

Pennsylvania Bar Association

Real Property Probate and Trust Law Section

Recommendation and Report on

The Proposal by the Orphans' Court Procedural Rules Committee of the Supreme Court of Pennsylvania regarding New Rule 10.7 concerning Section 3908 of Pennsylvania's Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA"), 20 Pa. C.S. Section 3908

RECOMMENDATIONS

Based upon the Report that follows, and in consideration of the official request for comments from the Orphans' Court Procedural Rules Committee of the Supreme Court of the Pennsylvania ("Committee") regarding its proposed new Rule 10.7 concerning Section 3908 of Pennsylvania's RUFADAA ("Proposed Rule"), it is hereby recommended:

1. That the Pennsylvania Bar Association ("PBA") respectfully oppose the Proposed Rule as stated. A copy of the Proposed Rule, Explanatory Comment, and Publication Report is attached hereto as Exhibit "A".
2. That the PBA support the issuance of a new rule regarding Section 3908 of Pennsylvania's RUFADAA ("Section 3908"). A copy of Section 3908 is attached hereto as Exhibit "B".
3. That the PBA support the issuance of a new rule regarding Section 3908 to provide more guidance than the cross-reference to Section 3908 stated in the Proposed Rule.
4. That the PBA respectfully request the Committee to consider the adoption of:
 - a. An amended new Rule 10.7 ("Amended Rule") in the form attached hereto as Exhibit "C", or in a form that is similar to the Amended Rule, in order to provide specific procedural guidance to attorneys with respect to Section 3908.
 - b. A revised uniform form of Petition for Grant of Letters (Form RW-02) and Supplemental Petition for Grant of Letters under Rules 1.8, 10.1, in order to allow for the insertion of averments by the petitioner as expressly provided in subpart (c) of Section 3908.
 - c. A new sample form of affidavit under Rules 1.8, 10.1 to be filed with the Register of Wills in order to allow for a uniform form of affidavit as expressly provided in subpart (c) of Section 3908, and under subpart (b) of Section 3908.
5. That the PBA respectfully oppose the explanatory Comment in the Proposed Rule and request the Committee to consider the adoption of amended comments ("Amended Comments") in the form attached hereto as Exhibit "C", or in a form that is similar to the Amended Comments.
6. That the PBA offer the within Report and Recommendation in response to the official request for comments from the Committee regarding the Proposed Rule.

REPORT

Committee Proposal Prompts Response

In the April 3, 2021 issue of the Pennsylvania Bulletin, the Committee announced that it is considering proposing to the Supreme Court of Pennsylvania the adoption of the Proposed Rule, which is an entirely new Rule 10.7 of the Pennsylvania Orphans' Court Rules, cross-referencing Section 3908 relating to procedures to obtain disclosure of a decedent's digital assets, for the reasons set forth in the accompanying Publication Report. A copy of the Proposed Rule and Publication Report is attached hereto as Exhibit "A".

The Committee has invited interested persons to submit comments, suggestions, or objections in writing to the Committee as more specifically described in its Publication Report. All communications should be received by May 10, 2021.

Introduction

For the reasons set forth herein, the PBA is opposed to the Proposed Rule and offers the following comments in support of an amended rule that will both clarify the scope of the rule and more clearly give Registers of Wills and lawyers who practice before them specific guidance as to the procedure to use in order to satisfy the "finding of the court" requirement in Section 3908. Because of the PBA's involvement with the development of this requirement, it is mindful that any new rule should be attentive to the important distinction between a custodian's requiring a "finding of the court" in response to a personal representative's request for disclosure of or access to **certain** digital assets of a decedent and a personal representative's request for a "catalogue of electronic communications" of a deceased user. In this regard, any such requirement does not extend to the "contents of electronic communications" of a deceased user, which is covered by Section 3907 rather than Section 3908.

Scope of 20 Pa. C.S. § 3908

Section 3908 is part of Pennsylvania's Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), Act 72 of 2020, 20 Pa. C.S. §§ 3901 *et seq.*, signed by Governor Wolf on July 23, 2020, effective in 90 days, or January 19, 2021. Section 3908 provides for disclosure of certain digital assets by describing the steps to be taken by the personal representative of a decedent's estate. A copy of Section 3908 is attached hereto as Exhibit "B".

Where a personal representative requests the disclosure of or access to the "content of electronic communications" of a deceased user, the requirements for such disclosure or access are governed by Section 3907, not Section 3908, and are more stringent than the requirements in Section 3908 for disclosure of or access to other digital assets of the decedent or a catalog of the decedent's electronic communications.

Section 3908 provides for the disclosure by a custodian of a catalog of the decedent's electronic communications **and** any digital assets **other than the content of electronic communications** of the deceased user, but only if not prohibited by the deceased user or directed otherwise by the court. To obtain such disclosure, Section 3908 (a) states that the personal representative is obligated to give the custodian the following:

- (1) a written request for disclosure in physical or electronic form;
- (2) a certified copy of the death certificate of the user;
- (3) a certified copy of the letters; and
- (4) **if requested by the custodian:**
 - (i) any number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
 - (ii) evidence linking the account to the user;
 - (iii) an affidavit by the personal representative stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or
 - (iv) **a finding of the court** that:
 - (A) the user had a specific account with the custodian identifiable by the information specified in subparagraph (i); or
 - (B) disclosure of the user's digital assets is reasonably necessary for administration of the estate.

Section 3908 is based on section 8 of the uniform law adopted by the Pennsylvania legislature (RUFADAA). Section 8, as originally incorporated in Section 3908 prior to enactment in Pennsylvania, was analyzed by the PBA along with informal reports that the "finding of the court" requirement therein was being routinely demanded by custodians in other jurisdictions having adopted RUFADAA. The PBA was highly concerned that such a requirement would cause extraordinary expense and delay in the normal administration of estates Pennsylvania.¹ Accordingly, on October 19, 2015, the Board of Governors of the PBA, acting in lieu of the House of Delegates, adopted a Report and Recommendation concerning this requirement and other provisions of RUFADAA, a copy of which is attached as Exhibit "D". As a result of the PBA's concerns regarding the "finding of the court" requirement expressed in the Report and Recommendation, the provisions of Section 3908 were modified,

¹ Because the administration of an estate in Pennsylvania is raised by filing a Petition for Grant of Letters with the Register of Wills, and not with the "Court" as in other jurisdictions, the personal representative would have to initiate a new proceeding in the Orphans' Court to obtain a "finding of the court" under Section 8.

and such modifications were incorporated in RUFADAA as passed by the Pennsylvania legislature in 2020.² The modifications are described below.

Section 3908 (b) makes special provisions regarding what constitutes “a finding of the court” as it relates to obtaining the disclosure of a catalog of electronic communications.³ This section provides that, unless otherwise provided by rules of court or court order, the issuance of letters testamentary or letters of administration by the Register of Wills shall have the same force and effect as a “finding of the court”⁴ if certain steps are taken by the personal representative. Specifically, there is a “finding of the court,” if the personal representative:

- (1) files with the register an affidavit subject to penalties under 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) setting forth the information required by subsection (a)(4)(i), (ii) and (iii) regarding records of electronic communications in the custody or control of the custodian; and
- (2) upon request, provides to the custodian a copy of the affidavit bearing evidence of filing with the register.

As noted above, such affidavit may be taken before and administered by a notary public. Once it is filed with the Register of Wills, the issued letters of administration or letters testamentary will have the same force and effect of a “finding of the Court”. The personal representative need only present the custodian with evidence of its being filed with the Register of Wills.

Section 3908 (c) contains express provisions regarding the Petition for Grant of Letters and affidavit. Specifically, it states that a personal representative may file the following with the Register of Wills:

- (1) an averment in the petition under § 3153 (relating to contents of petition) or the affidavit under § 3154 (relating to affidavit and oath);
or

² The PBA, along with other Pennsylvania stakeholders and members of the technology industry, participated in modifying Section 3908 in order to expedite the personal representative’s access to the catalog while retaining the safeguards imposed by Section 3908.

³ Under 20 Pa. C.S. § 3902, a “catalog of electronic communications” is defined as “[i]nformation which identifies (1) each person that has had an electronic communication with a user; (2) the time and date of the electronic communication; and (3) the electronic address of the person under paragraph (1)”. In the view of the PBA, the catalog of electronic communications of a deceased user could contain vital and otherwise unavailable clues to emails to or from financial institutions, alerting a personal representative to the existence of an underlying asset or financial account.

⁴ The force and effect language under Section 3908 (b) expressly applies to a finding by the court under Section 3908 (a)(4)(iv), described above, and Section 3916 (e) relating to custodian compliance and immunity.

- (2) a supplement to the petition under § 3153 or the affidavit under § 3154 which is filed with and sworn before the register.

As noted above, such petition, supplement to the petition, or affidavit is to be taken before and administered by the Register of Wills. In seeking a catalog of electronic communications of a deceased user, the personal representative may either proceed under Section 3908 (b) or Section 3908 (c).

Comments to Proposed Rule 10.7

1. The Proposed Rule offers no specific guidance to the Register of Wills and lawyers who practice before them, concerning the Petition for Grant of Letters and affidavit required under Section 3908.
2. The Proposed Rule does not distinguish between a filing related to digital assets and a filing related to a catalog of electronic communications.
3. The Proposed Rule provides no guidance regarding how to add averments in the Petition for Grant of Letters, or a supplemental Petition for Grant of Letters, as prescribed by Section 3908 (c).
4. The Proposed Rule offers no revised forms under Rule 10.1, approved by the Supreme Court for statewide practice before the Register of Wills as set forth in the Appendix thereto, including a revised form of Petition for Grant of Letters or supplemental Petition for Grant of Letters containing the averment and form of affidavit to be filed with the Register of Wills as provided in Section 3908 (b) and Section 3908 (c).
5. The Proposed Rule provides no guidance about filing an affidavit at the time of the initial Petition for Grant of Letters or after the grant of such letters.
6. The Proposed Rule does not distinguish between “other digital assets” and “a catalog of electronic communications” under Section 3908 and the “content of electronic communications” under Section 3907, all of which are distinct terms under RUFADAA.
7. The Proposed Rule does not clarify that the filing of an affidavit under Section 3908 (b) may occur at any time during the administration of the estate, and is independent of any filing under Section 3908 (c).

Comments to Proposed Explanatory Comment to the Proposed Rule

1. The Proposed Explanatory Comment states that the Proposed Rule cross-references “provisions of the Revised Uniform Fiduciary Access to Digital Assets Act”. However, the Proposed Rule cross-references only one section of said Act: Section 3908.
2. The Proposed Explanatory Comment states that the Proposed Rule relates to “the disclosure of the digital assets of a decedent to a personal representative,” whereas it should state that the Proposed Rule relates to the disclosure of a catalog of a deceased user and the decedent’s digital assets other than the content of electronic communications as prescribed by Section 3908.
3. The Proposed Explanatory Comment describes the Proposed Rule as pertaining to the disclosure of the digital assets of a decedent to a personal representative by referring to the entire chapter 39 that was added by RUFADDA, whereas the provisions of Sections 3909 and 3910 pertain to powers of attorney; the provisions of Sections 3911–3913 pertain to trusts; and the provisions of Section 3914 pertain to guardianships.
4. The Proposed Explanatory Comment defines the term “digital asset, as used in this Rule” by repeating the words defining “digital asset” stated in the section of RUFADAA providing definitions (20.Pa. C.S. § 3902) as if the term “digital asset” was the only significant term requiring definition under Section 3908. The provisions of Section 3908 apply to “a catalog of electronic communications sent or received by the user” as well as “any digital assets other than communications sent or received by the user”. The provisions of Section 3907, not Section 3908, pertain to “communications sent or received by the user”.

Comments on Publication Report

Although not invited to comment on the content of the Publication Report, the PBA respectfully offers the following comments in the interest of avoiding potentially misleading references:

1. In the second paragraph, the Publication Report states that “[t]he Act sets forth methods for individuals to plan for the management and disposition of their digital assets upon death.” By way of clarification, the Act also sets forth methods for individuals to plan for the management and disposition of their digital assets via a power of attorney and a trust. It also provides for the management and disposition of digital assets in a guardianship.
2. In the second paragraph, the Publication Report states that the decedent’s “court-appointed” fiduciary can gain access to digital assets as provided in Section 3908. The reference should be to the “register of wills” rather than the court. In addition, the second paragraph recites that that resort to Section 3908 is available if a decedent “did not plan for the distribution of their digital assets, e.g. through the custodian of the digital assets in or a will.” By way of clarification, RUFADAA does not state that if the decedent plans for the distribution in her will, the custodian shall follow the terms of the will. To the contrary, Section 3908 states that a custodian may request additional information as stated in Section 3908 (a), such as a “finding of the court”

prescribed in Section 3908 (a)(4)(iv). The concern is that, in practice, the custodian will routinely request a “finding of the court” as provided in Section 3908 (a)(4)(iv). It was the PBA’s concern over this default action on the part of custodians that inspired the provisions of Section 3908 (b) and Section 3908 (c).

3. In the third paragraph, the Publication Report refers only to “the disclosure of a decedent’s digital assets”, when the provisions of Section 3908 also provide expressly for the disclosure of a catalog of electronic communications of the decedent. The use of the term “digital assets” as if it were the same as a “catalog of electronic communications” may be misleading to the practitioner, and potentially adds confusion where the precise use of terms is important under RUFADAA.
4. The Publication Report refers to Section 3908 (c)(2) but is silent regarding Section 3908 (c)(1). The Publication Report does not highlight the primary distinction of Section 3908, which is the ability to secure a deemed “finding of the court” via the filing of the Petition for Grant of Letters or a supplemental Petition for Grant of Letters with the additional averments, or the filing of an affidavit either with such petition or thereafter.
5. The Publication Report states that the Committee believes “the procedures contained in the statute were adequate.” For reasons stated in the Comment to the Proposed Rule, the procedures in Section 3908 are inadequate.

Alison Smith
Chair, Real Property, Probate and Trust Law Section

April 27, 2021

Exhibit “A”

**SUPREME COURT OF PENNSYLVANIA
Orphans' Court Procedural Rules Committee**

NOTICE OF PROPOSED RULEMAKING

Proposed Adoption of Rule 10.7 of the Pennsylvania Orphans' Court Rules

The Orphans' Court Procedural Rules Committee is considering proposing to the Supreme Court of Pennsylvania the adoption of Rule 10.7 of the Pennsylvania Orphans' Court Rules cross-referencing 20 Pa.C.S. § 3908 related to procedures to obtain disclosure of a decedent's digital assets for the reasons set forth in the accompanying Publication Report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor be officially adopted by the Supreme Court.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

**Pamela S. Walker, Counsel
Orphans' Court Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635
FAX: 717-231-9546
orphanscourtproceduralrules@pacourts.us**

All communications in reference to the proposal should be received by **May 10, 2021**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Orphans' Court Procedural Rules Committee,

Kenneth G. Potter, Esq.
Chair

[This is an entirely new Rule.]

Rule 10.7 Affidavit for Disclosure of Digital Assets

The procedure for a personal representative to file an affidavit to obtain disclosure of the digital assets of a decedent is set forth at 20 Pa.C.S. § 3908.

Explanatory Comment: This rule was adopted in 20__ to cross-reference provisions of the Revised Uniform Fiduciary Access to Digital Assets Act relating to the disclosure of the digital assets of a decedent to a personal representative. See 20 Pa.C.S. §§ 3901–3917. The term “digital asset,” as used in this rule, means an electronic record in which a decedent had a right or interest, but not an underlying asset or liability unless the asset or liability is itself an electronic record. 20 Pa.C.S. § 3902.

While registers of wills are not subject to the *Case Records Public Access Policy of the Unified Judicial System*, they are encouraged to ensure the confidentiality of identifying information related to the decedent’s digital assets.

SUPREME COURT OF PENNSYLVANIA
Orphans' Court Procedural Rules Committee

PUBLICATION REPORT

Proposed Adoption of Rule 10.7 of the Pennsylvania Orphans' Court Rules

The Orphans' Court Procedural Rules Committee ("Committee") is considering proposing to the Supreme Court of Pennsylvania the adoption of Rule 10.7 of the Pennsylvania Orphans' Court Rules ("Rules"). Proposed Rule 10.7 would provide a cross-reference to 20 Pa.C.S. § 3908 and relates to the filing of an affidavit with the register of wills for the purpose of obtaining access to a decedent's digital assets.

On July 23, 2020, the Governor signed into law Act 72 of 2020, the Revised Uniform Fiduciary Access to Digital Assets Act ("Act"). See 20 Pa.C.S. §§ 3901–3917. A digital asset is defined as "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." See *id.* § 3902. The Act sets forth methods for individuals to plan for the management and disposition of their digital assets upon death. If a decedent did not plan for the distribution of their digital assets, e.g., through the custodian of the digital assets or in a will, the decedent's court-appointed fiduciary can gain access to the digital assets as provided in 20 Pa.C.S. § 3908.

Unless the decedent prohibited the disclosure of the digital assets or a court directs otherwise, the Act establishes the requirements for a personal representative to obtain disclosure of a decedent's digital assets from the custodian. See *id.* The Act provides for the filing of an affidavit with the register of wills to obtain disclosure of the digital assets in lieu of a court finding pursuant to § 3908(a)(4)(iv). See *id.* § 3908(b). To utilize the affidavit procedure, the personal representative must file an affidavit with the register setting forth information related to the decedent's digital assets, such account numbers, usernames, address, or other unique subscriber information assigned by the custodian, evidence linking the account to the user, and an averment that disclosure of the decedent's digital assets is reasonably necessary for administration of the estate. See *id.* § 3908(b)(1). The personal representative must file the affidavit with or supplemental to a petition for grant of letters. See *id.* § 3908(c)(2). The personal representative may then utilize a copy of the executed affidavit as set forth in the Act. See *id.* § 3908(b).

The Committee considered other approaches to incorporating the relevant provisions of § 3908 into the Rules, either by a detailed rule or changes to the petition for grant of letters. However, upon review of § 3908, the Committee believed the procedures contained in the statute were adequate. The practice of incorporation by reference of statutory procedures through rulemaking exists in rules governing the determination of incapacity. See Pa. O.C. Rule 14.6(a).

The Committee did not favor changes to the form petition for grant of letters because an averment in the petition or an affidavit for access to the decedent's digital assets can be filed either at the time of filing the petition or as a supplement to the petition. Such a revised form may suggest that the digital assets affidavit must be filed concurrently with the petition, even though the petitioner may not have identified the digital assets at the time of filing the petition. Additionally, access by filing an affidavit is only one method by which the personal representative can obtain disclosure of the decedent's digital assets – such assets can also be accessed when the decedent has provided for access in a will, has made prior arrangements with the custodian of the assets, or upon a court finding as set forth in the Act.

The Committee invites all comments, concerns, and suggestions regarding this rulemaking proposal.

Exhibit “B”

§ 3908. Disclosure of other digital assets of deceased user.

(a) Obligations of representative.--Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalog of electronic communications sent or received by the user and any digital assets other than the content of electronic communications of the user, if the personal representative gives the custodian:

- (1) a written request for disclosure in physical or electronic form;
- (2) a certified copy of the death certificate of the user;
- (3) a certified copy of the letters; and
- (4) if requested by the custodian:
 - (i) any number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
 - (ii) evidence linking the account to the user;
 - (iii) an affidavit by the personal representative stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or
 - (iv) a finding of the court that:
 - (A) the user had a specific account with the custodian identifiable by the information specified in subparagraph (i); or
 - (B) disclosure of the user's digital assets is reasonably necessary for administration of the estate.

(b) Finding of the court.--For the purposes of disclosure to the personal representative of the estate of a deceased user of a catalog of electronic communications, the issuance of letters testamentary or letters of administration to the personal representative by a register under section 901 (relating to register's jurisdiction) shall, unless otherwise provided by rules of court or a court order, have the same force and effect as a finding of the court under subsection (a)(4)(iv) and section 3916(e) (relating to custodian compliance and immunity), if the personal representative:

- (1) files with the register an affidavit subject to penalties under 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) setting forth the information required by subsection (a)(4)(i), (ii) and (iii) regarding records of electronic communications in the custody or control of the custodian; and
- (2) upon request, provides to the custodian a copy of the affidavit bearing evidence of filing with the register.

(c) Form of affidavit.--The affidavit required by subsection (a)(4)(iii) or (b)(1) may be provided by:

- (1) an averment in the petition under section 3153 (relating to contents of petition) or the affidavit under section 3154 (relating to affidavit and oath); or
- (2) a supplement to the petition under section 3153 or the affidavit under section 3154 which is filed with and sworn before the register.

Cross References. Section 3908 is referred to in section 3916 of this title.

Exhibit “C”

Proposed Rule 10.7

1. Petition for Grant of Letters. Where the personal representative intends to access the digital assets of the decedent (other than content of the decedent's electronic communications), and has sufficient information about such digital assets at the time of the filing of the Petition for Grant of Letters Testamentary or Letters of Administration:
 - a. The averment in the Petition permitted under 20 Pa. C. S. § 3908 (c) (1) may be made by adding to the Petition the recitals required by 20 Pa. C.S. § 3908 (b), or
 - b. The personal representative may file with the Petition an affidavit containing the recitals required by 20 Pa. C. S. § 3908(b).

Any such averment or affidavit shall be taken before and administered by the Register of Wills pursuant to 20 Pa. C.S. § 3908(c).

Explanatory Comment: If the personal representative chooses to address digital assets at the time of filing the Petition for Grant of Letters, there are two options for filing with the Register of Wills. Where modifying the form of Petition to include additional averments is not available in practice, the option of filing an affidavit may be preferred.

2. After Grant of Letters. Where the personal representative intends to access the digital assets of the decedent (other than content of the decedent's electronic communications), and has sufficient information about such digital assets after the time of the Grant of Letters Testamentary or Letters of Administration:
 - a. The supplement to the Petition permitted under 20 Pa. C. S. § 3908 (c) (2) may be made by filing a supplemental Petition with the averment regarding the recitals required by 20 Pa. C.S. § 3908 (b), or
 - b. The personal representative may file an affidavit containing the recitals required by 20 Pa. C. S. § 3908(b).

Any such averment or affidavit shall be taken before and administered by the Register of Wills pursuant to 20 Pa. C.S. § 3908(c).

Explanatory Comment: If the personal representative chooses to address digital assets after the Register of Wills has issued Letters Testamentary or Letters of Administration, there are two options for filing thereafter with the Register of Wills. Where modifying the form of Petition as a supplement is not available in practice, the option of filing an affidavit may be preferred.

3. Catalog of Electronic Communications. Where the personal representative is requested by a custodian to provide a finding of the court with respect to a catalog of electronic communications of a deceased user under 20 Pa. C.S. § 3908 (a)(4)(iv), and has not already filed with the Register of Wills a Petition for Grant of Letters Testamentary or Letters of Administration, a supplement thereto, or an affidavit as provided in sections 1 and 2 of this Rule 10.7, such affidavit to be filed with the Register of Wills as provided under 20 Pa. C.S. § 3908 (b) need not be taken before and administered by the Register of Wills.

Explanatory Comment: Under the circumstances of this subpart 3, such affidavit would be taken and administered pursuant to 20 Pa. C.S. § 3908 (b) and not § 3908 (c).

Exhibit “D”

**PENNSYLVANIA BAR ASSOCIATION
REAL PROPERTY PROBATE AND TRUST LAW SECTION**

RECOMMENDATION

Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)(2015)

Based upon the Report that follows, it is hereby recommended:

1. That the Pennsylvania Bar Association (PBA) support provisions of the RUFADAA, and as used herein, any similar legislation, that expand its application to an expanded set of fiduciaries to include personal representatives of decedents' estates, agents under a power of attorney, trustees, and court appointed guardians of the estate of incapacitated person, and oppose any alternatives that would limit the application of the act to personal representatives of decedents' estates.
2. That the PBA support the definition of "Court" in RUFADAA Section 2(7) to mean the Orphans' Court Division of the Court of Common Pleas of the county in which (1) a decedent was domiciled; (2) a principal who has delegated authority to an agent under a power of attorney resides; (3) the Court has assumed jurisdiction over the person and estate of an incapacitated person; or (4) which has jurisdiction over a trust under the provisions of the Pennsylvania Uniform Trust Act, along with conforming amendments to the mandatory jurisdiction provisions of the Probate, Estates and Fiduciaries (PEF) Code 20 Pa. C.S. Section 711, and oppose any alternatives that would allow a custodian of digital assets to seek an order of court in their home jurisdiction or any other jurisdiction outside of the Commonwealth of Pennsylvania.
3. That the PBA support provisions of the RUFADAA which impose a heightened level of protection over access to the content of a deceased user's "electronic communications" such as email, text messages, and messages on protected social media, by their fiduciary, but where appropriate, expand permissible access to other interested parties with court approval.
4. That the PBA oppose the provision in RUFADAA Section 8(4)(D) and related provisions which would allow a custodian to require a personal representative to obtain a court order in order to access "other digital assets", which could include information necessary for a fiduciary to promptly identify the existence of and assume control over online bank or brokerage accounts and similar assets.
5. That the PBA oppose provisions of RUFADAA Section 9(2) and 10(2) which would authorize a custodian to require the surrender an *original* power of attorney as proof of authority for an agent to act on behalf of the principal.
6. That the PBA support an amendment to revise RUFADAA Sections 9(3) and Section 10(3) to read: "(3) a certification by the agent, sworn before a Notary Public or other officer authorized to administer oaths that the power of attorney is in effect."
7. That the PBA support an amendment to the PEF Code 20 Pa.C.S. § 5601.4(a) to include access to digital assets by an agent as one of the "hot" powers which must be specifically authorized by a principal.
8. That the PBA support the promulgation of Official Comments (preferably by the Uniform Law Commission for uniformity, or if not feasible, by the Pennsylvania Bar Association) with respect to the type of evidence that could be required under

RUFADAA Sections 7(5)(B), 8(4)(B), 9(4)(B), 10(4)(B), 12(4)(B), 13(4)(B), 14(b)(3)(B), and 15(f)(3)(B) (all of which relate to a requirement to provide to the custodian evidence linking the account to the user [owner] thereof).

9. That the PBA coordinate with the Uniform Law Commission and the American Bar Association to seek conforming amendments to 18 U.S.C. § 2702 and related legislation governing voluntary disclosure of customer communications or records.

**Unanimously approved, as amended, by the Board of Governors, acting in lieu of the House of Delegates, October 19, 2015.*

REPORT

Scope of the Revised Act

Any proposal to limit the application of RUFADAA to the personal representative of the estate of a deceased user or account holder should be opposed as unduly limited. In modern practice, other fiduciaries have an equally important need to promptly obtain access to the digital assets of the individual to whom they owe a duty.

Court of Jurisdiction

The definition of “Court” in RUFADAA Section 2(7) to mean the Orphans’ Court Division of the Court of Common Pleas of the county in which (1) a decedent was domiciled; (2) a principal who has delegated authority to an agent under a power of attorney resides; (3) the Court has assumed jurisdiction over the person and estate of an incapacitated person; or (4) which has jurisdiction over a trust under the provisions of the Pennsylvania Uniform Trust Act, appropriately places jurisdiction for any court orders required or sought under the provisions of RUFADAA in the court that has jurisdiction over the financial and personal affairs of the user or account holder. A conforming amendment should be made to the mandatory jurisdiction provisions of the Probate, Estates and Fiduciaries Code 20 Pa. C.S. Section 711. Any proposed revision that would grant jurisdiction over the access to digital assets by a fiduciary to a court in the home jurisdiction of the digital asset custodian would place an undue burden on the ability of a fiduciary to assume control over the assets of the individuals or estates to which they owe a duty. In certain cases, the delay incident to dealing in a foreign jurisdiction could expose underlying financial assets of a user or account holder to market loss.

Heightened Protection for Electronic Communications of Deceased User

A heightened level of protection over access to the content of a deceased user’s electronic communications such as email, text messages, and messages on protected social media by their fiduciary, where that information is not required for purposes of financial management, is appropriate. The ability of a custodian to request a court order, as provided in RUFADAA Section 7(5)(C), —the expense of obtaining such an order falling on the fiduciary requesting access, grants protection to the privacy of the account user. RUFADAA should also give the court the power to direct the custodian, under appropriate

circumstances, to release the content of a deceased user's electronic communications to other interested parties (e.g., as part of permissible discovery in a will contest).

Power of Custodian to Request Court Order Authorizing Disclosure of "Other Digital Assets"

The provisions in RUFADAA Sections 8 (4)(D) and 16(e), which would allow a custodian to require a personal representative to obtain a court order in order to access "other digital assets", which could include information necessary to identify the existence of and assume control over increasingly commonplace online bank or brokerage accounts, are problematic and of great concern. The cost and possible delay associated with obtaining a court order places an undue burden on the personal representative for what should be a routine request. In a volatile market, the inability of a personal representative to act swiftly could expose securities held in an online brokerage account to market loss. If a custodian is opposed to a request by a personal representative for information of this type, the burden and expense of obtaining a protective order of court should fall upon the custodian who seeks the protection of, and presumably enjoys the benefit of, the court order. One potential solution would be to craft a carve-out provision which would eliminate the ability of a custodian to seek a court order where a personal representative is attempting to locate or liquidate the underlying financial assets of a deceased account user.

In addition, RUFADAA Section 16(e) would seem to give any custodian the power to require a court order prior to releasing any information concerning the digital assets of a user by their fiduciary, whether the fiduciary is acting as an agent, personal representative, guardian, or trustee. This places an undue financial burden and potential for delay upon a fiduciary and may prevent the fiduciary from performing their duties.

Production of Original Power of Attorney by Agent

The ability of a custodian to request an *original* power of attorney under RUFADAA Sections 9 (2) and 10(2) is impractical. An Agent may need an original power of attorney to convey real estate or to dispose of or sell a motor vehicle owned by the principal. A certified copy delivered to the custodian of digital assets should be sufficient. Existing law in the Pennsylvania Probate, Estates and Fiduciary Code (PEF Code), 20 Pa.C.S. § 5602(c), already permits the use of a certified copy and should not be repealed or otherwise superseded by this legislation.

Requiring Certification "Under Penalty of Perjury"

Sections 9(3) and 10(3) authorize a custodian to require a certification "under penalty of perjury". Pennsylvania law is narrower than the federal law regarding unsworn declarations under penalty of perjury in 28 U.S.C. § 1746. Pennsylvania in 18 Pa.C.S. § 4904 requires unsworn statements to be made in official proceedings for that section to apply. The Pennsylvania perjury provision, 18 Pa.C.S. § 4901, also applies only to official proceedings. Statements made to Google, Facebook, and other non-financial custodians are not official proceedings. See also 18 U.S.C. § 1001 et seq., regarding false statements. On the other hand, false representations to banks and other federally insured institutions are covered by federal law in 18 U.S.C. § 1014 and false representations to insurance companies are covered by Pennsylvania law in 18 Pa.C.S. § 4117. The more general law of theft by deception in 18 Pa.C.S. § 3922, could apply to a false statement made to unofficial nonfinancial custodians. The offense of forgery applies to a false representation of authority as to a writing and to nonfinancial matters. 18 Pa.C.S. § 4101(b), derived from the ALI Model Penal Code § 224.1 (1962). See ALI Commentary on the Model Code, 1070 Model Penal Code - Miscellaneous 278 (1980). The Commentary indicates that as of its

publication date some 20 states had enacted similar language and other states had pending legislation to do so. A sworn statement before a notary is subject to the penalty of perjury even though it is not used in an official proceeding. 18 Pa.C.S. § 4903(b) and (c). To accomplish the intent of the Uniform Act, in Sections 9(3) and Section 10(3), it is recommended that the language of (3) of both sections be revised to read:

(3) a certification by the agent, sworn before a Notary Public or other officer authorized to administer oaths that the power of attorney is in effect

Of interest, the Pennsylvania Probate, Estates and Fiduciaries Code in 20 Pa.C.S. § 5608(e)(1) also uses the “under penalty of perjury” language. However, in most cases those certifications would be used in official proceedings or in submission to a financial institution where the laws are different as stated above.

Amend The PEF Code, 20 Pa.C.S. § 5601.4(a), to Require Specific Authority with Respect to Digital Assets

The PEF Code in 20 Pa.C.S. § 5601.4(a) delineates those powers that must be specifically authorized. These are sometimes referred to as “hot powers”. Therefore, this subsection of the PEF Code should be amended to include the disclosure of digital assets, including or prohibiting the disclosure of electronic communications in order to synthesize the existing provisions of the PEF Code with Section 9 of RUFADAA. RUFADAA, in some sections allows a general power of attorney to suffice with respect to Other Digital Assets (See Section 10). The PEF Code should be made consistent with this Section.

Add Comments on Type of Evidence that Could be Required

Practicing attorneys would benefit from Official Comments (preferably by the Uniform Law Commission for uniformity, or if not feasible, by the Pennsylvania Bar Association) with respect to the type of evidence that could be required under RUFADAA Sections 7(5)(B), 8(4)(B), 9(4)(B), 10(4)(B), 12(4)(B), 13(4)(B), 14(b)(3)(B), and 15(f)(3)(B) (all of which relate to a requirement to provide to the custodian evidence linking the account to the user [owner] thereof).

Seek Conforming Amendment to 18 U.S.C. § 2702

Section 16(b) of RUFADAA would require the court order authorizing the release of digital assets to contain a finding that compliance with the order would not violate 18 U.S.C. § 2702. Without specific authority in that federal statute, a state court would not have the authority to rule on matters of federal criminal law. See *Mims v. Arrow Fin. Servs., LLC*, —U.S. —, 132 S.Ct. 740, 181 L.Ed.2d 881 (2012), discussing the presumption of concurrent jurisdiction with respect to private rights in civil matters, and *Tafflin v. Levitt*, 493 U.S. 455, 464 110 S.Ct. 792, 107 L.Ed.2d 887 (1990), discussing federal criminal jurisdiction; and 18 U.S.C. § 3231 (in criminal matters federal district courts have exclusive original jurisdiction). The protection envisioned by proposed Section 16(b) would require a separate action in the federal district court, even though estate and fiduciary matters are within state jurisdiction. Therefore, The Pennsylvania Bar Association should coordinate with Uniform Law Commission and the American Bar Association in seeking conforming amendments to 18 U.S.C. § 2702 and related provisions of federal law governing voluntary disclosure of customer communications or records. Case law already allows disclosure of some subscriber information and communication header information. See *In re Zynga Privacy Litigation*, 750 F.3d 1098 (2014); and *U.S. v. Christie*,

624 F.3d 558 (3d Cir. 2010). This recommendation is consistent with a recommendation made by the American College of Trust and Estate Counsel in a January 8, 2015 letter to The Honorable Jeff Flake, Chairman of the U.S. Senate Subcommittee on Privacy, Technology and the Law and The Honorable Darrel Issa, Chairman of the U.S. House of Representatives Subcommittee on Courts, Intellectual Property, and the Internet, requesting revisions to the Electronic Communications Protection Act (ECPA) 18 U.S.C. § 2702 and Computer Fraud and Abuse Act (CFAA) 18 U.S.C. § 1030.

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