



GENERAL STATUTES COMMISSION

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MEMORANDUM

To: Senate Committee on Judiciary I
From: General Statutes Commission
Re: SB 805 (Fiduciary Access to Digital Assets)
Date: May 25, 2016

General Comments

This bill contains the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADA) that was approved in 2015 by the Uniform Law Commission, with minor changes to conform to the court procedures, legal terminology, and statutory drafting style used in this State.

RUFADA was designed to address a growing problem caused by the increasing use of electronic formats for documents, accounts, pictures, memorabilia, communications, etc., that were formerly kept on paper or in some other tangible form. It is common for at least some of these documents, etc., to be stored as data on a computer server that is accessed via the Internet. Access is often password protected. Examples range from the trivial to things of major importance, including e-mail and e-mail attachments, text messages, photographs and recipes on a Facebook page, digital music, a Paypal account, business records stored "in the cloud," etc. RUFADA uses the term "digital assets" for a person's digital property and electronic communications and the term "custodian" for the companies that store those assets on their servers. Access to digital assets held by a custodian is usually governed by a terms-of-service agreement that may not address who has access if the person becomes incapacitated or dies. The result is a problem for both the custodian and the deceased or incapacitated person's family or other representatives, who have on occasion had difficulty in obtaining access to digital assets. RUFADA addresses this problem by providing procedures for disclosure of digital records to four types of fiduciaries: a personal representative of a decedent's estate, a trustee, a guardian for a minor or an incompetent person, and an attorney-in-fact. "Disclosure" includes obtaining full access, partial access, or copies of digital records.

Generally speaking, the fiduciary must send a request for disclosure of digital assets to the custodian, with a certified copy of the document granting fiduciary authority, for example, letters testamentary, and other specified information if requested by the custodian. The custodian has 60 days after receipt of all required information to comply with a request from a fiduciary to disclose digital assets or terminate an account. If the custodian does not comply, the fiduciary may seek a court order. A custodian is immune from liability for an act or omission done in good faith in compliance with the bill.

The bill makes conforming amendments to various sections of the General Statutes, authorizes the printing of official and drafters' comments, and is effective when it becomes law.

The major stakeholders, including Google and Facebook, participated in the development of RUFADA. Google and Facebook have informed the General Statutes Commission that they do not oppose this bill. The bill is supported by the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association.

Specific Comments

Part I establishes a new Chapter 36F of the General Statutes, consisting of §§ 36F-1 through 36F-18.

§ **36F-1** provides a short title (Revised Uniform Fiduciary Access to Digital Assets Act).

§ **36F-2** defines terms used in the Chapter, including the following key terms:

- User – A person that has an account with a custodian (i.e., account containing digital assets).
- Custodian – A person that carries, maintains, processes, receives, or stores a digital asset of a user.
- Digital asset – An electronic record in which an individual has a right or interest and does not include an underlying asset or liability unless the asset or liability is itself an electronic record.
- Designated recipient – A person named in a designation by a user to the custodian to administer digital assets of the user.
- Electronic communication – A particular type of digital asset that is subject to the privacy protections of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq. The term is defined in 18 U.S.C. § 2510(12) and includes e-mails, text messages, and any other electronic communication between private parties.
- Fiduciary – An original, additional, or successor personal representative, guardian, attorney-in-fact, or trustee.

The terms "guardian" and "ward" are used in preference to RUFADA's "conservator" and "protected person."

§ **36F-3** is an applicability provision. The Chapter applies to personal representatives, attorneys-in-fact, trustees, and guardians, regardless of when their authority became effective. It applies to custodians of digital assets of a user if the user resides in this State or resided in this State at the time of the user's death.

§ **36F-4** establishes the following three-tier priority system for determining the user's intent with respect to the disclosure or nondisclosure of digital assets:

- Top priority is given to a user's designation to the custodian of a representative to whom digital assets may be disclosed (a "designated recipient"). As long as the custodian allows a user to change a designation, the designation will override a contrary direction by the user in a will, trust, power of attorney, or other record.
- If a user does not make a designation with the custodian, legal effect is given to the user's directions as provided in the user's will, trust, power of attorney, or other record.
- If a user provides no other direction, the terms-of-service agreement governing the account will apply.

§ **36F-5** provides that the Chapter does not alter the custodian's or user's rights under a terms-of-service agreement to access and use of digital assets and does not give a fiduciary or designated recipient any rights other than those held by the user.

§ **36F-6** allows a custodian to:

- Grant full access to the user's account.
- Grant partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged.
- Provide a digital or paper copy of the digital assets.

A custodian may refuse to comply with a direction by a user, or a request by a fiduciary for partial disclosure if separating out only a part of the digital assets would impose an "undue" burden on the custodian. The custodian may, but is not required to, seek a court order in this event.

A custodian may charge a reasonable administrative fee for the cost of disclosing digital assets and is not required to disclose a digital asset deleted by the user.

§ **36F-7** addresses the disclosure of the content of electronic communications sent or received by a decedent. If the decedent consented to disclosure or a court orders disclosure, disclosure is required if the personal representative of the decedent's estate gives the custodian a written request for disclosure along with specified documents and certain other specified information if requested by the custodian.

§ **36F-8** addresses the disclosure of a decedent's other digital assets. Unless the decedent prohibited disclosure or a court directs otherwise, disclosure is required if the personal representative of the decedent's estate gives the custodian a written request for disclosure along with specified documents and certain other specified information if requested by the custodian.

§§ **36F-9** and **36F-10** address the disclosure to an attorney-in-fact of the content of electronic communications sent or received by a person who has executed a power of attorney (a "principal") and the principal's other digital assets in essentially the same manner as §§ 36F-7 and 36F-8.

§ **36F-11** requires a custodian to disclose digital assets of an account held in trust, including content of electronic communications, when the trustee is the original user of the account unless the trust instrument or a court order provide otherwise.

§§ **36F-12** and **36F-13** address the disclosure of content of electronic communications and other digital assets held in trust when the trustee is not an original user of an account in essentially the same manner as §§ 36F-7/36F-9 and 36F-8/36F-10.

§ **36F-14** addresses the disclosure of digital assets to a guardian of a ward. A custodian must disclose the catalogue of electronic communications (but not their content) sent or received by a ward and any digital asset in which the ward has a right or interest, if the guardian gives the custodian a written request for disclosure, a certified copy of a court order giving the guardian authority over the ward's digital assets, and certain other specified information if requested by the custodian.

In addition, a guardian with general authority to manage a ward's assets may ask the custodian of the ward's digital assets to suspend or terminate the ward's account for good cause. The request must be accompanied by a certified copy of the court order giving the guardian authority over the ward's property.

§ 36F-15 addresses the duty and authority of fiduciaries. Under this section:

- The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including the duties of care, loyalty, and confidentiality.
- A fiduciary has the right to access any digital asset that is not held by a custodian or subject to a terms-of-service agreement.
- A fiduciary acting within the scope of the fiduciary's duties is an authorized user for the purpose of applicable computer-fraud and unauthorized-computer-access laws.
- A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account.
- A fiduciary may request termination of a user's account

§ 36F-16 gives a custodian 60 days after receipt of all required information to comply with a request by a fiduciary or a designated recipient to disclose digital assets or terminate an account. If the custodian does not comply, the fiduciary or designated recipient may apply to the court for an order directing compliance. An order under this section must contain a finding that compliance would not violate the Stored Communications Act, 18 U.S.C. § 2702.

§ 36F-16 also allows a custodian to notify a user that a fiduciary has made a request for disclosure of digital assets or account termination and to deny a request if the custodian is aware of any lawful access to the account following receipt of the request.

This section also provides immunity to a custodian and its officers, employees, and agents from liability for an act or omission done in good faith in compliance with Chapter 36F.

§§ 36F-17 and 36F-18 are standard uniform act provisions relating to uniformity of application and to the federal E-SIGN act.

Part II makes conforming amendments to various sections of the General Statutes dealing with the powers of various fiduciaries. In addition, Section 2 amends G.S. 14-458 (Computer trespass; penalty) to provide that a person acting pursuant to Chapter 36F does not violate that section.

Part III authorizes the printing of official and drafters' comments and contains a severability and effective date provision.