From the Desk of the President

Thank you for the honor of representing the National College of Probate Judges as president this year. The canceling of the 2020 NCPJ Spring Conference was disappointing, albeit necessary. Though this year, the COVID-19 pandemic caused a widespread shutdown of courts, businesses, and gatherings of every sort, it enabled us all to draw our focus toward our families, our health, and perhaps even learning new skills.

Ironically, this highly contagious, sinister virus challenged us all to come together with the goal of keeping our distance. Social distancing created obstacles to the operation of courts everywhere. As you will read in this Journal, NCPJ members, Judge Tim Grendell and his staff attorney, Michael Hurst, along with Judge James Dunleavy, wrote about how the courts they oversee have continued to operate in compliance with social distancing guidelines. Drawing upon the diverse experiences of other judges and forging strong relationships with judicial colleagues is at the heart of NCPJ’s mission. This esprit de corps greatly deepens our knowledge base, expands our range of experience, and enhances our ability to serve.

With optimism, we look forward to a time when the virus is in our rear view mirror and we will once again enjoy the fellowship, support, and education that the National College of Probate Judges has offered its members since 1968.

Challenges For Probate Judges:
Trust Investments and Diversification

By: Steven K. Mignogna, Esquire and Tara Hagopian Zane Esquire

Financial markets and investments rise and fall over time, creating questions and concerns about the diversification of investments held by trusts. This is often complicated by a settlor’s direction to maintain specific investments in the trust. When the amounts at stake are large enough, however these questions and concerns usually end in litigation for resolution by the courts.

The American Law Institute has adopted the Restatement (Third) of Trusts and the Prudent Investor Rule to present a more generalized standard governing trustees’ investments. The drafters of the Prudent Investor Rule intended to modernize trust investment law and to restore the generality and flexibility of the original doctrine.

The thrust of the Prudent Investor Act is that the fiduciary shall invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the fiduciary shall exercise reasonable care, skill, and caution. The main innovation of the

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Prudent Investor Act is its incorporation of the “modern portfolio theory.” The Act specifies that a fiduciary’s investment and management decisions respecting individual assets shall not be evaluated in isolation but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

The Prudent Investor Act does impose an affirmative duty upon a fiduciary to diversify the investments of the trust unless the fiduciary reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying. See also Restatement (Third) of Trusts § 227(b): “In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.” These provisions depart from the former Prudent Person Rule, under which each particular investment made by a trustee could be subjected to scrutiny without regard to a trustee’s overall investment strategy.

Thus, the duty to diversify is not absolute. The duty to diversify may be set aside if the objectives of prudent risk management and impartiality can be satisfied without diversifying. The duty to diversify may be set aside if the special considerations of a particular trust situation make it undesirable to diversify. Restatement (Third) of Trusts § 227 cmt. g. A common example stems from the transaction costs and tax consequences of diversification - i.e., where the sale of assets for diversification might necessitate enormous tax or transaction costs. Restatement (Third) of Trusts § 229 cmt. a.

The Prudent Investor Act is a default rule that may be altered by the express provisions of the trust instrument, or in most states a court authorization.

The generality of these standards is best considered by assessing a sampling of cases from around the United States, especially in the context of diversification of investments - or the lack thereof.

Diversification without specific notice or approval led to significant damages in a recent New Jersey case.


Plaintiff Valley National Bank (“VNB”) filed an application for approval of a formal accounting. The remainder beneficiaries objected, complaining, inter alia, that VNB violated the terms of the trust by diversifying the trust portfolio in violation of the language of the trust.

The trust was a two-page document created in 1975. The grantor specifically provided that the trustee was to retain the assets deposited into the trust, free of any liability for such retention. The income from the trust was payable to the grantor for his lifetime, then to the grantor’s wife. On the death of the grantor’s wife, the remainder was to be paid to the grantor’s two granddaughters.

The grantor predeceased his wife, who lived until 2008. Meanwhile, the original trustee was acquired by VNB in 1993. In or about May 2000, VNB became concerned that the trust assets were not properly diversified. As a result, the bank had the matter reviewed by counsel, who advised that the bank had four options: do nothing if it was satisfied that the trust assets were acceptable; diversify the portfolio; notify the beneficiaries and seek consent to diversification and seek court approval of the decision to diversify.

VNB chose to simply diversify. The evidence at trial indicated that the bank never explicitly notified the beneficiaries that it had chosen to disregard the specific instructions of the trust and diversify the portfolio. A few months after his initial letter, in an unsolicited follow-up letter, the bank’s attorney advised that, based on a recent judicial decision, VNB should seek instruction from the court before diversifying or else it “was acting at its own peril.” VNB never did so and continued to diversify.

The bank’s defense was that the Prudent Investor Act superseded a grantor’s express direction in a trust regarding investments. The trial court rejected that argument based on the plain language of the statute. The bank’s secondary argument was that the remainder beneficiaries were estopped from objecting because they knew or should have known of the bank’s actions, despite the fact that VNB never expressly notified the beneficiaries of its course.

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of action. This argument was based on the fact that the beneficiaries began receiving statements prior to the diversification, which began in the year 2000, and according to the bank, had full knowledge of the terms of the trust at that time.

The trial court held that the bank violated its fiduciary duty by disregarding the terms of the trust and failing to obtain either the consent of the beneficiaries or judicial approval for its actions. It accepted in part, however, the bank’s equitable defense, finding that since the bank sent the trust to the beneficiaries in 2008, and since the beneficiaries had been receiving statements prior to that time regarding the trust investments, the beneficiaries should have objected in 2008, and thus their damages were measured from that date.

The trial court determined that, had the bank followed the grantor’s directions and retained the assets, the value of the trust portfolio in 2008 would have been $520,000 more than the value of the actual diversified portfolio. Therefore, the trial court entered judgment against the bank and in favor of the beneficiaries, in the amount of $520,000, plus prejudgment interest. The court disallowed commissions to the bank after May 2008, finding that it had stopped managing the assets as of the date of death of the income beneficiary.

The Appellate Division affirmed in all respects. See also In re Estate of Gehke, No. A-2499-17T2, 2020 WL 3493524 (N.J. Super. Ct. App. Div. June 29, 2020) (executors are bound as fiduciaries to act in the best interests of the estate’s creditors and beneficiaries, but are not liable for mere mistakes; New Jersey’s Prudent Investor Act states that fiduciaries of trusts are not liable to beneficiaries for investment decisions made in reasonable reliance on the trust provisions and that they thought would most benefit the beneficiaries). In an older New Jersey Supreme Court case, however, it was held that diversification was not necessary.

Commercial Trust Co. of New Jersey v. Barnard, 27 N.J. 332 (1958)

The settlor died in 1922 but had created the trust at issue before his death. The settlor had named his personal secretary, George Mason, and Commercial Trust Company of New Jersey as the trustees. The settlor himself had retained the power to control investments and directed that, after his death, his brothers and nephews had the power to veto investments.

In the meantime, as of 1927, the corpus was solely invested in tax-exempt securities. This investment had been approved by the appropriate family members.

When the trustees sought approval of their account, through 1955, certain beneficiaries sought a surcharge for the low-yield investments, arguing that the trustees had failed to exercise any judgment as to the investments. The trustees argued that the policy of investing in the tax-exempt vehicles was formulated by the members of the settlor’s family, and not vetoed by them (per the terms of the trust). The trustees also pointed out that the income beneficiaries received substantial sums ($1.3 million) from other family trusts, and were wealthy and in high-income tax brackets, such that the concentration in tax-exempt securities made sense. The trial court agreed with the trustees.

The New Jersey Supreme Court determined that the facts did not sustain a finding that the trustees failed to exercise judgment with respect to investments, but rather, supported the conclusion that they were alert to the relative advantages to be derived from the investment policy pursued and that diversification was not necessary. The Court noted that the trustees were in possession of sufficient knowledge of the beneficiaries’ high tax brackets to exercise a reasonable judgment with regard to investments. In addition, the initial trust policy of investing in tax-exempt assets was formulated by the members of the settlor’s family, during the period in which they exercised their veto power over investments.

Moreover, the individual trustee had served as personal and financial secretary to the settlor from 1906 until the time of his death and had an intimate acquaintance with the settlor’s financial affairs. He knew that the settlor left an estate of $11,000,000. He was also trustee for another inter vivos trust established by the settlor for the benefit of his wife, Carrie Guggenheim, the remainder on her death to his daughters. He knew that the instant life income beneficiaries each received $1,300,000 from that trust after Carrie Guggenheim’s death and were of substantial means.

In sum, the Court found that this knowledge afforded a basis for a reasonable inference that the life income beneficiaries all were in high-income tax brackets and that generating tax-free income from the trust was a prudent investment decision.

Investment in a closely-held corporation and the

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Charlotte P. Hyde and Nell Pruyn Cunningham were the daughters of Samuel Pruyn, who was a founder of Finch Pruyn & Company, Inc. ("Finch Pruyn"), a large manufacturer. There was a set of family trusts, with each trust funded with large concentrations of Finch Pruyn common stock. Finch Pruyn was a closely held family corporation, whose stock was not publicly traded. Each trust instrument granted the trustees absolute discretion in managing trust assets and contained no directions concerning the disposition of the Finch Pruyn stock.

Accounting actions were filed by the trustees, and the beneficiaries sought damages due to lack of diversification.

The appellate court approved the decision not to diversify. It stressed that Finch Pruyn was a closely held corporation with an unusual capital structure. For example, under Finch Pruyn’s capital structure, the class A shareholders held all of the voting rights and, therefore, controlled whether the corporation could be liquidated. However, class A shareholders would only receive $0.01 per share upon liquidation of the corporation. Class B shareholders would receive all the remaining proceeds upon liquidation, but, without any voting rights, they had no power to effectuate a liquidation. This capital structure engendered a state of “gridlock,” which may have been intended by Finch Pruyn’s founders in order to sustain Finch Pruyn as a family business.

In addition, several experienced trust officers testified that, because Finch Pruyn was a closely held corporation, there was no market for its stock and, as a result, it would only be possible to sell the stock at a speculative price. The trial testimony showed that the Finch Pruyn stock did not attract buyers; in fact, Finch Pruyn itself was not interested in purchasing the stock, except in small quantities at less than book value. A fair price for the stock could only be obtained via a sale of the entire company. Thus, the unusual capital structure made the stock particularly unmarketable.

In addition, the trustees determined not to diversify upon consideration of other factors, such as the general economic situation of the trust assets, the expected tax consequences of investment decisions, and the needs of the beneficiaries. The trustees determined that the Finch Pruyn assets incurred a low tax cost. Compared to the high capital gains taxes that would result from a sale of the stock, the trustees determined that retention of the stock was the most advantageous means of maintaining the trust.

Finally, the trustees concluded that the needs of the beneficiaries outweighed diversification. The Finch Pruyn stock paid out considerable dividends, such that selling the shares at a discounted price, for the sake of diversification, may have been imprudent. More importantly, there was an indication that the settlors of the trust wanted the ownership of Finch Pruyn to remain in the family and that the trusts were used as vehicles to achieve such a result. The trustee’s decision not to diversify was based on the family nature of the corporation.

Language of the governing document can relieve a trustee from the duty to diversify, as seen in an Indiana case involving charitable trusts. Americans for the Arts v. Ruth Lilly, 855 N.E.2d 592 (Ind. Ct. App. 2006)

This case addressed the lack of diversification of two charitable trusts created by National City Bank ("National City"), as conservator of Ruth Lilly’s estate. The trusts were established in January of 2002 and initially invested exclusively in Eli Lilly & Co. stock. National City drafted plans to diversify these investments in March of 2002 and began implementing the plans in July. The desired asset portfolio was achieved by October 2002 — too late, however, to avoid the negative impacts of a sharp decline in the value of Eli Lilly stock.

Two of the charitable beneficiaries, Americans for the Arts and The Poetry Foundation, filed an action alleging that National City’s failure to diversify sooner caused the trusts to lose value and constituted a breach of fiduciary duty. Id. National City objected to the charges, arguing that the language of the trust instruments was sufficient to relieve them of a duty to diversify.

The language of both trusts contained identical language, providing the right to "retain indefinitely any property received by the trustee and invest and reinvest the trust property" and further stating that "any investment made or retained by the trustee in good faith shall be proper despite any resulting risk or lack of diversification or marketability and although not of a kind considered by law suitable for trust investments." Id. at 595.

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Focusing on this text, the trial court determined that this instrument unquestionably relieved the trustee from the duty to diversify. The Indiana Court of Appeals affirmed, and held that the documents regarding the trust were sufficient to allow National City to retain the existing trust assets and that the bank’s good faith reliance on the retention clause was not a breach of fiduciary duty.

Likewise, in a Kansas case, the trustee was shielded from liability as a result of the language of the trust instrument and subsequent letter from the grantor.


In 1990, the grantor, then 79 years old, established a revocable trust funded primarily with Enron stock and with Bank of America serving as trustee. The trust agreement gave Bank of America some boilerplate discretionary powers, but another section severely restricted the trustee’s discretion. The grantor expressly reserved “the exclusive power to control all purchases and sales of trust assets” unless the grantor was incapable of managing her affairs. Id. at 1149.

Seven months after the trust was established, the grantor sent a letter to Bank of America stating, “I hereby direct you to continue to retain the following securities as assets of the above-referenced account: 1,541 shares Enron Corp.” Id. The letter further went on to “exonerate, indemnify and hold the Bank harmless...” and “relieve the Bank from any responsibility for analyzing or monitoring these securities in any way.” Id. at 1150. By its express terms, the letter was to remain effective until the grantor’s death, disability, or revocation of the letter.

Bank of America allegedly did nothing, and when Enron imploded approximately 10 years later, the grantor sued anyway, claiming a loss in value of her Enron stock, which went from a high of $789,687.50 to below $4,800. Id.

The trial court granted summary judgment in favor of Bank of America, citing the letter, Id.

On appeal, the Kansas Supreme Court framed the issue as to whether the language in the trust instrument and subsequent letter shielded Bank of America from liability, and distilled certain rules from the Kansas statutes that had evolved over the relevant time period. The court rejected the argument that the exculpatory provisions of the letter were ineffective because the trustee failed to adequately communicate and explain them to her. The grantor’s intent was to require Bank of America to abide by her decisions on buying and selling trust assets. This language found in the trust and the subsequent letter was plain, unambiguous, and therefore controlling. Id. at 1154. The trustee complied with the prudent investor rule as a matter of law. Id. at 1155. Nonetheless, in dicta, the court stated the better practice would have been for Bank of America to communicate the letter’s contents and legal effect before the grantor signed as well as periodically advise her of Enron’s decline. Id. at 1156.

Given the language of a trust to restrict the sale of stock, except in the event of compelling circumstances, a trustee’s decision to retain stock holdings was determined to be appropriate.


The New York Supreme Court, Appellate Division, ruled on a trust diversification conflict in which the trust instrument required that the trustee retain the trust’s concentration of Eastman Kodak Co. stock holdings, providing that the trustee was only permitted to sell this stock in the event of compelling circumstances. The instrument specifically stated that neither the executors of the decedent’s will nor the trustee were permitted to “dispose of such stock for the purpose of diversification of investment and neither they [n]or it shall be liable for any diminution in the value of such stock” with the exception that the sale of all or part of the Kodak stock was permitted where there was some “compelling reason other than diversification of investment for doing so.” Id. at 362. The trust was initially created by Charles G. Dumont in 1951 for the purpose of providing income to his daughter, Blanche, until the time of her death, when it would become a source of income for her children.

This action was filed in 1998, after Blanche’s 1972 death, by one of her children. The complaint alleged that the modest performance of Kodak stock became a compelling reason to alter the investment structure in January of 1973 because it produced a relatively low-income yield for the trust, and sought to recover the difference in value had 95 percent of the stock been sold in 1973. Id.

The trustee, Chase Manhattan Bank ("Chase"), countered that the trust always met the income needs of the beneficiaries and that therefore, the small growth rate was not a compelling reason for selling the stock. Chase conceded that a compelling reason to restructure emerged in December 2001, when Kodak instituted fundamental changes in their line of products, whereupon the trustee did begin to sell the Kodak stock. Id. at 363.

The court determined that Chase’s decision to retain the Kodak stock holdings was within the prudent person standard, and as there were no compelling reasons to sell, maintaining the stock did not violate the fiduciary duty. Id. at 364. The court stressed that the trustee is not responsible for predicting unforeseeable market (to be continued on page 6)
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fluctuations, nor is it required to make perfect investment decisions regarding long-term performance forecasts. Id.

A number of other cases have addressed the issue of diversification and considered a myriad of facts and circumstances:


A trust was created and funded in 1962 entirely with IBM stock. The corporate trustee did not diversify the trust in any manner, on the rationale that a diversified portfolio was not necessary because IBM stock was on the fiduciary’s “buy list.” The trustee also obtained a purported written consent by the beneficiaries as to the retention of the IBM stock. Nevertheless, the court refused to allow the trustee to use the “consent of the beneficiaries and held that diversification should have occurred in August 1987. By October 1987, the trust had lost much of its value. See also In re Rowe, 712 N.Y.S.2d 662 (App. Div. 2000) (under Prudent Person Rule, trustee acted negligently and imprudently in retaining certain stock and failing to diversify).

**In re Janes, 681 N.E.2d 332 (N.Y. 1997)**

The Saxton decision in New York was preceded by In re Janes. There, the bank trustee was deemed to have violated its duties when it did not diversify a trust, the stock portion of which consisted of 71 percent of Kodak stock. The court found that the trustee did not consider the investment in the stock in relation to the entire trust portfolio, did not pay attention to the needs of the income beneficiary, and failed to analyze the estate and follow its own trustee review protocol (which advised against portfolio concentration of more than 20 percent).

**In re Estate of Donner, 626 N.E.2d 922 (N.Y. 1993)**

The trustees claimed that they retained assets in the trust (80 percent of which were interest-sensitive securities) because they wanted to wait for favorable market conditions before selling. The court did not excuse the $786,000 loss incurred and found that the trustees took no action with respect to the investments except to raise cash for advance payment of their own commissions and legal fees. Their “indifference and inaction” was a violation of their fiduciary duties and was grounds for imposing a surcharge on them for the losses. Id. at 927.

**First Alabama Bank of Huntsville v. Spragins, 515 So.2d 962 (Ala. 1987)**

The bank/trustee’s concentration of trust property in its own stock (70-75 percent of the value of the trust) was determined to be a violation of the trustee's duty to the trust beneficiaries, even though the bank/trustee’s concentration of trust property was on the fiduciary’s “trust list.” The court noted that the trustee’s own bank advisory service recommended that investment in bank stock be limited to five percent of a trust’s portfolio. Id. at 964.

**Stevens v. Nat’l City Bank, 544 N.E.2d 612 (Ohio 1989)**

The decedent died in 1952, leaving an estate of approximately $4.5 million. About $2.6 million of that value was held in Dow Chemical stock and about $1.4 million in Union Carbide stock. The trust granted the trustee the power to retain the shares of Dow and Union Carbide. Nonetheless, from 1958 to 1976, the trustee sold blocks of these stocks to diversify. The beneficiaries argued that the trustee should not have diversified, because the assets would have been worth more had the stock been held. The court upheld the trustee’s decision to diversify, finding that the trustee acted in good faith when the trustee considered its own diversification policy, questioned holdings in excess of 30 percent of the total trust account, and implemented a prudent and gradual diversification program. The court held that the settlor merely authorized the trustee to retain the shares of Dow and Union Carbide stock, rather than directing the trustee to do so.


The trustees held stock that escalated dramatically in value, such that by 1994 the stock comprised approximately 70 percent of the value of the trust. However, as the stock increased in value, the trustees sold blocks of the stock and attempted to diversify. The beneficiaries raised a number of attacks, including the assertion that the trustees should have sold the stock earlier and should not have let the stock comprise such a large portion of the trust. The court held that the trustees did not violate the duty to diversify, because the trust instrument included a provision authorizing the retention of investments and an exculpatory provision that relieved the trustees of liability in case of retention unless there was an abuse of discretion. The court also found that the trustees vigilantly monitored the stock throughout the period and sold portions as the stock price began to fall. Id. at 53.


On a motion for summary judgment, the court determined that a genuine issue of material fact existed as to whether the trustee’s retention of 70-80 percent of the trust corpus in one stock was prudent. The court stated that, because a trust instrument can limit the Prudent Investor Rule, the court could not decide as a matter of law that the trustee had a duty to diversify. Id. at 944.

In conclusion, with money (and often large amounts of money) at stake, issues concerning investments and diversification will continue to present challenges for courts and probate judges. The Prudent Investor Rule provides a generalized standard governing investments to apply when conflicts are presented to courts concerning investments and diversification.
Upcoming Conferences

In 2020, amid the outbreak of COVID-19, both the Colorado Springs as well as the Destin, Florida conferences were canceled. With widespread lockdown orders and state of emergency declarations, attendance would be a challenging feat, and more than that, it would be genuinely unsafe to hold the conference. We are doing our best to reschedule the much-anticipated speakers for the spring conference of 2022 so that we may have a chance to hear from them. With that said, we are excited to announce the destinations of our next three conferences.

**Tucson, Arizona  Spring 2021**
From one scenic, sandy paradise to another, May 11-14 will see us travel to the lush heart of the Sonoran Desert. With culinary, cultural, and natural attractions, Tucson may be in a desert but it is an oasis for vacation. From Saguaro National Park to the west and Mount Lemmon to the east there is certainly no shortage of natural wonder in this idyllic valley.

**Colorado Springs, Colorado Spring 2022**
May 16-22 will see NCPJ come full circle as we take the spring conference back to Colorado Springs. From the Garden of the Gods to Pikes Peak, the fullest of Colorado’s natural beauty is certainly on display. This town, having a large Ute native population, will also provide for an unparalleled cultural experience.

**Savannah, Georgia Fall 2021**
From November 7-13 join NCPJ in the historic city of Savannah Georgia, a city abounding in culinary intrigue and architectural grandeur. From the colonial capital of Georgia to a principal strategic port during both the American Revolution and the Civil War, being the oldest city in the state of Georgia has its perks.
Probate Court Concerns Regarding Digital Assets

By David W. Welty, Esq. and Michael L. Hurst
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Background
Probate property could include what is known as "Digital Assets." Ownership of Digital Assets is becoming more prevalent. If a decedent's probate property includes Digital Assets, then a probate court must oversee the disposal of that probate property, which could include a sale to pay creditor claims, satisfaction of spousal rights, and ultimately the distribution to beneficiaries. A Ward's Digital Assets must be accounted for in guardianship proceedings. Moreover, the trustee of a testamentary trust may need to account for Digital Assets that are trust property.

There are two types of Digital Assets: Non-custodial Digital Assets and Custodial Digital Assets. To the extent that the decedent's probate property includes Custodial Digital Assets, there may be additional concerns that primarily relate to assisting the probate estate Fiduciary to interact with the Custodian of the Custodial Digital Assets in order to identify and ultimately sell or distribute those Custodial Digital Assets. Think of this in terms of probate property held by a bank in a safe deposit box, the bank being the custodian of property stored in that safe deposit box. A Fiduciary may be aware that a decedent has property in a safe deposit box, but the bank will refuse access until there is a court order permitting access.

Both federal and state law affect the interaction of the Fiduciary and the Custodian concerning Custodial Digital Assets.

I. Federal Law:
A. Stored Communications Act, 18 USC 2701 et seq. ("SCA"), enacted in 1986. In summary the SCA affects Custodial Digital Assets and requires a Custodian not to disclose certain types of Custodial Digital Assets “without the lawful consent of the originator or an addressee.”
B. Computer Fraud and Abuse Act, 18 USC 1030 ("CFAA"), enacted in 1986. Essentially, the CFAA is a federal criminal statute that criminalizes the intentional unauthorized access to a computer.

II. State Law:
A. Revised Uniform Fiduciary Access to Digital Assets Act (2015) ("RUFADAA"), which has been enacted by over 40 states. RUFADAA essentially deals with issues affecting Custodial Digital Assets.

What Is a Digital Asset?
RUFADAA defines a Digital Asset as follows:

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

Because a Digital Asset is any "electronic record" you must also consider the definitions of "electronic" and "record."

"Electronic" means - relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. "Record" means - information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. Examples of Digital Assets are numerous, but include:

Personal - electronic photos, videos, and music; emails and texts; digital books, electronic gaming assets; home security system recordings; medical records; tax documents; loyalty program benefits – e.g. credit card or airline credits and; a domain names for websites.

Social Media - Digital Assets resulting from interaction on social media platforms - e.g. Facebook, Linkedin, Twitter, YouTube, Instagram, Reddit, etc.

Financial Accounts - cryptocurrency – e.g. Bitcoins, Libra, Ethereum, XRP, EOS, etc.; Amazon, e-Bay, Apple, PayPal Accounts; online bill paying account

Business - generally for a self-employed decedent consisting of: customer, supplier, and employee information and; documents.

“Fiduciary may be aware that a decedent has property in a safe deposit box, but the bank will refuse access until there is a court order permitting access”

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Non-custodial Digital Assets v. Custodial Digital Assets

The two terms, "Non-custodial Digital Assets" and "Custodial Digital Asset" are not legal terms but rather are created by the authors to better explain how the law applies to Digital Assets. All Digital Assets are an "electronic record." All Digital Assets must be "stored" on the owner’s hardware or a Custodian’s hardware.

Non-custodial Digital Assets

In many cases a Digital Asset is stored on the owner’s storage equipment. Examples are computer hard drives (including a tablet), a cellphone, a "thumb" drive, backup devices, CD, DVD, and even a security camera. Such examples are referred to as Non-custodial Digital Assets. Both the storage equipment and the Digital Asset are property, but the storage equipment is tangible personal property and the Digital Asset that resides on the storage equipment is a Non-custodial Digital Asset — perhaps a form of intangible personal property. Think of it as a safe, which is located in the Decedent’s home. In the safe is $500,000 in stocks and bonds. The safe is tangible personal property and the stocks and bonds are intangible personal property. The storage equipment is the safe and the Digital Assets stored on the storage equipment is intangible personal property. The safe may have a combination lock and the storage equipment may have a password.

Neither federal law (SCA), nor state law (RUFADDA) deals with this type of probate asset, and in many cases, the state probate forms do not specifically deal with Digital Assets. A challenge for the probate court is how to inventory and dispose of Digital Assets, and perhaps how to establish value - i.e. appraisal.

I. Value

Digital Assets can have substantial economic value. Cryptocurrency, electronic game assets - e.g. a "magical sword" that is transferable, domain names, book manuscripts, music collections, Website accounts - e.g. Amazon, e-Bay, PayPal, and Loyalty Program Benefits - airlines, credit card usage are examples of such assets.

Of course, some Digital Assets can have little economic value but significant sentimental value - e.g. photos, videos, emails, documents.

II. Distribution

Creditor Claims. Depending upon value and solvency of a probate estate, the Fiduciary may need to sell Digital Assets to pay creditor claims. If there is no Will with a power to sell Digital Assets, then perhaps a Fiduciary may require a court order, similar to the sale of tangible personal property.

Surviving Spouse. In many states a surviving spouse has certain rights to probate property apart from those rights as a beneficiary under a Will or by reason of intestacy. Community property law may pose other issues. It is critical for the Fiduciary to identify Digital Assets and determine value.

I. Allowance for Support - many states provide a right of special allowance for support of a spouse and minor children that is senior to that of most creditor claims.

II. Right to Purchase - likewise, many states give a surviving spouse a right to purchase a portion of the probate property, which could include Digital Assets. Of course, the Fiduciary and the surviving spouse must be aware of the existence and value of Digital Assets comprising probate property.

Distribution in Kind - many states require a court order to make an "in-kind" distribution if there is no Will admitted to probate that has appropriate language. If a storage device is to be distributed, does that necessarily include the Digital Assets on the storage device? Can each beneficiary receive a copy of digital pictures or videos on the storage device?

III. Interpretation of a Will

Another challenge for the Fiduciary and the probate court will arise from the intended meaning of provisions in a Will admitted to probate, especially when the Will was signed before the onset of Digital Assets. Examples would include:

A. Are digital family photos and videos tangible or intangible personal property?

B. Suppose the Will leaves computer equipment to a son. Does the son also receive all Digital Assets on the hard drive of that computer - e.g. all digital family photos and videos?

IV. Conservatorship or Guardianship

A Protected Person (e.g. "Ward") may own Digital Assets. A Conservator needs to be aware of, inventory, and account for the Protected Person’s Digital Assets.

Custodial Digital Assets

Custodial Digital Assets are Digital Assets that reside or are stored on the storage equipment of a third party (i.e. the "Custodian"). Typically, during his lifetime the User, who uploaded his Digital Assets to a third party's storage equipment, could access those Digital Assets through the internet provided that the User has his username and password (and perhaps the answers to security questions). A key issue is to what extent can a Fiduciary access the User’s Digital Assets located on Custodian's storage equipment, which may be necessary to prepare an inventory and ascertain the value of the Digital Assets.

(to be continued page 10)
Probate Court Concerns Regarding Digital Assets (continued from page 9)

Think of a bank safe deposit box ("BSDB"). Suppose the User, while married, has four types of property that he wants to store in a BSDB. They are (1) family photos, (2) stock certificates, (3) love letters to and from a girlfriend, and (4) "compromising" videos. During lifetime, the User could go to the bank, sign a contract, and receive a unique number and key for the BSDB and deposit his property in the BSDB. Thereafter, he can easily access his property.

Storing Digital Assets with a Custodian is not much different. Before being permitted to store (i.e. "upload") Digital Assets on a Custodian’s storage equipment the User will sign a contract, which is known as a "Terms-of-service-agreement,"13 ("TOSA"), often the result of clicking the "I agree" box. Such contracts, known as "clickwrap" agreements, are an enforceable contract in most states. After entering into the TOSA, typically the User will receive a "username" and "password," (just like the unique number and key for a BSDB). The username and password give the User future access to the Digital Assets (just like going to the bank and opening the BSDB with a key).

I. Access to Custodian Digital Assets after Death of a User.

A fundamental problem for a Custodian of Digital Assets is the Stored Communications Act (18 USC 2701 et seq.), which essentially states that the Custodian cannot permit access to the Custodial Digital Assets without the lawful consent of the originator or an addressee. When a Fiduciary requests access to emails, the Custodian is fearful that releasing such Digital Assets is a violation of federal law. There are four sources of authority that permit a Custodian to release Information to a Fiduciary, in the following priority.

A. Online Tools.14 Many Custodians (e.g. Google, Facebook, etc.) provide what is called Online Tools that allow a User to instruct the Custodian as to how to dispose of Digital Assets stored by the Custodian upon learning of the User’s death. One instruction might be specific consent to permit a Fiduciary access to emails (thus satisfying the requirements of the SCA). Another might be ordering the Custodian to erase all emails, thus denying access to the Fiduciary, and destroying compromising emails or videos. The use of Online Tools overrides any contrary instructions in legal documents described next.

B. Legal Documents.15 An User may provide instructions regarding Digital Assets in the User’s Will, a trust, or a Power of Attorney,16 which will permit or prohibit access to Digital Assets. Any such instructions override any contrary instructions or provisions in a Terms-of-service-agreement.17

C. Terms-of-Service-Agreement (TOSA).18 Absent the use of any Online Tools or instructions in a legal document, the TOSA may govern the extent to which a Fiduciary may access Custodial Digital Assets. 19 For example, the Yahoo TOSA provides that an Account is non-transferable and upon being informed of the User’s death, the User’s Account20 is closed and all Digital Assets held by Yahoo are permanently deleted.

D. RUFADAA Default Rules.21 Failing the effective use of Online Tools, legal documents, or specific instructions in the TOSA, the rules provided in RUFADAA govern the manner of access by a Fiduciary to Custodial Digital Assets, particularly with respect to Electronic Communications22 - e.g., emails. It is important to notice that RUFADAA is more protective of Electronic Communications.

1. RUFADAA Sec. 6 - Procedure of Disclosing Digital Assets. This provision describes the authority required for a Custodian to voluntarily disclose a User’s Digital Assets.

2. RUFADAA Sec. 7 - Disclosure of Content of Electronic Communications of Deceased User. This provision describes the manner and requirements for the disclosure of a User’s Digital Assets by a Custodian (essentially the contents of emails) when the User has consented to disclosure (by Online Tools or legal documents) or a court ordered disclosure. This provision provides critical language to be incorporated into a court order that would require disclosure. If the User has not consented to a disclosure, then a Custodian will not disclose the "contents" of emails without a court order. Apparently, some Custodians – e.g. Google, Facebook, require a Court order in all events.

3. RUFADAA Sec. 8 – Disclosure of Other Digital Assets of Deceased User. Absent User instructions to the contrary (e.g. Online Tools or legal documents) or a court order, this provision describes how a Fiduciary may gain access to Digital Assets that are merely a "catalogue of electronic communications"23 - i.e., a "table of contents."

("To be continued on page 11")
Probate Court Concerns Regarding Digital Assets (continued from page 10)

4. RUFADAA Sec. 9 – Disclosure of Content of Electronic Communications of a Principal. This provision describes the manner and requirements for the disclosure of Electronic Communications of a principal who has an agent under a Power of Attorney. The agent may need access if the principal is legally incompetent.

5. RUFADAA Sec. 10 - Disclosure of Digital Assets of a Principal. This provision describes the manner and requirements for the disclosure of Digital Assets of a principal who has an agent under a Power of Attorney.

6. RUFADAA Sec. 11 – Disclosure of Digital Assets Held in Trust when Trustee is the Original User. This provision describes the manner and requirements for the disclosure of Digital Assets held in trust to a Trustee when the User is the original Trustee.

7. RUFADAA Sec. 12 - Disclosure of Contents of Electronic Communications Held in Trust when Trustee is not the Original User. This provision describes the manner and requirements for the disclosure of Electronic Communications held in trust to a Trustee when the User is not the original Trustee.

8. RUFADAA Sec. 13 – Disclosure of Other Digital Assets Held in Trust when Trustee is not the Original User. This provision describes the manner and requirements for the disclosure of other Digital Assets held in trust to a Trustee when the User is not the original Trustee.

9. RUFADAA Sec. 14 - Disclosure of Digital Assets to [Conservator of [Protected Person]. This provision describes the manner and requirements for the disclosure of Digital Assets of a Protected Person with a court appointed Conservator.

a. Order of Authority. The appointment of a Conservator does not grant a Conservator the authority to access the Protected Person’s Digital Assets. Only after a hearing, may the Court grant a Conservator access to Digital Assets.

b. Access to Custodial Digital Assets other than Email Content. After a Conservator is granted authority to access the Protected Person’s Digital Assets by court order, a Custodian shall give a Conservator access to (i) a “catalogue of electronic communications” (but NOT email content) and (ii) all other Custodial Digital Assets.

c. Account Termination (or Suspension). Without authority to access Digital Assets, a Conservator may request the termination or suspension of an Account (e.g. Facebook, Google, Amazon, etc.) provided the Conservator has good cause and delivers to the Custodian the original Court order granting authority over the Protected Person.

A Few Practical Suggestions

Below are a few ideas and forms that our court has implemented to deal with the growing issue of Digital Assets.

Probate Proceedings

I. Information Sheet. We believe that educating both the local bar and pro se applicants is helpful. We have an Information Sheet on our website and in our Help Center. See Exhibit A-1

II. Digital Asset Certification. In addition to a full administration in a decedent’s estate, which requires the filing of an inventory, Ohio permits, under certain circumstances, the filing of a Release from Administration or a Summary Release from Administration. In any such proceeding, our court requires the Fiduciary to prepare and file, before or upon filing the inventory, a “Digital Asset Certification,” which requires the Fiduciary to make a reasonable inquiry and inform to the court of the existence and nature of the decedent’s Digital Assets. See Exhibit A-2.

III. Supplemental Schedule of Assets. Depending upon the information provided by the “Digital Asset Certification,” our court may require the Fiduciary to prepare and file a “Supplemental Schedule of Assets” to provide more detailed information and values of the Digital Assets. See Exhibit A-3.

IV. Consent to Distribution of Digital Assets. Except when a decedent’s Will makes a specific bequest, before a Fiduciary distributes any Digital Assets, our local court rules require a Fiduciary to either: (i) obtain a court order of distribution, or (ii) prepare, obtain signatures, and file a “Consent to Distribution of Digital Assets.” See Exhibit A-4.

V. Application for Authority to Access Digital Assets. If a Fiduciary needs to access Digital Assets held by a Custodian, our court provides an application and court order for a Fiduciary. See Exhibit A-5.

Guardianship Proceedings

I. Digital Asset Certification. Similar to a probate proceeding, our court requires a guardian of the estate to prepare and file, before or upon filing the inventory, a “Digital Asset Certification.” See Exhibit B-1.

II. Application for Authority over Digital Assets. If a guardian needs access to the Ward’s Digital Assets, our court provides an application and court order for a guardian or attorney. See Exhibit B-2.

Other Resources

Exhibit A-1: Information Sheet Regarding Digital Assets

By Judge Timothy J. Grendell

Background

Decedents and Wards are increasingly likely to own Digital Assets (defined below). The Fiduciary\(^1\) has a duty to exercise reasonable efforts to ascertain whether the Decedent owned digital assets, for the benefit of creditors, a surviving spouse (and minor children, and beneficiaries or next-of-kin). Like any other probate property, digital assets may need to be sold to pay creditors, distributed to satisfy the rights of a surviving spouse, or distributed under the terms of a Will admitted to probate or under the laws of descent and distribution. Likewise, a Guardian must determine whether a Ward owns Digital Assets. The Fiduciary must be aware of, and abide by, applicable federal and state law, and the Fiduciary must be sensitive to the privacy rights and concerns of the Decedent or Ward.

What Is a Digital Asset?

At the risk of being too technical, a digital asset is defined in R.C. 2137.01(1) as follows:

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

Because a Digital Asset is any "electronic record" you must also consider the definitions of "electronic" and "record."

"Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.\(^2\)

"Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.\(^3\)

"Information" means - data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.\(^4\)

Some examples of Digital Assets are:

- **Personal** - electronic photos, videos, and music; emails and texts; digital books, electronic gaming assets; home security system recordings; medical records; tax documents; loyalty program benefits – e.g. credit card or airline credits and; a domain names for websites.

- **Social Media** - Digital Assets resulting from interaction on social media platforms - e.g. Facebook, Linkedin, Twitter, YouTube, Instagram, Reddit, etc.

- **Financial Accounts**\(^5\) - cryptocurrency – e.g. Bitcoins, Libra, Ethereum, XRP, EOS, etc.; Amazon, e-Bay, Apple, PayPal Accounts; online bill paying account

- **Business** - generally for a self-employed decedent (or Ward)\(^6\) consisting of: customer, supplier, and employee information; financial statements as well as; credit card and bank account information.

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Non-custodial Digital Assets v. Custodial Digital Assets

A Fiduciary can better understand his duties by identifying Digital Assets in two forms - i.e. "Non custodial Digital Assets" and "Custodial Digital Assets." Essentially a Non-custodial Digital Asset is a Digital Asset that the owner stores on his own storage equipment while a Custodial Digital Asset is a Digital Asset that the owner stores on the storage equipment of a third party (the "Custodian").

Non-custodial Digital Assets

A Non-custodial Digital Asset is stored on a storage device that is owned by the owner. Examples of such equipment are computer hard drives (including a tablet), cellphone, "flash" drive, backup systems, CD, DVD, etc. Both the storage equipment and the Digital Assets stored on the storage equipment are the owner's property, but the storage equipment is tangible personal property and the Digital Asset that resides on the storage equipment is a "Non-custodial Digital Asset" – i.e. an "electronic record." Think of a safe that is located in the owner's home and within the safe is certificates of stocks and bonds. The safe is tangible personal property and the stocks and bonds are intangible personal property. With Non-custodial Digital Assets, the safe is the storage equipment (i.e. a flash drive), which is tangible personal property, and the Non-custodial Digital Assets, which reside on the flash drive, are like the stocks and bonds that are stored in the safe.

Both the owner's electronic storage equipment and the Digital Assets that reside on such equipment are Probate Property.

(Continued on page 13)
Dealing with Non-Custodial Digital Assets

I. Appraisal

Some Digital Assets can have substantial economic value. Such Assets Include: cryptocurrency; domain names; book manuscript; music collections. Of course, some Digital Assets can have little economic value but significant sentimental value - e.g. photos, videos, emails, documents. The Fiduciary may need to have those Digital Assets with economic value appraised if their value is not readily ascertainable.

II. Inventory

Inventory. Like any Probate Property, the Fiduciary must include Digital Assets on the Inventory, or otherwise include them in the preparation of documents for a Release from Administration or Summary Release from Administration. Likewise, a Fiduciary must include the Ward’s Digital Assets on the guardian’s inventory.

III. Sale

If Probate Property must be sold, then the Fiduciary must consider whether and to what extent the Digital Assets must be included in the sale process.

IV. Rights of Surviving Spouse

The Rights of a Surviving Spouse extend to Digital Assets that are Probate Property.

V. Distribution

The Fiduciary must carefully consider the wording of a Will admitted to probate to determine who should receive any Digital Assets. If a Will does not specifically determine what beneficiary or beneficiaries should receive the Digital Assets, then the Fiduciary must prepare and file the form titled “Application to Distribute in Kind” (Probate Form 10.0) to obtain a court order for distribution – see the probate information sheet titled “Full Administration.”

A. Access Rights. A Fiduciary, with authority over the property of a Decedent or Ward, has the right to access any Digital Asset in which the Decedent or Ward had a right or interest and that is not held by a Custodian or subject to a terms-of-service agreement.

Custodial Digital Assets

A Custodial Digital Asset is stored on a storage device that is owned by a third-party (the “Custodian”). Examples of a Custodial Digital Asset are: social media accounts (e.g. Facebook, LinkedIn, Twitter, YouTube, Instagram, Reddit, Tumblr, etc.); website accounts (e.g. Amazon, e-Bay, PayPal, Hotwire.com, United.com, Alamo.com, Uber.com, etc.); Cryptocurrency (e.g. Bitcoin, Ethereum, Libra, etc.); Loyalty Programs (e.g. credit card points program, airline mileage program, etc.) and; Domain names (e.g. godaddy.com, bluehost.com, etc.)

Think of a bank safe deposit box (“BSDB”). Suppose the owner of property, while married, has four types of property that he wants to store in a BSDB. They are (1) family photos, (2) stock certificates, (3) love letters to and from a girlfriend, and (4) “compromising” videos. The owner would go to a bank, sign a contract, and receive a unique number and key for the BSDB and deposit his property in the BSDB. Thereafter, he can easily access his property. The owner has an expectation of privacy as to the property he has deposited. After the owner has died, the Fiduciary cannot access the BSDB without a court order - see probate information sheet titled “Safe Deposit Box.”

Storing Digital Assets with a Custodian is not much different. Before being permitted to store (i.e. “upload”) Digital Assets on a Custodian’s “storage facility” the owner will sign a contract, which is known as a “Terms of Service Agreement,” (TOSA), often the result of a “click in the box” or clicking the “I agree” box. Such contracts, known as “clickwrap” agreements, are enforceable as any other contract. After entering into the TOSA, the owner will receive a “username” and “password,” (just like the unique number and key for a BSDB). The username and password give the owner future access to the Digital Assets (just like going to the bank and opening the BSDB). Likewise, the owner has an expectation of privacy as to the Digital Assets he has uploaded onto the Custodian’s storage equipment and Custodians will honor that expectation of privacy of their users.

Both federal and state laws have been enacted to protect the privacy rights of an owner of Custodial Digital Assets.

Federal Law

the Storage Communications Act (“SCA”). In summary the SCA requires that the Custodian may not disclose certain types of Custodial Digital Assets “without the lawful consent of the originator or an addressee.” Although that may be helpful while the owner is living, the SCA is problematic when the owner dies or becomes legally incompetent - i.e. how can the owner give consent to access Digital Assets held by a Custodian?

State Law

the Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which provides a process for a Fiduciary to access Digital Assets held by a Custodian.

I. Dealing with Non-custodial Digital Assets

A Fiduciary must deal with Custodial Digital Assets in the same manner as described above for Non-custodial Digital Asset regarding appraisal, inventory, creditor and surviving spouse rights, sale, and distribution.

(to be continued on page 14)
I. Digital Asset Certification (GC PF 6.5)

At or before the filing of (i) the Inventory and Appraisal (Form 6.0), (ii) an Application to Relieve Estate from Administration (Form 5.0), or (iii) an Application for Summary Release from Administration (Form 5.10), the Estate Representative shall prepare and file with the Court the form titled "Digital Asset Certification (GC PF 6.5)." Likewise, a Guardian, at or before the filing of the guardianship inventory, shall file with the Court the form titled "Digital Asset Certification - Guardianship" (GC PF 15.5A).

II. Supplemental Schedule of Assets

Depending upon the disclosure on the Digital Asset Certification (GC PF 6.5), the Court may require the Fiduciary to prepare and file with the Court the form titled "Supplemental Schedule of Assets" (GC PF 6.1A).

III. Granting or Denying Access

The owner of Custodial Digital Assets (e.g., social media accounts, other website accounts) may determine whether a Fiduciary may access, or prohibit access to, such Digital Assets.

A. Online Tools. Many Custodians offer their users specific methods to govern access to the digital access held by the Custodian, known generally as online tools. By using an online tool, the owner can grant access or deny access to a Fiduciary for all or certain Digital Assets – such as the "content of electronic communications" – e.g., emails. Any directions regarding disclosure of access that is made by an online tool overrides any direction provided in legal documents explained below.

B. Legal Documents. The owner of Custodial Digital Assets may provide directions regarding access (or denial of access) to such property (including access to the content of emails) by providing directions in a Will, a power of attorney, or a trust. If the directions and authority provided in a legal document are contrary to an election made in an online tool, the online tool governs.

C. Terms-of-Service-Agreement (TOSA). In some cases, the Custodian’s TOSA will have provisions regarding access (or denial of access) to Digital Assets held by that Custodian. However, any contrary provision by an online tool or a legal document will override the TOSA.

D. Court Order. If an Estate Representative requires a court order to access Digital Assets pursuant to R.C. §8213.06 or 2137.07 in order to determine the full extent of the Digital Assets that are part of the probate property, then that Fiduciary shall prepare and file with the Court the form titled "Application for Access to Digital Assets - Estate" (GC PF 6.5B). The Estate Representative should deliver an authenticated copy of the judgment entry to the Custodian. Hopefully, the Custodian will abide by the judgment entry and grant access. Likewise, if a Guardian requires a court order to access Digital Assets pursuant to R.C. §2137.13, then the Guardian shall prepare and file with the Court the form titled "Application for Authority Over Digital Assets" (GC PF 15.5C). Again, the Guardian should deliver an authenticated copy of the judgment entry to the Custodian.

IV. Notifying the Court of the Decedent’s or Ward’s Digital Assets

The Fiduciary must make a good faith effort to determine the extent of the Decedent’s Digital Assets and report their existence to the Court.

V. Summary

P A G E 14

I. Digital Asset Certification (GC PF 6.5)

At or before the filing of (i) the Inventory and Appraisal (Form 6.0), (ii) an Application to Relieve Estate from Administration (Form 5.0), or (iii) an Application for Summary Release from Administration (Form 5.10), the Estate Representative shall prepare and file with the Court the form titled "Digital Asset Certification (GC PF 6.5)." Likewise, a Guardian, at or before the filing of the guardianship inventory, shall file with the Court the form titled "Digital Asset Certification - Guardianship" (GC PF 15.5A).

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B. Legal Documents. The owner of Custodial Digital Assets may provide directions regarding access (or denial of access) to such property (including access to the content of emails) by providing directions in a Will, a power of attorney, or a trust. If the directions and authority provided in a legal document are contrary to an election made in an online tool, the online tool governs.

C. Terms-of-Service-Agreement (TOSA). In some cases, the Custodian’s TOSA will have provisions regarding access (or denial of access) to Digital Assets held by that Custodian. However, any contrary provision by an online tool or a legal document will override the TOSA.

D. Court Order. If an Estate Representative requires a court order to access Digital Assets pursuant to R.C. §8213.06 or 2137.07 in order to determine the full extent of the Digital Assets that are part of the probate property, then that Fiduciary shall prepare and file with the Court the form titled "Application for Access to Digital Assets - Estate" (GC PF 6.5B). The Estate Representative should deliver an authenticated copy of the judgment entry to the Custodian. Hopefully, the Custodian will abide by the judgment entry and grant access. Likewise, if a Guardian requires a court order to access Digital Assets pursuant to R.C. §2137.13, then the Guardian shall prepare and file with the Court the form titled "Application for Authority Over Digital Assets" (GC PF 15.5C). Again, the Guardian should deliver an authenticated copy of the judgment entry to the Custodian.

IV. Notifying the Court of the Decedent’s or Ward’s Digital Assets

The Fiduciary must make a good faith effort to determine the extent of the Decedent’s Digital Assets and report their existence to the Court.

V. Summary

N C P J  J O U R N A L  F A L L  2 0 2 0
DIGITAL ASSET CERTIFICATION

I certify that (1) I have made a good faith effort to ascertain the Digital Assets owned by ______________________________________ (the "Decedent") and the value, and (2) the following is true and correct to the best of my knowledge:

The Decedent owns equipment capable of storing "electronic records" [see R.C. 2137.01(J) and (U) – e.g. computer, external hard drive, tablet, iPod, cellphone, flash-drive, backup equipment, CD, DVD, etc.] Yes ☐ No ☐

The aggregate value of Decedent's Digital Assets is less than $5,000 Yes ☐ No ☐

The Decedent owns or leases the following Digital Assets (as defined by R.C. 2137.01):

1. Photos, Video, Music
   Yes ☐ No ☐

2. Computer programs – Microsoft Windows, etc.
   Yes ☐ No ☐

3. Gaming Software
   Yes ☐ No ☐

4. Cryptocurrency – e.g. Bitcoin, Ethereum, etc.
   Yes ☐ No ☐

5. Loyalty Programs – e.g. credit card usage, airline accounts, etc.
   Yes ☐ No ☐

6. Domain Names
   Yes ☐ No ☐

7. Website Accounts – e.g. Amazon, eBay, Google, PayPal, etc.
   Yes ☐ No ☐

8. Social Media Accounts – e.g. Facebook, LinkedIn, Twitter, YouTube, Instagram, Reddit, Tumblr, etc.
   Yes ☐ No ☐

9. Other Digital Assets (see R.C. 2137.01(l))
   If so, please explain:
   Yes ☐ No ☐

I have fully informed (i) the surviving spouse, if any, (ii) all adult beneficiaries of this probate estate, and (iii) the guardian of all minor beneficiaries of this probate estate of the description, extent, and value of all Digital Assets known by me to be owned by the decedent at date of death.

______________________________
Print Name

GC PF 6.5 – Digital Asset Certification
EXHIBIT A-3

PROBATE COURT OF GEAUGA COUNTY, OHIO
JUDGE TIMOTHY J. GRENDELL

IN RE ________________________________
CASE NO. ____________________

☐ Estate  ☐ Guardianship  ☐ Conservatorship  ☐ Trust  ☐ Other ____________

SUPPLEMENTAL SCHEDULE OF ASSETS

__________________________________  Executors
Supplemental Schedule of Assets as ordered by the Court regarding:
☐ Digital Assets  ☐ Tangible Personal Property.

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Attorney for Fiduciary
Attorney Registration No. ____________________
Phone: ____________________

Fiduciary
Type Name
Phone: ____________________
EXHIBIT A-4
PROBATE COURT OF GEAUGA COUNTY, OHIO
JUDGE TIMOTHY J. GRENDELL

ESTATE OF _________________________________, DECEASED

CASE NO. ____________________________

CONSENT TO DISTRIBUTION OF DIGITAL ASSETS

The undersigned acknowledge being fully informed by ____________________________ , as the Executor ____________________________ , of the Estate of ____________________________ , Deceased, of the description, extent, and value of the Decedent’s probate property that is a Digital Asset [see R.C. 2137.01(1)], including for example all digital photos, videos, music, related storage equipment, rights to websites, social media accounts, loyalty programs, and cryptocurrency, but excluding such property that is specifically bequeathed under the Decedent’s Will admitted to probate, and therefore consent to a distribution of such property as determined by ____________________________ .

_________________________  ____________________________
Signature                  Print Name

_________________________  ____________________________
_________________________  ____________________________
_________________________  ____________________________
_________________________  ____________________________
_________________________  ____________________________
_________________________  ____________________________
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GC PF 6.5A – Consent to Distribution of Digital Assets
EXHIBIT A-5

PROBATE COURT OF GEAUGA COUNTY, OHIO
JUDGE TIMOTHY J. GRENDELL

ESTATE OF ________________________________ , DECEASED

CASE NO. __________________

APPLICATION FOR AUTHORITY TO ACCESS DIGITAL ASSETS
[R.C. §2137.06 and R.C. §2137.07]
[Words and phrases in this Application and Judgment Entry have the meaning set forth in R.C. 2137.01]

______________________________, the personal representative of this estate, applies to the Court for a court order directing ________________________________ to disclose to me, as the personal representative of the Estate of ________________________________ ("Decedent"):

☐ the contents of all electronic communications sent or received by the Decedent.

☐ a catalogue of electronic communications sent or received by the Decedent and all digital assets other than the content of all electronic communications of the Decedent.

☐ the contents of, and a catalogue of, electronic communications sent or received by the Decedent and all other digital assets.

Date: ____________________________ ______________________________

Type Name of Applicant

☐ Judgment Entry ☐ Magistrate’s Order

This Application, being well taken, the Court finds that the disclosure of digital assets requested by the personal representative is reasonably necessary for the administration of this estate.

IT IS THEREFORE ORDERED, that ________________________________ shall disclose to ________________________________, the personal representative of this estate:

☐ the contents of all electronic communications sent or received by the Decedent;

☐ a catalogue of electronic communications sent or received by the Decedent and all digital assets other than the content of all electronic communications of the Decedent.

☐ the contents of, and a catalogue of, electronic communications sent or received by the Decedent and all other digital assets.

IT IS FURTHER ORDERED, that ________________________________ shall not use, disclose, or otherwise distribute such digital assets to any person without further court order authorizing the use, disclosure, or distribution.

Dated: ____________________________ Judge Timothy J. Grendell/Magistrate Abbey L. King

GC PF 6.5B - Application for Authority to Access Digital Assets - Estate
EXHIBIT B-1

PROBATE COURT OF GEAUGA COUNTY, OHIO
JUDGE TIMOTHY J. GRENDELL

GUARDIANSHIP OF ________________________________.

CASE NO. ________________

DIGITAL ASSET CERTIFICATION

I certify that (1) I have made a good faith effort to ascertain the Digital Assets owned by
______________________________ (the "Ward"), and (2) the following is true and correct to the
best of my knowledge:

The Ward owns equipment capable of storing "electronic records"
[see R.C. 2137.01(J) and (U) – e.g. computer, external hard drive, tablet,
iPOD, cellphone, flash-drive, backup equipment, CD, DVD, etc.]

The Ward owns or leases the following Digital Assets (as defined by R.C. 2137.01):

1. Photos, Video, Music

2. Computer programs – Microsoft Windows, etc.

3. Gaming Software

4. Cryptocurrency – e.g. Bitcoin, Ethereum, etc.

5. Loyalty Programs – e.g. credit card usage, airline accounts, etc.

6. Domain Names

7. Website Accounts – e.g. Amazon, eBay, Goggle, PayPal, etc.

8. Social Media Accounts – e.g. Facebook, LinkedIn, Twitter,
YouTube, Instagram, Reddit, Tumbler, etc.

9. Other Digital Assets (see R.C. 2137.01(l))
   If so, please explain:

I have fully informed the (i) Ward’s spouse, if any, (ii) Ward’s adult next-of-kin,
and (iii) the guardian of the Ward’s next-of-kin, of the description, extent, and value
of all Digital Assets known by me to be owned by the Ward.

__________________________
Print Name

GC PF 15.5A – Digital Asset Certification - Guardian
EXHIBIT B-2

PROBATE COURT OF GEAUGA COUNTY, OHIO
JUDGE TIMOTHY J. GRENDELL

In the Matter of the Guardianship of ____________________________

Case No. ____________________________

APPLICATION FOR AUTHORITY OVER DIGITAL ASSETS
[R.C. 2137.13]

[Words and phrases in this Application and Judgment Entry have the meaning set forth in R.C. 2137.01]

__________________________, the guardian of ____________________________.

(the "Ward") applies to the Court for a court order granting to me, as the Ward's guardian authority
over and access to the Ward's Digital Assets.

__________________________

[Print Name of Guardian]

☐ Judgment Entry  ☐ Magistrate's Order

This matter came on to the heard upon the application of ____________________________,
as guardian, to be granted authority over, and access to, the Digital Assets of
__________________________, the Ward. The Court finds that granting such authority and
access to the guardian is in the best interest of the Ward.

IT IS THEREFORE ORDERED, that ____________________________ is granted access to,
and has authority over, the Digital Assets of ____________________________, and that said
guardian shall access and use those Digital Assets in a manner that is solely for the benefit, and in
the best interest, of the Ward.

Dated: ____________________________

Judge Timothy J. Grendell/Magistrate Abbey L. King

GC PF 15.5C - Application for Authority Over Digital Assets
PROBATE COURT CONCERNS REGARDING DIGITAL ASSETS

¹ RUFADAA Sec. 2(10) "RUFADAA" means the Revised Uniform Fiduciary Access to Digital Assets Act (2015).
² RUFADAA Sec. 2(14)
³ RUFADAA Sec. 2(8)
⁴ In Matter of Serrano, 27 NY Slip Op 27200 Decided on June 24, 2017 Surrogate Court, New York County Mella, decedent's spouse wanted access to decedent's Google email, contact and calendar information in order to notify friends of decedent's passing. Pursuant to the Stored Communications Act, a user's calendar is not a "communication" as long as there is no transfer of information between two or more parties. As a result, the administrator had the authority to request Google and Google had to disclose the contacts and calendar information associated with the decedent's Google account.
⁵ RUFADAA Sec. 2(10)
⁶ RUFADAA Sec. 2(11)
⁷ RUFADAA Sec. 2(22)
⁸ RUFADAA Sec. 2(15)
⁹ RUFADAA Sec. 2(27)
¹⁰ RUFADAA Sec. 2(21)
¹¹ RUFADAA Sec. 2(10)
¹² RUFADAA Sec. 2(26)
¹³ RUFADAA Sec. 2(19)
¹⁴ RUFADAA Sec. 2(16). See generally RUFADAA Sec. 4 for more details regarding Online Tools.
¹⁵ See RUFADAA Sec. 4(b) and Sec. 4(c)
¹⁶ RUFADAA Sec. 2(19)
¹⁷ RUFADAA Sec. 2(24)
¹⁸ See generally RUFADAA Sec. 5 for more details regarding a Terms-of-service-agreement.
¹⁹ In re Scandalios (2017-2976/ A N.Y.Surr.Ct.2019), decedent's husband petitioned the Court to order Apple allow husband have access to decedent's family photos stored on his iTunes and iCloud accounts. According to Apple iCloud's terms and conditions, "any rights to your AppleID or content within your account terminate upon your death." The Court found "disclosure of electronic communications, unlike disclosure of other digital assets requires, proof of user's consent or a court order" but "decedent's photographs stored in his Apple account are 'not electronic communications.'
²⁰ RUFADAA Sec. 2(1)
²¹ See generally RUFADAA Sec. 6 for more details regarding a procedure for disclosing Digital Assets.
²² RUFADAA Sec. 2(12)
²³ RUFADAA Sec. 2(4)
²⁴ RUFADAA Sec. 14(a)
²⁵ RUFADAA Sec. 14(b)
²⁶ RUFADAA Sec. 14(c)
**EXHIBIT A-I: INFORMATION SHEET REGARDING DIGITAL ASSETS**

1 “Fiduciary” means a person appointed as the Executor, Administrator, or Commissioner (for a Re- lease from Administration) or applicant of a Summary Release from Administration; or the Guardian of a Minor or Incompetent Adult.

2 R.C. 2137.01(1)

3 R.C. 2137.01(U)

4 R.C. 2137.01(O)

5 R.C. 2137.01(A)

6 R.C. 2137.01(Z)

7 R.C. 2137.14(C)

8 18 USC 2701 et seq., enacted in 1986

9 R.C. Chapter 2137

10 R.C. 2137.03(A)

11 R.C. 2137.03(B)

12 R.C. 2137.03(C)

13 See Geauga Probate Local Rule 78.5(A)(3)

14 See Geauga Probate Local Rule 78.5(A)(3)(a)

15 See Geauga Probate Local Rule 78.5(A)(3)(b)

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Endnotes

AN OVERVIEW OF TRUSTS AND TRUST ADMINISTRATION PART II

1 The District of Columbia Uniform Trust Code provides otherwise, authorizing trust property to be titled either in the name of the current Trustee as trustee or in the name of “the trustee” as Trustee of the trust, but also in the name of the trust by reference to the instrument creating the trust. D. C. Code, § 19-1304.18
2 UTC § 807, Delegation by Trustee
3 Most states have adopted the Uniform Principal and Income Act of the Uniform Law Commission. https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a367bd75-afa8-0ea6-9d16-c39170e5a4d&forceDialog=0
4 UTC, § 813, Duty to inform and Report
5 It is important to check the trust instrument because, in many states, some of these duties may be varied by the settlor in the terms of the trust
6 “Qualified Beneficiary” is a term of art in the UTC. UTC § 103(13)
7 Uniform Principal and Income Act Copyright © 2003 National Conference of Commissioners on Uniform State Laws.
8 See Comment to UPIA § 2 Standard of Care; Portfolio Strategy; Risk and Return Objectives
9 UPIA § 2, Standard of Care; Portfolio Strategy; Risk and Return Objectives
10 UTC § 1002, Damages for Breach of Trust and UTC § 1004, Attorney’s Fees and Costs UTC § 1003, Damages in Absence of Breach
11 UTC § 1003, Damages in Absence of Breach
12 UTC § 702(c) adds an additional optional provision: “A regulated financial-service institution qualified to do trust business in this State need not give bond, even if required by the terms of the trust.”
13 UTC § 702(a), Trustee’s Bond
14 UTC § 702(b). See also UTC § 105(b)(6) Default and Mandatory Rules
15 UTC § 708, Compensation of Trustee A reasonable compensation standard is also used in the National Probate Court Standards, Standard 3.1.4, Attorneys’ and Fiduciaries Compensation. Commentary to this standard provides the following guidance as to factors to be considered by a court when there is no guideline: “the usual and customary fees charged within that community; responsibilities and risks (including exposure to liability) associated with the services provided; the size of the estate or the character of the services required including the complexity of the matters involved; the amount of time required to perform the services provided; the exclusivity of the services provided; the experience, reputation and ability of the person providing the services and the benefit of the services provided.”.
16 UTC § 708(b), Compensation of Trustee
17 UTC § 709, Reimbursement of Expenses
18 UTC § 502, Spendthrift Provision
Case law may provide that mere entitlement to a distribution subjects the distributable amount to a claim.
19 UTC § 505(a)(3)
20 This type of action may arise when grantors deed real property, title accounts, or create legacies and devises to a trust for which no trust instrument or testatory trust provisions exist.
21 Note that UTC sec. 1008, Exculpation of Trustee, provides that the terms of the trust may relieve a Trustee of liability for breaches of trust as long as those terms do not purport to do so for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interest of beneficiaries, or resulted from an abuse of a fiduciary or confidential relationship. UTC sec. 1108 is intended to be consistent with UTC sec. 105 as well as to disapprove certain prior case law.
22 Several items are bracketed in the UTC formulation, including UTC § 105(b)(8) which provides for a duty to notify beneficiaries who reach the age of 25 of the existence of the trust, the identity of the Trustee, and right to request Trustee reports, UTC § 105(b)(9) which provides for a duty to respond to the request of a beneficiary of an irrevocable trust for Trustee reports and certain other trust information, and UTC § 105(b)(14), concerning subject-matter jurisdiction of the court and venue.
23 UTC § 601, Capacity of Settlor of Revocable Trust