

SENATE BILL REPORT

ESSB 5029

As Amended by House, 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: Law & Justice: 11/20/15, 1/12/16, 1/21/16 [DPS].

Passed Senate: 2/09/16, 48-0.

Passed House: 3/03/16, 80-15.

Brief Summary of Engrossed Substitute Bill

- Sets standards for custodians of digital assets to follow when a fiduciary, acting for the owner of the digital assets, needs electronic information to perform management duties.
- Applies to access for trustees, personal representatives of a deceased's estate, appointed guardians, and those appointed in a power of attorney to electronic information.
- Allows the digital asset's owner to grant specific consent to disclosure by the custodian online or through other written directions in wills, trusts, powers of attorney, or other written notices.
- The terms-of-service contract - absent the owner's specific written directions - controls and, if a consent term is not in the contract, provides default rules.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5029 be substituted therefor, and the substitute bill do pass.

Signed by Senators Padden, Chair; O'Ban, Vice Chair; Pedersen, Ranking Minority Member; Darneille, Frockt, Pearson and Roach.

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.

Staff: Melissa Burke-Cain (786-7755)

Background: The Uniform Fiduciary Access to Digital Assets Act (UFADAA) is a model law drafted and approved by the Uniform Laws Commission (ULC) in 2014. The UFADAA sets standards for access to electronic information held by internet providers when a fiduciary, acting on behalf of the information owner, needs the information to carry out fiduciary duties. During the 2015 legislative interim, the ULC approved changes to the model law addressing opponents' concerns.

Digital assets consist of any content or media, in any form, maintained and accessed electronically. Examples of digital assets include electronic information in online banking, investment accounts, photos, emails, and social media accounts.

The ULC developed the UFADAA because widespread internet use is changing how electronic information is used and stored for routine business matters and social media. Internet service providers maintain custody of digital assets and keep the electronic information secure according to a terms-of-service-agreement with the owner of the digital assets. Fiduciaries often need access to digital assets on the owner's behalf to manage tangible and digital assets when the owner dies, gives a power of attorney, or loses the capacity to manage the owner's own property. The UFADAA facilitates the fiduciary's access but also preserves privacy rights for the owner of the assets.

Under the UFADAA, the owner retains the power to plan for the disposition of the owner's digital assets. Revisions to the UFADAA clarify priorities for determining a fiduciary's access to digital assets if the owner does not provide instruction or multiple instructions conflict.

Summary of Engrossed Substitute Bill: The circumstances are addressed in which a digital asset custodian must disclose digital asset information to a fiduciary who is in need of access to the information to fulfill their duties. Four types of fiduciaries include personal representatives of a deceased person's estate; court appointed guardians of incapacitated persons; trustees; and attorneys in fact under a power of attorney. The revised UFADAA includes standard definitions and the proof elements a that fiduciary must provide to the custodian of digital assets that demonstrate legal authority to obtain the information.

The ULC's revised version clarifies the model law in seven main areas:

- The federal Electronic Communications Privacy Act (ECPA) governs disclosure of the content of private electronic communications such as voicemail and email. Under the ECPA, either the sender or the intended recipient of the communication must consent to the custodian's disclosure of the communication's content.
- The digital-assets-owner may consent to disclosure of electronic information and content either in a written record or by using an online tool supplied by the custodian. The account holder's specific consent overrides a blanket prohibition against content disclosure in the terms-of-service contract.
- When the custodian does not supply an online tool or an account holder elects not to use the custodian's tool, the owner may give legally-enforceable directions for disclosure of the digital assets in a will, trust, power of attorney, or other written record.

- The terms-of-service contract determines the fiduciary's access if the owner does not provide directions. The UFADAA provides default rules if the contract does not address fiduciary access.
- Custodians of digital assets are immune from liability for actions taken in good faith compliance with a fiduciary's request for access to digital assets.
- Custodians are not required to provide the fiduciary with full online account access. The custodian is only required to provide information contained in the account and may select the format used to disclose the requested information.
- The fiduciary must provide sufficient specific information for the custodian to identify and retrieve the electronic information that is requested.

In addition, a custodian of an account may obtain a court order confirming that the principal, deceased person, trustor, or incapacitated person owns the account containing digital assets and that the owner gave sufficient consent to disclose the assets or close the account at the fiduciary's request. A small number of technical changes have been added to conform more specifically to Washington's guardianship laws and practices and to include technical changes approved by the the Uniform Law Commission's executive committee in January 2016.

Appropriation: None

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on First Substitute: PRO: This bill has been fine-tuned for Washington and is a benefit for Washington's citizens. Laws regarding the disposition and handling of digital assets upon a person's death or disability are absolutely necessary. In the past, a fiduciary would be advised to sort through a deceased or incapacitated person's files and the mail delivered to the home to create a list of bills to pay, assets to collect, and creditors to notify. Now, the key information such as brokerage and bank accounts may have no paper trail but are stored digitally. Guardians, just like other fiduciaries need access to digital assets to pay expenses or protect an incapacitated person from exploitation. The bill appropriately balances protection of digital assets with the guardian's need to access digital assets. Under the bill, guardians with access are limited to persons who have been court-appointed after an adjudication of incapacity, and the right of a guardian to access digital records is demonstrated with Letters of Guardianship. The technical changes are added protection for incapacitated persons. The revised bill is the product of common accord between privacy advocates, the Uniform Law Commission, and companies in the technology sector.

Persons Testifying on First Substitute: PRO: Carla Calogero, representing the Elder Law Section of the WSBA; Megan Schrader, representing TechNet; and Rochelle Heller, representing the Real Property, Probate and Trust Section of the WSBA.

Persons Signed In To Testify But Not Testifying on First Substitute: No one.

House Amendment(s): A custodian may refuse an unduly burdensome disclosure request from designated recipients in addition to a user's or a fiduciary's unduly burdensome request. The phrase "digital communications" is changed to "electronic communications" with reference to a custodian's non-disclosure of the content of an incapacitated person's communications to a guardian.

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