

JAN 23 2015

A BILL FOR AN ACT

RELATING TO FIDUCIARY ACCESS TO DIGITAL ASSETS.

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

1 SECTION 1. The Hawaii Revised Statutes is amended by
2 adding a new chapter to be appropriately designated and to read
3 as follows:

4 **"CHAPTER**

5 **FIDUCIARY ACCESS TO DIGITAL ASSETS**

6 **§ -1 Definitions.** When used in this chapter, unless the
7 context otherwise requires:

8 "Account holder":

9 (1) Means a person who has entered into a terms-of-service
10 agreement with a custodian and a fiduciary for the
11 person; and

12 (2) Includes a deceased individual who entered into the
13 agreement during the individual's lifetime.

14 "Agent":

15 (1) Means a person who is granted authority to act for a
16 principal under a durable or nondurable power of



1 attorney, whether denominated an agent, an attorney-
2 in-fact, or otherwise; and

3 (2) Includes an original agent, a co-agent, and a
4 successor agent.

5 "Carry" means to engage in the transmission of electronic
6 communications.

7 "Catalogue of electronic communications" means information
8 that identifies each person with which an account holder has had
9 an electronic communication, the time and date of the
10 communication, and the electronic address of the person.

11 "Content of an electronic communication" means information
12 not readily accessible to the public concerning the substance or
13 meaning of an electronic communication.

14 "Court" means a circuit court of this State.

15 "Custodian" means a person who carries, maintains,
16 processes, receives, or stores a digital asset of an account
17 holder.

18 "Digital asset":

19 (1) Means an electronic record; and



1 (2) Does not include an underlying asset or liability to
2 which an electronic record refers, unless the asset or
3 liability is itself an electronic record.

4 "Electronic" means technology having electrical, digital,
5 magnetic, wireless, optical, electromagnetic, or similar
6 capabilities.

7 "Electronic communication":

8 (1) Means a digital asset stored by an electronic
9 communication service or carried or maintained by a
10 remote computing service; and

11 (2) Includes the catalogue of electronic communications
12 and the content of an electronic communication.

13 "Electronic communication service" means a custodian who
14 provides to the public the ability to send or receive an
15 electronic communication.

16 "Fiduciary" means a person who is an original, additional,
17 or successor personal representative, guardian, agent, or
18 trustee.

19 "Guardian":



1 (1) Means a person who has been appointed by the court as
2 guardian of the property of a minor or incapacitated
3 individual; and

4 (2) Includes a person who has been appointed by the court
5 as an emergency temporary guardian of the property.

6 "Information" means data, text, images, videos, sounds,
7 codes, computer programs, software, databases, or the like.

8 "Person" means an individual, estate, trust, business or
9 nonprofit entity, public corporation, government or governmental
10 subdivision, agency, or instrumentality, or other legal entity.

11 "Personal representative" means the fiduciary appointed by
12 the court to administer the estate of a deceased individual
13 pursuant to letters of administration or an order appointing a
14 curator or administrator ad litem for the estate.

15 "Power of attorney" means a record that grants an agent
16 authority to act in the place of a principal.

17 "Principal" means an individual who grants authority to an
18 agent in a power of attorney.

19 "Record" means information that is inscribed on a tangible
20 medium or that is stored in an electronic or other medium and is
21 retrievable in perceivable form.



1 "Remote computing service" means a custodian who provides
2 to the public computer processing services or the storage of
3 digital assets by means of an electronic communications system,
4 as defined in 18 U.S.C. section 2510(14).

5 "Terms of service agreement" means an agreement that
6 controls the relationship between an account holder and a
7 custodian.

8 "Trustee" means a fiduciary who holds legal title to a
9 digital asset pursuant to an agreement, declaration, or trust
10 instrument that creates a beneficial interest in the settlor or
11 others.

12 "Ward" means an individual for whom a guardian has been
13 appointed.

14 "Will":

15 (1) Means an instrument admitted to probate, including a
16 codicil, executed by an individual in the manner
17 prescribed by the uniform probate code, that disposes
18 of the individual's property upon or after the
19 individual's death; and

20 (2) Includes an instrument that merely appoints a personal
21 representative or revokes or revises another will.



1 § -2 **Authority of personal representative over digital**
2 **assets of a decedent.** Subject to section -6(b) and unless
3 otherwise provided by the court or the will of a decedent, a
4 personal representative shall have the right to access:

5 (1) The content of an electronic communication sent or
6 received by the decedent if the electronic
7 communication service or remote computing service is
8 authorized to disclose the content under 18 U.S.C.
9 section 2702(b);

10 (2) The catalogue of electronic communications sent or
11 received by the decedent; and

12 (3) Any other digital asset in which the decedent had a
13 right or interest at the time of the decedent's death.

14 § -3 **Authority of guardian over digital assets of a**
15 **ward.** The court, after an opportunity for hearing, may grant a
16 guardian the right to access:

17 (1) The content of an electronic communication sent or
18 received by the ward if the electronic communication
19 service or remote computing service is authorized to
20 disclose the content under 18 U.S.C. section 158
21 2702(b);



1 (2) The catalogue of electronic communications sent or
2 received by the ward; and

3 (3) Any other digital asset in which the ward has a right
4 or interest.

5 § -4 Control by agent of digital assets. (a) To the
6 extent a power of attorney expressly grants authority to an
7 agent over the content of an electronic communication of the
8 principal, the agent shall have the right to access the content
9 of an electronic communication sent or received by the principal
10 if the electronic communication service or remote computing
11 service is authorized to disclose the content under 18 U.S.C.
12 section 2702(b).

13 (b) Except as provided in subsection (a) and unless
14 otherwise provided by a power of attorney or a court order, an
15 agent shall have the right to access:

16 (1) The catalogue of electronic communications sent or
17 received by the principal; and

18 (2) Any other digital asset in which the principal has a
19 right or interest.

20 § -5 Control by trustee of digital assets. Subject to
21 section -6(b) and unless otherwise provided by the court or



1 the terms of a trust, a trustee or a successor of a trustee who
2 is:

3 (1) An original account holder shall have the right to
4 access each digital asset held in trust, including the
5 catalogue of electronic communications sent or
6 received and the content of an electronic
7 communication; or

8 (2) Not an original account holder shall have the right to
9 access the following digital assets held in trust:

10 (A) The catalogue of electronic communications sent
11 or received by the account holder;

12 (B) The content of an electronic communication sent
13 or received by the account holder if the
14 electronic communication service or remote
15 computing service is authorized to disclose the
16 content under 18 U.S.C. section 2702(b); and

17 (C) Any other digital asset in which the account
18 holder or any successor account holder has a
19 right or interest.



1 § -6 **Fiduciary access and authority.** (a) A fiduciary
2 who is an account holder or has the right under this chapter to
3 access a digital asset of an account holder:

4 (1) May take any action concerning the digital asset to
5 the extent of the account holder's authority and the
6 fiduciary's powers under the laws of this State,
7 subject to the terms-of-service agreement and
8 copyright or other applicable law;

9 (2) Shall be deemed to have the lawful consent of the
10 account holder for the custodian to divulge the
11 content of an electronic communication to the
12 fiduciary under applicable electronic privacy laws;
13 and

14 (3) Shall be an authorized user under applicable computer
15 fraud and unauthorized access laws.

16 (b) If a provision in a terms-of-service agreement limits
17 a fiduciary's access to a digital asset of the account holder,
18 the provision shall be void as against the strong public policy
19 of this State unless the account holder agreed to the provision
20 after July 1, 2015, by an affirmative act separate from the



1 account holder's assent to other provisions of the terms-of-
2 service agreement.

3 (c) A choice of law provision in a terms of service
4 agreement shall be unenforceable against a fiduciary acting
5 under this chapter to the extent the provision designates a law
6 that enforces a limitation upon a fiduciary's access to a
7 digital asset that is void under subsection (b).

8 (d) Except as provided in subsection (b), a fiduciary's
9 access to a digital asset under this chapter does not violate a
10 terms-of-service agreement, notwithstanding a provision of the
11 agreement that limits third-party access or requires notice of
12 change in the account holder's status.

13 (e) As to tangible personal property capable of receiving,
14 storing, processing, or sending a digital asset, a fiduciary
15 with authority over the property of a decedent, ward, principal,
16 or settlor shall have the right to access the property and any
17 digital asset stored in it and shall be an authorized user for
18 purposes of any applicable computer fraud and unauthorized
19 access laws, including the laws of this State.

20 § -7 Compliance. (a) If a fiduciary who has a right
21 under this chapter to access a digital asset of an account



1 holder complies with subsection (b), the custodian shall comply
2 with the fiduciary's request for a record for:

- 3 (1) Access to the digital asset;
- 4 (2) Control of the digital asset; and
- 5 (3) A copy of the digital asset to the extent authorized
6 by copyright law.

7 (b) If a request under subsection (a) is made by:

- 8 (1) A personal representative who has the right of access
9 under section -2, the request shall be accompanied
10 by a certified copy of the letters of administration
11 of the personal representative, an order authorizing a
12 curator or administrator ad litem, or other court
13 order;
- 14 (2) A guardian who has the right of access under section
15 -3, the request shall be accompanied by a certified
16 copy of letters of plenary guardianship of the
17 property or a court order that gives the guardian
18 authority over the digital asset;
- 19 (3) An agent who has the right of access under section
20 -4, the request shall be accompanied by an original
21 or a copy of the power of attorney that authorizes the



1 agent to exercise authority over the digital asset and
2 a certification of the agent, under penalty of
3 perjury, that the power of attorney is in effect;

4 (4) A trustee who has the right of access under section
5 -5, the request shall be accompanied by a certified
6 copy of the trust instrument that authorizes the
7 trustee to exercise authority over the digital asset;
8 or

9 (5) A person who is entitled to receive and collect
10 specified digital assets, the request shall be
11 accompanied by a certified copy of a court order
12 issued pursuant to chapter 560.

13 (c) A custodian shall comply with a request made under
14 subsection (a) not later than sixty days after receipt. If the
15 custodian fails to comply, the fiduciary may apply to the court
16 for an order directing compliance.

17 (d) A custodian who receives a certification of trust may
18 require the trustee to provide copies of excerpts from the
19 original trust instrument and later amendments that designate
20 the trustee and confer upon the trustee the power to act in the
21 pending transaction.



1 (e) A custodian who acts in reliance on a certification of
2 trust without knowledge that the representations contained in it
3 are incorrect shall not be liable to any person for so acting
4 and may assume without inquiry the existence of facts stated in
5 the certification.

6 (f) A custodian who enters into a transaction in good
7 faith and in reliance on a certification of trust may enforce
8 the transaction against the trust property as if the
9 representations contained in the certification were correct.

10 (g) A custodian who demands the trust instrument in
11 addition to a certification of trust or excerpts under
12 subsection (d) shall be liable for damages if the court
13 determines that the custodian did not act in good faith in
14 demanding the trust instrument.

15 (h) This section shall not limit the right of a person to
16 obtain a copy of a trust instrument in a judicial proceeding
17 concerning the trust.

18 § -8 **Immunity.** A custodian and its officers, employees,
19 and agents shall be immune from liability for any action done in
20 good faith in compliance with this chapter.



1 § -9 Relation to federal Electronic Signatures in Global
2 and National Commerce Act. This chapter shall modify, limit, or
3 supersede the Electronic Signatures in Global and National
4 Commerce Act, as codified in 15 U.S.C. sections 7001 et seq.,
5 but shall not modify, limit, or supersede section 101(c) of that
6 Act, as codified in 15 U.S.C. section 7001(c), or authorize
7 electronic delivery of the notices described in section 103(b)
8 of that Act, as codified in 15 U.S.C. section 7003(b).

9 § -10 Applicability. (a) Subject to subsection (b),
10 this chapter shall apply to:

- 11 (1) An agent acting under a power of attorney executed
12 before, on, or after July 1, 2015;
- 13 (2) A personal representative acting for a decedent who
14 died before, on, or after July 1, 2015;
- 15 (3) A guardian appointed through a guardianship
16 proceeding, whether pending in a court or commenced
17 before, on, or after July 1, 2015; and
- 18 (4) A trustee acting under a trust created before, on, or
19 after July 1, 2015.



1 (b) This chapter shall not apply to a digital asset of an
2 employer used by an employee in the ordinary course of the
3 employer's business."

4 SECTION 2. This Act shall take effect on July 1, 2015.
5

INTRODUCED BY:

~~SC. Rep. [unclear]~~
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[unclear]



S.B. NO. 467

Report Title:

Fiduciary; Digital Assets

Description:

Gives various types of fiduciaries access to the digital assets of the principal.

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