

CHAPTER 19

AN ACT

SB 1554

Relating to access to digital assets.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 to 18 of this 2016 Act may be cited as the Revised Uniform Fiduciary Access to Digital Assets Act (2015).

SECTION 2. As used in sections 2 to 18 of this 2016 Act:

(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 designated as an agent under a power of attorney in accordance with ORS 127.005 to 127.045.

(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" has the meaning given that term in ORS 125.005.

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

(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 a circuit court in this state.

(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. "Digital asset" 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. 2510(12).

(13) "Electronic communication service" means a custodian that provides to a user the

ability to send or receive an electronic communication.

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

(15) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases and similar intelligence of any nature.

(16) "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 the user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

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

(18) "Personal representative" means an executor, administrator or special administrator, or a person legally authorized to perform substantially the same functions.

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

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

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

(22) "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.

(23) "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. 2510(14).

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

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

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

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

SECTION 3. (1) Sections 2 to 18 of this 2016 Act apply to:

(a) A fiduciary acting under a will or power of attorney executed before, on or after the effective date of this 2016 Act;

(b) A personal representative acting for a decedent who died before, on or after the effective date of this 2016 Act;

(c) A conservatorship proceeding commenced before, on or after the effective date of this 2016 Act; and

(d) A trustee acting under a trust created before, on or after the effective date of this 2016 Act.

(2) Sections 2 to 18 of this 2016 Act apply to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(3) Sections 2 to 18 of this 2016 Act do not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

SECTION 4. (1) A user may use an online tool to direct the custodian to disclose to a 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.

(2) If a user has not used an online tool to give direction under subsection (1) of this section, 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.

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

SECTION 5. (1) Sections 2 to 18 of this 2016 Act do 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.

(2) Sections 2 to 18 of this 2016 Act do not give a fiduciary or a 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.

(3) A fiduciary's or 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 4 of this 2016 Act.

SECTION 6. (1) When disclosing digital assets of a user under sections 2 to 18 of this 2016 Act, the custodian may, in the custodian's sole discretion:

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

(b) 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

(c) 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.

(2) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under sections 2 to 18 of this 2016 Act.

(3) A custodian need not disclose under sections 2 to 18 of this 2016 Act a digital asset deleted by a user.

(4) If a user directs, or a fiduciary requests, a custodian to disclose some, but not all, of the user's digital assets under sections 2 to 18 of this 2016 Act, the custodian need not disclose the digital assets if segregation of the digital 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:

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

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

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

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

SECTION 7. If a deceased user consented to, or a court directs, disclosure of the contents of electronic communications of the 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 personal representative gives the custodian:

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

(2) A certified copy of the death certificate of the user;

(3) A certified copy of the letter of appointment of the personal representative or a small estate affidavit 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, user name, 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:

(A) The user had a specific account with the custodian, identifiable by the information specified in paragraph (a) of this subsection;

(B) Disclosure of the content of electronic communications of the user would not violate 18 U.S.C. 2701 et seq., 47 U.S.C. 222 or other applicable law;

(C) Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

(D) Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

SECTION 8. 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 personal representative gives the custodian:

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

(2) A certified copy of the death certificate of the user;

(3) A certified copy of the letter of appointment of the personal representative or a small estate affidavit or court order; and

(4) If requested by the custodian:

(a) A number, user name, 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:

(A) The user had a specific account with the custodian, identifiable by the information specified in paragraph (a) of this subsection; or

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

SECTION 9. 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, user name, 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.

SECTION 10. Unless otherwise ordered by the court, directed by the principal or provided in 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, user name, 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.

SECTION 11. Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that 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.

SECTION 12. 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 certified copy of the trust instrument or a certification of the trust under ORS 130.860 that includes consent to disclosure of the con-

tent 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, user name, 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.

SECTION 13. 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 certified copy of the trust instrument or a certification of the trust under ORS 130.860;

(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, user name, 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.

SECTION 14. (1) After an opportunity for a hearing, the court may grant a conservator access to the digital assets of a protected person.

(2) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to the 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:

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

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

(c) If requested by the custodian:

(A) A number, user name, 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.

(3) 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 the account of the protected person for good cause. A request made under this subsection must be accompanied by a certified copy of the court order giving the conservator authority over the protected person's property.

SECTION 15. (1) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

(a) The duty of care;

(b) The duty of loyalty; and

(c) The duty of confidentiality.

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

(a) Except as otherwise provided in section 4 of this 2016 Act, is subject to the applicable terms of service;

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

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

(d) May not be used to impersonate the user.

(3) 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 has a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(4) 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 laws on unauthorized computer access.

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

(a) Has the right to access the property and any digital asset stored in the property; and

(b) Is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including this state's laws on unauthorized computer access.

(6) 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.

(7) 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:

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

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

(c) If requested by the custodian:

(A) A number, user name, 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) of this paragraph.

SECTION 16. (1) Not later than 60 days after receipt of the information required under sections 7 to 15 of this 2016 Act, a custodian shall comply with a request 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.

(2) An order under subsection (1) of this section directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. 2702.

(3) A custodian may notify the user that a request for disclosure or to terminate an account was made under sections 2 to 18 of this 2016 Act.

(4) A custodian may deny a request under sections 2 to 18 of this 2016 Act from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custo-

dian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(5) Sections 2 to 18 of this 2016 Act do not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination to obtain a court order that:

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

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

(c) Contains a finding required by law other than under sections 2 to 18 of this 2016 Act.

(6) A custodian and the custodian's officers, employees and agents are immune from liability for an act or omission done in good faith in compliance with sections 2 to 18 of this 2016 Act.

SECTION 17. 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 the enacting states.

SECTION 18. Sections 2 to 18 of this 2016 Act modify, limit or supersede the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but do not modify, limit or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

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