
ENGROSSED SUBSTITUTE SENATE BILL 5029

State of Washington

64th Legislature

2016 Regular Session

By Senate Law & Justice (originally sponsored by Senators Pedersen and O'Ban; by request of Uniform Law Commission)

READ FIRST TIME 01/22/16.

1 AN ACT Relating to the revised uniform fiduciary access to
2 digital assets act; and adding a new chapter to Title 11 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** SHORT TITLE. This act may be known and
5 cited as the revised uniform fiduciary access to digital assets act.

6 NEW SECTION. **Sec. 2.** DEFINITIONS. In this chapter:

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

11 (2) "Agent" means an attorney in fact granted authority under a
12 durable or nondurable power of attorney.

13 (3) "Carries" means engages in the transmission of an electronic
14 communication.

15 (4) "Catalogue of electronic communications" means information
16 that identifies each person with which a user has had an electronic
17 communication, the time and date of the communication, and the
18 electronic address of the person.

19 (5) "Content of an electronic communication" means information
20 concerning the substance or meaning of the communication which:

1 (a) Has been sent or received by a user;

2 (b) Is in electronic storage by a custodian providing an
3 electronic communication service to the public or is carried or
4 maintained by a custodian providing a remote computing service to the
5 public; and

6 (c) Is not readily accessible to the public.

7 (6) "Court" means the superior court of each county.

8 (7) "Custodian" means a person that carries, maintains,
9 processes, receives, or stores a digital asset of a user.

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

12 (9) "Digital asset" means an electronic record in which an
13 individual has a right or interest. The term does not include an
14 underlying asset or liability unless the asset or liability is itself
15 an electronic record.

16 (10) "Electronic" means relating to technology having electrical,
17 digital, magnetic, wireless, optical, electromagnetic, or similar
18 capabilities.

19 (11) "Electronic communication" has the meaning set forth in 18
20 U.S.C. Sec. 2510(12), as it existed on the effective date of this
21 section.

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

25 (13) "Fiduciary" means an original, additional, or successor
26 personal representative, guardian, agent, or trustee.

27 (14) "Guardian" means a person appointed by a court to manage the
28 estate or person, or both, of a living individual. The term includes
29 a limited guardian or certified professional guardian.

30 (15) "Incapacitated person" means an individual for whom a
31 guardian has been appointed.

32 (16) "Information" means data, text, images, videos, sounds,
33 codes, computer programs, software, databases, or the like.

34 (17) "Online tool" means an electronic service provided by a
35 custodian that allows the user, in an agreement distinct from the
36 terms-of-service agreement between the custodian and user, to provide
37 directions for disclosure or nondisclosure of digital assets to a
38 third person.

1 (18) "Person" means an individual, estate, business or nonprofit
2 entity, public corporation, government or governmental subdivision,
3 agency, or instrumentality, or other legal entity.

4 (19) "Personal representative" means an executor, administrator,
5 special administrator, or person that performs substantially the same
6 function under law of this state other than this chapter.

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

9 (21) "Principal" means an individual who grants authority to an
10 agent in a power of attorney.

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

14 (23) "Remote computing service" means a custodian that provides
15 to a user computer processing services or the storage of digital
16 assets by means of an electronic communications system, as defined in
17 18 U.S.C. Sec. 2510(14), as it existed on the effective date of this
18 section.

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

21 (25) "Trustee" means a fiduciary with legal title to property
22 under an agreement or declaration that creates a beneficial interest
23 in another. The term includes a successor trustee.

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

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

28 NEW SECTION. **Sec. 3.** APPLICABILITY. (1) This chapter applies
29 to:

30 (a) A fiduciary acting under a will or power of attorney executed
31 before, on, or after the effective date of this section;

32 (b) A personal representative acting for a decedent who died
33 before, on, or after the effective date of this section;

34 (c) A guardian acting for an incapacitated person appointed
35 before, on, or after the effective date of this section;

36 (d) A trustee acting under a trust created before, on, or after
37 the effective date of this section; and

38 (e) A custodian if the user resides in this state or resided in
39 this state at the time of the user's death.

1 (2) This chapter does not apply to a digital asset of an employer
2 used by an employee in the ordinary course of the employer's
3 business.

4 NEW SECTION. **Sec. 4.** USER DIRECTION FOR DISCLOSURE OF DIGITAL
5 ASSETS. (1) A user may use an online tool to direct the custodian to
6 disclose to a designated recipient or not to disclose some or all of
7 the user's digital assets, including the content of electronic
8 communications. If the online tool allows the user to modify or
9 delete a direction at all times, a direction regarding disclosure
10 using an online tool overrides a contrary direction by the user in a
11 will, trust, power of attorney, or other record.

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

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

22 NEW SECTION. **Sec. 5.** TERMS-OF-SERVICE AGREEMENT. (1) This
23 chapter does not change or impair a right of a custodian or a user
24 under a terms-of-service agreement to access and use digital assets
25 of the user.

26 (2) This chapter does not give a fiduciary or a designated
27 recipient any new or expanded rights other than those held by the
28 user for whom, or for whose estate, the fiduciary or designated
29 recipient acts or represents.

30 (3) A fiduciary's or designated recipient's access to digital
31 assets may be modified or eliminated by a user, by federal law, or by
32 a terms-of-service agreement if the user has not provided direction
33 under section 4 of this act.

34 NEW SECTION. **Sec. 6.** PROCEDURE FOR DISCLOSING DIGITAL ASSETS.
35 (1) When disclosing digital assets of a user under this chapter, the
36 custodian may at its sole discretion:

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

3 (b) Grant a fiduciary or designated recipient partial access to
4 the user's account sufficient to perform the tasks with which the
5 fiduciary or designated recipient is charged; or

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

10 (2) A custodian may assess a reasonable administrative charge for
11 the cost of disclosing digital assets under this chapter.

12 (3) A custodian need not disclose under this chapter a digital
13 asset deleted by a user.

14 (4) If a user directs or a fiduciary requests a custodian to
15 disclose under this chapter some, but not all, of the user's digital
16 assets, the custodian need not disclose the assets if segregation of
17 the assets would impose an undue burden on the custodian. If the
18 custodian believes the direction or request imposes an undue burden,
19 the custodian or fiduciary may seek an order from the court to
20 disclose:

21 (a) A subset limited by date of the user's digital assets;

22 (b) All of the user's digital assets to the fiduciary or
23 designated recipient;

24 (c) None of the user's digital assets; or

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

27 NEW SECTION. **Sec. 7.** DISCLOSURE OF CONTENT OF ELECTRONIC
28 COMMUNICATIONS OF DECEASED USER. If a deceased user consented to or a
29 court directs disclosure of the contents of electronic communications
30 of the user, the custodian shall disclose to the personal
31 representative of the estate of the user the content of an electronic
32 communication sent or received by the user if the personal
33 representative gives the custodian:

34 (1) A written request for disclosure in physical or electronic
35 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
38 representative, or a small estate affidavit or court order;

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

5 (5) If requested by the custodian:

6 (a) A number, user name, address, or other unique subscriber or
7 account identifier assigned by the custodian to identify the user's
8 account;

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

10 (c) A finding by the court finding that:

11 (i) The user had a specific account with the custodian,
12 identifiable by the information specified in (a) of this subsection;

13 (ii) Disclosure of the content of electronic communications of
14 the user would not violate 18 U.S.C. Sec. 2701 et seq. and 47 U.S.C.
15 Sec. 222, existing on the effective date of this section, or other
16 applicable law;

17 (iii) Unless the user provided direction using an online tool,
18 the user consented to disclosure of the content of electronic
19 communications; or

20 (iv) Disclosure of the content of electronic communications of
21 the user is reasonably necessary for administration of the estate.

22 NEW SECTION. **Sec. 8.** DISCLOSURE OF OTHER DIGITAL ASSETS OF
23 DECEASED USER. Unless the user prohibited disclosure of digital
24 assets or the court directs otherwise, a custodian shall disclose to
25 the personal representative of the estate of a deceased user a
26 catalogue of electronic communications sent or received by the user
27 and digital assets, other than the content of electronic
28 communications of the user, if the representative gives the
29 custodian:

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

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

33 (3) A certified copy of the letter of appointment of the
34 representative, or a small estate affidavit or court order; and

35 (4) If requested by the custodian:

36 (a) A number, user name, or address, or other unique subscriber
37 or account identifier assigned by the custodian to identify the
38 user's account;

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

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

3 (d) A finding by the court that:

4 (i) The user had a specific account with the custodian,
5 identifiable by the information specified in (a) of this subsection;

6 (ii) Disclosure of the user's digital assets is reasonably
7 necessary for administration of the estate.

8 NEW SECTION. **Sec. 9.** DISCLOSURE OF CONTENT OF ELECTRONIC
9 COMMUNICATIONS OF PRINCIPAL. To the extent a power of attorney
10 expressly grants an agent authority over the content of electronic
11 communications sent or received by the principal and unless directed
12 otherwise by the principal or the court, a custodian shall disclose
13 to the agent the content if the agent gives the custodian:

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

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

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

21 (4) If requested by the custodian:

22 (a) A number, user name, address, or other unique subscriber or
23 account identifier assigned by the custodian to identify the
24 principal's account; or

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

26 NEW SECTION. **Sec. 10.** DISCLOSURE OF OTHER DIGITAL ASSETS OF
27 PRINCIPAL. Unless otherwise ordered by the court, directed by the
28 principal, or provided by a power of attorney, a custodian shall
29 disclose to an agent with specific authority over digital assets or
30 general authority to act on behalf of a principal a catalogue of
31 electronic communications sent or received by the principal and
32 digital assets, other than the content of electronic communications
33 of the principal, if the agent gives the custodian:

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

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

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

3 (4) If requested by the custodian:

4 (a) A number, user name, address, or other unique subscriber or
5 account identifier assigned by the custodian to identify the
6 principal's account; or

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

8 NEW SECTION. **Sec. 11.** DISCLOSURE OF DIGITAL ASSETS HELD IN
9 TRUST WHEN TRUSTEE IS ORIGINAL USER. Unless otherwise ordered by the
10 court or provided in a trust, a custodian shall disclose to a trustee
11 that is an original user of an account any digital asset of that
12 account held in trust, including a catalogue of electronic
13 communications of the trustee and the content of electronic
14 communications.

15 NEW SECTION. **Sec. 12.** DISCLOSURE OF CONTENT OF ELECTRONIC
16 COMMUNICATIONS HELD IN TRUST WHEN TRUSTEE NOT ORIGINAL USER. Unless
17 otherwise ordered by the court, directed by the user, or provided in
18 a trust, a custodian shall disclose to a trustee that is not an
19 original user of an account the content of an electronic
20 communication sent or received by an original or successor user and
21 carried, maintained, processed, received, or stored by the custodian
22 in the account of the trust if the trustee gives the custodian:

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

25 (2) A certified copy of the trust instrument, or a certification
26 of the trust under RCW 11.98.075, that includes consent to disclosure
27 of the content of electronic communications to the trustee;

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

31 (4) If requested by the custodian:

32 (a) A number, user name, address, or other unique subscriber or
33 account identifier assigned by the custodian to identify the trust's
34 account; or

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

36 NEW SECTION. **Sec. 13.** DISCLOSURE OF OTHER DIGITAL ASSETS HELD
37 IN TRUST WHEN TRUSTEE NOT ORIGINAL USER. Unless otherwise ordered by

1 the court, directed by the user, or provided in a trust, a custodian
2 shall disclose, to a trustee that is not an original user of an
3 account, a catalogue of electronic communications sent or received by
4 an original or successor user and stored, carried, or maintained by
5 the custodian in an account of the trust and any digital assets,
6 other than the content of electronic communications in which the
7 trust has a right or interest, if the trustee gives the custodian:

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

10 (2) A certified copy of the trust instrument or a certification
11 of the trust under RCW 11.98.075;

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

15 (4) If requested by the custodian:

16 (a) A number, user name, address, or other unique subscriber or
17 account identifier assigned by the custodian to identify the trust's
18 account; or

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

20 NEW SECTION. **Sec. 14.** DISCLOSURE OF DIGITAL ASSETS TO GUARDIAN
21 OF INCAPACITATED PERSON. (1) Unless otherwise ordered by the court, a
22 guardian appointed due to a finding of incapacity under RCW
23 11.88.010(1) has the right to access an incapacitated person's
24 digital assets other than the content of digital communications.

25 (2) Unless otherwise ordered by the court or directed by the
26 user, a custodian shall disclose to a guardian the catalogue of
27 electronic communications sent or received by an incapacitated person
28 and any digital assets, other than the content of electronic
29 communications, if the guardian gives the custodian:

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

32 (b) Certified copies of letters of guardianship and the court
33 order appointing the guardian; and

34 (c) If requested by the custodian:

35 (i) A number, user name, address, or other unique subscriber or
36 account identifier assigned by the custodian to identify the account
37 of the person; or

38 (ii) Evidence linking the account to the incapacitated person.

1 (3) A guardian may request a custodian of the incapacitated
2 person's digital assets to suspend or terminate an account of the
3 incapacitated person for good cause. A request made under this
4 section must be accompanied by certified copies of letters of
5 guardianship and the court order appointing the guardian.

6 NEW SECTION. **Sec. 15.** FIDUCIARY DUTY AND AUTHORITY. (1) The
7 legal duties imposed on a fiduciary charged with managing tangible
8 property apply to the management of digital assets, including:

- 9 (a) The duty of care;
- 10 (b) The duty of loyalty; and
- 11 (c) The duty of confidentiality.

12 (2) A fiduciary's or designated recipient's authority with
13 respect to a digital asset of a user:

- 14 (a) Except as otherwise provided in section 4 of this act, is
15 subject to the applicable terms-of-service agreement;
- 16 (b) Is subject to other applicable law, including copyright law;
- 17 (c) In the case of a fiduciary, is limited by the scope of the
18 fiduciary's duties; and
- 19 (d) May not be used to impersonate the user.

20 (3) A fiduciary with authority over the property of a decedent,
21 incapacitated person, principal, or settlor has the right to access
22 any digital asset in which the decedent, incapacitated person,
23 principal, or settlor had a right or interest and that is not held by
24 a custodian or subject to a terms-of-service agreement.

25 (4) A fiduciary acting within the scope of the fiduciary's duties
26 is an authorized user of the property of the decedent, incapacitated
27 person, principal, or settlor for the purpose of applicable computer
28 fraud and unauthorized computer access laws.

29 (5) A fiduciary with authority over the tangible, personal
30 property of a decedent, incapacitated person, principal, or settlor:

- 31 (a) Has the right to access the property and any digital asset
32 stored in it; and
- 33 (b) Is an authorized user for the purpose of computer fraud and
34 unauthorized computer access laws.

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

1 (7) A fiduciary of a user may request a custodian to terminate
2 the user's account. A request for termination must be in writing, in
3 either physical or electronic form, and accompanied by:

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

6 (b) A certified copy of the letter of appointment of the
7 representative or a small estate affidavit or court order, court
8 order, power of attorney, or trust giving the fiduciary authority
9 over the account; and

10 (c) If requested by the custodian:

11 (i) A number, user name, address, or other unique subscriber or
12 account identifier assigned by the custodian to identify the user's
13 account;

14 (ii) Evidence linking the account to the user; or

15 (iii) A finding by the court that the user had a specific account
16 with the custodian, identifiable by the information specified in

17 (c)(i) of this subsection.

18 NEW SECTION. **Sec. 16.** CUSTODIAN COMPLIANCE AND IMMUNITY. (1)

19 Not later than sixty days after receipt of the information required
20 under sections 7 through 15 of this act, a custodian shall comply
21 with a request under this chapter from a fiduciary or designated
22 recipient to disclose digital assets or terminate an account. If the
23 custodian fails to comply, the fiduciary or designated recipient may
24 apply to the court for an order directing compliance.

25 (2) An order under subsection (1) of this section directing
26 compliance must contain a finding that compliance is not in violation
27 of 18 U.S.C. Sec. 2702, as it existed on the effective date of this
28 section.

29 (3) A custodian may notify the user that a request for disclosure
30 or to terminate an account was made under this chapter.

31 (4) A custodian may deny a request under this chapter from a
32 fiduciary or designated recipient for disclosure of digital assets or
33 to terminate an account if the custodian is aware of any lawful
34 access to the account following the receipt of the fiduciary's
35 request.

36 (5) This section does not limit a custodian's ability to obtain
37 or require a fiduciary or designated recipient requesting disclosure
38 or termination under this chapter to obtain a court order which:

1 (a) Specifies that an account belongs to the incapacitated
2 person, trustor, decedent, or principal;

3 (b) Specifies that there is sufficient consent from the
4 incapacitated person, trustor, decedent, or principal to support the
5 requested disclosure; and

6 (c) Contains a finding required by law other than this chapter.

7 (6) A custodian and its officers, employees, and agents are
8 immune from liability for an act or omission done in good faith in
9 compliance with this chapter.

10 NEW SECTION. **Sec. 17.** UNIFORMITY OF APPLICATION AND
11 CONSTRUCTION. In applying and construing this chapter, consideration
12 must be given to the need to promote uniformity of the law with
13 respect to its subject matter among states that enact it.

14 NEW SECTION. **Sec. 18.** RELATION TO ELECTRONIC SIGNATURES IN
15 GLOBAL AND NATIONAL COMMERCE ACT. This chapter modifies, limits, or
16 supersedes the electronic signatures in global and national commerce
17 act, 15 U.S.C. Sec. 7001 et seq., but does not modify, limit, or
18 supersede 15 U.S.C. Sec. 7001(c) or authorize electronic delivery of
19 any of the notices described in 15 U.S.C. Sec. 7003(b).

20 NEW SECTION. **Sec. 19.** SEVERABILITY. If any provision of this
21 act or its application to any person or circumstance is held invalid,
22 the remainder of the act or the application of the provision to other
23 persons or circumstances is not affected.

24 NEW SECTION. **Sec. 20.** Sections 1 through 19 of this act
25 constitute a new chapter in Title 11 RCW.

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