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FISCAL IMPACT REPORT

SPONSOR Wirth ORIGINAL DATE 1/22/15
LAST UPDATED _____ HB _____
SHORT TITLE Uniform Fiduciary Access to Digital Assets SB 59
ANALYST A. Sánchez

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 124 and SB 60.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

Administrative Office of the District Attorneys (AODA)

Department of Information Technology (DoIT)

SUMMARY

Senate Bill 59 creates the Uniform Fiduciary Access to Digital Assets Act to vest four types of fiduciaries with the authority to access, control, or copy digital assets and accounts: personal representatives of decedents' estates; conservators for protected persons and individuals; agents acting pursuant to a power of attorney; and trustees. The Act is designed to provide access without changing the ownership of a digital asset. In July 2014, the Uniform Law Commission approved and recommended enactment of such an act.

SB59 describes the applicability and uniformity of application and construction of the Uniform Fiduciary Access to Digital Assets Act, and describes its relation to the federal Electronic Signatures in Global and National Commerce Act. The bill provides sections governing the following:

- Section 4: Access by Personal Representative to Digital Asset of Decedent
- Section 5: Access by Conservator to Digital Asset of Protected Person
- Section 6: Access by Agent to Digital Asset of Principal
- Section 7: Access by Trustee to Digital Asset

The general goal of SB 59 is to facilitate fiduciary access while respecting the privacy and intent of the account holder. It adheres to the traditional approach of trusts and estates law, which respects the intent of the account holder and promotes the fiduciary's ability to administer the account holder's property in accord with legally-binding fiduciary duties.

With regard to the general scope of SB 59, the bill's coverage is inherently limited by the definition of "digital assets." The act applies only to electronic records, which do not include the underlying asset or liability unless it is itself an electronic record.

SB 59 is sponsored by the Courts, Corrections and Justice Interim Committee.

FISCAL IMPLICATIONS

According to the AOC, there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to any judicial hearings or proceedings authorized or required under SB 59. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

Note: major assumptions underlying fiscal impact should be documented.

SIGNIFICANT ISSUES

The AOC stated in its response that "as the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual's death or incapacity are becoming more common. Few laws exist on the rights of fiduciaries over digital assets. Few holders of digital assets and accounts consider the fate of their online presences once they are no longer able to manage their assets. And these assets have real value: according to a 2011 survey from McAfee, Intel's security-technology unit, American consumers valued their digital assets, on average, at almost \$55 thousand. *Kelly Greene, Passing Down Digital Assets, WALL STREET JOURNAL (Aug. 31, 2012)*. These assets range from online gaming items to photos, to digital music, to client lists. There are millions of Internet accounts that belong to dead people. Some Internet service providers have explicit policies on what will happen when an individual dies, others do not; even where these policies are included in the terms-of-service agreement, most consumers click through these agreements.

Sections of SB 59 applicable to the courts are:

- Section 5: provides that subject to Section 8(B) of the bill, governing fiduciary authority, the court, after an opportunity for hearing pursuant to Chapter 45, Article 5 NMSA 1978 (governing protection of persons under disability and their property), may grant a conservator the right to access specified digital assets.
- Section 9(C): requires that a custodian comply with a request for access to digital assets not later than 60 days after receipt of the request. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

According to the AOC, Some SB 59 definitions (Section 2) either do not match the Uniform Law Commission draft act definitions or are not in the draft act:

- **(E):** SB 59 uses “protected person” in place of “living individual”
- **(J):** defines “durable” while draft act does not
- **(O):** includes “appointive” instrument in definition of “governing instrument”
- **(P):** defines “incapacity” while draft act does not
- **(R):** includes “trust” within the definition of “person”
- **(V):** defines “property” or “asset” while draft act does not
- **(W):** unlike in draft act, definition of “protected person” does not include an individual for whom an application for the appointment of a conservator is pending
- **(Z):** defines “settlor” while draft act does not
- **(BB):** defines “terms of a trust” while draft act does not
- **(CC):** defines “trust instrument” while draft act does not
- **(DD):** unlike in draft act, definition of “trustee” does not include a successor trustee

The AGO states that SB 59 would remove the barriers to a fiduciary’s access to electronic records and leaves unaffected other laws, such as fiduciary, probate, trust, banking, investment securities and agency law.

PERFORMANCE IMPLICATIONS

SB 59 may have an impact on the following district court measures:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

RELATIONSHIP

SB 59 relates to HB 124 (Appointment of Assets Between Trusts) and SB60 (Uniform Powers of Appointment Act).

TECHNICAL ISSUES

The AGO points out that digital assets may have real value, both monetary and sentimental. However, internet service agreements, passwords that can be reset only through the account holder’s email, and federal and state privacy laws that do not contemplate the account holder’s death or incapacity may prevent fiduciaries from gaining access to these valuable assets.

According to the AGO, the intent is to make digital assets more accessible for the fiduciary subject to the provisions of the service agreement between the account holder and the service provider, i.e., Xfinity, Dish or Comcast, etc. See Section 8, paragraph A (1). Thus, if the terms of the service agreement are not content-preservation-friendly, then nothing is accomplished by the adoption of SB 59. Therefore, perhaps express language need be interjected that would enable the fiduciary to retain any and all digital assets owned by the decedent, to wit:

“A fiduciary with authority over digital assets or digital accounts of an account holder under the Act shall have the same access as the account holder, and is deemed to (i) have the lawful consent of the account holder and (ii) be an authorized agent or user under all applicable state and federal law and regulations and any end user license agreement.”

OTHER SUBSTANTIVE ISSUES

The AGO states that there may be provisions in SB 59 that conflict with, *inter alia*, anti-hacking and computer laws. And suggests the following clause of severability be applied:

“Severability Clause—If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.”

ABS/bb