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# A BILL FOR AN ACT

RELATING TO FIDUCIARY ACCESS TO DIGITAL ASSETS.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The Hawaii Revised Statutes is amended by  
2 adding a new chapter to be appropriately designated and to read  
3 as follows:

## "CHAPTER

### FIDUCIARY ACCESS TO DIGITAL ASSETS

6           § -1 **Definitions.** When used in this chapter, unless the  
7 context otherwise requires:

8           "Account holder":

9           (1) Means a person who has entered into a terms-of-service  
10           agreement with a custodian and a fiduciary for the  
11           person; and

12           (2) Includes a deceased individual who entered into the  
13           agreement during the individual's lifetime.

14           "Agent":

15           (1) Means a person who is granted authority to act for a  
16           principal under a durable or nondurable power of



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1 attorney, whether denominated an agent, an attorney-  
2 in-fact, or otherwise; and

3 (2) Includes an original agent, a co-agent, and a  
4 successor agent.

5 "Carry" means to engage in the transmission of electronic  
6 communications.

7 "Catalogue of electronic communications" means information  
8 that identifies each person with which an account holder has had  
9 an electronic communication, the time and date of the  
10 communication, and the electronic address of the person.

11 "Content of an electronic communication" means information  
12 not readily accessible to the public concerning the substance or  
13 meaning of an electronic communication.

14 "Court" means a circuit court of this State.

15 "Custodian" means a person who carries, maintains,  
16 processes, receives, or stores a digital asset of an account  
17 holder.

18 "Digital asset":

19 (1) Means an electronic record; and



1           (2) Does not include an underlying asset or liability to  
2                    which an electronic record refers, unless the asset or  
3                    liability is itself an electronic record.

4           "Electronic" means technology having electrical, digital,  
5 magnetic, wireless, optical, electromagnetic, or similar  
6 capabilities.

7           "Electronic communication":

8           (1) Means a digital asset stored by an electronic  
9                    communication service or carried or maintained by a  
10                   remote computing service; and

11           (2) Includes the catalogue of electronic communications  
12                   and the content of an electronic communication.

13           "Electronic communication service" means a custodian who  
14 provides to the public the ability to send or receive an  
15 electronic communication.

16           "Fiduciary" means a person who is an original, additional,  
17 or successor personal representative, guardian, agent, or  
18 trustee.

19           "Guardian":



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1           (1) Means a person who has been appointed by the court as  
2           guardian of the property of a minor or incapacitated  
3           individual; and

4           (2) Includes a person who has been appointed by the court  
5           as an emergency temporary guardian of the property.

6           "Information" means data, text, images, videos, sounds,  
7 codes, computer programs, software, databases, or the like.

8           "Person" means an individual, estate, trust, business or  
9 nonprofit entity, public corporation, government or governmental  
10 subdivision, agency, or instrumentality, or other legal entity.

11          "Personal representative" means the fiduciary appointed by  
12 the court to administer the estate of a deceased individual  
13 pursuant to letters of administration or an order appointing a  
14 curator or administrator ad litem for the estate.

15          "Power of attorney" means a record that grants an agent  
16 authority to act in the place of a principal.

17          "Principal" means an individual who grants authority to an  
18 agent in a power of attorney.

19          "Record" means information that is inscribed on a tangible  
20 medium or that is stored in an electronic or other medium and is  
21 retrievable in perceivable form.



1 "Remote computing service" means a custodian who provides  
2 to the public computer processing services or the storage of  
3 digital assets by means of an electronic communications system,  
4 as defined in 18 U.S.C. section 2510(14).

5 "Terms of service agreement" means an agreement that  
6 controls the relationship between an account holder and a  
7 custodian.

8 "Trustee" means a fiduciary who holds legal title to a  
9 digital asset pursuant to an agreement, declaration, or trust  
10 instrument that creates a beneficial interest in the settlor or  
11 others.

12 "Ward" means an individual for whom a guardian has been  
13 appointed.

14 "Will":

15 (1) Means an instrument admitted to probate, including a  
16 codicil, executed by an individual in the manner  
17 prescribed by the uniform probate code, that disposes  
18 of the individual's property upon or after the  
19 individual's death; and

20 (2) Includes an instrument that merely appoints a personal  
21 representative or revokes or revises another will.



1           §   -2   **Authority of personal representative over digital**  
2 **assets of a decedent.** Subject to section   -6(b) and unless  
3 otherwise provided by the court or the will of a decedent, a  
4 personal representative shall have the right to access:

5           (1) The content of an electronic communication sent or  
6           received by the decedent if the electronic  
7           communication service or remote computing service is  
8           authorized to disclose the content under 18 U.S.C.  
9           section 2702(b);

10          (2) The catalogue of electronic communications sent or  
11          received by the decedent; and

12          (3) Any other digital asset in which the decedent had a  
13          right or interest at the time of the decedent's death.

14          §   -3   **Authority of guardian over digital assets of a**  
15 **ward.** The court, after an opportunity for hearing, may grant a  
16 guardian the right to access:

17          (1) The content of an electronic communication sent or  
18          received by the ward if the electronic communication  
19          service or remote computing service is authorized to  
20          disclose the content under 18 U.S.C. section 158  
21          2702(b);



1           (2) The catalogue of electronic communications sent or  
2           received by the ward; and

3           (3) Any other digital asset in which the ward has a right  
4           or interest.

5           § -4 Control by agent of digital assets. (a) To the  
6 extent a power of attorney expressly grants authority to an  
7 agent over the content of an electronic communication of the  
8 principal, the agent shall have the right to access the content  
9 of an electronic communication sent or received by the principal  
10 if the electronic communication service or remote computing  
11 service is authorized to disclose the content under 18 U.S.C.  
12 section 2702(b).

13           (b) Except as provided in subsection (a) and unless  
14 otherwise provided by a power of attorney or a court order, an  
15 agent shall have the right to access:

16           (1) The catalogue of electronic communications sent or  
17           received by the principal; and

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

20           § -5 Control by trustee of digital assets. Subject to  
21 section -6(b) and unless otherwise provided by the court or



1 the terms of a trust, a trustee or a successor of a trustee who  
2 is:

3 (1) An original account holder shall have the right to  
4 access each digital asset held in trust, including the  
5 catalogue of electronic communications sent or  
6 received and the content of an electronic  
7 communication; or

8 (2) Not an original account holder shall have the right to  
9 access the following digital assets held in trust:

10 (A) The catalogue of electronic communications sent  
11 or received by the account holder;

12 (B) The content of an electronic communication sent  
13 or received by the account holder if the  
14 electronic communication service or remote  
15 computing service is authorized to disclose the  
16 content under 18 U.S.C. section 2702(b); and

17 (C) Any other digital asset in which the account  
18 holder or any successor account holder has a  
19 right or interest.





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1           §   -6 **Fiduciary access and authority.** (a) A fiduciary  
2 who is an account holder or has the right under this chapter to  
3 access a digital asset of an account holder:

4           (1) May take any action concerning the digital asset to  
5               the extent of the account holder's authority and the  
6               fiduciary's powers under the laws of this State,  
7               subject to the terms-of-service agreement and  
8               copyright or other applicable law;

9           (2) Shall be deemed to have the lawful consent of the  
10            account holder for the custodian to divulge the  
11            content of an electronic communication to the  
12            fiduciary under applicable electronic privacy laws;  
13            and

14           (3) Shall be an authorized user under applicable computer  
15            fraud and unauthorized access laws.

16           (b) If a provision in a terms-of-service agreement limits  
17 a fiduciary's access to a digital asset of the account holder,  
18 the provision shall be void as against the strong public policy  
19 of this State unless the account holder agreed to the provision  
20 after July 1, 2015, by an affirmative act separate from the



1 account holder's assent to other provisions of the terms-of-  
2 service agreement.

3 (c) A choice of law provision in a terms of service  
4 agreement shall be unenforceable against a fiduciary acting  
5 under this chapter to the extent the provision designates a law  
6 that enforces a limitation upon a fiduciary's access to a  
7 digital asset that is void under subsection (b).

8 (d) Except as provided in subsection (b), a fiduciary's  
9 access to a digital asset under this chapter does not violate a  
10 terms-of-service agreement, notwithstanding a provision of the  
11 agreement that limits third-party access or requires notice of  
12 change in the account holder's status.

13 (e) As to tangible personal property capable of receiving,  
14 storing, processing, or sending a digital asset, a fiduciary  
15 with authority over the property of a decedent, ward, principal,  
16 or settlor shall have the right to access the property and any  
17 digital asset stored in it and shall be an authorized user for  
18 purposes of any applicable computer fraud and unauthorized  
19 access laws, including the laws of this State.

20 § -7 Compliance. (a) If a fiduciary who has a right  
21 under this chapter to access a digital asset of an account



1 holder complies with subsection (b), the custodian shall comply  
2 with the fiduciary's request for a record for:

- 3 (1) Access to the digital asset;
- 4 (2) Control of the digital asset; and
- 5 (3) A copy of the digital asset to the extent authorized  
6 by copyright law.

7 (b) If a request under subsection (a) is made by:

- 8 (1) A personal representative who has the right of access  
9 under section -2, the request shall be accompanied  
10 by a certified copy of the letters of administration  
11 of the personal representative, an order authorizing a  
12 curator or administrator ad litem, or other court  
13 order;

- 14 (2) A guardian who has the right of access under section  
15 -3, the request shall be accompanied by a certified  
16 copy of letters of plenary guardianship of the  
17 property or a court order that gives the guardian  
18 authority over the digital asset;

- 19 (3) An agent who has the right of access under section  
20 -4, the request shall be accompanied by an original  
21 or a copy of the power of attorney that authorizes the



1 agent to exercise authority over the digital asset and  
2 a certification of the agent, under penalty of  
3 perjury, that the power of attorney is in effect;

4 (4) A trustee who has the right of access under section  
5 -5, the request shall be accompanied by a certified  
6 copy of the trust instrument that authorizes the  
7 trustee to exercise authority over the digital asset;  
8 or

9 (5) A person who is entitled to receive and collect  
10 specified digital assets, the request shall be  
11 accompanied by a certified copy of a court order  
12 issued pursuant to chapter 560.

13 (c) A custodian shall comply with a request made under  
14 subsection (a) not later than sixty days after receipt. If the  
15 custodian fails to comply, the fiduciary may apply to the court  
16 for an order directing compliance.

17 (d) A custodian who receives a certification of trust may  
18 require the trustee to provide copies of excerpts from the  
19 original trust instrument and later amendments that designate  
20 the trustee and confer upon the trustee the power to act in the  
21 pending transaction.



1           (e) A custodian who acts in reliance on a certification of  
2 trust without knowledge that the representations contained in it  
3 are incorrect shall not be liable to any person for so acting  
4 and may assume without inquiry the existence of facts stated in  
5 the certification.

6           (f) A custodian who enters into a transaction in good  
7 faith and in reliance on a certification of trust may enforce  
8 the transaction against the trust property as if the  
9 representations contained in the certification were correct.

10          (g) A custodian who demands the trust instrument in  
11 addition to a certification of trust or excerpts under  
12 subsection (d) shall be liable for damages if the court  
13 determines that the custodian did not act in good faith in  
14 demanding the trust instrument.

15          (h) This section shall not limit the right of a person to  
16 obtain a copy of a trust instrument in a judicial proceeding  
17 concerning the trust.

18          § -8 Immunity. A custodian and its officers, employees,  
19 and agents shall be immune from liability for any action done in  
20 good faith in compliance with this chapter.



1           §   -9   Relation to federal Electronic Signatures in Global  
2   and National Commerce Act. This chapter shall modify, limit, or  
3   supersede the Electronic Signatures in Global and National  
4   Commerce Act, as codified in 15 U.S.C. sections 7001 et seq.,  
5   but shall not modify, limit, or supersede section 101(c) of that  
6   Act; as codified in 15 U.S.C. section 7001(c), or authorize  
7   electronic delivery of the notices described in section 103(b)  
8   of that Act, as codified in 15 U.S.C. section 7003(b).

9           §   -10   Applicability. (a) Subject to subsection (b),  
10   this chapter shall apply to:

- 11           (1) An agent acting under a power of attorney executed  
12               before, on, or after July 1, 2015;
- 13           (2) A personal representative acting for a decedent who  
14               died before, on, or after July 1, 2015;
- 15           (3) A guardian appointed through a guardianship  
16               proceeding, whether pending in a court or commenced  
17               before, on, or after July 1, 2015; and
- 18           (4) A trustee acting under a trust created before, on, or  
19               after July 1, 2015.



1 (b) This chapter shall not apply to a digital asset of an  
2 employer used by an employee in the ordinary course of the  
3 employer's business."

4 SECTION 2. This Act shall take effect on July 1, 2015.

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INTRODUCED BY:

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JAN 28 2015



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**Report Title:**

Fiduciary; Digital Assets

**Description:**

Gives various types of fiduciaries access to the digital assets of the principal.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

