
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 legislature finds that the number of
2 digital assets held by the average person is increasing and that
3 questions surrounding the disposition of these assets upon an
4 individual's death or incapacity are becoming more common.
5 These assets range from online gaming items to photographs, and
6 from digital music to client lists, all of which have monetary
7 value. While some internet service providers have explicit
8 policies on what will happen when an individual dies, others do
9 not, and there are millions of internet accounts that belong to
10 decedents.

11 Presently, there is no law in this State pertaining to
12 fiduciary access to digital assets. There are only criminal
13 laws regarding access to stored communications.

14 The purpose of this Act is to remove the uncertainty of
15 what happens to a person's online assets when the person dies
16 and to provide the personal representative of the person's will
17 with access to the person's online accounts when the passwords



1 are not in the personal representative's possession.
2 Specifically, this Act provides a fiduciary with the right to
3 "step into the shoes" of a decedent to manage the decedent's
4 digital assets. Administering both non-digital and digital
5 estate assets are similar in that the fiduciary will be granted
6 the same authority over both types of property. Because the
7 fiduciary has the same authority as the deceased account holder,
8 the fiduciary is "authorized" by the deceased account holder as
9 required under the federal Stored Communications Act and the
10 federal Computer Fraud and Abuse Act, both of which were passed
11 in 1986.

12 This Act will vest fiduciaries with the authority to
13 access, control, or copy digital assets and accounts and is
14 designed to work in conjunction with the State's existing laws
15 on probate, guardianship, trusts, and powers of attorney. This
16 Act protects privacy rights, and provides a clear set of
17 requirements for accessing digital assets, treating them like
18 other non-digital assets.

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



1 "CHAPTER

2 FIDUCIARY ACCESS TO DIGITAL ASSETS

3 § -1 Definitions. When used in this chapter, unless the
4 context otherwise requires:

5 "Account holder":

- 6 (1) Means a person who has entered into a terms-of-service
7 agreement with a custodian and a fiduciary for the
8 person; and
9 (2) Includes a deceased individual who entered into the
10 agreement during the individual's lifetime.

11 "Agent":

- 12 (1) Means a person who is granted authority to act for a
13 principal under a durable or nondurable power of
14 attorney, whether denominated an agent, an attorney-
15 in-fact, or otherwise; and
16 (2) Includes an original agent, a co-agent, and a
17 successor agent.

18 "Carry" means to engage in the transmission of electronic
19 communications.

20 "Catalogue of electronic communications" means information
21 that identifies each person with which an account holder has had



1 an electronic communication, the time and date of the
2 communication, and the electronic address of the person.

3 "Content of an electronic communication" means information
4 not readily accessible to the public concerning the substance or
5 meaning of an electronic communication.

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

7 "Custodian" means a person who carries, maintains,
8 processes, receives, or stores a digital asset of an account
9 holder.

10 "Digital asset":

- 11 (1) Means an electronic record; and
- 12 (2) Does not include an underlying asset or liability to
13 which an electronic record refers, unless the asset or
14 liability is itself an electronic record.

15 "Electronic" means technology having electrical, digital,
16 magnetic, wireless, optical, electromagnetic, or similar
17 capabilities.

18 "Electronic communication":

- 19 (1) Means a digital asset stored by an electronic
20 communication service or carried or maintained by a
21 remote computing service; and



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

3 "Electronic communication service" means a custodian who
4 provides to the public the ability to send or receive an
5 electronic communication.

6 "Fiduciary" means a person who is an original, additional,
7 or successor personal representative, guardian, agent, or
8 trustee.

9 "Guardian":

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

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

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

17 "Person" means an individual, estate, trust, business or
18 nonprofit entity, public corporation, government or governmental
19 subdivision, agency, or instrumentality, or other legal entity.

20 "Personal representative" means the fiduciary appointed by
21 the court to administer the estate of a deceased individual



1 pursuant to letters of administration or an order appointing a
2 curator or administrator ad litem for the estate.

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

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

7 "Record" means information that is inscribed on a tangible
8 medium or that is stored in an electronic or other medium and is
9 retrievable in perceivable form.

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

14 "Terms of service agreement" means an agreement that
15 controls the relationship between an account holder and a
16 custodian.

17 "Trustee" means a fiduciary who holds legal title to a
18 digital asset pursuant to an agreement, declaration, or trust
19 instrument that creates a beneficial interest in the settlor or
20 others.



1 "Ward" means an individual for whom a guardian has been
2 appointed.

3 "Will":

4 (1) Means an instrument admitted to probate, including a
5 codicil, executed by an individual in the manner
6 prescribed by the uniform probate code, that disposes
7 of the individual's property upon or after the
8 individual's death; and

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

11 § -2 Authority of personal representative over digital
12 assets of a decedent. Subject to section -6(b) and unless
13 otherwise provided by the court or the will of a decedent, a
14 personal representative shall have the right to access:

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

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



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

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

6 (1) The content of an electronic communication sent or
7 received by the ward if the electronic communication
8 service or remote computing service is authorized to
9 disclose the content under 18 U.S.C. section 158
10 2702(b);

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

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

15 § -4 Control by agent of digital assets. (a) To the
16 extent a power of attorney expressly grants authority to an
17 agent over the content of an electronic communication of the
18 principal, the agent shall have the right to access the content
19 of an electronic communication sent or received by the principal
20 if the electronic communication service or remote computing



1 service is authorized to disclose the content under 18 U.S.C.
2 section 2702(b).

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

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

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

10 § -5 **Control by trustee of digital assets.** Subject to
11 section -6(b) and unless otherwise provided by the court or
12 the terms of a trust, a trustee or a successor of a trustee who
13 is:

14 (1) An original account holder shall have the right to
15 access each digital asset held in trust, including the
16 catalogue of electronic communications sent or
17 received and the content of an electronic
18 communication; or

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



- 1 (A) The catalogue of electronic communications sent
- 2 or received by the account holder;
- 3 (B) The content of an electronic communication sent
- 4 or received by the account holder if the
- 5 electronic communication service or remote
- 6 computing service is authorized to disclose the
- 7 content under 18 U.S.C. section 2702(b); and
- 8 (C) Any other digital asset in which the account
- 9 holder or any successor account holder has a
- 10 right or interest.

11 § -6 **Fiduciary access and authority.** (a) A fiduciary
12 who is an account holder or has the right under this chapter to
13 access a digital asset of an account holder:

- 14 (1) May take any action concerning the digital asset to
- 15 the extent of the account holder's authority and the
- 16 fiduciary's powers under the laws of this State,
- 17 subject to the terms-of-service agreement and
- 18 copyright or other applicable law;
- 19 (2) Shall be deemed to have the lawful consent of the
- 20 account holder for the custodian to divulge the
- 21 content of an electronic communication to the



1 fiduciary under applicable electronic privacy laws;

2 and

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

5 (b) If a provision in a terms-of-service agreement limits
6 a fiduciary's access to a digital asset of the account holder,
7 the provision shall be void as against the strong public policy
8 of this State unless the account holder agreed to the provision
9 after July 1, 2015, by an affirmative act separate from the
10 account holder's assent to other provisions of the terms-of-
11 service agreement.

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

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



1 (e) As to tangible personal property capable of receiving,
2 storing, processing, or sending a digital asset, a fiduciary
3 with authority over the property of a decedent, ward, principal,
4 or settlor shall have the right to access the property and any
5 digital asset stored in it and shall be an authorized user for
6 purposes of any applicable computer fraud and unauthorized
7 access laws, including the laws of this State.

8 § -7 Compliance. (a) If a fiduciary who has a right
9 under this chapter to access a digital asset of an account
10 holder complies with subsection (b), the custodian shall comply
11 with the fiduciary's request for a record for:

- 12 (1) Access to the digital asset;
- 13 (2) Control of the digital asset; and
- 14 (3) A copy of the digital asset to the extent authorized
15 by copyright law.

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

- 17 (1) A personal representative who has the right of access
18 under section -2, the request shall be accompanied
19 by a certified copy of the letters of administration
20 of the personal representative, an order authorizing a



1 curator or administrator ad litem, or other court
2 order;

3 (2) A guardian who has the right of access under section
4 -3, the request shall be accompanied by a certified
5 copy of letters of plenary guardianship of the
6 property or a court order that gives the guardian
7 authority over the digital asset;

8 (3) An agent who has the right of access under section
9 -4, the request shall be accompanied by an original
10 or a copy of the power of attorney that authorizes the
11 agent to exercise authority over the digital asset and
12 a certification of the agent, under penalty of
13 perjury, that the power of attorney is in effect;

14 (4) A trustee who has the right of access under section
15 -5, the request shall be accompanied by a certified
16 copy of the trust instrument that authorizes the
17 trustee to exercise authority over the digital asset;
18 or

19 (5) A person who is entitled to receive and collect
20 specified digital assets, the request shall be



1 accompanied by a certified copy of a court order
2 issued pursuant to chapter 560.

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

7 (d) A custodian who receives a certification of trust may
8 require the trustee to provide copies of excerpts from the
9 original trust instrument and later amendments that designate
10 the trustee and confer upon the trustee the power to act in the
11 pending transaction.

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

17 (f) A custodian who enters into a transaction in good
18 faith and in reliance on a certification of trust may enforce
19 the transaction against the trust property as if the
20 representations contained in the certification were correct.



1 (g) A custodian who demands the trust instrument in
2 addition to a certification of trust or excerpts under
3 subsection (d) shall be liable for damages if the court
4 determines that the custodian did not act in good faith in
5 demanding the trust instrument.

6 (h) This section shall not limit the right of a person to
7 obtain a copy of a trust instrument in a judicial proceeding
8 concerning the trust.

9 § -8 Immunity. A custodian and its officers, employees,
10 and agents shall be immune from liability for any action done in
11 good faith in compliance with this chapter.

12 § -9 Relation to federal Electronic Signatures in Global
13 and National Commerce Act. This chapter shall modify, limit, or
14 supersede the Electronic Signatures in Global and National
15 Commerce Act, as codified in 15 U.S.C. sections 7001 et seq.,
16 but shall not modify, limit, or supersede section 101(c) of that
17 Act, as codified in 15 U.S.C. section 7001(c), or authorize
18 electronic delivery of the notices described in section 103(b)
19 of that Act, as codified in 15 U.S.C. section 7003(b).

20 § -10 Applicability. (a) Subject to subsection (b),
21 this chapter shall apply to:




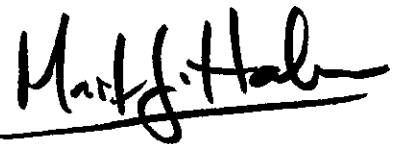
- 1 (1) An agent acting under a power of attorney executed
- 2 before, on, or after July 1, 2015;
- 3 (2) A personal representative acting for a decedent who
- 4 died before, on, or after July 1, 2015;
- 5 (3) A guardian appointed through a guardianship
- 6 proceeding, whether pending in a court or commenced
- 7 before, on, or after July 1, 2015; and
- 8 (4) A trustee acting under a trust created before, on, or
- 9 after July 1, 2015.



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



13 SECTION 3. This Act shall take effect on July 1, 2015.

14

INTRODUCED BY: 

H.B. NO. 745

Report Title:

Fiduciary; Digital Assets

Description:

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

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