MISSISSIPPI LEGISLATURE REGULAR SESSION 2017

By: Representatives Lamar, Dixon To: Judiciary A

HOUSE BILL NO. 849
(As Sent to Governor)

AN ACT TO CREATE THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (2015); TO CREATE DEFINITIONS FOR TERMS USED IN THIS ACT; TO PROVIDE FOR APPLICABILITY; TO AUTHORIZE USER DIRECTION FOR DISCLOSURE OF DIGITAL ASSETS; TO PROVIDE THAT THE ACT DOES NOT AFFECT TERMS-OF-SERVICE AGREEMENTS; TO PROVIDE A PROCEDURE FOR DISCLOSING DIGITAL ASSETS; TO PROVIDE FOR DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS OF A DECEASED USER; TO PROVIDE FOR DISCLOSURE OF OTHER DIGITAL ASSETS OF A DECEASED USER; TO PROVIDE FOR DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS OF THE PRINCIPAL; TO PROVIDE FOR DISCLOSURE OF OTHER DIGITAL ASSETS OF THE PRINCIPAL; TO PROVIDE FOR DISCLOSURE OF THE CONTENTS OF ELECTRONIC COMMUNICATIONS HELD IN TRUST WHEN THE TRUSTEE IS NOT THE ORIGINAL USER; TO PROVIDE FOR DISCLOSURE OF OTHER DIGITAL ASSETS HELD IN TRUST WHEN THE TRUSTEE IS NOT THE ORIGINAL USER; TO PROVIDE FOR THE DISCLOSURE OF DIGITAL ASSETS TO THE CONSERVATOR OF A WARD; TO IMPOSE LEGAL DUTIES ON AND GRANT AUTHORITY TO A FIDUCIARY UNDER THE ACT; TO PROVIDE FOR CUSTODIAN IMMUNITY; TO AMEND SECTIONS 87-3-7, 81-5-34, 91-8-303 AND 87-3-109, MISSISSIPPI CODE OF 1972, TO CONFORM TO THIS ACT; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Short title. Sections 1 through 18 of this act may be cited as the Revised Uniform Fiduciary Access to Digital Assets Act.

SECTION 2. Definitions. In this act the following terms shall have the meanings ascribed in this section, unless the context clearly requires otherwise:

(a) "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.

(b) "Agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(c) "Carries" means engages in the transmission of an electronic communication.

(d) "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.

(e) "Conservator" means a person appointed by a court to manage the estate of a living individual and includes a guardian appointed by a court to manage the estate of a living individual, and "conservatorship" includes guardianship of the estate of a living individual.

(f) "Content of an electronic communication" means information concerning the substance or meaning of the communication which:

(i) Has been sent or received by a user;

(ii) 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

(iii) Is not readily accessible to the public.

(g) "Court" means the chancery court.

(h) "Custodian" means a person that carries, maintains, processes, receives or stores a digital asset of a user.

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

(j) "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.

(k) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

(l) "Electronic communication" has the meaning set forth in 18 USC Section 2510(12).

(m) "Electronic-communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(n) "Fiduciary" means an original, additional, or successor personal representative, conservator, agent or trustee.

(o) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases or the like.

(p) "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.

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

(r) "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.

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

(t) "Principal" means an individual who grants authority to an agent in a power of attorney.

(u) "Protected person" means a ward or other individual for whom a conservator has been appointed and includes an individual for whom an application for the appointment of a conservator is pending.

(v) "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.

(w) "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 USC Section 2510(14).

(x) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

(y) "Trustee" means a fiduciary with legal title to property under an agreement or declaration that creates a beneficial interest in another. The term also includes a successor trustee.

(z) "User" means a person that has an account with a custodian.

(aa) "Will" includes a codicil, testamentary instrument that only appoints an executor and an instrument that revokes or revises a testamentary instrument.

SECTION 3. Applicability. (1) This act applies to:

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

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

(c) A conservatorship proceeding commenced before, on, or after the effective date of this act; and

(d) A trustee acting under a trust created before, on, or after the effective date of this act.

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

(3) 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. User direction for disclosure of digital assets. (1) 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, trust, power of attorney or other record.

(2) If a user has not used an online tool to give direction under subsection (1) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, 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.

(3) A user's direction under subsection (1) or (2) 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 5. Terms-of-service agreement. (1) 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.

(2) 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.

(3) 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 4.

SECTION 6. Procedure for disclosing digital assets. (1) When disclosing digital assets of a user under this act, the custodian may at its sole discretion:

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

(b) 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

(c) 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.

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

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

(4) 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:

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

(b) All of the user's digital assets to the fiduciary or designated recipient;

(c) None of the user's digital assets; or

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

SECTION 7. 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:

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

(b) A certified copy of the death certificate of the user;

(c) A certified copy of letters of administration or letters testamentary of the representative;

(d) 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

(e) If requested by the custodian:

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

(ii) Evidence linking the account to the user; or

(iii) A finding by the court that:

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

2. Disclosure of the content of electronic communications of the user would not violate 18 USC Section 2701 et seq., 47 USC Section 222, or other applicable law;

3. Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

4. Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

SECTION 8. 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:

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

(b) A certified copy of the death certificate of the user;

(c) A certified copy of letters of administration or letters testamentary of the representative; and

(d) If requested by the custodian:

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

(ii) Evidence linking the account to the user;

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

(iv) A finding by the court that:

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

2. Disclosure of the user's digital assets is reasonably necessary for administration of the estate.

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

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

(b) An original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;

(c) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(d) If requested by the custodian:

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

(ii) Evidence linking the account to the principal.

SECTION 10. **Disclosure of other digital assets of principal.** Unless otherwise ordered by the court, directed by the principal or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:

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

(b) An original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

(c) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(d) If requested by the custodian:

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

(ii) Evidence linking the account to the principal.

SECTION 11. **Disclosure of digital assets held in trust when trustee is original user.** Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the

account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

SECTION 12. Disclosure of contents of electronic communications held in trust when trustee not original user. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

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

(b) A certified copy of the trust instrument or a certification of the trust under Section 91-8-1013 that includes consent to disclosure of the content of electronic-communications to the trustee;

(c) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(d) If requested by the custodian:

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

(ii) Evidence linking the account to the trust.

SECTION 13. Disclosure of other digital assets held in trust when trustee not original user. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

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

(b) A certified copy of the trust instrument or a certification of the trust under Section 91-8-1013;

(c) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(d) If requested by the custodian:

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

(ii) Evidence linking the account to the trust.

SECTION 14. Disclosure of digital assets to conservator of protected person. (1) After an opportunity for a hearing under

Chapter 13, Title 93, Mississippi Code of 1972, the court may grant a conservator access to the digital assets of a protected person.

(2) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a conservator the catalogue of electronic communications sent or received by a protected person and any digital assets, other than the content of electronic communications, in which the protected person has a right or interest if the conservator gives the custodian:

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

(b) A certified copy of the court order that gives the conservator authority over the digital assets of the protected person; and

(c) If requested by the custodian:

(i) A number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the account of the protected person; or

(ii) Evidence linking the account to the protected person.

(3) A conservator with general authority to manage the assets of a protected person may request a custodian of the digital assets of the protected person to suspend or terminate an account of the protected person for good cause. A request made under this section must be accompanied by a certified copy of the

court order giving the conservator authority over the protected person's property.

SECTION 15. Fiduciary duty and authority. (1) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

(a) The duty of care;

(b) The duty of loyalty; and

(c) The duty of confidentiality.

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

(a) Except as otherwise provided in Section 4 of this act, is subject to the applicable terms of service;

(b) Is subject to other applicable law, including copyright law;

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

(d) May not be used to impersonate the user.

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

(4) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, protected person, principal or settlor for the purpose of

applicable computer fraud and unauthorized computer access laws, including Section 97-45-3.

(5) A fiduciary with authority over the tangible, personal property of a decedent, protected person, principal or settlor:

(a) Has the right to access the property and any digital asset stored in it; and

(b) Is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including Section 97-45-3.

(6) 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.

(7) 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:

(a) If the user is deceased, a certified copy of the death certificate of the user;

(b) A certified copy of the letters of administration or letters testamentary of the representative, court order, power of attorney, or trust giving the fiduciary authority over the account; and

(c) If requested by the custodian:

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

(ii) Evidence linking the account to the user; or

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

SECTION 16. Custodian compliance and immunity. (1) Not later than sixty (60) days after receipt of the information required under Sections 7 through 15 of this act, 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.

(2) An order under subsection (1) directing compliance must contain a finding that compliance is not in violation of 18 USC Section 2702.

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

(4) 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.

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

(a) Specifies that an account belongs to the protected person or principal;

(b) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and

(c) Contains a finding required by law other than this act.

(6) 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 17. 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 states that enact it.

SECTION 18. 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 USC Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 USC Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 USC Section 7003(b).

SECTION 19. Section 87-3-7, Mississippi Code of 1972, is amended as follows:

87-3-7. (1) A letter of attorney to transact any business need only express plainly the authority conferred.

(2) If any power of attorney or other writing (a) authorizes an attorney-in-fact or other agent to do, execute or perform any act that the principal might or could do, or (b) evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or deal with the principal's property, the attorney-in-fact or agent shall have the power and authority to make gifts in any amount of any of the principal's property to any individuals or to any organizations described in Sections 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts, including the authority to exercise all rights and powers granted to a fiduciary under the Revised Uniform Fiduciary Access to Digital Assets Act created under Sections 1 through 18 of this act.

(3) Subsection (2) as set forth above is declaratory of past and present law in the State of Mississippi, and shall be applied to all powers of attorney, whether executed before, on or after March 16, 1999.

SECTION 20. Section 81-5-34, Mississippi Code of 1972, is amended as follows:

81-5-34. Any bank, including a national bank, may accept accounts in the name of any administrator, executor, guardian, trustee or other fiduciary in trust for a named beneficiary or beneficiaries <u>including the authority to exercise all rights and powers granted to a fiduciary under the Revised Uniform Fiduciary Access to Digital Assets Act created under Sections 1 through 18 of this act</u>. Any such fiduciary shall have the power to make payments upon and to withdraw any such account, in whole or in part. The withdrawal value of any such account or other rights relating thereto may be paid or delivered, in whole or in part, to such fiduciary, without regard to any notice to the contrary, as long as such fiduciary is living. The payment or delivery to any such fiduciary or a receipt of acquittance signed by any such fiduciary to whom any such payment or any such delivery of rights is made shall be valid and sufficient release and discharge of any bank for the payment or delivery so made. Whenever a person holding an account in a fiduciary capacity dies, and no written notice of the revocation or termination of the trust relationship has been given to a bank and the bank has no notice of any other disposition of the trust estate, the withdrawal value of such account or other rights relating thereto may, at the option of a bank, be paid or delivered, in whole or in part, to the beneficiary or beneficiaries of such trust. Whenever an account shall be opened by any person describing himself in opening such account as trustee for another, and there is no other or further

notice of the existence and terms of a legal and valid trust, then such description shall be given in writing to such bank. In the event of the death of the person so described as trustee, the withdrawal value of such account or any part thereof may be paid to the person for whom the account was thus stated to have been opened, and such account and all additions thereto shall be the property of such person, unless prior to payment the trust agreement is presented to the bank showing a contrary interest. When made in accord with this section, the payment or delivery to any such beneficiary, beneficiaries or designated person, or a receipt or acquittance signed by any such beneficiary, beneficiaries or designated person for any such payment or delivery, shall be valid and sufficient release and discharge of a bank for the payment or delivery so made. Trust accounts permitted by this section shall not be required to be acknowledged and recorded. When an account is opened in a form described in this section, the right set forth in Section 81-5-62 shall apply. No bank paying any beneficiary in accordance with the provisions of this section shall thereby be liable for any estate, inheritance or succession taxes which may be due this state. The term "accounts" or "account" as used in this section shall include, but not be limited to, any form of deposit or account, such as a savings account, checking account, time deposit, demand deposit or certificate of deposit, whether negotiable, nonnegotiable or otherwise.

SECTION 21. Section 91-8-303, Mississippi Code of 1972, is amended as follows:

91-8-303. To the extent there is no material conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) A conservator or guardian may represent and bind the estate that the conservator or guardian controls;

(2) A conservator or guardian may represent and bind the ward if a conservator or guardian of the ward's estate has not been appointed;

(3) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(4) A trustee may represent and bind the beneficiaries of the trust;

(5) A personal representative of a decedent's estate may represent and bind persons interested in the estate;

(6) A parent may represent and bind the person's minor or unborn child if a conservator or guardian for the descendant has not been appointed;

(7) A grandparent may represent the grandparent's grandchild if that grandchild is not already represented by a parent under paragraph (6); *** * ***

(8) A person designated by the settlor either in the trust instrument or in a writing delivered to the trustee, or designated in a writing delivered to the trustee by a trust protector or trust advisor with power under the terms of the trust instrument to represent the beneficiaries of the trust, may represent and bind the beneficiaries *** * ***; and

(9) Any person acting in a fiduciary capacity shall exercise all rights and powers granted to a fiduciary under the Revised Uniform Fiduciary Access to Digital Assets Acts created under Sections 1 through 18 of this act.

SECTION 22. Section 87-3-109, Mississippi Code of 1972, is amended as follows:

87-3-109. (1) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.

(2) A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter

commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

(3) Any person acting in a fiduciary capacity shall exercise all rights and powers granted to a fiduciary under the Revised Uniform Fiduciary Access to Digital Assets Act created under Sections 1 through 18 of this act.

SECTION 23. This act shall take effect and be in force from and after July 1, 2017.