

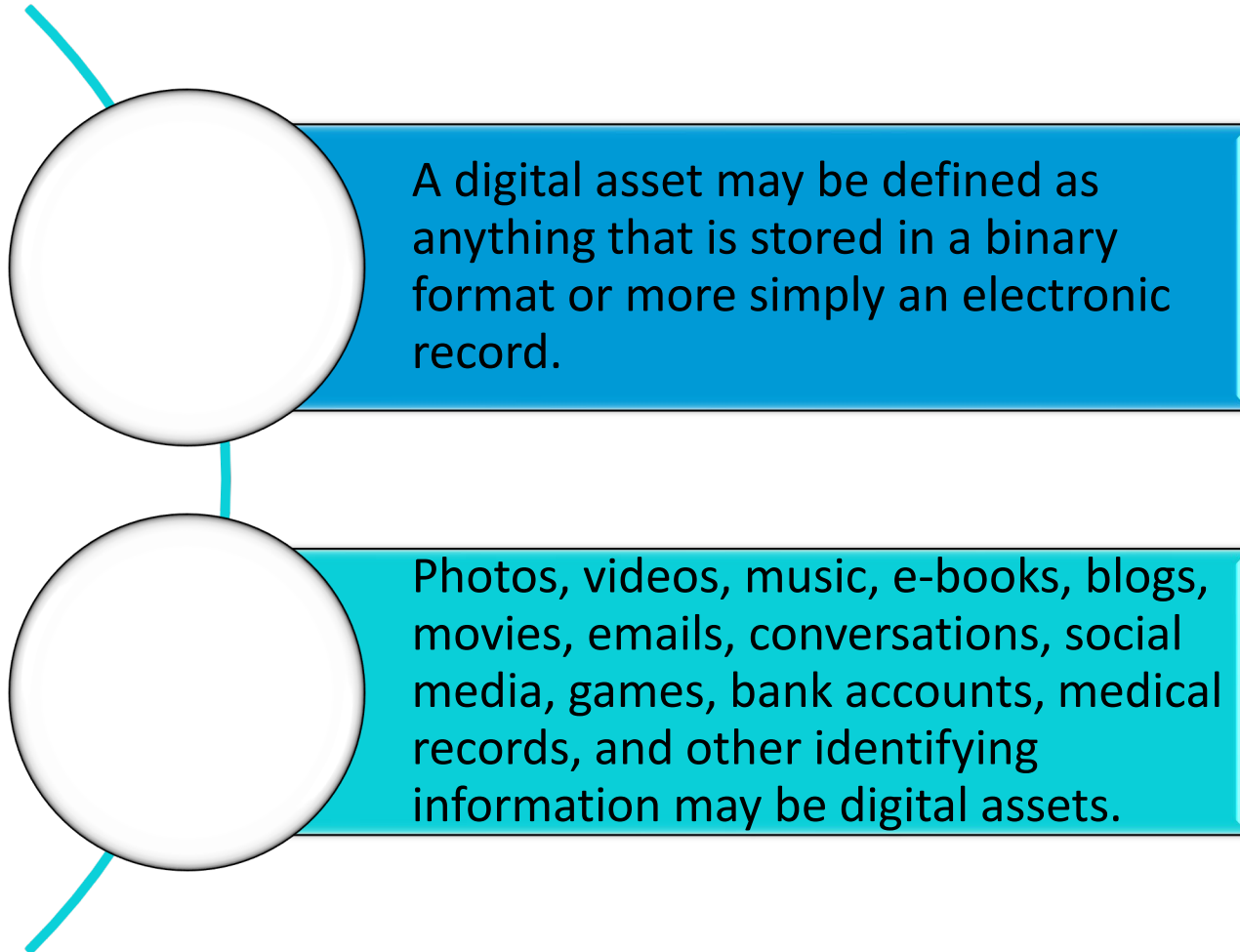
UNIFORM ACCESS TO DIGITAL ASSETS BY FIDUCIARIES ACT

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Alberta Justice and Solicitor General

August 8, 2016

What are digital assets?



When should we be concerned?

When an individual dies

- Need to protect digital assets with financial value or sentimental value; maintain privacy & confidentiality and avoid identity theft.

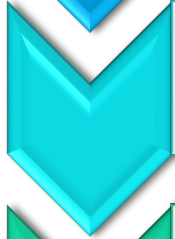
When an individual loses capacity

- Need to protect digital assets; maintain privacy & confidentiality and avoid identity theft.
- Maintain digital assets for individuals who may regain capacity in the future.

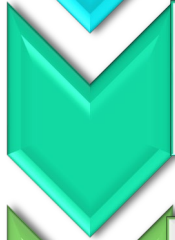
Which fiduciaries may be involved?



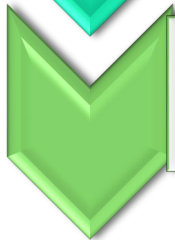
- A personal representative (or liquidator) of a deceased's estate



- A guardian (for property or curator) appointed for an account holder

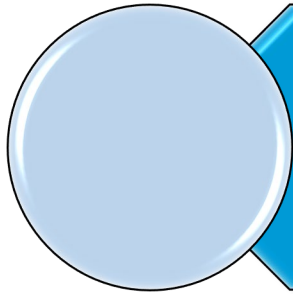


- An attorney (for property) acting under a Power of Attorney

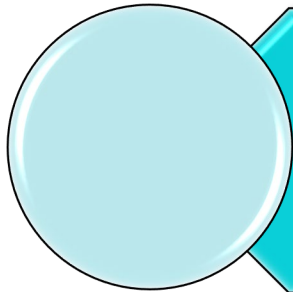


- A trustee (for property)

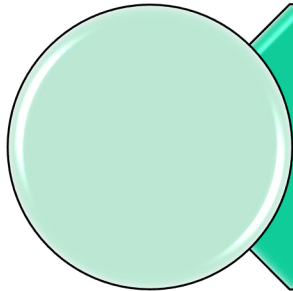
Are fiduciaries empowered to administer digital assets?



Law on fiduciaries generally gives broad scope to the assets covered

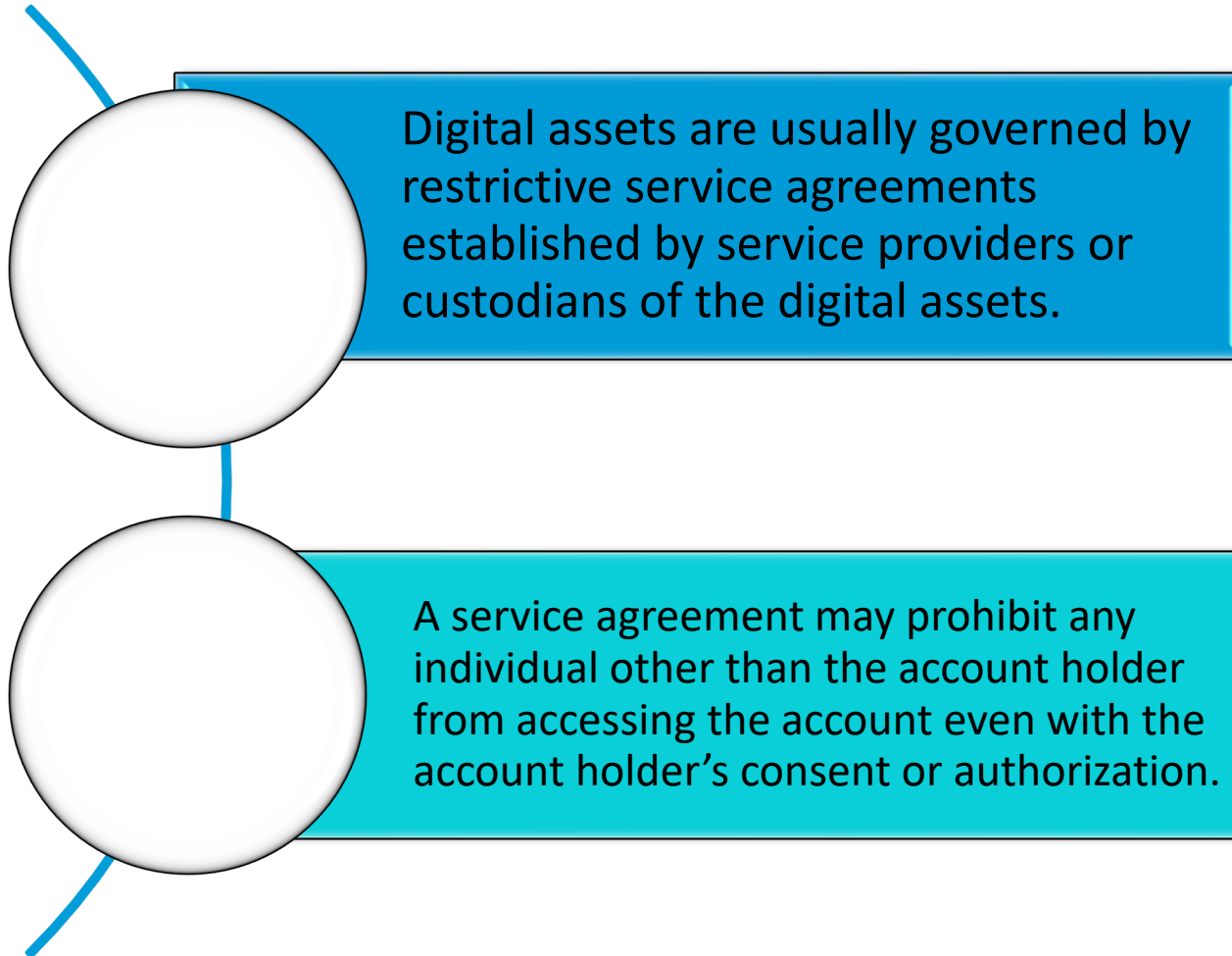


A document or instrument may exclude or limit a fiduciary's authority



Legislation may have a broad scope and media-neutral language (AB EAA section 20; BC WESA section 142)

Are fiduciaries empowered to administer digital assets?



Uniform Law Commission (United States)

Uniform
Fiduciary
Access to
Digital
Assets
Act
(UFADAA)

- Adopted Revised UFADDA 2015 as a Uniform Act; UFADAA 2014 is more similar to ADAF

Uniform Fiduciary Access to Digital Assets Act (UFADAA)

1

- Distinguishes fiduciary access to electronic communications versus other digital assets

2

- Access to electronic communications only allowed if the deceased or incapacitated individual gave express consent

3

- Access to other digital assets permitted unless the individual excluded access in an instrument; but an instrument may be required to expressly provide access or a court order may be required

Uniform Fiduciary Access to Digital Assets Act (UFADAA)

4

- An online tool applies over any offline direction; an express instrument applies over a boilerplate service agreement provision; but if no direction, the service agreement applies

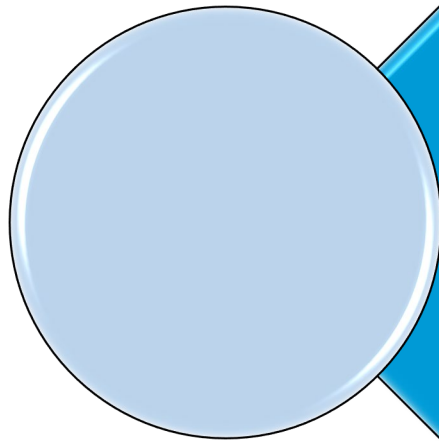
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- Custodian chooses how to disclose either by access to a user account; partial access to a user account or a data dump of all assets in the account

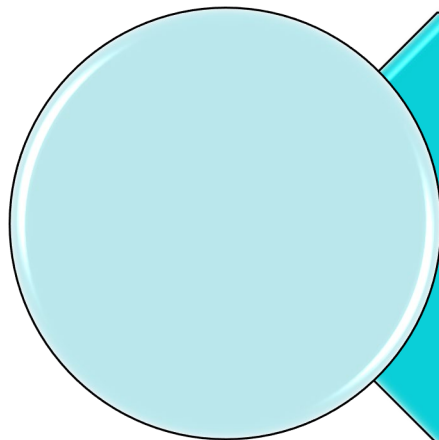
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- Custodian may charge a reasonable administrative fee for the cost of disclosing a user's asset

Differences in US and Canadian Law

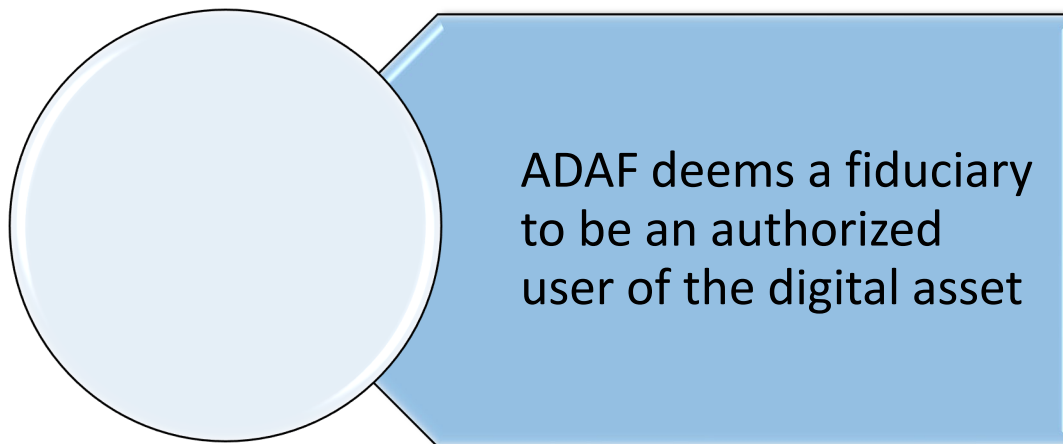
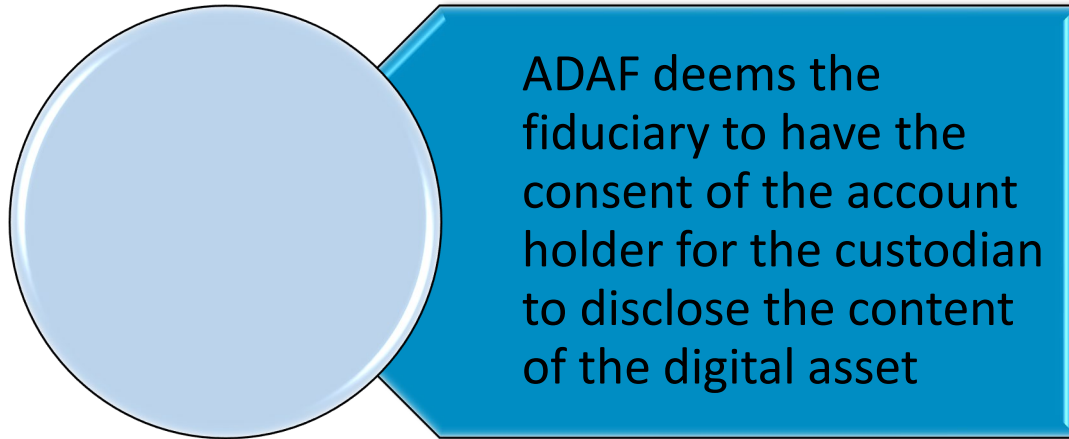


Canadian Criminal Code makes unauthorized use of a computer a crime only if the computer is accessed fraudulently and without colour of right (fiduciary has lawful authority to exercise their duties)



US computer fraud and abuse legislation criminalizes or creates civil liability for unauthorized access of computer hardware and data (requires express consent of the account holder)

Differences in US and Canadian Law



Uniform Fiduciary Access to Digital Assets Act (UFADAA)



Enacted in 13 States

In California will only apply to estate representatives of deceased individual estates; no law for incapacitated individuals

Society of Trust and Estate Practitioners (STEP) International Digital Asset Working Group (DAWG)

GOALS

Raise
awareness
among
professionals
and the
public

Contribute
to a sound
policy
framework

STEP International DAWG Objectives



Uniform Law Conference of Canada (ULCC)

Access to Digital Assets by Fiduciaries (ADAF) Project

- Prepare Uniform legislation for adoption by the ULCC to reform the law relating to access to digital assets by fiduciaries.

Access to Digital Assets by Fiduciaries Act (ADAF)



UNIFORM ACCESS TO DIGITAL ASSETS BY
FIDUCIARIES ACT Progress Report, August 2015

Resolution of the Civil Section 2015 – a. prepare uniform legislation and commentaries in accordance with the recommendations in the Report and the directions of the Committee; b. report back to the Conference at the 2016 meeting

Access to Digital Assets by Fiduciaries (ADAF)

1

- Applies to the 4 types of fiduciaries

2

- Sets out the fiduciary right to access a digital asset subject to an instrument or specific online instruction that excludes or limits access

3

- Clarifies that legal duties of a fiduciary for tangible property also apply to digital property

Access to Digital Assets by Fiduciaries (ADAF)

4

- A fiduciary can take any action that could have been taken by the account holder (stands in the shoes of the account holder)

5

- A service agreement that limits fiduciary access is void; fiduciary access is not a breach of a service agreement

6

- A fiduciary may apply to the Court for directions; court may make an order with directions