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AN ACT
RELATING TO FIDUCIARIES; ENACTING THE REVISED UNIFORM
FIDUCIARY ACCESS TO DIGITAL ASSETS ACT; MAKING CONFORMING
TECHNICAL AMENDMENTS TO THE UNIFORM PROBATE CODE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. SHORT TITLE.--Sections 1 through 18 of this act may be cited as the "Revised Uniform Fiduciary Access to Digital Assets Act".

SECTION 2. DEFINITIONS.--As used in the Revised Uniform Fiduciary Access to Digital Assets Act:

A. "account" means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives or stores a digital asset of the user or provides goods or services to the user;

B. "agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney;

C. "carries" means engages in the transmission of an electronic communication;

D. "catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication the time and date of the communication and the electronic address of the person;

E. "conservator" means a person appointed by a court to manage the estate of a living individual. The term

1 includes a limited conservator;

2 F. "content of an electronic communication" means
3 information concerning the substance or meaning of the
4 communication that:

5 (1) has been sent or received by a user;

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

10 (3) is not readily accessible to the public;

11 G. "court" means the district court;

12 H. "custodian" means a person that carries,
13 maintains, processes, receives or stores a digital asset of a
14 user;

15 I. "designated recipient" means a person chosen by
16 a user using an online tool to administer digital assets of
17 the user;

18 J. "digital asset" means an electronic record in
19 which an individual has a right or interest. The term does
20 not include an underlying asset or liability unless the asset
21 or liability is itself an electronic record;

22 K. "electronic" means relating to technology
23 having electrical, digital, magnetic, wireless, optical,
24 electromagnetic or similar capabilities;

25 L. "electronic communication" has the meaning set

1 forth in 18 U.S.C. Section 2510(12), as amended;

2 M. "electronic-communication service" means a
3 custodian that provides to a user the ability to send or
4 receive an electronic communication;

5 N. "fiduciary" means an original, additional or
6 successor personal representative, conservator, agent or
7 trustee;

8 O. "information" means data, text, images, videos,
9 sounds, codes, computer programs, software, databases or the
10 like;

11 P. "online tool" means an electronic service
12 provided by a custodian that allows the user, in an agreement
13 distinct from the terms-of-service agreement between the
14 custodian and user, to provide directions for disclosure or
15 nondisclosure of digital assets to a third person;

16 Q. "person" means an individual, estate,
17 partnership, association, trust, business or nonprofit
18 entity, public corporation, government or governmental
19 subdivision, agency or instrumentality or other legal or
20 commercial entity;

21 R. "personal representative" means an executor,
22 administrator, special administrator or person that performs
23 substantially the same function under law of this state other
24 than the Revised Uniform Fiduciary Access to Digital Assets
25 Act;

1 S. "power of attorney" means a record that grants
2 an agent authority to act in the place of a principal;

3 T. "principal" means an individual who grants
4 authority to an agent in a power of attorney;

5 U. "protected person" means an individual for whom
6 a conservator has been appointed. The term includes an
7 individual for whom an application for the appointment of a
8 conservator is pending;

9 V. "record" means information that is inscribed on
10 a tangible medium or that is stored in an electronic or other
11 medium and is retrievable in perceivable form;

12 W. "remote-computing service" means a custodian
13 that provides to a user computer-processing services or the
14 storage of digital assets by means of an electronic
15 communications system, as defined in 18 U.S.C. Section
16 2510(14), as amended;

17 X. "terms-of-service agreement" means an agreement
18 that controls the relationship between a user and a
19 custodian;

20 Y. "trustee" means a fiduciary with legal title to
21 property under an agreement or declaration that creates a
22 beneficial interest in another. The term includes a
23 successor trustee;

24 Z. "user" means a person that has an account with
25 a custodian; and

1 AA. "will" includes a codicil, testamentary
2 instrument that only appoints an executor and instrument that
3 revokes or revises a testamentary instrument.

4 SECTION 3. APPLICABILITY.--

5 A. The Revised Uniform Fiduciary Access to Digital
6 Assets Act applies to:

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

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

11 (3) a conservatorship proceeding commenced
12 before, on or after July 1, 2017; and

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

15 B. The Revised Uniform Fiduciary Access to Digital
16 Assets Act applies to a custodian if the user resides in this
17 state or resided in this state at the time of the user's
18 death.

19 C. The Revised Uniform Fiduciary Access to Digital
20 Assets Act does not apply to a digital asset of an employer
21 used by an employee in the ordinary course of the employer's
22 business.

23 SECTION 4. USER DIRECTION FOR DISCLOSURE OF DIGITAL
24 ASSETS.--

25 A. A user may use an online tool to direct the

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

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

15 C. A user's direction under Subsection A or B of
16 this section overrides a contrary provision in a terms-of-
17 service agreement that does not require the user to act
18 affirmatively and distinctly from the user's assent to the
19 terms of service.

20 SECTION 5. TERMS-OF-SERVICE AGREEMENT.--

21 A. The Revised Uniform Fiduciary Access to Digital
22 Assets Act does not change or impair a right of a custodian
23 or a user under a terms-of-service agreement to access and
24 use digital assets of the user.

25 B. The Revised Uniform Fiduciary Access to Digital

1 Assets Act does not give a fiduciary or designated recipient
2 any new or expanded rights other than those held by the user
3 for whom, or for whose estate, the fiduciary or designated
4 recipient acts or represents.

5 C. A fiduciary's or designated recipient's access
6 to digital assets may be modified or eliminated by a user, by
7 federal law or by a terms-of-service agreement if the user
8 has not provided direction under Section 4 of the Revised
9 Uniform Fiduciary Access to Digital Assets Act.

10 SECTION 6. PROCEDURE FOR DISCLOSING DIGITAL ASSETS.--

11 A. When disclosing digital assets of a user under
12 the Revised Uniform Fiduciary Access to Digital Assets Act,
13 the custodian may at its sole discretion:

14 (1) grant a fiduciary or designated
15 recipient full access to the user's account;

16 (2) grant a fiduciary or designated
17 recipient partial access to the user's account sufficient to
18 perform the tasks with which the fiduciary or designated
19 recipient is charged; or

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

25 B. A custodian may assess a reasonable

1 administrative charge for the cost of disclosing digital
2 assets under the Revised Uniform Fiduciary Access to Digital
3 Assets Act.

4 C. A custodian need not disclose under the Revised
5 Uniform Fiduciary Access to Digital Assets Act a digital
6 asset deleted by a user.

7 D. If a user directs or a fiduciary requests a
8 custodian to disclose under the Revised Uniform Fiduciary
9 Access to Digital Assets Act some, but not all, of the user's
10 digital assets, the custodian need not disclose the assets if
11 segregation of the assets would impose an undue burden on the
12 custodian. If the custodian believes the direction or
13 request imposes an undue burden, the custodian or fiduciary
14 may seek an order from the court to disclose:

15 (1) a subset limited by date of the user's
16 digital assets;

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

19 (3) none of the user's digital assets; or

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

22 SECTION 7. DISCLOSURE OF CONTENT OF ELECTRONIC
23 COMMUNICATIONS OF DECEASED USER.--If a deceased user
24 consented to, or a court directs, disclosure of the contents
25 of electronic communications of the user, the custodian shall

1 disclose to the personal representative of the estate of the
2 user the content of an electronic communication sent or
3 received by the user if the representative gives the
4 custodian:

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

7 B. a certified copy of the death certificate of
8 the user;

9 C. a certified copy of the letters of
10 administration or letters testamentary of the personal
11 representative or a small estate affidavit pursuant to the
12 provisions of Section 45-3-1201 NMSA 1978;

13 D. unless the user provided direction using an
14 online tool, a copy of the user's will, trust, power of
15 attorney or other record evidencing the user's consent to
16 disclosure of the content of electronic communications; and

17 E. if requested by the custodian:

18 (1) a number, username, address or other
19 unique subscriber or account identifier assigned by the
20 custodian to identify the user's account;

21 (2) evidence linking the account to the
22 user; or

23 (3) a finding by the court that:

24 (a) the user had a specific account
25 with the custodian, identifiable by the information specified

1 in Paragraph (1) of this subsection;

2 (b) disclosure of the content of
3 electronic communications of the user would not violate 18
4 U.S.C. Section 2701 et seq., as amended, 47 U.S.C. Section
5 222, as amended, or other applicable law;

6 (c) unless the user provided direction
7 using an online tool, the user consented to disclosure of the
8 content of electronic communications; or

9 (d) disclosure of the content of
10 electronic communications of the user is reasonably necessary
11 for administration of the estate.

12 SECTION 8. DISCLOSURE OF OTHER DIGITAL ASSETS OF A
13 DECEASED USER.--Unless the user prohibited disclosure of
14 digital assets or the court directs otherwise, a custodian
15 shall disclose to the personal representative of the estate
16 of a deceased user a catalogue of electronic communications
17 sent or received by the user and digital assets, other than
18 the content of electronic communications, of the user, if the
19 representative gives the custodian:

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

22 B. a certified copy of the death certificate of
23 the user;

24 C. a certified copy of the letters of
25 administration or letters testamentary of the personal

1 representative or a small estate affidavit pursuant to the
2 provisions of Section 45-3-1201 NMSA 1978; and

3 D. if requested by the custodian:

4 (1) a number, username, address or other
5 unique subscriber or account identifier assigned by the
6 custodian to identify the user's account;

7 (2) evidence linking the account to the
8 user;

9 (3) an affidavit stating that disclosure of
10 the user's digital assets is reasonably necessary for
11 administration of the estate; or

12 (4) a finding by the court that:

13 (a) the user had a specific account
14 with the custodian, identifiable by the information specified
15 in Paragraph (1) of this subsection; or

16 (b) disclosure of the user's digital
17 assets is reasonably necessary for administration of the
18 estate.

19 SECTION 9. DISCLOSURE OF CONTENT OF ELECTRONIC
20 COMMUNICATIONS OF PRINCIPAL.--To the extent a power of
21 attorney expressly grants an agent authority over the content
22 of electronic communications sent or received by the
23 principal and unless directed otherwise by the principal or
24 the court, a custodian shall disclose to the agent the
25 content if the agent gives the custodian:

1 A. a written request for disclosure in physical or
2 electronic form;

3 B. an original or copy of the power of attorney
4 expressly granting the agent authority over the content of
5 electronic communications of the principal;

6 C. a certification by the agent, under penalty of
7 perjury, that the power of attorney is in effect; and

8 D. if requested by the custodian:

9 (1) a number, username, address or other
10 unique subscriber or account identifier assigned by the
11 custodian to identify the principal's account; or

12 (2) evidence linking the account to the
13 principal.

14 SECTION 10. DISCLOSURE OF OTHER DIGITAL ASSETS OF
15 PRINCIPAL.--Unless otherwise ordered by the court, directed
16 by the principal or provided by a power of attorney, a
17 custodian shall disclose to an agent with specific authority
18 over digital assets or general authority to act on behalf of
19 a principal a catalogue of electronic communications sent or
20 received by the principal and digital assets, other than the
21 content of electronic communications, of the principal if the
22 agent gives the custodian:

23 A. a written request for disclosure in physical or
24 electronic form;

25 B. an original or a copy of the power of attorney

1 that gives the agent specific authority over digital assets
2 or general authority to act on behalf of the principal;

3 C. a certification by the agent, under penalty of
4 perjury, that the power of attorney is in effect; and

5 D. if requested by the custodian:

6 (1) a number, username, address or other
7 unique subscriber or account identifier assigned by the
8 custodian to identify the principal's account; or

9 (2) evidence linking the account to the
10 principal.

11 SECTION 11. DISCLOSURE OF DIGITAL ASSETS HELD IN TRUST
12 WHEN TRUSTEE IS AN ORIGINAL USER.--Unless otherwise ordered
13 by the court or provided in a trust, a custodian shall
14 disclose to a trustee that is an original user of an account
15 any digital asset of the account held in trust, including a
16 catalogue of electronic communications of the trustee and the
17 content of electronic communications.

18 SECTION 12. DISCLOSURE OF CONTENTS OF ELECTRONIC
19 COMMUNICATIONS HELD IN TRUST WHEN TRUSTEE IS NOT AN ORIGINAL
20 USER.--Unless otherwise ordered by the court, directed by the
21 user or provided in a trust, a custodian shall disclose to a
22 trustee that is not an original user of an account the
23 content of an electronic communication sent or received by an
24 original or successor user and carried, maintained,
25 processed, received or stored by the custodian in the account

1 of the trust if the trustee gives the custodian:

2 A. a written request for disclosure in physical or
3 electronic form;

4 B. a certified copy of the trust instrument or a
5 certified copy of the trust instrument or a certification of
6 trust under Section 46A-10-1013 NMSA 1978 that includes
7 consent to disclosure of the content of electronic
8 communications to the trustee;

9 C. a certification by the trustee, under penalty
10 of perjury, that the trust exists and the trustee is a
11 currently acting trustee of the trust; and

12 D. if requested by the custodian:

13 (1) a number, username, address or other
14 unique subscriber or account identifier assigned by the
15 custodian to identify the trust's account; or

16 (2) evidence linking the account to the
17 trust.

18 SECTION 13. DISCLOSURE OF OTHER DIGITAL ASSETS HELD IN
19 TRUST WHEN TRUSTEE IS NOT AN ORIGINAL USER.--Unless otherwise
20 ordered by the court, directed by the user or provided in a
21 trust, a custodian shall disclose, to a trustee that is not
22 an original user of an account, a catalogue of electronic
23 communications sent or received by an original or successor
24 user and stored, carried or maintained by the custodian in an
25 account of the trust and any digital assets, other than the

1 content of electronic communications, in which the trust has
2 a right or interest if the trustee gives the custodian:

3 A. a written request for disclosure in physical or
4 electronic form;

5 B. a certified copy of the trust instrument or a
6 certified copy of the trust instrument or a certification of
7 trust under Section 46A-10-1013 NMSA 1978;

8 C. a certification by the trustee, under penalty
9 of perjury, that the trust exists and the trustee is a
10 currently acting trustee of the trust; and

11 D. if requested by the custodian:

12 (1) a number, username, address or other
13 unique subscriber or account identifier assigned by the
14 custodian to identify the trust's account; or

15 (2) evidence linking the account to the
16 trust.

17 SECTION 14. DISCLOSURE OF DIGITAL ASSETS TO CONSERVATOR
18 OF A PROTECTED PERSON.--

19 A. After an opportunity for a hearing under
20 Chapter 45, Article 5 NMSA 1978, the court may grant a
21 conservator access to the digital assets of a protected
22 person.

23 B. Unless otherwise ordered by the court or
24 directed by the user, a custodian shall disclose to a
25 conservator the catalogue of electronic communications sent

1 or received by a protected person and any digital assets,
2 other than the content of electronic communications, in which
3 the protected person has a right or interest if the
4 conservator gives the custodian:

5 (1) a written request for disclosure in
6 physical or electronic form;

7 (2) a certified copy of the court order that
8 gives the conservator authority over the digital assets of
9 the protected person; and

10 (3) if requested by the custodian:

11 (a) a number, username, address or
12 other unique subscriber or account identifier assigned by the
13 custodian to identify the account of the protected person; or

14 (b) evidence linking the account to the
15 protected person.

16 C. A conservator with general authority to manage
17 the assets of a protected person may request a custodian of
18 the digital assets of the protected person to suspend or
19 terminate an account of the protected person for good cause.
20 A request made under this section shall be accompanied by a
21 certified copy of the court order giving the conservator
22 authority over the protected person's property.

23 SECTION 15. FIDUCIARY DUTY AND AUTHORITY.--

24 A. The legal duties imposed on a fiduciary charged
25 with managing tangible property apply to the management of

1 digital assets, including:

2 (1) the duty of care;

3 (2) the duty of loyalty; and

4 (3) the duty of confidentiality.

5 B. A fiduciary's or designated recipient's
6 authority with respect to a digital asset of a user:

7 (1) except as otherwise provided in Section
8 4 of the Revised Uniform Fiduciary Access to Digital Assets
9 Act, is subject to the applicable terms of service;

10 (2) is subject to other applicable law,
11 including copyright law;

12 (3) in the case of a fiduciary, is limited
13 by the scope of the fiduciary's duties; and

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

15 C. A fiduciary with authority over the property of
16 a decedent, protected person, principal or settlor has the
17 right to access any digital asset in which the decedent,
18 protected person, principal or settlor had a right or
19 interest and that is not held by a custodian or subject to a
20 terms-of-service agreement.

21 D. A fiduciary acting within the scope of the
22 fiduciary's duties is an authorized user of the property of
23 the decedent, protected person, principal or settlor for
24 the purpose of applicable computer-fraud and
25 unauthorized-computer-access laws, including the Computer

1 Crimes Act.

2 E. A fiduciary with authority over the tangible,
3 personal property of a decedent, protected person, principal
4 or settlor:

5 (1) has the right to access the property and
6 any digital asset stored in it; and

7 (2) is an authorized user for the purpose of
8 computer-fraud and unauthorized-computer-access laws,
9 including those offenses enumerated in the Computer Crimes
10 Act.

11 F. A custodian may disclose information in an
12 account to a fiduciary of the user when the information is
13 required to terminate an account used to access digital
14 assets licensed to the user.

15 G. A fiduciary of a user may request a custodian
16 to terminate the user's account. A request for termination
17 shall be in writing, in either physical or electronic form,
18 and accompanied by:

19 (1) if the user is deceased, a certified
20 copy of the death certificate of the user;

21 (2) a certified copy of the letters of
22 administration or letters testamentary of the personal
23 representative or a small estate affidavit pursuant to the
24 provisions of Section 45-3-1201 NMSA 1978, court order, power
25 of attorney or trust giving the fiduciary authority over the

1 account; and

2 (3) if requested by the custodian:

3 (a) a number, username, address or
4 other unique subscriber or account identifier assigned by the
5 custodian to identify the user's account;

6 (b) evidence linking the account to the
7 user; or

8 (c) a finding by the court that the
9 user had a specific account with the custodian, identifiable
10 by the information specified in Subparagraph (a) of this
11 paragraph.

12 SECTION 16. CUSTODIAN COMPLIANCE AND IMMUNITY.--

13 A. Not later than sixty days after receipt of the
14 information required under Sections 7 through 15 of the
15 Revised Uniform Fiduciary Access to Digital Assets Act, a
16 custodian shall comply with a request under the Revised
17 Uniform Fiduciary Access to Digital Assets Act from a
18 fiduciary or designated recipient to disclose digital assets
19 or terminate an account. If the custodian fails to comply,
20 the fiduciary or designated recipient may apply to the court
21 for an order directing compliance.

22 B. An order under Subsection A of this section
23 directing compliance shall contain a finding that compliance
24 is not in violation of 18 U.S.C. Section 2702, as amended.

25 C. A custodian may notify the user that a request

1 for disclosure or to terminate an account was made under the
2 Revised Uniform Fiduciary Access to Digital Assets Act.

3 D. A custodian may deny a request under the
4 Revised Uniform Fiduciary Access to Digital Assets Act from a
5 fiduciary or designated recipient for disclosure of digital
6 assets or to terminate an account if the custodian is aware
7 of any lawful access to the account following the receipt of
8 the fiduciary's request.

9 E. The Revised Uniform Fiduciary Access to Digital
10 Assets Act does not limit a custodian's ability to obtain or
11 require a fiduciary or designated recipient requesting
12 disclosure or termination under the Revised Uniform Fiduciary
13 Access to Digital Assets Act to obtain a court order that:

14 (1) specifies that an account belongs to the
15 protected person or principal;

16 (2) specifies that there is sufficient
17 consent from the protected person or principal to support the
18 requested disclosure; and

19 (3) contains a finding required by law other
20 than the Revised Uniform Fiduciary Access to Digital Assets
21 Act.

22 F. A custodian and its officers, employees and
23 agents are immune from liability for an act or omission done
24 with reasonable care in compliance with the Revised Uniform
25 Fiduciary Access to Digital Assets Act.

1 SECTION 17. UNIFORMITY OF APPLICATION AND
2 CONSTRUCTION.--In applying and construing the Revised Uniform
3 Fiduciary Access to Digital Assets Act, consideration shall
4 be given to the need to promote uniformity of the law with
5 respect to its subject matter among states that enact it.

6 SECTION 18. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
7 AND NATIONAL COMMERCE ACT.--The Revised Uniform Fiduciary
8 Access to Digital Assets Act modifies, limits or supersedes
9 the federal Electronic Signatures in Global and National
10 Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
11 modify, limit or supersede Section 101(c) of that act, 15
12 U.S.C. Section 7001(c), or authorize electronic delivery of
13 any of the notices described in Section 103(b) of that act,
14 15 U.S.C. Section 7003(b).

15 SECTION 19. Section 45-3-711 NMSA 1978 (being
16 Laws 1975, Chapter 257, Section 3-711) is amended to read:

17 "45-3-711. POWERS OF PERSONAL REPRESENTATIVES--IN
18 GENERAL.--

19 A. Until termination of a personal
20 representative's appointment, a personal representative has
21 the same power over the title to property of the estate that
22 an absolute owner would have, in trust however, for the
23 benefit of creditors whose claims have been allowed and
24 others interested in the estate. This power may be exercised
25 without notice, hearing or order of court.

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B. A personal representative has access to and authority over a digital asset of the decedent to the extent provided by the Revised Uniform Fiduciary Access to Digital Assets Act."

SECTION 20. EFFECTIVE DATE.--The effective date of the provisions of this act is January 1, 2018. _____