

ASSEMBLY, No. 4666

STATE OF NEW JERSEY 216th LEGISLATURE

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Sponsored by:

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District 6 (Burlington and Camden)

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SYNOPSIS

“Uniform Fiduciary Access to Digital Assets Act”; authorizes access by executor, agent, guardian, or trustee to digital property and electronic communications of decedent, principal, incapacitated person, or trust creator.

CURRENT VERSION OF TEXT

As introduced.



1 AN ACT concerning access by fiduciaries to digital assets and
2 supplementing Title 3B of the New Jersey Statutes.

3
4 **BE IT ENACTED** *by the Senate and General Assembly of the State*
5 *of New Jersey:*

6
7 1. Short Title. This act shall be known and may be cited as the
8 “Uniform Fiduciary Access to Digital Assets Act.”

9
10 2. Definitions. As used in this act:

11 “Account holder” means a person that has entered into a terms of
12 service agreement with a custodian of digital assets or a fiduciary
13 for the person.

14 “Agent” means an attorney in fact granted authority under a
15 durable or nondurable power of attorney.

16 “Carries” means engages in the transmission of electronic
17 communications.

18 “Catalogue of electronic communications” means information
19 that identifies each person with which an account holder has had an
20 electronic communication, the time and date of the communication,
21 and the electronic address of the person.

22 “Content of an electronic communication” means information
23 concerning the substance or meaning of the communication which:

24 (a) has been sent or received by an account holder;

25 (b) is in electronic storage by a custodian of digital assets
26 providing an electronic communication service to the public or is
27 carried or maintained by a custodian of digital assets providing a
28 remote computing service to the public; and

29 (c) is not readily accessible to the public.

30 “Court” means the Probate Part of the Chancery Division of the
31 Superior Court.

32 “Custodian of digital assets” means a person that carries,
33 maintains, processes, receives, or stores a digital asset of an account
34 holder.

35 “Digital asset” means a record that is electronic. The term does
36 not include an underlying asset or liability unless the asset or
37 liability is itself a record that is electronic.

38 “Electronic” means relating to technology having electrical,
39 digital, magnetic, wireless, optical, electromagnetic, or similar
40 capabilities.

41 “Electronic communication” has the same meaning as the
42 definition in 18 U.S.C. s. 2510(12).

43 “Electronic communication service” means a custodian of digital
44 assets that provides to an account holder the ability to send or
45 receive an electronic communication.

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

1 “Guardian” means a person appointed by the court to make
2 decisions regarding the property of an incapacitated adult, including
3 a person who has qualified as a guardian of an incapacitated person
4 pursuant to court appointment in accordance with N.J.S.3B:12-1 et
5 seq. or its equivalent in a state other than New Jersey.

6 “Governing instrument” means a will, trust, instrument creating a
7 power of attorney, or other dispositive or nominative instrument.

8 “Information” means data, text, images, videos, sounds, codes,
9 computer programs, software, databases, or the like.

10 “Person” means an individual, estate, business or nonprofit
11 entity, public corporation, government or governmental subdivision,
12 agency, or instrumentality, or other legal entity.

13 “Personal representative” means an executor, administrator,
14 special administrator, or person that performs substantially the same
15 function under the law of this State other than this act.

16 “Power of attorney” means a written instrument by which an
17 individual known as the principal authorizes another individual or
18 individuals or a qualified bank within the meaning of section 28 of
19 P.L.1948, c.67, s.28 (C.17:9A-28) known as the attorney-in-fact to
20 perform specified acts on behalf of the principal as the principal's
21 agent.

22 “Principal” means an individual, at least 18 years of age, who, in
23 a power of attorney, authorizes an agent to act.

24 “Incapacitated person” means an individual for whom a guardian
25 has been appointed. The term includes an individual for whom an
26 application for the appointment of a guardian is pending.

27 “Record” means information that is inscribed on a tangible
28 medium or that is stored in an electronic or other medium and is
29 retrievable in perceivable form.

30 “Remote computing service” means a custodian of digital assets
31 that provides to an account holder computer processing services or
32 the storage of digital assets by means of an electronic
33 communications system, as defined in 18 U.S.C. s.2510(14).

34 “Terms of service agreement” means an agreement that controls
35 the relationship between an account holder and a custodian of
36 digital assets.

37 “Trustee” means a fiduciary with legal title to property pursuant
38 to an agreement or declaration that creates a beneficial interest in
39 another. “Trustee” includes an original, additional or successor
40 trustee, whether or not appointed or confirmed by court.

41 “Will” means the last will and testament of a testator or testatrix
42 and includes any codicil and any testamentary instrument that
43 merely appoints an executor, revokes or revises another will,
44 nominates a guardian, or expressly excludes or limits the right of a
45 person or class to succeed to property of the decedent passing by
46 intestate succession.

1 3. Applicability.

2 a. This act applies to:

3 (1) a fiduciary or agent acting under a will or power of attorney
4 executed before, on, or after the effective date of this act;

5 (2) a personal representative acting for a decedent who died
6 before, on, or after the effective date of this act;

7 (3) a guardianship, whether the proceeding creating the
8 guardianship is pending in a court or commenced before, on, or
9 after the effective date of this act; and

10 (4) a trustee acting under a trust created before, on, or after the
11 effective date of this act.

12 b. This act does not apply to a digital asset of an employer used
13 by an employee in the ordinary course of the employer's business.

14

15 4. Access by Personal Representative to Digital Asset of
16 Decedent. Subject to subsection b. of section 8 of this act and
17 unless otherwise ordered by the court or provided in the will of a
18 decedent, the personal representative of the decedent has the right
19 to access:

20 (a) the content of an electronic communication that the
21 custodian of digital assets is permitted to disclose under the
22 Electronic Communications Privacy Act, 18 U.S.C. s.2702(b);

23 (b) any catalogue of electronic communications sent or received
24 by the decedent; and

25 (c) any other digital asset in which at death the decedent had a
26 right or interest.

27

28 5. Access by Guardian to Digital Asset of Incapacitated Person.

29 Subject to subsection b. of section 8 of this act, the court, after
30 an opportunity for a hearing pursuant to N.J.S.3B:12-1 et al. or
31 N.J.S.3B:12-2, may grant a guardian the right to access:

32 (1) the content of an electronic communication that the
33 custodian of digital assets is permitted to disclose under the
34 Electronic Communications Privacy Act, 18 U.S.C. s.2702(b);

35 (2) any catalogue of electronic communications sent or received
36 by the incapacitated person; and

37 (3) any other digital asset in which the incapacitated person has
38 a right or interest.

39

40 6. Access by Agent to Digital Asset of Principal.

41 a. To the extent a power of attorney expressly grants an agent
42 authority over the content of an electronic communication of the
43 principal and subject to subsection b. of section 8 of this act, the
44 agent has the right to access the content of an electronic
45 communication that the custodian of digital assets is permitted to
46 disclose under the Electronic Communications Privacy Act, 18
47 U.S.C. s.2702(b).

1 b. Subject to subsection b. of section 8 of this act and unless
2 otherwise ordered by the court or provided by a power of attorney,
3 an agent has the right to access:

4 (1) any catalogue of electronic communications sent or received
5 by the principal; and

6 (2) any other digital asset in which the principal has a right or
7 interest.

8

9 7. Access by Trustee to Digital Asset.

10 a. Subject to subsection b. of section 8 of this act and unless
11 otherwise ordered by a court of competent jurisdiction or provided
12 in a trust, a trustee that is an original account holder has the right to
13 access any digital asset held in trust, including any catalogue of
14 electronic communications of the trustee and the content of an
15 electronic communication.

16 b. Subject to subsection b. of section 8 of this act and unless
17 otherwise ordered by a court of competent jurisdiction or provided
18 in a trust, a trustee that is not an original account holder has the
19 right to access:

20 (1) the content of an electronic communication that the
21 custodian of digital assets is permitted to disclose under the
22 Electronic Communications Privacy Act, 18 U.S.C. s.2702(b);

23 (2) any catalogue of electronic communications sent or received
24 by the original or any successor account holder; and

25 (3) any other digital asset in which the original or any successor
26 account holder has a right or interest.

27

28 8. Fiduciary Authority.

29 a. A fiduciary that is an account holder or has the right under
30 this act to access a digital asset of an account holder:

31 (1) subject to the terms of service agreement, copyright law, and
32 other applicable law, may take any action concerning the asset to
33 the extent of the account holder's authority and the fiduciary's
34 power under the law of this State other than this act;

35 (2) has, for the purpose of applicable electronic privacy laws,
36 the lawful consent of the account holder for the custodian of digital
37 assets to divulge the content of an electronic communication to the
38 fiduciary; and

39 (3) is, for the purpose of applicable computer fraud and
40 unauthorized computer access laws, including but not limited to the
41 provisions of P.L.1984, c.184 (C.2C:20-23 et seq.), an authorized
42 user.

43 b. Unless an account holder, after the effective date of this act,
44 agrees to a provision in a terms of service agreement that limits a
45 fiduciary's access to a digital asset of the account holder by an
46 affirmative act separate from the account holder's assent to other
47 provisions of the agreement:

1 (1) the provision is void as against the strong public policy of
2 this State; and

3 (2) the fiduciary's access under this act to a digital asset does
4 not violate the terms of service agreement even if the agreement
5 requires notice of a change in the account holder's status.

6 c. A choice of law provision in a terms of service agreement is
7 unenforceable against a fiduciary acting under this act to the extent
8 the provision designates law that enforces a limitation on a
9 fiduciary's access to a digital asset, and the limitation is void under
10 subsection b. of this section

11 d. As to tangible personal property capable of receiving,
12 storing, processing, or sending a digital asset, a fiduciary with
13 authority over the property of a decedent, incapacitated person,
14 principal, or settlor:

15 (1) has the right to access the property and any digital asset
16 stored in it; and

17 (2) is an authorized user for purposes of any applicable
18 computer fraud and unauthorized computer access laws, including
19 but not limited to the provisions of P.L.1984, c.184 (C.2C:20-23 et
20 seq.)

21

22 9. Compliance.

23 a. If a fiduciary with a right under this act to access a digital
24 asset of an account holder complies with subsection b. of this
25 section, the custodian of digital assets shall comply with the
26 fiduciary's request in a record for:

27 (1) access to the asset;

28 (2) control of the asset; and

29 (3) a copy of the asset to the extent permitted by copyright law.

30 b. If a request under subsection a. of this section is made by:

31 (1) a personal representative with the right of access under
32 section 4 of this act, the request must be accompanied by a certified
33 copy of the certificate or court order evidencing the appointment of
34 the personal representative;

35 (2) a guardian with the right of access under section 5 of this
36 act, the request must be accompanied by a certified copy of the
37 court order that gives the guardian authority over the digital asset;

38 (3) an agent with the right of access under section 6 of this act,
39 the request must be accompanied by an original or a copy of the
40 power of attorney that authorizes the agent to exercise authority
41 over the digital asset and a certification of the agent, under penalty
42 of perjury, that the power of attorney is in effect; and

43 (4) a trustee with the right of access under section 7 of this act,
44 the request must be accompanied by a certified copy of the trust
45 instrument, or a certification of the trust under subsection d. of this
46 section.

47 c. A custodian of digital assets shall comply with a request
48 made under subsection a. of this section not later than 60 days after

1 receipt. If the custodian of digital assets fails to comply, the
2 fiduciary may apply to the court for an order directing compliance.

3 d. Instead of furnishing a copy of the trust instrument under
4 paragraph (4) of subsection b. of this section, the trustee may
5 provide a certification of trust. The certification:

6 (1) must contain the following information:

7 (a) that the trust exists and the date the trust instrument was
8 executed;

9 (b) the identity of the settlor;

10 (c) the identity and address of the trustee;

11 (d) that there is nothing inconsistent in the trust with respect to
12 the trustee's powers over digital assets;

13 (e) whether the trust is revocable and the identity of any person
14 holding a power to revoke the trust;

15 (f) whether a co-trustee has authority to sign or otherwise
16 authenticate; and

17 (g) whether all or fewer than all co-trustees are required to
18 exercise powers of the trustee;

19 (2) must be signed or otherwise authenticated by a trustee;

20 (3) must state that the trust has not been revoked, modified, or
21 amended in a manner that would cause the representations
22 contained in the certification of trust to be incorrect; and

23 (4) need not contain the dispositive terms of the trust.

24 e. A custodian of digital assets that receives a certification
25 under subsection d. of this section may require the trustee to
26 provide copies of excerpts from the original trust instrument and
27 later amendments designating the trustee and conferring on the
28 trustee the power to act in the pending transaction.

29 f. A custodian of digital assets that acts in reliance on a
30 certification under subsection d. of this section without knowledge
31 that the representations contained in it are incorrect shall not be
32 liable to any person for so acting and may assume without inquiry
33 the existence of facts stated in the certification.

34 g. A person that in good faith enters into a transaction in
35 reliance on a certification under subsection d. of this section may
36 enforce the transaction against the trust property as if the
37 representations contained in the certification were correct.

38 h. A person that demands the trust instrument in addition to a
39 certification under subsection d. of this section or excerpts under
40 subsection e. of this section is liable for damages, including
41 attorneys' fees, if the court determines that the person did not act in
42 good faith in demanding the instrument.

43 i. This section does not limit the right of a person to obtain a
44 copy of a trust instrument in a judicial proceeding concerning the
45 trust.

46

47 10. a. Immunity of Custodian of Digital Assets. A custodian of
48 digital assets and its officers, employees, and agents shall be

1 immune from liability for an act or omission done in good faith in
2 compliance with this act.

3 b. A custodian of digital assets and its officers, employees, and
4 agents shall be immune from liability for accidental destruction by
5 the custodian of any digital asset subject to this act.

6
7 11. Uniformity of Application and Construction. In applying
8 and construing this uniform act, consideration must be given to the
9 need to promote uniformity of the law with respect to its subject
10 matter among states that enact it.

11
12 12. Relation to Electronic Signatures in Global and National
13 Commerce Act. This act modifies, limits, or supersedes the
14 Electronic Signatures in Global and National Commerce Act, 15
15 U.S.C. Section 7001 et seq., but does not modify, limit, or
16 supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
17 authorize electronic delivery of any of the notices described in
18 Section 103(b) of that act, 15 U.S.C. Section 7003(b).

19
20 13. This act shall take effect on the 90th day following enactment
21 and shall be applicable as provided in section 3 of
22 P.L. , c. (C.) (pending before the Legislature as this bill).

23 24 25 STATEMENT

26
27 This bill would enact the “Uniform Fiduciary Access to Digital
28 Assets Act” (“UFADAA”). The bill authorizes access by an executor,
29 guardian, agent, or trustee to digital property and electronic
30 communications of a decedent, incapacitated person, principal, or
31 trust creator. The intent of the UFADAA is to vest fiduciaries with
32 the authority to access, control, or copy digital assets, while
33 respecting the privacy and intent of the account holder. UFADAA
34 was promulgated by the Uniform Law Commission in July 2014.

35 This uniform law address four types of fiduciaries: (1) executors
36 of a deceased person’s estate; (2) guardians for an incapacitated
37 person; (3) agents acting under a power of attorney; and (4) trustees
38 of a trust.

39 The act is designed to provide fiduciaries with access to digital
40 assets without changing the ownership of the digital assets. The act
41 defines “digital asset” as “a record that is electronic” and specifies
42 that “digital asset” does not include an underlying asset or liability
43 unless the asset or liability is itself a record that is electronic.

44 Sections 1 and 3 of the bill set out the act’s title, definitions, and
45 general provisions, including those relating to the scope of the
46 fiduciary’s authority.

47 Section 3 governs applicability, clarifying the scope of the act
48 and the fiduciaries who have access to digital assets under

1 UFADAA. This section specifies that the act does not apply to the
2 digital assets of an employer used by an employee during the
3 ordinary course of business.

4 Sections 4 through 7 establish the right of access by personal
5 representatives (executors), guardians, agents acting pursuant to a
6 power of attorney, and trustees. Each of these fiduciaries is subject
7 to different opt-in and default rules based on the presumed intent of
8 the account holder and the applicability of other State and federal
9 laws. A personal representative is presumed to have access to all of
10 the decedent's digital assets unless that is contrary to the decedent's
11 expressed intent or to other applicable law. A guardian for an
12 incapacitated person may access digital assets pursuant to a court
13 order. An agent acting pursuant to a power of attorney is presumed
14 to have access to all of a principal's digital assets not subject to the
15 protections of other applicable law; if another law protects the asset,
16 then the power of attorney must explicitly grant access. And a
17 trustee may access any digital asset held by the trust unless that is
18 contrary to the terms of the trust or to other applicable law.

19 Section 8 contains general provisions relating to the rights of the
20 fiduciary to access digital assets.

21 Section 9 addresses compliance by the custodian of digital assets
22 (the person or entity that carries, maintains, processes, receives, or
23 stores a digital asset of an account holder). This section provides
24 that the custodian must comply with a request for access to and
25 control of a digital asset and, to the extent permitted by copyright
26 law, a copy of the digital asset, within 60 days of receipt of the
27 request. If the custodian fails to comply, the fiduciary may apply to
28 the court for an order directing compliance.

29 Section 10 grants immunity from liability to custodians for an act
30 or omission done in good faith in compliance with the act. The
31 section also grants immunity from liability for accidental
32 destruction by the custodian of any digital asset subject to the act.

33 Section 11 provides that in applying and construing this uniform
34 act, consideration must be given to the need to promote uniformity
35 of the law with respect to its subject matter among states that enact
36 it.

37 Section 12 sets out the act's relation to the federal Electronic
38 Signatures in Global and National Commerce Act. This section
39 provides that the act modifies, limits, or supersedes the Electronic
40 Signatures in Global and National Commerce Act, 15 U.S.C.
41 Section 7001 et seq., but does not modify, limit, or supersede
42 Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
43 electronic delivery of any of the notices described in Section 103(b)
44 of that act, 15 U.S.C. Section 7003(b).

45 Section 13 provides that the act will take effect on the 90th day
46 following enactment and would be applicable as provided in section
47 3 of the act. Section 3 provides that the act would apply
48 retroactively to encompass:

- 1 (1) a fiduciary or agent acting under a will or power of attorney
- 2 executed before, on, or after the effective date;
- 3 (2) a personal representative acting for a decedent who died
- 4 before, on, or after the effective date;
- 5 (3) a guardianship, whether the proceeding creating the
- 6 guardianship is pending in a court or commenced before, on, or
- 7 after the effective date; and
- 8 (4) a trustee acting under a trust created before, on, or after the
- 9 effective date.