

1 **UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

2 2017 GENERAL SESSION

3 STATE OF UTAH

4

LONG TITLE

5 **General Description:**

6 This bill creates a new chapter within the Utah Uniform Probate Code addressing
7 access to digital assets when a person is incapacitated.
8

9 **Highlighted Provisions:**

10 This bill:

- 11 ▶ defines terms;
- 12 ▶ specifies who has access to the digital assets of an incapacitated or deceased person;
- 13 ▶ sets out responsibilities for agents and fiduciaries with access to a person's digital
14 assets; and
- 15 ▶ provides for the responsibilities of the custodian of a digital asset upon request of an
16 agent or fiduciary.

17 **Money Appropriated in this Bill:**

18 None

19 **Other Special Clauses:**

20 None

21 **Utah Code Sections Affected:**

22 ENACTS:

23 **75-10-101**, Utah Code Annotated 1953

24 **75-10-102**, Utah Code Annotated 1953

25 **75-10-103**, Utah Code Annotated 1953

26 **75-10-104**, Utah Code Annotated 1953

27 **75-10-105**, Utah Code Annotated 1953

28 **75-10-106**, Utah Code Annotated 1953

29 **75-10-107**, Utah Code Annotated 1953

30 **75-10-108**, Utah Code Annotated 1953

31 **75-10-109**, Utah Code Annotated 1953

32 **75-10-110**, Utah Code Annotated 1953

- 33 **75-10-111**, Utah Code Annotated 1953
- 34 **75-10-112**, Utah Code Annotated 1953
- 35 **75-10-113**, Utah Code Annotated 1953
- 36 **75-10-114**, Utah Code Annotated 1953
- 37 **75-10-115**, Utah Code Annotated 1953
- 38 **75-10-116**, Utah Code Annotated 1953
- 39 **75-10-117**, Utah Code Annotated 1953
- 40 **75-10-118**, Utah Code Annotated 1953

41

42 *Be it enacted by the Legislature of the state of Utah:*

43 Section 1. Section **75-10-101** is enacted to read:

44 **CHAPTER 10. UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT**

45 **75-10-101. Title.**

46 This chapter may be cited as the Uniform Fiduciary Access to Digital Assets Act.

47 Section 2. Section **75-10-102** is enacted to read:

48 **75-10-102. Definitions.**

49 As used in this chapter:

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

53 (2) "Agent" means an attorney in fact granted authority under a durable or nondurable
54 power of attorney.

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

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

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

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

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

64 (b) is in electronic storage by a custodian providing an electronic communication
65 service to the public or is carried or maintained by a custodian providing a remote computing
66 service to the public; and

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

68 (7) "Court" means the district court.

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

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

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

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

78 (12) "Electronic communication" has the same meaning as the definition in 18 U.S.C.
79 Sec. 2510(12).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

115 Section 3. Section **75-10-103** is enacted to read:

116 **75-10-103. Applicability.**

117 (1) This chapter applies to:

118 (a) a fiduciary or agent acting under a will or power of attorney executed before, on, or
119 after May 9, 2017;

120 (b) a personal representative acting for a decedent who died before, on, or after May 9,
121 2017;

122 (c) a conservatorship proceeding commenced before, on, or after May 9, 2017; and

123 (d) a trustee acting under a trust created before, on, or after May 9, 2017.

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

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

128 Section 4. Section **75-10-104** is enacted to read:

129 **75-10-104. User direction for disclosure of digital assets.**

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

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

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

142 Section 5. Section **75-10-105** is enacted to read:

143 **75-10-105. Terms-of-service agreement.**

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

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

149 (3) A fiduciary's or designated recipient's access to digital assets may be modified or
150 eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not
151 provided direction under Section 75-10-104.

152 Section 6. Section **75-10-106** is enacted to read:

153 **75-10-106. Procedure for disclosing digital assets.**

154 (1) When disclosing digital assets of a user under this chapter, the custodian may at the
155 custodian's sole discretion:

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

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

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

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

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

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

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

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

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

174 Section 7. Section **75-10-107** is enacted to read:

175 **75-10-107. Disclosure of content of electronic communications of deceased user.**

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

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

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

182 (3) a certified copy of the letter of appointment of the representative or a small estate
183 affidavit or court order;

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

187 (5) if requested by the custodian:

- 188 (a) a number, username, address, or other unique subscriber or account identifier
189 assigned by the custodian to identify the user's account;
190 (b) evidence linking the account to the user; or
191 (c) a finding by the court that:
192 (i) the user had a specific account with the custodian, identifiable by the information
193 specified in Subsection (5)(a);
194 (ii) disclosure of the content of electronic communications of the user would not
195 violate 18 U.S.C. Sec. 2701 et seq., 47 U.S.C. Sec. 222, or other applicable law;
196 (iii) unless the user provided direction using an online tool, the user consented to
197 disclosure of the content of electronic communications; or
198 (iv) disclosure of the content of electronic communications of the user is reasonably
199 necessary for administration of the estate.

200 Section 8. Section **75-10-108** is enacted to read:

201 **75-10-108. Disclosure of other digital assets of deceased user.**

202 Unless the user prohibited disclosure of digital assets or the court directs otherwise, a
203 custodian shall disclose to the personal representative of the estate of a deceased user a
204 catalogue of electronic communications sent or received by the user and digital assets, other
205 than the content of electronic communications, of the user, if the representative gives the
206 custodian:

- 207 (1) a written request for disclosure in physical or electronic form;
208 (2) a certified copy of the death certificate of the user;
209 (3) a certified copy of the letter of appointment of the representative, a small estate
210 affidavit, or court order; and
211 (4) if requested by the custodian:
212 (a) a number, username, address, or other unique subscriber or account identifier
213 assigned by the custodian to identify the user's account;
214 (b) evidence linking the account to the user;
215 (c) an affidavit stating that disclosure of the user's digital assets is reasonably necessary
216 for administration of the estate; or
217 (d) a finding by the court that:
218 (i) the user had a specific account with the custodian, identifiable by the information

219 specified in Subsection (4)(a); or

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

222 Section 9. Section **75-10-109** is enacted to read:

223 **75-10-109. Disclosure of content of electronic communications of principal.**

224 To the extent a power of attorney expressly grants an agent authority over the content of
225 electronic communications sent or received by the principal and unless directed otherwise by
226 the principal or the court, a custodian shall disclose to the agent the content if the agent gives
227 the custodian:

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

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

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

233 (4) if requested by the custodian:

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

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

237 Section 10. Section **75-10-110** is enacted to read:

238 **75-10-110. Disclosure of other digital assets of principal.**

239 Unless otherwise ordered by the court, directed by the principal, or provided by a power
240 of attorney, a custodian shall disclose to an agent with specific authority over digital assets, or
241 general authority to act on behalf of a principal, a catalogue of electronic communications sent
242 or received by the principal and digital assets, other than the content of electronic
243 communications, of the principal if the agent gives the custodian:

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

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

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

249 (4) if requested by the custodian:

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

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

253 Section 11. Section **75-10-111** is enacted to read:

254 **75-10-111. Disclosure of digital assets held in trust when trustee is original user.**

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

259 Section 12. Section **75-10-112** is enacted to read:

260 **75-10-112. Disclosure of contents of electronic communications held in trust when**
261 **trustee not original user.**

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

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

268 (2) a certified copy of the trust instrument or a certification of the trust under Section
269 75-7-1013 that includes consent to disclosure of the content of electronic communications to
270 the trustee;

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

273 (4) if requested by the custodian:

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

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

277 Section 13. Section **75-10-113** is enacted to read:

278 **75-10-113. Disclosure of other digital assets held in trust when trustee not original**
279 **user.**

280 Unless otherwise ordered by the court, directed by the user, or provided in a trust, a

281 custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of
282 electronic communications sent or received by an original or successor user and stored, carried,
283 or maintained by the custodian in an account of the trust and any digital assets, other than the
284 content of electronic communications, in which the trust has a right or interest if the trustee
285 gives the custodian:

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

287 (2) a certified copy of the trust instrument or a certification of the trust under Section
288 75-7-1013;

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

291 (4) if requested by the custodian:

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

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

295 Section 14. Section **75-10-114** is enacted to read:

296 **75-10-114. Disclosure of digital assets to conservator of protected person.**

297 (1) After an opportunity for a hearing under Chapter 5b, Uniform Adult Guardianship
298 and Protective Proceedings Jurisdiction Act, the court may grant a conservator access to the
299 digital assets of a protected person.

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

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

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

307 (c) if requested by the custodian:

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

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

311 (3) A conservator with general authority to manage the assets of a protected person

312 may request a custodian of the digital assets of the protected person to suspend or terminate an
313 account of the protected person for good cause. A request made under this section must be
314 accompanied by a certified copy of the court order giving the conservator authority over the
315 protected person's property.

316 Section 15. Section **75-10-115** is enacted to read:

317 **75-10-115. Fiduciary duty and authority.**

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

320 (a) the duty of care;

321 (b) the duty of loyalty; and

322 (c) the duty of confidentiality.

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

325 (a) except as otherwise provided in Section 75-10-104, is subject to the applicable
326 terms of service;

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

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

329 (d) may not be used to impersonate the user.

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

334 (4) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of
335 the property of the decedent, protected person, principal, or settlor for the purpose of applicable
336 computer fraud and unauthorized computer access laws.

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

339 (a) has the right to access the property and any digital asset stored in it; and

340 (b) is an authorized user for the purpose of computer fraud and unauthorized computer
341 access laws.

342 (6) A custodian may disclose information in an account to a fiduciary of the user when

343 the information is required to terminate an account used to access digital assets licensed to the
344 user.

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

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

349 (b) a certified copy of the letter of appointment of the representative, a small estate
350 affidavit, or court order, power of attorney, or trust giving the fiduciary authority over the
351 account; and

352 (c) if requested by the custodian:

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

355 (ii) evidence linking the account to the user; or

356 (iii) a finding by the court that the user had a specific account with the custodian,
357 identifiable by the information specified in Subsection (7)(c)(i).

358 Section 16. Section **75-10-116** is enacted to read:

359 **75-10-116. Custodian compliance and immunity.**

360 (1) Not later than 60 days after receipt of the information required under Sections
361 75-10-107 through 75-10-115, a custodian shall comply with a request under this chapter from
362 a fiduciary or designated recipient to disclose digital assets or terminate an account. If the
363 custodian fails to comply, the fiduciary or designated recipient may apply to the court for an
364 order directing compliance.

365 (2) An order under Subsection (1) directing compliance shall contain a finding that
366 compliance is not in violation of 18 U.S.C. Sec. 2702.

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

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

372 (5) This chapter does not limit a custodian's ability to obtain or require a fiduciary or
373 designated recipient requesting disclosure or termination under this chapter to obtain a court

374 order that:

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

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

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

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

381 Section 17. Section **75-10-117** is enacted to read:

382 **75-10-117. Uniformity of application and construction.**

383 In applying and construing this uniform act, consideration shall be given to the need to
384 promote uniformity of the law with respect to its subject matter among states that enact it.

385 Section 18. Section **75-10-118** is enacted to read:

386 **75-10-118. Relation to Electronic Signatures in Global and National Commerce**
387 **Act.**

388 This chapter modifies, limits, or supersedes the Electronic Signatures in Global and
389 National Commerce Act, 15 U.S.C. Sec. 7001 et seq., but does not modify, limit, or supersede
390 Section 101(c) of that act or 15 U.S.C. Sec. 7001(c), or authorize electronic delivery of any of
391 the notices described in Section 103(b) of that act or 15 U.S.C. Sec. 7003(b).