

2017 HOUSE JUDICIARY

HB 1214

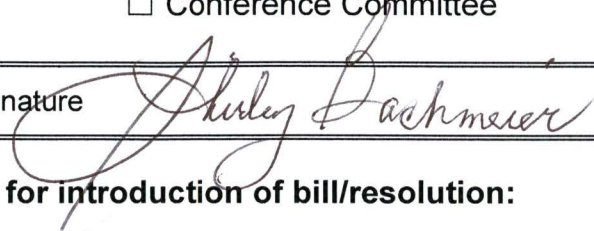
2017 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1214
1/24/2017
27294

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to a Uniform Fiduciary Access to Digital Assets Act.

Minutes:

Attachment 1

Chairman K. Koppelman: Opened the hearing on HB 1214.

Judge Gail Hagerty, Uniform Law Commissioner: I am to testify in support of HB 1214 Introduced by Rep. Klemin and Sen. Hogue. It would enact the Revise Uniform Fiduciary Access to Digital Assets Act. (See Attachment 1) Went over the handout. (:30-12:37) I served on the drafting committee on this act. It makes it clearer that the communications are protected.

Vice Chairman Karls: Are we talking about a Facebook account?

Judge Gail Hagerty: If Facebook knows someone has died they memorize the account rather than allowing it to remain active. Facebook does support this act and worked with drafting of this act. You would follow the rules set out here.

Representative Jones: This is interesting and brings up a lot of questions to changing times. We have a lot of things online, contracts, and everything important to our lives. In the event of an accident, someone has to deal with that stuff.

Judge Gail Hagerty: You couldn't continue to maintain that music. I think it is interesting that times are really changing. I am not sure we would have the expertise or the input of all of these national groups in order to draft an act that would address all these needs. That's where a drafting process will be very useful because it fills in some expertise that we just would not have.

Chairman K. Koppelman: Today we have been talking about trust, probates and wills. The disposition of property in one state cannot be continued a trust from another state. Now we are talking about digital assets? Does the law recognize a location for digital assets?

Judge Gail Hagerty: There is not a physical location for digital communication because they are not tangible. You don't have a physical location.

Chairman K. Koppelman: We have had several of these bills over the years. I served previously as the National Chairman of the Councils of State Governments which is now called their Shared Legislative Committee. It is basically designed to look at bills that are passing in different states and making them available to legislatures all over the country. We are not endorsing them but gathering valuable uniform information that is out there.

Opposition: None

Neutral: None

Hearing closed

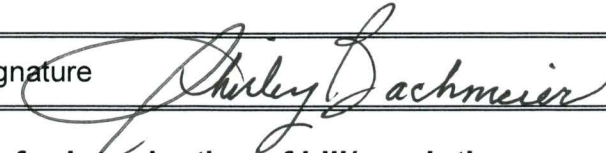
2017 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee
Prairie Room, State Capitol

HB 1214
1/24/2017
27311

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution.

Relating to Digital Assets and suggestions by Uniform Law Commission

Minutes:

Chairman K. Koppelman: Yesterday, Judge Hagerty gave testimony in support of HB 1214. HB 1214 has been delivered to your desks - (12-page bill replaces the 2-page bill).

Representative Klemin: All these amendments do is that every place that says conservator, it says "or guardian." It was omitted from the bill. We did have this bill brought up last session. All these amendments do is clarify clerical-like errors. I make the motion to move the amendments.

Representative Paur: Seconded the motion.

Chairman K. Koppelman: Representative Klemin moves the amendments, seconded by Representative Paur. Any further discussion on the proposed amendments? We will take a voice vote. Those in favor of the amendments presented by Judge Hagerty and Representative Klemin signify by saying ay. Ayes – all; no – 0. Motion carries. We have the amendments adopted. Any discussion on the bill?

Representative Klemin: Judge Hagerty mentioned that we did have this bill in legislature in the last session. There were some issues with it that were brought up by the Senate. We pass the bill in the House. Industry was regulated by this and we've got some issues that they raised. They did not pass the bill in the Senate. Meantime the Uniform Law Commission went back and did some correcting of the issues. Now we have the Uniform Judiciary Access to Digital Assets Act that resolved those issues. It is my understanding that those issues have been taken care of. It deals with digital assets which effects all of us. Digital records, and electronic records etc. We want to make sure that when you die or you become incapacitated,

that your estate or your guardian is going to be able to access those digital records. We are in the electronic age and we have to be cognizant that there are electronic assets out there.

Representative Paur: I'd like to make a motion for a Do Pass as amended recommendation on this.

Chairman K. Koppelman: We have a Do Pass as amended motion by Representative Paur. Seconded by Representative Hanson.

Representative Klemin: The question of Facebook came up for discussion and how they handle their content in the face of death of their users. I don't know how that all interfaces with this. What else comes to mind with we are talking about digital accesses? Downloaded music is an example.

Representative Satrom: My family owns a design company and we used to have lots of paper. Now we have digital everything.

Representative Vetter: Any kind of sales data would be electronic.

Representative Jones: We do a lot of genealogy for our families and ancestors and there always one that goes way back when and they are now digitizing it all with photos, birth and death records, family tree and all that stuff. It's going to be important to some families.

Chairman K. Koppelman: I visited Ellis Island because I have one grandmother who actually came from Europe. She came through Ellis Island. I went back to the records and I couldn't find them at Ellis Island. Then I went online on Ellis Island website and found them like that. All that stuff is digital and available.

Representative Simons: We have a U-tube channel that we actually make income from. I never thought about that.

Chairman K. Koppelman: I wonder about any business profit generating accesses. That is an example.

Representative Klemin: There is a major thing going on in the world with respect to virtual currency. In the future it would be a digital asset.

Chairman K. Koppelman: Gift cards that carry a value are examples that touch all of our lives.

Clerk to call a roll on a Do Pass as amended motion on HB 1214.

Yes – 12 No – 0 Absent 3

Floor Assignment: Representative Jones –

Hearing adjourned.

1/29/17 DR

17.0217.01001
Title.02000

Adopted by the Judiciary Committee

January 24, 2017

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1214

Page 1, line 17, after "Conservator" insert "or guardian"

Page 1, line 18, after "conservator" insert "or guardian"

Page 2, line 25, after "conservator" insert "or guardian"

Page 3, line 10, after "conservator" insert "or guardian"

Page 3, line 12, after "conservator" insert "or guardian"

Page 4, line 3, after "conservatorship" insert "or guardianship"

Page 9, line 18, after "**conservator**" insert "**or guardian**"

Page 9, line 20, after "conservator" insert "or guardian"

Page 9, line 22, after "conservator" insert "or guardian"

Page 9, line 25, after "conservator" insert "or guardian"

Page 9, line 27, after "conservator" insert "or guardian"

Page 10, line 5, after "conservator" insert "or guardian"

Page 10, line 9, after "conservator" insert "or guardian"

Renumber accordingly

2017 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1214

House Judiciary Committee

Subcommittee

Amendment LC# or Description: 17.0217.01001

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Rep. Klemin Seconded By Rep. Paur

Representatives	Yes	No	Representatives	Yes	No
Chairman K. Koppelman			Rep. Hanson		
Vice Chairman Karls			Rep. Nelson		
Rep. Blum					
Rep. Johnston					
Rep. Jones					
Rep. Klemin					
Rep. Magrum					
Rep. Maragos					
Rep. Paur					
Rep. Roers-Jones					
Rep. Satrom					
Rep. Simons					
Rep. Vetter					

Total (Yes) _____ No _____

Absent _____

Floor Assignment : _____

If the vote is on an amendment, briefly indicate intent:

Judge Hagerty amendment

Date: 1-24-17
Roll Call Vote: 2

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1214

House Judiciary Committee

Subcommittee

Amendment LC# or Description: 17-0217-01001

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
Other Actions: Reconsider

Motion Made By Rep. Paur Seconded By Rep. Hanson

Representatives	Yes	No	Representatives	Yes	No
Chairman K. Koppelman	✓		Rep. Hanson	✓	
Vice Chairman Karls	✓		Rep. Nelson	—	
Rep. Blum	✓				
Rep. Johnston	—				
Rep. Jones	✓				
Rep. Klemin	✓				
Rep. Magrum	—				
Rep. Maragos	✓				
Rep. Paur	✓				
Rep. Roers-Jones	✓				
Rep. Satrom	✓				
Rep. Simons	✓				
Rep. Vetter	✓				

Total (Yes) 12 No 0

Absent 3

Floor Assignment : Rep. Jones

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1214: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). HB 1214 was placed on the Sixth order on the calendar.

Page 1, line 17, after "Conservator" insert "or guardian"

Page 1, line 18, after "conservator" insert "or guardian"

Page 2, line 25, after "conservator" insert "or guardian"

Page 3, line 10, after "conservator" insert "or guardian"

Page 3, line 12, after "conservator" insert "or guardian"

Page 4, line 3, after "conservatorship" insert "or guardianship"

Page 9, line 18, after "**conservator**" insert "**or guardian**"

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Page 9, line 27, after "conservator" insert "or guardian"

Page 10, line 5, after "conservator" insert "or guardian"

Page 10, line 9, after "conservator" insert "or guardian"

Renumber accordingly

2017 SENATE JUDICIARY

HB 1214

2017 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1214
3/8/2017
28864

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to a Uniform Fiduciary Access to Digital Assets Act.

Minutes: Testimony attached #

1

Chairman Armstrong called the committee to order on HB 1214. All committee members were present.

Gail Hagerty, District Judge of Bismarck and Uniform Law Commissioner, introduced and testified in support of the bill. (0:55 – 18:06) (see attachment 1)

Chairman Armstrong (6:20): "How does the definition of custodian compare to other parts of the Century Code?"

Judge Hagerty: "I don't know if it's defined in other places in the Century Code. This is kind of a specific term that deals with electronics and other digital assets."

Senator Luick (9:50): "Is there a form or a place where you actually consent that yes you agree to purchase and not use it for some other purchase?"

Judge Hagerty: "Yes. It's in the terms of service or the agreement you make when you purchase that."

Senator Luick: "So you have purchased the rights to that, so can you copy that, correct?"

Judge Hagerty: "No."

Senator Luick: "You can just listen to it?"

Judge Hagerty: "You couldn't transfer it to someone else. What we are talking about is how your fiduciary would figure out you have it but they couldn't transfer it to someone else."

Senator Luick: "So what happens if you put that on a tangible separate device and that device goes to your other estate. Who owns it?"

Judge Hagerty: "The person who purchased it would probably own it and nobody else. It couldn't be transferred on your debt."

Senator Luick (11:30): "Then what happens?"

Chairman Armstrong: "Just make sure you give it to somebody who is on your sharing plan and we should all be good."

Senator Nelson (13:50): "My son has my passwords and is power of attorney, if something happens to me does he need a death certificate to go in and close all my accounts? This would include things like frequent flier miles, frequent stay miles and all those things like that."

Judge Hagerty: "This act would allow him to use those and go into your digital devices. It would be best if your power of attorney specified that he had the authority to go in and handle those assets. But I think there would be protection here, but I can't answer for every situation."

Senator Nelson (18:15): "What do we have in statute now that would deal in any way with digital assets?"

Judge Hagerty: "I don't think there is anything."

Senator Nelson: "So all my books on my Kindle are mine and nobody else's?"

Judge Hagerty: "Probably. Some of those things allow you to share with a limited number of people so it would depend on the terms of services."

Senator Osland: "What is a digital asset?"

Judge Hagerty: "It's something that exists but you cannot put your hand on. So like Bitcoin, they can own and transfer it, but you couldn't put your hands on it. So like a picture on email, pay pal funds, etc."

Chairman Armstrong (21:45): "I think we killed it last time because we would have been the first or second state to put this in and it seemed like the industry wasn't ready for this. But now the industry has done a 180 on the whole deal. So this is similar to what we had two years ago but it has been worked on since then as well. So you've said 20 states already implemented it?"

Judge Hagerty: "Yes."

Chairman Armstrong: "Has anybody seen any data on it? Have there been any reports back anywhere or is this legislation still too new?"

Judge Hagerty: "I think the biggest shift would be that the original act was that if you do everything the custodian would be required to provide you with whatever it is you asked for,

and this gives the custodian more ability to avoid doing that. I think states enacted it because there is such a need for this. We haven't heard of any problems so far. I think it will be adopted in most states as things go on."

Chairman Armstrong: "I have no doubt it will because this is a growing new field. I don't think I have printed out a real picture in like three years."

Tony Weiler, Executive Director of State Bar Association, testified in support of the bill.

"I just want to say that we do support this bill and there have been provisions that have taken care of the issues that were present two years ago. So we do support this legislation."

Chairman Armstrong closed the hearing on HB 1214.

Senator Luick motioned for a Do Pass. **Senator Myrdal** seconded.

A Roll Call Vote was taken. Yea: 6 Nay: 0 Absent: 0.

The motion carried.

Senator Nelson carried the bill.

**2017 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. HB 1214**

Senate Judiciary Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Senator Luick Seconded By Senator Myrdal

Senators	Yes	No	Senators	Yes	No
Chairman Armstrong	X		Senator Nelson	X	
Vice-Chair Larson	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Nelson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1214, as engrossed: Judiciary Committee (Sen. Armstrong, Chairman)
recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
Engrossed HB 1214 was placed on the Fourteenth order on the calendar.

2017 TESTIMONY

HB 1214

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1-24-17

**Testimony on
HB1214
The Revised Uniform Fiduciary Access to Digital Assets Act
House Judiciary Committee
January 24, 2017
By Gail Hagerty
Uniform Law Commissioner**

Mr. Chairman, Members of the Committee:

House Bill 1214, sponsored by Rep. Klemin and Sen. Hogue, enacts the Revised Uniform Fiduciary Access to Digital Assets Act. As a uniform law commissioner, I served on the drafting committee for this act. It has been revised since it was before you during the last legislative session to address some industry concerns. It has now been enacted in 20 states including Minnesota and has been introduced in 2017 in nine states, including North Dakota and Montana.

Just the title of this act may be enough to confuse you. A fiduciary is a person to whom property or power is entrusted for the benefit of another. A fiduciary duty has a legal duty to act solely in another party's interests. For the purpose of this act, a fiduciary is a personal representative in a probate case, a conservator or guardian, a person who is an agent under a power of attorney, or a trustee.

Those people need to have access to the assets of the person for whom they are acting, in order to fulfill their duties.

Digital assets may sound far out, but I'm pretty confident you all have digital assets. Maybe the digital assets are online gaming items, photos, digital music, client lists, the text of a book you authored which exists on the cloud. . .

Most people have not considered what will happen to their digital assets when they die or are incapacitated. This act gives fiduciaries authority to access, control, or copy digital assets and accounts as necessary to perform their duties.

This act does not cover access to digital assets by family members and friends.

The area is complicated by the existence of federal law which prohibits disclosure of the content of electronic communications to persons other than an account holder or intended recipient or a third party with lawful consent of the account holder. For that reason, electronic communications are considered separately from digital assets.

Section 46-36-01 includes the definitions.

Section 46-36-02 provides information concerning the applicability of the chapter to specific types of fiduciary relationships. It is a broad provision, encompassing fiduciaries appointed before or after the effective date of the chapter. It makes it clear that the Act does not apply to digital assets of employers used by employees in the ordinary course of business.

Section 47-36-03 allows a person to make decisions concerning who should have access to that person's digital assets using an online tool if the tool allows the person to modify the decision at a later time. When that type of tool exists, decisions made by the user take priority over decisions included in a document like a will or power of attorney.

Section 47-36-04 clarifies that the Act doesn't change the right of a user and a custodian of a digital asset to agree to terms of service, nor does it give a fiduciary greater rights than the protected person had.

Section 47-36-05 deals with what a custodian of records is required to do when digital assets are disclosed.

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Section 47-36-06 deals with disclosure of electronic communications of a deceased user, and what a personal representative is required to do to obtain such communications.

Section 47-36-07 provides for disclosure of other digital assets of a deceased user.

Section 47-36-08 deals with disclosure of electronic communications to a person acting under a power of attorney and Section 47-36-09 deals with disclosure of other digital assets to a person acting under a power of attorney.

Section 47-36-10 deals with disclosure of digital assets which are held in trust when the trustee is the original user of a digital asset. Section 47-36-11 deals with disclosure of the contents of electronic communications which are held in trust when the trustee is not an original user. Section 47-36-11 deals with disclosure of other digital assets when the trustee is not an original user.

Section 47-36-13 involves disclosure of digital assets to a conservator. A catalog of electronic communications and digital assets would be provided unless otherwise ordered by the court or directed by the user.

Section 47-36-14 details the duties of a fiduciary.

Section 47-36-15 provides immunity for a custodian if acts or omissions are done in good faith compliance with the act. Fiduciaries of digital assets are subject to the same duties which would apply if the assets they were dealing with were tangible assets.

Section 47-36-16 clarifies the need for uniformity of the law in this area.

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Proposed amendments to HB1214

Page 1, line 17:

5. "Conservator or Guardian" means a person appointed by a court to manage the estate of a living individual. The term includes a limited conservator or guardian.

Page 2, line 25:

conservator or guardian, agent, or trustee.

Page 3, line 10:

21. "Protected person" means an individual for whom a conservator or guardian has been appointed.

Page 3, line 12:

conservator or guardian is pending.

Page 4, line 3:

c. A conservatorship or guardianship proceeding commenced before, on or after the effective date of this chapter.

Page 9, line 18:

47-36-13. Disclosure of digital assets to conservator or guardian of protected person.

Page 9, line 20:

conservator or guardian access to the digital assets of a protected person.

Page 9, line 22:

disclose to a conservator or guardian the catalog of electronic communications sent or received by

Page 9, line 25:

conservator or guardian gives the custodian:

Page 9, line 27:

b. A certified copy of the court order that gives the conservator or guardian authority over the

Page 10, line 5:

3. A conservator or guardian with general authority to manage the assets of a protected person may

Page 10, line 9:

conservator or guardian authority over the protected person's property.



Uniform Law Commission

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

#1
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WHY YOUR STATE SHOULD ADOPT THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (2015)

The Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) modernizes fiduciary law for the Internet age. Fiduciaries are the people appointed to manage our property when we die or lose the capacity to manage it ourselves. Nearly everyone today has digital assets, such as documents, photographs, email, and social media accounts, and fiduciaries are often prevented from accessing those accounts by password protection or restrictive terms of service. Digital assets may have real value, both monetary and sentimental, but they also present novel privacy concerns. UFADAA provides legal authority for fiduciaries to manage digital assets in accordance with the user's estate plan, while protecting a user's private communications from unwarranted disclosure.

- ***Revised UFADAA gives Internet users control.*** Revised UFADAA allows users to specify whether their digital assets should be preserved, distributed to heirs, or destroyed.
- ***Revised UFADAA provides efficient uniformity for all concerned.*** Digital assets travel across state lines nearly instantaneously. In our modern mobile society, people relocate more often than ever. Because state law governs fiduciaries, a uniform law ensures that fiduciaries in every state will have equal access to digital assets and custodians will have a single legal standard with which to comply.
- ***Revised UFADAA respects privacy interests.*** Private communications like email and social media conversations are protected by federal privacy law. Revised UFADAA prevents the companies that store our communications from releasing them to fiduciaries unless the user consented to disclosure.
- ***Revised UFADAA addresses four common types of fiduciaries.*** Revised UFADAA provides appropriate default rules governing access to digital assets for executors of a decedent's estate, agents under a power of attorney, conservators, and trustees.
- ***Revised UFADAA works hand-in-hand with federal and state law.*** Under Revised UFADAA, fiduciaries must provide proof of their authority in the form of a certified document. Custodians of digital assets that comply with a fiduciary's apparently authorized request for access are immune from any liability under statutes that prohibit unauthorized access. A fiduciary's authority over digital assets is limited by federal law, including the Copyright Act and the Electronic Communications Privacy Act.

For further information about Revised UFADAA, please contact ULC Legislative Counsel Benjamin Orzeske at 312-450-6621 or borzeske@uniformlaws.org.

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.

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12/17
1-24-17



Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws



Contact Us: 312.450.6600

Legislative Fact Sheet - Fiduciary Access to Digital Assets Act, Revised (2015)

Act Fiduciary Access to Digital Assets Act, Revised (2015)

Origin Completed by the Uniform Law Commission in 2014 and Revised in 2015.

Description A fiduciary is a person appointed to manage the property of another person, subject to strict duties to act in the other person's best interest. Common types of fiduciaries include executors of a decedent's estate, trustees, conservators, and agents under a power of attorney. 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.

Endorsements Association of American Retired Persons
Center for Democracy and Technology
Facebook
Google
National Academy of Elder Law Attorneys

Enactments Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Maryland, Michigan, Minnesota, Nebraska, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Washington, Wisconsin, Wyoming

2017 Introductions Alaska, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Dakota, Utah, Virginia

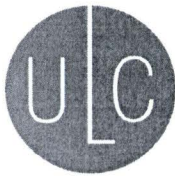
Staff Liaison(s) Katie Robinson, Benjamin Orzeske

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Uniform Law Commission

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

- A Summary -

In the Internet age, the nature of property and our methods of communication have changed dramatically. A generation ago, a human being delivered our mail, photos were kept in albums, documents in file cabinets, and money on deposit at the corner bank. For most people today, at least some of their property and communications are stored as data on a computer server and accessed via the Internet.

Collectively, a person's digital property and electronic communications are referred to as "digital assets" and the companies that store those assets on their servers are called "custodians." Access to digital assets is usually governed by a terms-of-service agreement rather than by property law. This creates problems when Internet users die or otherwise lose the ability to manage their own digital assets.

A fiduciary is a trusted person with the legal authority to manage another's property, and the duty to act in that person's best interest. The Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) addresses four common types of fiduciaries:

1. Executors or administrators of deceased persons' estates;
2. Court-appointed guardians or conservators of protected persons' estates;
3. Agents appointed under powers of attorney; and
4. Trustees.

Revised UFADAA 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. In case of conflicting instructions, the act provides a three-tiered system of priorities:

1. If the custodian provides an online tool, separate from the general terms of service, that allows the user to name another person to have access to the user's digital assets or to direct the custodian to delete the user's digital assets, Revised UFADAA makes the user's online instructions legally enforceable.
2. If the custodian does not provide an online planning option, or if the user declines to use the online tool provided, the user may give legally enforceable directions for the disposition of digital assets in a will, trust, power of attorney, or other written record.
3. If the user has not provided any direction, either online or in a traditional estate plan, the terms of service for the user's account will determine whether a fiduciary may access the user's digital assets. If the terms of service do not address fiduciary access, the default rules of Revised UFADAA will apply.

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.

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Revised UFADAA's default rules attempt to balance the user's privacy interest with the fiduciary's need for access by making a distinction between the "content of electronic communications," the "catalogue of electronic communications", and other types of digital assets.

The content of electronic communications includes the subject line and body of a user's email messages, text messages, and other messages between private parties. A fiduciary may never access the content of electronic communications without the user's consent. When necessary, a fiduciary may have a right to access a catalogue of the user's electronic communications – essentially a list of communications showing the addresses of the sender and recipient, and the date and time the message was sent.

For example, the executor of a decedent's estate may need to access a catalogue of the decedent's communications in order to compile an inventory of estate assets. If the executor finds that the decedent received a monthly email message from a particular bank or credit card company, the executor can contact that company directly and request a statement of the decedent's account.

Other types of digital assets are not communications, but intangible personal property. For example, an agent under a power of attorney who has authority to access the principal's business files will have access under Revised UFADAA to any files stored in "the cloud" as well as those stored in file cabinets. Similarly, an executor that is distributing funds from the decedent's bank account will also have access to the decedent's virtual currency account (e.g. bitcoin).

Under Revised UFADAA Section 15, fiduciaries for digital assets are subject to the same fiduciary duties that normally apply to tangible assets. Thus, for example, an executor may not publish the decedent's confidential communications or impersonate the decedent by sending email from the decedent's account. A fiduciary's management of digital assets may also be limited by other law. For example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not exceed the user's authority under the account's terms of service.

In order to gain access to digital assets, Revised UFADAA requires a fiduciary to send a request to the custodian, accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust. Custodians of digital assets that receive an apparently valid request for access are immune from any liability for acts done in good faith compliance.

Revised UFADAA is an overlay statute designed to work in conjunction with a state's existing laws on probate, guardianship, trusts, and powers of attorney. It is a vital statute for the digital age, and should be enacted by every state legislature as soon as possible.

For further information about Revised UFADAA, please contact ULC Legislative Counsel Benjamin Orzeske at 312-450-6621 or borzeske@uniformlaws.org.

**Testimony on
HB1214
The Revised Uniform Fiduciary Access to Digital Assets Act
Senate Judiciary Committee
March 8, 2017
By Gail Hagerty
Uniform Law Commissioner**

Mr. Chairman, Members of the Committee:

House Bill 1214, sponsored by Rep. Klemin and Sen. Hogue, enacts the Revised Uniform Fiduciary Access to Digital Assets Act. As a uniform law commissioner, I served on the drafting committee for this act. It has been revised since it was before you during the last legislative session to address some industry concerns. It has now been enacted in 20 states including Minnesota and has been introduced in 2017 in nine states, including North Dakota and Montana.

Just the title of this act may be enough to confuse you. A fiduciary is a person to whom property or power is entrusted for the benefit of another. A fiduciary duty has a legal duty to act solely in another party's interests. For the purpose of this act, a fiduciary is a personal representative in a probate case, a conservator or guardian, a person who is an agent under a power of attorney, or a trustee.

Those people need to have access to the assets of the person for whom they are acting, in order to fulfill their duties.

Digital assets may sound far out, but I'm pretty confident you all have digital assets. Maybe the digital assets are online gaming items, photos, digital music, client lists, the text of a book you authored which exists on the cloud. . .

Most people have not considered what will happen to their digital assets when they die or are incapacitated. This act gives fiduciaries authority to access, control, or copy digital assets and accounts as necessary to perform their duties.

This act does not cover access to digital assets by family members and friends.

The area is complicated by the existence of federal law which prohibits disclosure of the content of electronic communications to persons other than an account holder or intended recipient or a third party with lawful consent of the account holder. For that reason, electronic communications are considered separately from digital assets.

Section 46-36-01 includes the definitions.

Section 46-36-02 provides information concerning the applicability of the chapter to specific types of fiduciary relationships. It is a broad provision, encompassing fiduciaries appointed before or after the effective date of the chapter. It makes it clear that the Act does not apply to digital assets of employers used by employees in the ordinary course of business.

Section 47-36-03 allows a person to make decisions concerning who should have access to that person's digital assets using an online tool if the tool allows the person to modify the decision at a later time. When that type of tool exists, decisions made by the user take priority over decisions included in a document like a will or power of attorney.

Section 47-36-04 clarifies that the Act doesn't change the right of a user and a custodian of a digital asset to agree to terms of service, nor does it give a fiduciary greater rights than the protected person had.

Section 47-36-05 deals with what a custodian of records is required to do when digital assets are disclosed.

Section 47-36-06 deals with disclosure of electronic communications of a deceased user, and what a personal representative is required to do to obtain such communications.

Section 47-36-07 provides for disclosure of other digital assets of a deceased user.

Section 47-36-08 deals with disclosure of electronic communications to a person acting under a power of attorney and Section 47-36-09 deals with disclosure of other digital assets to a person acting under a power of attorney.

Section 47-36-10 deals with disclosure of digital assets which are held in trust when the trustee is the original user of a digital asset. Section 47-36-11 deals with disclosure of the contents of electronic communications which are held in trust when the trustee is not an original user. Section 47-36-11 deals with disclosure of other digital assets when the trustee is not an original user.

Section 47-36-13 involves disclosure of digital assets to a conservator. A catalog of electronic communications and digital assets would be provided unless otherwise ordered by the court or directed by the user.

Section 47-36-14 details the duties of a fiduciary.

Section 47-36-15 provides immunity for a custodian if acts or omissions are done in good faith compliance with the act. Fiduciaries of digital assets are subject to the same duties which would apply if the assets they were dealing with were tangible assets.

Section 47-36-16 clarifies the need for uniformity of the law in this area.

**Uniform Law Commission**

The National Conference of Commissioners on Uniform State Laws

Contact Us: **312.450.6600**

Legislative Fact Sheet - Fiduciary Access to Digital Assets Act, Revised (2015)

Act Fiduciary Access to Digital Assets Act, Revised (2015)**Origin** Completed by the Uniform Law Commission in 2014 and Revised in 2015.**Description** A fiduciary is a person appointed to manage the property of another person, subject to strict duties to act in the other person's best interest. Common types of fiduciaries include executors of a decedent's estate, trustees, conservators, and agents under a power of attorney. 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.**Endorsements** Association of American Retired Persons
Center for Democracy and Technology
Facebook
Google
National Academy of Elder Law Attorneys**Enactments** Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Maryland, Michigan, Minnesota, Nebraska, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Virginia, Washington, Wisconsin, Wyoming**2017 Introductions** Alabama, Alaska, Iowa, Kansas, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Rhode Island, South Dakota, Texas, Utah, Vermont**Staff Liaison(s)** Katie Robinson, Benjamin Orzeske

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WHY YOUR STATE SHOULD ADOPT THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (2015)

The Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) modernizes fiduciary law for the Internet age. Fiduciaries are the people appointed to manage our property when we die or lose the capacity to manage it ourselves. Nearly everyone today has digital assets, such as documents, photographs, email, and social media accounts, and fiduciaries are often prevented from accessing those accounts by password protection or restrictive terms of service. Digital assets may have real value, both monetary and sentimental, but they also present novel privacy concerns. UFADAA provides legal authority for fiduciaries to manage digital assets in accordance with the user's estate plan, while protecting a user's private communications from unwarranted disclosure.

- ***Revised UFADAA gives Internet users control.*** Revised UFADAA allows users to specify whether their digital assets should be preserved, distributed to heirs, or destroyed.
- ***Revised UFADAA provides efficient uniformity for all concerned.*** Digital assets travel across state lines nearly instantaneously. In our modern mobile society, people relocate more often than ever. Because state law governs fiduciaries, a uniform law ensures that fiduciaries in every state will have equal access to digital assets and custodians will have a single legal standard with which to comply.
- ***Revised UFADAA respects privacy interests.*** Private communications like email and social media conversations are protected by federal privacy law. Revised UFADAA prevents the companies that store our communications from releasing them to fiduciaries unless the user consented to disclosure.
- ***Revised UFADAA addresses four common types of fiduciaries.*** Revised UFADAA provides appropriate default rules governing access to digital assets for executors of a decedent's estate, agents under a power of attorney, conservators, and trustees.
- ***Revised UFADAA works hand-in-hand with federal and state law.*** Under Revised UFADAA, fiduciaries must provide proof of their authority in the form of a certified document. Custodians of digital assets that comply with a fiduciary's apparently authorized request for access are immune from any liability under statutes that prohibit unauthorized access. A fiduciary's authority over digital assets is limited by federal law, including the Copyright Act and the Electronic Communications Privacy Act.

For further information about Revised UFADAA, please contact ULC Legislative Counsel Benjamin Orzeske at 312-450-6621 or borzeske@uniformlaws.org.



THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

- A Summary -

In the Internet age, the nature of property and our methods of communication have changed dramatically. A generation ago, a human being delivered our mail, photos were kept in albums, documents in file cabinets, and money on deposit at the corner bank. For most people today, at least some of their property and communications are stored as data on a computer server and accessed via the Internet.

Collectively, a person's digital property and electronic communications are referred to as "digital assets" and the companies that store those assets on their servers are called "custodians." Access to digital assets is usually governed by a terms-of-service agreement rather than by property law. This creates problems when Internet users die or otherwise lose the ability to manage their own digital assets.

A fiduciary is a trusted person with the legal authority to manage another's property, and the duty to act in that person's best interest. The Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) addresses four common types of fiduciaries:

1. Executors or administrators of deceased persons' estates;
2. Court-appointed guardians or conservators of protected persons' estates;
3. Agents appointed under powers of attorney; and
4. Trustees.

Revised UFADAA 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. In case of conflicting instructions, the act provides a three-tiered system of priorities:

1. If the custodian provides an online tool, separate from the general terms of service, that allows the user to name another person to have access to the user's digital assets or to direct the custodian to delete the user's digital assets, Revised UFADAA makes the user's online instructions legally enforceable.
2. If the custodian does not provide an online planning option, or if the user declines to use the online tool provided, the user may give legally enforceable directions for the disposition of digital assets in a will, trust, power of attorney, or other written record.
3. If the user has not provided any direction, either online or in a traditional estate plan, the terms of service for the user's account will determine whether a fiduciary may access the user's digital assets. If the terms of service do not address fiduciary access, the default rules of Revised UFADAA will apply.

Revised UFADAA's default rules attempt to balance the user's privacy interest with the fiduciary's need for access by making a distinction between the "content of electronic communications," the "catalogue of electronic communications", and other types of digital assets.

The content of electronic communications includes the subject line and body of a user's email messages, text messages, and other messages between private parties. A fiduciary may never access the content of electronic communications without the user's consent. When necessary, a fiduciary may have a right to access a catalogue of the user's electronic communications – essentially a list of communications showing the addresses of the sender and recipient, and the date and time the message was sent.

For example, the executor of a decedent's estate may need to access a catalogue of the decedent's communications in order to compile an inventory of estate assets. If the executor finds that the decedent received a monthly email message from a particular bank or credit card company, the executor can contact that company directly and request a statement of the decedent's account.

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