

LEGISLATURE OF NEBRASKA
ONE HUNDRED FOURTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 463

Introduced by Harr, 8.

Read first time January 20, 2015

Committee: Judiciary

- 1 A BILL FOR AN ACT relating to fiduciaries; to adopt the Technology
- 2 Information Management Act; and to provide severability.
- 3 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 12 of this act shall be known and may be
2 cited as the Technology Information Management Act.

3 Sec. 2. In the Technology Information Management Act:

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

6 (2) Agent means an attorney in fact granted authority under a
7 lasting or nonlasting power of attorney.

8 (3) Carries means engages in the transmission of electronic
9 communications.

10 (4) Catalogue of electronic communications means information that
11 identifies each person with which an account holder has had an electronic
12 communication, the time and date of the communication, and the electronic
13 address of the person.

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

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

18 (A) has been sent or received by the account holder;

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

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

23 (7) Court means the county court.

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

26 (9) Digital asset means a record that is electronic. The term does
27 not include an underlying asset or liability unless the asset or
28 liability is itself a record that is electronic.

29 (10) Electronic means relating to technology having electrical,
30 digital, magnetic, wireless, optical, electromagnetic, or similar
31 capabilities.

1 (11) Electronic communication has the same meaning as the definition
2 in 18 U.S.C. 2510(12), as the section existed on the effective date of
3 this act.

4 (12) Electronic-communication service means a custodian that
5 provides to an account holder the ability to send or receive an
6 electronic communication.

7 (13) Fiduciary means an original, additional, or successor personal
8 representative, conservator, agent, or trustee.

9 (14) Governing instrument means a will, trust, instrument creating a
10 power of attorney, or other dispositive or nominative instrument.

11 (15) Information means data, text, images, videos, sounds, codes,
12 computer programs, software, databases, or the like.

13 (16) Person means an individual, estate, business or nonprofit
14 entity, public corporation, government or governmental subdivision,
15 agency, instrumentality, or other legal entity.

16 (17) Personal representative means an executor, administrator,
17 special administrator, or person that performs substantially the same
18 function under law of this state other than the act.

19 (18) Power of attorney means a record that grants an agent authority
20 to act in the place of a principal.

21 (19) Principal means an individual who grants authority to an agent
22 in a power of attorney.

23 (20) Protected person means an individual for whom a conservator has
24 been appointed. The term includes an individual for whom an application
25 for the appointment of a conservator is pending.

26 (21) Record means information that is inscribed on a tangible medium
27 or that is stored in an electronic or other medium and is retrievable in
28 perceivable form.

29 (22) Remote-computing service means a custodian that provides to an
30 account holder computer processing services or the storage of digital
31 assets by means of an electronic communications system, as defined in 18

1 U.S.C. 2510(14), as the section existed on the effective date of this
2 act.

3 (23) Terms-of-service agreement means an agreement that controls the
4 relationship between an account holder and a custodian.

5 (24) Trustee means a fiduciary with legal title to property pursuant
6 to an agreement or declaration that creates a beneficial interest in
7 another. The term includes a successor trustee.

8 (25) Will includes a codicil, testamentary instrument that only
9 appoints an executor, and instrument that revokes or revises a
10 testamentary instrument.

11 Sec. 3. (a) The Technology Information Management Act applies to:

12 (1) a fiduciary or agent acting under a will or power of attorney
13 executed before, on, or after the effective date of this act;

14 (2) a personal representative acting for a decedent who died before,
15 on, or after the effective date of this act;

16 (3) a conservatorship proceeding, whether pending in a court or
17 commenced before, on, or after the effective date of this act; and

18 (4) a trustee acting under a trust created before, on, or after the
19 effective date of this act.

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

22 Sec. 4. Subject to subsection (b) of section 8 of this act and
23 unless otherwise ordered by the court or provided in the will of a
24 decedent, the personal representative of the decedent has the right to
25 access:

26 (1) the content of an electronic communication that the custodian is
27 permitted to disclose under the Electronic Communications Privacy Act of
28 1986, 18 U.S.C. 2702(b), as the section existed on the effective date of
29 this act;

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

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

3 Sec. 5. Subject to subsection (b) of section 8 of this act, the
4 court, after an opportunity for hearing under sections 30-2601 to
5 30-2661, may grant a conservator the right to access:

6 (1) the content of an electronic communication that the custodian is
7 permitted to disclose under the Electronic Communications Privacy Act of
8 1986, 18 U.S.C. 2702(b), as the section existed on the effective date of
9 this act;

10 (2) any catalogue of electronic communications sent or received by
11 the protected person; and

12 (3) any other digital asset in which the protected person has a
13 right or interest.

14 Sec. 6. (a) To the extent a power of attorney expressly grants an
15 agent authority over the content of an electronic communication of the
16 principal and subject to subsection (b) of section 8 of this act, the
17 agent has the right to access the content of an electronic communication
18 that the custodian is permitted to disclose under the Electronic
19 Communications Privacy Act of 1986, 18 U.S.C. 2702(b), as the section
20 existed on the effective date of this act.

21 (b) Subject to subsection (b) of section 8 of this act and unless
22 otherwise ordered by the court or provided by a power of attorney, an
23 agent has the right to access:

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

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

28 Sec. 7. (a) Subject to subsection (b) of section 8 of this act and
29 unless otherwise ordered by the court or provided in a trust, a trustee
30 that is an original account holder has the right to access any digital
31 asset held in trust, including any catalogue of electronic communications

1 of the trustee and the content of an electronic communication.

2 (b) Subject to subsection (b) of section 8 of this act and unless
3 otherwise ordered by the court or provided in a trust, a trustee that is
4 not an original account holder has the right to access:

5 (1) the content of an electronic communication that the custodian is
6 permitted to disclose under the Electronic Communications Privacy Act of
7 1986, 18 U.S.C. 2702(b), as the section existed on the effective date of
8 this act;

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

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

13 Sec. 8. (a) A fiduciary that is an account holder or has the right
14 under the Technology Information Management Act to access a digital asset
15 of an account holder:

16 (1) subject to the terms-of-service agreement, copyright law, and
17 other applicable law, may take any action concerning the asset to the
18 extent of the account holder's authority and the fiduciary's power under
19 the law of this state other than the act;

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

23 (3) is, for the purpose of applicable computer-fraud and
24 unauthorized-computer-access laws, including the Computer Crimes Act, an
25 authorized user.

26 (b) Unless an account holder, after the effective date of this act,
27 agrees to a provision in a terms-of-service agreement that limits a
28 fiduciary's access to a digital asset of the account holder by an
29 affirmative act separate from the account holder's assent to other
30 provisions of the agreement:

31 (1) the provision is void as against the strong public policy of

1 this state; and

2 (2) the fiduciary's access under the Technology Information
3 Management Act to a digital asset does not violate the terms-of-service
4 agreement even if the agreement requires notice of a change in the
5 account holder's status.

6 (c) A choice-of-law provision in a terms-of-service agreement is
7 unenforceable against a fiduciary acting under the act to the extent the
8 provision designates law that enforces a limitation on a fiduciary's
9 access to a digital asset, and the limitation is void under subsection
10 (b) of this section.

11 (d) As to tangible personal property capable of receiving, storing,
12 processing, or sending a digital asset, a fiduciary with authority over
13 the property of a decedent, protected person, principal, or settlor:

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

16 (2) is an authorized user for purposes of any applicable computer-
17 fraud and unauthorized-computer-access laws, including the Computer
18 Crimes Act.

19 Sec. 9. (a) If a fiduciary with a right under the Technology
20 Information Management Act to access a digital asset of an account holder
21 complies with subsection (b) of this section, the custodian shall comply
22 with the fiduciary's request in a record for:

23 (1) access to the asset;

24 (2) control of the asset; and

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

26 (b) If a request under subsection (a) of this section is made by:

27 (1) a personal representative with the right of access under section
28 4 of this act, the request must be accompanied by a certified copy of the
29 letter of appointment of the representative or a small-estate affidavit
30 or court order;

31 (2) a conservator with the right of access under section 5 of this

1 act, the request must be accompanied by a certified copy of the court
2 order that gives the conservator authority over the digital asset;

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

8 (4) a trustee with the right of access under section 7 of this act,
9 the request must be accompanied by a certified copy of the trust
10 instrument, or a certification of the trust under sections 30-38,102 to
11 30-38,107, that authorizes the trustee to exercise authority over the
12 digital asset.

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

17 (d) Instead of furnishing a copy of the trust instrument under
18 subdivision (b)(4) of this section, the trustee may provide a
19 certification of trust. The certification:

20 (1) must contain the following information:

21 (A) that the trust exists and the date the trust instrument was
22 executed;

23 (B) the identity of the settlor;

24 (C) the identity and address of the trustee;

25 (D) that there is nothing inconsistent in the trust with respect to
26 the trustee's powers over digital assets;

27 (E) whether the trust is revocable and the identity of any person
28 holding a power to revoke the trust;

29 (F) whether a cotrustee has authority to sign or otherwise
30 authenticate; and

31 (G) whether all or fewer than all cotrustees are required to

1 exercise powers of the trustee;

2 (2) must be signed or otherwise authenticated by a trustee;

3 (3) must state that the trust has not been revoked, modified, or
4 amended in a manner that would cause the representations contained in the
5 certification of trust to be incorrect; and

6 (4) need not contain the dispositive terms of the trust.

7 (e) A custodian that receives a certification under subsection (d)
8 of this section may require the trustee to provide copies of excerpts
9 from the original trust instrument and later amendments designating the
10 trustee and conferring on the trustee the power to act in the pending
11 transaction.

12 (f) A custodian that acts in reliance on a certification under
13 subsection (d) of this section without knowledge that the representations
14 contained in it are incorrect is not liable to any person for so acting
15 and may assume without inquiry the existence of facts stated in the
16 certification.

17 (g) A person that in good faith enters into a transaction in
18 reliance on a certification under subsection (d) of this section may
19 enforce the transaction against the trust property as if the
20 representations contained in the certification were correct.

21 (h) A person that demands the trust instrument in addition to a
22 certification under subsection (d) of this section or excerpts under
23 subsection (e) of this section is liable for damages, including
24 attorneys' fees, if the court determines that the person did not act in
25 good faith in demanding the instrument.

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

28 Sec. 10. A custodian and its officers, employees, and agents are
29 immune from liability for an act or omission done in good faith in
30 compliance with the Technology Information Management Act.

31 Sec. 11. In applying and construing the Technology Information

1 Management Act, consideration must be given to the need to promote
2 uniformity among similar laws with respect to the subject matter of the
3 act among states that enact such similar laws.

4 Sec. 12. The Technology Information Management Act modifies,
5 limits, or supersedes the Electronic Signatures in Global and National
6 Commerce Act, 15 U.S.C. 7001 et seq., but does not modify, limit, or
7 supersede section 101(c) of that act, 15 U.S.C. 7001(c), or authorize
8 electronic delivery of any of the notices described in section 103(b) of
9 that act, 15 U.S.C. 7003(b), as the sections existed on the effective
10 date of this act.

11 Sec. 13. If any section in this act or any part of any section is
12 declared invalid or unconstitutional, the declaration shall not affect
13 the validity or constitutionality of the remaining portions.