

LEGISLATURE OF NEBRASKA
ONE HUNDRED FOURTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 829

FINAL READING

Introduced by Harr, 8.

Read first time January 08, 2016

Committee: Judiciary

- 1 A BILL FOR AN ACT relating to fiduciaries; to adopt the Revised Uniform
- 2 Fiduciary Access to Digital Assets Act (2015); to provide an
- 3 operative date; and to provide severability.
- 4 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 18 of this act shall be known and may be
2 cited as the Revised Uniform Fiduciary Access to Digital Assets Act
3 (2015).

4 Sec. 2. In the Revised Uniform Fiduciary Access to Digital Assets
5 Act (2015):

6 (1) Account means an arrangement under a terms-of-service agreement
7 in which a custodian carries, maintains, processes, receives, or stores a
8 digital asset of the user or provides goods or services to the user;

9 (2) Agent means an attorney in fact granted authority under a
10 durable or nondurable power of attorney;

11 (3) Carries means engages in the transmission of an electronic
12 communication;

13 (4) Catalogue of electronic communications means information that
14 identifies each person with which a user has had an electronic
15 communication, the time and date of the communication, and the electronic
16 address of the person;

17 (5) Conservator means a person appointed by a court to manage the
18 estate of a living individual. The term includes a limited conservator;

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

21 (A) has been sent or received by a user;

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

25 (C) is not readily accessible to the public;

26 (7) Court means the county court;

27 (8) Custodian means a person that carries, maintains, processes,
28 receives, or stores a digital asset of a user;

29 (9) Designated recipient means a person chosen by a user using an
30 online tool to administer digital assets of the user;

31 (10) Digital asset means an electronic record in which an individual

1 has a right or interest. The term does not include an underlying asset or
2 liability unless the asset or liability is itself an electronic record;

3 (11) Electronic means relating to technology having electrical,
4 digital, magnetic, wireless, optical, electromagnetic, or similar
5 capabilities;

6 (12) Electronic communication has the meaning set forth in 18 U.S.C.
7 2510(12), as amended;

8 (13) Electronic communication service means a custodian that
9 provides to a user the ability to send or receive an electronic
10 communication;

11 (14) Fiduciary means an original, additional, or successor personal
12 representative, conservator, agent, or trustee;

13 (15) Information means data, text, images, videos, sounds, codes,
14 computer programs, software, databases, or the like;

15 (16) Online tool means an electronic service provided by a custodian
16 that allows the user, in an agreement distinct from the terms-of-service
17 agreement between the custodian and user, to provide directions for
18 disclosure or nondisclosure of digital assets to a third person;

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

22 (18) Personal representative means an executor, administrator,
23 special administrator, or person that performs substantially the same
24 function under law of this state other than the Revised Uniform Fiduciary
25 Access to Digital Assets Act (2015);

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

28 (20) Principal means an individual who grants authority to an agent
29 in a power of attorney;

30 (21) Protected person means an individual for whom a conservator has
31 been appointed. The term includes an individual for whom an application

1 for the appointment of a conservator is pending;

2 (22) Record means information that is inscribed on a tangible medium
3 or that is stored in an electronic or other medium and is retrievable in
4 perceivable form;

5 (23) Remote-computing service means a custodian that provides to a
6 user computer-processing services or the storage of digital assets by
7 means of an electronic communications system, as defined in 18 U.S.C.
8 2510(14), as amended;

9 (24) Terms-of-service agreement means an agreement that controls the
10 relationship between a user and a custodian;

11 (25) Trustee means a fiduciary with legal title to property under an
12 agreement or declaration that creates a beneficial interest in another.
13 The term includes a successor trustee;

14 (26) User means a person that has an account with a custodian; and

15 (27) Will includes a codicil, testamentary instrument that only
16 appoints an executor, and instrument that revokes or revises a
17 testamentary instrument.

18 Sec. 3. (a) The Revised Uniform Fiduciary Access to Digital Assets
19 Act (2015) applies to:

20 (1) a fiduciary acting under a will or power of attorney executed
21 before, on, or after the operative date of this act;

22 (2) a personal representative acting for a decedent who died before,
23 on, or after the operative date of this act;

24 (3) a conservatorship proceeding commenced before, on, or after the
25 operative date of this act; and

26 (4) a trustee acting under a trust created before, on, or after the
27 operative date of this act.

28 (b) The Revised Uniform Fiduciary Access to Digital Assets Act
29 (2015) applies to a custodian if the user resides in this state or
30 resided in this state at the time of the user's death.

31 (c) The Revised Uniform Fiduciary Access to Digital Assets Act

1 (2015) does not apply to a digital asset of an employer used by an
2 employee in the ordinary course of the employer's business.

3 Sec. 4. (a) A user may use an online tool to direct the custodian
4 to disclose to a designated recipient or not to disclose some or all of
5 the user's digital assets, including the content of electronic
6 communications. If the online tool allows the user to modify or delete a
7 direction at all times, a direction regarding disclosure using an online
8 tool overrides a contrary direction by the user in a will, trust, power
9 of attorney, or other record.

10 (b) If a user has not used an online tool to give direction under
11 subsection (a) of this section or if the custodian has not provided an
12 online tool, the user may allow or prohibit in a will, trust, power of
13 attorney, or other record, disclosure to a fiduciary of some or all of
14 the user's digital assets, including the content of electronic
15 communications sent or received by the user.

16 (c) A user's direction under subsection (a) or (b) of this section
17 overrides a contrary provision in a terms-of-service agreement that does
18 not require the user to act affirmatively and distinctly from the user's
19 assent to the terms of service.

20 Sec. 5. (a) The Revised Uniform Fiduciary Access to Digital Assets
21 Act (2015) does not change or impair a right of a custodian or a user
22 under a terms-of-service agreement to access and use digital assets of
23 the user.

24 (b) The Revised Uniform Fiduciary Access to Digital Assets Act
25 (2015) does not give a fiduciary or a designated recipient any new or
26 expanded rights other than those held by the user for whom, or for whose
27 estate, the fiduciary or designated recipient acts or represents.

28 (c) A fiduciary's or designated recipient's access to digital assets
29 may be modified or eliminated by a user, by federal law, or by a terms-
30 of-service agreement if the user has not provided direction under section
31 4 of this act.

1 Sec. 6. (a) When disclosing digital assets of a user under the
2 Revised Uniform Fiduciary Access to Digital Assets Act (2015), the
3 custodian may at its sole discretion:

4 (1) grant a fiduciary or designated recipient full access to the
5 user's account;

6 (2) grant a fiduciary or designated recipient partial access to the
7 user's account sufficient to perform the tasks with which the fiduciary
8 or designated recipient is charged; or

9 (3) provide a fiduciary or designated recipient a copy in a record
10 of any digital asset that, on the date the custodian received the request
11 for disclosure, the user could have accessed if the user were alive and
12 had full capacity and access to the account.

13 (b) A custodian may assess a reasonable administrative charge for
14 the cost of disclosing digital assets under the Revised Uniform Fiduciary
15 Access to Digital Assets Act (2015).

16 (c) A custodian need not disclose under the Revised Uniform
17 Fiduciary Access to Digital Assets Act (2015) a digital asset deleted by
18 a user.

19 (d) If a user directs or a fiduciary requests a custodian to
20 disclose under the Revised Uniform Fiduciary Access to Digital Assets Act
21 (2015) some, but not all, of the user's digital assets, the custodian
22 need not disclose the assets if segregation of the assets would impose an
23 undue burden on the custodian. If the custodian believes the direction or
24 request imposes an undue burden, the custodian or fiduciary may seek an
25 order from the court to disclose:

26 (1) a subset limited by date of the user's digital assets;

27 (2) all of the user's digital assets to the fiduciary or designated
28 recipient;

29 (3) none of the user's digital assets; or

30 (4) all of the user's digital assets to the court for review in
31 camera.

1 Sec. 7. If a deceased user consented or a court directs disclosure
2 of the contents of electronic communications of the user, the custodian
3 shall disclose to the personal representative of the estate of the user
4 the content of an electronic communication sent or received by the user
5 if the representative gives the custodian:

6 (1) a written request for disclosure in physical or electronic form;

7 (2) a certified copy of the death certificate of the user;

8 (3) a certified copy of the letter of appointment of the
9 representative or a small-estate affidavit or court order;

10 (4) unless the user provided direction using an online tool, a copy
11 of the user's will, trust, power of attorney, or other record evidencing
12 the user's consent to disclosure of the content of electronic
13 communications; and

14 (5) if requested by the custodian:

15 (A) a number, username, address, or other unique subscriber or
16 account identifier assigned by the custodian to identify the user's
17 account;

18 (B) evidence linking the account to the user; or

19 (C) a finding by the court that:

20 (i) the user had a specific account with the custodian, identifiable
21 by the information specified in subdivision (5)(A) of this section;

22 (ii) disclosure of the content of electronic communications of the
23 user would not violate 18 U.S.C. 2701 et seq., as amended, 47 U.S.C. 222,
24 as amended, or other applicable law;

25 (iii) unless the user provided direction using an online tool, the
26 user consented to disclosure of the content of electronic communications;

27 or

28 (iv) disclosure of the content of electronic communications of the
29 user is reasonably necessary for administration of the estate.

30 Sec. 8. Unless the user prohibited disclosure of digital assets or
31 the court directs otherwise, a custodian shall disclose to the personal

1 representative of the estate of a deceased user a catalogue of electronic
2 communications sent or received by the user and digital assets, other
3 than the content of electronic communications, of the user, if the
4 representative gives the custodian:

5 (1) a written request for disclosure in physical or electronic form;

6 (2) a certified copy of the death certificate of the user;

7 (3) a certified copy of the letter of appointment of the
8 representative or a small-estate affidavit or court order; and

9 (4) if requested by the custodian:

10 (A) a number, username, address, or other unique subscriber or
11 account identifier assigned by the custodian to identify the user's
12 account;

13 (B) evidence linking the account to the user;

14 (C) an affidavit stating that disclosure of the user's digital
15 assets is reasonably necessary for administration of the estate; or

16 (D) a finding by the court that:

17 (i) the user had a specific account with the custodian, identifiable
18 by the information specified in subdivision (4)(A) of this section; or

19 (ii) disclosure of the user's digital assets is reasonably necessary
20 for administration of the estate.

21 Sec. 9. To the extent a power of attorney expressly grants an agent
22 authority over the content of electronic communications sent or received
23 by the principal and unless directed otherwise by the principal or the
24 court, a custodian shall disclose to the agent the content if the agent
25 gives the custodian:

26 (1) a written request for disclosure in physical or electronic form;

27 (2) an original or copy of the power of attorney expressly granting
28 the agent authority over the content of electronic communications of the
29 principal;

30 (3) a certification by the agent, under penalty of perjury, that the
31 power of attorney is in effect; and

1 (4) if requested by the custodian:

2 (A) a number, username, address, or other unique subscriber or
3 account identifier assigned by the custodian to identify the principal's
4 account; or

5 (B) evidence linking the account to the principal.

6 Sec. 10. Unless otherwise ordered by the court, directed by the
7 principal, or provided by a power of attorney, a custodian shall disclose
8 to an agent with specific authority over digital assets or general
9 authority to act on behalf of a principal a catalogue of electronic
10 communications sent or received by the principal and digital assets,
11 other than the content of electronic communications, of the principal if
12 the agent gives the custodian:

13 (1) a written request for disclosure in physical or electronic form;

14 (2) an original or a copy of the power of attorney that gives the
15 agent specific authority over digital assets or general authority to act
16 on behalf of the principal;

17 (3) a certification by the agent, under penalty of perjury, that the
18 power of attorney is in effect; and

19 (4) if requested by the custodian:

20 (A) a number, username, address, or other unique subscriber or
21 account identifier assigned by the custodian to identify the principal's
22 account; or

23 (B) evidence linking the account to the principal.

24 Sec. 11. Unless otherwise ordered by the court or provided in a
25 trust, a custodian shall disclose to a trustee that is an original user
26 of an account any digital asset of the account held in trust, including a
27 catalogue of electronic communications of the trustee and the content of
28 electronic communications.

29 Sec. 12. Unless otherwise ordered by the court, directed by the
30 user, or provided in a trust, a custodian shall disclose to a trustee
31 that is not an original user of an account the content of an electronic

1 communication sent or received by an original or successor user and
2 carried, maintained, processed, received, or stored by the custodian in
3 the account of the trust if the trustee gives the custodian:

4 (1) a written request for disclosure in physical or electronic form;

5 (2) a certified copy of the trust instrument, or a certification of
6 the trust under section 30-38,102, that includes consent to disclosure of
7 the content of electronic communications to the trustee;

8 (3) a certification by the trustee, under penalty of perjury, that
9 the trust exists and the trustee is a currently acting trustee of the
10 trust; and

11 (4) if requested by the custodian:

12 (A) a number, username, address, or other unique subscriber or
13 account identifier assigned by the custodian to identify the trust's
14 account; or

15 (B) evidence linking the account to the trust.

16 Sec. 13. Unless otherwise ordered by the court, directed by the
17 user, or provided in a trust, a custodian shall disclose, to a trustee
18 that is not an original user of an account, a catalogue of electronic
19 communications sent or received by an original or successor user and
20 stored, carried, or maintained by the custodian in an account of the
21 trust and any digital assets, other than the content of electronic
22 communications, in which the trust has a right or interest if the trustee
23 gives the custodian:

24 (1) a written request for disclosure in physical or electronic form;

25 (2) a certified copy of the trust instrument, or a certification of
26 the trust under section 30-38,102;

27 (3) a certification by the trustee, under penalty of perjury, that
28 the trust exists and the trustee is a currently acting trustee of the
29 trust; and

30 (4) if requested by the custodian:

31 (A) a number, username, address, or other unique subscriber or

1 account identifier assigned by the custodian to identify the trust's
2 account; or

3 (B) evidence linking the account to the trust.

4 Sec. 14. (a) After an opportunity for a hearing under section
5 30-2636, the court may grant a conservator access to the digital assets
6 of a protected person.

7 (b) Unless otherwise ordered by the court or directed by the user, a
8 custodian shall disclose to a conservator the catalogue of electronic
9 communications sent or received by a protected person and any digital
10 assets, other than the content of electronic communications, in which the
11 protected person has a right or interest if the conservator gives the
12 custodian:

13 (1) a written request for disclosure in physical or electronic form;

14 (2) a certified copy of the court order that gives the conservator
15 authority over the digital assets of the protected person; and

16 (3) if requested by the custodian:

17 (A) a number, username, address, or other unique subscriber or
18 account identifier assigned by the custodian to identify the account of
19 the protected person; or

20 (B) evidence linking the account to the protected person.

21 (c) A conservator with general authority to manage the assets of a
22 protected person may request a custodian of the digital assets of the
23 protected person to suspend or terminate an account of the protected
24 person for good cause. A request made under this section must be
25 accompanied by a certified copy of the court order giving the conservator
26 authority over the protected person's property.

27 Sec. 15. (a) The legal duties imposed on a fiduciary charged with
28 managing tangible property apply to the management of digital assets,
29 including:

30 (1) the duty of care;

31 (2) the duty of loyalty; and

1 (3) the duty of confidentiality.

2 (b) A fiduciary's or designated recipient's authority with respect
3 to a digital asset of a user:

4 (1) except as otherwise provided in section 4 of this act, is
5 subject to the applicable terms-of-service agreement;

6 (2) is subject to other applicable law, including copyright law;

7 (3) in the case of a fiduciary, is limited by the scope of the
8 fiduciary's duties; and

9 (4) may not be used to impersonate the user.

10 (c) A fiduciary with authority over the property of a decedent,
11 protected person, principal, or settlor has the right to access any
12 digital asset in which the decedent, protected person, principal, or
13 settlor had a right or interest and that is not held by a custodian or
14 subject to a terms-of-service agreement.

15 (d) A fiduciary acting within the scope of the fiduciary's duties is
16 an authorized user of the property of the decedent, protected person,
17 principal, or settlor for the purpose of applicable computer-fraud and
18 unauthorized-computer-access laws, including the Computer Crimes Act and
19 section 86-2,104.

20 (e) A fiduciary with authority over the tangible personal property
21 of a decedent, protected person, principal, or settlor:

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

24 (2) is an authorized user for the purpose of computer-fraud and
25 unauthorized-computer-access laws, including the Computer Crimes Act and
26 section 86-2,104.

27 (f) A custodian may disclose information in an account to a
28 fiduciary of the user when the information is required to terminate an
29 account used to access digital assets licensed to the user.

30 (g) A fiduciary of a user may request a custodian to terminate the
31 user's account. A request for termination must be in writing, in either

1 physical or electronic form, and accompanied by:

2 (1) if the user is deceased, a certified copy of the death
3 certificate of the user;

4 (2) a certified copy of the letter of appointment of the
5 representative or a small-estate affidavit or court order, power of
6 attorney, or trust giving the fiduciary authority over the account; and

7 (3) if requested by the custodian:

8 (A) a number, username, address, or other unique subscriber or
9 account identifier assigned by the custodian to identify the user's
10 account;

11 (B) evidence linking the account to the user; or

12 (C) a finding by the court that the user had a specific account with
13 the custodian, identifiable by the information specified in subdivision
14 (3)(A) of this subsection.

15 Sec. 16. (a) Not later than sixty days after receipt of the
16 information required under sections 7 to 15 of this act, a custodian
17 shall comply with a request under the Revised Uniform Fiduciary Access to
18 Digital Assets Act (2015) from a fiduciary or designated recipient to
19 disclose digital assets or terminate an account. If the custodian fails
20 to comply, the fiduciary or designated recipient may apply to the court
21 for an order directing compliance.

22 (b) An order under subsection (a) of this section directing
23 compliance must contain a finding that compliance is not in violation of
24 18 U.S.C. 2702, as amended.

25 (c) A custodian may notify the user that a request for disclosure or
26 to terminate an account was made under the Revised Uniform Fiduciary
27 Access to Digital Assets Act (2015).

28 (d) A custodian may deny a request under the Revised Uniform
29 Fiduciary Access to Digital Assets Act (2015) from a fiduciary or
30 designated recipient for disclosure of digital assets or to terminate an
31 account if the custodian is aware of any lawful access to the account

1 following the receipt of the fiduciary's request.

2 (e) The Revised Uniform Fiduciary Access to Digital Assets Act
3 (2015) does not limit a custodian's ability to obtain or require a
4 fiduciary or designated recipient requesting disclosure or termination
5 under the act to obtain a court order which:

6 (1) specifies that an account belongs to the protected person or
7 principal;

8 (2) specifies that there is sufficient consent from the protected
9 person or principal to support the requested disclosure; and

10 (3) contains a finding required by law other than the act.

11 (f) A custodian and its officers, employees, and agents are immune
12 from liability for an act or omission done in good faith in compliance
13 with the Revised Uniform Fiduciary Access to Digital Assets Act (2015).

14 Sec. 17. In applying and construing the Revised Uniform Fiduciary
15 Access to Digital Assets Act (2015), consideration must be given to the
16 need to promote uniformity of the law with respect to its subject matter
17 among states that enact it.

18 Sec. 18. The Revised Uniform Fiduciary Access to Digital Assets Act
19 (2015) modifies, limits, or supersedes the federal Electronic Signatures
20 in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but does not
21 modify, limit, or supersede section 101(c) of that act, 15 U.S.C.
22 7001(c), or authorize electronic delivery of any of the notices described
23 in section 103(b) of that act, 15 U.S.C. 7003(b).

24 Sec. 19. This act becomes operative on January 1, 2017.

25 Sec. 20. If any provision of this act or its application to any
26 person or circumstance is held invalid, the invalidity does not affect
27 other provisions or applications of this act which can be given effect
28 without the invalid provision or application, and to this end the
29 provisions of this act are severable.