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Electronic Commerce & Law Report™

Outlook on Decedents' Digital Assets Law: Suzanne Brown Walsh, Murtha Cullina LLP

The Uniform Fiduciary Access to Digital Assets Act (UFADAA) is a state-law proposal that would extend a fiduciary's existing authority over decedents' tangible assets to include their digital assets, such as e-mails, text messages and online accounts. Initially approved in 2014 by the Uniform Law Commission, the UFADAA has not yet been enacted by any state. It was substantially revised in 2015.

Bloomberg BNA's Alexis Kramer posed questions to Suzanne Brown Walsh, a partner at Murtha Cullina LLP in Hartford, Conn. and the chair of the UFADAA drafting committee, regarding previous setbacks of the act and whether state enactments are on the horizon.

BLOOMBERG BNA: What is your professional background?

Suzanne Brown Walsh: I am a partner at Murtha Cullina LLP in Hartford, Conn., and have been a trusts and estates lawyer in private practice for almost 30 years. I have been one of Connecticut's Uniform Law Commissioners since 2005.

As a Uniform Law Commissioner, I was involved in the drafting of the Uniform: Fiduciary Access to Digital Assets Act; Adult Guardianship and Protective Proceedings Jurisdiction Act; Powers of Appointment Act; Premarital and Marital Agreements Act; Principal and Income Act Amendments; Trust Decanting Act; and I'm currently serving on committees to draft the Divided Trusteeship Act and the Regulation of Virtual Currency Businesses Act.

BLOOMBERG BNA: What have your responsibilities been as chair of the Uniform Law Commission's drafting Committee on Uniform Fiduciary Access to Digital Assets?

Walsh: ULC drafting committee chairs work closely with a reporter, who is most often a law professor. Our reporter was Professor Naomi Cahn of George Washington University Law School. Naomi produced the drafts for each of our meetings and was the substantive expert, while I set our agenda, ran and moderated our meetings, coordinated with the ULC's leadership and encouraged our members and stakeholders to actively participate in the project.

BLOOMBERG BNA: What spurred the UFADAA proposal?

Walsh: Initially, there were a few cases where fiduciaries were denied access to e-mail and other digital assets. Recognizing the issue, the late Gene Hennig, a Minnesota ULC commissioner, and his law partner James Lamm, jointly suggested the project to the ULC's Scope and Program committee. Jim is an expert in this area and was heavily involved in our drafting.

BLOOMBERG BNA: What barriers have you faced in trying to get this uniform law enacted in the states?

Walsh: A coalition of privacy advocates and Internet industry representatives opposed the original act. The privacy advocates objected to third party (fiduciary) access to some accounts by default.

Normally, fiduciaries have access to all assets of the persons they represent or estates they manage, so the original act operated on that premise (of asset neutrality, meaning it treated digital assets as all others are treated in trusts and estates law) (19 ECLR 937, 7/23/14).

The industry representatives had a variety of concerns. They were worried that the act impermissibly upset their contracts with customers—that it would require them to disclose information without adequate means to confirm the identity of their customer (think of an e-mail or social media account not opened in the account holder's legal name, e.g., ''number1trekkie@aol.com'' or ''johnsmith@gmail.com'').

They also complained that not all digital products and accounts were intended to be disclosed at all to a third party, e.g., Ashley Madison accounts.

Now that we have revised it with their input, and enjoy their support, we hope not to face any major enactment issues.

Our hope is that with industry support, we will see numerous enactments this year and next, leading to eventual uniformity—which will benefit both fiduciaries and Internet service providers.

BLOOMBERG BNA: When did the committee revise the act? Why did it decide to do so?

Walsh: The ULC issued a revised version Sept. 25, 2015 (20 ECLR 1364, 9/30/15). We felt it was better to address industry concerns, so that both ''sides'' of what had been a contentious debate could work together and support the revised act.

While that might limit some fiduciary access, it will provide access for many others, and it encourages companies to build access mechanisms (called ''online tools'', such as Google's Inactive Account Manager) into their products. Those will, in turn, cause more customers to plan for fiduciary or third party access, reducing hardship to fiduciaries and families.

BLOOMBERG BNA: What were the main revisions?

Walsh: Most of the act was rewritten and restructured. We added a section dealing with online tools, eliminated access to electronic communications content by default for personal representatives, eliminated any access to electronic communications content for guardians and conservators, and provided specific procedures for fiduciaries and companies to follow.

Generally under the revised act, fiduciaries cannot rely on default access to many digital assets and accounts, which protects account holder privacy.

The changes also clarify the application of federal privacy laws, to better define the rights and duties of all parties, and to give legal effect to an account holder's instructions for the disposition of digital assets.

Essentially, the Stored Communications Act, 18 U.S.C. § 2701, et seq., prohibits certain public Internet service providers, cloud storage providers and social media companies from disclosing their customers' private communications to third parties, with few exceptions. It thus extends the Fourth Amendment's protections to electronic information which might be accessed via a home computer, but stored remotely.

Industry providers are concerned that disclosure of protected electronic communications content to fiduciaries violates the SCA, subjecting them to liability.

The revised act generally requires that the account holder provide his or her lawful consent to disclosure to a fiduciary, which satisfies industry concerns over compliance with the SCA.

The fiduciary must otherwise honor the company's contract with the account holder and other law, and the company must satisfy the fiduciary's reasonable request for disclosure or access.

BLOOMBERG BNA: Do you think more states will look to the revised version more favorably?

Walsh: Yes, we believe it will be well received. Facebook and Google have formally endorsed the act. Many other companies have provided actual legislative support at state legislative hearings. Several privacy advocates have voiced their informal support, as well.

BLOOMBERG BNA: What do you expect will happen this year regarding bill introductions and enactments?

Walsh: Twelve states have already introduced bills, and I believe an equal or greater number are working on drafts. Our hope is that with industry support, we will see numerous enactments this year and next, leading to eventual uniformity—which will benefit both fiduciaries and Internet service providers.

  ECLR ISSN 1098-5190