STATE OF CALIFORNIA
AUTHENTICATED
ELECTRONIC LEGAL MATERIAL

Assembly Bill No. 691

CHAPTER 551

An act to add Part 20 (commencing with Section 870) to Division 2 of the Probate Code, relating to estates.

[Approved by Governor September 24, 2016. Filed with Secretary of State September 24, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 691, Calderon. Revised Uniform Fiduciary Access to Digital Assets Act.

Existing law provides for the disposition of a testator's property by will. Existing law also provides for the disposition of that portion of a decedent's estate not disposed of by will. Existing law provides that the decedent's property, including property devised by a will, is generally subject to probate administration, except as specified.

This bill would enact the Revised Uniform Fiduciary Access to Digital Assets Act, which would authorize a decedent's personal representative or trustee to access and manage digital assets and electronic communications, as specified. The bill would authorize a person to use an online tool to give directions to the custodian of his or her digital assets regarding the disclosure of those assets. The bill would specify that, if a person has not used an online tool to give that direction, he or she may give direction regarding the disclosure of digital assets in a will, trust, power of attorney, or other record. The bill would require a custodian of the digital assets to comply with a fiduciary's request for disclosure of digital assets or to terminate an account, except under certain circumstances, including when the decedent has prohibited this disclosure using the online tool. The bill would make custodians immune from liability for an act or omission done in good faith in compliance with these provisions.

The people of the State of California do enact as follows:

SECTION 1. Part 20 (commencing with Section 870) is added to Division 2 of the Probate Code, to read:

PART 20. REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

870. This part shall be known, and may be cited, as the Revised Uniform Fiduciary Access to Digital Assets Act.

871. As used in this part, the following terms shall have the following meanings:

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

(b) "Carries" means engages in the transmission of electronic communications.

(c) "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(d) "Content of an electronic communication" means information concerning the substance or meaning of the communication, which meets all of the following requirements:

(1) Has been sent or received by a user.

(2) Is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public.

(3) Is not readily accessible to the public.

(e) "Court" means the superior court presiding over the judicial proceedings which have been initiated under this code to administer the estate of the deceased user, or, if none, the superior court sitting in the exercise of jurisdiction under this code in the county of the user's domicile, and the court, as defined in this section, shall have exclusive jurisdiction over proceedings brought under this part.

(f) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(g) "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user.

(h) "Digital asset" means an electronic record in which an individual has a right or interest. The term "digital asset" does not include an underlying asset or liability, unless the asset or liability is itself an electronic record.

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

(j) "Electronic communication" has the same meaning as the definition in Section 2510(12) of Title 18 of the United States Code.

(k) "Electronic communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(*l*) "Fiduciary" means an original, additional, or successor personal representative or trustee.

(m) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or other items with like characteristics.

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

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

(p) "Personal representative" means an executor, administrator, special administrator, or person that performs substantially the same function under any other law.

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

(r) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in a perceivable form.

(s) "Remote-computing service" means a custodian that provides to a user computer processing services or the storage of digital assets by means of an electronic communications system, as defined in Section 2510(14) of Title 18 of the United States Code.

(t) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

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

(v) "User" means a person that has an account with a custodian.

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

872. (a) This part shall apply to any of the following:

(1) A fiduciary acting under a will executed before, on, or after January 1, 2017.

(2) A personal representative acting for a decedent who died before, on, or after January 1, 2017.

(3) A trustee acting under a trust created before, on, or after January 1, 2017.

(4) A custodian of digital assets for a user if the user resides in this state or resided in this state at the time of the user's death.

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

873. (a) A user may use an online tool to direct the custodian to disclose to a designated recipient or not disclose some or all of the user's digital assets, including the content of electronic communications. 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) If a user has not used an online tool to give direction under subdivision (a) or if a custodian has not provided an online tool, a user may allow or prohibit in a will, trust, power of attorney, or other record the disclosure to a fiduciary of some or all of the user's digital assets, including the contents of electronic communications sent or received by the user.

(c) A user's direction under subdivision (a) or (b) overrides a contrary provision in a terms-of-service agreement.

874. (a) This part 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 a user.

(b) This part 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) A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement when the user has not provided any direction that is recognized in Section 873.

875. (a) When disclosing the digital assets of a user under this part, the custodian may, in its sole discretion, do any of the following:

(1) Grant the fiduciary or designated recipient full access to the user's account.

(2) Grant the fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged.

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

(b) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this part.

(c) A custodian need not disclose under this part a digital asset deleted by a user.

(d) If a user directs or a fiduciary or designated recipient requests a custodian to disclose under this part some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian, fiduciary, or designated recipient may petition the court for an order to do any of the following:

(1) Disclose a subset limited by date of the user's digital assets.

(2) Disclose all of the user's digital assets to the fiduciary or designated recipient.

(3) Disclose none of the user's digital assets.

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

876. If a deceased user consented to or a court directs disclosure of the content of electronic communications of the user, the custodian shall 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 personal representative gives to the custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A certified copy of the death certificate of the user.

(c) A certified copy of the letter of appointment of the representative, a small-estate affidavit under Section 13101, or court order.

(d) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications.

(e) If requested by the custodian, any of the following:

(1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account.

(2) Evidence linking the account to the user.

(3) An order of the court finding any of the following:

(A) That the user had a specific account with the custodian, identifiable by the information specified in paragraph (1).

(B) That disclosure of the content of the user's electronic communications would not violate Chapter 121 (commencing with Section 2701) of Part 1 of Title 18 of, and Section 222 of Title 47 of, the United States Code, or other applicable law.

(C) Unless the user provided direction using an online tool, that the user consented to disclosure of the content of electronic communications.

(D) That disclosure of the content of electronic communications of a user is reasonably necessary for estate administration.

877. Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the personal representative gives to the custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A certified copy of the death certificate of the user.

(c) A certified copy of the letter of appointment of the representative, a small-estate affidavit under Section 13101, or court order.

(d) If requested by the custodian, any of the following:

(1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account.

(2) Evidence linking the account to the user.

(3) An affidavit stating that disclosure of the user's digital assets is reasonably necessary for estate administration.

(4) An order of the court finding either of the following:

(A) That the user had a specific account with the custodian, identifiable by the information specified in paragraph (1).

(B) That disclosure of the user's digital assets is reasonably necessary for estate administration.

878. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall 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 to the custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A certified copy of the death certificate of the settlor.

(c) A certified copy of the trust instrument, or a certification of trust under Section 18100.5, evidencing the settlor's consent to disclosure of the content of electronic communications to the trustee.

(d) A certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust.

(e) If requested by the custodian, any of the following:

(1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account.

(2) Evidence linking the account to the trust.

879. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, the catalogue of electronic communications 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, other than the content of electronic communications, in which the trust has a right or interest if the settlor of the trust is deceased and the trustee gives the custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A certified copy of the death certificate of the settlor.

(c) A certified copy of the trust instrument or a certification of trust under Section 18100.5.

(d) A certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust.

(e) If requested by the custodian, any of the following:

(1) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account.

(2) Evidence linking the account to the trust.

880. (a) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including all of the following:

(1) The duty of care.

(2) The duty of loyalty.

(3) The duty of confidentiality.

(b) All of the following shall apply to a fiduciary's or designated recipient's authority with respect to a digital asset of a user:

(1) Except as otherwise provided in Section 873, a fiduciary's or designated recipient's authority is subject to the applicable terms-of-service agreement.

(2) A fiduciary's or designated recipient's authority is subject to other applicable law, including copyright law.

(3) In the case of a fiduciary, a fiduciary's authority is limited by the scope of the fiduciary's duties.

(4) A fiduciary's or designated recipient's authority may not be used to impersonate the user.

(c) A fiduciary with authority over the property of a decedent or settlor has the right of access to any digital asset in which the decedent or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement. Nothing in this subdivision requires a custodian to share passwords or decrypt protected devices.

(d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent or settlor for the purpose of applicable computer-fraud and unauthorized-computer-access laws.

(e) The following shall apply to a fiduciary with authority over the tangible, personal property of a decedent or settlor:

(1) The fiduciary has the right to access the property and any digital asset stored in it. Nothing in this subdivision requires a custodian to share passwords or decrypt protected devices.

(2) The fiduciary is an authorized user for purposes of any applicable computer-fraud and unauthorized-computer-access laws.

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

(g) A fiduciary of a decedent or settlor may request a custodian to terminate the user's account. A request for termination shall be in writing, in either physical or electronic form, and accompanied by all of the following:

(1) If the user is deceased, a certified copy of the death certificate of the user.

(2) A certified copy of the letter of appointment of the representative, a small-estate affidavit under Section 13101, a court order, a certified copy of the trust instrument, or a certification of the trust under Section 18100.5 giving the fiduciary authority over the account.

(3) If requested by the custodian, any of the following:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account.

(B) Evidence linking the account to the user.

(C) A finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A).

881. (a) Not later than 60 days after receipt of the information required under Sections 876 to 879, inclusive, a custodian shall comply with a request under this part from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply with a request, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(b) An order under subdivision (a) directing compliance shall contain a finding that compliance is not in violation of Section 2702 of Title 18 of the United States Code.

(c) A custodian may notify a user that a request for disclosure of digital assets or to terminate an account was made pursuant to this part.

(d) A custodian may deny a request under this part from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account

if the custodian is aware of any lawful access to the account following the date of death of the user.

(e) This part does not limit a custodian's ability to obtain or to require a fiduciary or designated recipient requesting disclosure or account termination under this part to obtain a court order that makes all of the following findings:

(1) The account belongs to the decedent, principal, or trustee.

(2) There is sufficient consent from the decedent, principal, or settlor to support the requested disclosure.

(3) Any specific factual finding required by any other applicable law in effect at that time, including, but not limited to, a finding that disclosure is not in violation of Section 2702 of Title 18 of the United States Code.

(f) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this part.

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

883. Disclosure of the contents of the deceased user's or settlor's account to a fiduciary of the deceased user or settlor is subject to the same license, restrictions, terms of service, and legal obligations, including copyright law, that applied to the deceased user or settlor.

884. If any provision of this part or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this part that can be given effect without the invalid provision or application, and, to this end, the provisions of this part are severable.

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