

P.L.2017, CHAPTER 237, *approved September 13, 2017*
Assembly, No. 3433 (*Third Reprint*)

1 AN ACT concerning access by fiduciaries to digital assets and
2 supplementing Title 3B of the New Jersey Statutes.

3
4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6
7 1. Short Title. This act shall be known and may be cited as the
8 “Uniform Fiduciary Access to Digital Assets Act.”

9
10 2. Definitions. As used in this act:

11 “Account” means an arrangement under a terms-of-service in
12 which a custodian carries, maintains, processes, receives, or stores a
13 digital asset of the user or provides goods or services to the user.

14 “Agent” means an attorney-in-fact granted authority under a
15 durable or nondurable power of attorney.

16 “Carries” means engages in the transmission of an electronic
17 communication.

18 “Catalogue of electronic communications” means information
19 that identifies each person with which a user has had an electronic
20 communication, the time and date of the communication, and the
21 electronic address of the person.

22 “Content of an electronic communication” means information
23 concerning the substance or meaning of the communication which:

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

25 (b) is in electronic storage by a custodian providing an
26 electronic communication service to the public or is carried or
27 maintained by a custodian providing a remote computing service to
28 the public; and

29 (c) is not readily accessible to the public.

30 “Court” means the Probate Part of the Chancery Division of the
31 Superior Court. ²For the purposes of this act, “court” includes the
32 Surrogate’s Court acting within the scope of its authority pursuant
33 to statute or the Rules of Court.²

34 “Custodian” means a person that carries, maintains, processes,
35 receives, or stores a digital asset of a user.

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Assembly AJU committee amendments adopted June 6, 2016.

²Assembly floor amendments adopted June 27, 2016.

³Senate SJU committee amendments adopted June 26, 2017.

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

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

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

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

12 “Electronic-communication service” means a custodian that
13 provides to a user the ability to send or receive an electronic
14 communication.

15 “Fiduciary” means an original, additional, or successor personal
16 representative, guardian, agent, or trustee.

17 “Guardian” means a person appointed by the court to make
18 decisions regarding the property of an incapacitated adult, including
19 a person appointed in accordance with N.J.S.3B:12-1 et seq. or its
20 equivalent in a state other than New Jersey.

21 “Incapacitated person” means an incapacitated individual, as
22 defined in N.J.S.3B:1-2, for whom a guardian has been appointed.

23 “Information” means data, text, images, videos, sounds, codes,
24 computer programs, software, databases, or the like.

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

30 “Person” means an individual, estate, business or nonprofit
31 entity, public corporation, government or governmental subdivision,
32 agency, or instrumentality, or other legal entity.

33 “Personal representative” means an executor, administrator,
34 special administrator, or person that performs substantially the same
35 function under the law of this State other than this act.

36 “Power of attorney” means a written instrument by which an
37 individual known as the principal authorizes another individual or
38 individuals or a qualified bank within the meaning of section 28 of
39 P.L.1948, c.67 (C.17:9A-28) known as the attorney-in-fact to
40 perform specified acts on behalf of the principal as the principal's
41 agent.

42 “Principal” means an individual, at least 18 years of age, who, in
43 a power of attorney, authorizes an agent to act.

44 “Record” means information that is inscribed on a tangible
45 medium or that is stored in an electronic or other medium and is
46 retrievable in perceivable form.

47 “Remote-computing service” means a custodian that provides to
48 a user computer processing services or the storage of digital assets

1 by means of an electronic communications system, as defined in 18
2 U.S.C. s.2510(14).

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

5 “Trustee” means a fiduciary with legal title to property pursuant
6 to an agreement or declaration that creates a beneficial interest in
7 another. “Trustee” includes an original, additional, or successor
8 trustee, whether or not appointed or confirmed by court.

9 “User” means a person that has an account with a custodian.

10 “Will” means the last will and testament of a testator or testatrix
11 and includes any codicil and any testamentary instrument that
12 merely appoints an executor, revokes or revises another will,
13 nominates a guardian, or expressly excludes or limits the right of a
14 person or class to succeed to property of the decedent passing by
15 intestate succession.

16

17 3. User’s Residence in State; Inapplicability of Act to
18 Employers’ Digital Assets.

19 a. This act applies to a custodian if the user resides in this State
20 or resided in this State at the time of the user’s death.

21 b. This act does not apply to a digital asset of an employer used
22 by an employee in the ordinary course of the employer’s business.

23

24 4. User Direction for Disclosure of Digital Assets.

25 a. A user may use an online tool to direct the custodian to
26 disclose or not to disclose to a designated recipient some or all of
27 the user’s digital assets, including the content of electronic
28 communications. If the online tool allows the user to modify or
29 delete a direction at all times, a direction regarding disclosure using
30 an online tool overrides a contrary direction by the user in a will,
31 trust, power of attorney, or other record.

32 b. If a user has not used an online tool to give direction under
33 subsection a. of this section or if the custodian has not provided an
34 online tool, the user may allow or prohibit in a will, trust, power of
35 attorney, or other record, disclosure to a fiduciary of some or all of
36 the user’s digital assets, including the content of electronic
37 communications sent or received by the user.

38 c. A user’s direction under subsection a. or b. of this section
39 overrides a contrary provision in a terms-of-service agreement that
40 does not require the user to act affirmatively and distinctly from the
41 user’s assent to the terms of service.

42

43 5. Terms-of-Service Agreement.

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

47 b. This act does not give a fiduciary or designated recipient any
48 new or expanded rights other than those held by the user for whom,

1 or for whose estate, the fiduciary or designated recipient acts or
2 represents.

3 c. A fiduciary's or designated recipient's access to digital
4 assets may be modified or eliminated by a user, by federal law, or
5 by a terms-of-service agreement if the user has not provided
6 direction under section 4 of this act.

7

8 6. Procedure for Disclosing Digital Assets.

9 a. When disclosing digital assets of a user under this act, the
10 custodian ¹**【may at its sole discretion】** shall either¹:

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

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

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

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

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

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

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

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

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

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

35

36 7. Disclosure of Content of Electronic Communications of
37 Deceased User.

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

43 a. a written request for disclosure in physical or electronic
44 form;

45 b. a copy of the death certificate of the user;

46 c. a ¹**【copy of the letters testamentary or letters of**
47 **administration】** certificate evidencing the appointment of the
48 representative or a small-estate affidavit¹;

- 1 d. unless the user provided direction using an online tool, a
2 copy of the user's will, trust, power of attorney, or other record
3 evidencing the user's consent to disclosure of the content of
4 electronic communications; and
- 5 e. if requested by the custodian, any of the following:
- 6 (1) a number, username, address, or other unique subscriber or
7 account identifier assigned by the custodian to identify the user's
8 account;
- 9 (2) evidence linking the account to the user; or
- 10 (3) a finding by the court of any of the following:
- 11 (a) the user had a specific account with the custodian,
12 identifiable by the information specified in paragraph (1) of this
13 subsection;
- 14 (b) disclosure of the content of electronic communications of
15 the user would not violate 18 U.S.C. s.2701 et seq., Unlawful
16 Access to Stored Communications; 47 U.S.C. s.222, Privacy of
17 Customer Information; or other applicable law;
- 18 (c) unless the user provided direction using an online tool, the
19 user consented to disclosure of the content of electronic
20 communications; or
- 21 (d) disclosure of the content of electronic communications of
22 the user is reasonably necessary for administration of the estate.

23
24 8. Disclosure of Other Digital Assets of Deceased User.

25 Unless the user prohibited disclosure of digital assets or the court
26 directs otherwise, a custodian shall disclose to the personal
27 representative of the estate of a deceased user a catalogue of
28 electronic communications sent or received by the user and digital
29 assets, other than the content of electronic communications, of the
30 user, if the representative gives the custodian:

- 31 a. a written request for disclosure in physical or electronic
32 form;
- 33 b. a copy of the death certificate of the user;
- 34 c. a ¹**【copy of the letters testamentary or letters of**
35 **administration】** certificate evidencing the appointment of the
36 representative or a small-estate affidavit¹; and
- 37 d. if requested by the custodian, any of the following:
- 38 (1) a number, username, address, or other unique subscriber or
39 account identifier assigned by the custodian to identify the user's
40 account;
- 41 (2) evidence linking the account to the user;
- 42 (3) an affidavit stating that disclosure of the user's digital assets
43 is reasonably necessary for administration of the estate; or
- 44 (4) a finding by the court of either of the following:
- 45 (a) the user had a specific account with the custodian,
46 identifiable by the information specified in paragraph (1) of this
47 subsection; or

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

3

4 9. Disclosure of Content of Electronic Communications of
5 Principal.

6 To the extent a power of attorney expressly grants an agent
7 authority over the content of electronic communications sent or
8 received by the principal and unless directed otherwise by the
9 principal or the court, a custodian shall disclose to the agent the
10 content if the agent gives the custodian:

11 a. a written request for disclosure in physical or electronic
12 form;

13 b. an original or copy of the power of attorney expressly
14 granting the agent authority over the content of electronic
15 communications of the principal;

16 c. a certification by the agent, under penalty of perjury, that the
17 power of attorney is in effect; and

18 d. if requested by the custodian:

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

22 (2) evidence linking the account to the principal.

23

24 10. Disclosure of Other Digital Assets of Principal.

25 Unless otherwise ordered by the court, directed by the principal,
26 or provided by a power of attorney, a custodian shall disclose to an
27 agent with specific authority over digital assets or general authority
28 to act on behalf of a principal a catalogue of electronic
29 communications sent or received by the principal and digital assets,
30 other than the content of electronic communications, of the
31 principal if the agent gives the custodian:

32 a. a written request for disclosure in physical or electronic
33 form;

34 b. an original or a copy of the power of attorney that gives the
35 agent specific authority over digital assets or general authority to
36 act on behalf of the principal;

37 c. a certification by the agent, under penalty of perjury, that the
38 power of attorney is in effect; and

39 d. if requested by the custodian:

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

43 (2) evidence linking the account to the principal.

44

45 11. Disclosure of Digital Assets Held in Trust When Trustee is
46 Original User.

47 Unless otherwise ordered by the court or provided in a trust, a
48 custodian shall disclose to a trustee that is an original user of an
49 account any digital asset of the account held in trust, including a

1 catalogue of electronic communications of the trustee and the
2 content of electronic communications.

3

4 12. Disclosure of Contents of Electronic Communications Held
5 in Trust When Trustee Not Original User.

6 Unless otherwise ordered by the court, directed by the user, or
7 provided in a trust, a custodian shall disclose to a trustee that is not
8 an original user of an account the content of an electronic
9 communication sent or received by an original or successor user and
10 carried, maintained, processed, received, or stored by the custodian
11 in the account of the trust if the trustee gives the custodian:

12 a. a written request for disclosure in physical or electronic
13 form;

14 b. a certified copy of the trust instrument or a certification of
15 the trust under N.J.S.3B:31-81 that includes consent to disclosure of
16 the content of electronic communications to the trustee;

17 c. a certification by the trustee, under penalty of perjury, that
18 the trust exists and the trustee is a currently acting trustee of the
19 trust; and

20 d. if requested by the custodian:

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

24 (2) evidence linking the account to the trust.

25

26 13. Disclosure of Other Digital Assets Held in Trust When
27 Trustee Not Original User.

28 Unless otherwise ordered by the court, directed by the user, or
29 provided in a trust, a custodian shall disclose, to a trustee that is not
30 an original user of an account, a catalogue of electronic
31 communications sent or received by an original or successor user
32 and stored, carried, or maintained by the custodian in an account of
33 the trust and any digital assets, other than the content of electronic
34 communications, in which the trust has a right or interest if the
35 trustee gives the custodian:

36 a. a written request for disclosure in physical or electronic
37 form;

38 b. a certified copy of the trust instrument or a certification of
39 the trust under N.J.S.3B:31-81;

40 c. a certification by the trustee, under penalty of perjury, that
41 the trust exists and the trustee is a currently acting trustee of the
42 trust; and

43 d. if requested by the custodian:

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

47 (2) evidence linking the account to the trust.

1 14. Disclosure of Digital Assets to Guardian of Incapacitated
2 Person.

3 a. After an opportunity for a hearing under N.J.S.3B:12-1 et
4 seq., the court may grant a guardian access to the digital assets of an
5 incapacitated person.

6 b. Unless otherwise ordered by the court or directed by the
7 user, a custodian shall disclose to a guardian the catalogue of
8 electronic communications sent or received by the incapacitated
9 person and any digital assets, other than the content of electronic
10 communications, in which the incapacitated person has a right or
11 interest if the guardian gives the custodian:

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

14 (2) a copy of the court order that gives the guardian authority
15 over the digital assets of the incapacitated person; and

16 (3) if requested by the custodian:

17 (a) a number, username, address, or other unique subscriber or
18 account identifier assigned by the custodian to identify the account
19 of the incapacitated person; or

20 (b) evidence linking the account to the incapacitated person.

21 c. A guardian with general authority to manage the assets of an
22 incapacitated person may request a custodian of the digital assets of
23 the incapacitated person to suspend or terminate an account of the
24 incapacitated person for good cause. A request made under this
25 section shall be accompanied by a copy of the court order giving the
26 guardian authority over the incapacitated person's property.
27

28 15. Fiduciary ³and Designated Recipient³ Duty and Authority.

29 a. The legal duties imposed on a fiduciary charged with
30 managing tangible property apply to the management of digital
31 assets, including:

32 (1) the duty of care;

33 (2) the duty of loyalty; and

34 (3) the duty of confidentiality.

35 b. A fiduciary's ³or designated recipient's³ authority with
36 respect to a digital asset of a user:

37 (1) except as otherwise provided in section 4 of this act, is
38 subject to the applicable terms of service;

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

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

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

43 c. A fiduciary with authority over the property of a decedent,
44 incapacitated person, principal, or settlor has the right to access any
45 digital asset in which the decedent, incapacitated person, principal,
46 or settlor had a right or interest and that is not held by a custodian
47 or subject to a terms-of-service agreement.

1 d. A fiduciary acting within the scope of the fiduciary's duties
2 is an authorized user of the property of the decedent, incapacitated
3 person, principal, or settlor for the purpose of applicable computer-
4 fraud and unauthorized-computer-access laws, including but not
5 limited to the provisions of P.L.1984, c.184 (C.2C:20-23 et seq.)
6 and N.J.S.2C:20-2.

7 e. A fiduciary with authority over the tangible, personal
8 property of a decedent, incapacitated person, principal, or settlor:

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

11 (2) is an authorized user for the purpose of computer-fraud and
12 unauthorized-computer-access laws, including but not limited to the
13 provisions of P.L.1984, c.184 (C.2C:20-23 et seq.) and
14 N.J.S.2C:20-2.

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

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

21 (1) if the user is deceased, a copy of the death certificate of the
22 user;

23 (2) a copy of the letters testamentary or letters of administration,
24 court order, power of attorney, or trust giving the fiduciary
25 authority over the account; and

26 (3) if requested by the custodian:

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

30 (b) evidence linking the account to the user; or

31 (c) a finding by the court that the user had a specific account
32 with the custodian, identifiable by the information specified in
33 subparagraph (a) of this paragraph.

34
35 16. Custodian Compliance and Immunity.

36 a. Not later than 60 days after receipt of the information
37 required under sections 7 through 15 of this act, a custodian shall
38 comply with a request under this act from a fiduciary or designated
39 recipient to disclose digital assets or terminate an account. If the
40 custodian fails to comply, the fiduciary or designated recipient may
41 apply to the court for an order directing compliance.

42 b. An order under subsection a. of this section directing
43 compliance must contain a finding that compliance is not in
44 violation of 18 U.S.C. s.2702.

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

47 d. A custodian may deny a request under this act from a
48 fiduciary or designated recipient for disclosure of digital assets or to

1 terminate an account if the custodian is aware of any lawful access
2 to the account following the receipt of the fiduciary's request.

3 e. This act does not limit a custodian's ability to obtain or
4 require a fiduciary or designated recipient requesting disclosure or
5 termination under this act to obtain a court order which:

6 (1) specifies that an account belongs to the incapacitated person
7 or principal;

8 (2) specifies that there is sufficient consent from the
9 incapacitated person or principal to support the requested
10 disclosure; and

11 (3) contains a finding required by law other than this act.

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

15

16 17. Uniformity of Application and Construction.

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

20

21 18. Relation to Electronic Signatures in Global and National
22 Commerce Act.

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

28

29 19. Effective date and applicability.

30 This act shall take effect on the 90th day following enactment and
31 shall apply to:

32 a. a fiduciary acting under a will or power of attorney executed
33 before, on, or after the effective date of this act;

34 b. a personal representative acting for a decedent who died
35 before, on, or after the effective date of this act;

36 c. a guardianship, whether the guardian was appointed before,
37 on, or after the effective date of this act; and

38 d. a trustee acting under a trust created before, on, or after the
39 effective date of this act.

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44 "Uniform Fiduciary Access to Digital Assets Act"; authorizes
45 executor, agent, guardian, or trustee, under certain circumstances, to
46 manage electronic records of decedent, principal, incapacitated
47 person, or trust creator.