

SB 147 – Revised Uniform Fiduciary Access to Digital Assets Act

By, Michael P. Panebianco

Currently, New Hampshire law does not expressly authorize fiduciaries to manage a person's digital assets as they can with the person's other, tangible, personal property. Recognizing this need, an effort was made two years ago by the Trust and Estate Law Section of the NH Bar Association to enact the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) in New Hampshire. At that time, it passed in the Senate but was never put to a vote in the House.

Those who are the driving force behind getting RUFADAA on the legislative calendar this year and all those who support it are hopeful it will get enacted this year. In February, RUFADAA (Senate Bill 147) was introduced and passed in the Senate.

If enacted in New Hampshire, RUFADAA will allow fiduciaries the ability to manage a person's "digital assets," which include digital property and electronic communications, such as photos, music, documents, and email. Companies that store digital assets on their computer servers are called "custodians" and the person who owns the account containing digital assets held by a custodian is called a "user." Under RUFADAA, a "fiduciary" includes an executor of a decedent's estate, a court appointed guardian of the estate, an agent under a power of attorney, a trustee, or any person so appointed by the court.

Access to digital assets is usually governed by a terms-of-service agreement between the custodian and the user, rather than by property law. This can create problems when the user dies or otherwise loses the ability to manage their digital assets. Ordinarily, when a person dies or is otherwise unable to manage their own affairs, a fiduciary will have the legal authority to manage that person's property and will have a duty to act in that person's best interest.



With this in mind, RUFADAA has two purposes: (1) to give fiduciaries legal authority to manage digital assets of the user in the same way they manage tangible assets and financial accounts (to the extent possible) and (2) to give custodians of digital assets legal authority to deal with the fiduciaries of their users, while respecting the user's reasonable expectation of privacy for personal communications.

RUFADAA accomplishes these purposes in various ways. One way is that, by default, a fiduciary will not have access to the content of a user's electronic communications without the user's express consent. The "content of electronic communications" includes the subject line and body of a user's email messages, text messages, and other messages between private parties.

Without such express consent, the fiduciary may have access to a catalogue of the user's electronic communications, which is essentially a list of communications showing the address of the sender and the recipient, and the date and time the message was sent. The ability to obtain a catalogue of electronic communications may be necessary for an executor to be able to compile a complete inventory of the decedent's assets. For example, the executor may learn that the decedent had a bank account or credit card that was otherwise unknown to the executor.

Another way is in providing the following order of priority in the event there are conflicting instructions from the user. The Uniform Law Commission's summary of RUFADAA describes the order of priority as follows (revised slightly for this article):

1. If the custodian provides an online tool or portal, separate from the general terms of service, that allows a user to give another person access to the user's digital assets or to direct the custodian to delete the user's digital assets, RUFADAA makes the user's instructions legally enforceable, regardless of what instructions the user may have provided in their will, power of attorney, or elsewhere.
2. If the custodian does not provide an online planning option, or if the user does not use the online option provided, the user may give legally enforceable direction for the disposition of digital assets in a will, trust, power of attorney, or other written record.
3. If the user has not provided any direction, either online or in a traditional estate plan, the terms of service for the user's account will determine whether a fiduciary may access the user's digital assets. If the terms of service do not address fiduciary access, the default rules of RUFADAA will apply.

Although attorneys have been making provisions in estate planning documents to account for digital assets even without RUFADAA being the law in New Hampshire, if RUFADAA is not enacted, there is no guarantee that custodians of digital assets will honor such provisions in the user's documents.

RUFADAA has been enacted in the U.S. Virgin Islands and 41 states, including neighboring states, Vermont and Maine, and has been endorsed by AARP, the Center for Democracy and Technology, Facebook, Google, and the National Academy of Elder Law Attorneys. Hopefully, New Hampshire will be next.

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