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AMENDED IN ASSEMBLY MARCH 23, 2015
CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 691

**Introduced by Assembly Member Calderon
(Coauthors: Assembly Members Travis Allen, Chang, Chávez, Chu,
Dababneh, Cristina Garcia, Gatto, Gonzalez, Steinorth, and
Waldron)**

February 25, 2015

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

LEGISLATIVE COUNSEL'S DIGEST

AB 691, as amended, 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.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

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

3
4 PART 20. REVISED UNIFORM FIDUCIARY ACCESS TO
5 DIGITAL ASSETS ACT

6
7 870. This part shall be known, and may be cited, as the Revised
8 Uniform Fiduciary Access to Digital Assets Act.

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

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

15 (b) “Carries” means engages in the transmission of electronic
16 communications.

17 (c) “Catalogue of electronic communications” means
18 information that identifies each person with which a user has had

1 an electronic communication, the time and date of the
2 communication, and the electronic address of the person.

3 (d) “Content of an electronic communication” means
4 information concerning the substance or meaning of the
5 communication, which meets all of the following requirements:

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

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

10 (3) Is not readily accessible to the public.

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

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

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

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

25 (i) “Electronic” means relating to technology having electrical,
26 digital, magnetic, wireless, optical, electromagnetic, or similar
27 capabilities.

28 (j) “Electronic communication” has the same meaning as the
29 definition in Section 2510(12) of Title 18 of the United States
30 Code.

31 (k) “Electronic communication service” means a custodian that
32 provides to a user the ability to send or receive an electronic
33 communication.

34 (l) “Fiduciary” means an original, additional, or successor
35 personal representative or trustee.

36 (m) “Information” means data, text, images, videos, sounds,
37 codes, computer programs, software, databases, or other items
38 with like characteristics.

39 (n) “Online tool” means an electronic service provided by a
40 custodian that allows the user, in an agreement distinct from the

1 terms-of-service agreement between the custodian and user, to
2 provide directions for disclosure or nondisclosure of digital assets
3 to a third person.

4 (o) “Person” means an individual, estate, business or nonprofit
5 entity, public corporation, government or governmental
6 subdivision, agency, or instrumentality, or other legal entity.

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

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

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

15 (s) “Remote-computing service” means a custodian that provides
16 to a user computer processing services or the storage of digital
17 assets by means of an electronic communications system, as
18 defined in Section 2510(4) of Title 18 of the United States Code.

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

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

24 (v) “User” means a person that has an account with a custodian.

25 (w) “Will” includes a codicil, a testamentary instrument that
26 only appoints an executor, or an instrument that revokes or revises
27 a testamentary instrument.

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

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

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

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

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

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

1 873. (a) A user may use an online tool to direct the custodian
2 to disclose to a designated recipient or not disclose some or all of
3 the user's digital assets, including the content of electronic
4 communications. If the online tool allows the user to modify or
5 delete a direction at all times, a direction regarding disclosure using
6 an online tool overrides a contrary direction by the user in a will,
7 trust, power of attorney, or other record.

8 (b) If a user has not used an online tool to give direction under
9 subdivision (a) or if a custodian has not provided an online tool,
10 a user may allow or prohibit in a will, trust, power of attorney, or
11 other record the disclosure to a fiduciary of some or all of the user's
12 digital assets, including the contents of electronic communications
13 sent or received by the user.

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

18 874. (a) This part does not change or impair a right of a
19 custodian or a user under a terms-of-service agreement to access
20 and use digital assets of a user.

21 (b) This part does not give a fiduciary or designated recipient
22 any new or expanded rights other than those held by the user for
23 whom, or for whose estate or trust, the fiduciary or designated
24 recipient acts or represents.

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

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

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

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

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

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

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

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

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

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

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

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

18 876. If a deceased user consented to or a court directs disclosure
19 of the content of electronic communications of the user, the
20 custodian shall disclose to the personal representative of the estate
21 of the user the content of an electronic communication sent or
22 received by the user if the personal representative gives to the
23 custodian all of the following:

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

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

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

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

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

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

38 (2) Evidence linking the account to the user.

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

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

3 (B) That disclosure of the content of the user’s electronic
4 communications would not violate ~~Section 2701 et seq.~~ *Chapter*
5 *121 (commencing with Section 2701) of Part 1* of Title 18 of, and
6 Section 222 of Title 47 of, the United State Code, or other
7 applicable law.

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

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

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

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

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

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

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

27 (1) A number, user name, address, or other unique subscriber
28 or account identifier assigned by the custodian to identify the user’s
29 account.

30 (2) Evidence linking the account to the user.

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

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

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

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

38 878. Unless otherwise ordered by the court, directed by the
39 user, or provided in a trust, a custodian shall disclose to a trustee
40 that is not an original user of an account the content of an electronic

1 communication sent or received by an original or successor user
2 and carried, maintained, processed, received, or stored by the
3 custodian in the account of the trust if the trustee gives to the
4 custodian all of the following:

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

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

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

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

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

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

19 (2) Evidence linking the account to the trust.

20 879. Unless otherwise ordered by the court, directed by the
21 user, or provided in a trust, a custodian shall disclose, to a trustee
22 that is not an original user of an account, the catalogue of electronic
23 communications sent or received by an original or successor user
24 and stored, carried, or maintained by the custodian in an account
25 of the trust and any digital assets, other than the content of
26 electronic communications, in which the trust has a right or interest
27 if the settlor of the trust is deceased and the trustee gives the
28 custodian all of the following:

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

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

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

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

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

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

1 (2) Evidence linking the account to the trust.

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

5 (1) The duty of care.

6 (2) The duty of loyalty.

7 (3) The duty of confidentiality.

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

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

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

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

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

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

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

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

29 (1) The fiduciary has the right to access the property and any
30 digital asset stored in it.

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

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

38 (g) A fiduciary of a decedent or settlor may request a custodian
39 to terminate the user's account. A request for termination shall be

1 in writing, in either physical or electronic form, and accompanied
 2 by all of the following:

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

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

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

11 (A) A number, user name, address, or other unique subscriber
 12 or account identifier assigned by the custodian to identify the user’s
 13 account.

14 (B) Evidence linking the account to the user.

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

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

25 (b) An order under subdivision (a) directing compliance shall
 26 contain a finding that compliance is not in violation of Section
 27 2702 of Title 18 of the United States Code.

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

31 (d) A custodian may deny a request under this part from a
 32 fiduciary or designated recipient for disclosure of digital assets or
 33 to terminate an account if the custodian is aware of any lawful
 34 access to the account following the date of death of the user.

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

39 (1) The account belongs to the decedent, principal, or ~~settlor~~
 40 trustee.

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

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

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

10 882. In applying and construing this part, which is based upon
11 a uniform act, consideration shall be given to the need to promote
12 uniformity of the law with respect to its subject matter among
13 states that enact similar acts.

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

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

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