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March 5, 2015

Representative William Tong, Co-Chairperson
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Senator Eric D. Coleman, Co-Chairperson
Judiciary Committee
Legislative Office Building
Room 2500
Hartford, Connecticut 06106-1591

Re: Senate Bill 979, AAC The Connecticut Uniform Fiduciary Access to Digital Assets Act

Judiciary Committee
Public Hearing: 3/6/15

**TESTIMONY OF LIZA KARSAI
IN SUPPORT OF SENATE BILL 979**

**AAC THE ADOPTION OF THE CONNECTICUT
UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

Chairmen Coleman and Tong, and Members of the Committee:

My name is Liza Karsai. I am the Executive Director of the Uniform Law Commission. **I submit this testimony on behalf of SB 979, and urge you to SUPPORT SB 979, the Connecticut Uniform Fiduciary Access to Digital Assets Act (UFADAA)**, which will expand and update the Connecticut law that since 2005 has given executors necessary access to a decedent's emails.

Thank you for considering SB 979, a bill to enact the Uniform Fiduciary Access to Digital Assets Act (or UFADAA). This new uniform act is the product of a two-year drafting project by a committee chaired by one of Connecticut's uniform law commissioners, Suzanne Brown Walsh. Suzy wanted to be here today to testify in favor of SB 979, but she is attending the annual conference of the American College of Trust and Estate Counsel, where she is a fellow.

The uniform law commission drafting process is open to the public and we welcome all stakeholders to the drafting table to provide input. The UFADAA committee benefitted from the input of many representatives from technology firms, and the bill you will consider today contains many provisions included at their request. Of course, drafting good legislation involves compromise, and some of those same firms decided not to support the final version of UFADAA because the act did not include everything the tech firms requested. Nevertheless, we believe the bill before you today balances the interests of all parties appropriately and makes for sound public policy.

The objections to UFADAA generally fall into three categories:

- Privacy concerns;
- Potential conflict with federal law; and
- Interference with a private contract.

I will now explain how the drafting committee considered and addressed each of these issues.

Privacy

First off, I want to stress that you can keep 100% of your digital assets private under UFADAA – even from the fiduciary who handles your estate when you die. Here is the difference: under UFADAA, YOU alone can make that choice. Under the current law, the custodian of your digital assets makes the decision for you, and often buries the decision in a click-through terms-of-service agreement. UFADAA requires the companies that hold your digital assets to take directions from you – either through their web sites or through your estate plan.

If you do not direct the company how to handle your digital assets, UFADAA will allow the trusted fiduciary who handles your estate to manage your digital assets as well as your tangible assets – subject to any limitations imposed by the terms-of-service agreement or by other law. The fiduciary is someone selected by you or by the probate court, who swears an oath to act only in the estate’s best interest, posts a bond if the court deems it necessary, and is overseen throughout the process by the probate judge. The fiduciary may not make any of your private information public, but can destroy it or distribute it to your heirs, as appropriate.

A variation on the privacy concern involves third parties who communicate with someone who later dies. For example, a doctor or addiction counselor dies leaving records of private communications with their clients. However, this is not a new problem – doctors and drug counselors died before email was invented, and someone had to administer their estates. Most responsible professionals will plan for such eventualities and designate someone responsible to take possession of client files. If they do not, the probate court handling the estate will take special care to appoint someone appropriate to handle the sensitive duty of transferring, shredding, or deleting client files. UFADAA does not change this aspect of the law in any way.

Conflict with Federal Law

In 1986, when email was in its infancy, Congress enacted the Electronic Communications Privacy Act (ECPA) to ensure email providers did not mishandle the communications between private citizens. ECPA prevents an email provider from releasing the content of communications to a law enforcement or governmental agency without a warrant, and prohibits release to third parties unless either the sender or the recipient consents. Unsurprisingly, the law does not address fiduciaries, who have always been regulated by state governments.

During the drafting process, some technology firms expressed concern that they could be sued under ECPA for releasing information to a fiduciary as required by UFADAA. Although the committee was satisfied that long-standing state law allows the fiduciary to “step into the shoes” of the decedent and assume the decedent’s rights, it agreed that ECPA did not expressly address fiduciaries. The committee devised a two-part solution.

1. UFADAA exempts custodian firms from releasing the content of any communications protected by ECPA. (See UFADAA Sections 4, 5, 6, and 7, which expressly reference the federal law.)
2. ACTEC and others are trying to persuade Congress to enact a clarifying amendment to ECPA to remove any doubt that protected communications can be released to fiduciaries.

Of course, UFADAA covers a broad universe of digital assets while ECPA addresses a small subset: the content of email and text messages (but not the “envelope information” such as the email address of the sender and the recipient). Even if Congress were to tell us that ECPA prevents the release of content to fiduciaries authorized under state law, UFADAA would still be useful because it requires the release of the envelope data and hundreds of other kinds of digital assets.

Contract Interference

Finally, I will address the issue of interference with contracts. The contracts at issue are the click-through terms-of-service agreements that are unilaterally imposed on account holders. UFADAA defers to all terms of a terms-of-service agreement except one that violates the long-standing public policy of this state: a blanket restriction on fiduciary access.

Connecticut must ensure the orderly transfer of digital assets at death in the same way that tangible assets are transferred: as directed by the decedent and administered by a fiduciary under the watchful eye of the probate court. In our modern world where digital assets can have great financial and sentimental value, Connecticut citizens deserve no less.

Thank you for your consideration of HB 979 – an important update to Connecticut law for the digital age. I welcome your questions.

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