

ASSEMBLY BILL NO. 434—COMMITTEE ON JUDICIARY

MARCH 23, 2015

Referred to Committee on Judiciary

SUMMARY—Enacts the Uniform Fiduciary Access to Digital Assets Act. (BDR 12-1094)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to personal representatives; enacting the Uniform Fiduciary Access to Digital Assets Act; repealing provisions concerning the authority of a personal representative of a decedent to direct the termination of certain electronic or digital accounts or assets of the decedent; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law authorizes, with certain exceptions, a personal representative of a decedent to direct the termination of certain accounts of a decedent, including: (1) certain Internet accounts; and (2) electronic or digital assets of the decedent. (NRS 143.188) **Section 38** of this bill repeals these provisions, and **sections 1-37** of this bill enact the Uniform Fiduciary Access to Digital Assets Act (the Act).

Sections 4-27 define various terms for purposes of the Act. **Section 28** provides that a personal representative of a decedent generally has the right to access: (1) the content of an electronic communication that the custodian of a digital asset is permitted to disclose under federal law; (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. **Sections 29-31** establish provisions granting similar rights to a conservator, agent and trustee, respectively, in certain circumstances.

Section 32 provides that a personal representative, conservator, agent or trustee that is an account holder or has the right to access a digital asset of an account holder: (1) generally may take any action concerning the asset to the extent of the account holder's authority and the power of the personal representative, conservator, agent or trustee under Nevada law; (2) has the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the personal representative, conservator, agent or trustee for the purpose of applicable electronic privacy laws; and (3) is an authorized user for the purpose of applicable computer-fraud and unauthorized-computer-access laws.



Section 32 also provides that with regard to tangible personal property that is capable of receiving, storing, processing or sending a digital asset, a personal representative, conservator, agent or trustee with authority over the property of certain persons: (1) has the right to access the property and any digital asset stored in it; and (2) is an authorized user for the purpose of applicable computer-fraud and unauthorized-computer-access laws.

Section 33 requires a personal representative, conservator, agent or trustee in certain circumstances to provide to a custodian of digital assets the respective document that grants a right of access to the personal representative, conservator, agent or trustee, and **section 34** provides immunity from liability to a custodian and its officers, employees and agents for an act or omission done in good faith in compliance with the provisions of the Act.

Section 37 provides that the Act applies to: (1) a fiduciary or agent acting under a will or power of attorney executed before, on or after October 1, 2015; (2) a personal representative acting for a decedent who died before, on or after October 1, 2015; (3) a conservatorship proceeding, whether pending in a court or commenced before, on or after October 1, 2015; and (4) a trustee acting under a trust created before, on or after October 1, 2015. **Section 37** also provides that the Act does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 143 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 36, inclusive, of this act.

Sec. 2. *Sections 2 to 36, inclusive, of this act may be cited as the Uniform Fiduciary Access to Digital Assets Act.*

Sec. 3. *As used in sections 2 to 36, inclusive, of this act, unless the context otherwise requires, the words and terms defined in sections 4 to 27, inclusive, of this act have the meanings ascribed to them in those sections.*

Sec. 4. *“Account holder” means a person that has entered into a terms-of-service agreement with a custodian or a fiduciary for the person.*

Sec. 5. *“Agent” means an attorney-in-fact granted authority under a durable or nondurable power of attorney.*

Sec. 6. *“Carries” means engages in the transmission of electronic communications.*

Sec. 7. *“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.*

Sec. 8. *“Conservator” means a person appointed by a court to manage the estate of a living individual. The term includes a limited conservator.*



Sec. 9. *“Content of an electronic communication” means information concerning the substance or meaning of the communication which:*

1. Has been sent or received by an account holder;

2. 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

3. Is not readily accessible to the public.

Sec. 10. *“Court” means a district court of this State.*

Sec. 11. *“Custodian” means a person that carries, maintains, processes, receives or stores a digital asset of an account holder.*

Sec. 12. *“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.*

Sec. 13. *“Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.*

Sec. 14. *“Electronic communication” has the same meaning as the definition in 18 U.S.C. § 2510(12).*

Sec. 15. *“Electronic-communication service” means a custodian that provides to an account holder the ability to send or receive an electronic communication.*

Sec. 16. *“Fiduciary” means an original, additional or successor personal representative, conservator, agent or trustee.*

Sec. 17. *“Information” means data, text, images, videos, sounds, codes, computer programs, software, databases or the like.*

Sec. 18. *“Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality or other legal entity.*

Sec. 19. *“Personal representative” means an executor, administrator, special administrator or person that performs substantially the same function under the laws of this State other than sections 2 to 36, inclusive, of this act.*

Sec. 20. *“Power of attorney” means a record that grants an agent authority to act in the place of a principal.*

Sec. 21. *“Principal” means an individual who grants authority to an agent in a power of attorney.*

Sec. 22. *“Protected person” means an individual for whom a conservator has been appointed. The term includes an individual for whom an application for the appointment of a conservator is pending.*

Sec. 23. *“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.*



1 **Sec. 24.** *“Remote-computing service” means a custodian that*
2 *provides to an account holder computer processing services or the*
3 *storage of digital assets by means of an electronic communications*
4 *system, as defined in 18 U.S.C. § 2510(14).*

5 **Sec. 25.** *“Terms-of-service agreement” means an agreement*
6 *that controls the relationship between an account holder and a*
7 *custodian.*

8 **Sec. 26.** *“Trustee” means a fiduciary with legal title to*
9 *property pursuant to an agreement or declaration that creates a*
10 *beneficial interest in another. The term includes a successor*
11 *trustee.*

12 **Sec. 27.** *“Will” includes a codicil, a testamentary instrument*
13 *that only appoints an executor, and an instrument that revokes or*
14 *revises a testamentary instrument.*

15 **Sec. 28.** *Subject to subsection 2 of section 32 of this act and*
16 *unless otherwise ordered by the court or provided in the will of a*
17 *decedent, the personal representative of the decedent has the right*
18 *to access:*

19 1. *The content of an electronic communication that the*
20 *custodian is permitted to disclose under the Electronic*
21 *Communications Privacy Act, 18 U.S.C. § 2702(b);*

22 2. *Any catalogue of electronic communications sent or*
23 *received by the decedent; and*

24 3. *Any other digital asset in which at death the decedent had*
25 *a right or interest.*

26 **Sec. 29.** *Subject to subsection 2 of section 32 of this act, the*
27 *court, after an opportunity for hearing, may grant a conservator*
28 *the right to access:*

29 1. *The content of an electronic communication that the*
30 *custodian is permitted to disclose under the Electronic*
31 *Communications Privacy Act, 18 U.S.C. § 2702(b);*

32 2. *Any catalogue of electronic communications sent or*
33 *received by the protected person; and*

34 3. *Any other digital asset in which the protected person has a*
35 *right or interest.*

36 **Sec. 30.** 1. *To the extent a power of attorney expressly*
37 *grants an agent authority over the content of an electronic*
38 *communication of the principal and subject to subsection 2 of*
39 *section 32 of this act, the agent has the right to access the content*
40 *of an electronic communication that the custodian is permitted to*
41 *disclose under the Electronic Communications Privacy Act, 18*
42 *U.S.C. § 2702(b).*

43 2. *Subject to subsection 2 of section 32 of this act and unless*
44 *otherwise ordered by the court or provided by a power of attorney,*
45 *an agent has the right to access:*



1 (a) Any catalogue of electronic communications sent or
2 received by the principal; and

3 (b) Any other digital asset in which the principal has a right or
4 interest.

5 **Sec. 31.** 1. Subject to subsection 2 of section 32 of this act
6 and unless otherwise ordered by the court or provided in a trust, a
7 trustee that is an original account holder has the right to access
8 any digital asset held in trust, including any catalogue of
9 electronic communications of the trustee and the content of an
10 electronic communication.

11 2. Subject to subsection 2 of section 32 of this act and unless
12 otherwise ordered by the court or provided in a trust, a trustee that
13 is not an original account holder has the right to access:

14 (a) The content of an electronic communication that the
15 custodian is permitted to disclose under the Electronic
16 Communications Privacy Act, 18 U.S.C. § 2702(b);

17 (b) Any catalogue of electronic communications sent or
18 received by the original or any successor account holder; and

19 (c) Any other digital asset in which the original or any
20 successor account holder has a right or interest.

21 **Sec. 32.** 1. A fiduciary that is an account holder or has the
22 right under sections 2 to 36, inclusive, of this act to access a digital
23 asset of an account holder:

24 (a) Subject to the terms-of-service agreement, copyright law
25 and other applicable law, may take any action concerning the
26 asset to the extent of the account holder's authority and the
27 fiduciary's power under the laws of this State other than sections 2
28 to 36, inclusive, of this act;

29 (b) Has, for the purpose of applicable electronic privacy laws,
30 the lawful consent of the account holder for the custodian to
31 divulge the content of an electronic communication to the
32 fiduciary; and

33 (c) Is, for the purpose of applicable computer-fraud and
34 unauthorized-computer-access laws, including NRS 205.473 to
35 205.513, inclusive, an authorized user.

36 2. Unless an account holder, after October 1, 2015, agrees to
37 a provision in a terms-of-service agreement that limits a
38 fiduciary's access to a digital asset of the account holder by an
39 affirmative act separate from the account holder's assent to other
40 provisions of the agreement:

41 (a) The provision is void as against the strong public policy of
42 this State; and

43 (b) The fiduciary's access under sections 2 to 36, inclusive, of
44 this act to a digital asset does not violate the terms-of-service



1 *agreement even if the agreement requires notice of a change in*
2 *the account holder's status.*

3 3. *A choice-of-law provision in a terms-of-service agreement*
4 *is unenforceable against a fiduciary acting under sections 2 to 36,*
5 *inclusive, of this act to the extent the provision designates law that*
6 *enforces a limitation on a fiduciary's access to a digital asset, and*
7 *the limitation is void under subsection 2.*

8 4. *As to tangible personal property capable of receiving,*
9 *storing, processing or sending a digital asset, a fiduciary with*
10 *authority over the property of a decedent, protected person,*
11 *principal or settlor:*

12 (a) *Has the right to access the property and any digital asset*
13 *stored in it; and*

14 (b) *Is an authorized user for purposes of any applicable*
15 *computer-fraud and unauthorized-computer-access laws,*
16 *including NRS 205.473 to 205.513, inclusive.*

17 **Sec. 33.** 1. *If a fiduciary with a right under sections 2 to 36,*
18 *inclusive, of this act to access a digital asset of an account holder*
19 *complies with subsection 2, the custodian shall comply with the*
20 *fiduciary's request in a record for:*

21 (a) *Access to the asset;*

22 (b) *Control of the asset; and*

23 (c) *A copy of the asset to the extent permitted by copyright law.*

24 2. *If a request under subsection 1 is made by:*

25 (a) *A personal representative with the right of access under*
26 *section 28 of this act, the request must be accompanied by a*
27 *certified copy of the letter of appointment of the representative or*
28 *a small-estate affidavit or court order;*

29 (b) *A conservator with the right of access under section 29 of*
30 *this act, the request must be accompanied by a certified copy of the*
31 *court order that gives the conservator authority over the digital*
32 *asset;*

33 (c) *An agent with the right of access under section 30 of this*
34 *act, the request must be accompanied by an original or a copy of*
35 *the power of attorney that authorizes the agent to exercise*
36 *authority over the digital asset and a certification of the agent,*
37 *under penalty of perjury, that the power of attorney is in effect;*
38 *and*

39 (d) *A trustee with the right of access under section 31 of this*
40 *act, the request must be accompanied by a certified copy of the*
41 *trust instrument that authorizes the trustee to exercise authority*
42 *over the digital asset.*

43 3. *A custodian shall comply with a request made pursuant to*
44 *subsection 1 not later than 60 days after receipt. If the custodian*



1 *fails to comply, the fiduciary may apply to the court for an order*
2 *directing compliance.*

3 4. *Instead of furnishing a copy of the trust instrument under*
4 *paragraph (d) of subsection 2, the trustee may provide a*
5 *certification of trust. The certification:*

6 (a) *Must contain the following information:*

7 (1) *That the trust exists and the date the trust instrument*
8 *was executed;*

9 (2) *The identity of the settlor;*

10 (3) *The identity and address of the trustee;*

11 (4) *That there is nothing inconsistent in the trust with*
12 *respect to the trustee's powers over digital assets;*

13 (5) *Whether the trust is revocable and the identity of any*
14 *person holding a power to revoke the trust;*

15 (6) *Whether a cotrustee has authority to sign or otherwise*
16 *authenticate; and*

17 (7) *Whether all or fewer than all cotrustees are required to*
18 *exercise powers of the trustee;*

19 (b) *Must be signed or otherwise authenticated by a trustee;*

20 (c) *Must state that the trust has not been revoked, modified or*
21 *amended in a manner that would cause the representations*
22 *contained in the certification of trust to be incorrect; and*

23 (d) *Need not contain the dispositive terms of the trust.*

24 5. *A custodian that receives a certification under subsection 4*
25 *may require the trustee to provide copies of excerpts from*
26 *the original trust instrument and later amendments designating*
27 *the trustee and conferring on the trustee the power to act in the*
28 *pending transaction.*

29 6. *A custodian that acts in reliance on a certification under*
30 *subsection 4 without knowledge that the representations contained*
31 *in it are incorrect is not liable to any person for so acting and may*
32 *assume without inquiry the existence of facts stated in the*
33 *certification.*

34 7. *A person that in good faith enters into a transaction in*
35 *reliance on a certification under subsection 4 may enforce the*
36 *transaction against the trust property as if the representations*
37 *contained in the certification were correct.*

38 8. *A person that demands the trust instrument in addition to a*
39 *certification under subsection 4 or excerpts under subsection 5 is*
40 *liable for damages, including attorney's fees, if the court*
41 *determines that the person did not act in good faith in demanding*
42 *the instrument.*

43 9. *This section does not limit the right of a person to obtain a*
44 *copy of a trust instrument in a judicial proceeding concerning the*
45 *trust.*



1 **Sec. 34.** *A custodian and its officers, employees and agents*
2 *are immune from liability for an act or omission done in good*
3 *faith in compliance with sections 2 to 36, inclusive, of this act.*

4 **Sec. 35.** *In applying and construing this uniform act,*
5 *consideration must be given to the need to promote uniformity of*
6 *the law with respect to its subject matter among states that enact it.*

7 **Sec. 36.** *This act modifies, limits and supersedes the federal*
8 *Electronic Signatures in Global and National Commerce Act, 15*
9 *U.S.C. §§ 7001 et seq., but does not modify, limit or supersede §*
10 *101(c) of that act, 15 U.S.C. § 7001(c), or authorize electronic*
11 *delivery of any of the notices described in § 103(b) of that act, 15*
12 *U.S.C. § 7003(b).*

13 **Sec. 37.** 1. Sections 2 to 36, inclusive, of this act apply to:
14 (a) A fiduciary or agent acting under a will or power of attorney
15 executed before, on or after October 1, 2015;
16 (b) A personal representative acting for a decedent who died
17 before, on or after October 1, 2015;
18 (c) A conservatorship proceeding, whether pending in a court or
19 commenced before, on or after October 1, 2015; and
20 (d) A trustee acting under a trust created before, on or after
21 October 1, 2015.
22 2. Sections 2 to 36, inclusive, of this act do not apply to a
23 digital asset of an employer used by an employee in the ordinary
24 course of the employer's business.
25 **Sec. 38.** NRS 143.188 is hereby repealed.

TEXT OF REPEALED SECTION

143.188 Power to direct termination of certain electronic or digital accounts or assets.

1. Except as otherwise provided in subsection 2, subject to such restrictions as may be prescribed in the will of a decedent or by an order of a court of competent jurisdiction, a personal representative has the power to direct the termination of any account of the decedent, including, without limitation:

- (a) An account on any:
 - (1) Social networking Internet website;
 - (2) Web log service Internet website;
 - (3) Microblog service Internet website;
 - (4) Short message service Internet website; or
 - (5) Electronic mail service Internet website; or
- (b) Any similar electronic or digital asset of the decedent.



2. The provisions of subsection 1 do not authorize a personal representative to direct the termination of any financial account of the decedent, including, without limitation, a bank account or investment account.

3. The act by a personal representative to direct the termination of any account or asset of a decedent pursuant to subsection 1 does not invalidate or abrogate any conditions, terms of service or contractual obligations the holder of such an account or asset has with the provider or administrator of the account, asset or Internet website.

