



SB-715: Creating the Uniform Fiduciary Access to Digital Assets

February 18, 2016

Colleagues,

In this day and age, nearly everyone has an email account or other accounts based online. States around the country have been faced with the challenge of dealing with these accounts after someone has died or is incapacitated.

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 known as the "custodians" of these records. Access to digital assets is usually governed by a terms-of-service agreement (TOSA) rather than by property law. This creates problems when Internet users die or otherwise lose the ability to manage their own digital assets. The rights of ownership, control, privacy, and access are intertwined in a complex web of federal, state, and privacy law.

This has resulted in fiduciaries of estates (executors / personal representatives) with very little legal authority or guidance on identifying, collecting, distributing, and settling a decedent's digital estate assets. Too often, the businesses that control a decedent's digital assets refuse to recognize the fiduciary has any authority over such assets, and, thus, deny the fiduciary such access. For example, a personal representative often has trouble accessing an email account of a decedent.

In 2011, the Uniform Law Commission set out to create model state legislation which would help to clarify ambiguities in federal law regarding these digital assets.

SB 715 is based on this model legislation and gives Internet users the power to plan for the management and disposition of their digital assets in a similar way as they can make plans for their tangible property.





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STATE REPRESENTATIVE • 60TH ASSEMBLY DISTRICT

**Senate Committee on Revenue, Financial Institutions and Rural Issues
Public Hearing, February 18, 2016**

Senator Marklein and members of the Senate Committee on Revenue, Financial Institutions and Rural Issues, thank you for affording me with the opportunity to testify on behalf of SB 715, relating to revised Uniform Fiduciary Access to Digital Assets.

SB 715, if enacted, would afford internet users with the ability to plan for the management and disposition of digital assets in a vein analogous to that of tangible property. In an era where new technology and digital data are commonplace, we felt it was imperative to bring Wisconsin law into the twenty-first century by protecting the digital assets of Badger State citizens.

Collectively, an individual's digital property and electronic communications are referred to as "digital assets" and the companies that store those assets are known as "custodians" of these records. Access to digital assets is usually governed by a terms-of-service agreement, herein referred to as TOSA, rather than by property law. This creates a problem when internet users perish or lose the ability to manage their own digital assets. The rights of ownership, control, privacy, and access are intertwined in a complex network of federal, state and privacy laws.

The aforementioned has resulted in fiduciaries of estates (executors/personal representatives) with very little legal authority or guidance on identifying, collecting, distributing, and settling a decedent's digital estate assets. Too often, the businesses that control a decedent's digital assets to refuse to recognize the fiduciary has any authority over such assets, and, thus, deny the fiduciary such access. For example, a personal representative often has trouble accessing in an e-mail account of a decedent.

Currently, the Stored Communications Act and the Computer Fraud Abuse Act at the federal level, dictate access to digital assets. Due to rapidly changing technology and the fact that these bills were passed nearly thirty years ago, in 1986, states have begun passing legislation to fill the gaps where the aforementioned federal laws are insufficient.



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Senate Bill 715 adopts the Revised Uniform Fiduciary Access to Digital Assets Act, as approved and recommended by the National Conference of Commissioners on Uniform State Laws in July 2015. The bill provides default provisions related to a fiduciary's right to access digital assets. Under this bill, a digital asset is an electronic record in which an individual has a right or interest. Examples of digital assets include information stored on a computer or other digital device, content uploaded onto a website, text messages, and rights in domain names or rights associated with online games. A fiduciary, under this bill, is a personal representative, guardian, conservator, agent under a power of attorney, or a trustee.

I strongly encourage my colleagues on this committee to support SB 715, as it brings Wisconsin law into the twenty-first century and affords individuals with the ability to manage their digital assets.

I would, at this time, be more than willing to answer any questions members of the committee might have. Thank you for your time and consideration.



Statement of Ben Orzeske, Chief Counsel from the Uniform Law Commission, to the Senate Committee on Revenue, Financial Institutions, and Rural Issues in support of SB 715 – the Revised Uniform Fiduciary Access to Digital Assets Act.

Chairman Marklein and Members of the Committee:

Thank you for considering SB 715, the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), which is based on a uniform act produced by the Uniform Law Commission (ULC). The ULC is a non-profit organization formed in 1892 to draft non-partisan model legislation in the areas of state law for which uniformity among the states is advisable. Wisconsin has a long and successful history of enacting ULC acts including the Uniform Commercial Code, the Uniform Anatomical Gifts Act, the Uniform Transfers to Minors Act, the Uniform Athlete Agents Act, the Uniform Trust Code, and dozens of others.

SB 715 is necessary because the law has not kept pace with technological advances in the Internet age. A generation ago, a human being delivered our mail, photos were kept in albums, documents were filed in file cabinets, and money was deposited 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. While Wisconsin citizens have complete control over what happens to their tangible private property when they die or lose capacity, that is not always the case for their digital assets. SB 715 solves that problem.

This bill will give Wisconsin citizens 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, or by using simple online planning tools. The act encourages Internet service providers to offer online tools that allow the user to name a designated representative to receive account access if the user dies or loses capacity.

SB 715 will authorize access to digital assets by four common types of fiduciaries:

1. personal representatives of decedents' estates,
2. court-appointed conservators of incapacitated persons' property,
3. agents under a power of attorney, and
4. trustees.

This act is supported by the trust and estate section of the Wisconsin Bar, by major internet firms including Facebook and Google, and by senior advocates including AARP and the National Academy of Elder Law Attorneys.

Enacting this legislation will give Wisconsin citizens the ability to plan for disposition of their digital assets in the same way they can plan for their more tangible assets. I ask for your support to advance this important legislation for the digital age.

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.