

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 507

(Delegate Kramer, *et al.*)

Health and Government Operations

Judicial Proceedings

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 the types of fiduciaries who are permitted access, the rights of fiduciaries, and the procedures for fiduciaries to gain access to digital assets. Among other things, the bill establishes rules for a user to modify an online terms-of-service agreement (TOS) for the purpose of allowing or restricting a fiduciary's or designated recipient's access to digital assets. It also specifies the types of digital assets that can be accessed by a fiduciary when a TOS does not address disclosure and/or when the user has not expressed any preference.

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, any revenue increase may be offset somewhat by a decrease in general fund revenues from estate taxes, as inheritance tax paid is allowed as a credit against estate tax liability.

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

Small Business Effect: Minimal.

Analysis

Bill Summary:

Definitions: “Account” is an arrangement under a TOS in which a custodian carries, maintains, processes, receives, or stores a digital asset of a user or provides goods or services to the user.

“Catalogue of electronic communications” is information that identifies (1) each person with whom a user has had an electronic communication; (2) the time and date of the communication; and (3) the electronic address of the person.

“Content of an electronic communication” means information concerning the substance or meaning of a communication that (1) has been sent or received by a user; (2) is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and (3) is not readily accessible to the public.

“Custodian” is an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, instrumentality or other legal entity who carries, maintains, processes, receives, or stores a digital asset of an account holder.

“Designated recipient” means a person chosen by a user using an online tool to administer the digital assets of the user.

“Digital asset” means an electronic record in which an individual has a right or interest; it does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

“Fiduciary” means an original, additional, or successor personal representative, guardian, agent, or trustee.

“Online tool” means an electronic service provided by a custodian that allows a user, in an agreement distinct from the TOS between the custodian and the user, to provide directions for disclosure or nondisclosure of digital assets to a third party.

“User” means a person who has an account with a custodian.

Authority of Fiduciaries or Designated Recipients to Access Digital Assets: The bill distinguishes between the *content* of electronic communications and a *catalogue or inventory* of digital assets and establishes rules under which fiduciaries or other designated recipients are able to access both. Generally, in the absence of a contrary provision in a

TOS or modification by a user, fiduciaries have access to a catalogue of electronic communications sent or received by a decedent and any other digital asset in which at death the decedent had a right or interest. However, a user's express consent is required via an online tool, a will, trust, power of attorney, or other record evidencing the user's consent for a fiduciary or designated recipient to access the *content* of any individual's electronic communications. These rules are subject to applicable federal law or, in the absence of any specific direction by the user, a TOS that prohibits fiduciary access to digital assets.

The bill enables a fiduciary to "step into the shoes" of the account holder. When taking action concerning a digital asset, a fiduciary or designated recipient is bound by the same authorizations and limitations that bound the account holder before the incapacitation or death of the account holder. Generally, unless a user specifically prohibits disclosure of digital assets, or a court order directs otherwise, a custodian must disclose, with appropriate authorization, at least a catalogue of electronic communications and other digital assets to the fiduciary or designated recipient. The content of electronic communications must also be disclosed by the custodian with proper authorization, as specified in the bill. In addition, for the purpose of specified fraud, unauthorized computer access, and criminal law provisions, a fiduciary is considered an authorized user.

User Disclosure Preferences: A user may use an online tool (examples include Facebook's Legacy Tool and Google's Inactive Account Manager) to direct a custodian to disclose or to refrain from disclosing some or all of the user's digital assets, including the content of electronic mail communications sent or received by the user. If the online tool allows modification or deletion of disclosure preferences at any time, this online method of modification supersedes any conflicting direction by an individual in a will, trust, power of attorney, or other record. If a user does not use an online tool to give direction regarding a user's disclosure preferences, then a will, trust, power of attorney, or other record supersedes any contrary provision in an online TOS. However, if the user is required to act affirmatively and distinctly from the usual assent to the TOS, then the relevant TOS provisions prevail. In cases where a TOS does not address or prohibit fiduciary access, and an individual has not given direction via an online tool, will, trust, power of attorney, or other record, the bill allows a fiduciary access to a catalog of electronic mail communication sent or received by the individual.

Custodian Rights and Duties: A custodian may, in its sole discretion:

- grant a fiduciary or designated recipient full access to a user's account;
- grant a fiduciary or designated recipient partial access to a user's account sufficient to perform the tasks with which the fiduciary or designated representative is charged; or

- provide a fiduciary or a designated representative a copy in a record of a digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive or had full capacity and access to the account.

A custodian must comply with a request to disclose digital assets or to terminate a user account from a fiduciary or a designated representative within 60 days. A custodian may assess reasonable fees and is not required to disclose a digital asset that was deleted by a user. A custodian is not required to disclose digital assets if a user directs or a fiduciary requests partial disclosure, and segregation of the digital asset imposes an undue burden on the custodian. If a custodian fails to comply with a disclosure or termination request, the fiduciary or designated representative may apply to a court for an order directing compliance. Such a court order must specify that compliance with the request is not a violation of the federal Electronic Communications Privacy Act. The bill lists specified filing requirements and procedures for guardians, personal representatives, agents, trustees, and other fiduciaries who seek disclosure of the digital assets that are held by custodians.

A custodian may notify a user that a request for disclosure of digital asset contents or for termination of an account was made, and may deny a request if the custodian is aware of a lawful access to the account following receipt of the fiduciary's request. A custodian may require a fiduciary or designated recipient to obtain a court order which declares that (1) an account belongs to the protected individual; (2) there is sufficient consent from the protected person; and (3) the order contains a specified finding required by an existing law. A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith to comply with MFADAA.

Fiduciary Rights and Duties: A fiduciary may also request a custodian to terminate a user's account by submitting a request for termination in writing, in either physical or electronic form. The request must be accompanied by (1) a copy of the death certificate, if the user is deceased and (2) a copy of the letters of administration of the personal representative or court order appointing a special administrator, power of attorney, or trust that grants the fiduciary authority over the account. If requested by a custodian, the fiduciary must also provide (1) a number, username, address or other unique subscriber or account identifier; (2) evidence linking the account to the user; or (3) a finding by a court that the user had a specific account with the custodian identifiable by the information specified or a unique identifier.

Application of the Act: MFADAA applies to:

- a fiduciary acting under a will or power of attorney executed before, on, or after October 1, 2016;
- a personal representative acting for a decedent who died before, on, or after October 1, 2016;

- a guardianship proceeding, whether pending in a court or commenced before, on, or after October 1, 2016;
- a trustee or an adviser acting under a trust created before, on, or after October 1, 2016; and
- a custodian, if the user resides in this State or resided in this State at the time of the user's death.

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.

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

The bill is based on revised version of the Uniform Fiduciary Access to Digital Assets Act (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. In 2016, different versions of the revised UFADAA have been introduced in at least 19 states, including Maryland. A number of other states, including Connecticut, Idaho, Indiana, Louisiana, Nevada, Oklahoma, Rhode Island, and Virginia, have enacted legislation addressing fiduciary access to the digital assets of a decedent, but most of these laws differ greatly from the revised UFADAA.

According to ULC, the revised version of UFADAA reflects clarifying changes since its introduction in 2015. The amendments made by ULC include language that is intended to preserve a TOS except to give effect to a user's express consent. The revised version is also intended to conform to the federal Electronic Communications Privacy Act by prohibiting default access to the content of electronic communications without the affirmative and express consent of an account holder.

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 into 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. Thus, 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: SB 429 of 2015, a bill that is substantially different, received an unfavorable report from the Senate Judicial Proceedings Committee. Its cross file, HB 531, received an unfavorable report from the House Health and Government Operations Committee.

Cross File: SB 239 (Senator Kelley) - Judicial Proceedings.

Information Source(s): Office of the Attorney General; Comptroller's Office; Judiciary (Administrative Office of the Courts); Register of Wills; National Conference of Commissioners on Uniform State Laws; Department of Legislative Services

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