

Pennsylvania's New Revised Uniform Fiduciary Access to Digital Assets Act

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On July 23, 2020, Governor Wolf signed Act 72 of 2020, the Revised Uniform Fiduciary Access to Digital Assets Act (Act 72). Developed by the Uniform Law Commission, Act 72 provides fiduciaries, such as executors, guardians, trustees and agents under powers of attorneys with legal authority to manage the digital assets of deceased or incapacitated individuals. The new law adds new Chapter 39 to the Pennsylvania Probate, Estates & Fiduciaries Code (PEF Code). Act 72, which is modeled after a version adopted by the Uniform Law Commission, will become effective January 19, 2021, which is 180 days from enactment.

Act 72 is designed to provide fiduciaries with the authority to access an individual's digital assets or electronic communications. It provides a statutory procedure for custodians of digital assets and electronic communications to safely follow to disclose an individual's digital assets and electronic communications to a fiduciary.

Digital Assets

Digital assets have become an integral part of our lives. Almost everyone owns some type of digital asset. The Act defines a digital asset as "an electronic record in which an individual has a right or interest." Digital assets may include email accounts, digital photos, social media accounts such as Facebook, Twitter and Instagram, cloud-based storage accounts and even cryptocurrencies. Prior to the enactment of this new Act, Pennsylvania law provided no guidance for individuals to transfer their digital assets or for their executors, trustees, agents under powers of attorney or guardians to access their digital assets.

Fiduciary Access to Digital Assets

Custodians typically create online tools under which a user may direct the custodian to disclose or not disclose some or all of the user's digital assets (including the content of electronic communications) to a designated recipient. Similarly, online tools may allow a user to designate a specific individual to access his or her account.

Without an online tool or a designated recipient, a user may, in his or her will, trust and/or power of attorney, allow or prohibit disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user. Act 72 clarifies that the express direction in a will, trust, power of attorney, online tool, or other record may override the provisions of the custodian's terms of service agreement.

Procedures for Disclosure of Digital Assets

In addition to providing a means for a fiduciary to access digital assets and electronic communications, Act 72 provides custodians with a procedure for disclosing digital assets or electronic communications to fiduciaries. First, custodians have discretion to grant either full or partial access to a digital asset to a fiduciary or designated recipient under an online tool or can simply provide a copy of any digital asset in a record. The discretion granted to the custodian takes into consideration that different custodians have different business models and different capabilities. Act 72 also allows a custodian to charge a reasonable administrative fee for disclosure.

Next, custodians must disclose the content of an electronic communication to a fiduciary if the user specifically consented to the disclosure. Act 72 defines the content of an electronic communication as information concerning the substance or meaning of the electronic communication that has been sent or received by a user, is in electronic storage by a custodian and is not readily accessible to the public. Accordingly, when wills or trusts are being drafted, individuals should consider whether they want to grant their executors or trustees the authority to access some, none, or all of their digital assets and electronic communications.

If a user fails to consent to the disclosure of the content of electronic communications, the custodian must disclose a catalogue of the electronic communications to the fiduciary, which is defined in Act 72 as information that identifies each person who has had an electronic communication with a user, the time and date of the electronic communication, and the electronic address of the person having the electronic communication with the user. In an email, for example, the catalogue would *not* include the actual content of the electronic communication.

Often times, upon a user's death, a custodian may request a court order providing that the user had a specific account with the custodian and that disclosure is reasonably necessary for administration of the estate. Act 72, however, provides that the issuance of letters testamentary or letters of administration to the personal representative of the estate has the same effect as a court order as long as the personal representative files an affidavit with the Register of Wills setting forth the information and, if requested, provides the custodian with a copy of the affidavit evidencing such filing. The affidavit may be included in the original petition for grant of letters testamentary or letters of administration and sworn before the Register of Wills, or it may be included in a supplement to the petition.

Revision to Powers of Attorneys

Act 72 also amends Chapter 56 of the PEF Code by including an agent's ability to access the electronic communications and digital assets of the principal as a power that requires a specific grant of authority. Thus, such a power is not granted to the agent under a general grant of authority. This new "hot" power goes into effect for powers of attorney executed January 19, 2021, the effective date of Act 72.

Conclusion

As this new Act becomes effective on January 19, 2021, individuals should consider updating their wills, trusts and powers of attorney to ensure that this new law is properly incorporated into all of their appropriate estate planning documents.

If you have questions or would like additional information, please contact Susan W. O'Donnell (odonnells@whiteandwilliams.com; 215.864.6293) or another member of the Tax and Estates Group.

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