

HOUSE SUMMARY OF SENATE AMENDMENTS

HB 1118

2016 Regular Session

Hunter

TELECOMMUNICATIONS: Authorizes certain fiduciaries to exercise control respecting the digital property of decedents and other certain persons

Synopsis of Senate Amendments

1. Changes the definition of "court" to be any district court of appropriate venue.
2. Deletes references to contents of electronic communication regarding rights to intestate successors.
3. Provides that certain provisions of present law (R.S. 6:325 or 767) control how federally insured financial institutions provide internet or other electronic access to an authorized succession representative.
4. Makes technical changes.

Digest of Bill as Finally Passed by Senate

Proposed law is known and may be cited as the "Revised Uniform Fiduciary Access to Digital Assets Act".

Proposed law provides certain definitions.

Proposed law applies to the following persons or circumstances with respect to a user's digital assets: (1) A fiduciary acting pursuant to the provisions of a will or power of attorney, (2) A personal representative acting for a decedent, (3) A commenced conservatorship proceeding, (4) A trustee acting pursuant to a trust, and (5) A custodian, if the user resides in the state of La. or resided in this state at the time of the user's death.

Proposed law does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

Proposed law authorizes a user to use an online tool to direct a custodian to disclose or not to disclose to a designated recipient some or all of the user's digital assets. Provides if the online tool allows the user to modify or delete a direction at all times, a direction of disclosure made through the online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

If a user has not used an online tool to provide direction or if the custodian has not provided an online tool, proposed law authorizes the user to allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, sent or received by the user.

Proposed law provides that a user's direction overrides a contrary provision in a terms-of-service agreement if such agreement does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

The provisions of proposed law do not do either of the following: (1) Change or impair the right of a custodian to access and use digital assets of the user pursuant to a terms-of-service agreement or (2) Give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

Proposed law provides that a fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, federal law, or a terms-of-service agreement if the user has not provided direction as described in proposed law.

When disclosing digital assets of a user to a fiduciary, proposed law provides that a custodian may, at its sole discretion, do any of the following: (1) Grant a fiduciary or designated recipient full access to the user's account, (2) Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged, and (3) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

Proposed law further provides that a custodian may assess to a fiduciary a reasonable administrative charge for the cost of disclosing digital assets.

Proposed law provides that a custodian need not disclose a digital asset deleted by a user. Further provides if a user directs or a fiduciary requests a custodian to disclose some, but not all of the user's digital assets, the custodian need not disclose the assets if segregation of the assets imposes an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek a court order to disclose digital assets in any of the following manners:

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

If a deceased user consented or a court directs disclosure of the deceased user's contents of electronic communications, proposed law requires the custodian to disclose to the personal representative of the user's estate the content of electronic communications sent or received by the user, if the representative gives the custodian all of the following: (1) A written request for disclosure in physical or electronic form, (2) A certified copy of the death certificate of the user, (3) A certified copy of the letter of appointment of the representative or a small succession affidavit or court order, and (4) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications.

If requested by the custodian, proposed law requires the representative to also provide to the custodian either of the following: (1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account, (2) Evidence linking the account to the user, (3) A finding by the court that provides either of the following: (a) The user had a specific account with the custodian identifiable by the information specified in proposed law, (b) Disclosure of the content of electronic communications of the user does not violate certain federal law, (c) Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications, or (d) Disclosure of the user's electronic communications content is reasonably necessary for administration of the estate.

Unless the user prohibited disclosure of digital assets or the court directs otherwise, proposed law requires a custodian to disclose to the personal representative of a deceased user's estate a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications of the user, if the representative gives the custodian all of the following: (1) A written request for disclosure in physical or electronic form, (2) A certified copy of the death certificate of the user, and (3) A certified copy of the letter of appointment of the representative or a small succession affidavit or court order.

Proposed law further provides, if requested by the custodian, the representative is required to also provide either of the following: (1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account, (2) Evidence linking the account to the user, (3) An affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate, or (4) A finding by the court that provides either of the following: (a) The user had a specific account with the custodian identifiable by the information described in proposed law or (b) Disclosure of the user's digital assets is reasonably necessary for administration of the estate.

To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal, and unless directed otherwise by the principal or the court, proposed law requires a custodian to disclose to the agent the content if the agent gives the custodian all of the following: (1) A written request for disclosure in physical or electronic form, (2) An original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal, and (3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect.

If requested by the custodian, proposed law requires the agent to also provide either of the following: (1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account or (2) Evidence linking the account to the principal.

Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, proposed law requires a custodian to disclose to an agent who has specific authority over digital assets or general authority to act on behalf of a principal, a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian all of the following: (1) A written request for disclosure in physical or electronic form, (2) An original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal, and (3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect.

If requested by the custodian, proposed law requires the agent to also provide either of the following: (1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account or (2) Evidence linking the account to the principal.

Unless otherwise ordered by the court or provided in a trust, proposed law requires a custodian to disclose to a trustee who is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, proposed law requires a custodian to disclose to a trustee who is not an original user of an account the content of electronic communications sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian all of the following: (1) A written request for disclosure in physical or electronic form, (2) A certified copy of the trust instrument that includes consent to disclosure of the content of electronic communications to the trustee, and (3) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust.

If requested by the custodian, proposed law requires the trustee to also provide either of the following: (1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account or (2) Evidence linking the account to the user.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, proposed law requires a custodian to disclose to a trustee who is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian all of the following: (1) A written request for disclosure in physical or electronic form, (2) A certified copy of the trust instrument, and (3) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust.

If requested by the custodian, proposed law further requires the trustee to also provide either of the following: (1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account, or (2) Evidence linking the account to the user.

Proposed law provides that the court may, after an opportunity for a hearing of a proceeding for conservatorship, grant a conservator access to the digital assets of a protected person. Further requires, unless otherwise ordered by the court or directed by the user, a custodian to disclose to a conservator the catalogue of electronic communications sent or received by a protected person and any digital assets, other than the content of electronic communications, in which the protected person has a right or interest if the conservator gives the custodian both of the following: (1) A written request for disclosure in physical or electronic form and (2) A certified copy of the court order giving the conservator authority over the digital assets of the protected person.

If requested by the custodian, proposed law requires the conservator to also provide either of the following: (1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account or (2) Evidence linking the account to the user.

Proposed law authorizes a conservator, one with general authority to manage the assets of a protected person, to request a custodian of the digital assets of the protected person to suspend or terminate an account of the protected person for good cause. A conservator making such a request is also required to provide a certified copy of the court order giving the conservator authority over the protected person's property.

Proposed law provides certain legal duties of a fiduciary who manages a user's tangible property. Further provides that such duties also apply to the management of the user's digital assets. Such duties include but are not limited to the following: (1) The duty of care, (2) The duty of loyalty, and (3) The duty of confidentiality.

Except as otherwise provided in proposed law, a fiduciary's or designated recipient's authority with respect to a digital asset of a user is subject to all of the following: (1) The applicable terms-of-service agreement, (2) Other applicable law, including copyright law, and (3) In the case of a fiduciary, the authority is limited by the scope of the fiduciary's duties.

Proposed law makes it a prohibited act for a fiduciary or designated recipient to use any respective authority to impersonate the user.

Proposed law gives a fiduciary with authority over the property of a decedent, protected person, principal, or settlor the right to access any digital asset in which the decedent, protected person, principal, or settlor had a right or interest, when such right or interest is not held by a custodian or subject to a terms-of-service agreement.

Proposed law provides that a fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, protected person, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including but not limited to certain provisions of present law (R.S. 14:73.5 and 73.7).

Proposed law provides that a fiduciary with authority over the tangible, personal property of a decedent, protected person, principal, or settlor has the following rights: (1) To access the property and any digital asset stored in it and (2) To act as an authorized user for the purpose of computer fraud and unauthorized computer access laws, including but not limited to certain provisions of present law (R.S. 14:73.5 and 73.7).

Proposed law authorizes a custodian to disclose information in an account to a user's fiduciary when the information is required to terminate an account used to access digital assets licensed to the user.

Proposed law provides for a user's fiduciary to request a custodian to terminate the user's account. A fiduciary's request for termination is required to be written in either physical or electronic form and accompanied by both of the following: (1) If the user is deceased, a certified copy of the death certificate of the user and (2) A certified copy of the letter of appointment of the representative or a small succession affidavit or court order, power of attorney, or trust giving the fiduciary authority over the account.

If the fiduciary makes a request for account termination, and if requested by the custodian, proposed law requires the fiduciary to also provide either of the following: (1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account, (2) Evidence linking the account to the user, or (3) A finding by the court that the user had a specific account with the custodian identifiable by the information specified in proposed law.

Within 60 days after a custodian's receipt of certain information as described in proposed law, the custodian is required to comply with a fiduciary's or designated recipient's request to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may petition the court for an order directing compliance. A court order to direct compliance must contain a finding that compliance is not in violation of certain federal law (18 U.S.C. Section 2702).

Proposed law authorizes a custodian to notify the user that a request for disclosure or to terminate an account was made pursuant to the provisions of proposed law.

Proposed law provides that if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request, a custodian may deny a request from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account.

The provisions of proposed law do not limit a custodian's ability to obtain on its own accord, or to require a fiduciary or designated recipient requesting disclosure or termination, to obtain a court order which does all of the following: (1) Specifies that an account belongs to the protected person or principal, (2) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure, and (3) Contains a finding required by law other than required by the provisions of this Chapter.

Proposed law provides no liability for a custodian and its officers, employees, or agents for an act or omission done in good faith in compliance with the provisions of proposed law.

Proposed law provides if a decedent user does not give written direction for the disclosure of some or all of the decedent user's digital assets, and if the court has not ordered otherwise, the right to access any digital asset devolves by intestacy as provided in the proposed law.

Proposed law authorizes an intestate successor, after the attainment of a court order, to request the custodian to disclose the decedent user's digital assets, or terminate the account. Further provides if the successor makes such a request, the successor is required to submit all information requested by a custodian, exclusive to the information described in proposed law, and the custodian is required to comply with the request within 60 days.

Proposed law authorizes an intestate successor to petition the court for an order directing compliance, if the custodian fails to comply as requested.

Proposed law applies consideration for the need to promote uniformity of proposed law with respect to its subject matter among states that enact the Revised Uniform Fiduciary Access To Digital Assets Act.

Proposed law modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act. However, proposed law does not modify, limit, or supersede certain provisions of that Act, nor does it authorize electronic delivery of any of the notices described in certain Sections of that Act.

Proposed law provides that notwithstanding any other provision of law to the contrary, present law (R.S. 6:325 or 767) shall control how federally insured financial institutions provide internet or other electronic access to an authorized succession representative for the administration of a decedent's estate.

The provisions of proposed law are severable. If certain provisions or applications of proposed law are held invalid with respect to certain persons or circumstances, the respective invalidity does not affect other provisions or applications which can be given effect without the invalid provision or application.

(Adds R.S. 51:2701-2721)