

MAINE STATE LEGISLATURE

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127th MAINE LEGISLATURE

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Legislative Document

No. 1177

H.P. 809

House of Representatives, April 1, 2015

**An Act To Enact the Recommendations of the Probate and Trust
Law Advisory Commission Regarding the Maine Uniform Fiduciary
Access to Digital Assets Act**

Reported by Representative HOBBS of Saco for the Joint Standing Committee on
Judiciary pursuant to Resolve 2013, chapter 27, section 2.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint
Rule 218.

Robert B. Hunt

ROBERT B. HUNT
Clerk

1 **Be it enacted by the People of the State of Maine as follows:**

2 **PART A**

3 **UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

4 **PREFATORY NOTE**

5 The purpose of this act is to vest fiduciaries with the authority to access, control, or
6 copy digital assets and accounts. The act applies only to fiduciaries, who must always act
7 in compliance with their fiduciary powers and duties. The goal of the Uniform Fiduciary
8 Access to Digital Assets Act (UFADAA) is to remove barriers to a fiduciary's access to
9 electronic records and to leave unaffected other law, such as fiduciary, probate, trust,
10 banking, investment securities, and agency law. Existing law prohibits any fiduciary
11 from violating fiduciary responsibilities by divulging or publicizing any information the
12 fiduciary obtains while carrying out his or her fiduciary duties.

13 UFADAA addresses four different types of fiduciaries: personal representatives of
14 decedents' estates, conservators for protected persons and individuals, agents acting
15 pursuant to a power of attorney, and trustees. It distinguishes the authority of fiduciaries,
16 which exercise authority subject to this act only on behalf of the account holder, from any
17 other efforts to access the digital assets. Family members or friends may seek such
18 access, but, unless they are fiduciaries, their efforts are subject to other laws and are not
19 covered by this act.

20 As the number of digital assets held by the average person increases, questions
21 surrounding the disposition of these assets upon the individual's death or incapacity are
22 becoming more common. Few laws exist on the rights of fiduciaries over digital assets.
23 Few holders of digital assets and accounts consider the fate of their online presences once
24 they are no longer able to manage their assets. And these assets have real value:
25 according to a 2011 survey from McAfee, Intel's security-technology unit, American
26 consumers valued their digital assets, on average, at almost \$55,000. Kelly Greene,
27 *Passing Down Digital Assets*, WALL STREET JOURNAL (Aug. 31, 2012),
28 <http://goo.gl/7KAaOm>. These assets range from online gaming items to photos, to
29 digital music, to client lists. There are millions of Internet accounts that belong to dead
30 people. Some Internet service providers have explicit policies on what will happen when
31 an individual dies, others do not; even where these policies are included in the
32 terms-of-service agreement, most consumers click through these agreements.

33 The situation regarding fiduciaries' access to digital assets is less than clear, and is
34 subject to federal and state privacy and computer "hacking" laws as well as state probate
35 law. A minority of states has enacted legislation on fiduciary access to digital assets, and
36 numerous other states have considered, or are considering, legislation. Existing
37 legislation differs with respect to the types of digital assets covered, the rights of the
38 fiduciary, the category of fiduciary included, and whether the principal's death or
39 incapacity is covered. A uniform approach among states will provide certainty and
40 predictability for courts, account holders, fiduciaries, and Internet service providers. It
41 gives states precise, comprehensive, and easily accessible guidance on questions

1 concerning fiduciaries' ability to access the electronic records of a decedent, protected
2 person, principal, or a trust. For issues on which states diverge or on which the law is
3 unclear or unknown, the act will for the first time provide uniform rules.

4 The general goal of the act is to facilitate fiduciary access while respecting the
5 privacy and intent of the account holder. It adheres to the traditional approach of trusts
6 and estates law, which respects the intent of the account holder and promotes the
7 fiduciary's ability to administer the account holder's property in accord with legally-
8 binding fiduciary duties.

9 With regard to the general scope of the act, the act's coverage is inherently limited by
10 the definition of "digital assets." The act applies only to electronic records, which do not
11 include the underlying asset or liability unless it is itself an electronic record.

12 The act is divided into fifteen sections. Sections 1-2 contain general provisions and
13 definitions, including those relating to the scope of the fiduciary's authority.

14 Section 3 governs applicability, clarifying the scope of the act and the fiduciaries who
15 have access to digital assets under UFADAA. Section 3 states that the act does not apply
16 to the digital assets of an employer used by an employee during the ordinary course of
17 business.

18 Sections 4-7 establish the rights of personal representatives, conservators, agents
19 acting pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to
20 different opt-in and default rules based on the presumed intent of the account holder and
21 the applicability of other state and federal laws. A personal representative is presumed to
22 have access to all of the decedent's digital assets unless that is contrary to the decedent's
23 expressed intent or to other applicable law. A conservator may access digital assets
24 pursuant to a court order. An agent acting pursuant to a power of attorney is presumed to
25 have access to all of a principal's digital assets not subject to the protections of other
26 applicable law; if another law protects the asset, then the power of attorney must
27 explicitly grant access. And a trustee may access any digital asset held by the trust unless
28 that is contrary to the terms of the trust or to other applicable law.

29 Section 8 contains general provisions relating to the rights of the fiduciary to access
30 digital assets. Section 9 addresses compliance, and Section 10 grants immunity to
31 custodians. Sections 11-15 address miscellaneous topics, including retroactivity, the
32 effective date of the act, and similar issues. The act addresses only the rights of the four
33 types of fiduciaries, and it is designed to provide access without changing the ownership
34 of the digital asset.

35 **Sec. A-1. 18-A MRSA, art. 10** is enacted to read:

36 **ARTICLE 10**

1 **MAINE UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

2 **§10-101. Short title**

3 This Act may be known and cited as "the Maine Uniform Fiduciary Access to Digital
4 Assets Act."

5 **§10-102. Definitions**

6 As used in this Act, unless the context otherwise indicates, the following terms have
7 the following meanings.

8 (a). "Account holder" means a person that has entered into a terms of service
9 agreement with a custodian or a fiduciary for the person.

10 (b). "Agent" means an attorney in fact granted authority under a durable or
11 nondurable power of attorney.

12 (c). "Carries" means engages in the transmission of electronic communications.

13 (d). "Catalogue of electronic communications" means information that identifies
14 each person with which an account holder has had an electronic communication, the time
15 and date of the communication and the electronic address of the person.

16 (e). "Conservator" means a person appointed by a court to manage the estate of a
17 living individual. The term includes a limited conservator.

18 (f). "Content of an electronic communication" means information concerning the
19 substance or meaning of the communication that:

20 (1). Has been sent or received by an account holder;

21 (2). Is in electronic storage by a custodian providing an electronic communication
22 service to the public or is carried or maintained by a custodian providing a remote
23 computing service to the public; and

24 (3). Is not readily accessible to the public.

25 (g). "Court" means any one of the several courts of probate of this State established
26 as provided in Title 4, sections 201 and 202.

27 (h). "Custodian" means a person that carries, maintains, processes, receives or stores
28 a digital asset of an account holder.

29 (i). "Digital asset" means a record that is electronic. The term does not include an
30 underlying asset or liability unless the asset or liability is itself a record that is electronic.

31 (j). "Electronic" means relating to technology having electrical, digital, magnetic,
32 wireless, optical, electromagnetic or similar capabilities.

33 (k). "Electronic communication" has the same meaning as the definition in 18 United
34 States Code, Section 2510(12).

(I). "Electronic communication service" means a custodian that provides to an account holder the ability to send or receive an electronic communication.

(m). "Fiduciary" means an original, additional or successor personal representative, conservator, agent or trustee.

(n). "Governing instrument" means a will, trust, instrument creating a power of attorney or other dispositive or nominative instrument.

(o). "Information" means data, text, images, videos, sounds, codes, computer programs, software and databases or the like.

(p). "Person" means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality or other legal entity.

(q). "Personal representative" means an executor, administrator, special administrator or person that performs substantially the same function under the laws of this State other than this Act.

(r). "Power of attorney" means a record that grants an agent authority to act in the place of a principal.

(s). "Principal" means an individual who grants authority to an agent in a power of attorney.

(t). "Protected person" means an individual for whom a conservator has been appointed. The term includes an individual for whom an application for the appointment of a conservator is pending.

(u). "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(v). "Remote computing service" means a custodian that provides to an account holder computer processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 United States Code, Section 2510(14).

(w). "Terms of service agreement" means an agreement that controls the relationship between an account holder and a custodian.

(x). "Trustee" means a fiduciary with legal title to property pursuant to an agreement or declaration that creates a beneficial interest in another. The term includes a successor trustee.

(y). "Will" includes a codicil, testamentary instrument that only appoints an executor and instrument that revokes or revises a testamentary instrument.

Comment

(Maine section 10-102 is based on the Uniform Fiduciary Access to Digital Assets

Act section 2.)

Many of the definitions are based on those in the Uniform Probate Code: agent (UPC Section 1-201(1)), conservator (UPC Section 5-102(1)), court (UPC Section 1-201(8)), electronic (UPC Section 5B-102(3)), fiduciary (UPC Section 1-201(15)), governing instrument (UPC Section 1-201(18)), person (UPC Section 5B-101(6)), personal representative (UPC Section 1-201(35)), power of attorney (UPC Section 5B-102(7)), principal (UPC Section 5B-102(9)), property (UPC Section 1-201(38)), protected person (UPC Section 5-102(8)), record (UPC Section 1-201(41)), and will (UPC Section 1-201(57)). The definition of "information" is based on that in the Uniform Electronic Transactions Act, Section 2, subsection (11). Many of the other definitions are either drawn from federal law, as discussed below, or are new for this act.

An account holder includes any person who entered into a terms-of-service agreement with a custodian, including a deceased individual who entered into the agreement during the individual's lifetime. A fiduciary is defined as a person, and a fiduciary can be an account holder when the fiduciary opens the account.

The definition of "carries" is drawn from federal law, 47 U.S.C. Section 1001(8).

The term "catalogue of electronic communications" in Section 2(4) is designed to cover log-type information about an electronic communication such as the email addresses of the sender and the recipient, and the date and time the communication was sent.

The term "content of an electronic communication" in Section 2(6) is adapted from 18 U.S.C. Section 2510(8), which provides that content: "when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication." The 2(6) definition is designed to cover only content subject to the coverage of Section 2702 of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. Section 2510 et seq.; it does not include content not subject to ECPA. Consequently, the "content of an electronic communication", as used later throughout UFADAA, refers *only* to information in the body of an electronic message that is not readily accessible to the public; if the information were readily accessible to the public, it would not be subject to the privacy protections of federal law under ECPA. See S. Rep. No. 99-541, at 36 (1986). When the privacy protections of federal law under ECPA apply to the content of an electronic communication, the act's legislative history notes the requirements for disclosure: "Either the sender or the receiver can directly or through authorized agents authorize further disclosures of the contents of their electronic communication." S. Rep. No. 99-541, at 37 (1986).

ECPA does not apply to private e-mail service providers, such as employers and educational institutions. See 18 U.S.C. Section 2702(a)(2); James D. Lamm, Christina L. Kunz, Damien A. Riehl and Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 404 (2014) (available at: <http://goo.gl/T9jX1d>).

Example: X uses a Twitter account to send a message. If the tweet is sent only to

1 other people who have been granted access to X's tweets, then it meets the Act's
2 definition of "content of an electronic communication." But, if the tweet is completely
3 public with no access restrictions, then it does not meet the Act's definition of "content of
4 an electronic communication."

5 A custodian includes any Internet service provider as well as any other entity that
6 provides or stores electronic data of an account holder. A custodian does not include
7 most employers because an employer typically does not have a terms-of-service
8 agreement with an employee. The treatment of digital assets of an employer used by an
9 employee in the ordinary course of the employer's business is discussed in Section 3.

10 The definition of a digital asset specifies that it is "a record that is electronic."
11 Because records may exist in both electronic and non-electronic formats, this definition
12 clarifies the scope of the act and the limitation on the type of records to which it applies.
13 The term includes products currently in existence and yet to be invented that are available
14 only electronically. It refers to any type of electronically-stored information, such as: 1)
15 any information stored on a computer and other digital devices; 2) content uploaded onto
16 websites, ranging from photos to documents; and 3) rights in digital property, such as
17 domain names or digital entitlements associated with online games. See Lamm, *et al*,
18 *supra*, at 388. Both the catalogue and content of an electronic communication are
19 covered by the term "digital assets."

20 The fiduciary's access to a record defined as a "digital asset" does not mean that the
21 fiduciary is entitled to "own" the asset or otherwise engage in transactions with the asset.
22 Consider, for example, funds in a bank account or securities held with a broker or other
23 custodian, regardless of whether the bank, broker, or custodian has a brick-and-mortar
24 presence. This act affects records concerning the bank account or securities, but does not
25 affect the authority to engage in transfers of title or other commercial transactions in the
26 funds or securities, even though such transfers or other transactions might occur
27 electronically. UFADAA simply reinforces the right of the fiduciary to access all
28 relevant electronic communications and the online account that provides evidence of
29 ownership or similar rights. An entity may not refuse to provide access to online records
30 any more than the entity can refuse to provide the fiduciary with access to hard copy
31 records.

32 The definition of "electronic communication" in Section 2(11) is that set out in 18
33 U.S.C. Section 2510(12):

34 "electronic communication" means any transfer of signs, signals, writing, images,
35 sounds, data, or intelligence of any nature transmitted in whole or in part by a wire,
36 radio, electromagnetic, photoelectronic or photooptical system that affects interstate
37 or foreign commerce, but does not include—

38 (A) any wire or oral communication;

39 (B) any communication made through a tone-only paging device;

40 (C) any communication from a tracking device (as defined in section 3117 of
41 this title); or

42 (D) electronic funds transfer information stored by a financial institution in a
43 communications system used for the electronic storage and transfer of funds.

1 The definition of "electronic-communication service" in Section 2(12) is drawn from
2 18 U.S.C. Section 2510(15): "any service which provides to users thereof the ability to
3 send or receive wire or electronic communications." The definition of
4 "remote-computing service" in Section 2(22) is adapted from 18 U.S.C. Section 2711(2):
5 "the provision to the public of computer storage or processing services by means of an
6 electronic communications system." The definition refers to 18 U.S.C. Section 2510(14),
7 which defines an electronic communications system as: "any wire, radio, electromagnetic,
8 photooptical or photoelectronic facilities for the transmission of wire or electronic
9 communications, and any computer facilities or related electronic equipment for the
10 electronic storage of such communications."

11 Electronic communication is a particular type of digital asset and covers only the
12 category of digital assets subject to the privacy protections of the Electronic
13 Communications Privacy Act. For example, material stored on a computer's hard drive is
14 a digital asset but not an electronic communication.

15 A "fiduciary" under this act occupies a status recognized by state law, and a
16 fiduciary's powers under this act are subject to the relevant limits established by other
17 state laws. The definition of fiduciary specifically applies to "each person" in order to
18 cover co-fiduciaries.

19 The term "record" includes information available in both tangible and electronic
20 media. The act applies only to electronic records.

21 The "terms-of-service agreement" definition relies on the definition of "agreement"
22 found in UCC Section 1-201(b)(3) ("the bargain of the parties in fact, as found in their
23 language or inferred from other circumstances, including course of performance, course
24 of dealing, or usage of trade"). It refers to any agreement that controls the relationship
25 between an account holder and a custodian, even though it might be called a terms-of-use
26 agreement, a click-wrap agreement, a click-through license, or a similar term. State and
27 federal law determine capacity to enter into a binding terms-of-service agreement.

28 **§10-103. Applicability**

29 **(a). This Act applies to:**

30 (1). A fiduciary or agent acting under a will or power of attorney executed before, on
31 or after January 1, 2016;

32 (2). A personal representative acting for a decedent who died before, on or after
33 January 1, 2016;

34 (3). A conservatorship proceeding, whether pending in a court or commenced before,
35 on or after January 1, 2016; and

36 (4). A trustee acting under a trust created before, on or after the effective date of this
37 Act.

38 **(b). This Act does not apply to a digital asset of an employer used by an employee in**
39 **the ordinary course of the employer's business.**

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Comment

(Maine section 10-103 is based on the Uniform Fiduciary Access to Digital Assets Act Section 3.)

This act does not change the substantive rules of other law, such as agency, banking, conservatorship, contract, copyright, criminal, fiduciary, privacy, probate, property, security, trust, or other applicable law except to vest fiduciaries with authority, according to the provisions of this act, to access, control, or copy digital assets of a decedent, protected person (or other individual under Section 5), principal, settlor, or trustee.

Subsection (a)(2) covers the situations in which a decedent dies intestate, so it falls outside of subsection (a)(1), as well as the situations in which a state's procedures for small estates are used.

Subsection (b) clarifies that the act does not apply to a fiduciary's access to an employer's internal email system.

Example 1—Fiduciary access to an employee e-mail account. D dies, employed by Company Y. Company Y has an internal e-mail communication system, available only to Y's employees, and used by them in the ordinary course of Y's business. D's personal representative, R, believes that D used Company Y's e-mail system to effectuate some financial transactions that R cannot find through other means. R requests access from Company Y to the e-mails.

Company Y is not a custodian subject to the act. Under Section 2(7), a custodian must carry, maintain or store an account holder's digital assets. An account holder, in turn, is defined under Section 2(1) as someone who has entered into a terms-of-service agreement. Company Y, like most employers, did not enter into a terms-of-service agreement with D, so D was not an account holder.

Example 2—Employee of electronic-communication service provider. D dies, employed by Company Y. Company Y is an electronic-communication service provider. Company Y has an internal e-mail communication system, available only to Y's employees and used by them in the ordinary course of Y's business. D used the internal Company Y system. When not at work, D also used an electronic-communication service system that Company Y provides to the public. D's personal representative, R, believes that D used Company Y's internal e-mail system as well as Company Y's electronic-communication system available to the public to effectuate some financial transactions. R seeks access to both communication systems.

As is true in Example 1, Company Y is not a custodian subject to the act for purposes of the internal email system. The situation is different with respect to R's access to Company Y's system that is available to the public. Assuming that Company Y can disclose the communications under federal law, then Company Y must disclose them to R.

1 the account holder is the "originator" can be disclosed to third parties only with the
2 account holder's "lawful consent." 18 U.S.C. Section 2702(b)(3). (Note that, when the
3 account holder is the addressee or intended recipient, material can be disclosed under
4 either (b)(1) or (b)(3), but that when the account holder is the originator, lawful consent is
5 required under (b)(3).) See the Comments concerning the definition of "content" after
6 Section 2. By contrast to content-based material, non-content material can be disclosed
7 either with the lawful consent of the account holder or to any person (other than a
8 governmental entity) even without lawful consent. This information includes material
9 about any communication sent, such as the addressee, sender, date/time, and other
10 subscriber data, which this act defines as the "catalogue of electronic communications."
11 (Further discussion of this issue and examples are set out in the Comments to Section 8,
12 *infra*.)

13 **§10-105. Access by conservator to digital asset of protected person**

14 Subject to section 10-108, subsection (b), the court, after an opportunity for hearing
15 under Article 5, Part 4, may grant a conservator the right to access:

16 (a). The content of an electronic communication that the custodian is permitted to
17 disclose under the Electronic Communications Privacy Act, 18 United States Code,
18 Section 2702(b);

19 (b). Any catalogue of electronic communications sent or received by the protected
20 person; and

21 (c). Any other digital asset in which the protected person has a right or interest.

22 **Comment**

23 (Maine section 10-105 is based on the Uniform Fiduciary Access to Digital Assets
24 Act section 5.)

25 Section 5 establishes that the conservator must be specifically authorized by the court
26 to access the protected person's digital assets. Each of the different levels of access to the
27 content of an electronic communication, to the catalogue of electronic communications,
28 and to any other digital assets must be specifically granted by court order. The
29 requirement in Section 5 for express authority over digital assets does not limit the
30 fiduciary's authority over the underlying assets, such as funds held in a bank account.
31 The meaning of the term "hearing" will vary from state to state according to state law and
32 procedures.

33 Section 5 is comparable to Section 4. It responds to the concerns of Internet service
34 providers who believe that the act should be structured to clarify the difference between
35 fiduciary authority over digital assets other than the content of an electronic
36 communication protected by federal law (the Electronic Communications Privacy Act
37 (ECPA)), and fiduciary authority over ECPA-protected content of an electronic
38 communication. Consequently, Section 5 sets out separate procedures for digital assets as
39 well as the catalogue of electronic communications (logs and records) that relevant
40 service providers may release without consent under ECPA, and the ECPA-covered

1 content of an electronic communication.

2 The section refers to an individual or a protected person because a conservator may
3 be appointed for a single transaction or without a finding that the person is a protected
4 person.

5 State law will establish the criteria for when a court will grant power to the
6 conservator. For example, UPC Section 5-411(c) requires the court to consider the
7 decision the protected person would have made as well as a list of other factors. Existing
8 state law may also set out the requisite standards for a conservator's actions. Under
9 Section 8, if access to digital assets is granted by the court, the conservator has the same
10 power over digital assets as the account holder. The conservator must exercise authority
11 in the interests of the protected person.

12 **§10-106. Access by agent to digital asset of principal**

13 (a). To the extent a power of attorney expressly grants an agent authority over the
14 content of an electronic communication of the principal and subject to section 10-108,
15 subsection (b), the agent has the right to access the content of an electronic
16 communication that the custodian is permitted to disclose under the Electronic
17 Communications Privacy Act, 18 United States Code, Section 2702(b).

18 (b). Subject to section 10-108, subsection (b) and unless otherwise ordered by the
19 court or provided by a power of attorney, an agent has the right to access:

20 (1). Any catalogue of electronic communications sent or received by the principal;
21 and

22 (2). Any other digital asset in which the principal has a right or interest.

23 **Comment**

24 (Maine section 10-106 is based on the Uniform Fiduciary Access to Digital Assets
25 Act section 6.)

26 This section establishes that the agent has default authority over all of the principal's
27 digital assets, other than the content of the principal's electronic communications. When
28 the principal does not want the agent to exercise such broad authority, then the power of
29 attorney must explicitly prevent an agent from doing so. An agent has access to the
30 content of electronic communications only when the power of attorney explicitly grants
31 access.

32 Paragraph (a) is modeled on UPC Section 5B-201(a). Because a power of attorney
33 contains the consent of the account holder, ECPA should not prevent the agent from
34 exercising authority over the content of an electronic communication. See the Comments
35 concerning the definitions of the "content of an electronic communication" after Section
36 2. There should be no question that an explicit delegation of authority in a power of
37 attorney constitutes authorization from the account holder to access digital assets and
38 provides "lawful consent" to allow disclosure of the content of an electronic

1 communication from an electronic-communication service or a remote-computing service
2 pursuant to applicable law. Both authorization and lawful consent are important because
3 18 U.S.C. Section 2701 deals with intentional access without authorization and 18 U.S.C.
4 Section 2702 allows a service provider to disclose with lawful consent. Federal courts
5 have not yet interpreted how ECPA affects a fiduciary's efforts to access the content of an
6 electronic communication. *E.g., In re Facebook, Inc.*, 923 F. Supp. 2d 1204 (N.D. Cal.
7 2012).

8 **§10-107. Access by trustee to digital asset**

9 (a). Subject to section 10-108, subsection (b) and unless otherwise ordered by the
10 court or provided in a trust, a trustee that is an original account holder has the right to
11 access any digital asset held in trust, including any catalogue of electronic
12 communications of the trustee and the content of an electronic communication.

13 (b). Subject to 10-108, subsection (b) and unless otherwise ordered by the court or
14 provided in a trust, a trustee that is not an original account holder has the right to access:

15 (1). The content of an electronic communication that the custodian is permitted to
16 disclose under the Electronic Communications Privacy Act, 18 United States Code,
17 Section 2702(b);

18 (2). Any catalogue of electronic communications sent or received by the original or
19 any successor account holder; and

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

22 **Comment**

23 (Maine section 10-107 is based on the Uniform Fiduciary Access to Digital Assets
24 Act Section 7.)

25 Subsection (a) clarifies that access to digital assets, including the content of electronic
26 communications, is presumed with respect to assets for which the trustee is the initial
27 account holder. A trustee may have title to digital assets when the trustee opens an
28 account as trustee; under those circumstances, the trustee can access the content of each
29 digital asset that is in an account for which the trustee is the original account holder, not
30 necessarily each digital asset held in the trust.

31 Subsection (b) addresses situations involving an inter vivos transfer of a digital asset
32 into a trust, a transfer into a testamentary trust, or a transfer via a pourover will or other
33 governing instrument of a digital asset into a trust. In those situations, a trustee becomes
34 a successor account holder when the settlor transfers a digital asset into the trust. There
35 should be no question that the trustee with legal title to the digital asset was authorized by
36 the settlor to access the digital assets so transferred, including both the catalogue and
37 content of an electronic communication, and this provides "lawful consent" to allow
38 disclosure of the content of an electronic communication from an
39 electronic-communication service or a remote-computing service pursuant to applicable

1 law. See the Comments concerning the definitions of the "content of an electronic
2 communication" after Section 2. Nonetheless, subsection (2) distinguishes between the
3 catalogue and content of an electronic communication in case there are any questions
4 about whether the form in which property transferred into a trust is held constitutes lawful
5 consent. Both authorization and lawful consent are important because 18 U.S.C. Section
6 2701 deals with intentional access without authorization and because 18 U.S.C. Section
7 2702 allows a service provider to disclose with lawful consent.

8 The underlying trust documents and default trust law will supply the allocation of
9 responsibilities between and among trustees.

10 **§10-108. Fiduciary authority**

11 (a). A fiduciary that is an account holder or has the right under this Act to access a
12 digital asset of an account holder:

13 (1). Subject to the terms of service agreement, copyright law and other applicable
14 law, may take any action concerning the asset to the extent of the account holder's
15 authority and the fiduciary's power under the law of this State other than this Act;

16 (2). Has, for the purpose of applicable electronic privacy laws, the lawful consent of
17 the account holder for the custodian to divulge the content of an electronic
18 communication to the fiduciary; and

19 (3). Is, for the purpose of applicable computer fraud and unauthorized computer
20 access laws, including Title 17-A, chapter 18, an authorized user.

21 (b). Unless an account holder, after January 1, 2016, agrees to a provision in a terms
22 of service agreement that limits a fiduciary's access to a digital asset of the account holder
23 by an affirmative act separate from the account holder's assent to other provisions of the
24 agreement:

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

26 (2). The fiduciary's access under this Act to a digital asset does not violate the terms
27 of service agreement even if the agreement requires notice of a change in the account
28 holder's status.

29 (c). A choice of law provision in a terms of service agreement is unenforceable
30 against a fiduciary acting under this Act to the extent the provision designates law that
31 enforces a limitation on a fiduciary's access to a digital asset, and the limitation is void
32 under subsection (b).

33 (d). As to tangible personal property capable of receiving, storing, processing or
34 sending a digital asset, a fiduciary with authority over the property of a decedent,
35 protected person, principal or settlor:

36 (1). Has the right to access the property and any digital asset stored in it; and

37 (2). Is an authorized user for purposes of any applicable computer fraud and
38 unauthorized computer access laws, including Title 17-A, chapter 18.

Comment

(Maine section 10-108 is based on the Uniform Fiduciary Access to Digital Assets Act Section 8.)

This issue concerning the parameters of the fiduciary's authority potentially arises in two situations: 1) the fiduciary obtains access to a password or the like directly from the account holder, as would be true in various circumstances such as for the trustee of an inter vivos trust or someone who has stored passwords in a written or electronic list and those passwords are then transmitted to the fiduciary; and 2) the fiduciary obtains access pursuant to this act.

This section clarifies that the fiduciary has the same authority as the account holder if the account holder were the one exercising the authority (note that, where the account holder has died, this means that the fiduciary has the same access as the account holder had immediately before death). This means that the fiduciary's authority to access the digital asset is the same as the account holder except where, pursuant to subsection (b), the account holder has explicitly opted out of fiduciary access. In exercising its responsibilities, the fiduciary is subject to the duties and obligations established pursuant to state fiduciary law and is liable for breach of those duties. Note that even if the digital asset were illegally obtained by the account holder, the fiduciary would still need access in order to handle that asset appropriately. There may, for example, be tax consequences that the fiduciary would be obligated to report.

In exercising its responsibilities, the fiduciary is subject to the same limitations as the account holder more generally. For example, a fiduciary cannot delete an account if this would be fraudulent. Similarly, if the account holder could challenge provisions in a terms-of-service agreement, then the fiduciary is also able to do so. *See Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013).

Subsection (a) is designed to establish that the fiduciary is authorized to exercise control over digital assets in accordance with other applicable laws. The language mirrors that used in Title II of the Electronic Communications Privacy Act of 1986 (ECPA), also known as the Stored Communications Act, 18 U.S.C. Section 2701 *et seq.* (2006); *see, e.g.*, Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208 (2004). The subsection clarifies that state law treats the fiduciary as "authorized" under the two federal statutes that prohibit unauthorized access to computers and computer data, ECPA and the Computer Fraud and Abuse Act, as well as pursuant to any comparable state laws criminalizing unauthorized access. Computer Fraud and Abuse Act, 18 U.S.C. Section 1030 (2006); Lamm, *et al.*, *supra* (state law may be useful to federal courts interpreting these statutes.)

ECPA contains two potentially relevant prohibitions. The first, 18 U.S.C. Section 2701(a), defines the crime of unlawful access to stored communications, which applies to a person who "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility...." Thus, someone who has authorization to access

1 the facility is not engaging in criminal behavior. Moreover, this section does not apply to
2 "conduct authorized...by a user of that service with respect to a communication of or
3 intended for that user." 18 U.S.C. Section 2701(a), (c)(2).

4 The second, 18 U.S.C. Section 2702, entitled "Voluntary disclosure of customer
5 communications or records," concerns actions by the service provider. It prohibits an
6 electronic-communication service or a remote-computing service from knowingly
7 divulging the content of an electronic communication that is stored by or carried or
8 maintained on that service unless disclosure is made (among other exceptions) "to an
9 addressee or intended recipient of such communication or an agent of such addressee or
10 intended recipient" or "with the *lawful consent* of the originator or an addressee or
11 intended recipient of such communication, or the subscriber in the case of
12 remote-computing service." 18 U.S.C. Section 2702(b)(1), (3) (emphasis added). See the
13 Comments concerning the definitions of the "content of an electronic communication"
14 after Section 2. The statute permits disclosure of "customer records" that do not include
15 content, either with lawful consent from the customer or "to any person other than a
16 governmental entity." 18 U.S.C. Section 2702(c)(2) and (6). Thus, in contrast to its
17 restrictions on the release of content, the electronic-communication or remote-computing
18 service provider is permitted to disclose the catalogue of electronic communications to
19 anyone except the government.

20 The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to
21 computers. 18 U.S.C. Section 1030. Like ECPA, the CFAA similarly protects against
22 anyone who "intentionally accesses a computer without authorization or exceeds
23 authorized access." 18 U.S.C. Section 1030(a).

24 State laws vary in their coverage but typically prohibit unauthorized computer access.

25 By defining the fiduciary as an authorized user: 1) the fiduciary has authorization
26 under applicable law to access the digital assets under the *first* relevant provision of
27 ECPA, 18 U.S.C. Section 2701, as well as under the CFAA; and 2) the fiduciary has "the
28 lawful consent" of the originator/subscriber under applicable law so that the service
29 provider can voluntarily disclose the digital assets pursuant to the *second* relevant
30 provision of ECPA, 18 U.S.C. Section 2702, including the content of an electronic
31 communication. Moreover, this language should be adequate to avoid liability under the
32 state unauthorized computer access laws.

33 Subsection (a)(1) states that the fiduciary can take actions to the extent of the
34 fiduciary's power under the law of this state. Note that the fiduciary's powers under state
35 law are defined by statute, common law, and the terms of the governing instrument.

36 Subsection (b) addresses whether account holders can opt out of the rules in this act
37 and whether Internet service providers can prevent fiduciary access. First, a
38 terms-of-service agreement in which an account holder has made an affirmative choice to
39 limit a fiduciary's right to access will supersede any contrary provision in a will, trust,
40 protective order, or power of attorney. The affirmative act must clearly demonstrate the
41 account holder's deliberate intent to prevent fiduciary access. Second, the subsection
42 provides that any other term in a terms-of-service agreement that bars fiduciary access is
43 void as against the state's strong public policy. While all of a state's laws could be

1 considered that state's public policy, the phrase "strong public policy" is to be construed
2 under conflict of laws principles to protect fiduciary access to digital assets under this act,
3 notwithstanding a contrary terms-of-service agreement provision and even if the
4 terms-of-service agreement chooses the law of another state or country to govern its
5 contractual rights and duties. See Restatement (Second) Conflict of Laws § 90 and § 187
6 cmt. G; see also Uniform Trust Code § 107(1). However, a terms-of-service agreement
7 provision for which an account holder has made an affirmative choice, separate from the
8 account holder's assent to other provisions of the terms-of-service agreement, to limit a
9 fiduciary's access to the account holder's digital assets is not voided by this act and will
10 supersede any contrary provision in a will, or trust. (See Example 5).

11 Subsection (b) reinforces the concept that the fiduciary "steps into the shoes" of the
12 account holder, with no more—and no fewer—rights. For example, the terms-of-service
13 agreement controls the rights of the account holder (settlor, principal, incapacitated
14 person, decedent). The act does not permit the account holder's fiduciary to override the
15 terms-of-service agreement in order to make a digital asset or collection of digital assets
16 "descendible," although it does preserve the rights of the fiduciary to make the same
17 claims as the account holder. See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013);
18 David Horton, *Indescendibility*, 102 Calif. L. Rev. 543 (2014).

19 Under subsection (b), access by a fiduciary should not be considered a transfer or
20 other use that would violate the anti-transfer terms or other terms of a terms-of-service
21 agreement.

22 Subsection (c) supports the importance of fiduciary access by providing that any
23 choice of law governing the effect of a terms-of-service agreement that prevents fiduciary
24 access is unenforceable.

25 Subsection (d) clarifies that the fiduciary is authorized to access digital assets stored
26 on tangible personal property, such as laptops, computers, smartphones or storage media
27 of the decedent, protected person, principal, or settlor, exempting fiduciaries from
28 application for purposes of state or federal laws on unauthorized computer access. For
29 criminal law purposes, this clarifies that the fiduciary is authorized to access all of the
30 account holder's digital assets, whether held locally or remotely.

31 *Example 1—Access to digital assets by personal representative.* D dies with a will
32 that is silent with respect to digital assets. D has a bank account for which D received
33 only electronic statements, D has stored photos in a cloud-based Internet account, and D
34 has an e-mail account with a company that provides electronic-communication services to
35 the public. The personal representative of D's estate needs access to the electronic bank
36 account statements, the photo account, and e-mails.

37 The personal representative of D's estate has the authority to access D's electronic
38 banking statements and D's photo account, which both fall under the act's definition of a
39 "digital asset." This means that, if these accounts are password-protected or otherwise
40 unavailable to the personal representative, then the bank and the photo account service
41 must give access to the personal representative when the request is made in accordance
42 with Section 9. If the terms-of-service agreement permits D to transfer the accounts
43 electronically, then the personal representative of D's estate can use that procedure for

1 transfer as well.

2 The personal representative of D's estate is also able to request that the e-mail
3 account service provider grant access to e-mails sent or received by D; ECPA permits the
4 service provider to release the catalogue to the personal representative. The service
5 provider also must provide the personal representative access to the content of an
6 electronic communication sent or received by D if the service provider is permitted under
7 18 U.S.C. Section 2702(b) to disclose the content. The bank may release the catalogue of
8 electronic communications or content of an electronic communication for which it is the
9 originator or the addressee because the bank is not subject to the ECPA.

10 *Example 2—Access to digital assets by conservator.* C is seeking appointment as the
11 conservator for P. P has a bank account for which P received only electronic statements,
12 P has stored photos in a cloud-based Internet account, and P has an e-mail account with a
13 company that provides electronic communication services to the public. C needs access
14 to the electronic bank account statements, the photo account, and e-mails.

15 Without a court order that explicitly grants access to P's digital assets, including
16 electronic communications, C has no authority pursuant to this act to access the electronic
17 bank account statements, the photo account, or the e-mails. Based on law outside of this
18 act, the bank may release the catalogue of electronic communications or content of an
19 electronic communication for which it is the originator or the addressee because the bank
20 is not subject to the ECPA.

21 *Example 3—Access to digital assets by agent.* X creates a power of attorney
22 designating A as X's agent. The power of attorney expressly grants A authority over X's
23 digital assets, including the content of an electronic communication. X has a bank
24 account for which X receives only electronic statements, X has stored photos in a
25 cloud-based Internet account, and X has a game character and in-game property
26 associated with an online game. X also has an e-mail account with a company that
27 provides electronic-communication services to the public.

28 A has the authority to access X's electronic bank statements, the photo account, the
29 game character and in-game property associated with the online game, all of which fall
30 under the act's definition of a "digital asset." This means that, if these accounts are
31 password-protected or otherwise unavailable to A as X's agent, then the bank, the photo
32 account service provider, and the online game service provider must give access to A
33 when the request is made in accordance with Section 9. If the terms-of-service agreement
34 permits X to transfer the accounts electronically, then A as X's agent can use that
35 procedure for transfer as well.

36 As X's agent, A is also able to request that the e-mail account service provider grant
37 access to e-mails sent or received by X; ECPA permits the service provider to release the
38 catalogue. The service provider also must provide A access to the content of an
39 electronic communication sent or received by X if the service provider is permitted under
40 18 U.S.C. Section 2702(b) to disclose the content. The bank may release the catalogue of
41 electronic communications or content of an electronic communication for which it is the
42 originator or the addressee because the bank is not subject to the ECPA.

1 *Example 4—Access to digital assets by trustee.* T is the trustee of a trust established
2 by S. As trustee of the trust, T opens a bank account for which T receives only electronic
3 statements. S transfers into the trust to T as trustee (in compliance with a
4 terms-of-service agreement) a game character and in-game property associated with an
5 online game and a cloud-based Internet account in which S has stored photos. S also
6 transfers to T as trustee (in compliance with the terms-of-service agreement) an e-mail
7 account with a company that provides electronic-communication services to the public.

8 T is an original account holder with respect to the bank account that T opened, and T
9 has the ability to access the electronic banking statements. T, as successor account holder
10 to S, may access the game character and in-game property associated with the online
11 game and the photo account, which both fall under the act's definition of a "digital asset."
12 This means that, if these accounts are password-protected or otherwise unavailable to T
13 as trustee, then the bank, the photo account service provider, and the online game service
14 provider must give access to T when the request is made in accordance with Section 9. If
15 the terms-of-service agreement permits the account holder to transfer the accounts
16 electronically, then T as trustee can use that procedure for transfer as well.

17 T as successor account holder of the e-mail account for which S was previously the
18 account holder is also able to request that the e-mail account service provider grant access
19 to e-mails sent or received by S; the ECPA permits the service provider to release the
20 catalogue. The service provider also must provide T access to the content of an electronic
21 communication sent or received by S if the service provider is permitted under 18 U.S.C.
22 Section 2702(b) to disclose the content. The bank may release the catalogue of electronic
23 communications or content of an electronic communication for which it is the originator
24 or the addressee because the bank is not subject to the ECPA.

25 *Example 5—Access notwithstanding terms in a terms-of-service agreement.* D, who
26 is domiciled in state X, dies. D was a professional photographer who stored valuable
27 digital photos in an online storage account provided by C. P is appointed by a court in
28 state X to administer D's estate. P needs access to D's online storage account to inventory
29 and appraise D's estate assets and to file D's estate tax return. During D's lifetime, D
30 entered into a terms-of-service agreement with C for the online storage account. The
31 choice-of-law provision selects the law of state Y to govern the contractual rights and
32 duties under the terms-of-service agreement. A provision of the terms-of-service
33 agreement prohibits fiduciary access to the digital assets of an account holder, but D did
34 not agree to that provision by an affirmative act separate from D's assent to other
35 provisions of the terms-of-service agreement. UFADAA has been enacted by state X but
36 not by state Y. Because P's access to D's assets is fundamental to carrying out P's
37 fiduciary duties, a court should apply subsections (b) and (c) of this act under the law of
38 state X to void the terms-of-service agreement provision prohibiting P's access to D's
39 online account, even though the terms-of-service agreement selected the law of state Y to
40 govern the contractual rights and duties under the terms-of-service agreement.

41 **§10-109. Compliance**

42 **(a).** If a fiduciary with a right under this Act to access a digital asset of an account
43 holder complies with subsection (b), the custodian shall comply with the fiduciary's
44 request in a record for:

1 *Example—Fiduciary control over a digital asset.* D dies with a will disposing of all
2 D's assets to D's spouse, S. E is the personal representative for D's estate. D left a bank
3 account, for which D only received online statements, and a blog.

4 E as personal representative of D's estate has access to both of D's accounts and can
5 request the passwords from the custodians of both accounts. If D's agreement with the
6 bank requires that transferring the underlying title to the account be done in person,
7 through a hard copy signed by the account holder and the bank manager, then E must
8 comply with those procedures (signing as the account holder) and cannot transfer the
9 funds in the account electronically. If the terms-of-service agreement for the blog
10 permitted D to transfer the blog electronically, then E can make the transfer electronically
11 as well.

12 Subsection (c) establishes 60 days as the appropriate time for compliance. This is
13 true regardless of the procedure for supplying the requisite trust instrument. If applicable
14 law other than this act does not prohibit the custodian from complying, then the custodian
15 must grant access to comply. This provision should be read in conjunction with the
16 state's power of attorney act.

17 Subsection (h) allows for attorneys' fees. As the comment to Section 709 of the
18 Uniform Trust Code explains, reimbursement under this section may include attorney's
19 fees and expenses incurred by the trustee in defending an action. However, a trustee is not
20 ordinarily entitled to attorney's fees and expenses if it is determined that the trustee
21 breached the trust. *See* 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* §
22 245 (4th ed. 1988).

23 **§10-110. Custodian immunity**

24 A custodian and its officers, employees and agents are immune from liability for an
25 act or omission done in good faith in compliance with this Act.

26 **Comment**

27 (Main section 10-110 is based on the Uniform Fiduciary Access to Digital Assets
28 Act section 10.)

29 This section establishes that custodians are protected from liability when they act in
30 accordance with the procedures of this act and in good faith. The types of actions
31 covered include disclosure as well as transfer of copies. The critical issue in conferring
32 immunity is the source of the liability. Direct liability is not subject to immunity; indirect
33 liability is subject to immunity.

34 Direct liability could only arise from noncompliance with a judicial order issued
35 under section 9. Upon determination of a right of access under sections 4, 5, 6, or 7, a
36 court may issue an order to grant access under section 9. Noncompliance with that order
37 would give rise to liability for contempt. There is no immunity from this liability.

38 Indirect liability could arise from granting a right of access under this act. Access to
39 a digital asset might invade the privacy or the harm the reputation of the decedent,

1 protected person, principal, or settlor, it might harm the family or business of the
2 decedent, protected person, principal, or settlor, and it might harm other persons. The
3 grantor of access to the digital asset is immune from liability arising out of any of these
4 circumstances if the grantor acted in good faith to comply with this act. If there is a
5 judicial order under section 9, compliance with the order establishes good faith. Absent a
6 judicial order under section 9, good faith must be established by the grantor's assessment
7 of the requirements of this act.

8 **§10-111. Uniformity of application and construction**

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

12 **§10-112. Relation to Electronic Signatures in Global and National Commerce Act**

13 This Act modifies, limits or supersedes the Electronic Signatures in Global and
14 National Commerce Act, 15 United States Code, Section 7001 et seq., but does not
15 modify, limit or supersede Section 101(c) of that Act, 15 United States Code, Section
16 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b)
17 of that Act, 15 United States Code, Section 7003(b).

18 **PART B**

19 **Sec. B-1. 18-A MRSA §5-931, sub-§(a), ¶¶(7) and (8),** as enacted by PL
20 2009, c. 292, §2 and affected by §6, are amended to read:

21 (7). Exercise fiduciary powers that the principal has authority to delegate; ~~or~~

22 (8). Disclaim property, including a power of appointment; or

23 **Sec. B-2. 18-A MRSA §5-931, sub-§(a), ¶(9)** is enacted to read:

24 (9). Exercise authority over the content of an electronic communication of the
25 principal in accordance with the Maine Uniform Fiduciary Access to Digital Assets
26 Act.

27 **PART C**

28 **Sec. C-1. Effective date.** This Act takes effect January 1, 2016.

29 **SUMMARY**

30 This bill enacts the Uniform Fiduciary Access to Digital Assets Act as the Maine
31 Uniform Fiduciary Access to Digital Assets Act as a new Article 10 in the Maine Revised
32 Statutes, Title 18-A. The Probate and Trust Law Advisory Commission recommended
33 enactment in the report submitted to the Joint Standing Committee on Judiciary pursuant
34 to Resolve 2013, chapter 27 as amended by Resolve 2013, chapter 81.

35 The Prefatory Note and accompanying Comments to the Uniform Fiduciary Access
36 to Digital Assets Act provide a summary and explanation of the Uniform Fiduciary

1 Access to Digital Assets Act. The Uniform Fiduciary Access to Digital Assets Act
2 provides an important update for the Internet age. A generation ago, files were stored in
3 cabinets, photos were stored in albums and mail was delivered by a human being. Today,
4 people are more likely to use the Internet to communicate and store information. The
5 Uniform Fiduciary Access to Digital Assets Act ensures account holders retain control of
6 their digital property and can plan for its ultimate disposition after their death. Unless the
7 account holder instructs otherwise, legally appointed fiduciaries will have the same
8 access to digital assets as they have always had to tangible assets and the same duty to
9 comply with the account holder's instructions.

10 This bill modifies the Uniform Fiduciary Access to Digital Assets Act to be
11 consistent with existing Maine law with regard to conservators. Part B amends Maine's
12 Uniform Power of Attorney Act to specifically allow a power of attorney to grant
13 authority to enable the agent to access the content of an electronic communication to be
14 consistent with the grant of express authority required by Section 6 of the Uniform
15 Fiduciary Access to Digital Assets Act, included in this bill as the Maine Revised
16 Statutes, Title 18-A, section 10-106.

17 Part C provides that this bill takes effect January 1, 2016.