FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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WITH PREFATORY NOTE AND COMMENTS

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Prefatory Note for the Drafting Committee

The purpose of this act is to vest fiduciaries with the authority to access, manage, distribute, copy or delete digital assets and accounts. It addresses four different types of fiduciaries: personal representatives of decedents’ estates, conservators for protected persons, agents acting pursuant to a power of attorney, and trustees.

As the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual’s death or incapacity are becoming more common. Few laws exist on the rights of fiduciaries over digital assets. Few holders of digital assets and accounts consider the fate of their online presences once they are no longer able to manage their assets. And these assets have real value: according to a 2011 survey from McAfee, Intel’s security-technology unit, American consumers valued their digital assets, on average, at almost $55,000.1 These assets range from online gaming pieces to photos, to digital music, to client lists, to bank accounts, to bill-paying, etc. There are 30 million Facebook accounts that belong to dead people.2 The average individual has 25 passwords. Some service providers have explicit policies on what will happen when an individual dies, others do not;3 even where these policies are included in the terms of service, most consumers click-through these agreements.

Only a minority of states has enacted legislation on fiduciary access to digital assets, including Connecticut, Idaho, Indiana, Oklahoma, Rhode Island, Nevada, and Virginia, and the existing statutes grant varying degrees of access to different types of digital assets. In addition, other states, including Massachusetts, Nebraska, New York, and Oregon, have considered, or are considering, legislation.4 Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, and whether the principal’s death or incapacity is covered.

This draft is for review by the Drafting Committee at our March meeting. The draft is divided into sixteen sections. Sections 1-3 contain general provisions and definitions, including those relating to the scope of the fiduciary’s authority. Sections 4-7 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Section 8 contains provisions relating to the rights of the fiduciary to recover property. Section 9 addresses compliance, and Section 10 grants immunity to custodians. Sections 11-16 address miscellaneous topics, including the effective date of the Act and similar issues. The act

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4. A memo summarizing these laws and legislative proposals is available on the shared Google Drive.
addresses only the rights of the four types of fiduciaries, and it is designed solely to provide access without changing the ownership of the underlying asset.

After many of the proposed sections, a Comment to the Committee discusses the drafting of the section and raises issues for Committee consideration. The Comments should be read in conjunction with the proposed statutory text.
FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Fiduciary Access to Digital Assets Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Account holder” means an individual who has entered into a terms-of-service agreement. The term includes a deceased individual who entered into the agreement during the individual’s lifetime.

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

(3) “Catalogue of electronic communications” means the record of the name of each person with which an account holder communicated, the time and date of the communication, and the electronic address of each person in an electronic communication that is controlled by an electronic communication service or a remote computing service.

(4) “[Conservator] means a person appointed by a court to manage the estate of an individual. The term includes a limited [conservator].

(5) “Content of electronic communications” means information concerning the substance, or meaning of an electronic communication that is controlled by an electronic communication service or a remote computing service that is not readily accessible to the public.

(6) “Court” means the [insert name of court in this state having jurisdiction in matters relating to the content of this [act]].

(7) “Custodian” means a person that stores, or has control of, a digital asset or electronic communication of an account holder.

(8) “Digital asset” means an electronic record. The term includes the catalogue of
electronic communications and the content of electronic communications.

(9) “Electronic” means relating to technology having electrical, digital, magnetic,
wireless, optical, electromagnetic, or similar capabilities.

(10) “Electronic communication” means an electronic record while in electronic storage
by an electronic communication service and an electronic record which is carried or maintained
by a remote computing service.

(11) “Electronic communication service” means any service that provides to the public
the ability to send or receive electronic communications.

(12) “Fiduciary” means each person who is an original, additional, or successor personal
representative, [conservator], agent, or trustee.

(13) “Governing instrument” means a will, a trust, an instrument creating a power of
attorney, or other dispositive or nominative instrument.

(14) “Information” means data, text, images, videos, sounds, codes, computer programs,
software, databases, or similar intelligence of any nature.

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

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

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

(18) “Principal” means an individual who grants authority to an agent in a power of
attorney.
(19) “Protected person” means an individual for whom a [conservator] has been appointed.

(20) “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.

(21) “Remote computing service” means any service that provides to the public computer processing services or storage of electronic records by means of an electronic communication system.

(22) “Terms-of-service agreement” means an agreement that controls the relationship between an account holder and a custodian.

(23) “Trustee” means a fiduciary with legal title to an asset pursuant to an agreement or declaration that creates a beneficial interest in others.

(24) “Will” includes a codicil and a testamentary instrument that only appoints an executor or revokes or revises another testamentary instrument.

Comments for the Committee

The definitions of agent, conservator, court, electronic, fiduciary, governing instrument, information, person, personal representative, power of attorney, principal, property, protected person, protective order, record, and will are based on those in the Uniform Probate Code or the Uniform Power of Appointment Act. The other definitions are new for this act, although the definition of digital service comes from the White House Digital Government Strategy: http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-strategy.pdf. The definition of “contents” is adapted from 18 U.S.C. § 2510(8), the definition of “electronic communication” is adapted from the language of 18 U.S.C. §§ 2510(12) and 2702(a)(1) and (2), the definition of “electronic communication service” is drawn from 18 U.S.C. 2510(15), and the definition of “remote computing service” is adapted from 18 U.S.C. § 2711(2), to help ensure the Act’s compliance with federal law.

An account holder is an individual not acting in a fiduciary capacity.

This newest draft includes a definition for “catalogue of electronic communications.” Past drafts had referred to these as “records,” limited to log-type information about an electronic communication; because “record” has a different definition under the Act, the new term should clarify the distinction between the catalogue and the content of an electronic communication.
A custodian does not include an employer because an employer typically does not have a
terms-of-service agreement with an employee. Any digital assets created through employment
generally belong to the employer. A custodian includes an electronic service provider as well as
any other entity that provides or stores electronic data.

Digital assets include digital currency and similar products currently in existence and yet
to be invented. Digital assets do not include any material that the account holder has not
obtained legally, such as pirated media.

The definition of “electronic communication” is designed to cover only those records that
are subject to the privacy protections of federal law under the Electronic Communications
Privacy Act, 18 U.S.C. §§ 2510 et seq. Electronic communication is a subcategory of “digital
assets.”

A “fiduciary” under this Act occupies a status recognized by state law, and fiduciaries’
powers under the Act are subject to the relevant limits established by other state laws.

The terms-of-service agreement definition relies on the definition found in UCC § 1-201
(3). It refers to any agreement that controls the relationship between an account holder and a
custodian, even though it might be called a terms-of-use agreement, a click-through license, or a
similar term.

SECTION 3. SCOPE. This [act] applies only to a grant of authority to a fiduciary who
is acting lawfully in accordance with fiduciary obligations and duties.

Comment

Section 3 is critical because it establishes that the act applies only to fiduciaries that act in
compliance with their fiduciary obligation. The section distinguishes the authority of fiduciaries,
who exercise authority subject to this act only on behalf of the account holder, from any other
efforts to access the digital assets and electronic communications. Family members or friends
may seek such access, but, unless they are fiduciaries, their efforts are subject to other laws and
are not covered by this Act.

SECTION 4. AUTHORITY OF PERSONAL REPRESENTATIVE OVER
DIGITAL ASSETS OF A DECEDENT. Unless prohibited by the will of a decedent, a court,

law of this state other than this [act], or federal law, a personal representative of the decedent
may access:

(1) any digital asset of the decedent, other than the content of an electronic

communication;
(2) the catalogue of electronic communications sent or received by the decedent; and

(3) the content of electronic communications described in subsection (2) if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

Comments for the Committee

Subsection (1) establishes the default rule that the personal representative is authorized to administer all of the decedent’s digital assets other than material covered by the Electronic Communications Privacy Act (ECPA). It is modeled on the formulation of the personal representative’s default power set out in UPC Sec. 3-715.

The subsection clarifies the difference between fiduciary authority over digital assets other than electronic communications protected by ECPA, and authority over ECPA-covered electronic communications. For electronic communications, subsections (a)(2) and (3) establish procedures that cover: first, the catalogue (logs and records) that providers may release without consent under ECPA; and second, ECPA-covered communications. Federal law distinguishes between the permissible disclosure of the “contents” of a communication, covered in 18 U.S.C. § 2702(b), and of “a record or other information pertaining to a” subscriber or customer, covered in 18 U.S.C. § 2702(c); see Matthew J. Tokson, The Content/Envelope Distinction in Internet Law, 50 Wm. & Mary L. Rev. 2105 (2009).

Content-based material can, in turn, be divided into two types of communications: those received by the account holder and those sent. Material when the account holder is the “addressee or intended recipient” can be disclosed either to that individual or to an agent for that person, 18 U.S.C. § 2702(b)(1), and it can also be disclosed to third parties with the “lawful consent” of the addressee or intended recipient. 18 U.S.C. § 2702(b)(3). Material for which the account holder is the “originator” can only be disclosed to third parties with the account holder’s “lawful consent.” 18 U.S.C. § 2702(b)(3). (Note that, when the account holder is the addressee or intended recipient, material can be disclosed under either (b)(1) or (b)(3), but that when the account holder is the originator, lawful consent is required.) By contrast to content-based material, non-content material can be disclosed not only with the lawful consent of the account holder but also to any person other than a governmental entity (which would presumably include fiduciaries). This information includes material about any communication sent, such as the addressee, sender, date/time, and other subscriber data, what this draft defines as the “catalogue of electronic communication”. (Further discussion of this issue is set out in the Comments to Section 8, infra.)

Comment

The phrase, “Unless prohibited by the will,” is intended to indicate that a will controls the personal representative’s authority. As is true more generally with respect to interpretation of wills, public policy can override the explicit terms of a will.
SECTION 5. AUTHORITY OF [CONSERVATOR] OVER DIGITAL ASSET OF
A PROTECTED PERSON.

(a) The court, after an opportunity for hearing, may authorize a [conservator] to access:

(1) any digital asset of the individual or protected person, other than the content of electronic communications;

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

(3) the content of electronic communications described in subsection (2) if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

(b) In granting authority to a [conservator] under subsection (a), the court shall consider:

(1) the intent of the individual or protected person with respect to the authority granted to the extent that intent can be ascertained; or

(2) whether granting authority to a [conservator] is in the individual’s or the protected person’s best interest.

Comments for the Committee

Section 5 establishes that the conservator must be specifically authorized by the court to access the protected person’s digital assets and electronic communications. Each of the different levels of access must be specifically granted by court order. The requirement in Section 5 for express authority over digital assets does not limit the fiduciary’s authority over the underlying “bricks and mortar” assets, such as a bank account. As a legislative enacting matter, the meaning of the term “hearing” will vary, depending on a state’s procedures.

Section 5 is comparable to Section 4. It responds to the concerns of internet service providers who believe that the Act should be structured to clarify the difference between fiduciary authority over digital assets other than electronic communications protected by federal law, the Electronic Communications Privacy Act (ECPA), and fiduciary authority over ECPA-protected electronic communications. Consequently, this draft sets out procedures that cover all digital assets as well as the catalogue of electronic communications (logs and records) that providers may release without consent under ECPA, and then addresses ECPA-covered communications.
This section is designed to clarify that a decision by the court to grant powers to the conservator under this section must be based primarily on the decision that the individual or protected person would have made, if of full capacity. Subsection (b) draws on UPC Section 5-411. The individual’s personal values and expressed desires, past and present, are to be considered when making decisions about the conservator’s authority. Existing state law may also set out the requisite standards for a conservator’s actions, and the bracketed language allows for reference to those laws. Under Section 8, the conservator has the same power over digital assets as the account holder. The conservator must exercise authority in the interests of the protected person.

SECTION 6. CONTROL BY AGENT OF DIGITAL ASSETS.

(a) Unless prohibited by a power of attorney, an agent may access any digital assets of the principal, including the catalogue of electronic communications sent or received by the principal, but not including the content of those electronic communications.

(b) If a power of attorney expressly grants authority to an agent over electronic communications of the principal, the agent may access the content of electronic communications sent or received by the principal, if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

Comments for the Committee

This section establishes that the agent has default authority over the principal’s digital assets and the records, other than the contents, of the principal’s electronic communications. When the principal does not want the agent to exercise this authority, then the power of attorney must explicitly prevent an agent from doing so.

The situation is different with respect to the contents of electronic communications. In that case, the agent must be specifically authorized by the principal to access the contents of the principal’s electronic communications. This provision is modeled on UPC Sec. 5B-201(a).

Because a power of attorney contains the consent of the account holder, ECPA should not prevent the agent from exercising authority over the content of electronic communications. There should be no question that an explicit delegation of authority in a power of attorney constitutes authorization from the account holder to access digital assets, and provides “lawful consent” to allow disclosure of electronic communications from an electronic communication service or a remote computing service pursuant to applicable law. Both authorization and lawful consent are important because 18 U.S.C. § 2701 deals with intentional access without authorization and 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

The American College of Trusts and Estates Counsel’s State Laws Committee and others asked the Committee to consider whether the authority over digital assets and electronic
communications should be a default power. The Committee has decided that the power to access
the contents of electronic communications must be expressly granted, because when expressed
and not default, it satisfies the lawful consent requirement of ECPA. The agent has default
authority over other digital assets under (a). States may need to amend their power of attorney
forms to include this power.

SECTION 7. CONTROL BY TRUSTEE OF DIGITAL ASSETS.

(a) Unless prohibited by the settlor in the terms of a trust, the trustee that is an initial
account holder may access each digital asset, including the catalogue of electronic
communications sent or received by the account holder and the content of those electronic
communications, held in the trust.

(b) Unless prohibited by the settlor in the terms of a trust, when the trustee is a successor
account holder, the trustee may access:

(1) the digital assets, including the catalogue of electronic communications sent or
received by the account holder, but not including the content of those electronic
communications, held in the trust; and

(2) the content of electronic communications described in subsection (b)(1) if the
electronic communication service or the remote computing service is permitted under 18 U.S.C.
Section 2702(b) to disclose the content.

Comments for the Committee

Access to digital assets, including the contents of the electronic communications is
presumed with respect to assets for which the trustee is the initial account holder. A trustee may
have title to digital assets and electronic communications when the trust itself becomes the
account holder of a digital asset held by the trust, and when the trustee becomes an account
holder for trustee business, situations addressed in subsection (a).

Subsection (b) addresses situations involving either an inter vivos transfer of a digital
asset into a trust, or transfer via a pourover will of a digital asset into a trust. There should be no
question that holding property in trust form constitutes authorization from the account holder for
the trustee to access digital assets, including both the catalogue and contents of the electronic
communications, and this provides “lawful consent” to allow disclosure of electronic
communications from an electronic communication service or a remote computing service
pursuant to applicable law. Nonetheless, subsection (b) distinguishes between the catalogue and
contents of electronic communications in case there are any questions about whether the form in which property – transferred into a trust - is held constitutes lawful consent. Both authorization and lawful consent are important because 18 U.S.C. § 2701 deals with intentional access without authorization, and 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

The underlying trust documents and default trust law will supply the allocation of responsibilities between and among trustees.

SECTION 8. FIDUCIARY ACCESS AND AUTHORITY.

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

(1) may take actions concerning the asset to the extent of the account holder’s authority and the fiduciary’s powers under law of this state other than this [act], subject to copyright and other law and the terms-of-service agreement;

(2) is deemed to have the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the fiduciary pursuant to state and federal electronic privacy law; and

(3) is an authorized user under the federal Computer Fraud and Abuse Act [18 U.S.C. Section 1030 et seq.] [and state computer fraud and abuse acts].

(b) any provision in a terms-of-service agreement that limits a fiduciary’s access to the digital assets of the account holder under this [act] is void as against the strong public policy of this state, unless the limitations of that provision are signed by the account holder separately from the other provisions of the terms-of-service agreement.

(c) subject to Section 9(a), a fiduciary’s access to a digital asset is not a violation of a terms-of-service agreement, notwithstanding a provision that bars third party access.

(d) A fiduciary with authority over the equipment of a decedent, protected person, principal, or settlor that can receive, store, process, or send an electronic record may access that equipment and any electronic record stored on it.
Comment

This section clarifies that the fiduciary has the same authority as the account holder if the
account holder were the one exercising the authority (note that, where the account holder has
died, this means that the fiduciary has access as of the hour before the account holder’s death).
Of course, in exercising its responsibilities, the fiduciary is subject to the duties and obligations
established pursuant to state fiduciary law and is liable for breach of those duties.

This issue concerning the parameters of the fiduciary’s authority potentially arises in two
situations: 1) the fiduciary obtains access to a password directly from the account holder, as
would be true in various circumstances such as for the trustee of an inter vivos trust or someone
who has stored passwords with a digital locker and those passwords are then transmitted to the
fiduciary; and 2) the fiduciary has obtained access pursuant to this act.

The fiduciary does not, however, obtain power over any digital assets if that property was
illegally obtained by the account holder. The section also provides that control by a fiduciary
should not be considered a transfer that would violate the anti-transfer terms of a terms-of-
service agreement. Finally, the fiduciary has the same responsibilities as the account holder
more generally. For example, a fiduciary cannot delete an account if this would be fraudulent.
Similarly, if the account holder could challenge provisions in a terms-of-service agreement, then
the fiduciary is similarly able to do so. See Ajemian v. Yahoo!, Inc., 987 N.E.2d 604 (Mass.
2013).

Subsection (a) is designed to establish that the fiduciary is authorized to exercise control
over digital assets in accordance with other applicable laws. The language mirrors that used in
Title II of the Electronic Communications Privacy Act of 1986 (ECPA), known as the Stored
Communications Act (SCA), 18 U.S.C. § 2701 et seq. The subsection clarifies that the fiduciary
is “authorized” under the two federal statutes that prohibit unauthorized access to computers and
computer data, the SCA and the Computer Fraud and Abuse Act, as well as pursuant to any
comparable state laws criminalizing unauthorized access.

The Stored Communications Act contains two potentially relevant prohibitions.

1) 18 U.S.C. § 2701(a), which concerns access to the digital assets, makes it a crime for

et seq. (2006); see, e.g., Orin S. Kerr, A User’s Guide to the Stored Communications Act, and a Legislator’s
Guide to Amending It, 72 GEO. WASH. L. REV. 1208 (2004); Allan D. Hankins, Note, Compelling Disclosure of
Facebook Content Under the Stored Communications Act, 17 SUFFOLK J. TRIAL & APP. ADVOC. 295 (2012).

6 See Computerized Hacking and Unauthorized Access States Laws, NATIONAL CONFERENCE OF STATE
LEGISLATURES (May 21, 2009), http://www.ncsl.org/issues-research/telecom/computer-hacking-and-
unauthorized-access-laws.aspx; Christina Kunz, Peter Rademacher & Lucie O’Neill, 50 State Survey of
Unauthorized Access (2012) (on file with the Committee and available on the Google Drive); James D. Lamm,
et al., The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital
Property.pdf.
anyone to “intentionally access [] without authorization a facility through which an electronic communication service is provided” as well as to “intentionally exceed [] an authorization to access that facility.” Thus, someone who has authorization to access the facility is not engaging in criminal behavior. Moreover, this section does not apply to “conduct authorized . . . by a user of that service with respect to a communication of or intended for that user.”7

2) 18 U.S.C. § 2702, “Voluntary disclosure of customer communications or records,” concerns actions by the service provider. It prohibits an electronic communication service or a remote computing service from knowingly divulging the contents of a communication that is stored by or carried or maintained on that service unless disclosure is made (among other exceptions) “to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient” or “with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.” 18 U.S.C. § 2702(b)(1), (3) (emphasis added). The statute permits disclosure of “customer records” that do not include content, either with lawful consent from the customer or “to any person other than a governmental entity.” 18 U.S.C. § 2702(c)(2) and (6). Thus, unlike the contents, the provider is permitted to disclose the non-content "records" of the electronic communications to anyone except the government, and may disclose to the government with the customer's lawful consent or in certain emergencies.

The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers. 18 U.S.C. § 1030. Like the SCA, the CFAA similarly protects against anyone who “intentionally accesses a computer without authorization or exceeds authorized access.” 18 U.S.C. § 1030(a).

State laws vary in their coverage, but typically prohibit unauthorized access.

By defining the fiduciary as an authorized user: 1) the fiduciary has authorization to access the files under the first section of the SCA, 18 U.S.C. § 2701, as well as under the CFAA; and 2) the fiduciary has “the lawful consent” of the originator/subscriber so that the provider can voluntarily disclose the files pursuant to the second relevant provision of the SCA, 18 U.S.C. § 2702. Moreover, this language should be adequate to avoid liability under the state unauthorized access laws.

Subsection (b) is new and is based on discussions at the last Drafting Committee meeting. This subsection is discussed in more detail in Commissioner Walsh’s issues memo.

Subsection (c) reinforces the concept that the fiduciary “steps into the shoes” of the account holder, with no more – and no fewer – rights. For example, the terms-of-service agreement (TOSA) controls the rights of the account holder (settlor, principal, incapacitated person, decedent). The Act does not permit the account holder’s fiduciary to override the TOSA in order to make a digital asset or collection of digital assets “descendible,” although it does preserve the rights of the fiduciary to make the same claims as the account holder. See Ajemian v. Yahoo!, Inc., 987 N.E.2d 604 (Mass. 2013); David Horton, Indescendibility, 102 Calif. L. Rev. __ (forthcoming 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311506.

7 18 U.S.C. §§ 2701(a), (c)(2).
The providers have indicated that they would feel more comfortable with language like the following, suggested by Commissioner Dan Robbins:

The fiduciary’s authority to access the digital asset is the same as the account holder except where (i) the TOS permits an account holder to pre-designate another individual to have exclusive access to the account upon the incapacitation or death of the account holder, in which case the fiduciary would have no access; or (ii) the custodian has conspicuously disclosed within the TOS a default rule for deleting the contents of the account upon death of the account holder.

Subsection (d) is designed to clarify that the fiduciary is authorized to access digital assets stored on equipment of the decedent, protected person, principal, or settlor, thereby superseding state laws on unauthorized access to the equipment.

SECTION 9. COMPLIANCE.

(a) If a fiduciary that has a right to access a digital asset of an account holder under this act has complied 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; or

(3) a copy of the asset unless the asset is subject to the copyright of a third party.

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

(1) a personal representative with the right of access under Section 4, the request must be accompanied by a certified copy of [the letter of appointment of the representative or a small estate affidavit];

(2) a [conservator] with the right of access under Section 5, the request must be accompanied by a certified copy of the court order that gives the [conservator] authority over the digital asset;

(3) an agent with the right of access under Section 6, the request must be accompanied by a certified copy of a currently-effective power of attorney that authorizes the
agent to exercise authority over the digital asset; and

(4) a trustee with the right of access under Section 7, the request must be accompanied by a certified copy of the trust instrument [, or a certification of the trust under [cite trust-certification statute, such as Uniform Trust Code Section 1013,] that authorizes the trustee to exercise authority over the digital asset.

(c) A custodian shall comply with a request not later than [60] days after receipt of the request. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

(d) [Instead of furnishing a copy of a trust instrument under subsection (b)(4), the trustee may provide a certification of trust. A certification:

(1) must contain the following information:

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

(B) the identity of the settlor;

(C) the identity and address of the currently acting trustee;

(D) the powers of the trustee;

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

(F) whether the cotrustee has authority to sign or otherwise authenticate, and whether all or fewer than all cotrustees are required to exercise powers of the trustee;

(G) the trust’s taxpayer identification number; and

(H) the manner of taking title to trust property;

(2) may be signed or otherwise authenticated by any trustee;

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

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

(e) A recipient of a certification of trust under subsection (d) may require the trustee to provide copies of excerpts from the original trust instrument and later amendments which designate the trustee and confer on the trustee the power to act in the pending transaction.

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

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

(h) A person that demands the trust instrument in addition to a certification of trust under subsection (d) or excerpts under subsection (e) is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) 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.

Comment

The bracketed material allows states that have already enacted the UTC to use the shorter version. Those states that have not adopted the UTC may choose to include the bracketed material, which is a slight modification of the language in Uniform Trust Code Section 1013.

The Committee may want to consider the “copyright” language in subsection (a), which has been modified at the suggestion of Commissioner Robbins. He has also suggested, as an alternative, the following language: “(3) a copy of the asset unless the asset is a copyrighted motion picture, sound recording, software or electronic book where the copyright is held by a third party.”

Subsection (c) establishes 60 days as the appropriate time for compliance. The
Committee may want to discuss, at Style’s suggestion, whether to include an expedited time period.

SECTION 10. CUSTODIAN IMMUNITY. A custodian and its officers, employees, and agents are immune from liability for any action done in good faith in compliance with this [act].

Comment
This section establishes that custodians are protected from liability when they act in accordance with the procedures of this Act and in good faith. The types of actions covered include disclosure as well as transfer of copies.

SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform 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 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 13. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.

Legislative Note: Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.

SECTION 14. APPLICABILITY. This [act] applies to:
(1) a fiduciary or agent acting under a will, trust or power of attorney executed before, on
or after [the effective date of this [act]], except as otherwise provided in this [Act]; and

(2) a conservatorship proceeding, whether pending in a court or commenced before, on or after [the effective date of this [act]], except as otherwise provided in this [Act].

Comment

As the issues memo and the memo from Chris Kunz and John Gregory note, the Committee may want to discuss this provision in more detail.

SECTION 15. REPEALS; CONFORMING AMENDMENTS.

(a) …

(b) …

(c) …

SECTION 16. If the custodian has obligations under other state or federal laws to preserve records, this act does not override those other obligations.

SECTION 17. EFFECTIVE DATE. This [act] takes effect....