

House Bill 5034

Fiduciary Access to Digital Assets

Senate Judiciary Committee

Testimony of Howard H. Collens, Esq.

February 9, 2016

Good afternoon Mr. Chairman and Members of the Committee. My name is Howard Collens. I appear before you this morning as a member of the Legislation Development and Drafting Committee of the Probate and Estate Planning Section of the State Bar of Michigan. I am also a council member of the Elder Law and Disability (ELDR) Section and have served as a liaison to the ELDR Section in relation to the drafting in this area undertaken by the Legislation Development and Drafting Committee. I am a member of the law firm of Galloway and Collens, PLLC located in Huntington Woods, Michigan.

The use of the internet in all segments of life is a daily reality of the 21st Century. From all varieties of commerce to social networking, storage of photos and data in the cloud to sending emails, texts and photos, there is not a minute of the day that goes by where someone is not engaging in the use of the internet. It is also true that every day, people are becoming incapacitated or dying. To date, Michigan law has not directly addressed the intersection of these two realities.

House Bill 5034 proposes to provide a comprehensive approach to allowing fiduciaries to access the digital assets of a person who has become incapacitated or has died. This Bill will authorize a fiduciary - including agents under powers of attorney, guardians and conservators, personal representatives in decedent's estates and trustees of trusts - to be able to access and utilize the incapacitated or deceased individual's online assets to the extent permitted in the Bill. Creating new law in this area will benefit both the general public and practitioners alike.

Over the course of the last couple of years, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has engaged in a thorough and thoughtful process to develop a Uniform Fiduciary Access to Digital Assets Act (UFADAA).¹ The prior version of UFADAA proved to be too contentious between advocates for industry, privacy advocates and end users to enact. Last summer, after significant negotiations, NCCUSL revised the UFADAA.

The Legislation Development and Drafting Committee has reviewed, in depth, the emerging NCCUSL approaches and, in light of the recent national developments, proposed a Michigan specific version of the law for Fiduciary Access to Digital Assets (FADA).

On November 7, 2015, both the Probate and Estate Planning Section and the Elder Law and Disability Rights Section adopted support for the Michigan FADA as prepared by the Legislation Development and Drafting Committee and amended by the Probate Council. House Bill 5034 reflects the Michigan FADA as endorsed by both Probate and Estate Planning and ELDR Sections with several nonsubstantive modifications.

¹ A previous version of UFADAA was adopted by NCCUSL in July 2014.

It is beneficial to have the law enacted in Michigan consistent with the NCCUSL version of FADA to achieve the benefits of uniformity among the states. Namely, fiduciaries will enjoy more efficient access to digital assets and custodians of digital data will benefit from uniform regulation.

We want to thank Representative Forlini for his leadership in helping the parties work through often contentious issues to develop a workable compromise. It is both Sections' hope that we can continue to work with the relevant policymakers and stakeholders to enact a law on Fiduciary Access to Digital Assets that will support and enhance the probate and trust law in the 21st century and beyond.²

Thank you for your time. I would be happy to address any questions that you may have for me.

² Only a handful of states have enacted legislation addressing FADA. Michigan can and should be an early adopter of a comprehensive approach in this area.