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**SENATE BILL 5029**

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**State of Washington 64th Legislature 2015 Regular Session**

**By** Senators Pedersen and O'Ban; by request of Uniform Law Commission

AN ACT Relating to the uniform fiduciary access to digital assets act; and adding a new chapter to Title 11 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  SHORT TITLE. This act may be known and cited as the uniform fiduciary access to digital assets act.

NEW SECTION. **Sec.**  DEFINITIONS. In this chapter:

(1) "Account holder" means a person that has entered into a terms‑of‑service agreement with a custodian or a fiduciary for the person.

(2) "Agent" means an attorney in fact granted authority under a durable or nondurable power of attorney.

(3) "Carries" means engages in the transmission of electronic communications.

(4) "Catalogue of electronic communications" means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) "Content of an electronic communication" means information concerning the substance or meaning of the communication which:

(a) Has been sent or received by an account holder;

(b) Is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and

(c) Is not readily accessible to the public.

(6) "Court" means the superior court of each county.

(7) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

(8) "Digital asset" means a record that is electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic.

(9) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(10) "Electronic communication" has the same meaning as the definition in 18 U.S.C. Sec. 2510(12), as amended.

(11) "Electronic communication service" means a custodian that provides to an account holder the ability to send or receive an electronic communication.

(12) "Fiduciary" means an original, additional, or successor personal representative, guardian, agent, or trustee.

(13) "Governing instrument" means a will, trust, instrument creating a power of attorney, or other dispositive or nominative instrument.

(14) "Guardian" means a person appointed by a court to manage the estate of a living individual. The term includes a limited guardian or certified professional guardian.

(15) "Incapacitated person" means an individual for whom a guardian has been appointed. The term includes an individual for whom an application for the appointment of a guardian is pending.

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

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

(18) "Personal representative" means an executor, administrator, special administrator, or person that performs substantially the same function under law of this state other than this chapter.

(19) "Power of attorney" means a record that grants an agent authority to act in the place of a principal.

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

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

(22) "Remote computing service" means a custodian that provides to an account holder computer processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. Sec. 2510(14), as amended.

(23) "Terms of service agreement" means an agreement that controls the relationship between an account holder and a custodian.

(24) "Trustee" means a fiduciary with legal title to property pursuant to an agreement or declaration that creates a beneficial interest in another. The term includes a successor trustee.

(25) "Will" includes a codicil, testamentary instrument that only appoints an executor, and instrument that revokes or revises a testamentary instrument.

NEW SECTION. **Sec.**  APPLICABILITY. (1) This chapter applies to:

(a) A fiduciary or agent acting under a will or power of attorney executed before, on, or after the effective date of this section;

(b) A personal representative acting for a decedent who died before, on, or after the effective date of this section;

(c) A guardianship proceeding, whether pending in a court or commenced before, on, or after the effective date of this section; and

(d) A trustee acting under a trust created before, on, or after the effective date of this section.

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

NEW SECTION. **Sec.**  ACCESS BY PERSONAL REPRESENTATIVE TO DIGITAL ASSET OF DECEDENT. Subject to section 8(2) of this act and unless otherwise ordered by the court or provided in the will of a decedent, the personal representative of the decedent has the right to access:

(1) The content of an electronic communication that the custodian is permitted to disclose under the electronic communications privacy act, 18 U.S.C. Sec. 2702(b), as amended;

(2) Any catalogue of electronic communications sent or received by the decedent; and

(3) Any other digital asset in which at death the decedent had a right or interest.

NEW SECTION. **Sec.**  ACCESS BY GUARDIAN TO DIGITAL ASSET OF INCAPACITATED PERSON. Subject to section 8(2) of this act, the court, after an opportunity for hearing under chapter 11.88 RCW, may grant a guardian the right to access:

(1) The content of an electronic communication that the custodian is permitted to disclose under the electronic communications privacy act, 18 U.S.C. Sec. 2702(b), as amended;

(2) Any catalogue of electronic communications sent or received by the incapacitated person; and

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

NEW SECTION. **Sec.**  ACCESS BY AGENT TO DIGITAL ASSET OF PRINCIPAL. (1) To the extent a power of attorney expressly grants an agent authority over the content of an electronic communication of the principal and subject to section 8(2) of this act, the agent has the right to access the content of an electronic communication that the custodian is permitted to disclose under the electronic communications privacy act, 18 U.S.C. Sec. 2702(b), as amended.

(2) Subject to section 8(2) of this act and unless otherwise ordered by the court or provided by a power of attorney, an agent has the right to access:

(a) Any catalogue of electronic communications sent or received by the principal; and

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

NEW SECTION. **Sec.**  ACCESS BY TRUSTEE TO DIGITAL ASSET. (1) Subject to section 8(2) of this act and unless otherwise ordered by the court or provided in a trust, a trustee that is an original account holder has the right to access any digital asset held in trust, including any catalogue of electronic communications of the trustee and the content of an electronic communication.

(2) Subject to section 8(2) of this act and unless otherwise ordered by the court or provided in a trust, a trustee that is not an original account holder has the right to access:

(a) The content of an electronic communication that the custodian is permitted to disclose under the electronic communications privacy act, 18 U.S.C. Sec. 2702(b), as amended;

(b) Any catalogue of electronic communications sent or received by the original or any successor account holder; and

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

NEW SECTION. **Sec.**  FIDUCIARY AUTHORITY. (1) A fiduciary that is an account holder or has the right under this chapter to access a digital asset of an account holder:

(a) Subject to the terms‑of‑service agreement, copyright law, and other applicable law, may take any action concerning the asset to the extent of the account holder's authority and the fiduciary's power under the law of this state other than this chapter;

(b) Has, for the purpose of applicable electronic privacy laws, the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the fiduciary; and

(c) Is, for the purpose of applicable computer fraud and unauthorized computer access laws, an authorized user.

(2) Unless an account holder, after the effective date of this section, agrees to a provision in a terms-of-service agreement that limits a fiduciary's access to a digital asset of the account holder by an affirmative act separate from the account holder's asset to other provisions of the agreement:

(a) The provision is void as against the strong public policy of this state; and

(b) The fiduciary's access under this chapter to a digital asset does not violate the terms-of-service agreement even if the agreement requires notice of a change in the account holder's status.

(3) A choice of law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this chapter to the extent the provision designates law that enforces a limitation on a fiduciary's access to a digital asset, and the limitation is void under subsection (2) of this section.

(4) 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, incapacitated person, principal, or settlor:

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

(b) Is an authorized user for purposes of any applicable computer fraud and unauthorized computer access laws.

NEW SECTION. **Sec.**  COMPLIANCE. (1) If a fiduciary with a right under this chapter to access a digital asset of an account holder complies with subsection (2) of this section, the custodian shall comply with the fiduciary's request in a record for:

(a) Access to the asset;

(b) Control of the asset; and

(c) A copy of the asset to the extent permitted by copyright law.

(2) If a request under subsection (1) of this section is made by:

(a) A personal representative with the right of access under section 4 of this act, the request must be accompanied by a certified copy of the letter of appointment of the representative or court order;

(b) A guardian with the right of access under section 5 of this act, the request must be accompanied by a certified copy of the court order that gives the guardian authority over the digital asset;

(c) An agent with the right of access under section 6 of this act, the request must be accompanied by an original or a copy of the power of attorney that authorizes the agent to exercise authority over the digital asset and a certification of the agent, under penalty of perjury, that the power of attorney is in effect; and

(d) A trustee with the right of access under section 7 of this act, the request must be accompanied by a certified copy of the trust instrument, or a certification of the trust under chapter 11.98 RCW, that authorizes the trustee to exercise authority over the digital asset.

(3) A custodian shall comply with a request made under subsection (1) of this section not later than sixty days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

(4) This section does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

NEW SECTION. **Sec.**  CUSTODIAN IMMUNITY. A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this chapter.

NEW SECTION. **Sec.**  UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

NEW SECTION. **Sec.**  RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This chapter modifies, limits, or supersedes the electronic signatures in global and national commerce act, 15 U.S.C. Sec. 7001 et seq., as amended, but does not modify, limit, or supersede 15 U.S.C. Sec. 7001(c), as amended, or authorize electronic delivery of any of the notices described in 15 U.S.C. Sec. 7003(b), as amended.

NEW SECTION. **Sec.**  SEVERABILITY. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec.**  Sections 1 through 13 of this act constitute a new chapter in Title 11 RCW.

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