HB138
180734-2
By Representatives Givan and Shedd
RFD: Judiciary
First Read: 07-FEB-17
SYNOPSIS: This bill would adopt the Revised Uniform Fiduciary Access to Digital Assets Act.

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

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

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

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

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(15) "Good faith" means honesty in fact and reasonable under the circumstances.
(16) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

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

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

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

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

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

(22) "Protected person" means an individual for whom a conservator has been appointed. The term includes an individual for whom an application for the appointment of a conservator is pending.
(23) "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.

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

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

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

(27) "User" means a person that has an account with a custodian.

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

§19-1A-3. APPLICABILITY.

(a) This chapter applies to:

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

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

(3) a conservatorship proceeding commenced before, on, or after October 1, 2016; and
(4) a trustee acting under a trust created before, on, or after October 1, 2016.

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

(c) 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. Neither does this chapter apply to a digital asset, whether employer owned or otherwise, that an employee or contractor has stored on, housed on, maintained on, or transmitted to any software, program, hardware, system, account, drive, tape, media, or other storage device leased, licensed, or owned by the employer.

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

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

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

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

§19-1A-5. TERMS-OF-SERVICE AGREEMENT.

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

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

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

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

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

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

(2) grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or
(3) provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

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

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

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

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

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

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

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

§19-1A-7. DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS OF DECEASED USER. If a deceased user consented or a court directs disclosure of the contents of electronic communications of a deceased user, the custodian shall provide a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.
communications of the deceased user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:

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

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

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

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

   (5) if requested by the custodian:

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

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

   (C) a finding by the court that:

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

   (ii) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. Section 2701 et seq., as amended, 47 U.S.C. Section 222, as amended, or other applicable law;
(iii) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

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

§19-1A-8. DISCLOSURE OF OTHER DIGITAL ASSETS OF DECEASED USER. Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:

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

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

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

(4) if requested by the custodian:

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

(B) evidence linking the account to the user;

(C) an affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or
(D) a finding by the court that:

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

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

§19-1A-9. DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS OF PRINCIPAL. To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:

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

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

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

(4) if requested by the custodian:

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

(B) evidence linking the account to the principal.

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

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

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

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

(4) if requested by the custodian:

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

(B) evidence linking the account to the principal.

§19-1A-11. DISCLOSURE OF DIGITAL ASSETS HELD IN TRUST WHEN TRUSTEE IS ORIGINAL USER. Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to any trustee of a trust of which any trustee is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.
§19-1A-12. DISCLOSURE OF CONTENTS OF ELECTRONIC COMMUNICATIONS HELD IN TRUST WHEN TRUSTEE NOT ORIGINAL USER.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

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

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

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

(4) if requested by the custodian:

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

(B) evidence linking the account to the trust.

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

   (1) a written request for disclosure in physical or electronic form;
   
   (2) a copy of the trust instrument or a certification of the trust under Section 19-3B-1013.
   
   (3) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

   (4) if requested by the custodian:

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

      (B) evidence linking the account to the trust.

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

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

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

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

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

(3) if requested by the custodian:

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

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

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

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

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

(1) the duty of care;

(2) the duty of loyalty; and
(3) the duty of confidentiality.

(b) A fiduciary's or a designated recipient's authority with respect to a digital asset of a user:

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

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

(3) in the case of a fiduciary, is limited by the scope of the fiduciary's duties; and

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

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

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

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

(1) has the right to access the property and any digital asset stored in it; and
(2) is an authorized user for the purpose of computer-fraud and unauthorized-computer-access laws, including Article 5A of Chapter 8, Title 13A, 18 U.S.C. Section 2701 et seq., and 47 U.S.C. Section 222.

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

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

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

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

(3) if requested by the custodian:

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

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

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

§19-1A-16. CUSTODIAN COMPLIANCE AND IMMUNITY.
(a) Not later than 60 days after receipt of the
information required under Sections 19-1A-7 to 19-1A-14,
inclusive, a custodian shall comply with a request under this
chapter from a fiduciary or designated recipient to disclose
digital assets or terminate an account. If the custodian fails
to comply, the fiduciary or designated recipient may apply to
the court for an order directing compliance, and such other
relief allowed under the law of this state.

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

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

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

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

(1) specifies that an account belongs to the
protected person or principal;
(2) specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and

(3) contains a finding required by law other than this chapter.

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

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

§19-1A-18. 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. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Section 2. This act shall become effective on January 1, 2018, following its passage and approval by the Governor, or its otherwise becoming law.