(When) Will Massachusetts and Oklahoma Join the Growing List of RUFADAA States?

Legislators introduce measures to control access in probate to the digital assets that were held by a deceased individual. by Alan Barlow

HOUSTON, TEXAS, UNITED STATES, May 4, 2021 /EINPresswire.com/ -- By now, almost every state in the country has adopted the Uniform Fiduciary Access to Digital Assets Act (UFADAA) or its successor revised version (RUFADAA). Louisiana, Oklahoma and Massachusetts seem to be the lone holdouts. In Oklahoma, a bill to enact RUFADAA in the state has been languishing in the House Rules Committee since February 4, 2020, the day after it was introduced to the legislature. Meanwhile, Massachusetts legislators have attempted for several years to push through RUFADAA, although the measure always seems to need more study first. RUFADAA was most recently introduced again to the Massachusetts legislature in 2021 through HD 289. By its own terms, HD 289 would go into effect one year after its passage.

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>
> *Leigh B. Meineke, Houston Probate Attorney*

What is RUFADAA? What is a Digital Asset?

RUFADAA was created to address the question of how estate administrators and probate courts should deal with a person’s digital assets after they die. RUFADAA is a “uniform law,” meaning it was created by the Uniform Law Commission (ULC), a group that has been creating model laws for states for more than 100 years. These laws serve as a model for the states to enact legislation on a particular topic. Each state is free to adopt a uniform law in its original form, although many use the uniform law as a template and modify it to suit the state’s unique needs. The ULC has promulgated over 200 uniform laws over the years, and over 100 have been enacted by at least one state. In many areas of law, such as probate, uniform laws such as RUFADAA have been widely adopted nationwide.

Under RUFADAA, a digital asset is defined as “an electronic record in which an individual has a right or interest.” Further, digital assets are held in online “accounts,” which are defined by RUFADAA as an “arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services

to the user."

This broad definition of a digital asset means that the term includes, among other things, social media accounts (Facebook, Twitter, Instagram), subscription services (Netflix, Hulu, Amazon Prime, Disney+), bill pay or money transfer services (PayPal), and cloud data storage of photos, music and movies. Some of these accounts will have digital assets or personal value such as photos while others will have items of real cash value or even actual cash, such as a credit balance in a PayPal or Amazon account, or the value built up in an Etsy or eBay storefront.

Speaking of cash value, the ultimate digital asset may be cryptocurrency such as Bitcoin (and Ethereum and Stellar and Tether and Chainlink... altcoins are proliferating rapidly). Laws such as RUFADAA address key aspects of how estate administrators can deal with all these digital assets that were held by a person when they die. In general, RUFADAA:

- gives fiduciaries the legal authority to manage the digital assets of the deceased
- gives custodians of digital assets a method to disclose information to fiduciaries while protecting the user's privacy

Users Must Consent to the Disclosure of Digital Assets

In its original form, UFADAA ostensibly gave custodians the right to disclose digital assets to fiduciaries in violation of the Stored Communications Act, which prohibits disclosure of electronic communications, such as emails or tweets, without consent and requires court orders for other digital assets.

RUFADAA goes a step further in protecting a user's right to privacy and control over their digital assets. In a RUFADAA state, custodians are prohibited from disclosing a digital asset to a fiduciary unless the user has consented to the disclosure.

RUFADAA creates a three-tiered hierarchy of steps that control the disclosure of digital assets from a custodian to a fiduciary. These steps are, in order of priority: the custodian's online tool, the user's estate planning documents, and the custodian's terms of service.

Online tool - A user may use an online tool provided by the custodian to direct the custodian to disclose or not to disclose some or all of the user's digital assets, including the content of electronic communications.

Estate planning documents – If the user did not use the custodian's online tool, or if the custodian did not provide an online tool, then the user can allow or prohibit disclosure/access through a will, trust, power of attorney or other similar legal documents.

Terms of service – Regardless of what the custodian's terms of service say, the user's direction under either an online tool or estate planning document will override anything in the terms of

service to the contrary. However, in the absence of an online tool or relevant legal document such as a will or power of attorney, the custodian's terms of service will then control access to the user's digital assets, including eliminating access to a fiduciary if so written.

What if a holder of digital assets does not want the executor to be able to access a digital account? Leigh Meineke, a Houston estate planning and probate attorney at Stephens | Domnitz | Meineke, PLLC, explains that in Texas access can be denied by using the online tool provided by the custodian holding the digital assets or by specifically denying access in a will, trust, power of attorney or other record. "In order to gain access to digital assets in Texas," says Meineke, "a copy of the will, trust, power of attorney or other record must be presented to the custodian setting out consent to access." If consent is not specifically given, access should not be granted, but Meineke cautions that to fully limit access, it would be best to specifically address access in estate planning documents such as a will, trust, or power of attorney.

Another point to keep in mind is that custodians are allowed to charge fees to access and disclose a user's account to a fiduciary. RUFADAA also allows custodians to refuse an otherwise valid request on the grounds that complying would be "unduly burdensome." Attorney Meineke points out that custodians can provide access only to digital assets that are "reasonably necessary" for administering the estate. In the event that the custodian ignores or refuses to disclose on the grounds that the request is unduly burdensome, Meineke explains that it may be necessary to ask a court for an order directing compliance. "Another thing to keep in mind," says Meineke, "is that custodians are under no obligation to disclose digital assets that have been deleted by the user and cannot provide access to joint accounts."

What Should Users Do?

If giving access to your executor through a will or power of attorney, do more than say they have access. Leave detailed instructions on how they can access your data; otherwise, they will need to obtain court orders and jump through many hoops. Provide your usernames and passwords in a letter or computer file with directions on how to access it, but don't put such personal information in the will itself, which becomes a public record once it is admitted into probate. Be sure to update this letter as you gain new accounts or delete old ones.

According to the National Conference of State Legislatures (NCSL), 48 states plus U.S. Virgin Islands have some form of law addressing the transfer of digital assets after death, and at least 46 states have adopted UFADAA or RUFADAA since 2015 when Delaware became the first state to adopt the uniform law. The District of Columbia enacted RUFADAA this year, according to the ULC. Whether any of the few remaining holdouts will decide to join the team this year remains to be seen, but the possibility is there for the Bay State to be next on the list, if the Sooner State doesn't get there, well, sooner.

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