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3-9-2015

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Sergio Pareja
University of New Mexico - School of Law

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Recommended Citation

Sergio Pareja, *The Impact of Federal Law on a Decedent's Digital Assets*, Trusts & Estates Jotwell (2015).
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The Impact of Federal Law on a Decedent's Digital Assets

By Sergio Pareja

Jotwell, Trusts & Estates
March 9th, 2015

Recently, estate planners and scholars have begun to grapple with the problem of transferring digital assets at death. In *Probate Law Meets the Digital Age*, Professor Naomi Cahn adds an interesting new dimension to this relatively new issue. She focuses on the effect of the Stored Communications Act ("SCA") on estate administration. Although the SCA does not affect a fiduciary's ability to distribute assets once they are discovered, it affects the fiduciary's ability to examine on-line accounts to discover those assets.

The SCA, which was enacted nearly two decades before the development of Facebook, was passed in response to privacy concerns related to the internet. It was not aimed at transfers at death, but it certainly can impact probate administration in an era when most people have some sort of on-line presence. This has created a great deal of uncertainty for internet service providers as well as for fiduciaries, including personal representatives, agents, conservators, and trustees. As Professor Cahn points out in her piece, this uncertainty currently impacts anyone who dies with an e-mail account.

At its most basic level, the SCA does two things. First, it limits the government's ability to require internet service providers to disclose information about subscribers unless an exception applies. The most notable exception is when the disclosure occurs with the consent of the subscriber or the intended recipient of an electronic communication. Second, the SCA limits the ability of the internet service provider to voluntarily disclose the information. Although a court could interpret the SCA to allow disclosure by, for example, determining that the fiduciary stands in the place of the decedent for consent purposes, this result is far from certain.

In Part II of her article, Professor Cahn discusses difficulties related to the inheritance of digital assets under state law. Digital assets include any information that is stored on a digital device or on the internet, including electronic documents, e-mails, bitcoins, music, social media profiles, photos, and websites. These assets are a unique form of intangible asset. Unlike other more traditional intangible assets, such as trademarks and copyrights, digital assets can raise unique privacy concerns. The rights of the account owner are typically governed by a terms-of-service agreement that, in turn, is governed by state law. This agreement may give the account owner an ownership interest in an asset that can be transferred at death, or it may give the account owner a license that terminates at death.

In Part III, Professor Cahn analyzes federal statutes that impact the inheritance of digital assets. Here, she focuses on the SCA and notes that it was concerned only

with protecting the privacy of the account holder; it was not concerned with ownership of the account or ownership of communications. The SCA sets out the procedures that the government must follow to force an internet service provider to disclose information, and it also sets out penalties for unauthorized disclosures. She notes that while an internet service provider may disclose non-content based communications (the envelope rather than the letter) to a fiduciary, it may only disclose content-based communications in seven situations, including with the consent of the account holder. Unfortunately, the SCA does not explicitly address whether a fiduciary automatically has lawful consent to access the decedent's digital assets. This has caused some internet service providers to refuse to disclose information rather than risk liability.

The SCA House Committee Report emphasized that the account holder's consent does not need to be explicit, and it gives examples of acceptable forms of implied consent. Professor Cahn argues that state-recognized fiduciaries should be included within the lawful consent exception. She notes that the fiduciary obligations of executors to administer estates in the best interest of the beneficiaries are frustrated if they cannot have access to digital assets.

In Part IV, Professor Cahn proposes changes to existing state and federal laws. She first argues that there is a simple way to legislatively fix federal law: just add "or state-recognized fiduciary" to the list of people who can provide lawful consent for disclosure. Despite the apparent simplicity of this solution, Professor Cahn recognizes the inherent political difficulty of trying to change a law that deals with sensitive issues of national security and privacy. As an alternative to a specific legislative change, Professor Cahn argues that courts should interpret the law to permit fiduciary access.

In the absence of federal legislation and judicial decisions interpreting federal law, Professor Cahn argues that states should enact laws that define lawful consent and that define the scope of access to clarify whether digital assets should be treated the same as non-digital assets. Although states cannot require federal courts to interpret federal statutes in a specific way, those courts can seek interpretive guidance from state laws.

Professor Cahn has written an extremely thought-provoking piece. I tend to agree that a decedent would want a named fiduciary to have access to his or her digital assets. Implying that consent makes all the sense in the world to me. That said, I probably would come out slightly differently with respect to fiduciaries who were not expressly named by the decedent, such as administrators of an intestate estate. Although I have no basis for knowing this, something tells me that decedents generally would only want expressly-named people to have unfettered access to their digital life. Regardless of my personal opinion on that issue, I cannot help but conclude that Professor Cahn has made a wonderful contribution to this very important and current issue.

Naomi R. Cahn, Probate Law Meets the Digital Age, 67 **Vand. L. Rev.** *1697 (2014), available at SSRN.*

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