

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 1458 (Allen)
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Fiscal: No
Urgency: No
AM

SUBJECT

The Revised Uniform Fiduciary Access to Digital Assets Act

DIGEST

This bill expands the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) to additionally apply to a fiduciary acting as a conservator appointed by the court to manage the estate of a living individual or an agent acting as an attorney-in-fact who is granted authority under a durable or nondurable power of attorney, as provided.

EXECUTIVE SUMMARY

In 2016, the Legislature enacted RUFADAA to establish procedures for a decedent's personal representative or trustee to obtain digital assets and electronic information from the custodian of those assets and information for the purpose of administering the estate or trust. (AB 691 (Calderon, Ch. 551, Stats 2016.) and SB 873 (Beall, 2016, Ch. 585; Stats. 2016.)) This bill seeks to expand RUFADAA to additionally apply to a conservator appointed by a court to manage the estate of a living individual and to an attorney-in-fact granted authority under a durable or nondurable power of attorney. The bill is sponsored by the California Lawyers Association, Trusts and Estates Section Executive Committee (TEXCOM). The Committee has received no timely support or opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes RUFADAA to specify rules for the disclosure of electronic communications from a custodian of a person's digital assets (custodian) to the personal representative of the estate of a deceased user (representative) or trustee of

the deceased user's trust (trustee) for the purpose of administering the estate or trust, as provided. (Prob. Code § 870 et. seq.¹)

- 2) Authorizes a person to use an online tool to give directions to the custodian of their digital assets regarding the disclosure of those assets.
- 3) Authorizes the custodian, in its sole discretion, to do any of the following when disclosing the digital assets of a user:
 - a) grant the fiduciary or designated recipient full access to the user's account;
 - b) grant the fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; and
 - c) provide the fiduciary or designated recipient with a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account. (§ 875(a).)
- 4) Authorizes a custodian to assess a reasonable administrative charge for the cost of disclosing digital assets and would not require a custodian to disclose a digital asset deleted by a user. (§ 875(b) & (c).)
- 5) Provides that if a user directs or a fiduciary or designated recipient requests a custodian to disclose some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. (§ 875(d).)
- 6) Authorizes the custodian, fiduciary, or designated recipient to petition the court for an order, as specified, if the custodian believes the direction or request imposes an undue burden. (*Ibid.*)
- 7) Specifies that, if a deceased user consented to or a court directs disclosure of the content of electronic communications of the user, the custodian must disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the personal representative gives to the custodian specified forms of documentation, including, among other things:
 - a) a written request for disclosure in physical or electronic;
 - b) a certified copy of the user's death certificate;
 - c) a certified copy of the letter of appointment of the representative, a small-estate affidavit, or a court order; and
 - d) a certified copy of the user's will, trust, or other record evidencing the user's consent to disclosure, unless the user provided direction using an online tool. (§ 876.)

¹ All further references are to the Probate Code unless otherwise specified.

- 8) Provides that, unless otherwise ordered by the court, directed by the user, or provided in a trust, the custodian must disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives to the custodian specified forms of documentation. (§ 878.)
- 9) Specifies that, unless the user prohibited disclosure of digital assets or the court directs otherwise, the custodian must disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the personal representative gives to the custodian specified documentation, including, among other things:
 - a) a written request for disclosure;
 - b) a certified copy of the user's death certificate; and
 - c) a certified copy of the letter of appointment of the representative. (§ 877.)
- 10) Provides that, unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian must disclose, to a trustee that is not an original user of an account, the catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the settlor of the trust is deceased and the trustee gives to the custodian specified documentation. (§ 879.)
- 11) Provides that the legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including all of the following:
 - a) the duty of care;
 - b) the duty of loyalty; and
 - c) the duty of confidentiality. (§ 880(a).)
- 12) Provides that a fiduciary with authority over the property of a decedent or settlor has the right of access to any digital asset in which the decedent or settlor had a right or interest, as specified. (§880(c).)
- 13) Requires a custodian, not later than 60 days after receipt of the information required, as specified, to comply with a request from a fiduciary or designated recipient to disclose digital assets or terminate an account. Further provides that if the custodian fails to comply with a request, the fiduciary or designated recipient may apply to the court for an order directing compliance. (§ 881(a).)
- 14) Makes disclosure of the contents of the deceased user's or settlor's account to a fiduciary of the deceased user or settlor subject to the same license, restrictions,

terms of service, and legal obligations, including copyright law, that applied to the deceased user or settlor. (§ 883.)

- 15) Provides that a custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith and in compliance with RUFADAA, but that this immunity does not apply in a case of gross negligence or willful or wanton misconduct of the custodian or its officers, employees, or agents. (§ 881(f).)

This bill:

- 1) Expands the definition of fiduciary under RUFADA to include a conservator or agent appointed before, on, or after January 1, 2025.
 - a) Defines “agent” as an attorney-in-fact granted authority under a durable or nondurable power of attorney.
 - b) Defines “conservator” as a person appointed by a court to manage the estate of a living individual. Conservator includes a limited conservator.
 - c) Defines “conservatee” as an individual for whom a conservator has been appointed.
 - d) “Defines “principal” as an individual who grants authority to an agent in a power of attorney.

- 2) Specifies that, to the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal, and unless directed otherwise by the principal or the court, a custodian must disclose the content of electronic communications to the agent if the agent gives the custodian all of the following:
 - a) a written request for disclosure in physical or electronic form;
 - b) an original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;
 - c) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
 - d) if requested by the custodian either: (i) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal’s account, or (ii) evidence linking the account to the principal.

- 3) Specifies that, unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian must disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian all of the following:
 - a) a written request for disclosure in physical or electronic form;

- b) an original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;
 - c) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
 - d) if requested by the custodian either: (i) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account, or (ii) evidence linking the account to the principal.
- 4) Authorizes a court to grant a conservator access to digital assets of a conservatee after an opportunity for a hearing.
- 5) Specifies that, unless otherwise ordered by the court or directed by the user, a custodian must disclose to a conservator the catalogue of electronic communications sent or received by a conservatee and digital assets, other than the content of electronic communications, in which the conservatee has a right or interest if the conservator gives the custodian all of the following:
- a) a written request for disclosure in physical or electronic form;
 - b) a certified copy of the court order that gives the conservator authority over the digital assets of the conservatee; and
 - c) if requested by the custodian either: (i) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account, or (ii) evidence linking the account to the principal.
- 6) Authorizes a conservator with general authority to manage the assets of a conservatee to request a custodian of the digital assets of the conservatee to suspend an account of the conservatee for good cause.
- a) A request made under this provision must be accompanied by a certified copy of the court order giving the conservator authority over the conservatee's property.

COMMENTS

1. Stated need for the bill

The author writes:

SB 1458 brings California's current enacted version of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) closer to the provisions recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The purpose of RUFADAA was to 1) give fiduciaries the legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts, to the extent possible, and 2) give custodians of digital assets and electronic communications legal authority to deal with the fiduciaries of their users, while respecting the user's reasonable expectation

of privacy for personal communications. As approved by the NCCUSL, the revised UFADAA addressed four different types of fiduciaries: personal representatives of decedents' estates, conservators for protected persons, agents acting under a power of attorney, and trustees. However, as California enacted its version of the law, it excluded agents acting under a power of attorney or conservators of the estate – lifetime fiduciaries. This exclusion has limited those fiduciaries from being able to fulfill their duties, ultimately causing a detriment to the individuals benefitting from the fiduciary relationship. SB 1458 would fill the gap in the law and align California with the 47 other states that have enacted the revised UFADAA with lifetime fiduciaries included.

2. This bill would expand RUFADAA to include authority for an agent acting under a power of attorney or a conservator to access electronic records of a principal or conservatee

In July 2014, the NCCUSL approved the Uniform Fiduciary Access to Digital Assets Act (UFADAA) which was recommended for enactment in all states with the goal of removing barriers to a fiduciary's access to electronic records while leaving unaffected other state laws, such as fiduciary, probate, trust, banking, investment, securities, and agency law. Additional clarifications were made to UFADAA to address the application of federal privacy laws and give legal effect to an account holder's instructions for the disposition of digital assets. In 2016 California enacted RUFADAA, which was a paired down version of the revised UFADAA. California's statute granted authority to access electronic records of a deceased person by a trustee or personal representative of the estate; however, it did not grant authority for an agent acting under a power of attorney or a conservator to access electronic records as was included in the revised UFADAA.

RUFADAA was established with a three-tier priority system for determining the user's intent for disclosure of their electronic communications. RUFADAA grants first priority, of authorization for disclosure pursuant to the user's designation through an online tool. (§ 873.) Next, a user can provide directions in an estate plan for the disposition of the user's digital assets, which would then allow a fiduciary to be able to rely on the testamentary document containing these disclosure instructions (i.e a will or trust). Lastly, if a user did not provide any direction regarding disclosure of digital assets, the terms-of-service governing the account would apply. If the terms-of-service do not address fiduciary access to digital assets, the default rules provided in RUFADAA would apply.

This bill seeks to expand RUFADAA by including both: (1) an agent acting under an attorney-in-fact granted authority under a durable or nondurable power of attorney by a principal; and (2) a conservator appointed by a court to manage the estate of a living individual (conservatee), including a limited conservator. These provisions were in the revised UFADAA. The author states that this bill is needed so that fiduciaries acting in

the capacity of an agent or conservator can access electronic records of a principal or conservatee in order to fulfill their fiduciary duties.

This bill provides specific authority and procedures for what documentation an agent and conservator must provide to a custodian in order to gain authority over the content of electronic communications sent or received by a principal or conservatee. In the case of an agent, the agent must provide this information under penalty of perjury. A conservator must first seek permission from the court before seeking access to a conservatee's electronic records. All existing protections for a user under RUFADAA still apply, such as the right to prohibit disclosure in a testamentary document, power of attorney, or other document of record and the right to use an online tool to direct disclosure of the user's electronic records.

3. Statements in support

TEXCOM, the sponsor of the bill, writes in support stating:

In 2015, the Uniform Law Commission (ULC) approved RUFADAA as a uniform act that modernized fiduciary law for the Internet age. A generation ago, physical mail was delivered, photos were kept in albums, documents were kept in file cabinets, and deposits were kept at a local bank. For most people today, at least some of their property and communications are stored as data on a computer server and accessed via the Internet. Collectively, a person's digital property and electronic communications are referred to as "digital assets," and the companies that store those assets on their servers are called "custodians." Fiduciaries are those appointed to manage a person's property when they die or lose the capacity to manage it themselves.

RUFADAA provides legal authority for fiduciaries to manage digital assets in the same way they manage tangible assets and financial accounts. It was drafted to ensure that fiduciaries would be able to fulfill their fiduciary duties concerning digital assets while still complying with federal privacy laws (namely, the Electronic Communications Privacy Act of 1986 or "ECPA") and criminal anti-hacking laws (such as the Computer Fraud and Abuse Act of 1986 and analogous state laws). RUFADAA balances the needs of fiduciaries, the privacy of account holders, and the legal obligations of the custodians.

As approved by the ULC, RUFADAA addressed four different types of fiduciaries: personal representatives of decedents' estates, conservators for protected persons, agents acting under a power of attorney, and trustees. Forty-five states, the District of Columbia, and the U.S. Virgin Islands have enacted RUFADAA in full. California is the only state that enacted RUFADAA in part. When California enacted RUFADAA in 2016, it only applied to fiduciaries acting after the death of the person for whom they are a fiduciary. Because RUFADAA as enacted in California did not

apply to fiduciaries acting during an individual's life, those fiduciaries are limited from being able to do their jobs, ultimately causing a detriment to the individuals benefitting from the fiduciary relationship.

SB 1458 amends RUFADAA by adding agents acting under a power of attorney and conservators of the estate to the statutory scheme, giving these fiduciaries the legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts. These fiduciaries would be subject to the same rights, duties, and obligations as other fiduciaries under the existing statutory scheme, fully consistent with RUFADAA's intent.

SUPPORT

Trusts and Estates Section of the California Lawyers Association (sponsor)

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 873 (Beall, Ch. 585, Stats. 2016) specified that the immunity granted under RUFADA to custodian and its officers, employees, and agents for an act or omission done in good faith and in compliance with RUFADA does not apply in a case of f gross negligence or willful or wanton misconduct.

AB 691 (Calderon, Ch. 551, Stats. 2016) enacted RUFADA to establish procedures for a decedent's personal representative or trustee to obtain digital assets and electronic information from the custodian of those assets and information for the purpose of administering the estate or trust.

SB 849 (Anderson, 2014) would have authorized a decedent's personal representative to request, and would have authorized an electronic communication service or remote computer service to provide, access to the electronic mail account of a decedent or to copies of the content of the account, subject to any applicable service agreement. SB 849 was held in this Committee after testimony was taken.
