

SENATE BILL NO. 118

INTRODUCED BY M. MCNALLY, N. SWANDAL, J. ESSMANN

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4 A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE 2015 REVISED UNIFORM FIDUCIARY ACCESS
5 TO DIGITAL ASSETS ACT; PROVIDING DEFINITIONS; PROVIDING USER DIRECTION FOR DISCLOSURE
6 OF DIGITAL ASSETS; PROVIDING PROCEDURE FOR DISCLOSURE OF DIGITAL ASSETS; PROVIDING FOR
7 DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATION AND OTHER DIGITAL ASSETS OF
8 CERTAIN USERS TO DESIGNATED RECIPIENTS AND FIDUCIARIES; PROVIDING FOR FIDUCIARY DUTIES
9 AND AUTHORITY; PROVIDING FOR CUSTODIAN COMPLIANCE AND IMMUNITY; AND PROVIDING A
10 RETROACTIVE APPLICABILITY DATE."

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12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

13
14 NEW SECTION. **Section 1. Short title.** [Sections 1 through 17] may be cited as the "Revised Uniform
15 Fiduciary Access to Digital Assets Act".

16
17 NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 17]:

- 18 (1) "Account" means an arrangement under a terms-of-service agreement in which a custodian carries,
19 maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.
20 (2) "Agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney.
21 (3) "Carries" means engages in the transmission of an electronic communication.
22 (4) "Catalogue of electronic communications" means information that identifies each person with which
23 a user has had an electronic communication, the time and date of the communication, and the electronic address
24 of the person.
25 (5) "Conservator" means a person appointed by a court to manage the estate of a living individual.
26 (6) "Content of an electronic communication" means information concerning the substance or meaning
27 of the communication which:
28 (a) has been sent or received by a user;
29 (b) is in electronic storage by a custodian providing an electronic-communication service to the public
30 or is carried or maintained by a custodian providing a remote-computing service to the public; and



1 (c) is not readily accessible to the public.

2 (7) "Court" means the district court having jurisdiction in matters relating to the content of [sections 1
3 through 17].

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

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

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

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

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

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

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

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

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

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

24 (18) "Personal representative" means an executor, administrator, special administrator, or person that
25 performs substantially the same function under law of this state other than [sections 1 through 17].

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

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

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

30 (22) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic

1 or other medium and is retrievable in perceivable form.

2 (23) "Remote-computing service" means a custodian that provides to a user computer-processing
3 services or the storage of digital assets by means of an electronic communications system, as defined in
4 18 U.S.C. 2510(14), as amended.

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

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

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

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

12

13 **NEW SECTION. Section 3. User direction for disclosure of digital assets.** (1) A user may use an
14 online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's
15 digital assets, including the content of electronic communications. If the online tool allows the user to modify or
16 delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction
17 by the user in a will, trust, power of attorney, or other record.

18 (2) If a user has not used an online tool to give direction under subsection (1) or if the custodian has not
19 provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure
20 to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent
21 or received by the user.

22 (3) A user's direction under subsection (1) or (2) overrides a contrary provision in a terms-of-service
23 agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of
24 service.

25

26 **NEW SECTION. Section 4. Terms-of-service agreement.** (1) [Sections 1 through 17] do not change
27 or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets
28 of the user.

29 (2) [Sections 1 through 17] do not give a fiduciary or designated recipient any new or expanded rights
30 other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or

1 represents.

2 (3) A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a
3 user, by federal law, or by a terms-of-service agreement if the user has not provided direction under [section 3].

4
5 **NEW SECTION. Section 5. Procedure for disclosing digital assets.** (1) When disclosing digital
6 assets of a user under [sections 1 through 17], the custodian may at its sole discretion:

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

8 (b) grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the
9 tasks with which the fiduciary or designated recipient is charged; or

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

13 (2) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets
14 under [sections 1 through 17].

15 (3) A custodian need not disclose under [sections 1 through 17] a digital asset deleted by a user.

16 (4) If a user directs or a fiduciary requests a custodian to disclose under [sections 1 through 17] some,
17 but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets
18 would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an
19 undue burden, the custodian or fiduciary may seek an order from the court to disclose:

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

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

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

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

24
25 **NEW SECTION. Section 6. Disclosure of content of electronic communications of deceased user.**

26 If a deceased user consented or a court directs disclosure of the contents of electronic communications of the
27 user, the custodian shall disclose to the personal representative of the estate of the user the content of an
28 electronic communication sent or received by the user if the representative gives the custodian:

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

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

1 (3) a certified copy of the letter of appointment of the representative or a collection of personal property
2 affidavit or court order;

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

6 (5) if requested by the custodian:

7 (a) a number, username, address, or other unique subscriber or account identifier assigned by the
8 custodian to 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 custodian, identifiable by the information specified in
12 subsection (5)(a);

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

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

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

19
20 **NEW SECTION. Section 7. Disclosure of other digital assets of deceased user.** Unless the user
21 prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal
22 representative of the estate of a deceased user a catalogue of electronic communications sent or received by
23 the user and digital assets, other than the content of electronic communications, of the user, if the representative
24 gives the custodian:

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

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

27 (3) a certified copy of the letter of appointment of the representative or a collection of personal property
28 affidavit or court order; and

29 (4) if requested by the custodian:

30 (a) a number, username, address, or other unique subscriber or account identifier assigned by the

- 1 custodian to identify the user's account;
- 2 (b) evidence linking the account to the user;
- 3 (c) an affidavit stating that disclosure of the user's digital assets is reasonably necessary for
- 4 administration of the estate; or
- 5 (d) a finding by the court that:
- 6 (i) the user had a specific account with the custodian, identifiable by the information specified in
- 7 subsection (4)(a); or
- 8 (ii) disclosure of the user's digital assets is reasonably necessary for administration of the estate.
- 9

10 **NEW SECTION. Section 8. Disclosure of content of electronic communications of principal.** To

11 the extent a power of attorney expressly grants an agent authority over the content of electronic communications

12 sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall

13 disclose to the agent the content if the agent gives the custodian:

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

15 (2) an original or copy of the power of attorney expressly granting the agent authority over the content

16 of electronic communications of the principal;

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

18 (4) if requested by the custodian:

19 (a) a number, username, address, or other unique subscriber or account identifier assigned by the

20 custodian to identify the principal's account; or

21 (b) evidence linking the account to the principal.

22

23 **NEW SECTION. Section 9. Disclosure of other digital assets of principal.** Unless otherwise ordered

24 by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent

25 with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of

26 electronic communications sent or received by the principal and digital assets, other than the content of electronic

27 communications, of the principal if the agent gives the custodian:

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

29 (2) an original or a copy of the power of attorney that gives the agent specific authority over digital assets

30 or general authority to act on behalf of the principal;

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

2 (4) if requested by the custodian:

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

5 (b) evidence linking the account to the principal.

6
7 **NEW SECTION. Section 10. Disclosure of digital assets held in trust when trustee is original user.**

8 Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an
9 original user of an account any digital asset of the account held in trust, including a catalogue of electronic
10 communications of the trustee and the content of electronic communications.

11
12 **NEW SECTION. Section 11. Disclosure of contents of electronic communications held in trust**

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

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

18 (2) a certified copy of the trust instrument or a certification of the trust under 72-38-1013 that includes
19 consent to disclosure of the content of electronic communications to the trustee;

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

22 (4) if requested by the custodian:

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

25 (b) evidence linking the account to the trust.

26
27 **NEW SECTION. Section 12. Disclosure of other digital assets held in trust when trustee not**

28 **original user.** Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian
29 shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications
30 sent or received by an original or successor user and stored, carried, or maintained by the custodian in an

1 account of the trust and any digital assets, other than the content of electronic communications, in which the trust
2 has a right or interest if the trustee gives the custodian:

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

4 (2) a certified copy of the trust instrument or a certification of the trust under 72-38-1013;

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

7 (4) if requested by the custodian:

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

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

11

12 **NEW SECTION. Section 13. Disclosure of digital assets to conservator of protected person.** (1)

13 After an opportunity for a hearing under 72-5-408, the court may grant a conservator access to the digital assets
14 of a protected person.

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

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

20 (b) a certified copy of the court order that gives the conservator authority over the digital assets of the
21 protected person; and

22 (c) if requested by the custodian:

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

25 (ii) evidence linking the account to the protected person.

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

30

- 1 **NEW SECTION. Section 14. Fiduciary duty and authority.** (1) The legal duties imposed on a fiduciary
2 charged with managing tangible property apply to the management of digital assets, including:
- 3 (a) the duty of care;
- 4 (b) the duty of loyalty; and
- 5 (c) the duty of confidentiality.
- 6 (2) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:
- 7 (a) except as otherwise provided in ~~[Section 4]~~ [SECTION 5], is subject to the applicable terms of service;
- 8 (b) is subject to other applicable law, including copyright law;
- 9 (c) in the case of a fiduciary, is limited by the scope of the fiduciary's duties; and
- 10 (d) may not be used to impersonate the user.
- 11 (3) A fiduciary with authority over the property of a decedent, protected person, principal, or settlor has
12 the right to access any digital asset in which the decedent, protected person, principal, or settlor had a right or
13 interest and that is not held by a custodian or subject to a terms-of-service agreement.
- 14 (4) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of
15 the decedent, protected person, principal, or settlor for the purpose of applicable computer-fraud and
16 unauthorized-computer-access laws, including 45-6-311.
- 17 (5) A fiduciary with authority over the tangible, personal property of a decedent, protected person,
18 principal, or settlor:
- 19 (a) has the right to access the property and any digital asset stored in it; and
- 20 (b) is an authorized user for the purpose of computer-fraud and unauthorized-computer-access laws,
21 including 45-6-311.
- 22 (6) A custodian may disclose information in an account to a fiduciary of the user when the information
23 is required to terminate an account used to access digital assets licensed to the user.
- 24 (7) A fiduciary of a user may request a custodian to terminate the user's account. A request for
25 termination must be in writing, in either physical or electronic form, and accompanied by:
- 26 (a) if the user is deceased, a certified copy of the death certificate of the user;
- 27 (b) a certified copy of the letter of appointment of the representative or a collection of personal property
28 affidavit or court order, court order, power of attorney, or trust giving the fiduciary authority over the account; and
- 29 (c) if requested by the custodian:
- 30 (i) a number, username, address, or other unique subscriber or account identifier assigned by the

1 custodian to identify the user's account;
2 (ii) evidence linking the account to the user; or
3 (iii) a finding by the court that the user had a specific account with the custodian, identifiable by the
4 information specified in subsection (7)(c)(i).

5
6 **NEW SECTION. Section 15. Custodian compliance and immunity.** (1) Not later than 60 days after
7 receipt of the information required under [sections 6 through 14], a custodian shall comply with a request under
8 [sections 1 through 17] from a fiduciary or designated recipient to disclose digital assets or terminate an account.
9 If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing
10 compliance.

11 (2) An order under subsection (1) directing compliance must contain a finding that compliance is not in
12 violation of 18 U.S.C. 2702, as amended.

13 (3) A custodian may notify the user that a request for disclosure or to terminate an account was made
14 under [sections 1 through 17].

15 (4) A custodian may deny a request under [sections 1 through 17] from a fiduciary or designated recipient
16 for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the
17 account following the receipt of the fiduciary's request.

18 (5) [Sections 1 through 17] do not limit a custodian's ability to obtain or require a fiduciary or designated
19 recipient requesting disclosure or termination under [sections 1 through 17] to obtain a court order which:

20 (a) specifies that an account belongs to the protected person or principal;

21 (b) specifies that there is sufficient consent from the protected person or principal to support the
22 requested disclosure; and

23 (c) contains a finding required by law other than [sections 1 through 17].

24 (6) (a) Except as provided in subsection (6)(b), a custodian and its officers, employees, and agents are
25 immune from liability for an act or omission done in good faith in compliance [sections 1 through 17].

26 (b) The immunity in subsection (6)(a) does not apply to actions against the state or a political subdivision
27 of the state.

28
29 **NEW SECTION. Section 16. Uniformity of application and construction.** In applying and construing
30 this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its

1 subject matter among states that enact it.

2

3 **NEW SECTION. Section 17. Relation to electronic signatures in global and national commerce**
4 **act.** [Sections 1 through 17] modify, limit, or supersede the Electronic Signatures in Global and National
5 Commerce Act, 15 U.S.C. 7001 et seq., but do not modify, limit, or supersede section 101(c) of that act, 15 U.S.C.
6 section 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act,
7 15 U.S.C. 7003(b).

8

9 **NEW SECTION. Section 18. Codification instruction.** [Sections 1 through 17] are intended to be
10 codified as an integral part of Title 72, chapter 31, and the provisions of Title 72, chapter 31, apply to [sections
11 1 through 17].

12

13 **NEW SECTION. Section 19. Severability.** If a part of [this act] is invalid, all valid parts that are
14 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,
15 the part remains in effect in all valid applications that are severable from the invalid applications.

16

17 **NEW SECTION. Section 20. Retroactive applicability.** (1) [Sections 1 through 17] apply retroactively,
18 within the meaning of 1-2-109, to:

19 (a) a fiduciary acting under a will or power of attorney executed before, on, or after [the effective date
20 of this act];

21 (b) a personal representative acting for a decedent who died before, on, or after [the effective date of
22 this act];

23 (c) a conservatorship proceeding commenced before, on, or after [the effective date of this act]; and

24 (d) a trustee acting under a trust created before, on, or after [the effective date of this act].

25 (2) [Sections 1 through 17] apply to a custodian if the user resides in this state or resided in this state
26 at the time of the user's death.

27 (3) [Sections 1 through 17] do not apply to a digital asset of an employer used by an employee in the
28 ordinary course of the employer's business.

29

- END -