

## **Revised Uniform Fiduciary Access to Digital Assets Act; SB 63**

**SB 63** enacts the Revised Uniform Fiduciary Access to Digital Assets Act [2015] (Act).

### ***General Applicability***

The bill would define “digital asset” as an electronic record in which an individual has a right or interest, but it would not include an underlying asset or liability unless the asset or liability is itself an electronic record.

The Act authorizes access to digital assets by four common types of fiduciaries. Specifically, the Act applies to:

- A fiduciary acting under a will or power of attorney executed before, 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, it applies 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” is defined as a person who carries, maintains, processes, receives, or stores a user’s digital assets. The bill does not apply to digital assets of any employer used by an employee in the ordinary course of the employer’s business.

The bill allows a “user,” defined as a person who has 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 overrides 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 can 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 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 under the terms of service.

The Act does 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 can 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 of 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 defines key terms and amends the definition of “personal property” in the statute defining terms for construction of state law to include digital assets.

### ***Disclosure of Assets***

The bill outlines a custodian’s responsibilities in disclosing digital assets and the timeline 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 must 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 must disclose a catalog of electronic communications and digital assets to a representative acting for a decedent if the representative provides 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, a custodian must 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 also amends 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***

A custodian must 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. Additionally, unless otherwise ordered by the court, directed by the user, or provided in a trust, the custodian must 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 also amends 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), a court may 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 must then 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 also amends 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 can request suspension or termination of an account for good cause.

### ***Duties of a Fiduciary***

The bill specifies legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including the duties of care, loyalty, and confidentiality, and describes the scope of a fiduciary or designated recipient's authority over a user's digital assets.