

BILL ANALYSIS

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S.B. 1193
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Digital assets are electronic records in which someone has a personal interest or right. They include electronic communications and records such as emails, text messages, online photographs, documents stored in a cloud, electronic bank statements, and other electronic communications or records. The advent of certain technologies has created challenges, particularly to a person who is tasked with managing the digital assets of someone who has either lost capacity or died.

The purpose of S.B. 1193 is twofold. First, it provides fiduciaries the legal authority to manage digital assets and electronic communications in the same manner that they manage tangible assets and accounts. S.B. 1193 specifies when a fiduciary may access the content of digital assets and electronic communications, and when only a catalog of the property is permitted to be accessed. Second, it provides custodians of digital assets and electronic communications the legal authority they need to interact with the fiduciaries of their users while honoring the user's privacy expectations for his or her personal communications. A custodian is granted immunity from liability for acts or omissions done in good faith compliance with the provisions of this bill.

S.B. 1193 gives Internet users the ability to plan for the management and disposition of their digital assets if they should die or become unable to manage their assets. This is accomplished by vesting fiduciaries with the authority to access, control, or copy digital assets and accounts.

As proposed, S.B. 1193 amends current law relating to the adoption of the Texas Revised Uniform Fiduciary Access to Digital Assets Act.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends the Estates Code, by adding Title 4, as follows:

TITLE 4. DIGITAL ASSETS

CHAPTER 2001. TEXAS REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 2001.001. SHORT TITLE. Authorizes this chapter to be cited as the Texas Revised Uniform Fiduciary Access to Digital Assets Act.

Sec. 2001.002. DEFINITIONS. Defines "account," "agent," "carries," "catalog of electronic communications," "content of an electronic communication," "custodian," "designated recipient," "digital asset," "electronic," "electronic communication," "electronic communication service," "fiduciary," "guardian," "information," "online tool,"

"person," "personal representative," "power of attorney," "principal," "record," "remote computing service," "terms-of-service agreement," "trustee," and "user."

Sec. 2001.003. APPLICABILITY. (a) Provides that this chapter applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(b) Provides that 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.

Sec. 2001.004. UNIFORMITY OF APPLICATION AND CONSTRUCTION. Requires that consideration be given, in applying and construing this chapter, to the need to promote uniformity of the law, with respect to the subject matter of this chapter, among states that enact a law based on the uniform act on which this chapter is based.

Sec. 2001.005. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. Provides that this chapter modifies, limits, and supersedes the federal 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)).

SUBCHAPTER B. GENERAL PROCEDURES FOR ACCESS TO DIGITAL ASSETS

Sec. 2001.051. USER DIRECTION FOR DISCLOSURE OF DIGITAL ASSETS. (a) Authorizes a user to use an online tool to direct the custodian to disclose or not to disclose to a designated recipient some or all of the user's digital assets, including the content of an electronic communication. Provides that if the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(b) Authorizes the user to, if a user has not used an online tool to give direction under Subsection (a) or if the custodian has not provided an online tool, allow or prohibit disclosure to a fiduciary of some or all of the user's digital assets, including the content of an electronic communication sent or received by the user, in a will, trust, power of attorney, or other record.

(c) Provides that a user's direction under Subsection (a) or (b) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

Sec. 2001.052. TERMS-OF-SERVICE AGREEMENT. (a) Provides that this chapter does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(b) Provides that this chapter does not give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate or trust, the fiduciary or designated recipient acts or represents.

(c) Authorizes a fiduciary's or designated recipient's access to digital assets to be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under Section 2001.051.

Sec. 2001.053. PROCEDURE FOR DISCLOSING DIGITAL ASSETS. (a) Authorizes the custodian to, when disclosing digital assets of a user under this chapter at the custodian's sole discretion, grant a fiduciary or designated recipient a certain amount of access.

(b) Authorizes a custodian to assess a reasonable administrative charge for the cost of disclosing digital assets under this chapter.

(c) Provides that a custodian is not required to disclose under this chapter a digital asset deleted by a user.

(d) Provides that, if a user directs or a fiduciary request a custodian to disclose under this chapter some, but not all, of the user's digital assets, the custodian is not required to disclose the assets if segregation of the assets would impose an undue burden on the custodian. Authorizes the custodian or fiduciary, if the custodian believes the direction or request imposes an undue burden, to seek an order from the court to disclose certain digital assets.

SUBCHAPTER C. PROCEDURES FOR DISCLOSURE OF DIGITAL ASSETS OF DECEASED USER

Sec. 2001.101. DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS OF DECEASED USER. (a) Requires the custodian to, if a deceased user consented to or a court directs disclosure of the content of an electronic communication of the user, disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian certain documentation.

(b) Requires the personal representative to, in addition to the items required to be given to the custodian under Subsection (a), provide certain requirements if requested by the custodian.

Sec. 2001.102. DISCLOSURE OF OTHER DIGITAL ASSETS OF DECEASED USER. (a) Requires a custodian to, unless the deceased user prohibited disclosure of digital assets or the court directs otherwise, disclose to the personal representative of the estate of a deceased user a catalog of electronic communications sent or received by the user and digital assets, other than the content of an electronic communication, of the user if the representative gives the custodian certain documentation.

(b) Requires the personal representative to, in addition to the items required to be given to the custodian under Subsection (a), provide certain documentation if requested by the custodian.

SUBCHAPTER D. PROCEDURES FOR DISCLOSURE OF DIGITAL ASSETS OF PRINCIPAL

Sec. 2001.131. DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS OF PRINCIPAL. (a) Requires a custodian to, to the extent a power of attorney expressly grants an agent authority over the content of an electronic communication sent or received by the principal and unless directed otherwise by the principal or the court, disclose to the agent the content of an electronic communication if the agent gives the custodian certain documentation.

(b) Requires the agent to, in addition to the items required to be given to the custodian under Subsection (a), provide certain information if requested by the custodian.

Sec. 2001.132. DISCLOSURE OF OTHER DIGITAL ASSETS OF PRINCIPAL. (a) Requires a custodian to, unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalog of electronic communications sent or received by the principal and digital assets of the principal, other than the content of an electronic communication, if the agent gives the custodian certain documentation.

(b) Requires the agent to, in addition to the items required to be given to the custodian under Subsection (a), provide certain information if requested by the custodian.

SUBCHAPTER E. DISCLOSURE OF DIGITAL ASSETS HELD IN TRUST

Sec. 2001.151. DISCLOSURE OF DIGITAL ASSETS HELD IN TRUST WHEN TRUSTEE IS ORIGINAL USER. Requires a custodian, unless otherwise ordered by the court or provided in a trust, to disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalog of electronic communications of the trustee and the content of an electronic communication.

Sec. 2001.152. DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS HELD IN TRUST WHEN TRUSTEE IS NOT ORIGINAL USER. (a) Requires a custodian to, unless otherwise ordered by the court, directed by the user, or provided in a trust, disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian certain information.

(b) Requires the trustee to, in addition to the items required to be given to the custodian under Subsection (a), provide certain information if requested by the custodian.

Sec. 2001.153. DISCLOSURE OF OTHER DIGITAL ASSETS HELD IN TRUST WHEN TRUSTEE IS NOT ORIGINAL USER. (a) Requires a custodian to, unless otherwise ordered by the court, directed by the user, or provided in a trust, disclose to a trustee that is not an original user of an account a catalog of an electronic communication sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets in which the trust has a right or interest, other than the content of an electronic communication, if the trustee gives the custodian certain request or certification.

(b) Requires the trustee to, in addition to the items required to be given to the custodian under Subsection (a), provide certain information if requested by the custodian.

SUBCHAPTER F. DISCLOSURE OF DIGITAL ASSETS TO GUARDIAN

Sec. 2001.171. DISCLOSURE OF DIGITAL ASSETS TO GUARDIAN. (a) Authorizes the court to, after an opportunity for a hearing under Title 3, grant the guardian of a ward access to the digital assets of the ward.

(b) Requires a custodian to, unless otherwise ordered by the court or directed by the user, disclose to the guardian of a ward the catalog of electronic communications set or received by the ward and any digital assets in which the ward has a right or interest, other than the content of an electronic communication if the guard gives the custodian certain documentation.

(c) Requires the guardian to, in addition to the items required to be given to the custodian under Subsection (b), provide the custodian with certain requested information.

(d) Authorizes the guardian of a ward to request a custodian of the digital assets of the ward to suspend or terminate an account of the ward for good cause. Requires that a request made under this section be accompanied by a certified copy of the court order giving the guardian authority over the ward's digital assets.

SUBCHAPTER G. DUTY AND AUTHORITY OF FIDUCIARY AND OTHERS REGARDING DIGITAL ASSETS

Sec. 2001.201. FIDUCIARY DUTY AND AUTHORITY. (a) Provides that the legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including the duty of care, the duty of loyalty, and the duty of confidentiality.

(b) Provides that a fiduciary's or designated recipient's authority with respect to a digital asset of a user, except as otherwise provided by Section 2001.051, is subject to the applicable terms of service, is subject to other applicable law, including copyright law; in the case of a fiduciary, is limited by the scope of the fiduciary's duties, and may not be used to impersonate the user.

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

(d) Provides that a fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, ward, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including all laws of this state governing unauthorized computer access.

(e) Provides that a fiduciary with authority over the tangible personal property of a decedent, ward, principal, or settlor has the right to access the property and any digital asset stored in it, and is an authorized user for the purpose of applicable computer fraud and unauthorized computer access laws, including laws of this state governing unauthorized computer access.

Sec. 2001.202. AUTHORITY TO TERMINATE ACCOUNT. (a) Authorizes a custodian to disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(b) Authorizes a fiduciary of a user to request a custodian to terminate the user's account. Requires that a request for termination be in writing, in physical or electronic form, and accompanied by certain documentation.

(c) Requires the fiduciary to, in addition to the items required to accompany a termination request under Subsection (b), provide certain information if requested by the custodian.

SUBCHAPTER H. CUSTODIAN COMPLIANCE AND IMMUNITY REGARDING DIGITAL ASSETS

Sec. 2001.231. CUSTODIAN COMPLIANCE AND IMMUNITY. (a) Requires a custodian to, not later than a certain required date, comply with a request under this chapter from a fiduciary or designated recipient to disclose digital assets or terminate an account. Authorizes the fiduciary or designated recipient to, if the custodian fails to comply, apply to the court for an order directing compliance.

(b) Requires an order under Subsection (a) directing compliance to contain a finding that compliance is not in violation of 18 U.S.C. Section 2702.

(c) Authorizes a custodian to notify the user that a request for disclosure or to terminate an account was made under this chapter.

(d) Authorizes a custodian to deny a request under this chapter from a fiduciary or designated recipient for disclosure for digital assets or to terminate an account if

the custodian is aware of any lawful access to the account following the receipt of the request.

(e) Provides that this chapter does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this chapter to obtain a court order that specifies certain information or contains a required finding.

Sec. 2001.232. IMMUNITY FROM LIABILITY. Provides that a custodian and the custodian's officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this chapter.

SECTION 2. Amends Section 752.051, Estates Code, to create a new line in a statutory durable power of attorney form to include digital assets and the content of an electronic communication, and change references to N to O and M to N in the contents of the form.

SECTION 3. Amends Subchapter C, Chapter 752, Estates Code, by adding Section 752.1145, as follows:

Sec. 752.1145. DIGITAL ASSET TRANSACTIONS. (a) Defines "digital asset."

(b) Provides that the language conferring authority with respect to digital assets in a statutory durable power of attorney empowers the attorney in fact or agent, without further reference to a specific digital asset, to access digital assets as provided in Chapter 2001.

SECTION 4. Amends Section 752.115, Estates Code, to change a reference to Sections 752.102-752.114 to Sections 752.102-752.1145.

SECTION 5. Amends Section 1151.101, Estates Code, by amending Subsection (a) and adding Subsection (c), as follows:

(a) Provides that, subject to Subsection (b), the guardian of the estate of a ward is entitled to:

(1) to (3) makes no changes to these subdivisions;

(4) makes a nonsubstantive change; and

(5) access the ward's digital assets as provided by Chapter 2001.

(c) Defines "digital asset."

SECTION 6. Amends Subchapter A, Chapter 113, Property Code, by adding Section 113.031, as follows:

Sec. 113.031. DIGITAL ASSETS. (a) Defines "digital asset."

(b) Authorizes a trustee to access digital assets as provided by Chapter 2001, Estates Code.

SECTION 7. Provides that Chapter 2001, Estates Code, as added by this Act, applies to a fiduciary acting under a will or power of attorney executed before, on, or after the effective date of this act, a personal representative acting for a decedent who died before, on, or after the effective date of this act, a guardian appointed to act for a ward in guardianship proceeding commenced before, on, or after the effective date of this act, and a trustee acting under a trust created before, on, or after the date of this Act

SECTION 8. Effective date: September 1, 2017.