

SENATE BILL NO. 266

INTRODUCED BY M. MCNALLY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

A BILL FOR AN ACT ENTITLED: "AN ACT ADOPTING THE 2014 UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT; PROVIDING DEFINITIONS; PROVIDING ACCESS TO DIGITAL ASSETS FOR PERSONAL REPRESENTATIVES OF DECEDENTS, CONSERVATORS, AGENTS, TRUSTEES, AND OTHER FIDUCIARIES; AND PROVIDING AN APPLICABILITY DATE."

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

NEW SECTION. **Section 1. Short title.** [Sections 1 through 11] may be cited as the Uniform Fiduciary Access to Digital Assets Act.

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 11]:

(1) "Account holder" means a person that has entered into a terms-of-service agreement with a custodian or 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) "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 that:

- (a) has been sent or received by an account holder;
- (b) is in electronic storage by a custodian providing a remote-computing service to the public; and
- (c) is not readily accessible to the public.

(7) "Court" means any court of competent jurisdiction in matters relating to an agent, guardianship, conservatorship, estate, or other proceeding involving fiduciaries.

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

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

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

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

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

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

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

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

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

19 (17) "Personal representative" means an executor, administrator, special administrator, or person that
20 performs substantially the same function under law of this state other than [sections 1 through 11].

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

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

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

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

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

30 (23) "Terms-of-service agreement" mean an agreement that controls the relationship between an

1 account holder and a custodian.

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

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

6
7 **NEW SECTION. Section 3. Access by personal representative to digital asset of decedent.** Subject
8 to [section 7(2)] and unless otherwise ordered by the court or provided in the will of a decedent, the personal
9 representative of the decedent has the right to access:

- 10 (1) the content of an electronic communication that the custodian is permitted to disclose under the
- 11 Electronic Communications Privacy Act, 18 U.S.C. 2702(b), as amended;
- 12 (2) any catalogue of electronic communication sent or received by the decedent; and
- 13 (3) any other digital asset in which at death the decedent had a right or interest.

14
15 **NEW SECTION. Section 4. Access by conservator to digital asset of protected person.** Subject
16 to [section 7(2)], the court, after an opportunity for hearing as may be provided under any proceeding governing
17 a fiduciary as defined in [section 2], may grant a conservator the right to access:

- 18 (1) the content of an electronic communication that the custodian is permitted to disclose under the
- 19 Electronic Communications Privacy Act, 18 U.S.C. 2702(b), as amended;
- 20 (2) any catalogue of electronic communications sent or received by the protected person; and
- 21 (3) any other digital asset in which the protected person has a right or interest.

22
23 **NEW SECTION. Section 5. Access by agent to digital asset of principal.** (1) To the extent a power
24 of attorney expressly grants an agent authority over the content of an electronic communication of the principal
25 and subject to [section 7(2)], the agent has the right to access the content of an electronic communication that
26 the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. 2702(b), as
27 amended.

28 (2) Subject to [section 7(2)] and unless otherwise ordered by the court or provided by a power of
29 attorney, an agent has the right to access:

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

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

2

3 **NEW SECTION. Section 6. Access by trustee to digital asset.** (1) Subject to [section 7(2)] and
4 unless otherwise ordered by the court or provided in a trust, a trustee that is an original account holder has the
5 right to access any digital asset held in trust, including any catalogue of electronic communications of the trustee
6 and the content of an electronic communication.

7 (2) Subject to [section 7(2)] and unless otherwise ordered by the court or provided in a trust, the trustee
8 that is not an original account holder has the right to access:

9 (a) the content of an electronic communication that the custodian is permitted to disclose under the
10 Electronic Communications Privacy Act, 18 U.S.C. 2702(b), as amended;

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

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

14

15 **NEW SECTION. Section 7. Fiduciary authority.** (1) A fiduciary that is an account holder or has the
16 right under [sections 1 through 11] to access a digital asset of an account holder:

17 (a) subject to the terms-of-service agreement, copyright laws, and other applicable law, may take any
18 action concerning the asset to the extent of the account holder's authority and the fiduciary's power under the law
19 of this state other than [sections 1 through 11]; and

20 (b) has, for the purpose of applicable electronic privacy laws, the lawful consent of the account holder
21 for the custodian to divulge the content of the electronic communication to the fiduciary.

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

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

26 (b) the fiduciary's access under [sections 1 through 11] to a digital asset does not violate the
27 terms-of-service agreement even if the agreement requires notice of a change in the account holder's status.

28 (3) A choice-of-law provision in the terms-of-service agreement is unenforceable against a fiduciary
29 acting under [sections 1 through 11] to the extent the provision designates law that enforces a limitation on a
30 fiduciary's access to a digital asset, and the limitation is void under subsection (2).

1 (4) As to tangible personal property capable of receiving, storing, processing, or sending a digital asset,
 2 a fiduciary with authority over the property of the decedent, protected person, principal, or settlor has the right
 3 to access the property and any digital asset stored in it.

4
 5 **NEW SECTION. Section 8. Compliance.** (1) If a fiduciary with a right under [sections 1 through 11]
 6 to access a digital asset of an account holder complies with subsection (2), the custodian shall comply with the
 7 fiduciary's request in a record for:

- 8 (a) access to the asset;
- 9 (b) control of the asset; and
- 10 (c) a copy of the asset to the extent permitted by copyright law.

11 (2) If a request under subsection (1) is made by:

12 (a) a personal representative with the right of access under [section 3], the request must be
 13 accompanied by a certified copy of the letter of appointment of the representative, a small-estate affidavit, or court
 14 order;

15 (b) a conservator with the right of access under [section 4], the request must be accompanied by a
 16 certified copy of the court order that gives the conservator authority over the digital asset;

17 (c) an agent with the right of access under [section 5], the request must be accompanied by an original
 18 or a copy of the power of attorney that authorizes the agent to exercise authority over the digital asset and a
 19 certification of the agent, under penalty of perjury, that the power of attorney is in effect; and

20 (d) a trustee with the right of access under [section 6], the request must be accompanied by a certified
 21 copy of the trust instrument, or a certification of the trust under 72-38-1013, that authorizes the trustee to exercise
 22 authority over the digital asset.

23 (3) A custodian shall comply with a request made under subsection (1) not later than 60 days after
 24 receipt. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

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

27
 28 **NEW SECTION. Section 9. Custodian immunity.** A custodian and its officers, employees, and agents
 29 are immune from liability for an act or omission done in good faith in compliance with [sections 1 through 11].
 30

