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## SPELLING OUT FIDUCIARY ACCESS TO DIGITAL ASSETS

By Ami S. Longstreet

Date: 12/2/2016 8:05 PM

On Sept. 29, 2016, Governor Andrew Cuomo signed into law a new statute amending the New York Estates Powers and Trusts Law regarding the administration of digital assets.

The New York State Assembly memorandum in support of the legislation explains the need for this legislation as follows:

“The wide use of digital assets has created an urgent need for legislation dealing with the administration of these [digital] assets upon the death or incapacity of the user. As a practical matter, there should be no difference between a fiduciary’s ability to gain access to information from an online bank or other Internet-based business and the fiduciary’s ability to gain access to information from a business with a brick-and-mortar building. This measure . . . amend[s] the EPTL [New York Estates Powers and Trusts Law] to restore control of the disposition of digital assets back to the individual and removes such power from the service provider.

This measure gives fiduciaries authority to gain access to manage, distribute and copy or delete digital assets. It addresses four types of fiduciaries, namely: a personal representative (executor or administrator) of a decedent’s estate; a guardian of a ward or protected person; an agent acting pursuant to a power of attorney; and a trustee.

In the past, where property was mostly in tangible there was little doubt of its ownership and control. Indeed, the law recognizes that when a property

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owner dies or becomes unable to manage his or her property such owner may appoint a fiduciary to manage the property. The role of the fiduciary subsumes the duty of loyalty, care and confidentiality. The system has worked well throughout our history. This measure does not break legal ground; it merely applies the laws governing fiduciaries to a new type of property.”

What are digital assets? The new statute defines a digital asset as “an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.” Examples that come to mind are email, online banking, and social media. The types of digital assets seem to increase daily.

This is a step in the right direction for fiduciaries dealing with digital assets. It is very important for individuals to review their current wills and powers of attorney and make sure that the disclosure (or nondisclosure) of digital assets is addressed in those documents, because if the individual does not authorize a fiduciary to access digital assets either online or through a will, power of attorney or trust, the fiduciary will not automatically have access to the content of digital assets.

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1/8/2019 8:00 AM - 1/8/2019 12:20 PM

### Greater Binghamton Chamber of Commerce Connect Over Lunch January 2019

1/10/2019 11:45 AM - 1/10/2019 1:15 PM

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1/17/2019 6:30 PM - 1/17/2019 8:00 PM

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