

Sixty-fourth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2106

Introduced by

Judiciary Committee

(At the request of the Commission on Uniform State Laws)

1 A BILL for an Act to create and enact chapter 30.1-36 of the North Dakota Century Code,
2 relating to the Uniform Fiduciary Access to Digital Assets Act; and to provide for retroactive
3 application.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** Chapter 30.1-36 of the North Dakota Century Code is created and enacted as
6 follows:

7 **30.1-36-01. Short title.**

8 This chapter may be cited as the Uniform Fiduciary Access to Digital Assets Act.

9 **30.1-36-02. Definitions.**

10 In this chapter:

- 11 1. "Account holder" means a person that has entered into a terms-of-service agreement
12 with a custodian and a fiduciary for that person.
- 13 2. "Agent" means an attorney in fact granted authority under a durable or nondurable
14 power of attorney.
- 15 3. "Carries" means engaging in the transmission of electronic communications.
- 16 4. "Catalogue of electronic communications" means information that identifies each
17 person with which an account holder has had an electronic communication, the time
18 and date of the communication, and the electronic address of the person.
- 19 5. "Content of an electronic communication" means information not readily accessible to
20 the public concerning the substance or meaning of an electronic communication.
- 21 6. "Court" means the district court.
- 22 7. "Custodian" means a person that carries, maintains, processes, receives, or stores a
23 digital asset of an account holder.

- 1 8. "Digital asset" means a record that is electronic. The term does not include an
2 underlying asset or liability unless the asset or liability is itself a record that is
3 electronic.
- 4 9. "Electronic" means relating to technology having electrical, digital, magnetic, wireless,
5 optical, electromagnetic, or similar capabilities.
- 6 10. "Electronic communications" means a digital asset stored by an
7 electronic-communication service or carried or maintained by a remote-operating
8 computer service. The term includes the catalogue of electronic communications and
9 the content of an electronic communication.
- 10 11. "Electronic-communication service" means a custodian that provides to the public the
11 ability to send or receive an electronic communication.
- 12 12. "Fiduciary" means a person that is an original, additional, or successor personal
13 representative, guardian or conservator, agent, or trustee.
- 14 13. "Governing instrument" means a will, trust, instrument creating a power of attorney, or
15 other dispositive or nominative instrument.
- 16 14. "Information" means data, text, images, videos, sounds, codes, computer programs,
17 software, databases, or the like.
- 18 15. "Power of attorney" means a record that grants an agent authority to act in the place of
19 a principal.
- 20 16. "Principal" means an individual who grants authority to an agent in a power of
21 attorney.
- 22 17. "Protected person" means an individual for whom a guardian or conservator has been
23 appointed. The term includes an individual for whom a petition for the appointment of a
24 guardian or conservator is pending.
- 25 18. "Remote-computing service" means a custodian that provides to the public computer
26 processing services or the storage of digital assets by means of an electronic
27 communications system, as defined in 18 U.S.C. section 2510(14).
- 28 19. "Terms-of-service agreement" means an agreement that controls the relationship
29 between an account holder and a custodian.
- 30 20. "Trustee" means a fiduciary with legal title to an asset pursuant to an agreement or
31 declaration that creates a beneficial interest in others.

1 **30.1-36-03. Access by personal representative to digital assets of decedent.**

2 1. Subject to subsection 2 of section 30.1-36-07 and unless otherwise provided by the
3 court or the will of a decedent, a personal representative of the decedent has the right
4 to access:

5 a. The content of an electronic communication sent or received by the decedent if
6 the electronic-communication service or remote-computing service is permitted to
7 disclose the content under the Electronic Communications Privacy Act, 18 U.S.C.
8 section 2702(b);

9 b. The catalogue of electronic communications sent or received by the decedent;
10 and

11 c. Any other digital asset in which the decedent at death had a right or interest.

12 **30.1-36-04. Access by guardian or conservator to digital asset of protected person.**

13 1. Subject to subsection 2 of section 30.1-36-07, the court, after an opportunity for
14 hearing under chapter 30.1-28 or 30.1-29, may grant a guardian or conservator the
15 right to access:

16 a. The content of an electronic communication sent or received by the protected
17 person if the electronic-communication service or remote-computing service is
18 permitted to disclose the content under the Electronic Communications Privacy
19 Act, 18 U.S.C. section 2702(b);

20 b. The catalogue of electronic communications sent or received by the protected
21 person; and

22 c. Any other digital asset in which the protected person has a right or interest.

23 **30.1-36-05. Access by agent to digital asset of principal.**

24 1. To the extent a power of attorney expressly grants authority to an agent over the
25 content of an electronic communication of the principal and subject to subsection 2 of
26 section 30.1-36-07, the agent has the right to access the content of an electronic
27 communication sent or received by the principal if the electronic-communication
28 service or remote-computing service is permitted to disclose the content under the
29 Electronic Communications Privacy Act, 18 U.S.C. section 2702(b).

30 2. Except as provided in subsection 1 and unless otherwise provided by a power of
31 attorney or the court, an agent has the right, subject to subsection 2 of section

1 30.1-36-07, to access the catalogue of electronic communications sent or received by
2 the principal and any digital asset in which the principal has a right or interest.

3 **30.1-36-06. Access by trustee to digital assets.**

4 1. Subject to subsection 2 of section 30.1-36-07 and unless otherwise provided by the
5 court or the settlor in the terms of a trust, a trustee or successor of the trustee that is
6 an original account holder has the right to access each digital asset held in trust,
7 including the catalogue of electronic communications sent or received by the trustee
8 and the content of electronic communication and that is not an original account holder
9 has the right to access:

- 10 a. The content of an electronic communication sent or received by the original or
11 any successor account holder if the electronic-communication service or
12 remote-computing service is permitted to disclose the content under the
13 Electronic Communications Privacy Act, 18 U.S.C. section 2702(b);
14 b. The catalogue of electronic communications sent or received by the original or
15 any successor account holder; and
16 c. Any other digital asset in which the original or any successor account holder has
17 a right or interest.

18 **30.1-36-07. Fiduciary authority.**

- 19 1. A fiduciary that is an account holder or has the right under section 30.1-36-03,
20 30.1-36-04, 30.1-36-05, or 30.1-36-06 to access a digital asset of an account holder:
21 a. Subject to the terms-of-service agreement and copyright or other applicable law,
22 may take any action concerning the asset to the extent of the account holder's
23 authority and the fiduciary's powers under the law of this state;
24 b. Has, under applicable electronic privacy laws, the lawful consent of the account
25 holder for the custodian to divulge the content of an electronic communication to
26 the fiduciary; and
27 c. Is, under applicable computer fraud and unauthorized access laws, an authorized
28 user.
- 29 2. If a provision in a terms-of-service agreement limits a fiduciary's access to the digital
30 assets of the account holder, the provision is void as against the strong public policy of
31 this state, unless the account holder, after the effective date of this chapter, agreed to

1 the provision by an affirmative act separate from the account holder's assent to other
2 provisions of the terms-of-service agreement.

3 3. A choice-of-law provision in a terms-of-service agreement is unenforceable against a
4 fiduciary acting under this chapter to the extent the provision designates law that
5 enforces a limitation on a fiduciary's access to digital assets which limitation is void
6 under subsection 2.

7 4. Except as provided in subsection 2, a fiduciary's access under this chapter to a digital
8 asset does not violate a terms-of-service agreement, notwithstanding a provision of
9 the agreement which limits third-party access or requires notice of change in the
10 account holder's status.

11 5. As to tangible personal property capable of receiving, storing, processing, or sending a
12 digital asset, a fiduciary with authority over the property of a decedent, protected
13 person, principal, or settlor has the right to access the property and any digital asset
14 stored in it and is an authorized user for purposes of any applicable computer fraud
15 and unauthorized access laws.

16 **30.1-36-08. Compliance.**

17 1. If a fiduciary with a right under this chapter to access a digital asset of an account
18 holder complies with subsection 2, the custodian shall comply with the fiduciary's
19 request in a record for access to the asset, control of the asset, and a copy of the
20 asset to the extent permitted by copyright law.

21 2. If a request under subsection 1 as made by:

22 a. A personal representative with a right of access under section 30.1-36-03, the
23 request must be accompanied by a certified copy of the letter of appointment of
24 the representative, a small estate affidavit, or a court order;

25 b. A guardian or conservator with the right of access under section 30.1-36-04, the
26 request must be accompanied by a certified copy of the court order that gives the
27 guardian or conservator authority over the digital asset;

28 c. An agent with the right of access under section 30.1-36-05, the request must be
29 accompanied by an original or a copy of the power of attorney that authorizes the
30 agent to exercise authority over the digital asset and a certification of the agent,
31 under penalty of perjury, that the power of attorney is in effect; and

- 1 d. A trustee with the right of access under section 30.1-36-06, the request must be
2 accompanied by a certified copy of the trust instrument or a certification of the
3 trust under section 59-18-13 that authorizes the trustee to exercise authority over
4 the digital asset.
- 5 2. A custodian shall comply with a request made under subsection 1 not later than sixty
6 days after receipt. If the custodian fails to comply, the fiduciary may apply to the court
7 for an order directing compliance.
- 8 3. Instead of furnishing a copy of the trust instrument under subdivision d of
9 subsection 2, the trustee may provide the certification of trust. The certification:
- 10 a. Must contain the following information:
- 11 (1) That the trust exists and the date the trust instrument was executed;
12 (2) The identity of the settlor;
13 (3) The identity and address of the trustee;
14 (4) That there is nothing inconsistent in the trust with respect to the trustee's
15 powers over digital assets;
16 (5) Whether the trust is revocable and the identity of any person holding a
17 power to revoke the trust; and
18 (6) Whether a cotrustee has authority to sign or otherwise authenticate, and
19 whether all or fewer than all cotrustees are required to exercise powers of
20 the trustee;
- 21 b. Must be signed or otherwise authenticated by a trustee;
- 22 c. Must state that the trust has not been revoked, modified, or amended in a
23 manner that would cause the representations contained in the certification of trust
24 to be incorrect; and
- 25 d. Need not contain the dispositive terms of the trust.
- 26 4. A custodian that receives a certification of trust under subsection 3 may require the
27 trustee to provide copies of excerpts from the original trust instrument and later
28 amendments which designate the trustee and confer on the trustee the power to act in
29 the pending transaction.
- 30 5. A custodian that acts in reliance on a certification under subsection 3 without
31 knowledge that the representations contained in it are incorrect is not liable to any

1 person for so acting and may assume without inquiry the existence of facts stated in
2 the certification.

3 6. A person that in good faith enters into a transaction in reliance on a certification of trust
4 under subsection 3 may enforce the transaction against the trust property as if the
5 representations contained in the certification were correct.

6 7. A person that demands the trust instrument in addition to a certification of trust under
7 subsection 3 or excerpts under subsection 4 is liable for damages if the court
8 determines that the person did not act in good faith in demanding the trust instrument.

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

11 **30.1-36-09. Custodian immunity.**

12 A custodian and its officers, employees, and agents are immune from liability for any act
13 done in good faith in compliance with this chapter.

14 **30.1-36-10. Uniformity of application and construction.**

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

17 **30.1-36-11. Relation to Electronic Signatures in Global and National Commerce Act.**

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

22 **30.1-36-12. Employee Exception.**

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

25 **SECTION 2. RETROACTIVE APPLICATION.**

26 1. Subject to subsection 2, this Act applies to:

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

29 b. A personal representative acting for a decedent who died before, on, or after
30 August 1, 2015;

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- 1 c. A guardianship or conservatorship proceeding, whether pending in a court or
- 2 commenced before, on, or after August 1, 2015; and
- 3 d. A trustee acting under a trust created before, on, or after August 1, 2015.