

**SENATE BILL No. 63**

By Committee on Judiciary

1-23

Proposed Amendments to SB 63  
Senate Judiciary  
February 13, 2017  
Prepared by: Jason Thompson  
Office of Revisor of Statutes

1 AN ACT enacting the revised uniform fiduciary access to digital assets  
2 act; amending K.S.A. 58a-816 and 59-3078 and K.S.A. 2016 Supp. 58-  
3 654, 59-3075 and 77-201 and repealing the existing sections.

4  
5 *Be it enacted by the Legislature of the State of Kansas:*

6 New Section 1. This act may be cited as the revised uniform fiduciary  
7 access to digital assets act (2015).

8 New Sec. 2. In this act:

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

12 (b) "Agent" means an attorney-in-fact granted authority under a  
13 durable or nondurable power of attorney.

14 (c) "Carries" means engages in the transmission of an electronic  
15 communication.

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

20 (e) "Conservatee" means an individual for whom a conservator has  
21 been appointed.

22 (f) "Conservator" means a person appointed by a court pursuant to  
23 K.S.A. 59-3050 et seq., and amendments thereto, to manage the estate of a  
24 minor or adult individual. The term includes a temporary conservator.

25 (g) "Content of an electronic communication" means information  
26 concerning the substance or meaning of the communication which:

27 (1) Has been sent or received by a user;

28 (2) is in electronic storage by a custodian providing an electronic  
29 communication service to the public or is carried or maintained by a  
30 custodian providing a remote computing service to the public; and

31 (3) is not readily accessible to the public.

32 (h) "Court" means the district court.

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

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

1 agreement or declaration that creates a beneficial interest in another. The  
2 term includes a successor trustee.

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

4 (bb) "Ward" means an individual for whom a guardian has been  
5 appointed.

6 (cc) "Will" includes a codicil, a testamentary instrument that only  
7 appoints an executor and an instrument that revokes or revises a  
8 testamentary instrument.

9 New Sec. 3. (a) This act applies to:

10 (1) A fiduciary acting under a will or power of attorney executed  
11 before, on or after July 1, 2017;

12 (2) a personal representative acting for a decedent who died before,  
13 on or after July 1, 2017;

14 (3) a guardianship or conservatorship proceeding commenced before,  
15 on or after July 1, 2017; and

16 (4) a trustee acting under a trust created before, on or after July 1,  
17 2017.

18 (b) This act applies to a custodian if the user resides in this state or  
19 resided in this state at the time of the user's death.

20 (c) This 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 New Sec. 4. (a) A user may use an online tool to direct the custodian  
23 to disclose or not to disclose some or all of the user's digital assets,  
24 including the content of electronic communications. If the online tool  
25 allows the user to modify or delete a direction at all times, a direction  
26 regarding disclosure using an online tool overrides a contrary direction by  
27 the user in a will, trust, power of attorney or other record.

to a designated recipient

28 (b) If a user has not used an online tool to give direction under  
29 subsection (a) or if the custodian has not provided an online tool, the user  
30 may allow or prohibit in a will, trust, power of attorney or other record,  
31 disclosure to a fiduciary of some or all of the user's digital assets,  
32 including the content of electronic communications sent or received by the  
33 user.

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

38 New Sec. 5. (a) This act does not change or impair a right of a  
39 custodian or a user under a terms-of-service agreement to access and use  
40 digital assets of the user.

or designated recipient

41 (b) This act does not give a fiduciary any new or expanded rights  
42 other than those held by the user for whom, or for whose estate, the  
43 fiduciary acts or represents.

or designated recipient

or designated recipient's

1 (c) A fiduciary's access to digital assets may be modified or  
2 eliminated by a user, by federal law or by a terms-of-service agreement if  
3 the user has not provided direction under section 4, and amendments  
4 thereto.

5 New Sec. 6. (a) When disclosing digital assets of a user under this  
6 act, the custodian may at its sole discretion:

7 (1) Grant a fiduciary or designated recipient full access to the user's  
8 account;

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

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

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

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

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

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

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

29 (3) none of the users digital assets; or

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

31 New Sec. 7. If a deceased user consented or a court directs disclosure  
32 of the contents of electronic communications of the user, the custodian  
33 shall disclose to the personal representative of the estate of the user the  
34 content of an electronic communication sent or received by the user if the  
35 representative gives the custodian:

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

37 (b) a certified copy of the death certificate of the user;

38 (c) a certified copy of the letter of appointment of the representative  
39 or a small estate affidavit or court order;

40 (d) unless the user provided direction using an online tool, a copy of  
41 the user's will, trust, power of attorney or other record evidencing the  
42 user's consent to disclosure of the content of electronic communications;  
43 and

1 assets of the ward or conservatee to suspend or terminate an account of the  
2 ward or conservatee for good cause. A request made under this section  
3 must be accompanied by a certified copy of the court order giving the  
4 guardian or conservator authority over the ward or conservatee's property.

5 New Sec. 15. (a) The legal duties imposed on a fiduciary charged  
6 with managing tangible property apply to the management of digital  
7 assets, including:

- 8 (1) The duty of care;
- 9 (2) the duty of loyalty; and
- 10 (3) the duty of confidentiality.

11 (b) A fiduciary's authority with respect to a digital asset of a user:

or designated recipient's

12 (1) Except as otherwise provided in section 4, and amendments  
13 thereto, is subject to the applicable terms of service;

14 (2) is subject to other applicable laws, including copyright laws;

in the case of a fiduciary,

15 (3) is limited by the scope of the fiduciary's duties; and

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

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

22 (d) A fiduciary acting within the scope of the fiduciary's duties is an  
23 authorized user of the property of the decedent, ward or conservatee,  
24 principal or settlor for the purpose of applicable computer fraud and  
25 unauthorized computer access laws, including K.S.A. 2016 Supp. 21-5839,  
26 and amendments thereto.

27 (e) A fiduciary with authority over the tangible, personal property of  
28 a decedent, ward or conservatee, principal or settlor:

29 (1) Has the right to access the property and any digital asset stored in  
30 it; and

31 (2) is an authorized user for the purpose of computer fraud and  
32 unauthorized computer access laws, including K.S.A. 2016 Supp. 21-5839,  
33 and amendments thereto.

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

37 (g) A fiduciary of a user may request a custodian to terminate the  
38 user's account. A request for termination must be in writing, in either  
39 physical or electronic form, and accompanied by:

40 (1) If the user is deceased, a certified copy of the death certificate of  
41 the user;

42 (2) a certified copy of the letter of appointment of the representative  
43 or a small estate affidavit or court order, court order, power of attorney or

- 1 trust giving the fiduciary authority over the account; and  
2 (3) if requested by the custodian:  
3 (A) A number, username, address or other unique subscriber or  
4 account identifier assigned by the custodian to identify the user's account;  
5 (B) evidence linking the account to the user; or  
6 (C) a finding by the court that the user had a specific account with the  
7 custodian, identifiable by the information specified in subparagraph (A).

8 New Sec. 16. (a) Not later than 60 days after receipt of the  
9 information required under sections 7 through 14, and amendments  
10 thereto, a custodian shall comply with a request under this act from a  
11 fiduciary or designated recipient to disclose digital assets or terminate an  
12 account. If the custodian fails to comply, the fiduciary or designated  
13 recipient may apply to the court for an order directing compliance.

14 (b) An order under subsection (a) directing compliance must contain  
15 a finding that compliance is not in violation of 18 U.S.C. § 2702.

16 (c) A custodian may notify the user that a request for disclosure or to  
17 terminate an account was made under this act.

18 (d) A custodian may deny a request under this act from a fiduciary or  
19 designated recipient for disclosure of digital assets or to terminate an  
20 account if the custodian is aware of any lawful access to the account  
21 following the receipt of the fiduciary's request.

22 (e) This act does not limit a custodian's ability to obtain or require a  
23 fiduciary or designated recipient requesting disclosure or termination  
24 under this act to obtain a court order which:

25 (1) Specifies that an account belongs to the ward, conservatee or  
26 principal;

27 (2) specifies that there is sufficient consent from the ward,  
28 conservatee or principal to support the requested disclosure; and

29 (3) contains a finding required by law other than this act.

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

33 New Sec. 17. In applying and construing this uniform act,  
34 consideration must be given to the need to promote uniformity of the law  
35 with respect to its subject matter among states that enact it.

36 New Sec. 18. This act modifies, limits or supersedes the electronic  
37 signatures in global and national commerce act, 15 U.S.C. § 7001 et seq.,  
38 but does not modify, limit or supersede § 101(c) of that act, 15 U.S.C. §  
39 7001(c), or authorize electronic delivery of any of the notices described in  
40 § 103(b) of that act, 15 U.S.C. § 7003(b).

41 New Sec. 19. If any provision of this act or its application to any  
42 person or circumstance is held invalid, the invalidity does not affect other  
43 provisions or applications of this act which can be given effect without the