

JAN 22 2016

A BILL FOR AN ACT

RELATING TO THE UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT.

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:

4 "CHAPTER

5 UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

6 § -1 Short title. This chapter may be cited as the
7 Uniform Fiduciary Access to Digital Assets Act (2015).

8 § -2 Definitions. In this chapter:

9 "Account" means an arrangement under a terms-of-service
10 agreement in which a custodian carries, maintains, processes,
11 receives, or stores a digital asset of the user or provides
12 goods or services to the user.

13 "Agent" means an attorney-in-fact granted authority under a
14 durable or nondurable power of attorney.

15 "Carries" means engages in the transmission of an
16 electronic communication.



1 "Catalogue of electronic communications" means information
2 that identifies each person with which a user has had an
3 electronic communication, the time and date of the
4 communication, and the electronic address of the person.

5 "Conservator" means a person appointed by a court to manage
6 the estate of a living individual. The term includes a limited
7 conservator.

8 "Content of an electronic communication" means information
9 concerning the substance or meaning of the communication which:

- 10 (1) Has been sent or received by a user;
- 11 (2) Is in electronic storage by a custodian providing an
12 electronic communication service to the public or is
13 carried or maintained by a custodian providing a
14 remote computing service to the public; and
- 15 (3) Is not readily accessible to the public.

16 "Court" means the circuit court in this State having
17 jurisdiction in matters relating to powers of attorney, in the
18 case of a fiduciary or agent acting under a will or power of
19 attorney; a circuit court in this State having jurisdiction in
20 matters relating to the affairs of decedents, in the case of a
21 personal representative; a circuit court in this State having



1 jurisdiction in matters relating to the affairs of decedents or
2 the family court, depending on which court has subject matter
3 jurisdiction under section 560:5-106, in the case of a
4 conservatorship; or a court that has jurisdiction under section
5 560:7-204, in the case of a trustee acting under a trust.

6 "Custodian" means a person that carries, maintains,
7 processes, receives, or stores a digital asset of a user.

8 "Designated recipient" means a person chosen by a user
9 using an online tool to administer digital assets of the user.

10 "Digital asset" means an electronic record in which an
11 individual has a right or interest. The term does not include
12 an underlying asset or liability unless the asset or liability
13 is itself an electronic record.

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

17 "Electronic communication" has the meaning set forth in
18 title 18 U.S.C. section 2510(12).

19 "Electronic communication service" means a custodian that
20 provides to a user the ability to send or receive an electronic
21 communication.



1 "Fiduciary" means an original, additional, or successor
2 personal representative, conservator, agent, or trustee.

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

5 "Online tool" means an electronic service provided by a
6 custodian that allows the user, in an agreement distinct from
7 the terms-of-service agreement between the custodian and user,
8 to provide directions for disclosure or nondisclosure of digital
9 assets to a third person.

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

13 "Personal representative" means an executor, administrator,
14 special administrator, or person that performs substantially the
15 same function under the law of this State other than this
16 chapter.

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

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



1 "Protected person" means an individual for whom a
2 conservator has been appointed. The term includes an individual
3 for whom an application for the appointment of a conservator is
4 pending.

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

8 "Remote computing service" means a custodian that provides
9 to a user computer-processing services or the storage of digital
10 assets by means of an electronic communications system, as
11 defined in title 18 U.S.C. section 2510(14).

12 "Terms-of-service agreement" means an agreement that
13 controls the relationship between a user and a custodian.

14 "Trustee" means a fiduciary with legal title to property
15 under an agreement or declaration that creates a beneficial
16 interest in another. The term includes a successor trustee.

17 "User" means a person that has an account with a custodian.

18 "Will" includes a codicil, testamentary instrument that
19 only appoints an executor, and instrument that revokes or
20 revises a testamentary instrument.

21 § -3 **Applicability.** (a) This chapter applies to:



1 (1) A fiduciary acting under a will or power of attorney
2 executed before, on, or after the effective date of
3 this Act;

4 (2) A personal representative acting for a decedent who
5 died before, on, or after the effective date of this
6 Act;

7 (3) A conservatorship proceeding commenced before, on, or
8 after the effective date of this Act; and

9 (4) A trustee acting under a trust created before, on, or
10 after the effective date of this Act.

11 (b) This chapter applies to a custodian if the user
12 resides in this State or resided in this State at the time of
13 the user's death.

14 (c) This chapter does not apply to a digital asset of an
15 employer used by an employee in the ordinary course of the
16 employer's business.

17 § -4 User direction for disclosure of digital assets.

18 (a) A user may use an online tool to direct the custodian to
19 disclose or not to disclose some or all of the user's digital
20 assets, including the content of electronic communications. If
21 the online tool allows the user to modify or delete a direction



1 at all times, a direction regarding disclosure using an online
2 tool overrides a contrary direction by the user in a will,
3 trust, power of attorney, or other record.

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

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

15 § -5 **Terms-of-service agreement.** (a) This chapter does
16 not change or impair a right of a custodian or a user under a
17 terms-of-service agreement to access and use digital assets of
18 the user.

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



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

5 § -6 Procedure for disclosing digital assets. (a) When
6 disclosing digital assets of a user under this chapter, the
7 custodian may at its sole discretion:

8 (1) Grant a fiduciary or designated recipient full access
9 to the user's account;

10 (2) Grant a fiduciary or designated recipient partial
11 access to the user's account sufficient to perform the
12 tasks with which the fiduciary or designated recipient
13 is charged; or

14 (3) Provide a fiduciary or designated recipient a copy in
15 a record of any digital asset that, on the date the
16 custodian received the request for disclosure, the
17 user could have accessed if the user were alive and
18 had full capacity and access to the account.

19 (b) A custodian may assess a reasonable administrative
20 charge for the cost of disclosing digital assets under this
21 chapter.



1 (c) A custodian need not disclose under this chapter a
2 digital asset deleted by a user.

3 (d) If a user directs or a fiduciary requests a custodian
4 to disclose under this chapter some, but not all, of the user's
5 digital assets, the custodian need not disclose the assets if
6 segregation of the assets would impose an undue burden on the
7 custodian. If the custodian believes the direction or request
8 imposes an undue burden, the custodian or fiduciary may seek an
9 order from the court to disclose:

10 (1) A subset limited by date of the user's digital assets;

11 (2) All of the user's digital assets to the fiduciary or
12 designated recipient;

13 (3) None of the user's digital assets; or

14 (4) All of the user's digital assets to the court for
15 review in camera.

16 § -7 Disclosure of content of electronic communications
17 of deceased user. If a deceased user consented or a court
18 directs disclosure of the contents of electronic communications
19 of the user, the custodian shall disclose to the personal
20 representative of the estate of the user the content of an



1 electronic communication sent or received by the user if the
2 personal representative gives the custodian:

- 3 (1) A written request for disclosure in physical or
4 electronic form;
- 5 (2) A certified copy of the death certificate of the user;
- 6 (3) A certified copy of the letter of appointment of the
7 personal representative or a small estate affidavit or
8 court order;
- 9 (4) Unless the user provided direction using an online
10 tool, a copy of the user's will, trust, power of
11 attorney, or other record evidencing the user's
12 consent to disclosure of the content of electronic
13 communications; and
- 14 (5) If requested by the custodian:
 - 15 (A) A number, username, address, or other unique
16 subscriber or account identifier assigned by the
17 custodian to identify the user's account;
 - 18 (B) Evidence linking the account to the user; or
 - 19 (C) A finding by the court that:



- 1 (i) The user had a specific account with the
2 custodian, identifiable by the information
3 specified in subparagraph (A);
- 4 (ii) Disclosure of the content of electronic
5 communications of the user would not violate
6 title 18 U.S.C. section 2701 et seq., title
7 47 U.S.C. section 222, or other applicable
8 law;
- 9 (iii) Unless the user provided direction using an
10 online tool, the user consented to
11 disclosure of the content of electronic
12 communications; or
- 13 (iv) Disclosure of the content of electronic
14 communications of the user is reasonably
15 necessary for administration of the estate.

16 § -8 Disclosure of other digital assets of deceased
17 user. Unless the user prohibited disclosure of digital assets
18 or the court directs otherwise, a custodian shall disclose to
19 the personal representative of the estate of a deceased user a
20 catalogue of electronic communications sent or received by the
21 user and digital assets, other than the content of electronic



1 communications, of the user, if the personal representative
2 gives the custodian:

- 3 (1) A written request for disclosure in physical or
4 electronic form;
- 5 (2) A certified copy of the death certificate of the user;
- 6 (3) A certified copy of the letter of appointment of the
7 personal representative or a small estate affidavit or
8 court order; and
- 9 (4) If requested by the custodian:
 - 10 (A) A number, username, address, or other unique
11 subscriber or account identifier assigned by the
12 custodian to identify the user's account;
 - 13 (B) Evidence linking the account to the user;
 - 14 (C) An affidavit stating that disclosure of the
15 user's digital assets is reasonably necessary for
16 administration of the estate; or
 - 17 (D) A finding by the court that:
 - 18 (i) The user had a specific account with the
19 custodian, identifiable by the information
20 specified in subparagraph (A); or



1 (ii) Disclosure of the user's digital assets is
2 reasonably necessary for administration of
3 the estate.

4 § -9 Disclosure of content of electronic communications
5 of principal. To the extent a power of attorney expressly
6 grants an agent authority over the content of electronic
7 communications sent or received by the principal and unless
8 directed otherwise by the principal or the court, a custodian
9 shall disclose to the agent the content if the agent gives the
10 custodian:

- 11 (1) A written request for disclosure in physical or
12 electronic form;
- 13 (2) An original or copy of the power of attorney expressly
14 granting the agent authority over the content of
15 electronic communications of the principal;
- 16 (3) A certification by the agent, under penalty of
17 perjury, that the power of attorney is in effect; and
- 18 (4) If requested by the custodian:
 - 19 (A) A number, username, address, or other unique
20 subscriber or account identifier assigned by the
21 custodian to identify the principal's account; or



1 (B) Evidence linking the account to the principal.

2 § -10 Disclosure of other digital assets of principal.

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

- 11 (1) A written request for disclosure in physical or
12 electronic form;
- 13 (2) An original or a copy of the power of attorney that
14 gives the agent specific authority over digital assets
15 or general authority to act on behalf of the
16 principal;
- 17 (3) A certification by the agent, under penalty of
18 perjury, that the power of attorney is in effect; and
19 (4) If requested by the custodian:



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

4 (B) Evidence linking the account to the principal.

5 § -11 Disclosure of digital assets held in trust when
6 trustee is original user. Unless otherwise ordered by the court
7 or provided in a trust, a custodian shall disclose to a trustee
8 that is an original user of an account any digital asset of the
9 account held in trust, including a catalogue of electronic
10 communications of the trustee and the content of electronic
11 communications.

12 § -12 Disclosure of contents of electronic
13 communications held in trust when trustee not original user.
14 Unless otherwise ordered by the court, directed by the user, or
15 provided in a trust, a custodian shall disclose to a trustee
16 that is not an original user of an account the content of an
17 electronic communication sent or received by an original or
18 successor user and carried, maintained, processed, received, or
19 stored by the custodian in the account of the trust if the
20 trustee gives the custodian:



- 1 (1) A written request for disclosure in physical or
- 2 electronic form;
- 3 (2) A certified copy of the trust instrument that includes
- 4 consent to disclosure of the content of electronic
- 5 communications to the trustee;
- 6 (3) A certification by the trustee, under penalty of
- 7 perjury, that the trust exists and the trustee is a
- 8 currently acting trustee of the trust; and
- 9 (4) If requested by the custodian:
- 10 (A) A number, username, address, or other unique
- 11 subscriber or account identifier assigned by the
- 12 custodian to identify the trust's account; or
- 13 (B) Evidence linking the account to the trust.

14 § -13 Disclosure of other digital assets held in trust
15 when trustee not original user. Unless otherwise ordered by the
16 court, directed by the user, or provided in a trust, a custodian
17 shall disclose, to a trustee that is not an original user of an
18 account, a catalogue of electronic communications sent or
19 received by an original or successor user and stored, carried,
20 or maintained by the custodian in an account of the trust and
21 any digital assets, other than the content of electronic



1 communications, in which the trust has a right or interest if
2 the trustee gives the custodian:

- 3 (1) A written request for disclosure in physical or
4 electronic form;
- 5 (2) A certified copy of the trust instrument;
- 6 (3) A certification by the trustee, under penalty of
7 perjury, that the trust exists and the trustee is a
8 currently acting trustee of the trust; and
- 9 (4) If requested by the custodian:
- 10 (A) A number, username, address, or other unique
11 subscriber or account identifier assigned by the
12 custodian to identify the trust's account; or
- 13 (B) Evidence linking the account to the trust.

14 **§ -14 Disclosure of digital assets to conservator of**
15 **protected person.** (a) After an opportunity for a hearing under
16 section 560:5-410 or section 560:5-414, the court may grant a
17 conservator access to the digital assets of a protected person.

18 (b) Unless otherwise ordered by the court or directed by
19 the user, a custodian shall disclose to a conservator the
20 catalogue of electronic communications sent or received by a
21 protected person and any digital assets, other than the content



1 of electronic communications, in which the protected person has
2 a right or interest if the conservator gives the custodian:

3 (1) A written request for disclosure in physical or
4 electronic form;

5 (2) A certified copy of the court order that gives the
6 conservator authority over the digital assets of the
7 protected person; and

8 (3) If requested by the custodian:

9 (A) A number, username, address, or other unique
10 subscriber or account identifier assigned by the
11 custodian to identify the account of the
12 protected person; or

13 (B) Evidence linking the account to the protected
14 person.

15 (c) A conservator with general authority to manage the
16 assets of a protected person may request a custodian of the
17 digital assets of the protected person to suspend or terminate
18 an account of the protected person for good cause. A request
19 made under this section shall be accompanied by a certified copy
20 of the court order giving the conservator authority over the
21 protected person's property.



1 § -15 Fiduciary duty and authority. (a) The legal
2 duties imposed on a fiduciary charged with managing tangible
3 property apply to the management of digital assets, including:

- 4 (1) The duty of care;
- 5 (2) The duty of loyalty; and
- 6 (3) The duty of confidentiality.

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

- 9 (1) Except as otherwise provided in section -4, is
10 subject to the applicable terms of service;
- 11 (2) Is subject to other applicable law, including
12 copyright law;
- 13 (3) Is limited by the scope of the fiduciary's duties; and
- 14 (4) May not be used to impersonate the user.

15 (c) A fiduciary with authority over the property of a
16 decedent, protected person, principal, or settlor has the right
17 to access any digital asset in which the decedent, protected
18 person, principal, or settlor had a right or interest and that
19 is not held by a custodian or subject to a terms-of-service
20 agreement.



1 (d) A fiduciary acting within the scope of the fiduciary's
2 duties is an authorized user of the property of the decedent,
3 protected person, principal, or settlor for the purpose of
4 applicable computer fraud and unauthorized computer access laws,
5 including part IX of chapter 708.

6 (e) A fiduciary with authority over the tangible, personal
7 property of a decedent, protected person, principal, or settlor:

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

10 (2) Is an authorized user for the purpose of computer
11 fraud and unauthorized computer access laws, including
12 part IX of chapter 708.

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

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



- 1 (1) If the user is deceased, a certified copy of the death
2 certificate of the user;
- 3 (2) A certified copy of the letter of appointment of the
4 representative or a small estate affidavit or court
5 order, court order, power of attorney, or trust giving
6 the fiduciary authority over the account; and
- 7 (3) If requested by the custodian:
- 8 (A) A number, username, address, or other unique
9 subscriber or account identifier assigned by the
10 custodian to identify the user's account;
- 11 (B) Evidence linking the account to the user; or
- 12 (C) A finding by the court that the user had a
13 specific account with the custodian, identifiable
14 by the information specified in subparagraph (A).

15 § -16 Custodian compliance and immunity. (a) Not later
16 than sixty days after receipt of the information required under
17 sections -7 through -14, a custodian shall comply with a
18 request under this chapter from a fiduciary or designated
19 recipient to disclose digital assets or terminate an account.
20 If the custodian fails to comply, the fiduciary or designated



1 recipient may apply to the court for an order directing
2 compliance.

3 (b) An order under subsection (a) directing compliance
4 shall contain a finding that compliance is not in violation of
5 title 18 U.S.C. section 2702.

6 (c) A custodian may notify the user that a request for
7 disclosure or to terminate an account was made under this
8 chapter.

9 (d) A custodian may deny a request under this chapter from
10 a fiduciary or designated recipient for disclosure of digital
11 assets or to terminate an account if the custodian is aware of
12 any lawful access to the account following the receipt of the
13 fiduciary's request.

14 (e) This chapter does not limit a custodian's ability to
15 obtain or require a fiduciary or designated recipient requesting
16 disclosure or termination under this chapter to obtain a court
17 order that:

18 (1) Specifies that an account belongs to the protected
19 person or principal;



1 (2) Specifies that there is sufficient consent from the
2 protected person or principal to support the requested
3 disclosure; and

4 (3) Contains a finding required by law other than this
5 chapter.

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

9 § -17 Relation to Electronic Signatures in Global and
10 National Commerce Act. This chapter modifies, limits, or
11 supersedes the Electronic Signatures in Global and National
12 Commerce Act, title 15 U.S.C. section 7001 et seq., but does not
13 modify, limit, or supersede section 101(c) of that Act, title 15
14 U.S.C. section 7001(c), or authorize electronic delivery of any
15 of the notices described in section 103(b) of that Act, title 15
16 U.S.C. section 7003(b)."

17 SECTION 2. This Act shall take effect upon its approval.

18

INTRODUCED BY: ~~SEN. D.C. [Signature]~~

[Handwritten signatures]

S.B. NO. 2298

Report Title:

Uniform Acts; Uniform Fiduciary Access to Digital Assets Act

Description:

Provides authority to plan for the management and disposition of digital assets.

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

