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2 90th General Assembly

A Bill

3 Regular Session, 2015

HOUSE BILL 1362

4

5 By: Representatives Shepherd, *Broadaway, Sabin*

6 By: Senator J. Hutchinson

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For An Act To Be Entitled

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

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Subtitle

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TO CREATE THE UNIFORM FIDUCIARY ACCESS TO
DIGITAL ASSETS ACT.

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

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

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Subchapter 9 – Uniform Fiduciary Access to Digital Assets Act

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28-69-901. Short title.

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

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28-69-902. Definitions.

29

In this subchapter:

30

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

32

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

34

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

36

(4) “Catalogue of electronic communications” means information



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

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

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

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

10 (C) is not readily accessible to the public.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24
25 28-69-903. Applicability.

26 (a) This subchapter applies to:

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

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

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

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

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

1
2 28-69-904. Access by personal representative to digital asset of
3 decedent.

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

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

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

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

15
16 28-69-905. Access by guardian of the estate to digital asset of a
17 ward.

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

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

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

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

29
30 28-69-906. Access by agent to digital asset of principal.

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

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

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

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

7
8 28-69-907. Access by trustee to digital asset.

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

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

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

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

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

24
25 28-69-908. Fiduciary authority.

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

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

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

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

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

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

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

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

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

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

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

22
23 28-69-909. Compliance.

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

27 (1) access to the asset;

28 (2) control of the asset; and

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

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

32 (1) a personal representative with the right of access under §
33 28-69-904, the request must be accompanied by a certified copy of the Letters
34 Testamentary, Letters of Administration, or a small-estate affidavit or court
35 order;

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

1 28-69-905, the request must be accompanied by a certified copy of the court
2 order that gives the guardian of the estate authority over the digital asset;

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

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

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

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

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

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

25 26 28-69-910. Custodian immunity.

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

30 31 28-69-911. Uniformity of application and construction.

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

35 36 28-69-812. Relation to electronic signatures in global and national

1 commerce act.

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

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/s/Shepherd

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