

[First Reprint]
SENATE, No. 2527

STATE OF NEW JERSEY
217th LEGISLATURE

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Sponsored by:
Senator PATRICK J. DIEGNAN, JR.
District 18 (Middlesex)

SYNOPSIS

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

CURRENT VERSION OF TEXT

As reported by the Senate Judiciary Committee on June 26, 2017, with amendments.



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. For 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.

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

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

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

42 “Electronic” means relating to technology having electrical,
43 digital, magnetic, wireless, optical, electromagnetic, or similar
44 capabilities.

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:

¹Senate SJU committee amendments adopted June 26, 2017.

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

3 “Electronic-communication service” means a custodian that
4 provides to a user the ability to send or receive an electronic
5 communication.

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

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

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

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

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

21 “Person” means an individual, estate, business or nonprofit
22 entity, public corporation, government or governmental subdivision,
23 agency, or instrumentality, or other legal entity.

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

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

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

35 “Record” means information that is inscribed on a tangible
36 medium or that is stored in an electronic or other medium and is
37 retrievable in perceivable form.

38 “Remote-computing service” means a custodian that provides to
39 a user computer processing services or the storage of digital assets
40 by means of an electronic communications system, as defined in 18
41 U.S.C. s.2510(14).

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

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

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

1 “Will” means the last will and testament of a testator or testatrix
2 and includes any codicil and any testamentary instrument that
3 merely appoints an executor, revokes or revises another will,
4 nominates a guardian, or expressly excludes or limits the right of a
5 person or class to succeed to property of the decedent passing by
6 intestate succession.

7

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

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

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

14

15 4. User Direction for Disclosure of Digital Assets.

16 a. A user may use an online tool to direct the custodian to
17 disclose or not to disclose to a designated recipient some or all of
18 the user’s digital assets, including the content of electronic
19 communications. If the online tool allows the user to modify or
20 delete a direction at all times, a direction regarding disclosure using
21 an online tool overrides a contrary direction by the user in a will,
22 trust, power of attorney, or other record.

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

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

33

34 5. Terms-of-Service Agreement.

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

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

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

46

47 6. Procedure for Disclosing Digital Assets.

- 1 a. When disclosing digital assets of a user under this act, the
2 custodian shall either:
- 3 (1) grant a fiduciary or designated recipient full access to the
4 user's account;
- 5 (2) grant a fiduciary or designated recipient partial access to the
6 user's account sufficient to perform the tasks with which the fiduciary
7 or designated recipient is charged; or
- 8 (3) provide a fiduciary or designated recipient a copy in a record
9 of any digital asset that, on the date the custodian received the request
10 for disclosure, the user could have accessed if the user were alive and
11 had full capacity and access to the account.
- 12 b. A custodian may assess a reasonable administrative charge for
13 the cost of disclosing digital assets under this act.
- 14 c. A custodian need not disclose under this act a digital asset
15 deleted by a user.
- 16 d. If a user directs or a fiduciary requests a custodian to disclose
17 under this act some, but not all, of the user's digital assets, the
18 custodian need not disclose the assets if segregation of the assets
19 would impose an undue burden on the custodian. If the custodian
20 believes the direction or request imposes an undue burden, the
21 custodian or fiduciary may seek an order from the court to disclose:
- 22 (1) a subset limited by date of the user's digital assets;
- 23 (2) all of the user's digital assets to the fiduciary or designated
24 recipient;
- 25 (3) none of the user's digital assets; or
- 26 (4) all of the user's digital assets to the court for review in
27 camera.
- 28
- 29 7. Disclosure of Content of Electronic Communications of
30 Deceased User.
- 31 If a deceased user consented or a court directs disclosure of the
32 contents of electronic communications of the user, the custodian
33 shall disclose to the personal representative of the estate of the user
34 the content of an electronic communication sent or received by the
35 user if the representative gives the custodian:
- 36 a. a written request for disclosure in physical or electronic
37 form;
- 38 b. a copy of the death certificate of the user;
- 39 c. a certificate evidencing the appointment of the representative
40 or a small-estate affidavit;
- 41 d. unless the user provided direction using an online tool, a
42 copy of the user's will, trust, power of attorney, or other record
43 evidencing the user's consent to disclosure of the content of
44 electronic communications; and
- 45 e. if requested by the custodian, any of the following:
- 46 (1) a number, username, address, or other unique subscriber or
47 account identifier assigned by the custodian to identify the user's
48 account;

1 (2) evidence linking the account to the user; or

2 (3) a finding by the court of any of the following:

3 (a) the user had a specific account with the custodian,
4 identifiable by the information specified in paragraph (1) of this
5 subsection;

6 (b) disclosure of the content of electronic communications of
7 the user would not violate 18 U.S.C. s.2701 et seq., Unlawful
8 Access to Stored Communications; 47 U.S.C. s.222, Privacy of
9 Customer Information; or other applicable law;

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

13 (d) disclosure of the content of electronic communications of
14 the user is reasonably necessary for administration of the estate.
15

16 8. Disclosure of Other Digital Assets of Deceased User.

17 Unless the user prohibited disclosure of digital assets or the court
18 directs otherwise, a custodian shall disclose to the personal
19 representative of the estate of a deceased user a catalogue of
20 electronic communications sent or received by the user and digital
21 assets, other than the content of electronic communications, of the
22 user, if the representative gives the custodian:

23 a. a written request for disclosure in physical or electronic
24 form;

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

26 c. a certificate evidencing the appointment of the representative
27 or a small-estate affidavit; and

28 d. if requested by the custodian, any of the following:

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

32 (2) evidence linking the account to the user;

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

35 (4) a finding by the court of either of the following:

36 (a) the user had a specific account with the custodian,
37 identifiable by the information specified in paragraph (1) of this
38 subsection; or

39 (b) disclosure of the user's digital assets is reasonably necessary
40 for administration of the estate.
41

42 9. Disclosure of Content of Electronic Communications of
43 Principal.

44 To the extent a power of attorney expressly grants an agent
45 authority over the content of electronic communications sent or
46 received by the principal and unless directed otherwise by the
47 principal or the court, a custodian shall disclose to the agent the
48 content if the agent gives the custodian:

- 1 a. a written request for disclosure in physical or electronic
2 form;
- 3 b. an original or copy of the power of attorney expressly
4 granting the agent authority over the content of electronic
5 communications of the principal;
- 6 c. a certification by the agent, under penalty of perjury, that the
7 power of attorney is in effect; and
- 8 d. if requested by the custodian:
- 9 (1) a number, username, address, or other unique subscriber or
10 account identifier assigned by the custodian to identify the
11 principal's account; or
- 12 (2) evidence linking the account to the principal.

13
14 10. Disclosure of Other Digital Assets of Principal.

15 Unless otherwise ordered by the court, directed by the principal,
16 or provided by a power of attorney, a custodian shall disclose to an
17 agent with specific authority over digital assets or general authority
18 to act on behalf of a principal a catalogue of electronic
19 communications sent or received by the principal and digital assets,
20 other than the content of electronic communications, of the
21 principal if the agent gives the custodian:

- 22 a. a written request for disclosure in physical or electronic
23 form;
- 24 b. an original or a copy of the power of attorney that gives the
25 agent specific authority over digital assets or general authority to
26 act on behalf of the principal;
- 27 c. a certification by the agent, under penalty of perjury, that the
28 power of attorney is in effect; and
- 29 d. if requested by the custodian:
- 30 (1) a number, username, address, or other unique subscriber or
31 account identifier assigned by the custodian to identify the
32 principal's account; or
- 33 (2) evidence linking the account to the principal.

34
35 11. Disclosure of Digital Assets Held in Trust When Trustee is
36 Original User.

37 Unless otherwise ordered by the court or provided in a trust, a
38 custodian shall disclose to a trustee that is an original user of an
39 account any digital asset of the account held in trust, including a
40 catalogue of electronic communications of the trustee and the
41 content of electronic communications.

42
43 12. Disclosure of Contents of Electronic Communications Held
44 in Trust When Trustee Not Original User.

45 Unless otherwise ordered by the court, directed by the user, or
46 provided in a trust, a custodian shall disclose to a trustee that is not
47 an original user of an account the content of an electronic
48 communication sent or received by an original or successor user and

- 1 carried, maintained, processed, received, or stored by the custodian
2 in the account of the trust if the trustee gives the custodian:
- 3 a. a written request for disclosure in physical or electronic
4 form;
 - 5 b. a certified copy of the trust instrument or a certification of
6 the trust under N.J.S.3B:31-81 that includes consent to disclosure of
7 the content of electronic communications to the trustee;
 - 8 c. a certification by the trustee, under penalty of perjury, that
9 the trust exists and the trustee is a currently acting trustee of the
10 trust; and
 - 11 d. if requested by the custodian:
 - 12 (1) a number, username, address, or other unique subscriber or
13 account identifier assigned by the custodian to identify the trust's
14 account; or
 - 15 (2) evidence linking the account to the trust.
- 16

17 13. Disclosure of Other Digital Assets Held in Trust When
18 Trustee Not Original User.

- 19 Unless otherwise ordered by the court, directed by the user, or
20 provided in a trust, a custodian shall disclose, to a trustee that is not
21 an original user of an account, a catalogue of electronic
22 communications sent or received by an original or successor user
23 and stored, carried, or maintained by the custodian in an account of
24 the trust and any digital assets, other than the content of electronic
25 communications, in which the trust has a right or interest if the
26 trustee gives the custodian:
- 27 a. a written request for disclosure in physical or electronic
28 form;
 - 29 b. a certified copy of the trust instrument or a certification of
30 the trust under N.J.S.3B:31-81;
 - 31 c. a certification by the trustee, under penalty of perjury, that
32 the trust exists and the trustee is a currently acting trustee of the
33 trust; and
 - 34 d. if requested by the custodian:
 - 35 (1) a number, username, address, or other unique subscriber or
36 account identifier assigned by the custodian to identify the trust's
37 account; or
 - 38 (2) evidence linking the account to the trust.
- 39

40 14. Disclosure of Digital Assets to Guardian of Incapacitated
41 Person.

- 42 a. After an opportunity for a hearing under N.J.S.3B:12-1 et
43 seq., the court may grant a guardian access to the digital assets of an
44 incapacitated person.
- 45 b. Unless otherwise ordered by the court or directed by the
46 user, a custodian shall disclose to a guardian the catalogue of
47 electronic communications sent or received by the incapacitated
48 person and any digital assets, other than the content of electronic

1 communications, in which the incapacitated person has a right or
2 interest if the guardian gives the custodian:

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

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

7 (3) if requested by the custodian:

8 (a) a number, username, address, or other unique subscriber or
9 account identifier assigned by the custodian to identify the account
10 of the incapacitated person; or

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

12 c. A guardian with general authority to manage the assets of an
13 incapacitated person may request a custodian of the digital assets of
14 the incapacitated person to suspend or terminate an account of the
15 incapacitated person for good cause. A request made under this
16 section shall be accompanied by a copy of the court order giving the
17 guardian authority over the incapacitated person's property.

18

19 15. Fiduciary ¹and Designated Recipient¹ Duty and Authority.

20 a. The legal duties imposed on a fiduciary charged with
21 managing tangible property apply to the management of digital
22 assets, including:

23 (1) the duty of care;

24 (2) the duty of loyalty; and

25 (3) the duty of confidentiality.

26 b. A fiduciary's ¹or designated recipient's¹ authority with
27 respect to a digital asset of a user:

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

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

31 (3) ¹in the case of a fiduciary,¹ is limited by the scope of the
32 fiduciary's duties; and

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

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

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

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

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

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

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

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

11 (1) if the user is deceased, a copy of the death certificate of the
12 user;

13 (2) a copy of the letters testamentary or letters of administration,
14 court order, power of attorney, or trust giving the fiduciary
15 authority over the account; 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 user's
19 account;

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

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

24
25 16. Custodian Compliance and Immunity.

26 a. Not later than 60 days after receipt of the information
27 required under sections 7 through 15 of this act, a custodian shall
28 comply with a request under this act from a fiduciary or designated
29 recipient to disclose digital assets or terminate an account. If the
30 custodian fails to comply, the fiduciary or designated recipient may
31 apply to the court for an order directing compliance.

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

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

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

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

44 (1) specifies that an account belongs to the incapacitated person
45 or principal;

46 (2) specifies that there is sufficient consent from the
47 incapacitated person or principal to support the requested
48 disclosure; and

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

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

5

6 17. Uniformity of Application and Construction.

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

10

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

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

18

19 19. Effective date and applicability.

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

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

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

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

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