

SENATE BILL 326

By Norris

AN ACT to amend Tennessee Code Annotated, Title 30; Title 31; Title 32; Title 34; Title 35 and Title 39, relative to access to digital assets by certain fiduciaries.

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

SECTION 1. Tennessee Code Annotated, Title 35, is amended by adding Sections 2 through 13 as a new chapter 51.

SECTION 2. This chapter shall be known and may be cited as the "Uniform Fiduciary Access to Digital Assets Act."

SECTION 3. In this chapter:

(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) "Conservator" means a person appointed by a court to manage the estate of a person with a disability. "Conservator" includes a limited conservator;

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

(A) Has been sent or received by the 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;

(7) "Court" means any court of record that has jurisdiction to hear matters concerning personal representatives, conservators, guardians, agents acting pursuant to a power of attorney, or trustees;

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

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

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

(11) "Electronic communication" has the same meaning as defined in 18 U.S.C. § 2510(12);

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

(13) "Fiduciary" means an original, additional, or successor personal representative, conservator, guardian, agent, or trustee;

(14) "Governing instrument" means a will, trust, instrument creating a power of attorney, or other dispositive or nominative instrument;

(15) "Guardian" means a person appointed by a court to manage the estate of a minor. "Guardian" includes a limited guardian;

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

(17) "Limited conservator" means a conservator with partial, restricted, or temporary powers;

(18) "Limited guardian" means a guardian with partial, restricted, or temporary powers;

(19) "Minor" means an unemancipated individual who has not attained eighteen (18) years of age and who has not otherwise been emancipated, and for whom a guardian has been appointed. "Minor" includes an individual for whom an application for the appointment of a guardian is pending;

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

(21) "Person with a disability" means an individual eighteen (18) years of age or older determined by a court to be in need of partial or full supervision, protection, and assistance by reason of mental illness, physical illness or injury, developmental disability, or other mental or physical incapacity, and for whom a conservator has been appointed. "Person with a disability" includes an individual for whom an application for the appointment of a conservator is pending;

(22) "Personal representative" means an executor, administrator, special administrator, or person that performs substantially the same function under the law of this state other than this chapter;

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

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

(25) "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;

(26) "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. § 2510(14);

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

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

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

SECTION 4.

(a) This chapter applies to:

(1) A fiduciary or agent acting under a will or power of attorney executed before, on, or after July 1, 2015;

(2) A personal representative acting for a decedent who died before, on, or after July 1, 2015;

(3) A conservatorship or guardianship proceeding, whether pending in a court or commenced before, on, or after July 1, 2015; and

(4) A trustee acting under a trust created before, on, or after July 1, 2015.

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

SECTION 5. Subject to Section 9(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. § 2702(b));

(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.

SECTION 6. Subject to Section 9(b), the court, after an opportunity for hearing under title 34, chapter 1, may grant a guardian or conservator 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. § 2702(b));

(2) Any catalogue of electronic communications sent or received by the minor or person with a disability; and

(3) Any other digital asset in which the minor or person with a disability has a right or interest.

SECTION 7.

(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 Section 9(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. § 2702(b)).

(b) Subject to Section 9(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.

SECTION 8.

(a) Subject to Section 9(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 Section 9(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. § 2702(b));

(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.

SECTION 9.

(a) A fiduciary that is an account holder or has the right under this chapter 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 chapter;

(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, including title 39, chapter 14, part 6, an authorized user.

(b) Unless an account holder, after the effective date of this act, 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 chapter 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 chapter 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, minor, person with a disability, 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, including title 39, chapter 14, part 6.

SECTION 10.

(a) If a fiduciary with a right under this chapter 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 Section 5, the request must be accompanied by a certified copy of the letters of administration or letters testamentary appointing the personal representative, a small-estate affidavit under title 30, chapter 4, or a court order;

(2) A conservator or guardian with the right of access under Section 6, the request must be accompanied by a certified copy of the court order that gives the conservator or guardian authority over the digital asset;

(3) An agent with the right of access under Section 7, 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 Section 8, the request must be accompanied by a certified copy of the trust instrument, or a certification of the trust under § 35-15-1013, 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 sixty (60) days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

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

SECTION 11. 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 chapter.

SECTION 12. In applying and construing this Uniform Fiduciary Access to Digital Assets 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.

SECTION 13. This chapter modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act (15 U.S.C. §§ 7001 et seq.), but does not modify, limit, or supersede Section 101(c), Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001(c)), or authorize electronic delivery of any of the notices described in Section 103(b), Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7003(b)).

SECTION 14. Tennessee Code Annotated, Section 39-14-602, is amended by adding the following new subsection:

(e) Any person who accesses, causes to be accessed, or attempts to access a digital asset pursuant to the Uniform Fiduciary Access to Digital Assets Act, compiled in title 35, chapter 51, is not in violation of this chapter.

SECTION 15. Tennessee Code Annotated, Section 34-6-109, is amended by adding the following as a new subdivision:

(23) Access any catalogue of electronic communications sent or received by the principal, and any other digital asset in which the principal has a right or interest, pursuant to the Uniform Fiduciary Access to Digital Assets Act, compiled in title 35,

chapter 51. For purposes of this subdivision (23), "catalogue of electronic communications" and "digital asset" have the same meaning as defined in the Uniform Fiduciary Access to Digital Assets Act, compiled in title 35, chapter 51;

SECTION 16. Tennessee Code Annotated, Title 34, Chapter 6, Part 1, is amended by adding the following as a new section:

34-6-112. Subject to the Uniform Fiduciary Access to Digital Assets Act, compiled in title 35, chapter 51, if any power of attorney expressly grants an attorney-in-fact or other agent authority over the content of an electronic communication of the principal, then the attorney-in-fact or other agent shall have the power and authority 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. § 2702(b)). For purposes of this section, "content of an electronic communication," "custodian," and "electronic communication" have the same meaning as defined in the Uniform Fiduciary Access to Digital Assets Act, compiled in title 35, chapter 51.

SECTION 17. The Tennessee Code Commission is requested to publish in the Tennessee Code Annotated, Title 35, Chapter 51, the official comments that are filed with the executive secretary of the Tennessee Code Commission within thirty (30) days of the enactment of this act.

SECTION 18. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 19. This act shall take effect July 1, 2015, the public welfare requiring it.