

FIDUCIARY ACCESS TO DIGITAL ASSETS

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House Bill 5034 as introduced
Sponsor: Rep. Anthony G. Forlini
Committee: Communications and Technology
Complete to 11-3-15

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 5034 would create a new act, which would be titled the "Fiduciary Access to Digital Assets Act." Generally speaking, the bill would provide a way for an individual's heirs to gain access to and possession of that individual's digital property after the individual's death.

Definitions

The bill would define the following key terms:

"Digital asset," as 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.

"User," as a person that has an account with a digital custodian.

"Digital Custodian," as a person that carries, maintains, processes, receives, or stores a digital asset of a user."

"Account," as 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.

Applicability of act

The act would apply to all of the following:

- A fiduciary acting under a will or power of attorney executed before, on, or after the effective date of this act.
- A personal representative acting for a decedent who died before, on, or after the effective date of this act.
- A proceeding involving a conservator commenced before, on, or after the effective date of this act.
- A trustee acting under a trust created before, on, or after the effective date of this act.
- A digital custodian, if the user resides in this state or resided in this state at the time of the user's death.

The act would not do either of the following:

- Impair an accrued right or an action taken in a proceeding before the effective date of this act.
- Apply to a digital asset of an employer used by an employee in the ordinary course of business.

Usage of an online tool

The bill would define an "online tool" as 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.

The user could use an online tool to direct the digital custodian to disclose or not to disclose 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.

If a user has not used an online tool to give direction, or if the digital custodian has not provided an online tool, the user could allow or prohibit in a will, trust, power of attorney, or other record, disclosure of some or all of the user's digital assets, including the contents of electronic communications sent or received by the user.

A user's direction as detailed above would override 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.

However, this act would 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, nor would it give a fiduciary any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary acts or who the fiduciary represents.

Disclosure of a user's digital assets

A digital custodian would be allowed to assess a reasonable administrative charge for the cost of disclosing digital assets under this act. When disclosing the digital assets of a user under this act, the digital custodian could, at his or her sole discretion, do any of the following:

- Grant a fiduciary or designated recipient full access to the user's account.
- 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.
- 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.

A digital custodian would not be required to disclose under this act a digital asset deleted by a user.

If a user directs, or a fiduciary requests, a digital custodian to disclose some, but not all, of the user's digital assets, the digital custodian would not be 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 subset limited by date of the user's digital assets.
- All of the user's digital assets to the fiduciary or designated recipient.
- None of the user's digital assets.
- All of the user's digital assets to the court for review in camera.

Disclosure of electronic communications

If a deceased user consented, or a court so directs a custodian, the following would be needed in order for a digital custodian to disclose the contents of that user's electronic communications:

- A written request for disclosure in physical or electronic form.
- A copy of the death certificate of the user.
- A certified copy of the letters of authority of the personal representative, a small-estate affidavit, or other court order.
- 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.
- If requested by the digital custodian, any of the following:
 - A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.
 - Evidence linking the account to the user.
 - A finding by the court that:
 - The user had a specific account with the digital custodian, identifiable by the number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.
 - 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.
 - Unless the user provided direction using an online tool, the user consented to disclosure of the contents of electronic communications.
 - Disclosure of the contents of electronic communications of the user is reasonably necessary for administration of the estate.

Disclosure of electronic communications to personal representative

Unless the user prohibited disclosure of digital assets or the court directs otherwise, a digital custodian must 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 written request for disclosure in physical or electronic form.
- A copy of the death certificate of the user.
- A certified copy of the letters of authority of the personal representative, a small-estate affidavit, or a court order.
- If requested by the digital custodian, any of the following:
 - A written request for disclosure in physical or electronic form.
 - A copy of the death certificate of the user.
 - A certified copy of the letters of authority of the personal representative, a small-estate affidavit, or a court order.
 - If requested by the digital custodian, any of the following:
 - A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.
 - Evidence linking the account to the user.
 - An affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate.
 - A finding of the court that: (1) the user had a specific account with the digital custodian, identifiable by a number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account; and (2) disclosure of the contents of electronic communications of a user is reasonably necessary for administration of the estate.

Agent's access to digital assets

To the extent a power of attorney grants an agent authority over the content of electronic communications sent or received by the principal, a digital custodian would be required to disclose to the agent the content of electronic communication, unless otherwise directed by the principal or the court, if the agent gives the digital custodian all of the following:

- A written request for disclosure in physical or electronic form.
- An original or copy of the power of attorney granting the agent the authority over the content of electronic communications of the principal.
- An affidavit showing proof of continuance of durable and other powers of attorney, as provided for in Section 5505 of the Estates and Protected Individuals Code.
 - If requested by the digital custodian, any of the following:
 - A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the principal's account.
 - Evidence linking the account to the principal.

Trustee's access to digital assets

Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a digital custodian would be required to 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 same information listed above.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a digital custodian would be required 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. For a trustee who is not an original user of an account, a digital custodian would be also be required to disclose 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 written request for disclosure in physical or electronic form.
- A certificate of the trust, as provided for in Section 7913 of the Estates and Protected Individuals Code, that includes consent to disclosure of the contents of electronic communications to the trustee.
- 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.
- If requested by the digital custodian, any of the following:
 - A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the trust's account.
 - Evidence linking the account to the trust.

Conservator's access to digital assets

After an opportunity for a hearing, the court may grant a conservator access to the digital assets of a protected person, and, unless otherwise ordered by the court or directed by the user, the digital custodian would be required to 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 written request for disclosure in physical or electronic form.
- A certified copy of the court order that gives the conservator authority over the digital assets of the protected person.
- If requested by the digital custodian, any of the following:
 - A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the account of the protected person.
 - Evidence linking the account to the protected person.

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. Such a request would have to be accompanied by a certified copy of the conservator's letters of authority or other order appointing the conservator.

Legal duties of a fiduciary

The bill would extend the legal duties of a fiduciary charged with managing tangible personal property so as to apply to the management of digital assets, including all of the following:

- The duty of care.
- The duty of loyalty.
- The duty of confidentiality.

All of the following would apply to a fiduciary's authority with respect to a digital asset of a user:

- Except as otherwise provided below, it is subject to the applicable terms-of-service agreement.
- It is subject to other applicable laws, including copyright law.
- It is limited to the scope of the fiduciary's duties.
- It may not be used to impersonate the user.

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.

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:

- Section 5 of Public Act 53 of 1979 (MCL 752.795).
- Section 540 (MCL 750.540) and Section 157n (750.157n) of the Michigan Penal Code, to the extent that the property is a financial transaction device, as defined in Section 157m of the code (MCL 750.157m).

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

- The fiduciary has the right to access the property and any digital asset stored in it.
- 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:
 - Section 5 of Public Act 53 of 1979 (MCL 752.795).
 - Section 540 (MCL 750.540) and Section 157n (750.157n) of the Michigan Penal Code, to the extent that the property is a financial transaction device, as defined in Section 157m of the code (MCL 750.157m).

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.

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:

- If the user is deceased, a copy of the death certificate of the user.
- 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.
- If requested by the digital custodian, any of the following:
 - A number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.
 - Evidence linking the account to the user.
 - A finding of the court that the user had a specific account with the digital custodian, identifiable by a number, username, address, or other unique subscriber or account identifier assigned by the digital custodian to identify the user's account.

Requests made to the digital custodian

Not later than 56 days after receipt of the information, a digital custodian must comply with a request 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. An order directing compliance must contain a finding that compliance is not in violation of 18 USC 2702.

A digital custodian that receives a certificate of trust from a trustee who is a non-original account user seeking disclosure of content or a catalogue of electronic communications may require that trustee to provide copies of excerpts from the original trust instrument and later amendments that designate the trustee and that also includes consent to disclosure of the contents of electronic communications to the trustee, if the trustee is requesting content of electronic communications.

A digital custodian or other person that demands the trust instrument in addition to a certificate of trust, or demands excerpts, is liable for damages to the same extent the digital custodian or other person would be liable under Section 7913 (Certificate of Trust) of the Estates and Protected Individuals Code (MCL 700.7913).

The act would not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust, and also states that a digital custodian could notify the user that a request for disclosure or to terminate an account was made under this act. A digital custodian would have the ability to deny a request 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.

The act would 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 either (1) specifies that an account belongs to the protected person or principal, (2) specifies that there is sufficient consent from the protected person or principal to support the requested disclosure, or (3) contains a finding required by law other than this act.

Notwithstanding the provisions of Section 7 (disclosure of content to personal representative) or Section 8 (disclosure of catalogue to personal representative) of the act, 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 fall between 14 days and 56 days after the date the petition is filed, except for good cause.

The bill would make the digital custodian and its officers, employees, and agents immune from liability for an action done in good faith in compliance with this act. The bill also contains a provision which states that it 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), nor does it authorize electronic delivery of any of the notices described in 15 USC 7003(b).

FISCAL IMPACT:

A fiscal analysis is in process.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.