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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:

4                               **"CHAPTER**

5                               **FIDUCIARY ACCESS TO DIGITAL ASSETS**

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

8       "Account holder" means a person who has entered into a  
9 terms-of-service agreement with a custodian and a fiduciary for  
10 the person. "Account holder" includes a deceased individual who  
11 entered into the agreement during the individual's lifetime.

12       "Agent" means a person who is granted authority to act for  
13 a principal under a durable or nondurable power of attorney,  
14 whether denominated an agent, an attorney-in-fact, or otherwise.

15       "Agent" includes an original agent, a co-agent, and a successor  
16 agent.



1 "Carries" or "carried" means to engage in the transmission  
2 of electronic communications.

3 "Catalogue of electronic communications" means information  
4 that identifies each person with whom an account holder has had  
5 an electronic communication, the time and date of the  
6 communication, and the electronic mail address of the person.

7 "Content of an electronic communication" means information  
8 not readily accessible to the public concerning the substance or  
9 meaning of an electronic communication.

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

11 "Custodian" means a person who carries, maintains,  
12 processes, receives, or stores a digital asset of an account  
13 holder.

14 "Digital asset" means an electronic record. "Digital  
15 asset" does not include an underlying asset or liability to  
16 which an electronic record refers, unless the asset or liability  
17 is itself an electronic record.

18 "Electronic" means having electrical, digital, magnetic,  
19 wireless, optical, electromagnetic, or similar capabilities.

20 "Electronic communication" means a digital asset stored by  
21 an electronic communication service or carried or maintained by



1 a remote computing service. "Electronic communication" includes  
2 the catalogue of electronic communications and the content of an  
3 electronic communication.

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

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

10 "Guardian" means a person who has been appointed by the  
11 court as guardian of the property of a minor or incapacitated  
12 individual. "Guardian" includes a person who has been appointed  
13 by the court as an emergency temporary guardian of the property.

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

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

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



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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 title 18 United States Code 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" means an instrument admitted to probate, including a  
4 codicil, executed by an individual in the manner prescribed by  
5 the uniform probate code, that disposes of the individual's  
6 property upon or after the individual's death. "Will" includes  
7 an instrument that merely appoints a personal representative or  
8 revokes or revises another will.

9 **§ -2 Authority of personal representative over digital**  
10 **assets of a decedent.** Subject to section -6(b) and unless  
11 otherwise provided by the court or the will of a decedent, a  
12 personal representative shall have the right to access:

- 13 (1) The content of an electronic communication sent or  
14 received by the decedent if the electronic  
15 communication service or remote computing service is  
16 authorized to disclose the content under title 18  
17 United States Code section 2702(b);
- 18 (2) The catalogue of electronic communications sent or  
19 received by the decedent; and
- 20 (3) Any other digital asset in which the decedent had a  
21 right or interest at the time of the decedent's death.



1           **§ -3 Authority of guardian over digital assets of a**  
2 **ward.** The court, after an opportunity for hearing, may grant a  
3 guardian the right to access:

4           (1) The content of an electronic communication sent or  
5               received by the ward if the electronic communication  
6               service or remote computing service is authorized to  
7               disclose the content under title 18 United States Code  
8               section 2702(b);

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

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

13           **§ -4 Control by agent of digital assets.** (a) To the  
14 extent a power of attorney expressly grants authority to an  
15 agent over the content of an electronic communication of the  
16 principal, the agent shall have the right to access the content  
17 of an electronic communication sent or received by the principal  
18 if the electronic communication service or remote computing  
19 service is authorized to disclose the content under title 18  
20 United States Code section 2702(b).



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

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

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

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

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

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

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



(B) The content of an electronic communication sent or received by the account holder if the electronic communication service or remote computing service is authorized to disclose the content under title 18 United States Code section 2702(b); and

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

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

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

(2) Shall be deemed to have the lawful consent of the account holder for the custodian to divulge the 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, 2021, 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.



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

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

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

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

- (1) A personal representative who has the right of access under section -2, the request shall be accompanied by a certified copy of the letters of administration 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  
4 section -3, the request shall be accompanied by a  
5 certified copy of letters of plenary guardianship of  
6 the 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  
9 section -4, the request shall be accompanied by an  
10 original or a copy of the power of attorney that  
11 authorizes the agent to exercise authority over the  
12 digital asset and a certification of the agent, under  
13 penalty of perjury, that the power of attorney is in  
14 effect;

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

20 (5) A person who is entitled to receive and collect  
21 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 title 15 United States Code  
16 sections 7001 et seq., but shall not modify, limit, or supersede  
17 section 101(c) of that Act, as codified in title 15 United  
18 States Code section 7001(c), or authorize electronic delivery of  
19 the notices described in section 103(b) of that Act, as codified  
20 in title 15 United States Code section 7003(b).



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

(1) An agent acting under a power of attorney executed before, on, or after July 1, 2021;

(2) A personal representative acting for a decedent who died before, on, or after July 1, 2021;

(3) A guardian appointed through a guardianship proceeding, whether pending in a court or commenced before, on, or after July 1, 2021; and

(4) A trustee acting under a trust created before, on, or after July 1, 2021.

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

SECTION 2. This Act shall take effect on July 1, 2021.

INTRODUCED BY:

JAN 22 2021



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**Report Title:**

Fiduciary; Digital Assets; Authority; Access

**Description:**

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

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