

**SENATE SUBSTITUTE FOR
HOUSE BILL NO. 5034**

A bill 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.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. This act shall be known and may be cited as the
2 "fiduciary access to digital assets act".

3 Sec. 2. As used in this act:

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

8 (b) "Agent" means an attorney-in-fact granted authority under

1 a durable or nondurable power of attorney.

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

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

8 (e) "Conservator" means a person that is appointed by a court
9 to manage all or part of the estate of a protected person.

10 Conservator includes, but is not limited to, any of the following:

11 (i) A conservator as that term is defined in section 1103 of
12 the estates and protected individuals code, 1998 PA 386, MCL
13 700.1103.

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

16 (iii) A partial guardian as that term is defined in section
17 600 of the mental health code, 1974 PA 258, MCL 330.1600.

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

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

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

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

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

27 (ii) The information is in electronic storage by a digital

1 custodian providing an electronic communication service to the
2 public or is carried or maintained by a digital custodian providing
3 a remote-computing service to the public.

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

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

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

9 (i) "Developmental disability" means that term as defined in
10 section 100a of the mental health code, 1974 PA 258, MCL 330.1100a.

11 (j) "Digital asset" means an electronic record in which a user
12 has a right or interest. Digital asset does not include an
13 underlying asset or liability unless the asset or liability is
14 itself an electronic record.

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

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

21 (m) "Electronic communication" means that term as defined in
22 18 USC 2510.

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

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

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

4 (q) "Guardian" means that term as defined in section 1104 of
5 the estates and protected individuals code, 1998 PA 386, MCL
6 700.1104.

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

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

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

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

18 (v) "Letters" means that term as described in section 1105 of
19 the estates and protected individuals code, 1998 PA 386, MCL
20 700.1105.

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

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

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

3 (z) "Personal representative" means that term as defined in
4 section 1106 of the estates and protected individuals code, 1998 PA
5 386, MCL 700.1106. Personal representative also includes a special
6 fiduciary appointed to take possession of and administer the
7 property of a decedent's estate.

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

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

12 (cc) "Proceeding" means that term as defined in section 1106
13 of the estates and protected individuals code, 1998 PA 386, MCL
14 700.1106.

15 (dd) "Protected individual" means that term as defined in
16 section 1106 of the estates and protected individuals code, 1998 PA
17 386, MCL 700.1106.

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

19 (i) A protected individual.

20 (ii) A legally incapacitated individual.

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

23 (iv) An individual who has a developmental disability.

24 (ff) "Record" means information that is inscribed on a
25 tangible medium or that is stored in an electronic or other medium
26 and is retrievable in perceivable form.

27 (gg) "Remote-computing service" means a digital custodian that

1 provides to a user computer processing services or the storage of
2 digital assets by means of an electronic communications system.

3 (hh) "Settlor" means that term as defined in section 7103 of
4 the estates and protected individuals code, 1998 PA 386, MCL
5 700.7103.

6 (ii) "Special fiduciary" means a special fiduciary appointed
7 by the court under sections 1308, 1309, 7704, 7815, and 7901 of the
8 estates and protected individuals code, 1998 PA 386, MCL 700.1308,
9 700.1309, 700.7704, 700.7815, and 700.7901.

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

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

14 (ll) "Trustee" means that term as defined in section 1107 of
15 the estates and protected individuals code, 1998 PA 386, MCL
16 700.1107. Trustee also includes a special fiduciary that controls
17 all or part of a trust.

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

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

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

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

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

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

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

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

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

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

12 Sec. 4. (1) A user may use an online tool to direct the
13 digital custodian to disclose or not to disclose to a designated
14 recipient some or all of the user's digital assets, including the
15 contents of electronic communications. If the online tool allows
16 the user to modify or delete a direction at all times, a direction
17 regarding disclosure using an online tool overrides a contrary
18 direction by the user in a will, trust, power of attorney, or other
19 record.

20 (2) If a user has not used an online tool to give direction
21 under subsection (1) or if the digital custodian has not provided
22 an online tool, the user may allow or prohibit in a will, trust,
23 power of attorney, or other record disclosure to a fiduciary of
24 some or all of the user's digital assets, including the contents of
25 electronic communications sent or received by the user.

26 (3) A user's direction under subsection (1) or (2) overrides a
27 contrary provision in a terms-of-service agreement that does not

1 require the user to act affirmatively and distinctly from the
2 user's assent to the terms-of-service agreement.

3 Sec. 5. (1) This act does not change or impair a right of a
4 digital custodian or a user under a terms-of-service agreement to
5 access and use digital assets of the user.

6 (2) This act does not give a fiduciary or designated recipient
7 any new or expanded rights other than those held by the user for
8 whom, or for whose estate, the fiduciary or designated recipient
9 acts or who the fiduciary or designated recipient represents.

10 (3) A fiduciary's or designated recipient's access to digital
11 assets may be modified or eliminated by a user, by federal law, or
12 by a terms-of-service agreement if the user has not provided
13 direction under section 4.

14 Sec. 6. (1) When disclosing the digital assets of a user under
15 this act, the digital custodian may at its sole discretion do any
16 of the following:

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

19 (b) Grant a fiduciary or designated recipient partial access
20 to the user's account sufficient to perform the tasks with which
21 the fiduciary or designated recipient is charged.

22 (c) Provide a fiduciary or designated recipient a copy in a
23 record of any digital asset that, on the date the digital custodian
24 received the request for disclosure, the user could have accessed
25 if the user were alive and had full capacity and access to the
26 account.

27 (2) A digital custodian may assess a reasonable administrative

1 charge for the cost of disclosing digital assets under this act.

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

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

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

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

16 (c) None of the user's digital assets.

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

19 Sec. 7. If a deceased user consented to or a court directs
20 disclosure of the contents of electronic communications of the
21 user, a digital custodian shall disclose to the personal
22 representative of the user the content of an electronic
23 communication sent or received by the user if the personal
24 representative gives the digital custodian all of the following:

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

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

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

4 (d) Unless the user provided direction using an online tool, a
5 copy of the user's will, trust, power of attorney, or other record
6 evidencing the user's consent to disclosure of the contents of
7 electronic communications.

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

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

13 (ii) Evidence linking the account to the user.

14 (iii) A finding by the court that:

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

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

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

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

26 Sec. 8. Unless the user prohibited disclosure of digital
27 assets or the court directs otherwise, a digital custodian shall

1 disclose to the personal representative of the estate of a deceased
2 user a catalogue of electronic communications sent or received by
3 the user and digital assets, other than the content of electronic
4 communications, of the user if the personal representative gives
5 the digital custodian all of the following:

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

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

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

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

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

17 (ii) Evidence linking the account to the user.

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

21 (iv) A finding of the court that:

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

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

27 Sec. 9. To the extent a power of attorney grants an agent

1 authority over the content of electronic communications sent or
2 received by the principal and unless directed otherwise by the
3 principal or the court, a digital custodian shall disclose to the
4 agent the content of electronic communication if the agent gives
5 the digital custodian all of the following:

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

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

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

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

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

18 (ii) Evidence linking the account to the principal.

19 Sec. 10. Unless otherwise ordered by the court, directed by
20 the principal, or provided by a power of attorney, a digital
21 custodian shall disclose to an agent with specific authority over
22 digital assets or general authority to act on behalf of a principal
23 a catalogue of electronic communications sent or received by the
24 principal and any digital assets, other than the content of
25 electronic communications, of the principal if the agent gives to
26 the digital custodian all of the following:

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

1 form.

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

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

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

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

12 (ii) Evidence linking the account to the principal.

13 Sec. 11. Unless otherwise ordered by the court or provided in
14 a trust, a digital custodian shall disclose to the trustee that is
15 an original user of an account any digital assets of the account
16 held in trust, including a catalogue of electronic communications
17 of the trustee and the content of electronic communications.

18 Sec. 12. Unless otherwise ordered by the court, directed by
19 the user, or provided in a trust, a digital custodian shall
20 disclose to a trustee that is not an original user of an account
21 the content of an electronic communication sent or received by an
22 original or successor user and carried, maintained, processed,
23 received, or stored by the digital custodian in the account of the
24 trust if the trustee gives to the digital custodian all of the
25 following:

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

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

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

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

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

13 (ii) Evidence linking the account to the trust.

14 Sec. 13. Unless otherwise ordered by the court, directed by
15 the user, or provided in a trust, a digital custodian shall
16 disclose to a trustee that is not an original user of an account a
17 catalogue of electronic communications sent or received by an
18 original or successor user and stored, carried, or maintained by
19 the digital custodian in the account of the trust and any digital
20 assets, other than the content of electronic communications, in
21 which the trust has a right or interest if the trustee gives the
22 digital custodian all of the following:

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

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

27 (c) A certification of the trustee, under penalty of perjury,

1 that the trust exists and that the trustee is a currently acting
2 trustee of the trust.

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

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

8 (ii) Evidence linking the account to the trust.

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

12 (2) Unless otherwise ordered by the court or directed by the
13 user, a digital custodian shall disclose to a conservator the
14 catalogue of electronic communications sent or received by the
15 protected person and any digital asset, other than the content of
16 electronic communications, in which the protected person has a
17 right or interest if the conservator gives the digital custodian
18 all of the following:

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

21 (b) A certified copy of the court order that gives the
22 conservator authority over the digital assets of the protected
23 person.

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

26 (i) A number, username, address, or other unique subscriber or
27 account identifier assigned by the digital custodian to identify

1 the account of the protected person.

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

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

9 Sec. 15. (1) The legal duties imposed on a fiduciary charged
10 with managing tangible personal property apply to the management of
11 digital assets, including all of the following:

12 (a) The duty of care.

13 (b) The duty of loyalty.

14 (c) The duty of confidentiality.

15 (2) All of the following apply to a fiduciary's or designated
16 recipient's authority with respect to a digital asset of a user:

17 (a) Except as otherwise provided in section 4, it is subject
18 to the applicable terms-of-service agreement.

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

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

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

24 (3) A fiduciary with authority over the property of a
25 decedent, protected person, principal, or settlor has the right to
26 access any digital asset in which the decedent, protected person,
27 principal, or settlor had a right or interest and that is not held

1 by a digital custodian or subject to a terms-of-service agreement.

2 (4) A fiduciary acting within the scope of the fiduciary's
3 duties is an authorized user of the property of the decedent,
4 protected person, principal, or settlor for the purpose of
5 applicable computer fraud and unauthorized computer access laws,
6 including, but not limited to, all of the following:

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

8 (b) Section 540 of the Michigan penal code, 1931 PA 328, MCL
9 750.540.

10 (c) Section 157n of the Michigan penal code, 1931 PA 328, MCL
11 750.157n, to the extent that the property is a financial
12 transaction device as that term is defined in section 157m of the
13 Michigan penal code, 1931 PA 328, MCL 750.157m.

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

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

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

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

23 (ii) Section 540 of the Michigan penal code, 1931 PA 328, MCL
24 750.540.

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

1 157m of the Michigan penal code, 1931 PA 328, MCL 750.157m.

2 (6) A digital custodian may disclose information in an account
3 to a fiduciary of the user if the information is required to
4 terminate an account used to access digital assets licensed to the
5 user.

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

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

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

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

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

21 (ii) Evidence linking the account to the user.

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

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

27 Sec. 16. (1) Not later than 56 days after receipt of the

1 information required under sections 7 to 14, a digital custodian
2 shall comply with a request under this act from a fiduciary or
3 designated recipient to disclose digital assets or terminate an
4 account. If the digital custodian fails to comply, the fiduciary or
5 designated recipient may petition or otherwise apply to the court
6 for an order directing compliance.

7 (2) An order under subsection (1) directing compliance must
8 contain a finding that compliance is not in violation of 18 USC
9 2702.

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

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

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

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

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

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

9 (a) Specifies that an account belongs to the protected person
10 or principal.

11 (b) Specifies that there is sufficient consent from the
12 protected person or principal to support the requested disclosure.

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

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

17 Sec. 17. Notwithstanding section 7 or 8, an interested person
18 may file a petition in the court for an order to limit, eliminate,
19 or modify the personal representative's powers with respect to the
20 decedent's digital assets. On receipt of a petition under this
21 section, the court shall set a date for a hearing on the petition.
22 The hearing date must not be less than 14 days or more than 56 days
23 after the date the petition is filed, except for good cause.

24 Sec. 18. This act modifies, limits, or supersedes the
25 electronic signatures in the global and national commerce act, 15
26 USC 7001 to 7006, but does not modify, limit, or supersede 15 USC
27 7001(c) or authorize electronic delivery of any of the notices

House Bill No. 5034 as amended March 16, 2016

1 described in 15 USC 7003(b).

<<Enacting section 1. This act takes effect 90 days after the date it is enacted into law.>>