

Testimony of Jeff Cheyne on behalf of the OBS Estate Planning Section HB 2647 – House Judiciary Committee

Short Summary: HB 2647 creates an additional Probate Court process for personal representatives and estate administrators to possibly recover electronic communications of a deceased person. The problem with HB 2647 is that the proposed remedy is largely illusory, because the service providers have complete discretion to determine whether or not to comply with the order.

HB 2647 places an additional burden on courts and adds additional expenses and time delays for estate representatives to seek a court order which the service providers do not have to follow.

HB 2647 only provides for disclosure of electronic information through the probate process. There are no provisions for guardians, conservators, trustees, or attorneys in fact. This disrupts current estate planning for individuals who want to avoid probate. An estate plan will have to be revised to include provisions for digital assets to authorize a personal representative to pursue these remedies. This would be a roadblock for older wills and intestate estates.

HB 2647 creates broad opt-outs for service providers to deny personal representatives and estate administrators access to electronic information. For example:

- If the request places an undue burden on the service provider.
- If the terms of the service agreement are inconsistent with disclosure to the requesting party.

HB 2647 creates a significant burden on estate representatives and the Probate Courts by requiring the courts to enter an order directing providers to disclose electronic information. Under this process:

- Probate Court judges will be required to make a finding that the disclosure of electronic information will not violate 18 USC 2701 (the Stored Communications Act); 47 USC222, or other applicable law which are highly technical areas of federal law outside the usual scope of the probate process.
- Each estate is required to indemnify the provider from all liability in complying with the order which may cause fiduciaries to forgo the process because of the financial and administrative burden.
- Personal representatives and estate administrators will have to provide extensive documentation to gain access to an account including: proof of death, proof the decedent was a subscriber or customer, unique identifiers identifying user accounts, and documentation demonstrating that the request is not in conflict with the user's will.

Even if disclosure is ordered by the Probate Court, this will only facilitate the release of information from one year prior to death. This artificial cap will limit a personal representative or estate administrator's ability to access necessary information in cases where the deceased was disabled for some time prior to his or her death.

Recommendation: A better alternative to consider is Oregon's version of the Uniform Fiduciary Access to Digital Assets Act (UFADAA), **SB 369**, does not burden the court to the extent of HB 2647. In addition, UFADAA includes other fiduciaries such as court appointed guardians and conservators, trustees and agents appointed under powers of attorney.