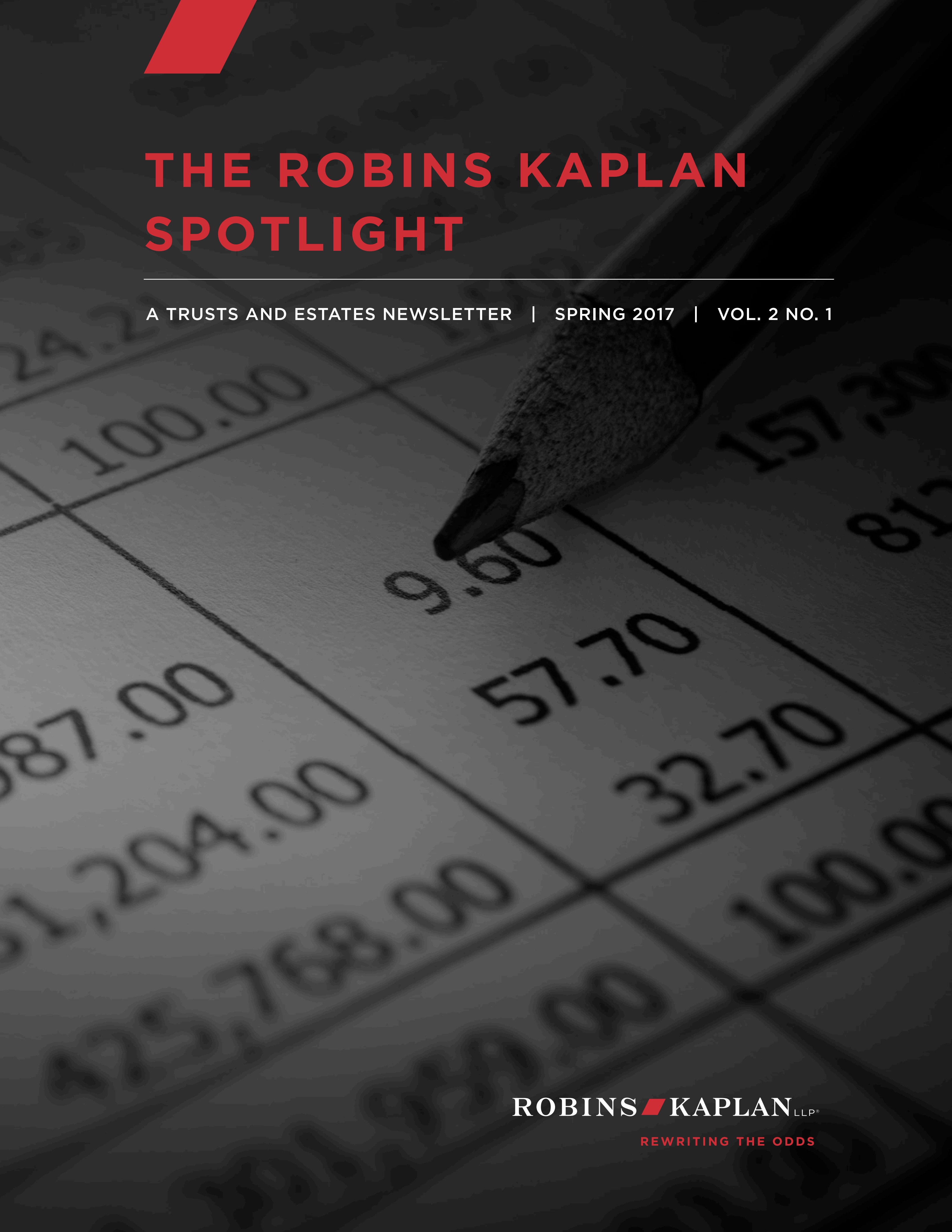

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ROBINS KAPLAN LLP

REWRITING THE ODDS

INSIDE THIS ISSUE

DIGITAL ASSETS AFTER DEATH: RUFADAA AND ITS IMPLICATIONS

STEVEN K. ORLOFF AND MATTHEW J. FRERICHS

Cloud computing has made our lives much easier, but it has made our deaths more complex. Many significant physical possessions—photographs, letters, bank statements, even currency itself—are increasingly being stored in digital form. While some "digital assets" have physical analogs (for instance, letters and music), others do not (for instance, social media accounts). If such assets were held in the physical possession of a deceased person—on a computer, flash drive, or other device—they could be distributed in much the same manner as tangible property. Frequently, however, a decedent's digital assets are maintained on third-party computer servers such as Facebook, Google, or an online bank.

Until recently, this situation placed estate administrators in a troubling limbo, raising questions as to how to properly identify, access, and dispose of digital assets. The obligation to gather and manage a decedent's assets was made difficult by numerous obstacles limiting or preventing access to digital assets, including restrictive terms-of-service agreements and federal anti-hacking statutes.

Digital assets have risen to prominence in our culture so quickly that legislatures are only now stepping in to provide some clarity to this issue. The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which became effective in Minnesota in August 2016, has largely resolved the catch-22 that faces estate administrators. Codified as Minnesota Statutes §521A.01, et seq., the statute provides a workable framework for disposing of digital assets after death. As such, it's worthwhile to understand the basics of the statute and basic best practices that clients should implement to take advantage of its protections.

OVERVIEW OF RUFADAA

The purpose of RUFADAA is straightforward. As its drafters at the Uniform Law Commission (ULC) put it, the act "gives Internet users the power to plan for the management and disposition of their digital assets in a similar way as they can make plans for their tangible property."[1]

Arriving at the statutory language that achieves this objective was a far less simple matter. Custodian technology companies, which maintain user accounts containing digital assets, such as Apple and Yahoo, had raised numerous concerns with previous versions of the act, arguing among other things that the law, in giving fiduciaries access to the contents of email messages and other personal documents of the deceased, violated their users' privacy. Concerns were also raised that the federal Stored Communications Act arguably prohibits custodians from turning over a user's account to a third party.

The approach ultimately embodied in RUFADAA takes account of the tech industry's objections to the original legislation. Specifically, it limits a fiduciary's access to the substance of certain digital content, unless the deceased affirmatively authorized it. In describing RUFADAA, the ULC states:

> This act extends the traditional power of a fiduciary to manage tangible property to include management of a person's digital assets. The act allows fiduciaries to manage digital property like computer files, web domains, and virtual currency, but restricts a fiduciary's access to electronic communications such as email, text messages, and social media accounts unless the original user consented in a will, trust, power of attorney, or other record.[2]

Under RUFADAA, the extent to which a fiduciary can access the digital assets of a decedent is dictated by one of several sets of terms, in descending order of authority.

- **Online tool:** Under RUFADAA, custodians can create an "online tool," separate from their terms of service, through which users can determine the extent to which their digital assets are revealed to third parties, including fiduciaries. (On Facebook, the online tool is known as Facebook Legacy Contact.) If a user has provided direction through the online tool, it will supersede conflicting directives, including those in a will.[3]
- **Will, trust, or power of attorney:** The user can authorize access to his or her assets after death through a will, trust, or power of attorney.[4]
- **Terms of service:** If the user has not provided direction, the custodian's terms of service apply.
- **RUFADAA default rules:** If the terms of service do not cover the issue, RUFADAA's default rules apply. Those default rules recognize multiple types of digital assets. For certain digital assets, like virtual currency, RUFADAA gives fiduciaries unrestricted access. To electronic communications, however, the statute does not provide fiduciaries access; instead, it allows them to access a "catalog" of communications consisting of metadata such as the addresses of the sender and recipient, as well as the date and the time the message was received.

For all actions taken in good faith under RUFADAA, custodians receive the legal protection of immunity.[5]

Best practices

Users should consider using the online tool option whenever it's offered. Of course, online tools are site specific. To secure blanket protection, digital assets should be directly addressed in a user's estate planning documents. Specifically, estate planning documents should identify the fiduciary and the extent of access that he or she should be given to the user's digital assets. It would also be wise for the estate plan to include language stating that such provisions should be considered lawful consent under the Stored Communications Act and other relevant statutes.

In conjunction with estate planning, users should also maintain an updated inventory of their digital assets, including accounts and passwords. They should be careful about revealing that inventory to third parties, however, as it presents a possible claim of a violation of the Computer Fraud and Abuse Act, in the event that a site's terms of service prevent password sharing with third parties.

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SOUTH DAKOTA: AN OPPORTUNE ENVIRONMENT FOR LONG-TERM WEALTH MANAGEMENT

BRENDAN V. JOHNSON AND GEOFFREY KOZEN

The largest wealth transfer in history is underway as the baby boomers begin to pass on their estates to younger generations. When all is said and done, more than $30 trillion in assets will likely be transferred, with ultra-high net worth individuals passing on more than half of that amount. Such wealth transfers present significant estate planning opportunities. Among the most important decisions to be made is the location where one should establish a trust or otherwise hold assets.

A common misperception is that the wealthy locate significant assets in nations like the Cayman Islands, Switzerland, the Bahamas, and Panama. While such "off-shore" options exist, and while some individuals certainly utilize this approach, recent experience has demonstrated that locating trusts offshore has significant downsides. As a result, many high-net-worth individuals are instead establishing trusts and holding assets in South Dakota. The state's favorable tax and estate laws and strong privacy protections provide a uniquely appealing environment for those seeking to protect family assets.

The allure of protecting assets offshore was never about the destination. Rather, offshore options purported to provide a set of capabilities that were unavailable in many states—favorable tax treatment, privacy assurances, easy access, and the like. As many states have since undertaken significant modifications of their trust codes and related statutory provisions, these benefits are now available in many states, including South Dakota.

In addition to a leveling of the playing field resulting from many states modernizing their respective trust codes, the 2016 leak of legal documents dubbed "the Panama Papers" vividly illustrates the extensive risks associated with offshore "havens." In addition to exposing reputational risks, the Panama Papers detail international tax cheating, money laundering, and political malfeasance. Utilization of such offshore opportunities also carries the risk of increased attention from watchdogs, including the United States Department of Justice. It is thus unsurprising that many individuals favor South Dakota as a trust situs over riskier foreign alternatives.

South Dakota has positioned itself as one of the foremost trust law jurisdictions worldwide. Since Governor Janklow issued Executive Order 97-10, the state has cultivated an environment that has attracted many trusts and trust companies. South Dakota now leads the nation in bank assets, with a value approaching $3 trillion and growing. Similarly, South Dakota has seen the aggregate wealth under management within the state grow from less than $35 billion in 2009 to over $226 billion in 2015.

The reasons so many individuals have turned to South Dakota as a trust situs are simple: The state has adopted robust privacy laws, maintains low trust company fees, and has no income, capital gains, estate, gift, or corporate taxes. Investors are not required to live in the state. Together, these policies allow for considerable growth in wealth and investment.

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Robust Privacy Laws: The Panama Papers sparked renewed calls from the OECD to increase participation in the disclosure standards adopted on July 15, 2014. Even Switzerland acquiesced; it will begin turning the names of foreign taxpayers over to tax authorities starting January 1, 2018. Eventually 97 countries adopted the standard, including all major financial centers, except one—the United States. Within the United States, South Dakota stands out for having the most vigorous trust privacy laws. State Code § 21-22-28 requires only a simple petition to permanently seal court filings and orders related to the trust. This permits the owners of trusts to keep private the value of any assets held in trust.

Favorable Tax Treatment: South Dakota Code §43-5-8 permits the creation of “dynasty” trusts of indefinite duration. While South Dakota is not unique in this regard, what sets it apart from other dynasty-trust states is the fact that it does not assess income tax on trust earnings. In contrast, other states, including Wisconsin and Idaho, both charge an income tax on trust investments and appreciation.

That’s why South Dakota provides an opportune environment for long-term wealth management. Because of the state’s favorable tax code and trust protections, a South Dakota trust should be considered a preferred tool in any complex or high-net-worth estate-planning arsenal.

SHOULD iWORRY? THE ACTEC TECHNOLOGY COMMENTARY ON MRPC 1.1

DENISE S. RAHNE AND SHIRA T. SHAPIRO

Just under 10 years ago, in June of 2007, Apple released the first iPhone. While it was not necessarily the first device of its genre, it arguably paved the way for the most widespread changes in how consumers in many fields interact with all kinds of service providers. It also forever changed consumer expectations regarding the when, where, and how of those service deliveries. And by all accounts, the rate of technological change continues to increase at what few will argue is anything but exponential.

Legal services aren't immune from this drastic change. The iPhone and its peers have forever changed how we communicate with our clients, the ways by which we transmit and store information, and clients' expectations regarding their lawyer's competence with regard to both.

Beyond client expectations, technological changes have real reputational and ethical implications. The American Bar Association's Model Rule of Professional Conduct 1.1 has long provided that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." More recently, the Fifth Edition of the American College of Trust Estate Counsel Commentaries outlined its guidance for applying MRPC 1.1 to technological competence. Specifically:

> **Competence with Technology.** A lawyer who uses technology to transmit or store client documents or communicates electronically with a client regarding the drafting of documents must be aware of the potential effects of such use of technology on client confidentiality and preservation of client information. A lawyer must stay reasonably informed about developments in technology used in client communications and document storage, including improvements, discoveries of risks and best practices.

For many lawyers, including, not insignificantly, the many solo and small practitioners who benefit less from the infrastructure of a larger organization, this commentary raises the specter of not knowing what one does not know. For example, if your client texts you questions regarding the substance of his or her documents, is it secure? If you use a cloud-based storage system, have you satisfactorily protected client privacy and confidentiality? If your clients want to send documents via Dropbox, is this a good idea?

These and similar questions don't necessarily have straightforward answers. Maybe more notably, the answers for today's technologies will become irrelevant sooner than has ever been the case in recorded history. Instead of striving to achieve permanent best practices for communications safety and privacy, some simple, standard principals may be useful as we all navigate the new technological world order:

- Go Old School: Take advantage of the plethora of CLEs – yes, many of them are online – related to this topic. And given the frequency of change, put yourself on a regimen of regular learning.
- Find a Win-Win: If you're an experienced practitioner, there's undoubtedly a newer attorney who would benefit from your years of expertise. And these newer attorneys might know a little something you don't. Use mentoring as a way to trade knowledge and skills. You'll both benefit.
- You're in Good Company: With some exceptions, nobody is that far ahead of anyone else in facing technological change. There are numerous study groups and online list-serves where practitioners meet to compare professional experience on a range of substantive matters. Why should the issue of technology be any different? Join a group and/or raise it in the one to which you are already subscribed.

At the end of the day, this is not about becoming an expert in technology – it's about the practices that will keep you adequately informed and supported so that your clients' information won't become an inadvertent casualty of rapidly changing technology.

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Lawyers will want to become familiar with the terms of service of various sites—especially those in which their clients hold significant digital assets. Yahoo's terms of service, for instance, indicate that "any rights to your Yahoo ID or contents within your account terminate upon your death," raising uncertainty over the extent to which a fiduciary could access them.[6]

Finally, lawyers should be aware of the choice-of-law provisions in various terms of service. Many point to California, where RUFADAA took effect at the end of September. If the terms select the law of a state where RUFADAA does not govern, however, there will be an argument that the fiduciary is back in the dreaded state of limbo.

While the digital revolution has introduced great convenience into our lives, it has also introduced great complexity into estate administration. By passing versions of RUFADAA, Minnesota and other states have mitigated some of that complexity and confusion. To secure the advantages offered by that statute, however, lawyers and their clients must actively make plans now for the disposition of their digital assets after death.

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1. Uniform Law Committee, "The Revised Uniform Fiduciary Access to Digital Assets Act: A Summary" (http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Revised%202015/Revised%20UFADAA%20-%20Summary%20-%20March%202016.pdf).
2. Fiduciary Access to Digital Assets Act, Revised (2015) (Description): http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015).
3. Minnesota Statutes § 521A.04(a).
4. Minnesota Statutes § 521A.04(b).
5. Minnesota Statutes § 521A.16(f).
6. Yahoo Terms of Service, Section 28 ("General Information").

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