Department of Legislative Services

Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

Senate Bill 429 (Senator Klausmeier)
Judicial Proceedings

Estates and Trusts - Maryland Fiduciary Access to Digital Assets Act

This bill establishes the Maryland Fiduciary Access to Digital Assets Act (MFADAA). The Act addresses fiduciaries' access to digital assets by specifying, among other things, the types of fiduciaries permitted access, the rights of fiduciaries, and procedures for fiduciaries to gain access to digital assets.

Fiscal Summary

State Effect: General fund revenues increase to the extent that a decedent's digital assets increase the value of a decedent's estate thereby increasing the amount of probate fees and inheritance taxes collected. However, general fund revenues from estate taxes decrease to the extent that inheritance tax collections increase, as inheritance tax paid is allowed as a credit against estate tax liability. Expenditures are not affected.

Local Effect: The bill is not expected to materially affect local finances or operations.

Small Business Effect: Minimal.

Analysis

Bill Summary: The bill vests fiduciaries with the authority to access, control, or copy digital assets and accounts. Under the bill, a fiduciary is a personal representative, a guardian, an agent acting pursuant to a power of attorney, a trustee, or an adviser. Specifically, a fiduciary is authorized, under certain circumstances and subject to specified limitations, to access (1) the content of an electronic communication sent or received by the decedent that the custodian is authorized to disclose under federal law; (2) any

catalogue of electronic communications sent or received by the decedent; and (3) any other digital asset in which at death the decedent had a right or interest.

The bill enables a fiduciary to "step into the shoes" of the account holder. When taking action concerning a digital asset, a fiduciary is bound by the same authorizations and limitations that bound the account holder before the incapacitation or death of the account holder. For the purposes of applicable privacy laws, the fiduciary acts with the consent of the account holder, which authorizes the custodian to divulge the content of electronic communications to the fiduciary. In addition, for the purpose of certain fraud, unauthorized computer access, and criminal laws, a fiduciary is considered an authorized user.

For the validity of a terms-of-service agreement that limits a fiduciary's access to an account holder's digital asset to continue after October 1, 2015, the account holder must make an affirmative act separate from the account holder's assent to a single terms-of-service agreement. Terms-of-service agreements, entered in to on or before October 1, 2015, that include a provision limiting a fiduciary's access to the digital asset of the account holder, are void as against the strong public policy of the State. Under such circumstances, a fiduciary's access under MFADAA does not violate the terms-of-service agreement even if the agreement requires notice of a change in the status of the account holder.

A "custodian" is a person that carries, maintains, processes, receives, or stores a digital asset of an account holder. A custodian must comply with a fiduciary's request in a record for access to, control of (the ability to move or delete), or a copy of a digital asset. The request must be accompanied by specified documents that verify the fiduciary's authority to make such a request. If the custodian fails to comply with a proper request within 60 days after receipt, the fiduciary may apply to the court for an order directing compliance.

MFADAA does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning a trust. A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with MFADAA. In applying and construing MFADAA, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the Uniform Fiduciary Access to Digital Assets Act (UFADAA). MFADAA modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, but does not modify, limit, or supersede certain subsections of federal law or authorize electronic delivery of any notices described under certain subsections of federal law.

MSFADAA applies to:

- a fiduciary or an agent acting under a will or power of attorney executed before, on, or after October 1, 2015;
- a personal representative acting for a decedent who died before, on, or after October 1, 2015;
- a guardianship proceeding, whether pending in a court or commenced before, on, or after October 1, 2015; and
- a trustee or an adviser acting under a trust created before, on, or after October 1, 2015.

Current Law/Background: No State law governs a fiduciary's access to digital assets.

The bill is a modified version of UFADAA drafted by the National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission (ULC)). Delaware is the only state to have enacted a version of UFADAA; however, as of February 18, 2015, varying versions of UFADAA have been introduced in 14 states in 2015 alone, excluding Maryland. A number of other states have enacted legislation addressing fiduciary access to the digital assets of a decedent, but most of these laws differ greatly.

The prefatory note to UFADAA states that the Act's goal is to remove barriers to a fiduciary's access to electronic records to leave unaffected other law, such as fiduciary, probate, trust, banking, investment securities, and agency law. ULC notes that laws regarding a fiduciary's right to access digital assets, at best, are vague and clouded by a number of federal and state privacy and computer hacking laws. ULC further notes that a 2011 survey revealed that American's value their digital assets, on average, at approximately $55,000.

State Revenues: The probate fees and inheritance taxes collected by the registers of wills that are not used for salaries and expenses of the registers of wills are deposited in the general fund. The amount of probate fees and inheritance taxes collected by the registers of wills is based on the value of a decedent's estate. To the extent that the inclusion of a decedent's digital assets in the valuation of a decedent's estate increases the value of the estate, probate fees and inheritance taxes collected by the registers of wills increase. However, estate tax revenues which are also paid into the general fund, decrease to the extent that inheritance tax collections increase, as inheritance tax paid is allowed as a credit against estate tax liability.

Additional Information

Prior Introductions: None.

Cross File: HB 531 (Delegate Kramer) - Health and Government Operations.

Information Source(s): Comptroller's Office; Department of Labor, Licensing, and Regulation; Judiciary (Administrative Office of the Courts); Register of Wills; Uniform Law Commission; Department of Legislative Services

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min/kdm

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