

2015 SESSION

LEGISLATION NOT PREPARED BY DLS
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SENATE BILL NO. 1452

Offered January 23, 2015

A BILL to amend and reenact §§ 64.2-109, 64.2-110, and 64.2-1622 of the Code of Virginia and to amend the Code of Virginia by adding in Article 3 of Chapter 1 of Title 64.2 sections numbered 64.2-111 through 64.2-119, relating to creation of the Uniform Fiduciary Access to Digital Assets Act.

Patron—Chafin

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-109, 64.2-110, and 64.2-1622 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 3 of Chapter 1 of Title 64.2 sections numbered 64.2-111 through 64.2-119 as follows:

§ 64.2-109. Definitions.

As used in this article, unless the context requires otherwise:

"Account holder" means a person who has entered into a terms-of-service agreement with a custodian or a fiduciary for such person.

"Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

"Carries" means engages in the transmission of electronic communications.

"Catalogue of electronic communications" means information that identifies each person with whom an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

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

"Content of an electronic communication" means information concerning the substance or meaning of the communication which: (i) has been sent or received by an account holder; (ii) is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and (iii) is not readily accessible to the public.

"Court" means the circuit court for the county or city having jurisdiction over the fiduciary in matters relating to the content of this article.

"Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

"Digital account asset" means an a record that is electronic account maintained, managed, controlled, or operated by a minor in accordance with a terms of service agreement legally executed by such minor and includes blogging, email, multimedia, personal, social networking, and other online accounts or comparable items as technology develops. "Digital account" excludes accounts as such term is defined in § 6.2-604 to which a financial institution, financial institution holding company, or affiliate or subsidiary of a financial institution is a party. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic.

"Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

"Electronic communication" has the same meaning as the definition provided in 18 U.S.C. § 2510(12).

"Electronic-communication service" means a custodian that provides to an account holder the ability to send or receive an electronic communication.

"Fiduciary" means an original, additional, or successor personal representative, conservator, guardian, agent, or trustee. "Fiduciary" also means a designated successor or successor under the Virginia Small Estate Act (§ 64.2-600 et seq.).

"Governing instrument" means a will, trust, instrument creating a power of attorney, or other dispositive or nominative instrument.

"Guardian" means a person appointed by a court to manage the person of a living individual adult pursuant to Chapter 20 (§ 64.2-2000 et seq.). "Guardian" also means a person appointed by a court to manage the estate of a minor pursuant to Chapter 17 (§ 64.2-1700 et seq.). "Guardian" also includes a limited guardian.

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59 "Information" means data, text, images, videos, sounds, codes, computer games, software, databases,
60 or something that is substantially similar.

61 "Person" means an individual, estate, business or nonprofit entity, public corporation, government or
62 governmental subdivision, agency, or instrumentality, or other legal entity.

63 "Personal representative" has the same meaning as provided in § 64.2-100 means an executor,
64 administrator, curator, or a person that performs substantially the same function under the laws of the
65 Commonwealth. "Personal representative" also means a designated successor or successor under the
66 Virginia Small Estate Act (§ 64.2-600 et seq.).

67 "Power of attorney" means a record that grants an agent authority to act in the place of a principal.

68 "Protected person" means an individual for whom a conservator or guardian has been appointed.

69 "Protected person" includes an individual for whom an application for the appointment of a conservator
70 or guardian is pending.

71 "Record" means information that is inscribed on a tangible medium or that is stored in an electronic
72 or other medium and is retrievable in perceivable form.

73 "Remote-computing service" means a custodian that provides to an account holder computer
74 processing services or the storage of digital assets by means of an electronic communications system, as
75 defined in 18 U.S.C. § 2510(14).

76 "Terms of service" ~~Terms-of-service~~ agreement means any legally executed an agreement that controls
77 a the relationship between a minor and any person or entity that maintains, manages, or supervises a
78 digital account of a minor an account holder and a custodian.

79 "Trustee" means a fiduciary with legal title to property pursuant to an agreement or declaration that
80 creates a beneficial interest in another. "Trustee" also means a successor trustee.

81 "Will" includes a codicil, testamentary instrument that only appoints an executor, and instrument that
82 revokes or revises a testamentary instrument.

83 **§ 64.2-110. Access by personal representative to digital assets of decedent.**

84 ~~A. A~~ Subject to subsection B of § 64.2-114, and unless otherwise ordered by the court or provided
85 in the will of a decedent, the personal representative of a deceased minor who was domiciled in the
86 Commonwealth at the time of his death may assume the deceased minor's terms of service agreement
87 for a digital account with an Internet service provider, communications service provider, or other online
88 account service provider for purposes of consenting to and obtaining the disclosure of the contents of
89 the deceased minor's communications and subscriber records pursuant to 18 U.S.C. § 2702 unless such
90 access is contrary to the express provisions of a will, trust instrument, power of attorney, or court order.
91 Such access shall be subject to the same license, restrictions, or legal obligations of the deceased minor.

92 B. An Internet service provider, communications service provider, or other online account service
93 provider shall provide to the personal representative access to the deceased minor's communications and
94 subscriber records pursuant to subsection A within 60 days from the receipt of (i) a written request for
95 such access by the personal representative and (ii) a copy of the death certificate of the deceased minor.
96 However, if the Internet service provider, communications service provider, or other online account
97 service provider receives notice of a claim or dispute regarding providing access to the deceased minor's
98 communications and subscriber records pursuant to this subsection, such provider is not required to
99 comply with any written request received pursuant to this subsection until a final nonappealable
100 judgment is rendered by a court of competent jurisdiction determining the rights in or entitlement to any
101 content in the deceased minor's digital account.

102 C. Nothing in this section shall be construed to require an Internet service provider, communications
103 service provider, or other online account service provider to disclose any information in violation of any
104 applicable state or federal law.

105 D. No person may maintain a cause of action against an Internet service provider, communications
106 service provider, or other online account service provider for acting in compliance with this section the
107 decedent has the right to access:

108 1. The content of an electronic communication that the custodian is permitted to disclose under 18
109 U.S.C. § 2702(b) of the Electronic Communications Privacy Act;

110 2. Any catalogue of electronic communications sent or received by the decedent; and

111 3. Any other digital asset in which, at death, the decedent had a right or interest.

112 **§ 64.2-111. Access by conservator or guardian to digital assets of protected person.**

113 Subject to subsection B of § 64.2-114, the court, after an opportunity for hearing under Chapter 20
114 (§ 64.2-2000 et seq.), may grant a conservator or guardian the right to access:

115 1. The content of an electronic communication that the custodian is permitted to disclose under 18
116 U.S.C. § 2702(b) of the Electronic Communications Privacy Act;

117 2. Any catalogue of electronic communications sent or received by the protected person; and

118 3. Any other digital asset in which the protected person has a right or interest.

119 **§ 64.2-112. Access by agent to digital assets of principal.**

120 A. To the extent a power of attorney expressly grants an agent authority over the content of an

electronic communication of the principal and subject to subsection B of § 64.2-114, the agent has the right to access the content of an electronic communication that the custodian is permitted to disclose under 18 U.S.C. § 2702(b) of the Electronic Communications Privacy Act.

B. Subject to subsection B of § 64.2-114 and unless otherwise ordered by the court or provided by a power of attorney, an agent has the right to access:

1. Any catalogue of electronic communications sent or received by the principal; and
2. Any other digital asset in which the principal has a right or interest.

§ 64.2-113. Access by trustee to digital assets.

A. Subject to subsection B of § 64.2-114 and unless otherwise ordered by the court or provided in the terms of a trust, a trustee that is an original account holder has the right to access any digital asset held in trust, including any catalogue of electronic communications of the trustee and the content of an electronic communication.

B. Subject to subsection B of § 64.2-114 and unless otherwise ordered by the court or provided in a trust, a trustee that is not an original account holder has the right to access:

1. The content of an electronic communication that the custodian is permitted to disclose under 18 U.S.C. § 2702(b) of the Electronic Communications Privacy Act;
2. Any catalogue of electronic communications sent or received by the original or any successor account holder; and
3. Any other digital asset in which the original or any successor account holder has a right or interest.

§ 64.2-114. Fiduciary authority.

A. A fiduciary that is an account holder or has the right under this article to access a digital asset of an account holder:

1. Subject to the terms-of-service agreement, copyright law, and other applicable law, may take any action concerning the asset to the extent of the account holder's authority and the fiduciary's power under the laws of the Commonwealth;
2. Has, for the purpose of applicable electronic privacy laws, the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the fiduciary; and
3. Is, for the purpose of applicable computer-fraud and unauthorized computer-access laws, including Article 7.1 (§ 18.2-152.1 et seq.) of Chapter 5 of Title 18.2, an authorized user.

B. Unless an account holder, after July 1, 2015, agrees to a provision in a terms-of-service agreement that limits a fiduciary's access to a digital asset of the account holder by an affirmative act separate from the account holder's assent to other provisions of the terms-of-service agreement:

1. The provision is void as against the public policy of the Commonwealth; and
2. The fiduciary's access under this article to a digital asset does not violate the terms-of-service agreement even if the agreement requires notice of a change in the account holder's status.

C. A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this article to the extent the provision designates law that enforces a limitation on a fiduciary's access to a digital asset, and the limitation is void under subsection B.

D. As to tangible personal property capable of receiving, storing, processing, or sending a digital asset, a fiduciary with authority over the property of a decedent, protected person, principal, or settlor:

1. Has the right to access the property and any digital asset stored in it; and
2. Is an authorized user for purposes of any applicable computer-fraud and unauthorized computer-access laws, including Article 7.1 (§ 18.2-152.1 et seq.) of Chapter 5 of Title 18.2.

§ 64.2-115. Compliance.

A. If a fiduciary with a right under this article to access a digital asset of an account holder complies with subsection B, the custodian shall comply with the fiduciary's request in a record for:

1. Access to the asset;
2. Control of the asset; and
3. A copy of the asset to the extent permitted by copyright law.

B. If a request under subsection A is made by:

1. A personal representative with the right of access under § 64.2-110, the request must be accompanied by a certified copy of the letter of appointment of the personal representative or a small-estate affidavit or court order;

2. A conservator or guardian with the right of access under § 64.2-111, the request must be accompanied by a certified copy of the court order that gives the conservator or guardian authority over the digital asset;

3. An agent with the right of access under § 64.2-112, the request must be accompanied by an original or a copy of the power of attorney that authorizes the agent to exercise authority over the digital asset and a certification of the agent, under penalty of perjury, that the power of attorney is in effect; and

4. A trustee with the right of access under § 64.2-113, the request must be accompanied by a certified copy of the trust instrument, or a certification of the trust under § 64.2-804 that authorizes the trustee to exercise authority over the digital asset.

C. A custodian shall comply with a request made under subsection A no later than 60 days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

D. This section does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

§ 64.2-116. Custodian immunity.

A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this article.

§ 64.2-117. Uniformity of application and construction.

In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 64.2-118. Relation to Electronic Signatures in Global and National Commerce Act.

This article modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001 et seq.), but does not modify, limit, or supersede § 101(c) of that act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in § 103(f) of that act, 15 U.S.C. § 7002(b).

§ 64.2-119. Applicability.

A. Subject to subsection B, this article applies to:

1. A fiduciary or agent acting under a will or power of attorney executed before, on, or after July 1, 2015;

2. A personal representative acting for a decedent who died before, on, or after July 1, 2015;

3. A conservatorship or guardianship proceeding, whether pending in a court or commenced before, on, or after July 1, 2015; and

4. A trustee acting under a trust created before, on, or after July 1, 2015.

B. This article does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

§ 64.2-1622. Authority that requires specific grant; grant of general authority.

A. Subject to the provisions of subsection H, an agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited or limited by another statute, agreement, or instrument to which the authority or property is subject:

1. Create, amend, revoke, or terminate an inter vivos trust;

2. Make a gift;

3. Create or change rights of survivorship;

4. Create or change a beneficiary designation;

5. Delegate authority granted under the power of attorney;

6. Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or

7. Exercise fiduciary powers that the principal has authority to delegate; or

8. Have authority over the content of an electronic communication of the principal as provided by §§ 64.2-112 and 64.2-114.

B. Notwithstanding a grant of authority to do an act described in subsection A or H, unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or descendant of the principal may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

C. Subject to subsections A, B, D, and E, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in §§ 64.2-1625 through 64.2-1637.

D. Unless the power of attorney otherwise provides and subject to subsection H, a grant of authority to make a gift is subject to § 64.2-1638.

E. Subject to subsections A, B, and D, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

F. Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in the Commonwealth and whether or not the authority is exercised or the power of attorney is executed in the Commonwealth.

G. An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had

244 performed the act.

245 H. Notwithstanding the provisions of subsection A, if a power of attorney grants to an agent
246 authority to do all acts that a principal could do, the agent shall have the authority to make gifts in any
247 amount of any of the principal's property to any individuals or to organizations described in §§ 170(c)
248 and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both,
249 in accordance with the principal's personal history of making or joining in the making of lifetime gifts.
250 This subsection shall not in any way impair the right or power of any principal, by express words in the
251 power of attorney, to authorize, or limit the authority of, an agent to make gifts of the principal's
252 property.