

1 HB138
2 180734-2
3 By Representatives Givan and Shedd
4 RFD: Judiciary
5 First Read: 07-FEB-17

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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) "Good faith" means honesty in fact and
26 reasonable under the circumstances.

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

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

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

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

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

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

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

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

4 (24) "Remote-computing service" means a custodian
5 that provides to a user computer-processing services or the
6 storage of digital assets by means of an electronic
7 communications system, as defined in 18 U.S.C. Section
8 2510(14), as amended.

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

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

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

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

20 §19-1A-3. APPLICABILITY.

21 (a) This chapter applies to:

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

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

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

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

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

6 (c) This chapter does not apply to a digital asset
7 of an employer used by an employee in the ordinary course of
8 the employer's business. Neither does this chapter apply to a
9 digital asset, whether employer owned or otherwise, that an
10 employee or contractor has stored on, housed on, maintained
11 on, or transmitted to any software, program, hardware, system,
12 account, drive, tape, media, or other storage device leased,
13 licensed, or owned by the employer.

14 §19-1A-4. USER DIRECTION FOR DISCLOSURE OF DIGITAL
15 ASSETS.

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

24 (b) If a user has not used an online tool to give
25 direction under subsection (a) or if the custodian has not
26 provided an online tool, the user may allow or prohibit in a
27 will, trust, power of attorney, or other record, disclosure to

1 a fiduciary of some or all of the user's digital assets,
2 including the content of electronic communications sent or
3 received by the user.

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

7 §19-1A-5. TERMS-OF-SERVICE AGREEMENT.

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

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

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

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

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

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

24 (2) grant a fiduciary or designated recipient
25 partial access to the user's account sufficient to perform the
26 tasks with which the fiduciary or designated recipient is
27 charged; or

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

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

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

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

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

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

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

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

25 §19-1A-7. DISCLOSURE OF CONTENT OF ELECTRONIC
26 COMMUNICATIONS OF DECEASED USER. If a deceased user consented
27 or a court directs disclosure of the contents of electronic

1 communications of the deceased user, the custodian shall
2 disclose to the personal representative of the estate of the
3 user the content of an electronic communication sent or
4 received by the user if the representative gives the
5 custodian:

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

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

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

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

15 (5) if requested by the custodian:

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

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

20 (C) a finding by the court that:

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

24 (ii) disclosure of the content of electronic
25 communications of the user would not violate 18 U.S.C. Section
26 2701 et seq., as amended, 47 U.S.C. Section 222, as amended,
27 or other applicable law;

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

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

7 §19-1A-8. DISCLOSURE OF OTHER DIGITAL ASSETS OF
8 DECEASED USER. Unless the user prohibited disclosure of
9 digital assets or the court directs otherwise, a custodian
10 shall disclose to the personal representative of the estate of
11 a deceased user a catalogue of electronic communications sent
12 or received by the user and digital assets, other than the
13 content of electronic communications, of the user, if the
14 representative gives the custodian:

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

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

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

20 (4) if requested by the custodian:

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

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

25 (C) an affidavit stating that disclosure of the
26 user's digital assets is reasonably necessary for
27 administration of the estate; or

1 (D) a finding by the court that:

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

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

7 §19-1A-9. DISCLOSURE OF CONTENT OF ELECTRONIC
8 COMMUNICATIONS OF PRINCIPAL. To the extent a power of attorney
9 expressly grants an agent authority over the content of
10 electronic communications sent or received by the principal
11 and unless directed otherwise by the principal or the court, a
12 custodian shall disclose to the agent the content if the agent
13 gives the custodian:

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

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

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

21 (4) if requested by the custodian:

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

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

26 §19-1A-10. DISCLOSURE OF OTHER DIGITAL ASSETS OF
27 PRINCIPAL. Unless otherwise ordered by the court, directed by

1 the principal, or provided by a power of attorney, a custodian
2 shall disclose to an agent with specific authority over
3 digital assets or general authority to act on behalf of a
4 principal a catalogue of electronic communications sent or
5 received by the principal and digital assets, other than the
6 content of electronic communications, of the principal if the
7 agent gives the custodian:

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

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

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

15 (4) if requested by the custodian:

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

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

20 §19-1A-11. DISCLOSURE OF DIGITAL ASSETS HELD IN
21 TRUST WHEN TRUSTEE IS ORIGINAL USER. Unless otherwise ordered
22 by the court or provided in a trust, a custodian shall
23 disclose to any trustee of a trust of which any trustee is an
24 original user of an account any digital asset of the account
25 held in trust, including a catalogue of electronic
26 communications of the trustee and the content of electronic
27 communications.

1 §19-1A-12. DISCLOSURE OF CONTENTS OF ELECTRONIC
2 COMMUNICATIONS HELD IN TRUST WHEN TRUSTEE NOT ORIGINAL USER.
3 Unless otherwise ordered by the court, directed by the user,
4 or provided in a trust, a custodian shall disclose to a
5 trustee that is not an original user of an account the content
6 of an electronic communication sent or received by an original
7 or successor user and carried, maintained, processed,
8 received, or stored by the custodian in the account of the
9 trust if the trustee gives the custodian:

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

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

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

19 (4) if requested by the custodian:

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

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

24 §19-1A-13. DISCLOSURE OF OTHER DIGITAL ASSETS HELD
25 IN TRUST WHEN TRUSTEE NOT ORIGINAL USER. Unless otherwise
26 ordered by the court, directed by the user, or provided in a
27 trust, a custodian shall disclose, to a trustee that is not an

1 original user of an account, a catalogue of electronic
2 communications sent or received by an original or successor
3 user and stored, carried, or maintained by the custodian in an
4 account of the trust and any digital assets, other than the
5 content of electronic communications, in which the trust has a
6 right or interest if the trustee gives the custodian:

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

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

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

14 (4) if requested by the custodian:

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

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

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

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

24 (b) Unless otherwise ordered by the court or
25 directed by the user, a custodian shall disclose to a
26 conservator the catalogue of electronic communications sent or
27 received by a protected person and any digital assets, other

1 than the content of electronic communications, in which the
2 protected person has a right or interest if the conservator
3 gives the custodian:

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

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

9 (3) if requested by the custodian:

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

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

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

22 §19-1A-15. FIDUCIARY DUTY AND AUTHORITY.

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

26 (1) the duty of care;

27 (2) the duty of loyalty; and

1 (3) the duty of confidentiality.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 (3) if requested by the custodian:

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

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

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

26 §19-1A-16. CUSTODIAN COMPLIANCE AND IMMUNITY.

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

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

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

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

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

24 (1) specifies that an account belongs to the
25 protected person or principal;

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

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

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

9 §19-1A-17. UNIFORMITY OF APPLICATION AND
10 CONSTRUCTION. In applying and construing this uniform act,
11 consideration must be given to the need to promote uniformity
12 of the law with respect to its subject matter among states
13 that enact it.

14 §19-1A-18. RELATION TO ELECTRONIC SIGNATURES IN
15 GLOBAL AND NATIONAL COMMERCE ACT. This chapter modifies,
16 limits, or supersedes the Electronic Signatures in Global and
17 National Commerce Act, 15 U.S.C. Section 7001 et seq., but
18 does not modify, limit, or supersede Section 101(c) of that
19 act, 15 U.S.C. Section 7001(c), or authorize electronic
20 delivery of any of the notices described in Section 103(b) of
21 that act, 15 U.S.C. Section 7003(b).

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