal property, the answer is quite clear: of course it can.

In probate matters, the situs of intangible property is deemed to be the domicile of its owner. So, in the case of digital assets, as other intangible ones, the law where the incapable person lives, or where the estate or trust is administered, clearly governs the fiduciary's access to and authority to deal with the asset. This is reflected in UFADAA Section 8(a)(1), which says that a fiduciary's authority over a digital asset is subject to the terms of service agreement, unless it triggers the unenforceability provision in 8(b) or (c).

We know that internet service providers take the position that their adhesive choice of law and data deletion contractual terms apply to fiduciaries, and that they will use adhesive choice of law provisions to enforce those terms. [vii]

UFADAA Sections 8(b) and (c) prevent such adhesive terms from interfering with fiduciary access, where the account holder did not expressly intend to block access. Still, the jurisdiction chosen in the TOSA's choice-of-law clause would be relevant for some purposes.

For example, the account holder's domicile state law (UFADAA) would likely not govern the internal administration of the digital asset itself. When we deal with intangible assets with a situs outside the state of administration, the authority to sell, liquidate, etc. such assets generally is governed by that state's law[viii]; e.g. the authority of an executor to sell an interest in a corporate entity held by a Connecticut decedent's estate would be proscribed by Connecticut law. However, the rules governing the entity itself (for example, restrictions on transfer) presumably would be governed by the law designated in the entity's operating agreement (perhaps not Connecticut). This is the approach adopted in UFADAA: the fiduciary simply steps into the shoes of the account holder, but is released from adhesive contractual provisions that would negate the fiduciary's ability to act on the account holder's behalf.

UFADAA has been endorsed by NAELA and approved for enactment by the ABA, as it has been by many, many trusts and estate state bar associations. It's a sensible, fair act that freely allows for digital death and privacy, yet affords fiduciary access where it is desired and necessary.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Suzanne Brown Walsh

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CITATIONS:

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[i] "Britain Embraces £1 Billion-a-Day Digital Banking Revolution" British Bankers' Association Press Release, July 8, 2014.

[ii] Model Fiduciary Access to Digital Assets Act

[iii] Privacy Expectation Afterlife and Choices Act (PEAC)

[iv] http://preview.tinyurl.com/kfk8nrt

[v] Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns a Decedent's E-Mails? Inheritable Probate Assets or Property of the Network?* 10 NYU Journal of Legislation & Public Policy 281 at 313 (2007).

[vi] 18 U.S.C. §§ 2701 et seq. (2006).

[vii] Ajemian v. Yahoo!, Inc., 987 N.E.2d 604 (Mass. Ct. App. May 7, 2013) ("Yahoo! moved to dismiss the second action on four grounds: (1) the forum selection clause in the TOS required that the suit be brought in California; (2) the suit was untimely given the one-year statute of limitations in the TOS; (3) the doctrine of res judicata barred the action; and (4) the complaint failed to

state a claim upon which relief could be granted because e-mails in the account are not property of the estate."

[viii] See, e.g., Folsom and Wilhelm, Probate Jurisdiction and Procedure in Connecticut 2d, Section 2.19 (West, 2009).