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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

Prefiled 12/30/14. Read first time 01/12/15. Referred to Committee on Law & Justice.

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

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

4 NEW SECTION. **Sec. 1.** SHORT TITLE. This act may be known and  
5 cited as the uniform fiduciary access to digital assets act.

6 NEW SECTION. **Sec. 2.** DEFINITIONS. In this chapter:

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

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

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

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

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

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

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

5 (c) Is not readily accessible to the public.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 NEW SECTION. **Sec. 3.** APPLICABILITY. (1) This chapter applies  
19 to:

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

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

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

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

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

32 NEW SECTION. **Sec. 4.** ACCESS BY PERSONAL REPRESENTATIVE TO  
33 DIGITAL ASSET OF DECEDENT. Subject to section 8(2) of this act and  
34 unless otherwise ordered by the court or provided in the will of a  
35 decedent, the personal representative of the decedent has the right  
36 to access:

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

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

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

8 NEW SECTION. **Sec. 5.** ACCESS BY GUARDIAN TO DIGITAL ASSET OF  
9 INCAPACITATED PERSON. Subject to section 8(2) of this act, the court,  
10 after an opportunity for hearing under chapter 11.88 RCW, may grant a  
11 guardian the right to access:

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

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

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

19 NEW SECTION. **Sec. 6.** ACCESS BY AGENT TO DIGITAL ASSET OF  
20 PRINCIPAL. (1) To the extent a power of attorney expressly grants an  
21 agent authority over the content of an electronic communication of  
22 the principal and subject to section 8(2) of this act, the agent has  
23 the right to access the content of an electronic communication that  
24 the custodian is permitted to disclose under the electronic  
25 communications privacy act, 18 U.S.C. Sec. 2702(b), as amended.

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

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

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

33 NEW SECTION. **Sec. 7.** ACCESS BY TRUSTEE TO DIGITAL ASSET. (1)  
34 Subject to section 8(2) of this act and unless otherwise ordered by  
35 the court or provided in a trust, a trustee that is an original  
36 account holder has the right to access any digital asset held in

1 trust, including any catalogue of electronic communications of the  
2 trustee and the content of an electronic communication.

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

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

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

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

13 NEW SECTION. **Sec. 8.** FIDUCIARY AUTHORITY. (1) A fiduciary that  
14 is an account holder or has the right under this chapter to access a  
15 digital asset of an account holder:

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

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

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

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

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

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

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

1 (4) As to tangible personal property capable of receiving,  
2 storing, processing, or sending a digital asset, a fiduciary with  
3 authority over the property of a decedent, incapacitated person,  
4 principal, or settlor:

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

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

9 NEW SECTION. **Sec. 9.** COMPLIANCE. (1) If a fiduciary with a  
10 right under this chapter to access a digital asset of an account  
11 holder complies with subsection (2) of this section, the custodian  
12 shall comply with the fiduciary's request in a record for:

13 (a) Access to the asset;

14 (b) Control of the asset; and

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

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

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

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

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

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

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

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

4 NEW SECTION. **Sec. 10.** CUSTODIAN IMMUNITY. A custodian and its  
5 officers, employees, and agents are immune from liability for an act  
6 or omission done in good faith in compliance with this chapter.

7 NEW SECTION. **Sec. 11.** UNIFORMITY OF APPLICATION AND  
8 CONSTRUCTION. In applying and construing this chapter, consideration  
9 must be given to the need to promote uniformity of the law with  
10 respect to its subject matter among states that enact it.

11 NEW SECTION. **Sec. 12.** RELATION TO ELECTRONIC SIGNATURES IN  
12 GLOBAL AND NATIONAL COMMERCE ACT. This chapter modifies, limits, or  
13 supersedes the electronic signatures in global and national commerce  
14 act, 15 U.S.C. Sec. 7001 et seq., as amended, but does not modify,  
15 limit, or supersede 15 U.S.C. Sec. 7001(c), as amended, or authorize  
16 electronic delivery of any of the notices described in 15 U.S.C. Sec.  
17 7003(b), as amended.

18 NEW SECTION. **Sec. 13.** SEVERABILITY. If any provision of this  
19 act or its application to any person or circumstance is held invalid,  
20 the remainder of the act or the application of the provision to other  
21 persons or circumstances is not affected.

22 NEW SECTION. **Sec. 14.** Sections 1 through 13 of this act  
23 constitute a new chapter in Title 11 RCW.

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