

2015 SENATE JUDICIARY

SB 2106

2015 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2106
1/19/2015
22101

- Subcommittee
 Conference Committee

Committee Clerk Signature 

Minutes:

1,2

Ch. Hogue: We will open the hearing on SB 2106.

Gail Hagerty, Uniform Law Commissioner: Support (see attached #1), explained the bill. On page 5 are the amendments that need to be made.

Ch. Hogue: Could you go through section 2, which is a retroactive feature of the bill. It would apply to persons who were appointed guardians before the effective date of the act, as well as individuals appointed as personal representatives before the effective date of the act. What's the rationale behind that feature?

Gail Hagerty: Section 2 would be a fiduciary agent acting under a Will or Power of Attorney that would be after August, 2015. You would have to have that included. If it isn't, the personal representative acting for a decedent who died before or after August 1, that is so people will have an opportunity to make those decisions, and make the changes. A conservatorship proceeding, whether pending or commenced, the Court is exercising on-going control and that should be guardianship or conservatorship or a trustee acting under a trust created on or before August 1. All of these things are solved if you prepare the documents that control that makes the decisions with regard to digital assets. We aren't at that point yet, but we wouldn't want to overrule what somebody may have assumed which would happen. People have a sense that things are very private that are digital and somehow in your mind it seems like it is different than a paper document.

Ch. Hogue: I wanted to be clear; if someone was appointed Power of Attorney five years ago, and that power of attorney is still in effect, when this law goes into effect on August 1, 2015, that would be there.

Gail Hagerty: The default would be there, but that can be changed by the person changing the document or the court.

Sen. C. Nelson: I have a power of attorney and a Will; everything goes, of course, goes to my spouse, and then split with my three children, if he is no longer living. It says "all assets".

Gail Hagerty: The problem may be under current law. If you had some assets that were considered digital assets, your personal representative may have difficulty getting to those assets; this provides a way for your personal representative. You may have set up your bank account so you only get on-line statements. You might want your PR to have the ability to get to the accounts. There may be people who have accounts, who have existing assets that their family or PR don't know about. There has to be a way for them to at least find out; maybe they won't get the contents of an email but that you are getting an email every month from some kind of money lending organization or something. That gives them a chance to get started on collecting up what they need to have in order to administer your estate.

Sen. Luick: If we suppose that you are the conservator of someone's estate or in charge of it. They passed away and you have in your hands some copyright materials in digital form. Who rightfully owns that after the death and then what can be done with that legally?

Gail Hagerty: A conservator is always acting for a person who is still alive, but doesn't have capacity to manage their own finances and that requires a court order. If that person dies, it moves into a probate estate, and then a PR is acting. They are able to collect up the assets. This act doesn't say what they can do with the assets. That's left to other law; copyright law might apply. Other law might apply to how those assets are treated. This just gives an opportunity to get the information that you would need in order to administer the estate. This bill doesn't solve that.

Sen. Luick: In your opinion, who would own that property?

Gail Hagerty: I don't know what kind of property you are referring to. If someone owns a copyright that might be something they would be able to transfer. If you have, for instance, a copyrighted movie that you purchased, you couldn't share that with someone else if the terms of your purchase of it said you couldn't do that. Let's say you buy audio books and they are stored

in the cloud. I paid for those assets and they have value. When I purchased them, the agreement was that I couldn't share the material with someone else. My PR would probably say that you have got this asset but it can't be transferred so we don't have to worry about it in the estate.

Sen. Luick: Then what happens to it.

Gail Hagerty: It disappears. No one else has the opportunity or right to access that, like I did when I purchased it. That's what I agreed to when I didn't read the click-through.

Sen. C. Nelson: I have a Kindle and have all sorts of books on it. I die and my daughter picks up the Kindle. What's to prevent her from reading all the books that are on the Kindle?

Gail Hagerty: Other law is going to govern that. This act isn't going to cover it. Those are assets that you have purchased; probably you signed something that said that they were for your use only and that you wouldn't transfer it or give it to someone else. There may be other provisions in that account, but you would have to look at the language of the account and when you made that purchase. People are going to start thinking about this differently, as we move into more electronic assets and transmission of those assets. If you owned a book, you couldn't make a photocopy of it for your friend.

Sen. C. Nelson: I could give her the book.

Gail Hagerty: You could give her the book. It's different when you buy the electronic.

Sen. Luick: That would then be the exact same thing for anything you bought and put on an MP3 player, the songs.

Gail Hagerty: Yes, you would have to look at what your agreement said. Some accounts it states that you can share this account with four people. Then you would still have the same right. There is specific language here that says the PR could do with whatever the original owner could have.

Ch. Hogue: Thank you. Further testimony in support.

Tony Weiler, Executive Director of the State Bar Association of ND: I represent almost 2,900 licensed ND lawyers. Previous to holding this

position, I was the State Labor Commissioner. The State Bar Association does support this legislation. I just wanted you to know that we do support this uniform law and ask for a Do Pass.

Ch. Hogue: Thank you. Further testimony in support. Testimony in opposition.

Laney Herauf, Greater ND Chamber of Commerce: Opposed (see attached #2).

Ch. Hogue: Are you aware of whether the US Chamber participated in the drafting of the Uniform Act at the national conference. I don't know.

Gail Hagerty: I know that providers and people providing the services did participate. They left the session because we made a decision during the sessions. Basically they liked the language that said that the PR or fiduciary was deemed to be an account holder. Then once that was done, they wanted to add the option then of whether to provide the information or not. The Committee came down on the side of saying, "no if you have this consent, if state law says that you are able, you can get lawful consent, and then the provider must provide". It wasn't up to them then to make a decision. It was at that point that the providers who are members of the National Chamber decided that they would no longer participate and they left enforce during that proceeding. That was actually the dividing line; they wanted it to say, if you have the lawful consent, then we may provide it at our option and the committee said no. If you have lawful consent, then you must. The federal law is outdated and there have been a lot of ongoing efforts to get that changed, but it hasn't occurred yet.

Ch. Hogue: Thank you. Further testimony in opposition. Neutral testimony.

Marilyn Foss, General Counsel for the ND Banker's Association: Our legislative committee has taken a neutral position on this. One of the things that I do think needs to be clear as you are making a consideration of this bill is that we are not just talking about audio books and Facebook pictures. We are talking about records for on-line bank accounts, insurance policies, brokerage accounts. Think of all the things that are online, business or personal. If I understand the intention of the drafters correctly, this would apply not necessarily to the underlying money in a bank account or proceeds from an insurance policy. It would apply to communications with respect to that. I think that clarity about this issue is a desirable thing. I have been a PR

in the past and I didn't have any problems getting information regarding accounts, online or not, from banks, insurance companies, etc. Of course, clarity for us is a helpful thing. I would just note that, as you are going through this session, you will see other bills. I know there is a bill in the House now. It doesn't talk about online assets, but it is the Dept. of Human Services wanting to clarify when it can get information from the custodian of property when there is an issue or complaint about a matter of elderly financial or vulnerable adult abuse. We need to see how all of these can work together, so that we have some reasonable grip on who we are giving access to whether it's the State or a PR. In my business, clarity is good and we do think that this bill does set things out better than they have been set out before. We don't take a position on whether the default selected was the appropriate default or not.

Ch. Hogue: Thank you. Any further testimony. We will close the hearing.

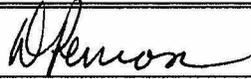
2015 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

SB 2106
2/4/2015
23234

- Subcommittee
 Conference Committee

Committee Clerk Signature



Minutes:

Ch. Hogue: We will take a look at SB 2106.

Sen. C. Nelson: I move the Gail Hagerty amendment, 15.0226.01001.

Sen. Armstrong: Second the motion.

Ch. Hogue: Voice vote, motion carried. We now have the bill before us as amended.

Sen. Casper: I move a Do Not Pass.

Sen. C. Nelson: Second the motion.

6 YES 0 NO 0 ABSENT

DO NOT PASS AS AMENDED

CARRIER: Sen. C. Nelson

February 4, 2015

TD
2/5/15

PROPOSED AMENDMENTS TO SENATE BILL NO. 2106

Page 2, line 13, after the first underscored comma insert "guardian or"

Page 2, line 22, after "a" insert "guardian or"

Page 2, line 23, replace "an application" with "a petition"

Page 2, line 23, after "a" insert "guardian or"

Page 3, line 12, after "by" insert "guardian or"

Page 3, line 14, after "chapter" insert "30.1-28 or"

Page 3, line 14, after "a" insert "guardian or"

Page 5, line 25, after "A" insert "guardian or"

Page 5, line 26, after the second "the" insert "guardian or"

Page 8, line 1, after "A" insert "guardianship or"

Renumber accordingly

Date: 2/4/15
Voice Vote # 1

2015 SENATE STANDING COMMITTEE
VOICE VOTE
BILL/RESOLUTION NO. 2106

Senate Judiciary Committee

Subcommittee

Amendment LC# or Description: 15.0224.01001 02000

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
Other Actions: Reconsider _____

Motion Made By Sen. Nelson Seconded By Sen. Armstrong

Senators	Yes	No	Senators	Yes	No
Ch. Hogue			Sen. Grabinger		
Sen. Armstrong			Sen. C. Nelson		
Sen. Casper					
Sen. Luick					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Motion Carried.

Date: 2/4/2015

Roll Call Vote #: 2

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTE

BILL/RESOLUTION NO. 2106

Senate JUDICIARY Committee

Subcommittee

Amendment LC# or Description: 15.0226.01001 02000

- Recommendation:
- Adopt Amendment
 - Do Pass Do Not Pass Without Committee Recommendation
 - As Amended Rerefer to Appropriations
 - Place on Consent Calendar
- Other Actions: Reconsider _____

Motion Made By Sen. Casper Seconded By Sen. Nelson

Senators	Yes	No	Senators	Yes	No
Chairman Hogue	✓		Sen. Grabinger	✓	
Sen. Armstrong	✓		Sen. C. Nelson	✓	
Sen. Casper	✓				
Sen. Luick	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen. Nelson

REPORT OF STANDING COMMITTEE

SB 2106: Judiciary Committee (Sen. Hogue, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2106 was placed on the Sixth order on the calendar.

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Page 2, line 22, after "a" insert "guardian or"

Page 2, line 23, replace "an application" with "a petition"

Page 2, line 23, after "a" insert "guardian or"

Page 3, line 12, after "**by**" insert "guardian or"

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Page 5, line 25, after "A" insert "guardian or"

Page 5, line 26, after the second "the" insert "guardian or"

Page 8, line 1, after "A" insert "guardianship or"

Renumber accordingly

2015 TESTIMONY

SB 2106

SB2106

Uniform Fiduciary Access to Digital Assets Act
Testimony By Uniform Law Commissioner Gail Hagerty

January 19, 2015

Chair Hogue, members of the Senate Judiciary Committee:

Just the title of this act may be enough to confuse you. A fiduciary is a person to whom property or power is entrusted for the benefit of another. A fiduciary duty has a legal duty to act solely in another party's interests. For the purpose of this act, a fiduciary is a personal representative in a probate case, a guardian or conservator, a person who is an agent under a power of attorney, or a trustee.

As I prepared my testimony, I realized the draft refers only to conservators, and it should refer to guardians and conservators. I have prepared amendments that I believe will correct the draft, and they are attached to my testimony. (#1-5).

Those people need to have access to the assets of the person for whom they are acting, in order to fulfill their duties.

Digital assets may sound far out, but I'm pretty confident you all have digital assets. Maybe the digital assets are online gaming items, photos, digital music, client lists, the text of a book you authored which exists on the cloud. . .

Most people have not considered what will happen to their digital assets when they die or are incapacitated. This act gives fiduciaries – authority to access, control, or copy digital assets and accounts as necessary to perform their duties.

This act does not cover access to digital assets by family members and friends.

The area is complicated by the existence of federal law which prohibits disclosure of the content of electronic communications to persons other than an account holder or intended

recipient or a third party with lawful consent of the account holder.

This Act attempts to allow fiduciaries to give lawful consent on behalf of the account holder, and therefore allow the custodians of the digital assets to provide content to the fiduciaries.

Section 30.1-36-01 provides definitions. The most difficult definition, from the standpoint of drafting, was the definition of **digital asset**. It is defined as a record that is electronic. It does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic. It refers to electronically-stored information, such as information stored on a computer, content uploaded onto websites, and rights in digital property, such as domain names or digital entitlements associated with online games.

Section 30.1-36-03 deals with access by personal representatives. A personal representative has a duty to collect and preserve the assets of a deceased person for the heirs who will receive the property.

Section 30.1-36-04 deals with access by guardians and conservators. Guardians' and conservators' powers and duties are determined by a court and are limited. Specific authorization is required to access to digital assets.

Section 30.1-36-05 deals with access by agents acting under a power of attorney. An agent under a power of attorney would have default authority over all of the principal's digital assets, other than the content of electronic communications. Specific authorization is required for access to the content of electronic communications.

30.1-36-07 deals with access by a trustee to digital assets. A trustee is presumed to have access to digital assets including the content of electronic communications with respect to assets for which the trustee is the initial account holder. If a digital asset is transferred into a trust, the trustee becomes the successor account holder and should have access to the digital

assets.

Each has a differing duty the person to whom digital assets belong, and that's why there are variations in the language describing the circumstances under which the fiduciary is entitled to access and the extent to which access is permitted.

Section 30.1-36-07 of the Uniform Act, permits a fiduciary to access a digital access digital assets, subject to the terms-of-service agreement, copyright and other applicable law. Fiduciaries have the lawful consent of the account holder for the purposes of federal law governing disclosure of electronic communications. Fiduciaries cannot take action with regard to a digital asset if the original owner could not have taken the action – they can't violate copyright laws or transfer music or other licensed materials if the original owner couldn't have made the transfers.

If a provision of a terms-of-service agreement limits a fiduciary's access, the provision is void against the strong public policy of the state UNLESS the account holder has agreed to the provision by an affirmative act separate from the account holder's assent to other provisions of the terms-of-service agreement.

A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary under this act to the extent that it designates law that enforces a limitation on a fiduciary's access to digital assets.

Section 30.1-36-08 requires the custodian of a digital asset to comply with fiduciary's requests concerning those assets, and sets forth the documentation required to establish the fiduciary's authority.

Section 30.1-36-09 provides immunity for custodians of digital assets for acts done in good faith compliance with the Act.

Section 30.1-36-12 makes it clear that the Act does not apply to a digital asset of an

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employer used by an employee in the ordinary course of the employers business.

Proposed amendments to SB2106:

On Page 2, line 13, add the following words:

representative, guardian or conservator, agent, or trustee.

On Page 2, lines 22 - 24, make the following changes:

17. "Protected person means an individual for whom a guardian or conservator has been appointed. The term includes an individual for whom ~~an application~~ a petition for the appointment of a guardian or conservator is pending.

On Page 3, lines 12 - 14, add the following language:

30.1-36-04. Access by guardian or conservator to digital asset of protected person.

1. Subject to Section 2 of section 30.1-36-07, the court, after an opportunity for hearing under chapter 30.1-28 or 30.1-29, may grant a guardian or conservator the right to access:

On Page 5, line 25, add the following language:

b. A guardian or conservator with the right of access under section 30.1-36-04, the request must



**WHY YOUR STATE SHOULD ADOPT THE
UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

The Uniform Fiduciary Access to Digital Assets Act (UFADAA) modernizes fiduciary law for the Internet age. Nearly everyone today has digital assets, such as documents, photographs, email, and social media accounts. Digital assets may have real value, both monetary and sentimental. However, Internet service agreements, passwords that can be reset only through the account holder's email, and federal and state privacy laws that do not contemplate the account holder's death or incapacity may prevent fiduciaries from gaining access to these valuable assets. UFADAA solves the problem by ensuring that legally appointed fiduciaries can access, delete, preserve, and distribute digital assets as appropriate.

- ***UFADAA gives account holders control.*** UFADAA allows account holders to specify whether their digital assets should be preserved, distributed to heirs, or destroyed.
- ***UFADAA treats digital assets like all other assets.*** If a fiduciary has the legal authority to inventory and dispose of all of a person's documents, it should not matter whether those documents are printed on paper, stored on a personal computer, or stored in the cloud. UFADAA provides a fiduciary with access to both tangible and digital property.
- ***UFADAA provides rules for four common types of fiduciaries.*** The executor of a decedent's estate may have responsibilities altogether different from those of an agent under a living person's power of attorney. UFADAA provides appropriate default rules governing access for executors, agents, conservators, and trustees.
- ***UFADAA protects custodians and copyright holders.*** Under UFADAA, fiduciaries must provide proof of their authority in the form of a certified document. Custodians of digital assets that comply with a fiduciary's apparently authorized request for access are immune from any liability. A fiduciary's authority over digital assets is limited by federal law, including the Copyright Act and the Electronic Communications Privacy Act.
- ***UFADAA provides efficient uniformity for all concerned.*** Digital assets travel across state lines nearly instantaneously. In our modern mobile society, people relocate more often than ever. Because state law governs fiduciaries, a uniform law ensures that, regardless of the state, fiduciaries will have equal access to digital assets and custodians will benefit from uniform regulation.

For further information about UFADAA, please contact ULC Legislative Counsel Benjamin Orzeske at 312-450-6621 or borzeske@uniformlaws.org.

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Uniform Law Commission

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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THE UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

- A Summary -

In the Internet age, the nature of property and our methods of communication have changed dramatically. A generation ago, a human being delivered our mail, photos were kept in albums, documents in file cabinets, and money on deposit at the corner 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." Access to digital assets is usually governed by a restrictive terms-of-service agreement provided by the custodian. This creates problems when account holders die or otherwise lose the ability to manage their own digital assets.

A fiduciary is a trusted person with the legal authority to manage another's property, and the duty to act in that person's best interest. The Uniform Fiduciary Access to Digital Assets Act (UFADAA) concerns four common types of fiduciaries:

1. Executors or administrators of deceased persons' estates;
2. Court-appointed guardians or conservators of protected persons' estates;
3. Agents appointed under powers of attorney; and
4. Trustees.

UFADAA gives people the power to plan for the management and disposition of their digital assets in the same way they can make plans for their tangible property: by providing instructions in a will, trust, or power of attorney. If a person fails to plan, the same court-appointed fiduciary that manages the person's tangible assets can manage the person's digital assets, distributing those assets to heirs or disposing of them as appropriate.

Some custodians of digital assets provide an online planning option by which account holders can choose to delete or preserve their digital assets after some period of inactivity. UFADAA defers to the account holder's choice in such circumstances, but overrides any provision in a click-through terms-of-service agreement that conflicts with the account holder's express instructions.

Under UFADAA, fiduciaries that manage an account holder's digital assets have the same right to access those assets as the account holder, but only for the limited purpose of carrying out their fiduciary duties. Thus, for example, an executor may access a decedent's email account in order to make an inventory of estate assets and ultimately to close the account in an orderly manner,

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.

but may not publish the decedent's confidential communications or impersonate the decedent by sending email from the account. Moreover, a fiduciary's management of digital assets may be limited by other law. For example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not access the contents of communications protected by federal privacy laws.

In order to gain access to digital assets, UFADAA requires a fiduciary to send a request to the custodian, accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust. Custodians of digital assets that receive an apparently valid request for access are immune from any liability for good faith compliance.

UFADAA is an overlay statute designed to work in conjunction with a state's existing laws on probate, guardianship, trusts, and powers of attorney. Enacting UFADAA will simply extend a fiduciary's existing authority over a person's tangible assets to include the person's digital assets, with the same fiduciary duties to act for the benefit of the represented person or estate. It is a vital statute for the digital age, and should be enacted by every state legislature as soon as possible.

For further information about UFADAA, please contact ULC Legislative Counsel Benjamin Orzeske at 312-450-6621 or borzeske@uniformlaws.org.



Testimony of Laney Herauf
Greater North Dakota Chamber of Commerce
SB 2106
January 19, 2015

Mr. Chairman and members of the committee, my name is Laney Herauf; I am the Government and Regulatory Affairs Specialist for the Greater North Dakota Chamber. GNDC is working on behalf of our more than 1,100 members, to build the strongest business environment in North Dakota. GNDC also represents the National Association of Manufacturers and works closely with the U.S. Chamber of Commerce. As a group we stand in opposition to Senate Bill 2106.

There are a number of issues with this bill. The first and perhaps most concerning is that it puts online service providers in the precarious position of attempting to balance federal privacy laws. There are a number of laws in place that protect a person's privacy on the internet, including their electronic communication. This bill creates a strange dynamic between the two and forces online service providers in between a rock and a hard place.

Additionally, concerning privacy, this bill violates the contractual agreements of privacy between online users and the online service provider by offering that private information to another person upon the user's death. The contract was made between the online user and the online service provider and did not include another person. The violation of that contract is unacceptable, even more so because it involves a person's communication to an unknown number of people regarding an unknown amount of subjects.

We should allow the online service providers the ability to develop their own policies regarding someone's digital assets upon death so the user is informed, aware and can plan accordingly. To do anything else is doing a great disservice to the consumer. Because of these reasons, we respectfully request a do not pass on Senate Bill 2016.

Thank you and I'd be happy to answer any questions.