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Malpractice Prevention Education for Oregon Lawyers

Uniform Fiduciary Access to Digital Assets Act

The term "digital assets" incorporates both a person's digital property and his or her electronic communications. This can include Facebook accounts, online banking, email accounts, photos stored on the "cloud," Instagram and Twitter feeds, just to name a few. Access to these assets is generally controlled by a terms-of-service agreement as opposed to traditional property law, which has proven troublesome once the user dies. Companies that store these assets, referred to as "custodians," are often hesitant to give access to the personal representative of the deceased and frequently only grant access pursuant to a court order. This can draw out the probate process and increase the overall costs, not to mention add frustration to an already emotional time in someone's life.

House Bill 1554 (2016) adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) to address this problem. Under the Act, users can now dictate what they want to happen to their accounts once they die or become incapacitated. Users can do this in two ways, either by using an online tool provided by the custodian, or by will, trust, power of attorney, or another similar written document. The online tool must be separate from the terms of service and requires the user to affirmatively state his or her wishes. For example, Facebook now has a function in its settings called "legacy contact." This allows the user to name someone to manage his or her account after the user passes away. There is also a box the user can check if he or she wants the Facebook account permanently deleted after the user passes away.If the custodian does not provide an online tool, or if the user does not use the one provided, then the user can include his or her wishes in the user's estate planning documents. The online tool trumps what is expressed in the written document, and they both override any contrary provisions in the terms of service. If the terms of service do not provide anything related to fiduciary access, then the default rules of RUFADAA apply. This law does not limit a fiduciary's ability to obtain a court order granting the same level of access. In fact, the law expressly provides for such judicial relief and gives fiduciaries alternative means to reach the same end.

HB 1554 does not grant fiduciaries unfettered access to the user's digital assets. Custodians have discretion when it comes to what information they provide. If they choose, custodians may give a fiduciary full access to the account, or they may choose to grant only partial access so that a fiduciary may perform its duties. Custodians may also choose to give a fiduciary a copy of the record, like bank statements, without allowing the fiduciary any online access. For example, Facebook only lets a legacy contact respond to friend requests, update profile and cover photos, and write a post to the profile. The legacy contact cannot log in to the account as the user or read private messages. However, if the user consents to disclosure of more information or

the court orders it, then the custodian must comply. At the bare minimum, the RUFADAA requires disclosure of digital assets, but fiduciaries may be granted access or even control, depending on the user's wishes.

This statute will become effective on January 1, 2017. However, it will retroactively apply to wills, trusts, powers of attorney, and other documents created before the effective date. In addition, custodians can choose to honor the legislation before the January 1, 2017, effective date. Therefore, if any user passes away or becomes incapacitated between now and the effective date, the custodian may choose to follow the terms in the user's estate planning documents.

This article was originally published in the 2016 Oregon Legislation Highlights*, authored by Susan Gary, University of Oregon School of Law; Eric Wieland, Samuels Yoelin Kantor LLP; and Walker Clark, Samuels Yoelin Kantor LLP and published by the Oregon State Bar Public Affairs Department. Reprinted with permission.*

Practice Aid – Digital Assets

A sample "Digital Asset Instruction Sheet" is available on the PLF website, courtesy of Beate Weiss-Krull. Go to www.osbplf.org, select Forms under Practice Management, then Estate Planning category.