

HOUSE BILL REPORT

ESSB 5029

As Passed House - Amended:
March 3, 2016

Title: An act relating to the revised uniform fiduciary access to digital assets act.

Brief Description: Concerning the revised uniform fiduciary access to digital assets act.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Pedersen and O'Ban; by request of Uniform Law Commission).

Brief History:

Committee Activity:

Judiciary: 2/18/16, 2/26/16 [DPA].

Floor Activity:

Passed House - Amended: 3/3/16, 80-15.

Brief Summary of Engrossed Substitute Bill
(As Amended by House)

- Adopts the Revised Uniform Fiduciary Access to Digital Assets Act, allowing persons to provide direction regarding third-party access to the person's digital assets, providing fiduciaries with the authority to access and manage the digital assets of a person, and providing custodians of digital assets with standards for responding to requests for access to digital assets.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 11 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Goodman, Hansen, Kirby, Klippert, Kuderer, Muri, Orwall and Stokesbary.

Minority Report: Do not pass. Signed by 2 members: Representatives Shea, Assistant Ranking Minority Member; Haler.

Staff: Edie Adams (786-7180).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The Revised Uniform Fiduciary Access to Digital Assets Act (UFADAA) is a uniform law adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2015. The UFADAA addresses the ability of fiduciaries and other designated persons to access an individual's digital assets according to specific direction from the individual or through default rules for access. The NCCUSL developed the UFADAA due to an increase in the number of digital assets held by individuals and the lack of clear laws addressing a fiduciary's ability to access these records in order to manage the property and affairs of the person according to the fiduciaries' obligations.

According to the NCCUSL, the purpose of the UFADAA is to give fiduciaries the legal authority to manage digital assets in the same way that they manage tangible assets and financial accounts, and to provide custodians of digital assets the legal authority to deal with fiduciaries while respecting the privacy rights of persons who own or have an interest in the digital assets.

A fiduciary is a person with the legal authority to manage another person's property or affairs and a duty to act in that person's best interest. Fiduciaries include the personal representative of a decedent, an agent under a power of attorney, a trustee of a trust, and a guardian of an incapacitated person. Fiduciaries often need access to digital assets on the owner's behalf to manage the property and affairs of a person who dies or becomes incapacitated, or who transfers property to a trust or executes a power of attorney.

Digital assets are electronic records in which a person has a right or interest, such as electronic mail and social media accounts, blogs, photo and video sharing sites, and online file storage accounts. Many digital assets are governed by the terms-of-service agreements of online service providers that may restrict or prohibit fiduciaries from accessing and managing a person's digital assets. In addition, the federal Electronic Communications Privacy Act generally prohibits the disclosure of the content of electronic communications without consent, and establishes limitations on the disclosure of other electronic information. Washington laws governing personal representatives, agents, trustees, and guardians do not address the issue of the authority of these fiduciaries to access digital assets.

Summary of Amended Bill:

The Revised Uniform Fiduciary Access to Digital Assets Act (Act) is enacted, with some modifications, to provide specified fiduciaries with the authority to access and manage the digital assets of a person. The Act applies to four types of fiduciaries: personal representatives; trustees; agents under powers of attorney; and guardians. The Act does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

Under the Act, a "custodian" is a person that carries, maintains, processes, receives, or stores a digital asset of a "user," who is a person that has an account with a custodian under a terms-of-service agreement. "Digital asset" means an electronic record in which an individual has a right or interest, but does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

The Act addresses the authority of fiduciaries to access and manage digital assets, including the content of electronic communications, a catalogue of electronic communications, and other digital assets. "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person. "Content of an electronic communication" means information concerning the substance or meaning of a communication is not readily accessible to the public, and that has been sent or received by a user and is in electronic storage, or carried or maintained, by a custodian.

Direction by User.

A user may provide direction regarding disclosure of the user's digital assets to a designated recipient or fiduciary through an online tool, or in a will, trust, power of attorney, or other record. An "online tool" is an electronic option provided by the custodian that allows the user, in an agreement distinct from the terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person.

A direction regarding disclosure through an online tool overrides a contrary direction in a will, trust, power of attorney, or other record if the online tool allows the user to modify or delete the direction at all times. A user's specific direction overrides a contrary provision in a terms-of-service agreement that does not require an affirmative act distinct from the user's assent to the agreement.

Terms-of-Service Agreements.

The Act does not change or impair a right of a custodian or user under a terms-of-service agreement to access and use digital assets of the user, and does not give a fiduciary or a designated recipient any new or expanded rights other than those held by the user.

Custodian Procedures for Disclosure.

A custodian has discretion regarding the procedures to be used when disclosing digital assets to a fiduciary or designated recipient. The custodian may grant full access to the user's account, grant partial access sufficient for the fiduciary or designated recipient to perform necessary tasks, or provide a fiduciary or designated recipient with a copy in a record of any digital asset the user could have accessed. A custodian need not disclose any digital asset deleted by the user.

A custodian may charge a reasonable administrative charge for disclosure. A custodian need not disclose digital assets where a request for disclosure of some but not all of the user's digital assets poses an undue burden on the custodian. A custodian or a fiduciary or designated recipient may seek a court order regarding a disclosure the custodian believes poses an undue burden.

Disclosure of Digital Assets to Fiduciaries.

Standards for the disclosure of digital assets to specific fiduciaries are established. Different requirements for disclosure apply depending on the type of fiduciary involved. In general, the content of electronic communications may be disclosed to a fiduciary only if the user has provided specific consent in an online tool, or in a will, power of attorney, trust, or other document. A catalogue of electronic communications and any digital assets other than the

content of communications may be disclosed to a fiduciary unless otherwise directed by a court or by the user.

A fiduciary's request for disclosure of digital assets must be in writing and accompanied by certified copies of the relevant documents establishing the fiduciary relationship and granting fiduciary authority. The custodian may require the fiduciary to provide a unique identifier assigned by the custodian to identify the user's account or some evidence linking the account to the user.

In the case of a personal representative requesting disclosure of the digital assets of a decedent, the custodian may require the personal representative to also provide court findings that the user had an account with the custodian and that disclosure is necessary for estate administration. If the request is for disclosure of the content of electronic communications, the custodian may also require the personal representative to provide court findings that disclosure of the content would not violate federal law governing privacy of electronic communications and that the user consented to disclosure of the content of electronic communications.

In the case of a trustee who is an original user of an account, the custodian must disclose to the trustee any digital asset of the account held in trust, including the content of electronic communications, unless otherwise ordered by the court or provided in the trust. If the trustee is not an original user, the trustee may obtain access to the content of an electronic communication in the account only if the trust instrument includes consent to disclosure of the content to the trustee. Other digital assets and a catalogue of electronic communications may be disclosed without specific consent in the trust instrument.

Fiduciary Duties and Authority.

The legal duties that apply to a fiduciary charged with managing tangible property apply to the management of digital assets, including the duty of care, the duty of loyalty, and the duty of confidentiality.

A fiduciary's or designated recipient's authority with respect to a digital asset is subject to the applicable terms-of-service agreement and other applicable law, including copyright law, and may not be used to impersonate the user. A fiduciary's authority with respect to digital assets is limited by the scope of the fiduciary's duties.

A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property for the purpose of applicable computer fraud and unauthorized computer access laws. A fiduciary with authority over the tangible personal property of the decedent, principal, settlor, or incapacitated person has the right to access the property and any digital asset stored in it, and is an authorized user for the purpose of applicable computer fraud and unauthorized computer access laws.

A fiduciary may request termination of a user's account if the request is in writing and accompanied by the death certificate of the user, if deceased, and a certified copy of the document providing the fiduciary's authority. If requested by the custodian, the fiduciary must also provide a unique identifier to identify the account, some evidence linking the

account to the incapacitated person, or a court finding that the user had a specific account with the custodian.

Custodian Compliance and Immunity.

A custodian must comply with a request from a fiduciary or designated recipient to disclose digital assets or terminate an account no later than 60 days after receipt of the request. A fiduciary or designated recipient may apply to the court for an order directing compliance with the request, and any such order must contain a finding that compliance is not in violation of federal law governing privacy of electronic communications.

A custodian may deny a request for disclosure or to terminate an account if the custodian knows of any lawful access to the account following receipt of the request. The Act does not limit a custodian's ability to require a fiduciary or designated recipient to obtain a court order that specifies that an account belongs to the user and there is sufficient consent from the user to support the requested disclosure.

A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with the Act.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This legislation was introduced in numerous states last year, and it quickly ran into a buzzsaw because many technology companies were concerned it would require them to violate federal law. Under federal law, a company that is the keeper of digital assets, such as financial records or photos stored in the cloud, is not permitted to disclose electronic communications absent consent. The problem is that peoples' assets become stranded when they die or become incapacitated. The purpose of this legislation is to provide that if these digital assets are stranded, it is because of an intentional decision. The prior legislation did not give enough control to the user. The revised legislation allows a person to designate whether or not his or her digital assets can be disclosed. If a person does not make an election about disclosure, there are default rules regarding disclosure to fiduciaries.

The issue of fiduciary access to digital assets needs to be addressed. In the past, a personal representative would go through a decedent's mail to figure out the person's bank accounts, insurance policies, and other assets or liabilities. These days, those records tend to be stored electronically. It is impossible to settle an estate when the personal representative cannot see what assets or liabilities the decedent owns. Some individual states have attempted to address the issue, but their laws have not been adequate.

The Uniform Law Commission engaged a large group of stakeholders and negotiated a model bill that works for everyone. This is an extremely complicated legal landscape. The

bill addresses and provides a balance between a number of important concerns, including a fiduciary's need for access and a user's privacy rights. Federal law prohibits online service providers from disclosing electronic communications except in limited circumstances, and this bill recognizes and addresses those limitations. Uniformity in state laws is very important to service providers who operate across jurisdictions. There is one technical correction that should be made to change a reference to "digital communication" to "electronic communication."

(Opposed) None.

Persons Testifying: Senator Pederson, prime sponsor; Karen Boxx, Washington State Bar Association's Real Property, Probate, and Trust Section and Elder Law Section; Tom McBride, Google; and Megan Schrader, TechNet.

Persons Signed In To Testify But Not Testifying: None.