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New York's Fiduciary Access to Digital Assets Act

On September 29, 2016, a bill was signed into law by Governor Cuomo adding Article 13-A to the New York Estates Powers and Trust Law (the "EPTL"). This legislation is the New York version of the "Uniform Fiduciary Access to Digital Assets Act" (the "Act") which nineteen (19) other states have also enacted into law. The sponsor's Memorandum in support of the Act explains its purpose this way:

[t]he wide use of digital assets has created an urgent need for legislation dealing with the administration of these assets upon the death or incapacity of the user. As a practical matter, there should be no difference between a fiduciary's ability to gain access to information from an online bank or other Internet-based business and the fiduciary's ability to gain access to information from a business with a brick and mortar building. This measure would amend the EPTL to restore control of the disposition of digital assets back to the individual and removes such power from the service provider."

The Act is effective immediately. It provides certainty to all types of fiduciaries – including: trustees, executors, administrators, agents under a power of attorney and guardians – in their efforts to acquire access to digital assets. They now have the authority to gain access to, manage, distribute and copy or delete digital assets. The Act covers digital assets used for personal use and does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

In a reversal of roles, a user may now direct the custodian of an internet account to disclose (or not to disclose) to a designated recipient some or all of the user's digital assets. This power to authorize disclosure may be exercised by the user *via*: (i) an "on-line tool" or (ii) in his or her will, trust, power of attorney, or other record. It is clear that the terms of a user's will, trust or power of attorney are well within his or her control. Similarly, an "online tool" requires the knowing assent of the user through the use of an electronic service provided by a custodian which allows the user, in an agreement distinct from the terms of service ("TOS") agreement, to provide directions for disclosure or non-disclosure of digital assets to a third person.

Until the enactment of the Act, control of digital assets was governed by a TOS agreement drafted by the custodian of the internet account which gave the custodian, not the user, ultimate control of the digital asset. The Act now gives the control of the digital assets to the user,

whose directions override a contrary provision in a TOS agreement in all cases *except* where the TOS agreement requires the user to act affirmatively and to express direction in a manner which is distinct from the user's general assent to the terms of service. In other words, a "click wrap" agreement (one which requires a user to click on the "I agree" Box") will no longer be effective!

The reluctance of custodians to allow access to digital assets is not without merit. The Stored Communications Act (18 USC §§2701-2711) prohibits the providers of public communications services from disclosing the content of the user's communication except in limited circumstances. One exception is to allow disclosure with the "lawful consent" of the originator. Until enactment of the Act, it was not clear whether a fiduciary, guardian or an agent acting under a power of attorney had the "lawful consent" of the user. The Act now clarifies when and under what circumstances a fiduciary, guardian or agent has "lawful consent" and provides certainty to the users of on-line accounts. The Act goes on step further by providing that a "fiduciary" acting within the scope of his or her duties is an "authorized user" of the property of the decedent, ward, principal, or settlor for the purpose of applicable computer-fraud and unauthorized computer-access laws, including this state's law on unauthorized computer access.

When disclosing digital assets of a user under the Act, the custodian may at its sole discretion: (i) grant a fiduciary or designated recipient full access to the user's account; (ii) grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or (iii) provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account. A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets. A custodian need not disclose digital assets which have been deleted by a user.

The custodian has sixty (60) days to comply with a request to of a fiduciary or designated recipient to disclose digital assets or to terminate the account under the Act. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance. A custodian may deny a request from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

There are two types of disclosure which can be requested. One is access to the "content of an electronic communication" which broader and includes information concerning the substance or meaning of the communication which: (i) has been sent or received by a user; (ii) is in electronic storage by a custodian providing service to the public; and (iii) is not readily accessible to the public. The other access is to a "catalogue of electronic communications" which is narrower and includes information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

If a deceased user consents or a court order directs, the executors and administrators of a user's estate are afforded access to the content of electronic communications. Unless a deceased user prohibits disclosure or a court directs otherwise, the executor or administrator of a user's estate is afforded access to a catalogue of electric communications (and digital assets *other than* the content of electronic communications). An agent under a power of attorney is afforded access to a catalogue of electronic communications (and digital assets *other than* the content of electronic communications) unless a Court, the user or the power of attorney directs otherwise. However, access to the content of an electronic communication is a "hot power" and is allowed only if the power of attorney specifically provides for it. A trustee of a trust which is not the original user of an account may gain access to a catalogue of electronic communications (and any digital assets *other than* the content of electronic communications), unless it is otherwise ordered by a court, directed by the user or provided in the trust agreement. The Act permits a guardian access to digital assets after the opportunity for a hearing. Unless otherwise ordered by a court or directed by the user, the guardian can gain access to a catalogue of electric communications (and any other digital assets *other than* the content of electronic communications). A guardian with general authority to manage the assets of a ward may request a custodian of the digital asset of the ward to suspend or terminate an account for good cause. The request must be accompanied with a certified copy of the court order giving the guardian authority over the ward's property.

A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form and comply with the detailed requirements of the Act,

The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets; including: (i) the duty of care; (ii) the duty of loyalty; and (iii) the duty of confidentiality. A fiduciary's or designated recipient's authority with respect to a digital asset of a user may not be used to impersonate the user. The Act's grant of access is limited to what is necessary to allow a fiduciary, guardian, trustee or agent to perform their fiduciary duties. It is not personal access and does not allow the fiduciary to maintain or continue social media accounts "impersonating" the account holder for whom the

fiduciary is acting.

The Act provides a list of definitions which facilitate understanding of its terms and conditions. Some of the definitions provided are set forth below.

An "account" means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

A "catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

The "content of an electronic communication" means information concerning the substance or meaning of the communication which:(i) has been sent or received by a user; (ii) is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and (iii) is not readily accessible to the public.

A "custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

"Digital asset" means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

"Information" means data, metadata, Internet protocol address, user login information, text, images, videos, sounds, codes, computer programs, software, databases, or similar intelligence of any nature.

"Online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or non-disclosure of digital assets to a third person.

"Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

A "user" is a person that has an account with a custodian.

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