HOUSE DOCKET, NO. 2586 FILED ON: 1/19/2017

HOUSE . . . . . No. 2208

The Commonwealth of Massachusetts

PRESENTED BY:

John C. Velis

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to uniform fiduciary access to digital assets.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
John C. Velis	*4th Hampden*	*1/19/2017*

HOUSE DOCKET, NO. 2586 FILED ON: 1/19/2017

HOUSE . . . . . No. 2208

By Mr. Velis of Westfield, a petition (accompanied by bill, House, No. 2208) of John C. Velis relative to uniform fiduciary access to digital assets. Financial Services.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. *3422* OF 2015-2016.]

The Commonwealth of Massachusetts

In the One Hundred and Ninetieth General Court
(2017-2018)

An Act relative to uniform fiduciary access to digital assets.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The General Laws are hereby amended by inserting after chapter 184B the following chapter:-

CHAPTER 184C

UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS

Section 1. Short Title. This act may be cited as the Uniform Fiduciary Access to Digital Assets Act.

Section 2. Definitions. In this act:

(1) "Account Holder" means a person that has entered into a terms-of-service agreement with a custodian or a fiduciary for the person.

(2) “Agent” means an attorney in fact granted authority under a durable or nondurable power of attorney.

(3) “Carries” means engages in the transmission of electronic communications.

(4) “Catalogue of electronic communications” means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) “Conservator” means a person appointed by a court to manage the estate of a living individual. The term includes a limited conservator.

(6) “Content of electronic communication” means information concerning the substance or meaning of the communication which:

(a) Has been sent or received by an account holder;

(b) Is an 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

(c) Is not readily accessible to the public.

(7) “Court” means the probate court.

(8) “Custodian” means a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

(9) “Digital Asset” means a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

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

(11) “Electronic communication” has the same meaning as the definition in 18 U.S.C. Section 2510(12) as amended.

(12) “Electronic-communication service” means a custodian that provides to an account holder the ability to send or receive an electronic communication.

(13) “Fiduciary” means an original, additional, or successor personal representative, conservator, agent, or trustee.

(14) “Governing instrument” means a will, trust, instrument creating a power of attorney, or other dispositive or nominative instrument.

(15) “Information” means data, text images, videos, sounds, codes, computer programs, software, databases, or the like.

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

(17) “Personal representative” means an executor, administrator, special administrator, or person that performs substantially the same function under law of this state other than this act.

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

(19) “Principal” means an individual who grants authority to an agent in a power of attorney.

(20) “Protected person” means an individual for whom a conservator has been appointed. The term includes an individual for whom an application for the appointment of a conservator is pending.

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

(22) “Remote-computing service” means a custodian that provides to an account holder computer processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. Section 2510(14) ,as amended.

(23) “Terms-of-service agreement” means an agreement that controls the relationship between an account holder and a custodian.

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

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

Section 3. Applicability.

(a) This act applies to:

1. A fiduciary or agent acting under a will or power of attorney executed before, on, or after August 1, 2017.

2. A personal representative acting for a decedent who died before, on, or after August 1, 2017

3. A conservatorship proceeding, whether pending in a court or commenced before, on, or after August 1, 2017; and

4. A trustee acting under a trust created before, on, or after January 1, 2018.

(b) This act does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

Section 4. Access by Personal Representative to Digital Asset of Decedent.

Subject to Section 8(b) and unless otherwise ordered by the court or provided in the will of a decedent, the personal representative of the decedent has the right to access:

(1) The content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 270(b) as amended;

(2) Any catalogue of electronic communications sent or received by the decedent; and

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

Section 5. Access by Conservator to Digital Asset of Protected Person.

Subject to Section 8(b), the court, after an opportunity for hearing under Article V of chapter 190B may grant a conservator the right to access:

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

(2) Any catalogue of electronic communications sent or received by the protected person;

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

Section 6. Access by Agent to Digital Asset of Principal.

(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 Section 8(b), the agent has the right to access the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) as amended.

(b) Subject to Section 8(b) 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.

Section 7. Access by Trustee to Digital Asset.

(a) Subject to Section 8(b) and unless otherwise ordered by the court or provided in 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 Section 8(b) 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 the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) as amended;

(2) Any catalogue or 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 other successor account holder has a right or interest.

Section 8. Fiduciary Authority.

(a) A fiduciary that is an account holder or has the right under this act 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 law of this state other than this act.

(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 an authorized user, for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including section 120F of chapter 266.

(b) Unless account holder, after January 1, 2018, 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 agreement:

(1) The provision is void as against the strong public policy of this state; and

(2) The fiduciary's access under this act 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 act 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 section 120F of chapter 266.

Section 9. Compliance.

(a) If a fiduciary with a right under this act 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 asset;

(2) Control of the asset;

(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 Section 4, the request must be accompanied by a certified copy of a court order;

(2) A conservator with the right of access under Section 5, the request must be accompanied by a certified copy of the court order that gives the conservator authority over the digital asset;

(3) An agent with the right of access under Section 6, 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 Section 7, the request must be accompanied by a certified copy of the trust instrument, or a certification of trust under section 1013 of chapter 203E that authorizes the trustee to exercise authority over the digital asset.

(c) A custodian shall comply with a request made under subsection (a) not 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.

Section 10. 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 act.

Section 11. Uniformity of Application and Construction.

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

Section 12. Relation to Electronic Signatures in Global and National Commerce Act.

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

Section 13. Severability.

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.

SECTION 2. This act shall take effect on January 1, 2018.