

# SENATE JUDICIARY COMMITTEE

## STATEMENT TO

[Second Reprint]

## ASSEMBLY, No. 3433

with committee amendments

# STATE OF NEW JERSEY

DATED: JUNE 26, 2017

The Senate Judiciary Committee reports favorably and with committee amendments Assembly Bill No. 3433 (2R).

This bill, as amended, would enact the “Uniform Fiduciary Access to Digital Assets Act” (UFADAA). The model act was promulgated by the Uniform Law Commission in 2014 and revised by the commission in 2015.

Under the bill, the traditional power of a fiduciary to manage a person’s tangible property when that person dies or loses the ability to manage his own property would be extended to allow the fiduciary to manage digital assets. The bill defines the term “digital assets” to mean a person’s digital property and electronic communications. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

The bill allows fiduciaries to manage digital property, such as 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 (i.e., accountholder) consented in a will, trust, power of attorney, or other record.

The bill encompasses four types of fiduciaries: (1) executors or administrators of deceased persons’ estates; (2) court-appointed guardians of incapacitated persons; (3) agents appointed under powers of attorney; and (4) trustees.

The bill would not apply to digital assets of an employer used by an employee during the ordinary course of business.

The bill distinguishes between a “catalogue of electronic communications” (information that identifies each person with which a user has had an electronic communication, and the time and date of that communication) and the “content of an electronic communication” (information concerning the substance or meaning of the communication). The bill provides that generally a fiduciary would have access to a catalogue of the user’s communications, but not the content, unless the user consented to the disclosure of the content.

Under the bill, a “custodian” is a person or entity that carries, maintains, processes, receives, or stores digital assets. The bill provides that if a 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, the user’s online instructions would be enforceable.

If the custodian does not provide an online tool or if the user declines to use the online tool provided, the user may give directions for the disposition of digital assets in a will, trust, power of attorney, or other written record.

If the user has not provided any direction, either online or in an estate plan, the terms of service for the user’s account would determine whether a fiduciary may access the user’s digital assets. If the terms of service do not address fiduciary access, the default rules presented in the bill would apply.

Under the bill, fiduciaries for digital assets would be subject to the same fiduciary duties that normally apply to tangible assets. Thus, for example, an executor would not be authorized to 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, a fiduciary would be required to send a request to the custodian, accompanied by a copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust.

Under the bill, custodians of digital assets would be immune from any liability for an act or omission done in good faith in compliance with the bill.

#### SPECIFIC SECTIONS OF THE BILL:

Section 1: Designates the bill as the “Uniform Fiduciary Access to Digital Assets Act.”

Section 2: Sets out definitions of terms. Among other definitions, this section of the bill defines the term “court” to mean the Probate Part of the Chancery Division of the Superior Court, and includes the Surrogate’s Court acting within the scope of its authority.

Section 3: Provides that the bill applies to a custodian if the user resides in this State or resided in this State at the time of the user’s death, and provides that the bill does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer’s business.

Section 4: Sets out procedures concerning the use of an online tool to designate disclosure or non-disclosure of the user’s digital assets.

Section 5: Establishes that the terms-of-service agreement

governing an online account applies to fiduciaries as well as users, and clarifies that a fiduciary or designated recipient would not have any new or expanded rights other than those held by the user. A “designated recipient” is a person chosen by the user, using an online tool made available by the custodian of an online account, to administer the user’s digital assets for that particular account.

Section 6: Gives the custodians of digital assets some discretion in determining disclosure of digital assets to fiduciaries and designated recipients. This section provides that a custodian may, for example, comply with a request for access to reset the password and access the user’s account. Under the bill, a custodian may also comply without giving access to a user’s account by simply giving a copy of all the user’s digital assets to the fiduciary or designated recipient. This section also allows the custodian to assess a reasonable administrative charge for the cost of disclosing digital assets.

With respect to disclosure, the custodian shall either: (1) grant a fiduciary or designated recipient full access to the account; (2) grant a fiduciary or designated recipient partial access; or (3) provide a fiduciary or designated recipient a copy in a record of any digital asset that the user could have accessed on the date the custodian received the request if the user were alive and had full capacity. Thus, the custodian would have discretion as to which method of disclosure to use, but would not have discretion to refuse disclosure.

Sections 7-14: Establishes the rights of personal representatives of an estate, guardians, agents acting pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different rules for the content of communications protected under federal privacy laws and for other types of digital assets.

Section 15: Provides that the legal duties imposed on 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. The section also provides that, except as otherwise provided in section 4 of the bill concerning online tools, a fiduciary’s or designated recipient’s authority with respect to a digital asset: would be subject to the applicable terms of service; would be subject to other applicable law, including copyright law; in the case of a fiduciary, would be limited by the scope of the fiduciary’s duties; and may not be used to impersonate the user. This section also authorizes a fiduciary to make a request to a custodian to terminate the user’s account and sets out the documentation that must accompany such request, such as a copy of the death certificate, court order, power of attorney, or trust.

Section 16: Requires the custodian to comply with a request from a fiduciary or designated recipient, within 60 days after receipt, concerning the disclosure of digital assets or termination of a user’s account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

This section also allows a custodian to deny a request from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any further lawful access to the account following the receipt of the termination request; this is intended to protect joint owners of the account.

Section 17: Provides that in applying and construing the bill, intended as a multistate uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Section 18: Provides that the bill modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. section 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. section 7003(b).

Section 19: Provides that the bill would take effect on the 90th day following enactment and would apply retroactively. It would encompass a fiduciary acting under a will or power of attorney executed before, on, or after the effective date of the bill; a personal representative acting for a decedent who died before, on, or after the effective date; a guardianship, whether the guardian was appointed before, on, or after the effective date; and a trustee acting under a trust created before, on, or after the effective date.

As amended and reported by the committee, this bill is identical to Senate Bill No. 2527, also amended and reported today by the committee.

#### COMMITTEE AMENDMENTS

- add a reference to “designated representative” in section 15 of the bill, so that a fiduciary’s *or designated recipient’s* authority with respect to a digital asset: would be subject to the applicable terms of service; would be subject to other applicable law, including copyright law; in the case of a fiduciary, would be limited by the scope of the fiduciary’s duties; and may not be used to impersonate the user.