

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas *As Engrossed: H2/17/15 H2/18/15 S3/5/15*
90th General Assembly **A Bill**
Regular Session, 2015

HOUSE BILL 1362

By: Representatives Shepherd, *Broadaway, Sabin*

By: Senator J. Hutchinson

For An Act To Be Entitled

AN ACT TO CREATE THE UNIFORM FIDUCIARY ACCESS TO
DIGITAL ASSETS ACT; AND FOR OTHER PURPOSES.

Subtitle

TO CREATE THE UNIFORM FIDUCIARY ACCESS TO
DIGITAL ASSETS ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Title 28, Chapter 69, is amended to add an additional subchapter to read as follows:

Subchapter 9 – Uniform Fiduciary Access to Digital Assets Act

28-69-901. Short title.

This subchapter may be cited as the Uniform Fiduciary Access to Digital Assets Act.

28-69-902. Definitions.

In this subchapter:

(1) “Account holder” means a person that has entered into a terms-of-service agreement with a custodian or a fiduciary for the person.

(2) “Agent” means an attorney in fact granted authority under a durable or nondurable power of attorney.

(3) “Carries” means engages in the transmission of electronic communications.

(4) “Catalogue of electronic communications” means information



that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

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

(A) has been sent or received by an account holder;

(B) is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and

(C) is not readily accessible to the public.

(6) "Court" means the circuit court of the county of residence of the account holder.

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

(8) "Digital asset" means a record that is electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic.

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

(10) "Electronic communication" has the same meaning as the definition in 18 U.S.C. Section 2510(12) as amended.

(11) "Electronic-communication service" means a custodian that provides to an account holder the ability to send or receive an electronic communication.

(12) "Fiduciary" means an original, additional, or successor personal representative, guardian of the estate, agent, or trustee.

(13) "Guardian of the estate" means a person appointed by a court to manage the estate of a living individual. The term also includes a limited guardian, and a temporary guardian.

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

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

(16) "Personal representative" means an executor, administrator,

special administrator, or person that performs substantially the same function under law of this state other than this subchapter.

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

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

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

(20) "Remote-computing service" means a custodian that provides to an account holder computer processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. Section 2510(14), as amended.

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

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

(23) "Ward" means an individual for whom a guardian of the estate or conservator has been appointed.

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

28-69-903. Applicability.

(a) This subchapter applies to:

(1) a fiduciary or agent acting under a will or power of attorney executed before, on, or after the effective date of this subchapter;

(2) a personal representative acting for a decedent who died before, on, or after the effective date of this subchapter;

(3) a guardianship of the estate, whether commenced before, on, or after the effective date of this subchapter; and

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

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

28-69-904. Access by personal representative to digital asset of decedent.

Subject to § 28-69-908(b) and unless otherwise ordered by the court or provided in the will of a decedent, the personal representative of the decedent has the right to access:

(1) the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) as amended, or 47 U.S.C. Section 222, as amended;

(2) any catalogue of electronic communications sent or received by the decedent; and

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

28-69-905. Access by guardian of the estate to digital asset of a ward.

Subject to § 28-69-908(b), the court, after an opportunity for hearing under state guardianship law, may grant a guardian of the estate the right to access:

(1) the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) as amended, or 47 U.S.C. Section 222, as amended;

(2) any catalogue of electronic communications sent or received by the ward; and

(3) any other digital asset in which the ward has a right or interest.

28-69-906. Access by agent to digital asset of principal.

(a) To the extent a power of attorney expressly grants an agent authority over the content of an electronic communication of the principal and subject to § 28-69-908(b), the agent has the right to access the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended, or 47 U.S.C. Section 222, as amended.

(b) Subject to § 28-69-908(b) and unless otherwise ordered by the court or provided by a power of attorney, an agent has the right to access:

(1) any catalogue of electronic communications sent or received by the principal; and

(2) any other digital asset in which the principal has a right or interest.

28-69-907. Access by trustee to digital asset.

(a) Subject to § 28-69-908(b) and unless otherwise ordered by the court or provided in a trust, a trustee that is an original account holder has the right to access any digital asset held in trust, including any catalogue of electronic communications of the trustee and the content of an electronic communication.

(b) Subject to § 28-69-908(b) and unless otherwise ordered by the court or provided in a trust, a trustee that is not an original account holder has the right to access:

(1) the content of an electronic communication that the custodian is permitted to disclose under the *Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) as amended, or 47 U.S.C. Section 222, as amended;*

(2) any catalogue of electronic communications sent or received by the original or any successor account holder; and

(3) any other digital asset in which the original or any successor account holder has a right or interest.

28-69-908. Fiduciary authority.

(a) A fiduciary that is an account holder or has the right under this subchapter to access a digital asset of an account holder:

(1) subject to the terms-of-service agreement, copyright law, and other applicable law, may take any action concerning the asset to the extent of the account holder's authority and the fiduciary's power under the law of this state other than this subchapter;

(2) has, for the purpose of applicable electronic privacy laws, the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the fiduciary; and

(3) is, for the purpose of applicable computer-fraud and unauthorized-computer-access laws, an authorized user.

(b) Unless an account holder, after the effective date of this subchapter, agrees to a provision in a terms-of-service agreement that limits a fiduciary's access to a digital asset of the account holder by an affirmative act separate from the account holder's assent to other provisions of the agreement:

(1) the provision is void as against the strong public policy of this state; and

(2) the fiduciary's access under this subchapter to a digital asset does not violate the terms-of-service agreement even if the agreement requires notice of a change in the account holder's status.

(c) A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this subchapter to the extent the provision designates law that enforces a limitation on a fiduciary's access to a digital asset, and the limitation is void under subsection (b).

(d) As to tangible personal property capable of receiving, storing, processing, or sending a digital asset, a fiduciary with authority over the property of a decedent, ward, principal, or settlor:

(1) has the right to access the property and any digital asset stored in it; and

(2) is an authorized user for purposes of any applicable computer-fraud and unauthorized-computer-access laws.

28-69-909. Compliance.

(a) If a fiduciary with a right under this subchapter to access a digital asset of an account holder complies with subsection (b), the custodian shall comply with the fiduciary's request in a record for:

(1) access to the asset;

(2) control of the asset; and

(3) a copy of the asset to the extent permitted by copyright law.

(b) If a request under subsection (a) is made by:

(1) a personal representative with the right of access under § 28-69-904, the request must be accompanied by a certified copy of the Letters Testamentary, Letters of Administration, or a small-estate affidavit or court order;

(2) a guardian of the estate with the right of access under §

28-69-905, the request must be accompanied by a certified copy of the court order that gives the guardian of the estate authority over the digital asset;

(3) an agent with the right of access under § 28-69-906, the request must be accompanied by an original or a copy of the power of attorney that authorizes the agent to exercise authority over the digital asset and a certification of the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) a trustee with the right of access under § 28-69-907, the request must be accompanied by a certified copy of the trust instrument, or a certificate of the trust under § 28-73-1013 that authorizes the trustee to exercise authority over the digital asset.

(c) A custodian shall comply with a request made under subsection (a) not later than 30 days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

(d) A custodian that receives a certification under subdivision (b)(4) may require the trustee to provide copies of excerpts from the original trust instrument and later amendments designating the trustee and conferring on the trustee the power to act in the pending transaction.

(e) A person that demands the trust instrument in addition to a certification under subdivision (b)(4) or excerpts under subsection (d) is liable for damages, including attorneys' fees, if the court determines that the person did not act in good faith in demanding the instrument.

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

28-69-910. Custodian immunity.

A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this subchapter.

28-69-911. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

28-69-812. Relation to electronic signatures in global and national

commerce act.

This subchapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

/s/Shepherd