

Senate Bill 1554

Sponsored by Senator PROZANSKI; Representatives BARKER, HUFFMAN, OLSON (at the request of The Estate Planning Section of the Oregon State Bar) (Pre-session filed.)

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 Revised Uniform Fiduciary Access to Digital Assets Act (2015).

Authorizes certain fiduciaries to access electronic communications and digital assets of certain persons or decedents. Sets forth procedures for obtaining access and control of digital assets. Sets forth responsibilities of custodian of digital assets.

A BILL FOR AN ACT

1 Relating to access to digital assets.

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

3 **SECTION 1. Sections 2 to 18 of this 2016 Act may be cited as the Revised Uniform**
4 **Fiduciary Access to Digital Assets Act (2015).**

5 **SECTION 2. As used in sections 2 to 18 of this 2016 Act:**

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

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

11 (3) **“Carries” means engages in the transmission of an electronic communication.**

12 (4) **“Catalogue of electronic communications” means information that identifies each**
13 **person with which a user has had an electronic communication, the time and date of the**
14 **communication and the electronic address of the person.**

15 (5) **“Conservator” has the meaning given that term in ORS 125.005.**

16 (6) **“Content of an electronic communication” means information concerning the sub-**
17 **stance or meaning of the communication that:**

18 (a) **Has been sent or received by a user;**

19 (b) **Is in electronic storage by a custodian providing an electronic communication service**
20 **to the public or is carried or maintained by a custodian providing a remote computing service**
21 **to the public; and**

22 (c) **Is not readily accessible to the public.**

23 (7) **“Court” means a circuit court in this state.**

24 (8) **“Custodian” means a person that carries, maintains, processes, receives or stores a**
25 **digital asset of a user.**

26 (9) **“Designated recipient” means a person chosen by a user using an online tool to ad-**
27 **minister digital assets of the user.**

28 (10) **“Digital asset” means an electronic record in which an individual has a right or in-**
29 **terest. “Digital asset” does not include an underlying asset or liability unless the asset or**

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 liability is itself an electronic record.

2 (11) "Electronic" means relating to technology having electrical, digital, magnetic,
3 wireless, optical, electromagnetic or similar capabilities.

4 (12) "Electronic communication" has the meaning set forth in 18 U.S.C. 2510(12).

5 (13) "Electronic communication service" means a custodian that provides to a user the
6 ability to send or receive an electronic communication.

7 (14) "Fiduciary" means a person that is an original, additional or successor personal
8 representative, conservator, agent or trustee.

9 (15) "Information" means data, text, images, videos, sounds, codes, computer programs,
10 software, databases and similar intelligence of any nature.

11 (16) "Online tool" means an electronic service provided by a custodian that allows the
12 user, in an agreement distinct from the terms-of-service agreement between the custodian
13 and the user, to provide directions for disclosure or nondisclosure of digital assets to a third
14 person.

15 (17) "Person" means an individual, estate, business or nonprofit entity, public corpo-
16 ration, government or governmental subdivision, agency or instrumentality or other legal
17 entity.

18 (18) "Personal representative" means an executor, administrator or special administra-
19 tor, or a person legally authorized to perform substantially the same functions.

20 (19) "Power of attorney" means a record that grants an agent authority to act in the
21 place of a principal.

22 (20) "Principal" means an individual who grants authority to an agent in a power of at-
23 torney.

24 (21) "Protected person" means an individual for whom a conservator has been appointed.
25 "Protected person" includes an individual for whom an application for the appointment of a
26 conservator is pending.

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

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

32 (24) "Terms-of-service agreement" means an agreement that controls the relationship
33 between a user and a custodian.

34 (25) "Trustee" means a fiduciary with legal title to property under an agreement or dec-
35 laration that creates a beneficial interest in another person. "Trustee" includes a successor
36 trustee.

37 (26) "User" means a person that has an account with a custodian.

38 (27) "Will" includes a codicil, testamentary instrument that only appoints an executor
39 and instrument that revokes or revises a testamentary instrument.

40 **SECTION 3. (1) Sections 2 to 18 of this 2016 Act apply to:**

41 (a) A fiduciary acting under a will or power of attorney executed before, on or after the
42 effective date of this 2016 Act;

43 (b) A personal representative acting for a decedent who died before, on or after the ef-
44 fective date of this 2016 Act;

45 (c) A conservatorship proceeding commenced before, on or after the effective date of this

1 2016 Act; and

2 (d) A trustee acting under a trust created before, on or after the effective date of this
3 2016 Act.

4 (2) Sections 2 to 18 of this 2016 Act apply to a custodian if the user resides in this state
5 or resided in this state at the time of the user's death.

6 (3) Sections 2 to 18 of this 2016 Act do not apply to a digital asset of an employer used
7 by an employee in the ordinary course of the employer's business.

8 **SECTION 4.** (1) A user may use an online tool to direct the custodian to disclose or not
9 to disclose some or all of the user's digital assets, including the content of electronic com-
10 munications. If the online tool allows the user to modify or delete a direction at all times,
11 a direction regarding disclosure using an online tool overrides a contrary direction by the
12 user in a will, trust, power of attorney or other record.

13 (2) If a user has not used an online tool to give direction under subsection (1) of this
14 section, or if the custodian has not provided an online tool, the user may allow or prohibit
15 in a will, trust, power of attorney or other record disclosure to a fiduciary of some or all of
16 the user's digital assets, including the content of electronic communications sent or received
17 by the user.

18 (3) A user's direction under subsection (1) or (2) of this section overrides a contrary
19 provision in a terms-of-service agreement that does not require the user to act affirmatively
20 and distinctly from the user's assent to the terms of service.

21 **SECTION 5.** (1) Sections 2 to 18 of this 2016 Act do not change or impair a right of a
22 custodian or a user under a terms-of-service agreement to access and use digital assets of
23 the user.

24 (2) Sections 2 to 18 of this 2016 Act do not give a fiduciary any new or expanded rights
25 other than those held by the user for whom, or for whose estate, the fiduciary acts or re-
26 presents.

27 (3) A fiduciary's access to digital assets may be modified or eliminated by a user, by
28 federal law or by a terms-of-service agreement if the user has not provided direction under
29 section 4 of this 2016 Act.

30 **SECTION 6.** (1) When disclosing digital assets of a user under sections 2 to 18 of this 2016
31 Act, the custodian may, in the custodian's sole discretion:

32 (a) Grant a fiduciary or designated recipient full access to the user's account;

33 (b) Grant a fiduciary or designated recipient partial access to the user's account suffi-
34 cient to perform the tasks with which the fiduciary or designated recipient is charged; or

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

38 (2) A custodian may assess a reasonable administrative charge for the cost of disclosing
39 digital assets under sections 2 to 18 of this 2016 Act.

40 (3) A custodian need not disclose under sections 2 to 18 of this 2016 Act a digital asset
41 deleted by a user.

42 (4) If a user directs, or a fiduciary requests, a custodian to disclose some, but not all,
43 of the user's digital assets under sections 2 to 18 of this 2016 Act, the custodian need not
44 disclose the digital assets if segregation of the digital assets would impose an undue burden
45 on the custodian. If the custodian believes the direction or request imposes an undue burden,

1 the custodian or fiduciary may seek an order from the court to disclose:

- 2 (a) A subset limited by date of the user's digital assets;
- 3 (b) All of the user's digital assets to the fiduciary or designated recipient;
- 4 (c) None of the user's digital assets; or
- 5 (d) All of the user's digital assets to the court for review in camera.

6 **SECTION 7.** If a deceased user consented to, or a court directs, disclosure of the con-
 7 tents of electronic communications of the user, the custodian shall disclose to the personal
 8 representative of the estate of the user the content of an electronic communication sent or
 9 received by the user if the personal representative gives the custodian:

- 10 (1) A written request for disclosure in physical or electronic form;
- 11 (2) A certified copy of the death certificate of the user;
- 12 (3) A certified copy of the letter of appointment of the personal representative or a small
 13 estate affidavit or court order;

14 (4) Unless the user provided direction using an online tool, a copy of the user's will, trust,
 15 power of attorney or other record evidencing the user's consent to disclosure of the content
 16 of electronic communications; and

17 (5) If requested by the custodian:

18 (a) A number, user name, address or other unique subscriber or account identifier as-
 19 signed by the custodian to identify the user's account;

20 (b) Evidence linking the account to the user; or

21 (c) A finding by the court that:

22 (A) The user had a specific account with the custodian, identifiable by the information
 23 specified in paragraph (a) of this subsection;

24 (B) Disclosure of the content of electronic communications of the user would not violate
 25 18 U.S.C. 2701 et seq., 47 U.S.C. 222 or other applicable law;

26 (C) Unless the user provided direction using an online tool, the user consented to dis-
 27 closure of the content of electronic communications; or

28 (D) Disclosure of the content of electronic communications of the user is reasonably
 29 necessary for administration of the estate.

30 **SECTION 8.** Unless the user prohibited disclosure of digital assets or the court directs
 31 otherwise, a custodian shall disclose to the personal representative of the estate of a de-
 32 ceased user a catalogue of electronic communications sent or received by the user and digital
 33 assets, other than the content of electronic communications, of the user if the personal
 34 representative gives the custodian:

35 (1) A written request for disclosure in physical or electronic form;

36 (2) A certified copy of the death certificate of the user;

37 (3) A certified copy of the letter of appointment of the personal representative or a small
 38 estate affidavit or court order; and

39 (4) If requested by the custodian:

40 (a) A number, user name, address or other unique subscriber or account identifier as-
 41 signed by the custodian to identify the user's account;

42 (b) Evidence linking the account to the user;

43 (c) An affidavit stating that disclosure of the user's digital assets is reasonably necessary
 44 for administration of the estate; or

45 (d) A finding by the court that:

1 (A) The user had a specific account with the custodian, identifiable by the information
 2 specified in paragraph (a) of this subsection; or

3 (B) Disclosure of the user’s digital assets is reasonably necessary for administration of
 4 the estate.

5 **SECTION 9.** To the extent a power of attorney expressly grants an agent authority over
 6 the content of electronic communications sent or received by the principal and unless di-
 7 rected otherwise by the principal or the court, a custodian shall disclose to the agent the
 8 content if the agent gives the custodian:

9 (1) A written request for disclosure in physical or electronic form;

10 (2) An original or copy of the power of attorney expressly granting the agent authority
 11 over the content of electronic communications of the principal;

12 (3) A certification by the agent, under penalty of perjury, that the power of attorney is
 13 in effect; and

14 (4) If requested by the custodian:

15 (a) A number, user name, address or other unique subscriber or account identifier as-
 16 signed by the custodian to identify the principal’s account; or

17 (b) Evidence linking the account to the principal.

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

23 (1) A written request for disclosure in physical or electronic form;

24 (2) An original or a copy of the power of attorney that gives the agent specific authority
 25 over digital assets or general authority to act on behalf of the principal;

26 (3) A certification by the agent, under penalty of perjury, that the power of attorney is
 27 in effect; and

28 (4) If requested by the custodian:

29 (a) A number, user name, address or other unique subscriber or account identifier as-
 30 signed by the custodian to identify the principal’s account; or

31 (b) Evidence linking the account to the principal.

32 **SECTION 11.** Unless otherwise ordered by the court or provided in a trust, a custodian
 33 shall disclose to a trustee that is an original user of an account any digital asset of the ac-
 34 count held in trust, including a catalogue of electronic communications of the trustee and
 35 the content of electronic communications.

36 **SECTION 12.** Unless otherwise ordered by the court, directed by the user or provided in
 37 a trust, a custodian shall disclose to a trustee that is not an original user of an account the
 38 content of an electronic communication sent or received by an original or successor user and
 39 carried, maintained, processed, received or stored by the custodian in the account of the
 40 trust if the trustee gives the custodian:

41 (1) A written request for disclosure in physical or electronic form;

42 (2) A certified copy of the trust instrument or a certification of the trust under ORS
 43 130.860 that includes consent to disclosure of the content of electronic communications to
 44 the trustee;

45 (3) A certification by the trustee, under penalty of perjury, that the trust exists and the

1 trustee is a currently acting trustee of the trust; and

2 (4) If requested by the custodian:

3 (a) A number, user name, address or other unique subscriber or account identifier as-
4 signed by the custodian to identify the trust's account; or

5 (b) Evidence linking the account to the trust.

6 **SECTION 13.** Unless otherwise ordered by the court, directed by the user or provided in
7 a trust, a custodian shall disclose to a trustee that is not an original user of an account a
8 catalogue of electronic communications sent or received by an original or successor user and
9 stored, carried or maintained by the custodian in an account of the trust and any digital
10 assets, other than the content of electronic communications, in which the trust has a right
11 or interest if the trustee gives the custodian:

12 (1) A written request for disclosure in physical or electronic form;

13 (2) A certified copy of the trust instrument or a certification of the trust under ORS
14 130.860;

15 (3) A certification by the trustee, under penalty of perjury, that the trust exists and the
16 trustee is a currently acting trustee of the trust; and

17 (4) If requested by the custodian:

18 (a) A number, user name, address or other unique subscriber or account identifier as-
19 signed by the custodian to identify the trust's account; or

20 (b) Evidence linking the account to the trust.

21 **SECTION 14.** (1) After an opportunity for a hearing, the court may grant a conservator
22 access to the digital assets of a protected person.

23 (2) Unless otherwise ordered by the court or directed by the user, a custodian shall dis-
24 close to the conservator the catalogue of electronic communications sent or received by a
25 protected person and any digital assets, other than the content of electronic communi-
26 cations, in which the protected person has a right or interest if the conservator gives the
27 custodian:

28 (a) A written request for disclosure in physical or electronic form;

29 (b) A certified copy of the court order that gives the conservator authority over the
30 digital assets of the protected person; and

31 (c) If requested by the custodian:

32 (A) A number, user name, address or other unique subscriber or account identifier as-
33 signed by the custodian to identify the account of the protected person; or

34 (B) Evidence linking the account to the protected person.

35 (3) A conservator with general authority to manage the assets of a protected person may
36 request a custodian of the digital assets of the protected person to suspend or terminate the
37 account of the protected person for good cause. A request made under this subsection must
38 be accompanied by a certified copy of the court order giving the conservator authority over
39 the protected person's property.

40 **SECTION 15.** (1) The legal duties imposed on a fiduciary charged with managing tangible
41 property apply to the management of digital assets, including:

42 (a) The duty of care;

43 (b) The duty of loyalty; and

44 (c) The duty of confidentiality.

45 (2) A fiduciary's authority with respect to a digital asset of a user:

1 (a) Except as otherwise provided in section 4 of this 2016 Act, is subject to the applicable
2 terms of service;

3 (b) Is subject to other applicable law, including copyright law;

4 (c) Is limited by the scope of the fiduciary's duties; and

5 (d) May not be used to impersonate the user.

6 (3) A fiduciary with authority over the property of a decedent, protected person, principal
7 or settlor has the right to access any digital asset in which the decedent, protected person,
8 principal or settlor has a right or interest and that is not held by a custodian or subject to
9 a terms-of-service agreement.

10 (4) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of
11 the property of the decedent, protected person, principal or settlor for the purpose of appli-
12 cable computer fraud and unauthorized computer access laws, including this state's laws on
13 unauthorized computer access.

14 (5) A fiduciary with authority over the tangible, personal property of a decedent, pro-
15 tected person, principal or settlor:

16 (a) Has the right to access the property and any digital asset stored in the property; and

17 (b) Is an authorized user for the purpose of computer fraud and unauthorized computer
18 access laws, including this state's laws on unauthorized computer access.

19 (6) A custodian may disclose information in an account to a fiduciary of the user when
20 the information is required to terminate an account used to access digital assets licensed to
21 the user.

22 (7) A fiduciary of a user may request a custodian to terminate the user's account. A re-
23 quest for termination must be in writing, in either physical or electronic form, and accom-
24 panied by:

25 (a) If the user is deceased, a certified copy of the death certificate of the user;

26 (b) A certified copy of the letter of appointment of the personal representative, a small
27 estate affidavit or court order, a court order, a power of attorney or a trust giving the
28 fiduciary authority over the account; and

29 (c) If requested by the custodian:

30 (A) A number, user name, address or other unique subscriber or account identifier as-
31 signed by the custodian to identify the user's account;

32 (B) Evidence linking the account to the user; or

33 (C) A finding by the court that the user had a specific account with the custodian, iden-
34 tifiable by the information specified in subparagraph (A) of this paragraph.

35 **SECTION 16.** (1) Not later than 60 days after receipt of the information required under
36 sections 7 to 15 of this 2016 Act, a custodian shall comply with a request from a fiduciary
37 or designated recipient to disclose digital assets or terminate an account. If the custodian
38 fails to comply, the fiduciary or designated recipient may apply to the court for an order
39 directing compliance.

40 (2) An order under subsection (1) of this section directing compliance must contain a
41 finding that compliance is not in violation of 18 U.S.C. 2702.

42 (3) A custodian may notify the user that a request for disclosure or to terminate an ac-
43 count was made under sections 2 to 18 of this 2016 Act.

44 (4) A custodian may deny a request under sections 2 to 18 of this 2016 Act from a
45 fiduciary or designated recipient for disclosure of digital assets or to terminate an account

1 if the custodian is aware of any lawful access to the account following the receipt of the
2 fiduciary's request.

3 (5) Sections 2 to 18 of this 2016 Act do not limit a custodian's ability to obtain or require
4 a fiduciary or designated recipient requesting disclosure or termination to obtain a court
5 order that:

6 (a) Specifies that an account belongs to the protected person or principal;

7 (b) Specifies that there is sufficient consent from the protected person or principal to
8 support the requested disclosure; and

9 (c) Contains a finding required by law other than under sections 2 to 18 of this 2016 Act.

10 (6) A custodian and the custodian's officers, employees and agents are immune from li-
11 ability for an act or omission done in good faith in compliance with sections 2 to 18 of this
12 2016 Act.

13 SECTION 17. In applying and construing this uniform act, consideration must be given
14 to the need to promote uniformity of the law with respect to its subject matter among the
15 enacting states.

16 SECTION 18. Sections 2 to 18 of this 2016 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. Section 7003(b).