

Senate Bill 369

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SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Enacts Uniform Fiduciary Access to Digital Assets Act.

Authorizes certain fiduciaries to access electronic communications and digital assets of other person or decedent. Sets forth procedures for obtaining access and control of digital assets. Sets forth responsibilities of custodians of digital assets.

A BILL FOR AN ACT

1
2 Relating to access to digital assets.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1. Sections 2 to 11 of this 2015 Act may be cited as the Uniform Fiduciary Ac-**
5 **cess to Digital Assets Act.**

6 **SECTION 2. As used in sections 2 to 11 of this 2015 Act:**

7 (1) "Account holder" means:

8 (a) A person that has entered into a terms of service agreement with a custodian; or

9 (B) A fiduciary for a person that has entered into a terms of service agreement.

10 (2) "Agent" means a person designated as an agent under a power of attorney in ac-
11 cordance with ORS 127.005 to 127.045.

12 (3) "Catalog of electronic communications" means information that identifies each person
13 with which an account holder has had an electronic communication, the time and date of the
14 communication and the electronic address of the person.

15 (4) "Conservator" has the meaning given that term in ORS 125.005.

16 (5) "Content of an electronic communication" means information not readily accessible
17 to the public concerning the substance or meaning of an electronic communication.

18 (6) "Court" means a circuit court in this state.

19 (7) "Custodian" means a person that carries, maintains or stores a digital asset of an
20 account holder.

21 (8) "Digital asset" means an electronic record but does not include an underlying asset
22 or liability unless the asset or liability is itself an electronic record.

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

25 (10) "Electronic communication" means a digital asset stored by an electronic commu-
26 nication service or carried or maintained by a remote computing service, and includes but
27 is not limited to a catalog of electronic communications and the content of an electronic
28 communication.

29 (11) "Electronic communication service" means a custodian that provides to the public

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.
New sections are in **boldfaced** type.

1 the ability to send or receive an electronic communication.

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

4 (13) "Information" includes data, text, images, videos, sounds, codes, computer programs,
5 software, databases and similar intelligence of any nature.

6 (14) "Person" means an individual, corporation, estate, business or nonprofit entity,
7 public corporation, government or governmental subdivision, agency, or instrumentality, or
8 other legal entity.

9 (15) "Personal representative" means an executor, administrator, successor personal
10 representative, special administrator or a person legally authorized to perform substantially
11 the same functions.

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

14 (17) "Principal" means a person who grants authority to an agent in a power of attorney.

15 (18) "Protected person" means an individual for whom a conservator has been appointed
16 or for whom an application is pending for the appointment of a conservator.

17 (19) "Record" means information that is inscribed on a tangible medium or that is stored
18 in an electronic or other medium and is retrievable in perceivable form.

19 (20) "Remote computing service" means a custodian that provides to the public computer
20 processing services or the storage of digital assets by means of an electronic communi-
21 cations system as defined in 18 U.S.C. 2510(14).

22 (21) "Terms of service agreement" means an agreement that controls the relationship
23 between an account holder and a custodian.

24 (22) "Trustee" means a person with legal title to an asset pursuant to an agreement or
25 declaration that creates a beneficial interest in others.

26 (23) "Will" includes a codicil, testamentary instrument that only appoints an executor
27 and an instrument that revokes or revives another will or testamentary instrument.

28 **SECTION 3.** Subject to section 7 (2) of this 2015 Act and unless otherwise provided by the
29 court or the will of a decedent, a personal representative of the decedent has a right to ac-
30 cess:

31 (1) The content of an electronic communication sent or received by the decedent if the
32 electronic communication service or remote computing service is permitted to disclose the
33 content under the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2702(b);

34 (2) The catalog of electronic communications sent or received by the decedent; and

35 (3) Any other digital asset in which the decedent at death had a right or interest.

36 **SECTION 4.** Subject to section 7 (2) of this 2015 Act, the court, after notice and an op-
37 portunity to be heard, may authorize a conservator to access:

38 (1) The content of an electronic communication sent or received by the protected person
39 if the electronic communication service or remote computing service is permitted to disclose
40 the content under the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2702(b);

41 (2) The catalog of electronic communications sent or received by the protected person;
42 and

43 (3) Any other digital asset in which the protected person has a right or interest.

44 **SECTION 5.** (1) To the extent a power of attorney expressly grants authority to an agent
45 over the content of an electronic communication of the principal and subject to section 7 (2)

1 of this 2015 Act, the agent has a right to access the content of an electronic communication
2 sent or received by the principal if the electronic communication service or remote com-
3 puting service is permitted to disclose the content under the Electronic Communications
4 Privacy Act of 1986, 18 U.S.C. 2702(b).

5 (2) Unless otherwise provided by a power of attorney or the court, an agent has a right
6 to access:

7 (a) The catalog of electronic communications sent or received by the principal; and

8 (b) Any other digital asset in which the principal has a right or interest.

9 **SECTION 6.** Subject to section 7 (2) of this 2015 Act and unless otherwise provided by the
10 court or the settlor in the terms of a trust, a trustee or a successor of the trustee:

11 (1) That is an original account holder, has a right to access each digital asset held in
12 trust, including the catalog of electronic communications sent or received by the trustee and
13 the content of an electronic communication; and

14 (2) That is not an original account holder, has a right to access:

15 (a) The content of an electronic communication sent or received by the original or any
16 successor account holder if the electronic communication service or remote computing ser-
17 vice is permitted to disclose the content under the Electronic Communications Privacy Act
18 of 1986, 18 U.S.C. 2702(b);

19 (b) The catalog of electronic communications sent or received by the original or any
20 successor account holder; and

21 (c) Any other digital asset of the original or any successor account holder.

22 **SECTION 7.** (1) A fiduciary that is an account holder or has the right to access a digital
23 asset of an account holder:

24 (a) Subject to the terms of service agreement and copyright or other applicable law, may
25 take any action concerning the digital asset to the extent of the account holder's authority
26 and the fiduciary's powers;

27 (b) Has, under applicable electronic privacy laws, the lawful consent of the account
28 holder for the custodian to divulge the content of an electronic communication to the
29 fiduciary; and

30 (c) Is, under applicable computer fraud and unauthorized access laws, an authorized user.

31 (2) If a provision in a terms of service agreement limits a fiduciary's right to access the
32 digital assets of the account holder, the provision is void as against the strong public policy
33 of this state unless the account holder, after the effective date of this 2015 Act, agreed to
34 the provision by an affirmative act separate from the account holder's assent to other pro-
35 visions of the terms of service agreement.

36 (3) A choice of law provision in a terms of service agreement is unenforceable against a
37 fiduciary to the extent the provision designates law that enforces a limitation described in
38 subsection (2) of this section on a fiduciary's right to access digital assets.

39 (4) Except as provided in subsection (2) of this section, a fiduciary's right to access a
40 digital asset does not violate a terms of service agreement, notwithstanding a provision of
41 the agreement that limits third party access or requires notice of change in the account
42 holder's status.

43 (5) If tangible personal property of a decedent, protected person, principal or settlor can
44 receive, store, process or send a digital asset, a fiduciary with authority over the property
45 has a right to access the property and any digital asset stored in it. The fiduciary is an

1 authorized user for purposes of any applicable computer fraud and unauthorized access laws.

2 **SECTION 8.** (1) If a fiduciary with a right to access a digital asset of an account holder
3 complies with subsection (2) of this section, the custodian shall comply with the fiduciary's
4 request in a record for:

5 (a) Access to the digital asset;

6 (b) Control of the digital asset; and

7 (c) A copy of the digital asset to the extent permitted by copyright law.

8 (2) If a request under subsection (1) of this section is made by:

9 (a) A personal representative with a right of access under section 3 of this 2015 Act, the
10 request must be accompanied by a certified copy of the letter of appointment of the repre-
11 sentative or a small estate affidavit filed under ORS 114.515 or other court order;

12 (b) A conservator with a right of access under section 4 of this 2015 Act, the request
13 must be accompanied by a certified copy of the court order that gives the conservator au-
14 thority over the digital asset;

15 (c) An agent with a right of access under section 5 of this 2015 Act, the request must
16 be accompanied by a copy of the power of attorney that authorizes the agent to exercise
17 authority over the digital asset and a certification by the agent, under penalty of perjury,
18 that the power of attorney is in effect; and

19 (d) A trustee with a right of access under section 6 of this 2015 Act, the request must
20 be accompanied by:

21 (A) A certified copy of the trust instrument; or

22 (B) A certification of trust under ORS 130.860 that authorizes the trustee to exercise
23 authority over the digital asset, is signed or otherwise authenticated by a trustee, states that
24 the trust has not been revoked, modified or amended in a manner that would cause the re-
25 presentations contained in the certification of trust to be incorrect and contains the follow-
26 ing information:

27 (i) That the trust exists and the date the trust instrument was executed;

28 (ii) The identity of the settlor;

29 (iii) The identity and address of the trustee;

30 (iv) That there is nothing inconsistent in the trust with respect to the trustee's powers
31 over digital assets;

32 (v) Whether the trust is revocable and the identity of any person holding a power to re-
33 voke the trust; and

34 (vi) Whether a cotrustee has authority to sign or otherwise authenticate, and whether
35 all or fewer than all cotrustees are required to exercise powers of the trustee.

36 (3) A custodian shall comply with a request made under subsection (1) of this section not
37 later than 60 days after receipt. If the custodian fails to comply, the fiduciary may apply to
38 the court for an order directing compliance.

39 (4) A custodian that receives a certification of trust under ORS 130.860 may require the
40 trustee to provide copies of excerpts from the original trust instrument and later amend-
41 ments that designate the trustee and confer on the trustee the power to act in the pending
42 transaction.

43 (5) A custodian that acts in reliance on a certification of trust under ORS 130.860 without
44 knowledge that the representations contained in it are incorrect is not liable to any person
45 for so acting and may assume without inquiry the existence of facts stated in the certifica-

1 tion.

2 (6) A person that in good faith enters into a transaction in reliance on a certification of
3 trust under ORS 130.860 may enforce the transaction against the trust property as if the
4 representations contained in the certification were correct.

5 (7) A person that demands the trust instrument in addition to a certification of trust
6 under ORS 130.860 or excerpts under subsection (4) of this section is liable for damages if the
7 court determines that the person did not act in good faith in demanding the trust instru-
8 ment.

9 (8) This section does not limit the right of a person to obtain a copy of a trust instrument
10 in a judicial proceeding concerning the trust.

11 **SECTION 9.** A custodian and its officers, employees and agents are immune from liability
12 for any act done in good faith in compliance with sections 2 to 11 of this 2015 Act.

13 **SECTION 10.** In applying and construing sections 2 to 11 of this 2015 Act, consideration
14 must be given to the need to promote uniformity of the law with respect to its subject
15 matter among states that enact substantially similar provisions.

16 **SECTION 11.** Sections 2 to 11 of this 2015 Act modify, limit or supersede the Electronic
17 Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but do not modify,
18 limit or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices
19 described in 15 U.S.C. 7003(b).

20 **SECTION 12.** Sections 2 to 11 of this 2015 Act apply to:

21 (1) A fiduciary acting under a will, trust or power of attorney executed before, on or after
22 the effective date of this 2015 Act;

23 (2) A personal representative acting for a decedent who died before, on or after the ef-
24 fective date of this 2015 Act; and

25 (3) A conservatorship proceeding, whether pending in a court or commenced before, on
26 or after the effective date of this 2015 Act.

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