HOUSE DOCKET, NO. 3502 FILED ON: 1/20/2017

HOUSE . . . . . No. 3083

The Commonwealth of Massachusetts

PRESENTED BY:

Jay D. Livingstone

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 for uniform fiduciary access to digital assets.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
Jay D. Livingstone	*8th Suffolk*	*1/20/2017*
Josh S. Cutler	*6th Plymouth*	*1/20/2017*
Chris Walsh	*6th Middlesex*	*1/20/2017*

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HOUSE . . . . . No. 3083

By Mr. Livingstone of Boston, a petition (accompanied by bill, House, No. 3083) of Jay D. Livingstone, Josh S. Cutler and Chris Walsh relative to fiduciary access to digital assets under the uniform probate code. The Judiciary.

The Commonwealth of Massachusetts

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

An Act for 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. Subsection (a) of section 3-715 of chapter 190B of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by adding the following paragraph:

(28) obtain information from an entity that was a provider of an electronic communications service or remote computing service to the decedent in accordance with the procedures set forth in section 3-715A of chapter 190B of the General Laws, subject to the duties and responsibilities set forth in the Massachusetts uniform probate code and all other applicable state law pertaining to personal representatives, and subject to copyright law, the Electronic Communications Privacy Act, 18 U.S.C. § 2701 et seq., and all other applicable federal law.

SECTION 2. Said section 3-715 of said chapter 190B, as appearing, is hereby further amended by striking out subsection (b) and inserting in place thereof the following subsection:

(b) Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 3-902, a special personal representative

acting reasonably for the benefit of the interested persons, may properly exercise only those powers set forth in subsections (1), (2), (3), (5), (7), (12), (15), (18), (19), (20), (21), (22), (24), (26) and (28) of paragraph (a).

SECTION 3. Chapter 190B of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by adding after section 3-715 the following new section:

Section 3-715A

SECTION 1. DEFINITIONS.

(1) “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.

(2) “Carries” means engages in the transmission of an electronic communication.

(3) “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.

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

(A) has been sent or received by a user;

(B) 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

(C) is not readily accessible to the public.

(5) “Court” means the Massachusetts Probate and Family Court

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

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

(8) “Digital asset” means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

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

(10) “Electronic communication” has the meaning set forth in 18 U.S.C. Section 2510(12).

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

(12) “Fiduciary” means an original, additional, or successor personal representative

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

(14) “Online tool” means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

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

(16) “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.

(17) “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.

(18) “Remote computing service” means a custodian that provides to a user 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).

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

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

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

SECTION 2. APPLICABILITY.

(a) This act applies to:

(1) a fiduciary acting under a will executed before, on, or after the effective date of this act; and

(2) a personal representative acting for a decedent who died before, on, or after the effective date of this act.

(b) This act applies to a custodian if the user resided in this state at the time of the user's death.

(c) 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 3. USER DIRECTION FOR DISCLOSURE OF DIGITAL ASSETS.

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

(b) If a user has not used an online tool to give direction under subsection (a) or if the custodian has not provided an online tool, the user may allow or prohibit in a will or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

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

SECTION 4. TERMS-OF-SERVICE AGREEMENT.

(a) This act does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

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

(c) A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under Section 3.

SECTION 5. PROCEDURE FOR DISCLOSING DIGITAL ASSETS.

(a) When disclosing digital assets of a user under this act, the custodian may at its sole discretion:

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

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

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

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

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

(d) If a user directs or a fiduciary requests a custodian to disclose under this act some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:

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

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

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

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

SECTION 6. DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS OF DECEASED USER.

If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:

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

(2) a certified copy of the death certificate of the user;

(3) a certified copy of the letter of appointment of the representative or a small estate affidavit or court order;

(4) unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications; and

(5) if requested by the custodian:

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

(B) evidence linking the account to the user; or

(C) a finding by the court that:

(i) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A);

(ii) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. Section 2701 et seq, 47 U.S.C. Section 222, or other applicable law;

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

(iv) disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

SECTION 7. DISCLOSURE OF OTHER DIGITAL ASSETS OF DECEASED USER.

Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue

of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:

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

(2) a certified copy of the death certificate of the user;

(3) a certified copy of the letter of appointment of the representative or a small estate affidavit or court order; and

(4) if requested by the custodian:

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

(B) evidence linking the account to the user;

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

(D) a finding by the court that:

(i) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A); or

(ii) disclosure of the user's digital assets is reasonably necessary for administration of the estate.

SECTION 8. FIDUCIARY DUTY AND AUTHORITY.

(a) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

(1) the duty of care;

(2) the duty of loyalty; and

(3) the duty of confidentiality.

(b) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:

(1) except as otherwise provided in Section 3, is subject to the applicable terms of service;

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

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

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

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

(d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent for the purpose of applicable computer fraud and unauthorized computer access laws, including section 120F of chapter 266 of the General Laws.

(e) A fiduciary with authority over the tangible, personal property of a decedent:

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

(2) is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including section 120F of chapter 266 of the General Laws.

(f) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(g) A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

(1) a certified copy of the death certificate of the user;

(2) a certified copy of the letter of appointment of the representative or a small estate affidavit or court order, giving the fiduciary authority over the account; and

(3) if requested by the custodian:

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

(B) evidence linking the account to the user; or

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

SECTION 9. CUSTODIAN COMPLIANCE AND IMMUNITY.

(a) Not later than 60 days after receipt of the information required under Sections 6 through 8, a custodian shall comply with a request under this act from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(b) An order under subsection (a) directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. Section 2702.

(c) A custodian may notify the user that a request for disclosure or to terminate an account was made under this act.

(d) A custodian may deny a request under this act from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(e) 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.