FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

Act 59 of 2016

AN ACT to provide for fiduciary access to digital assets; and to provide for the powers and procedures of the court that has jurisdiction over these matters.

History: 2016, Act 59, Eff. June 27, 2016

The People of the State of Michigan enact:

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700.1001 Short title.

Sec. 1.

This act shall be known and may be cited as the "fiduciary access to digital assets act".

History: 2016, Act 59, Eff. June 27, 2016

700.1002 Definitions.

Sec. 2.

As used in this act:

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

(b) "Agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(c) "Carries" means engaging in the transmission of an electronic communication.

(d) "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.

(e) "Conservator" means a person that is appointed by a court to manage all or part of the estate of a protected person. Conservator includes, but is not limited to, any of the following:

(i) A conservator as that term is defined in section 1103 of the estates and protected individuals code, 1998 PA 386, MCL 700.1103.

(ii) A plenary guardian as that term is defined in section 600 of the mental health code, 1974 PA 258, MCL 330.1600.

(iii) A partial guardian as that term is defined in section 600 of the mental health code, 1974 PA 258, MCL 330.1600.

(iv) A special fiduciary appointed to take possession of and administer a protected person's property.

(v) A special conservator appointed under section 5408 of the estates and protected individuals code, 1998 PA 386, MCL 700.5408.

(vi) A guardian if no conservator has been appointed.

(f) "Content of an electronic communication" means information concerning the substance or meaning of an electronic communication to which all of the following apply:

(i) The information has been sent or received by a user.

(ii) The information is in electronic storage by a digital custodian providing an electronic communication service to the public or is carried or maintained by a digital custodian providing a remote-computing service to the public.

(iii) The information is not readily accessible to the public.

(g) "Court" means the probate court or, when applicable, the circuit court.

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

(i) "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA

258, MCL 330.1100a.

(j) "Digital asset" means an electronic record in which a user 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.

(k) "Digital custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

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

(m) "Electronic communication" means that term as defined in 18 USC 2510.

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

(o) "Electronic communication system" means that term as defined in 18 USC 2510.

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

(q) "Guardian" means that term as defined in section 1104 of the estates and protected individuals code, 1998 PA 386, MCL 700.1104.

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

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

(t) "Interested person" or "person interested in an estate" means those terms as defined in section 1105 of the estates and protected individuals code, 1998 PA 386, MCL 700.1105.

(u) "Legally incapacitated individual" means that term as defined in section 1105 of the estates and protected individuals code, 1998 PA 386, MCL 700.1105.

(v) "Letters" means that term as described in section 1105 of the estates and protected individuals code, 1998 PA 386, MCL 700.1105.

(w) "Minor" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

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

(y) "Person" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

(z) "Personal representative" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106. Personal representative also includes a special fiduciary appointed to take possession of and administer the property of a decedent's estate.

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

(bb) "Principal" means a person that grants authority to an agent in a power of attorney.

(cc) "Proceeding" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

(dd) "Protected individual" means that term as defined in section 1106 of the estates and protected individuals code, 1998 PA 386, MCL 700.1106.

(ee) "Protected person" includes any of the following:

(i) A protected individual.

(ii) A legally incapacitated individual.

(iii) A minor for whom a guardian has been appointed but no conservator has been appointed.

(iv) An individual who has a developmental disability.

(ff) "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.

(gg) "Remote-computing service" means a digital custodian that provides to a user computer processing services or the storage of digital assets by means of an electronic communications system.

(hh) "Settlor" means that term as defined in section 7103 of the estates and protected individuals code, 1998 PA 386, MCL 700.7103.

(ii) "Special fiduciary" means a special fiduciary appointed by the court under sections 1308, 1309, 7704, 7815, and 7901 of the estates and protected individuals code, 1998 PA 386, MCL 700.1308, 700.1309, 700.7704, 700.7815, and 700.7901.

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

(kk) "Trust" means that term as defined in section 1107 of the estates and protected individuals code, 1998 PA 386, MCL 700.1107.

(ll) "Trustee" means that term as defined in section 1107 of the estates and protected individuals code, 1998 PA 386, MCL 700.1107. Trustee also includes a special fiduciary that controls all or part of a trust.

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

(nn) "Will" means that term as defined in section 1108 of the estates and protected individuals code, 1998 PA 386, MCL 700.1108.

History: 2016, Act 59, Eff. June 27, 2016

700.1003 Applicability

Sec. 3.

(1) Subject to subsections (2), (3), and (4), this act applies to all of the following:

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

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

(c) A proceeding involving a conservator commenced before, on, or after the effective date of this act.

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

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

(3) This act does not impair an accrued right or an action taken in a proceeding before the effective date of this act.

(4) This act does not apply to a digital asset of an employer used by an employee in the ordinary course of business.

History: 2016, Act 59, Eff. June 27, 2016

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700.1004 Disclosure of user's digital assets; use of online tool to direct digital custodian; contrary provision.

Sec. 4.

(1) A user may use an online tool to direct the digital custodian to disclose or not to disclose to a designated recipient some or all of the user's digital assets, including the contents 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) or if the digital 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 contents of electronic communications sent or received by the user.

(3) A user's direction under subsection (1) or (2) 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 agreement.

History: 2016, Act 59, Eff. June 27, 2016

700.1005 Access and use of digital assets; change or impairment of right of digital custodian or user under terms-of-service agreement; new or expanded rights; modification or elimination of access to digital assets.

Sec. 5.

(1) This act does not change or impair a right of a digital custodian or a user under a terms-of-service agreement

to access and use digital assets of the user.

(2) This act does not give a fiduciary or 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 who the fiduciary or designated recipient 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.

History: 2016, Act 59, Eff. June 27, 2016

700.1006 Disclosure of digital assets by digital custodian; requirements.

Sec. 6.

(1) When disclosing the digital assets of a user under this act, the digital custodian may at its sole discretion do any of the following:

(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.

(c) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the digital 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 digital custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this act.

(3) A digital custodian is not required to disclose under this act a digital asset deleted by a user.

(4) If a user directs or a fiduciary requests a digital custodian to disclose under this act some, but not all, of the user's digital assets, the digital custodian is not required to disclose the requested digital assets if segregation of the requested digital assets would impose an undue burden on the digital custodian. If the digital custodian believes the direction or request imposes an undue burden, the digital custodian or fiduciary may seek an order from the court to disclose any of the following:

(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.

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

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History: 2016, Act 59, Eff. June 27, 2016

700.1007 Disclosure of deceased user's electronic communications to personal representative; procedure.

Sec. 7.

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

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

(b) A copy of the death certificate of the user.

(c) A certified copy of the letters of authority of the personal representative, a small-estate affidavit, or other court order.

(d) 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 contents of electronic communications.

(e) If requested by the digital custodian, any of the following:

(i) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.

(ii) Evidence linking the account to the user.

(iii) A finding by the court that:

(A) The user had a specific account with the digital custodian, identifiable by the information specified in subparagraph (i).

(B) Disclosure of the content of electronic communications of the user would not violate 18 USC 2701 to 2707, 47 USC 222, or other applicable law.

(C) Unless the user provided direction using an online tool, the user consented to disclosure of the contents of electronic communications.

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

History: 2016, Act 59, Eff. June 27, 2016

700.1008 Disclosure of other digital assets of deceased user to personal representative.

Sec. 8.

Unless the user prohibited disclosure of digital assets or the court directs otherwise, a digital 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 digital custodian all of the following:

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

(b) A copy of the death certificate of the user.

(c) A certified copy of the letters of authority of the personal representative, a small-estate affidavit, or a court order.

(d) If requested by the digital custodian, any of the following:

(i) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.

(ii) Evidence linking the account to the user.

(iii) An affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate.

(iv) A finding of the court that:

(A) The user had a specific account with the digital custodian, identifiable by the information specified in subparagraph (i).

(B) Disclosure of the contents of electronic communications of a user is reasonably necessary for administration of the estate.

History: 2016, Act 59, Eff. June 27, 2016

700.1009 Disclosure of content of electronic communications sent or received by principal.

Sec. 9.

To the extent a power of attorney 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 digital custodian shall disclose to the agent the content of electronic communication if the agent gives the digital custodian all of the following:

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

(b) An original or copy of the power of attorney granting the agent the authority over the content of electronic communications of the principal.

(c) An affidavit from the agent under section 5505 of the estates and protected individuals code, 1998 PA 386, MCL 700.5505.

(d) If requested by the digital custodian, any of the following:

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(i) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the principal's account.

(ii) Evidence linking the account to the principal.

History: 2016, Act 59, Eff. June 27, 2016

700.1010 Disclosure of other digital assets of principal.

Sec. 10.

Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a digital 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 any digital assets, other than the content of electronic communications, of the principal if the agent gives to the digital custodian all of the following:

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

(b) An original or a copy of the power of attorney that gives the agent authority over digital assets or general authority to act on behalf of the principal.

(c) An affidavit from the agent under section 5505 of the estates and protected individuals code, 1998 PA 386, MCL 700.5505.

(d) If requested by the digital custodian, any of the following:

(i) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the principal's account.

(ii) Evidence linking the account to the principal.

History: 2016, Act 59, Eff. June 27, 2016

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700.1011 Disclosure of content of electronic communication held in trust when trustee is original user.

Sec. 11.

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

History: 2016, Act 59, Eff. June 27, 2016

700.1012 Disclosure of content of electronic communication when trustee not original user.

Sec. 12.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a digital 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 digital custodian in the account of the trust if the trustee gives to the digital custodian all of the following:

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

(b) A certificate of the trust under section 7913 of the estates and protected individuals code, 1998 PA 386, MCL 700.7913, that includes consent to disclosure of the contents of electronic communications to the trustee.

(c) A certification of the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently

acting trustee of the trust.

(d) If requested by the digital custodian, any of the following:

(i) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the trust's account.

(ii) Evidence linking the account to the trust.

History: 2016, Act 59, Eff. June 27, 2016

700.1013 Disclosure of other digital assets held in trust when trustee not original user.

Sec. 13.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a digital 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 digital custodian in the 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 digital custodian all of the following:

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

(b) A certificate of the trust under section 7913 of the estates and protected individuals code, 1998 PA 386, MCL 700.7913.

(c) A certification of the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust.

(d) If requested by the digital custodian, any of the following:

(i) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the trust's account.

(ii) Evidence linking the account to the trust.

History: 2016, Act 59, Eff. June 27, 2016

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700.1014 Disclosure of protected person's digital assets to conservator.

Sec. 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 digital custodian shall disclose to a conservator the catalogue of electronic communications sent or received by the protected person and any digital asset, other than the content of electronic communications, in which the protected person has a right or interest if the conservator gives the digital custodian all of the following:

(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.

(c) If requested by the digital custodian, any of the following:

(i) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the account of the protected person.

(ii) Evidence linking the account to the protected person.

(3) A conservator may request a digital custodian of digital assets of a protected person to suspend or terminate an account of the protected person for good cause. A request made under this subsection must be accompanied by a certified copy of the conservator's letters of authority or other order appointing the conservator.

History: 2016, Act 59, Eff. June 27, 2016

700.1015 Duties and authority of fiduciary.

Sec. 15.

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

(a) The duty of care.

(b) The duty of loyalty.

(c) The duty of confidentiality.

(2) All of the following apply to 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, it is subject to the applicable terms-of-service agreement.

(b) It is subject to other applicable laws, including copyright law.

(c) For a fiduciary, it is limited to the scope of the fiduciary's duties.

(d) It 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 had a right or interest and that is not held by a digital 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, but not limited to, all of the following:

(a) Section 5 of 1979 PA 53, MCL 752.795.

(b) Section 540 of the Michigan penal code, 1931 PA 328, MCL 750.540.

(c) Section 157n of the Michigan penal code, 1931 PA 328, MCL 750.157n, to the extent that the property is a financial transaction device as that term is defined in section 157m of the Michigan penal code, 1931 PA 328, MCL 750.157m.

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

(a) The fiduciary has the right to access the property and any digital asset stored in it.

(b) The fiduciary is an authorized user for the purposes of computer fraud and unauthorized computer access laws, including, but not limited to, all of the following:

(i) Section 5 of 1979 PA 53, MCL 752.795.

(ii) Section 540 of the Michigan penal code, 1931 PA 328, MCL 750.540.

(iii) Section 157n of the Michigan penal code, 1931 PA 328, MCL 750.157n, to the extent that the tangible personal property is a financial transaction device as that term is defined in section 157m of the Michigan penal code, 1931 PA 328, MCL 750.157m.

(6) A digital custodian may disclose information in an account to a fiduciary of the user if 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 digital custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by all of the following:

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

(b) A certified copy of the letters of authority of the personal representative, small-estate affidavit, or court order, power of attorney, or trust giving the fiduciary authority over the account.

(c) If requested by the digital custodian, any of the following:

(i) A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.

(ii) Evidence linking the account to the user.

(iii) A finding of the court that the user had a specific account with the digital custodian, identifiable by the information specified in subparagraph (i).

(8) A fiduciary is immune from liability for an action done in good faith in compliance with this act.

History: 2016, Act 59, Eff. June 27, 2016

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700.1016 Digital custodian; compliance; liability; immunity.

Sec. 16.

(1) Not later than 56 days after receipt of the information required under sections 7 to 14, a digital custodian shall comply with a request under this act from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the digital custodian fails to comply, the fiduciary or designated recipient may petition or otherwise apply to the court for an order directing compliance.

(2) An order under subsection (1) directing compliance must contain a finding that compliance is not in violation of 18 USC 2702.

(3) A digital custodian that receives a certificate of trust under section 12 or 13 may require the trustee to provide copies of excerpts from the original trust instrument and later amendments that designate the trustee and, if the trustee is requesting content of electronic communications, that includes consent to disclosure of the contents of electronic communications to the trustee.

(4) A digital custodian or other person that demands the trust instrument in addition to a certificate of trust under section 12 or 13 or demands excerpts under subsection (3) is liable for damages to the same extent the digital custodian or other person would be liable under section 7913 of the estates and protected individuals code, 1998 PA 386, MCL 700.7913.

(5) This act does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

(6) A digital custodian may notify the user that a request for disclosure or to terminate an account was made under this act.

(7) A digital custodian may deny a request under this act from a fiduciary or designated recipient for disclosure or to terminate an account if the digital custodian is aware of any lawful access to the account following the receipt of the request.

(8) This act does not limit the digital custodian's ability to obtain or to require a fiduciary or designated recipient requesting disclosure or termination of an account under this act to obtain a court order that does any of the following:

(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.

(c) Contains a finding required by law other than this act.

(9) A digital custodian and its officers, employees, and agents are immune from liability for an action done in good faith in compliance with this act.

History: 2016, Act 59, Eff. June 27, 2016

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700.1017 Limiting, eliminating, or modifying powers of personal representative; court order.

Sec. 17.

Notwithstanding section 7 or 8, an interested person may file a petition in the court for an order to limit, eliminate, or modify the personal representative's powers with respect to the decedent's digital assets. On receipt of a petition under this section, the court shall set a date for a hearing on the petition. The hearing date must not be less than 14 days or more than 56 days after the date the petition is filed, except for good cause.

History: 2016, Act 59, Eff. June 27, 2016

700.1018 Electronic signatures in global and national commerce act; effect.

Sec. 18.

This act modifies, limits, or supersedes the electronic signatures in the global and national commerce act, 15 USC 7001 to 7006, but does not modify, limit, or supersede 15 USC 7001(c) or authorize electronic delivery of any of the notices described in 15 USC 7003(b).

History: 2016, Act 59, Eff. June 27, 2016

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