

Approved by the Judicial Council
June 3, 2016

TO: Judicial Council
FROM: Christy Molzen
DATE: June 3, 2016
RE: Probate Law Advisory Committee recommends the Revised Uniform Fiduciary Access to Digital Assets Act for adoption in Kansas

In December 2013, the Probate Law Committee requested and received permission from the Council to study the Uniform Fiduciary Access to Digital Assets Act (UFADAA). The original version of the act was finalized by the Uniform Law Commission in July 2014. It was adopted in one state, Delaware, and was introduced in at least 25 more states in 2015.

The 2015 bills to enact UFADAA were blocked by a coalition of internet-based businesses and privacy advocates. In order to address the concerns raised during the 2015 enactment effort, the Uniform Law Commission recommended a number of amendments to UFADAA, approving a Revised UFADAA in July 2015.

The Probate Law Committee had already voted to recommend the original 2014 UFADAA with amendments appropriate to Kansas. When the Revised UFADAA was approved, the Committee reviewed it but had serious concerns because it seemed too watered down compared to the original. While the Committee preferred the original 2014 UFADAA to the 2015 revised version, it recognized that the original version would be unlikely to pass the legislature due to opposition from service providers. Accordingly, the Committee spent the last year continuing to study the Revised UFADAA and monitoring its adoption by other states.

As of May 2016, the Revised UFADAA has been adopted in 13 states, including our neighboring states of Colorado and Nebraska, and introduced in at least 18 more. Other states, including Missouri, plan to introduce the Revised UFADAA next year. Efforts in other states to pass "variations" on the Revised UFADAA have been unsuccessful due to successful lobbying by service providers.

After further study of the Revised UFADAA, the Probate Law Committee believes that the Act will be helpful to ensure fiduciary access to digital assets where estate planners have worked with their clients to have the appropriate documents in place. Under the Revised UFADAA, a will or other document can provide the needed lawful consent for fiduciary access, and that will or other document will control unless the user has already chosen not to allow access via a service provider's online tool. A summary of the Act, which provides more detail about its purpose and content, is attached.

While the Committee discussed recommending a number of Kansas amendments to the Revised UFADAA, it was ultimately convinced that those amendments would be opposed by service providers who would kill the bill. Accordingly, the Committee recommends the attached Revised UFADAA with only minimal changes appropriate to Kansas. Any such changes are noted in the "Kansas comment" sections.

TO: Judicial Council
FROM: Probate Law Advisory Committee
DATE: December 2, 2016
RE: Additional amendment to be included with the Revised Uniform Fiduciary Access to Digital Assets Act

At the June meeting, the Judicial Council approved the Probate Law Advisory Committee's recommendation to request introduction of a bill enacting the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) in the 2017 legislative session. The Probate Committee's draft of the bill included conforming amendments to several existing Kansas statutes.

Since then, the Probate Committee has identified one additional amendment it would like to include in the bill enacting the RUFADAA. The Committee recommends amending the definition of personal property found at K.S.A. 77-201 *Ninth* as follows:

“Personal property’ includes money, goods, chattels, evidences of debt and things in action, and digital assets as defined in the Kansas Revised Uniform Fiduciary Access to Digital Assets Act.”



THE REVISED 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 terms-of-service agreement rather than by property law. This creates problems when Internet users 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 Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) addresses 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.

Revised UFADAA 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. In case of conflicting instructions, the act provides a three-tiered system of priorities:

1. If the custodian provides an online tool, separate from the general terms of service, that allows the user to name another person to have access to the user's digital assets or to direct the custodian to delete the user's digital assets, Revised UFADAA makes the user's online instructions legally enforceable.
2. If the custodian does not provide an online planning option, or if the user declines to use the online tool provided, the user may give legally enforceable directions for the disposition of digital assets in a will, trust, power of attorney, or other written record.
3. If the user has not provided any direction, either online or in a traditional estate plan, the terms of service for the user's account will determine whether a fiduciary may access the user's digital assets. If the terms of service do not address fiduciary access, the default rules of Revised UFADAA will apply.

Revised UFADAA's default rules attempt to balance the user's privacy interest with the fiduciary's need for access by making a distinction between the "content of electronic communications," the "catalogue of electronic communications", and other types of digital assets.

The content of electronic communications includes the subject line and body of a user's email messages, text messages, and other messages between private parties. A fiduciary may never access the content of electronic communications without the user's consent. When necessary, a fiduciary may have a right to access a catalogue of the user's electronic communications – essentially a list of communications showing the addresses of the sender and recipient, and the date and time the message was sent.

For example, the executor of a decedent's estate may need to access a catalogue of the decedent's communications in order to compile an inventory of estate assets. If the executor finds that the decedent received a monthly email message from a particular bank or credit card company, the executor can contact that company directly and request a statement of the decedent's account.

Other types of digital assets are not communications, but intangible personal property. For example, an agent under a power of attorney who has authority to access the principal's business files will have access under Revised UFADAA to any files stored in "the cloud" as well as those stored in file cabinets. Similarly, an executor that is distributing the decedent's family photo albums to heirs will also have access under Revised UFADAA to photos the decedent uploaded to a photo-sharing web site.

Under Revised UFADAA Section 15, fiduciaries for digital assets are subject to the same fiduciary duties that normally apply to tangible assets. Thus, for example, an executor may not publish the decedent's confidential communications or impersonate the decedent by sending email from the decedent's account. A fiduciary's management of digital assets may also be limited by other law. For example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not exceed the user's authority under the account's terms of service.

In order to gain access to digital assets, Revised 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 acts done in good faith compliance.

Revised UFADAA is an overlay statute designed to work in conjunction with a state's existing laws on probate, guardianship, trusts, and powers of attorney. 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 Revised UFADAA, please contact ULC Legislative Counsel Benjamin Orzeske at 312-450-6621 or borzeske@uniformlaws.org.

June 3, 2016 draft
(amended Dec. 2, 2016)

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (2015)

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FOURTH YEAR
WILLIAMSBURG, VIRGINIA
JULY 10 - JULY 16, 2015

STATUTORY TEXT ONLY

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

September 28, 2015

REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (2015)

SECTION 1. SHORT TITLE. This {act} may be cited as the Revised Uniform Fiduciary Access to Digital Assets Act (2015).

SECTION 2. DEFINITIONS. In this {act}:

(1) “Account” means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(2) “Agent” means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(3) “Carries” means engages in the transmission of an electronic communication.

(4) “Catalogue of electronic communications” means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) “Conservatee” means an individual for whom a conservator has been appointed.

(~~5~~6) “[Conservator]” means a person appointed by a court pursuant to K.S.A. 59-3050 et seq., and amendments thereto, to manage the estate of a living minor or adult individual. The term includes a limited temporary {conservator}.

(~~6~~7) “Content of an electronic communication” means information concerning the substance or meaning of the communication which:

(A) has been sent or received by a user;

(B) is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and

(C) is not readily accessible to the public.

(78) “Court” means the ~~insert name of court in this state having jurisdiction in matters relating to the content of this act~~ district court.

(89) “Custodian” means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(910) “Designated recipient” means a person chosen by a user using an online tool to administer digital assets of the user.

(1011) “Digital asset” means property in the form of an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(1112) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(1213) “Electronic communication” has the meaning set forth in 18 U.S.C. Section 2510(12) ~~as amended~~.

(1314) “Electronic-communication service” means a custodian that provides to a user the ability to send or receive an electronic communication.

(1415) “Fiduciary” means an original, additional, or successor personal representative, guardian, ~~conservator~~, agent, or trustee.

(16) “Guardian” means a person appointed by the court pursuant to K.S.A. 59-3050 et seq., and amendments thereto, to make decisions regarding the support, care, education, health, and welfare of a minor or adult individual. The term includes a temporary guardian but does not include a guardian ad litem.

(1517) “Information” means data, text, images, videos, sounds, codes, computer

programs, software, databases, or the like.

(1618) “Online tool” means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(1719) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(1820) “Personal representative” means an executor, administrator, special administrator, or person that performs substantially the same function under law of this state other than this [act].

(1921) “Power of attorney” means a record that grants an agent authority to act ~~in the~~ place on behalf of a principal.

(2022) “Principal” means an individual who grants authority to an agent in a power of attorney.

~~(21) “[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.~~

(2223) “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.

(2324) “Remote-computing service” means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. Section 2510(14)~~[, as amended]~~.

(2425) “Terms-of-service agreement” means an agreement that controls the relationship

between a user and a custodian.

~~(2526)~~ “Trustee” means a fiduciary with legal title to property under an agreement or declaration that creates a beneficial interest in another. The term includes a successor trustee.

~~(2627)~~ “User” means a person that has an account with a custodian.

~~(28)~~ “Ward” means an individual for whom a guardian has been appointed.

~~(2729)~~ “Will” includes a codicil, a testamentary instrument that only appoints an executor, and an instrument that revokes or revises a testamentary instrument.

Legislative Note: In paragraphs (5) and (21), an enacting jurisdiction should replace the bracketed language with local terminology, if different. Enacting jurisdictions should insert the appropriate court in paragraph (7) that would have jurisdiction over matters relating to this act. In jurisdictions in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in paragraphs (12) and (23).

Kansas Comment

The drafting committee added the terms “guardian,” “ward,” and “conservatee.” The drafting committee also amended the definition of “digital asset” to clarify that a digital asset is property.

SECTION 3. APPLICABILITY.

(a) This {act} applies to:

(1) a fiduciary acting under a will or power of attorney executed before, on, or after {the effective date of this {act}};

(2) a personal representative acting for a decedent who died before, on, or after {the effective date of this {act}};

(3) a guardianship or {conservatorship} proceeding commenced before, on, or after {the effective date of this {act}}; and

(4) a trustee acting under a trust created before, on, or after {the effective date of

this {act}}.

(b) This {act} applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(c) This {act} does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

Legislative Note: In subsection (a)(3), an enacting jurisdiction should replace the bracketed language with local terminology, if different.

SECTION 4. USER DIRECTION FOR DISCLOSURE OF DIGITAL ASSETS.

(a) A user may use an online tool to direct the custodian to disclose or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(b) If a user has not used an online tool to give direction under subsection (a) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(c) A user's direction under subsection (a) or (b) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

SECTION 5. TERMS-OF-SERVICE AGREEMENT.

(a) This {act} does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(b) This {act} does not give a fiduciary any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary acts or represents.

(c) A fiduciary's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under Section 4.

SECTION 6. PROCEDURE FOR DISCLOSING DIGITAL ASSETS.

(a) When disclosing digital assets of a user under this {act}, the custodian may at its sole discretion:

- (1) grant a fiduciary or designated recipient full access to the user's account;
- (2) grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or
- (3) provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(b) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this {act}.

(c) A custodian need not disclose under this {act} a digital asset deleted by a user.

(d) If a user directs or a fiduciary requests a custodian to disclose under this {act} some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of

the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:

- (1) a subset limited by date of the user's digital assets;
- (2) all of the user's digital assets to the fiduciary or designated recipient;
- (3) none of the user's digital assets; or
- (4) all of the user's digital assets to the court for review in camera.

SECTION 7. DISCLOSURE OF CONTENT OF ELECTRONIC

COMMUNICATIONS OF DECEASED USER. If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:

- (1) a written request for disclosure in physical or electronic form;
- (2) a {certified} copy of the death certificate of the user;
- (3) a {certified} copy of {the letter of appointment of the representative or a small-estate affidavit or court order};
- (4) unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications; and
- (5) if requested by the custodian:
 - (A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user; or

(C) a finding by the court that:

(i) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A);

(ii) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. Section 2701 et seq. ~~[as amended]~~, 47 U.S.C. Section 222 ~~[as amended]~~, or other applicable law;

(iii) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

(iv) disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

Legislative Note: In jurisdictions that certify legal documents, the word “certified” should be included in paragraphs (2) and (3). Other jurisdictions may substitute a word or phrase that conforms to the local practice for authentication. Enacting jurisdictions should insert into paragraph (3) the local term given to a document that authorizes a personal representative to administer a decedent’s estate. In jurisdictions in which the constitution, or other law, does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in paragraph (5)(C)(ii).

SECTION 8. DISCLOSURE OF OTHER DIGITAL ASSETS OF DECEASED

USER. Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a {certified} copy of the death certificate of the user;

(3) a {certified} copy of {the letter of appointment of the representative or a small-estate affidavit or court order}; and

(4) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user;

(C) an affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or

(D) a finding by the court that:

(i) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A); or

(ii) disclosure of the user's digital assets is reasonably necessary for administration of the estate.

Legislative Note: In jurisdictions that certify legal documents, the word "certified" should be included in paragraphs (2) and (3). Other jurisdictions may substitute a word or phrase that conforms to the local practice for authentication. Enacting jurisdictions should insert into paragraph (3) the local term given to a document that authorizes a personal representative to administer a decedent's estate.

SECTION 9. DISCLOSURE OF CONTENT OF ELECTRONIC

COMMUNICATIONS OF PRINCIPAL. To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) an original or copy of the power of attorney expressly granting the agent authority

over the content of electronic communications of the principal;

(3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(B) evidence linking the account to the principal.

SECTION 10. DISCLOSURE OF OTHER DIGITAL ASSETS OF PRINCIPAL.

Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) an original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

(3) a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(B) evidence linking the account to the principal.

SECTION 11. DISCLOSURE OF DIGITAL ASSETS HELD IN TRUST WHEN TRUSTEE IS ORIGINAL USER. Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

SECTION 12. DISCLOSURE OF CONTENTS OF ELECTRONIC COMMUNICATIONS HELD IN TRUST WHEN TRUSTEE NOT ORIGINAL USER. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

- (1) a written request for disclosure in physical or electronic form;
- (2) a certified copy of the trust instrument~~]~~ or a certification of the trust under ~~[e]ite trust certification statute, such as Uniform Trust Code Section 1013]]~~ K.S.A. 58a-1013, and amendments thereto, that includes consent to disclosure of the content of electronic communications to the trustee;
- (3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and
- (4) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(B) evidence linking the account to the trust.

SECTION 13. DISCLOSURE OF OTHER DIGITAL ASSETS HELD IN TRUST WHEN TRUSTEE NOT ORIGINAL USER. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a certified copy of the trust instrument~~]~~ or a certification of the trust under ~~either~~ trust certification statute, such as Uniform Trust Code Section 1013~~]]~~ K.S.A. 58a-1013, and amendments thereto;

(3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(4) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(B) evidence linking the account to the trust.

SECTION 14. DISCLOSURE OF DIGITAL ASSETS TO {GUARDIAN OR CONSERVATOR} OF WARD OR CONSERVATEE~~{PROTECTED PERSON}~~.

(a) After an opportunity for a hearing under ~~{state conservatorship law}~~ K.S.A. 59-3050 et seq., and amendments thereto, the court may grant a guardian or {conservator} access to the digital assets of a ward or conservatee ~~{protected person}~~.

(b) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a guardian or {conservator} the catalogue of electronic communications sent or received by a ward or conservatee ~~{protected person}~~ and any digital assets, other than the content of electronic communications, in which the ward or conservatee ~~{protected person}~~ has a right or interest if the guardian or {conservator} gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a ~~{certified}~~ copy of the court order that gives the guardian or {conservator} authority over the digital assets of the ward or conservatee ~~{protected person}~~; and

(3) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the ward or conservatee ~~{protected person}~~; or

(B) evidence linking the account to the ward or conservatee ~~{protected person}~~.

(c) A guardian or {conservator} with general authority to manage the assets of a ward or conservatee ~~{protected person}~~ may request a custodian of the digital assets of the ward or conservatee ~~{protected person}~~ to suspend or terminate an account of the ward or conservatee ~~{protected person}~~ for good cause. A request made under this section must be accompanied by a

{certified} copy of the court order giving the guardian or {conservator} authority over the ~~protected person's~~ ward or conservatee's property.

Legislative Note: Throughout this section, an enacting jurisdiction should replace the bracketed terms [conservator] and [protected person] with local terminology, if different. In jurisdictions that certify legal documents, the word "certified" should be included in subsections (b) and (c). Other jurisdictions may substitute a word or phrase that conforms to the local practice for authentication.

Kansas Comment

The drafting committee added references to guardians and wards or conservatees.

SECTION 15. FIDUCIARY DUTY AND AUTHORITY.

(a) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

- (1) the duty of care;
- (2) the duty of loyalty; and
- (3) the duty of confidentiality.

(b) A fiduciary's authority with respect to a digital asset of a user:

- (1) except as otherwise provided in Section 4, is subject to the applicable terms of service;
- (2) is subject to other applicable law, including copyright law;
- (3) is limited by the scope of the fiduciary's duties; and
- (4) may not be used to impersonate the user.

(c) A fiduciary with authority over the property of a decedent, [protected person], principal, or settlor has the right to access any digital asset in which the decedent, [protected person], principal, or settlor had a right or interest and that is not held by a custodian or subject

to a terms-of-service agreement.

(d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, ward or conservatee ~~[protected person]~~, principal, or settlor for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including ~~[this state's law on unauthorized computer access]~~ K.S.A. 21-5839, and amendments thereto.

(e) A fiduciary with authority over the tangible, personal property of a decedent, ward or conservatee ~~[protected person]~~, principal, or settlor:

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

(2) is an authorized user for the purpose of computer-fraud and unauthorized-computer-access laws, including ~~[this state's law on unauthorized computer access]~~ K.S.A. 21-5839, and amendments thereto.

(f) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(g) A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

(1) if the user is deceased, a ~~[certified]~~ copy of the death certificate of the user;

(2) a ~~[certified]~~ copy of the ~~[letter of appointment of the representative or a small-estate affidavit or court order,]~~ court order, power of attorney, or trust giving the fiduciary authority over the account; and

(3) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user; or

(C) a finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A).

Legislative Note: States with a computer trespass statute should cite to it in subsections (d) and (e), and may want to amend those statutes to be in accord with this act. In jurisdictions that certify legal documents, the word “certified” should be included in subsection (g). Other jurisdictions may substitute a word or phrase that conforms to the local practice for authentication. In subsections (c) and (e), an enacting jurisdiction should replace the bracketed language with local terminology, if different.

Kansas Comment

The drafting committee added references to Kansas law on unauthorized computer access, found at K.S.A. 21-5839.

SECTION 16. CUSTODIAN COMPLIANCE AND IMMUNITY.

(a) Not later than {60} days after receipt of the information required under Sections 7 through 14, a custodian shall comply with a request under this {act} from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(b) An order under subsection (a) directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. Section 2702~~[, as amended]~~.

(c) A custodian may notify the user that a request for disclosure or to terminate an account was made under this {act}.

(d) A custodian may deny a request under this {act} from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary’s request.

(e) This {act} does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this {act} to obtain a court order which:

(1) specifies that an account belongs to the ~~{protected person}~~ward or conservatee or principal;

(2) specifies that there is sufficient consent from the ~~{protected person}~~ward or conservatee or principal] to support the requested disclosure; and

(3) contains a finding required by law other than this {act}.

(f) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this {act}.

Legislative Note: In jurisdictions in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (b). In subsection (e), an enacting jurisdiction should replace the bracketed language with local terminology, if different.

SECTION 17. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This {act} modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

{SECTION 19. SEVERABILITY. If any provision of this {act} or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this {act} which can be given effect without the invalid provision or application, and to this end the provisions of this {act} are severable.}

Legislative Note: Include this section only if the jurisdiction lacks a general severability statute or a decision by the highest court of the jurisdiction stating a general rule of severability.

CONFORMING AMENDMENTS

SECTION 20, amending K.S.A. 58-654(f) relating to powers of an attorney in fact:

.....

(f) Any power of attorney, whether or not it grants general powers for all subjects and purposes or with respect to express subjects or purposes, shall be construed to grant power or authority to an attorney in fact to carry out any of the actions described in this subsection only if the actions are expressly enumerated and authorized in the power of attorney. Any power of attorney may grant power or authority to an attorney in fact to carry out any of the following actions if the actions are expressly authorized in the power of attorney:

- (1) To execute, amend or revoke any trust agreement;
- (2) to fund with the principal's assets any trust not created by the principal;
- (3) to make or revoke a gift of the principal's property in trust or otherwise;
- (4) to disclaim a gift or devise of property to or for the benefit of the principal;
- (5) to create or change survivorship interests in the principal's property or in property in which the principal may have an interest. The inclusion of the authority set out in this paragraph shall not be necessary in order to grant to an attorney in fact acting under a power of attorney granting general powers with respect to all lawful subjects and purposes the authority to withdraw funds or other property from any account, contract or other similar arrangement held in the names of the principal and one or more other persons with any financial institution, brokerage company or other depository to the same extent that the principal would be authorized to do if the principal were present, not disabled and seeking to act in the principal's own behalf;
- (6) to designate or change the designation of beneficiaries to receive any property, benefit or contract right on the principal's death;
- (7) to give or withhold consent to an autopsy or postmortem examination;
- (8) to make a gift of, or decline to make a gift of, the principal's body parts under the revised uniform anatomical gift act, K.S.A. 2014 Supp. 65-3220 through 65-3244, and amendments thereto;

- (9) to nominate a guardian or conservator for the principal; and if so stated in the power of attorney, the attorney in fact may nominate such attorney in fact's self as such;
- (10) to give consent on behalf of the principal to the sale, gift, transfer, mortgage or other alienation of the principal's homestead or interest therein if:
 - (A) The principal's spouse, personally or through such spouse's attorney in fact, has also consented to such alienation;
 - (B) the power of attorney specifically describes the homestead by reference to a legal description and the street address of the property; and
 - (C) the principal's spouse, in a written document duly acknowledged by the spouse, has stated such spouse's consent that the attorney in fact may alienate the interests, in whole or in part, of the principal in the described homestead and, further, the spouse agrees that the consent of the attorney in fact will constitute the consent of the principal required by Article 15, Section 9 of the Kansas Constitution. Nothing herein shall be construed as a limitation or abridgement of the right of the spouse of the principal to consent or withhold such spouse's consent to the alienation of the spouse's homestead, or any rights therein, under Article 15, section 9 of the Kansas Constitution;
- (11) to designate one or more substitute or successor or additional attorneys in fact;
- (12) to delegate any or all powers granted in a power of attorney pursuant to subsection (a) of K.S.A. 58-660, and amendments thereto; ~~or~~
- (13) to exercise authority over the content of an electronic communication of the principal pursuant to Section 9; or
- ~~(13)~~ (14) to pay reasonable expenses incurred for the funeral and burial or other disposition of the body of the principal.

.....

SECTION 21, amending K.S.A. 58a-816 relating to specific powers of a trustee:

Without limiting the authority conferred by K.S.A. 58a-815, and amendments thereto, a trustee may:

- (1) Collect trust property and accept or reject additions to the trust property from a settlor or any other person;
- (2) acquire or sell property, for cash or on credit, at public or private sale;
- (3) exchange, partition, or otherwise change the character of trust property;
- (4) deposit trust money in an account in a regulated financial-service institution;
- (5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- (6) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;
- (7) with respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:
 - (A) Vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

- (B) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;
- (C) pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights; and
- (D) deposit the securities with a depository or other regulated financial-service institution;
- (8) with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements and make or vacate plats and adjust boundaries;
- (9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;
- (10) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust and exercise an option so acquired;
- (11) insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;
- (12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;
- (13) with respect to possible liability for violation of environmental law:
 - (A) Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;
 - (B) take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;
 - (C) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;
 - (D) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and
 - (E) pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;
- (14) pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;
- (15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust and other expenses incurred in the administration of the trust;
- (16) exercise elections with respect to federal, state, and local taxes;
- (17) select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;
- (18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the

- trustee has a lien on future distributions for repayment of those loans;
- (19) pledge trust property to guarantee loans made by others to the beneficiary;
 - (20) appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;
 - (21) pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:
 - (A) Paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;
 - (B) paying it to the beneficiary's custodian, attorney-in-fact, custodial trustee or other person with legal authority to receive such funds for the benefit of the beneficiary;
 - (C) if the trustee does not know of a conservator, guardian, custodian, or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or
 - (D) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;
 - (22) on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;
 - (23) resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;
 - (24) prosecute or defend an action, claim or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;
 - (25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;
 - (26) access digital assets held in trust pursuant to Section 11, Section 12 and Section 13; and
 - ~~(26)~~ on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

SECTION 22, amending K.S.A. 59-3075(e) regarding the powers of a guardian:

....

- (e) A guardian shall not have the power:
 - (1) To prohibit the marriage or divorce of the ward;
 - (2) to consent, on behalf of the ward, to the termination of the ward's parental rights;
 - (3) to consent to the adoption of the ward, unless approved by the court;
 - (4) to consent, on behalf of the ward, to any psychosurgery, removal of any bodily organ, or amputation of any limb, unless such surgery, removal or amputation has been approved in advance by the court, except in an emergency and when necessary to preserve the life of the ward or to prevent serious and irreparable impairment to the physical health of the ward;
 - (5) to consent, on behalf of the ward, to the sterilization of the ward, unless approved by the court following a due process hearing held for the purposes of determining whether to approve such, and during which hearing the ward is represented by an attorney appointed by

the court;

(6) to consent, on behalf of the ward, to the performance of any experimental biomedical or behavioral procedure on the ward, or for the ward to be a participant in any biomedical or behavioral experiment, without the prior review and approval of such by either an institutional review board as provided for in title 45, part 46 of the code of federal regulations, or if such regulations do not apply, then by a review committee established by the agency, institution or treatment facility at which the procedure or experiment is proposed to occur, composed of members selected for the purposes of determining whether the proposed procedure or experiment:

(A) Does not involve any significant risk of harm to the physical or mental health of the ward, or the use of aversive stimulants, and is intended to preserve the life or health of the ward or to assist the ward to develop or regain skills or abilities; or

(B) involves a significant risk of harm to the physical or mental health of the ward, or the use of an aversive stimulant, but that the conducting of the proposed procedure or experiment is intended either to preserve the life of the ward, or to significantly improve the quality of life of the ward, or to assist the ward to develop or regain significant skills or abilities, and that the guardian has been fully informed concerning the potential risks and benefits of the proposed procedure or experiment or of any aversive stimulant proposed to be used, and as to how and under what circumstances the aversive stimulant may be used, and has specifically consented to such;

(7) to consent, on behalf of the ward, to the withholding or withdrawal of life-saving or life sustaining medical care, treatment, services or procedures, except:

(A) In accordance with the provisions of any declaration of the ward made pursuant to the provisions of K.S.A. 65-28,101 through 65-28,109, and amendments thereto; or

(B) if the ward, prior to the court's appointment of a guardian pursuant to K.S.A. 59-3067, and amendments thereto, shall have executed a durable power of attorney for health care decisions pursuant to K.S.A. 58-629, and amendments thereto, and such shall not have been revoked by the ward prior thereto, and there is included therein any provision relevant to the withholding or withdrawal of life-saving or life-sustaining medical care, treatment, services or procedures, then the guardian shall have the authority to act as provided for therein, even if the guardian has revoked or otherwise amended that power of attorney pursuant to the authority of K.S.A. 58-627, and amendments thereto, or the guardian may allow the agent appointed by the ward to act on the ward's behalf if the guardian has not revoked or otherwise amended that power of attorney; or

(C) in the circumstances where the ward's treating physician shall certify in writing to the guardian that the ward is in a persistent vegetative state or is suffering from an illness or other medical condition for which further treatment, other than for the relief of pain, would not likely prolong the life of the ward other than by artificial means, nor would be likely to restore to the ward any significant degree of capabilities beyond those the ward currently possesses, and which opinion is concurred in by either a second physician or by any medical ethics or similar committee to which the health care provider has access established for the purposes of reviewing such circumstances and the appropriateness of any type of physician's order which would have the effect of withholding or withdrawing life-saving or life sustaining medical care, treatment, services or procedures. Such written certification shall be approved by an order issued by the court;

(8) to exercise any control or authority over the ward's estate, except if the court shall specifically authorize such. The court may assign such authority to the guardian, including the authority to establish certain trusts as provided in K.S.A. 59-3080, and amendments thereto, and may waive the requirement of the posting of a bond, only if:

(A) Initially, the combined value of any funds and property in the possession of the ward or in the possession of any other person or entity, but which the ward is otherwise entitled to possess, equals \$10,000 or less; and

(B) either the court requires the guardian to report to the court the commencement of the exercising of such authority, or requires the guardian to specifically request of the court the authority to commence the exercise of such authority, as the court shall specify; and

(C) the court also requires the guardian, whenever the combined value of such funds and property exceeds \$10,000, to:

(i) File a guardianship plan as provided for in K.S.A. 59-3076, and amendments thereto, which contains elements similar to those which would be contained in a conservatorship plan as provided for in K.S.A. 59-3078, and amendments thereto;

(ii) petition the court for appointment of a conservator as provided for in K.S.A. 59-3058, 59-3059 or 59-3060, and amendments thereto; or

(iii) notify the court as the court shall specify that the value of the conservatee's estate has equaled or exceeded \$10,000, if the court has earlier appointed a conservator but did not issue letters of conservatorship pending such notification; ~~and~~

(9) to place the ward in a treatment facility as defined in K.S.A. 59-3077, and amendments thereto, except if authorized by the court as provided for therein; or

(10) to access digital assets of the ward except if authorized by the court pursuant to Section 14.

....

SECTION 23, amending K.S.A. 59-3078(f) regarding the powers of a conservator:

....

(f) A conservator shall not have the power:

(1) To use the assets of a minor's estate to pay any obligation imposed by law upon the minor's natural guardian or natural guardians, including the support, maintenance, care, treatment, habilitation or education of the minor, except with the specific approval of the court granted upon a showing of extreme hardship;

(2) to sell, convey, lease or mortgage the conservatee's interest in the homestead of the conservatee, except with the approval of the court, and no conservator's deed or other instrument executed by virtue of the court's approval shall be valid unless the spouse, or if the spouse has been adjudicated a person with an impairment in need of a conservator, the conservator appointed for the spouse, shall join therein as one of the grantors thereof;

(3) to lease, except with the approval of the court, the possession or use of any real estate within the conservatee's estate for any period of greater than three years;

(4) to sell, convey or mortgage, except with approval of the court, any real estate within the conservatee's estate;

(5) to sell, convey, lease or mortgage, except with approval of the court, any oil, gas or other mineral interest within the conservatee's estate;

(6) to sell, convey, lease or mortgage, except with the approval of the court, the inchoate

interest of the conservatee in any real estate the title to which is in the spouse of the conservatee, and no conservator's deed or other instrument executed by virtue of the court's approval shall be valid unless the spouse, or if the spouse has been adjudicated a person with an impairment in need of a conservator, the conservator appointed for the spouse, shall join therein as one of the grantors thereof;

(7) to extend, except with the approval of the court, an existing mortgage in favor of the conservatee or conservatee's estate, for a period of more than five years;

(8) to extend, except with the approval of the court, an existing mortgage which obligates the conservatee or the conservatee's estate, unless the extension agreement contains the same prepayment privileges, the rate of interest does not exceed the lowest rate in the mortgage extended, and the extension does not exceed five years; or

(9) to make any gift on behalf of the conservatee, except with the approval of the court upon a finding that:

(A) The conservatee had either in the past as a habit made similar gifts or declared an intent to make such a gift, or under the circumstances, would have made such a gift or gifts;

(B) sufficient funds and assets will remain in the conservatee's estate after the making of such a gift to meet the expected needs and responsibilities of the conservatee; and

(C) any person or entity who would have received the property to be gifted had the conservatee died at the time of the gift, but who is not the person or entity receiving the gift, has either consented to or agreed with the giving of the gift, in writing, or has received notice of the proposal to make the gift and been given the opportunity to request a hearing thereon by the court to be held prior to the court's approving the gift; or

(10) to access digital assets of the conservatee except if authorized by the court pursuant to Section 14.

....

SECTION 24, amending K.S.A. 77-201 *Ninth*:

....

Ninth. "Personal property" includes money, goods, chattels, evidences of debt and things in action, and digital assets as defined in the Revised Uniform Fiduciary Access to Digital Assets Act.

....

SECTION 25. EFFECTIVE DATE. This [act] takes effect ~~....~~ from and after its publication in the statute book.