

1 SB164
2 172884-1
3 By Senators Smitherman and Orr
4 RFD: Judiciary
5 First Read: 09-FEB-16

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8 SYNOPSIS: This bill would adopt the Revised Uniform
9 Fiduciary Access to Digital Assets Act.

10 This bill would extend the traditional power
11 of a fiduciary to manage tangible property to
12 include the management of digital assets.

13 This bill would specify the powers and
14 duties of a fiduciary in managing digital assets,
15 such as computer files, web domains, and virtual
16 currency.

17 This bill would provide a procedure for a
18 custodian of digital assets to disclose the digital
19 assets to a fiduciary or a personal representative.
20 This bill would restrict a fiduciary's access to
21 certain electronic communications such as email,
22 text messages, and social media accounts unless the
23 owner or creator of the electronic communications
24 or social media account has consented in a will,
25 trust, power of attorney, or other record.

26
27 A BILL

1 TO BE ENTITLED

2 AN ACT

3
4 Relating to fiduciary powers and duties; to adopt
5 the Revised Uniform Fiduciary Access to Digital Assets Act as
6 Chapter 1A of Title 19, Code of Alabama 1975; to expand the
7 powers and duties of a fiduciary to include management of
8 digital assets; to specify what is considered digital assets
9 for purposes of this act; to specify the circumstances in
10 which the custodian of digital assets may disclose them to
11 various persons; and to restrict a fiduciary's access to
12 certain electronic communications and social media accounts
13 unless the owner or creator of the electronic communications
14 or social media account has consented in a will, trust, power
15 of attorney, or other record.

16 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

17 Section 1. Chapter 1A is added to Title 19, Code of
18 Alabama 1975, as follows:

19 Chapter 1A. REVISED UNIFORM FIDUCIARY ACCESS TO
20 DIGITAL ASSETS ACT.

21 §19-1A-1. SHORT TITLE. This chapter may be cited as
22 the Revised Uniform Fiduciary Access to Digital Assets Act.

23 §19-1A-2. DEFINITIONS. In this chapter, the
24 following terms have the following meanings:

25 (1) "Account" means an arrangement under a
26 terms-of-service agreement in which a custodian carries,

1 maintains, processes, receives, or stores a digital asset of
2 the user or provides goods or services to the user.

3 (2) "Agent" means a person granted authority to act
4 for a principal under a power of attorney, whether denoted an
5 agent, attorney-in-fact, or otherwise. The term includes an
6 original agent, co-agent, successor agent, and person to which
7 an agent's authority is delegated.

8 (3) "Carries" means engages in the transmission of
9 an electronic communication.

10 (4) "Catalogue of electronic communications" means
11 information that identifies each person with which a user has
12 had an electronic communication, the time and date of the
13 communication, and the electronic address of the person.

14 (5) "Conservator" means a person appointed by a
15 court to manage the estate of a living individual. The term
16 includes a limited conservator.

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

20 (A) has been sent or received by a user;

21 (B) is in electronic storage by a custodian
22 providing an electronic-communication service to the public or
23 is carried or maintained by a custodian providing a
24 remote-computing service to the public; and

25 (C) is not readily accessible to the public.

1 (7) "Court" means the circuit court or a probate
2 court granted constitutional or statutory equitable
3 jurisdiction.

4 (8) "Custodian" means a person that carries,
5 maintains, processes, receives, or stores a digital asset of a
6 user.

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

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

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

17 (12) "Electronic communication" has the meaning set
18 forth in 18 U.S.C. Section 2510(12), as amended.

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

22 (14) "Fiduciary" means an original, additional, or
23 successor personal representative, conservator, agent, or
24 trustee.

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

1 (16) "Online tool" means an electronic service
2 provided by a custodian that allows the user, in an agreement
3 distinct from the terms-of-service agreement between the
4 custodian and user, to provide directions for disclosure or
5 nondisclosure of digital assets to a third person.

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

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

14 (19) "Power of attorney" means writing or other
15 record that grants an agent authority to act in the place of a
16 principal, whether or not the term power of attorney is used.

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

19 (21) "Protected person" means an individual for whom
20 a conservator has been appointed. The term includes an
21 individual for whom an application for the appointment of a
22 conservator is pending.

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

26 (23) "Remote-computing service" means a custodian
27 that provides to a user computer-processing services or the

1 storage of digital assets by means of an electronic
2 communications system, as defined in 18 U.S.C. Section
3 2510(14), as amended.

4 (24) "Terms-of-service agreement" means an agreement
5 that controls the relationship between a user and a custodian.

6 (25) "Trustee" means a fiduciary with legal title to
7 property under an agreement or declaration that creates a
8 beneficial interest in another. The term includes a successor
9 trustee.

10 (26) "User" means a person that has an account with
11 a custodian.

12 (27) "Will" includes a codicil or a testamentary
13 instrument that merely appoints a personal representative or
14 an executor or revokes or revises another will.

15 §19-1A-3. APPLICABILITY.

16 (a) This chapter applies to:

17 (1) a fiduciary acting under a will or power of
18 attorney executed before, on, or after October 1, 2016;

19 (2) a personal representative acting for a decedent
20 who died before, on, or after October 1, 2016;

21 (3) a conservatorship proceeding commenced before,
22 on, or after October 1, 2016; and

23 (4) a trustee acting under a trust created before,
24 on, or after October 1, 2016.

25 (b) This chapter applies to a custodian if the user
26 resides in this state or resided in this state at the time of
27 the user's death.

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

4 §19-1A-4. USER DIRECTION FOR DISCLOSURE OF DIGITAL
5 ASSETS.

6 (a) A user may use an online tool to direct the
7 custodian to disclose or not to disclose some or all of the
8 user's digital assets, including the content of electronic
9 communications. If the online tool allows the user to modify
10 or delete a direction at all times, a direction regarding
11 disclosure using an online tool overrides a contrary direction
12 by the user in a will, trust, power of attorney, or other
13 record.

14 (b) If a user has not used an online tool to give
15 direction under subsection (a) or if the custodian has not
16 provided an online tool, the user may allow or prohibit in a
17 will, trust, power of attorney, or other record, disclosure to
18 a fiduciary of some or all of the user's digital assets,
19 including the content of electronic communications sent or
20 received by the user.

21 (c) A user's direction under subsection (a) or (b)
22 overrides a contrary provision in a terms-of-service
23 agreement.

24 §19-1A-5. TERMS-OF-SERVICE AGREEMENT.

25 (a) This chapter does not change or impair a right
26 of a custodian or a user under a terms-of-service agreement to
27 access and use digital assets of the user.

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

4 (c) A fiduciary's access to digital assets may be
5 modified or eliminated by a user, by federal law, or by a
6 terms-of-service agreement if the user has not provided
7 direction under Section 19-1A-4.

8 §19-1A-6. PROCEDURE FOR DISCLOSING DIGITAL ASSETS.

9 (a) When disclosing digital assets of a user under
10 this chapter, the custodian may at its sole discretion:

11 (1) grant a fiduciary or designated recipient full
12 access to the user's account;

13 (2) grant a fiduciary or designated recipient
14 partial access to the user's account sufficient to perform the
15 tasks with which the fiduciary or designated recipient is
16 charged; or

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

22 (b) A custodian may assess a reasonable
23 administrative charge for the cost of disclosing digital
24 assets under this chapter.

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

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

8 (1) a subset limited by date of the user's digital
9 assets;

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

12 (3) none of the user's digital assets; or

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

15 §19-1A-7. DISCLOSURE OF CONTENT OF ELECTRONIC
16 COMMUNICATIONS OF DECEASED USER. If a deceased user consented
17 or a court directs disclosure of the contents of electronic
18 communications of the deceased user, the custodian shall
19 disclose to the personal representative of the estate of the
20 user the content of an electronic communication sent or
21 received by the user if the representative gives the
22 custodian:

23 (1) a written request for disclosure in physical or
24 electronic form;

25 (2) a copy of the death certificate of the user;

26 (3) a copy of letters testamentary, letters of
27 administration, or court order;

1 (4) unless the user provided direction using an
2 online tool, a copy of the user's will, trust, power of
3 attorney, or other record evidencing the user's consent to
4 disclosure of the content of electronic communications; and

5 (5) if requested by the custodian:

6 (A) a number, username, address, or other unique
7 subscriber or account identifier assigned by the custodian to
8 identify the user's account;

9 (B) evidence linking the account to the user; or

10 (C) a finding by the court that:

11 (i) the user had a specific account with the
12 custodian, identifiable by the information specified in
13 subparagraph (A);

14 (ii) disclosure of the content of electronic
15 communications of the user would not violate 18 U.S.C. Section
16 2701 et seq., as amended, 47 U.S.C. Section 222, as amended,
17 or other applicable law;

18 (iii) unless the user provided direction using an
19 online tool, the user consented to disclosure of the content
20 of electronic communications; or

21 (iv) disclosure of the content of electronic
22 communications of the user is reasonably necessary for
23 administration of the estate.

24 §19-1A-8. DISCLOSURE OF OTHER DIGITAL ASSETS OF
25 DECEASED USER. Unless the user prohibited disclosure of
26 digital assets or the court directs otherwise, a custodian
27 shall disclose to the personal representative of the estate of

1 a deceased user a catalogue of electronic communications sent
2 or received by the user and digital assets, other than the
3 content of electronic communications, of the user, if the
4 representative gives the custodian:

5 (1) a written request for disclosure in physical or
6 electronic form;

7 (2) a copy of the death certificate of the user;

8 (3) a copy of letters testamentary, letters of
9 administration or court order; and

10 (4) if requested by the custodian:

11 (A) a number, username, address, or other unique
12 subscriber or account identifier assigned by the custodian to
13 identify the user's account;

14 (B) evidence linking the account to the user;

15 (C) an affidavit stating that disclosure of the
16 user's digital assets is reasonably necessary for
17 administration of the estate; or

18 (D) a finding by the court that:

19 (i) the user had a specific account with the
20 custodian, identifiable by the information specified in
21 subparagraph (A); or

22 (ii) disclosure of the user's digital assets is
23 reasonably necessary for administration of the estate.

24 §19-1A-9. DISCLOSURE OF CONTENT OF ELECTRONIC
25 COMMUNICATIONS OF PRINCIPAL. To the extent a power of attorney
26 expressly grants an agent authority over the content of
27 electronic communications sent or received by the principal

1 and unless directed otherwise by the principal or the court, a
2 custodian shall disclose to the agent the content if the agent
3 gives the custodian:

4 (1) a written request for disclosure in physical or
5 electronic form;

6 (2) an original or copy of the power of attorney
7 expressly granting the agent authority over the content of
8 electronic communications of the principal;

9 (3) a certification by the agent, under penalty of
10 perjury, that the power of attorney is in effect; and

11 (4) if requested by the custodian:

12 (A) a number, username, address, or other unique
13 subscriber or account identifier assigned by the custodian to
14 identify the principal's account; or

15 (B) evidence linking the account to the principal.

16 §19-1A-10. DISCLOSURE OF OTHER DIGITAL ASSETS OF
17 PRINCIPAL. Unless otherwise ordered by the court, directed by
18 the principal, or provided by a power of attorney, a custodian
19 shall disclose to an agent with specific authority over
20 digital assets or general authority to act on behalf of a
21 principal a catalogue of electronic communications sent or
22 received by the principal and digital assets, other than the
23 content of electronic communications, of the principal if the
24 agent gives the custodian:

25 (1) a written request for disclosure in physical or
26 electronic form;

1 (2) an original or a copy of the power of attorney
2 that gives the agent specific authority over digital assets or
3 general authority to act on behalf of the principal;

4 (3) a certification by the agent, under penalty of
5 perjury, that the power of attorney is in effect; and

6 (4) if requested by the custodian:

7 (A) a number, username, address, or other unique
8 subscriber or account identifier assigned by the custodian to
9 identify the principal's account; or

10 (B) evidence linking the account to the principal.

11 §19-1A-11. DISCLOSURE OF DIGITAL ASSETS HELD IN
12 TRUST WHEN TRUSTEE IS ORIGINAL USER. Unless otherwise ordered
13 by the court or provided in a trust, a custodian shall
14 disclose to any trustee of a trust of which any trustee is an
15 original user of an account any digital asset of the account
16 held in trust, including a catalogue of electronic
17 communications of the trustee and the content of electronic
18 communications.

19 §19-1A-12. DISCLOSURE OF CONTENTS OF ELECTRONIC
20 COMMUNICATIONS HELD IN TRUST WHEN TRUSTEE NOT ORIGINAL USER.
21 Unless otherwise ordered by the court, directed by the user,
22 or provided in a trust, a custodian shall disclose to a
23 trustee that is not an original user of an account the content
24 of an electronic communication sent or received by an original
25 or successor user and carried, maintained, processed,
26 received, or stored by the custodian in the account of the
27 trust if the trustee gives the custodian:

1 (1) a written request for disclosure in physical or
2 electronic form;

3 (2) a copy of the trust instrument or a
4 certification of the trust under Section 19-3B-1013, which
5 includes consent to disclosure of the content of electronic
6 communications to the trustee;

7 (3) a certification by the trustee, under penalty of
8 perjury, that the trust exists and the trustee is a currently
9 acting trustee of the trust; and

10 (4) if requested by the custodian:

11 (A) a number, username, address, or other unique
12 subscriber or account identifier assigned by the custodian to
13 identify the trust's account; or

14 (B) evidence linking the account to the trust.

15 §19-1A-13. DISCLOSURE OF OTHER DIGITAL ASSETS HELD
16 IN TRUST WHEN TRUSTEE NOT ORIGINAL USER. Unless otherwise
17 ordered by the court, directed by the user, or provided in a
18 trust, a custodian shall disclose, to a trustee that is not an
19 original user of an account, a catalogue of electronic
20 communications sent or received by an original or successor
21 user and stored, carried, or maintained by the custodian in an
22 account of the trust and any digital assets, other than the
23 content of electronic communications, in which the trust has a
24 right or interest if the trustee gives the custodian:

25 (1) a written request for disclosure in physical or
26 electronic form;

1 (2) a copy of the trust instrument or a
2 certification of the trust under Section 19-3B-1013.

3 (3) a certification by the trustee, under penalty of
4 perjury, that the trust exists and the trustee is a currently
5 acting trustee of the trust; and

6 (4) if requested by the custodian:

7 (A) a number, username, address, or other unique
8 subscriber or account identifier assigned by the custodian to
9 identify the trust's account; or

10 (B) evidence linking the account to the trust.

11 §19-1A-14. DISCLOSURE OF DIGITAL ASSETS TO
12 CONSERVATOR OF PROTECTED PERSON.

13 (a) After an opportunity for a hearing, the court
14 may grant a conservator access to the digital assets of a
15 protected person.

16 (b) Unless otherwise ordered by the court or
17 directed by the user, a custodian shall disclose to a
18 conservator the catalogue of electronic communications sent or
19 received by a protected person and any digital assets, other
20 than the content of electronic communications, in which the
21 protected person has a right or interest if the conservator
22 gives the custodian:

23 (1) a written request for disclosure in physical or
24 electronic form;

25 (2) a copy of the court order that gives the
26 conservator authority over the digital assets of the protected
27 person; and

1 (3) if requested by the custodian:

2 (A) a number, username, address, or other unique
3 subscriber or account identifier assigned by the custodian to
4 identify the account of the protected person; or

5 (B) evidence linking the account to the protected
6 person.

7 (c) A conservator with general authority to manage
8 the assets of a protected person may request a custodian of
9 the digital assets of the protected person to suspend or
10 terminate an account of the protected person for good cause. A
11 request made under this section must be accompanied by a copy
12 of the court order giving the conservator authority over the
13 protected person's property.

14 §19-1A-15. FIDUCIARY DUTY AND AUTHORITY.

15 (a) The legal duties imposed on a fiduciary charged
16 with managing tangible property apply to the management of
17 digital assets, including:

18 (1) the duty of care;

19 (2) the duty of loyalty; and

20 (3) the duty of confidentiality.

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

23 (1) except as otherwise provided in Section 19-1A-4,
24 is subject to the applicable terms of service;

25 (2) is subject to other applicable law, including
26 copyright law;

1 (3) is limited by the scope of the fiduciary's
2 duties; and

3 (4) may not be used to impersonate the user.

4 (c) A fiduciary with authority over the property of
5 a decedent, protected person, principal, or settlor has the
6 right to access any digital asset in which the decedent,
7 protected person, principal, or settlor had a right or
8 interest and that is not held by a custodian or subject to a
9 terms-of-service agreement.

10 (d) A fiduciary acting within the scope of the
11 fiduciary's duties is an authorized user of the property of
12 the decedent, protected person, principal, or settlor for the
13 purpose of applicable computer-fraud and
14 unauthorized-computer-access laws, including this state's law
15 on unauthorized computer access.

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

19 (1) has the right to access the property and any
20 digital asset stored in it; and

21 (2) is an authorized user for the purpose of
22 computer-fraud and unauthorized-computer-access laws,
23 including Article 5A of Chapter 8, Title 13A, 18 U.S.C.
24 Section 2701 et seq., and 47 U.S.C. Section 222.

25 (f) A custodian may disclose information in an
26 account to a fiduciary of the user when the information is

1 required to terminate an account used to access digital assets
2 licensed to the user.

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

7 (1) if the user is deceased, a copy of the death
8 certificate of the user;

9 (2) a copy of the letters testamentary, letters of
10 administration, court order, power of attorney, or trust
11 giving the fiduciary authority over the account; and

12 (3) if requested by the custodian:

13 (A) a number, username, address, or other unique
14 subscriber or account identifier assigned by the custodian to
15 identify the user's account;

16 (B) evidence linking the account to the user; or

17 (C) a finding by the court that the user had a
18 specific account with the custodian, identifiable by the
19 information specified in subparagraph (A).

20 §19-1A-16. CUSTODIAN COMPLIANCE AND IMMUNITY.

21 (a) Not later than 60 days after receipt of the
22 information required under Sections 19-1A-7 to 19-1A-14,
23 inclusive, a custodian shall comply with a request under this
24 chapter from a fiduciary or designated recipient to disclose
25 digital assets or terminate an account. If the custodian fails
26 to comply, the fiduciary or designated recipient may apply to

1 the court for an order directing compliance, and such other
2 relief allowed under the law of this state.

3 (b) An order under subsection (a) directing
4 compliance must contain a finding that compliance is not in
5 violation of 18 U.S.C. Section 2702, as amended.

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

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

14 §19-1A-17. UNIFORMITY OF APPLICATION AND
15 CONSTRUCTION. In applying and construing this uniform act,
16 consideration must be given to the need to promote uniformity
17 of the law with respect to its subject matter among states
18 that enact it.

19 §19-1A-18. RELATION TO ELECTRONIC SIGNATURES IN
20 GLOBAL AND NATIONAL COMMERCE ACT. This chapter modifies,
21 limits, or supersedes the Electronic Signatures in Global and
22 National Commerce Act, 15 U.S.C. Section 7001 et seq., but
23 does not modify, limit, or supersede Section 101(c) of that
24 act, 15 U.S.C. Section 7001(c), or authorize electronic
25 delivery of any of the notices described in Section 103(b) of
26 that act, 15 U.S.C. Section 7003(b).

1 Section 2. This act shall become effective on
2 October 1, 2016, following its passage and approval by the
3 Governor, or its otherwise becoming law.