

SESSION OF 2017

SUPPLEMENTAL NOTE ON SENATE BILL NO. 63

As Amended by Senate Committee on Judiciary

Brief*

SB 63, as amended, would enact the Revised Uniform Fiduciary Access to Digital Assets Act (2015) (Act).

General Applicability

The Act would authorize access to digital assets by four common types of fiduciaries. Specifically, the Act would apply to:

- A fiduciary acting under a will or power of attorney executed on or after July 1, 2017;
- A personal representative acting for a decedent who died before, on, or after July 1, 2017;
- A guardianship or conservatorship proceeding commenced before, on, or after July 1, 2017; and
- A trustee acting under a trust created before, on, or after July 1, 2017.

Additionally, the bill specifies it would apply to a custodian of a digital asset if the user resides in Kansas or resided in Kansas at the time of the user's death. "Custodian" would be defined as a person that carries, maintains, processes, receives, or stores a user's digital assets. The bill would not apply to digital assets of any employer used by an employee in the ordinary course of the employer's business.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

The bill allows a “user,” defined as a person with an account with a custodian, to 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 tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using the tool would override a contrary direction by the user in a will, trust, power of attorney, or other record. If the user has not used the tool or the custodian does not provide one, the user could allow or prohibit disclosure of some or all of the user’s digital assets, including the content of electronic communications, in a will, trust, power of attorney, or other record. A user’s authorization using one of those records or the online tool would override 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 under the terms of service.

The bill states the Act would not change or impair a right of a custodian or user under a terms-of-service agreement to access and use the user’s digital assets or give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents. Further, a fiduciary or designated recipient’s access to digital assets could be modified or eliminated by a user, federal law, or a terms-of-service agreement if the user has not provided direction as described above. In applying and construing the Act, the bill requires consideration to the need to promote uniformity of the law with respect to its subject matter among states that enact it. Additionally, the bill includes a severability clause. The bill would define key terms and would amend the definition of “personal property” in the statute defining terms for construction of state law to include digital assets.

Disclosure of Assets

The bill would outline a custodian’s responsibilities in disclosing digital assets and the time line for disclosure as

well as other actions allowed, such as charging a reasonable administrative fee or choosing not to disclose deleted assets. Further, the bill provides specific guidelines for disclosure to each of the types of fiduciaries described above, including provisions specific to disclosure of digital assets, as well as the content of electronic communications, and procedures to compel disclosure.

Personal Representative of Deceased User

A custodian would be required to disclose the content of electronic communications to a personal representative acting for a decedent if the deceased user consented or a court directs disclosure. Further, absent a user's prohibition or a court order, a custodian would be required to disclose a catalog of electronic communications and digital assets to a representative acting for a decedent. The representative would first be required to provide certain documentation to the custodian, including a written request for disclosure; a certified copy of the user's death certificate; and a certified copy of a letter appointing the representative, small estate affidavit, or court order.

Agent Under a Power of Attorney

To the extent a power of attorney expressly grants an agent authority over digital assets and the content of electronic communications, and unless otherwise directed by the principal or the court, the bill would require a custodian to disclose the assets, a catalog of electronic communications, and the content if the agent provides certain documentation, including a written request for disclosure and an original or copy of the power of attorney. The bill would also amend the Kansas Power of Attorney Act to include exercising authority over the contents of electronic communications in the list of actions that may be granted if expressly authorized in a power of attorney.

Trustees

The bill would require a custodian to disclose any digital asset, including a catalog of electronic communications and the content, to a trustee who is an original user of an account absent a court order or provided in trust. Unless otherwise ordered by the court, directed by the user, or provided in a trust, the bill would require the custodian to disclose the assets, a catalog of electronic communications, and the contents to a trustee that is not an original user if the trustee provides certain documentation to the custodian, including a written request for disclosure, a certified copy of the trust, or a certification of the trust. The bill would also amend the Kansas Uniform Trust Code to specify that a trustee can access digital assets held in trust.

Guardian or Conservator

After an opportunity for a hearing conducted pursuant to the Act for Obtaining a Guardian or a Conservator, or Both (Guardianship Act), the bill provides the court could grant a guardian or conservator access to a ward or conservatee's digital assets, including a catalog of electronic communication but not the contents. The custodian would then be required to disclose the digital assets if the guardian or conservator provides certain documentation to the custodian, including a written request for disclosure and a certified copy of the court order granting that access. The bill would amend the Guardianship Act to prohibit a guardian or conservator from accessing the ward or conservatee's digital assets absent such an order. Further, a guardian or conservator with this general authority to manage the ward or conservatee's assets could request suspension or termination of an account for good cause.

Duties of a Fiduciary

The bill would specify legal duties imposed on a fiduciary charged with managing tangible property; would

apply to the management of digital assets, including the duties of care, loyalty, and confidentiality; and would describe the scope of a fiduciary or designated recipient's authority over a user's digital assets.

Background

The bill was introduced at the request of the Kansas Judicial Council. In the Senate Committee on Judiciary hearing, a representative of the Judicial Council explained the Act was proposed by the Uniform Law Commission (ULC) with only minor changes to reflect Kansas terminology. A representative of the ULC stated the bill is necessary as the law has not kept pace with technological advances in the Internet age.

The Senate Committee adopted a technical amendment proposed by the Judicial Council to add "designated recipient" in a few instances to clarify digital assets could be disclosed to designated recipients as well as fiduciaries. These changes were adopted by the ULC in 2016.

According to the fiscal note prepared by the Division of the Budget on the bill as introduced, the Office of Judicial Administration indicates enactment of the bill could increase case filings, complexity in probate cases, and the number of findings to be made by the judge hearing the case, thereby increasing costs for judicial and nonjudicial staff time. The bill could also increase revenues from docket fees because of additional cases filed. However, a precise estimate of additional revenues or expenditures by the Judicial Branch cannot be provided. Any fiscal effect associated with the bill is not reflected in *The FY 2018 Governor's Budget Report*.