**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ENACTING THE “SOUTH CAROLINA UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT” BY ADDING PART 10 TO ARTICLE 2, CHAPTER 2, TITLE 62 SO AS TO ESTABLISH A FRAMEWORK FOR THE MANAGEMENT AND DISPOSITION OF DIGITAL ASSETS UPON DEATH OR INCAPACITATION; TO DEFINE TERMS; TO SET FORTH THE APPLICABILITY OF THE ACT TO FIDUCIARIES, AGENTS, PERSONAL REPRESENTATIVES, CONSERVATORS, GUARDIANS, AND TRUSTEES; TO PROVIDE THAT THE ACT DOES NOT APPLY TO A DIGITAL ASSET OF AN EMPLOYER THAT IS USED BY AN EMPLOYEE IN THE ORDINARY COURSE OF BUSINESS; TO ENUMERATE THE RIGHTS AND LIMITATIONS OF A PERSONAL REPRESENTATIVE OF A DECEDENT TO ACCESS THE ELECTRONIC COMMUNICATIONS OR DIGITAL ASSETS OF THE DECEDENT; TO PERMIT A COURT TO GRANT A CONSERVATOR OR GUARDIAN THE RIGHT TO ACCESS ELECTRONIC COMMUNICATIONS OF A PROTECTED PERSON AFTER A HEARING CONDUCTED PURSUANT TO APPLICABLE STATE LAW; TO ENUMERATE THE RIGHTS AND LIMITATIONS OF AN AGENT TO ACCESS A PRINCIPAL’S ELECTRONIC COMMUNICATIONS AND DIGITAL ASSETS; TO ENUMERATE THE RIGHTS AND LIMITATIONS OF A TRUSTEE, OR SUCCESSOR OF A TRUSTEE TO ACCESS THE ELECTRONIC COMMUNICATIONS AND DIGITAL ASSETS OF AN ACCOUNT HOLDER OR SUCCESSOR ACCOUNT HOLDER; TO PROVIDE THAT A FIDUCIARY WHO IS AN ACCOUNT HOLDER OR HAS THE RIGHT UNDER THIS ACT TO ACCESS AN ACCOUNT HOLDER’S DIGITAL ASSETS MAY DO SO, SUBJECT TO CERTAIN LIMITATIONS; TO PROVIDE THAT AN ACCOUNT HOLDER MAY LIMIT A FIDUCIARY’S ACCESS TO ANY DIGITAL ASSET BY AFFIRMATIVE ACT, SEPARATE FROM HIS OR HER ASSENT TO OTHER PROVISIONS, IN A TERMS‑OF‑SERVICE AGREEMENT; TO SPECIFY WHEN A PROVISION IN A TERMS‑OF‑SERVICE AGREEMENT IS VOID AS AGAINST THE PUBLIC POLICY OF SOUTH CAROLINA; TO PROVIDE THAT A CHOICE‑OF‑LAW PROVISION IN AN AGREEMENT IS UNENFORCEABLE TO THE EXTENT THAT IT LIMITS A FIDUCIARY’S ACCESS TO A DIGITAL ASSET UNDER THIS ACT; TO ALLOW A FIDUCIARY WITH AUTHORITY OVER THE PROPERTY OF A DECEDENT, PROTECTED PERSON, PRINCIPAL, OR SETTLOR TO ACCESS TANGIBLE PROPERTY CONTAINING DIGITAL ASSETS; TO SPECIFY THE DOCUMENTS OR INSTRUMENTS THAT A FIDUCIARY MUST PROVIDE TO A CUSTODIAN IN ORDER TO ACCESS, CONTROL, OR COPY A DIGITAL ASSET; TO PROVIDE THAT A CUSTODIAN MUST COMPLY WITH A REQUEST MADE PURSUANT TO THIS SECTION WITHIN SIXTY DAYS OF RECEIPT OF THE REQUEST; TO REQUIRE THAT THE PROVISIONS OF THIS ACT BE APPLIED AND CONSTRUED SO AS TO PROMOTE UNIFORMITY OF LAW AMONG THE STATES; AND TO ESTABLISH CONFORMITY WITH FEDERAL REQUIREMENTS RELATED TO ELECTRONIC SIGNATURES AND RECORDS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. This act may be cited as the “South Carolina Uniform Fiduciary Access to Digital Assets Act”.

SECTION 2. Article 2, Chapter 2, Title 62 of the 1976 Code is amended by adding:

“Part 10

Uniform Fiduciary Access to Digital Assets

Section 62‑2‑1010. As used in this part:

(1) ‘Account holder’ means a:

(a) person that has entered into a terms‑of‑service agreement with a custodian; or

(b) fiduciary for a person described in subitem (a).

(2) ‘Agent’ means a person granted authority to act for a principal under a power of attorney whether the person is designated an agent, attorney in fact or otherwise.

(3) ‘Carries’ means engages in the transmission of electronic communications.

(4) ‘Catalog of electronic communications’ means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) ‘Conservator’ means a person appointed by a court to manage the estate of a living individual.

(6) ‘Content of an electronic communication’ means information concerning the substance or meaning of the communication that:

(a) has been sent or received by the account holder;

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

(c) is not readily accessible to the public.

(7) ‘Court’ has the meaning specified in Section 62‑1‑201(5).

(8) ‘Custodian’ means a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

(9) ‘Digital asset’ means a record that is electronic. The term does not include an underlying asset or liability unless the asset or liability is itself a record that is electronic.

(10) ‘Durable’, with reference to a power of attorney, means not terminated by the principal’s incapacity.

(11) ‘Electronic’ means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

(12) ‘Electronic communication’ has the meaning as specified in 18 U.S.C. Section 2510(12), as amended.

(13) ‘Electronic‑communication service’ means a custodian that provides to an account holder the ability to send or receive an electronic communication.

(14) ‘Fiduciary’ includes an original, additional, successor or copersonal representative, conservator, agent or trustee.

(15) ‘Governing instrument’ means a will, trust, power of attorney, or other dispositive, appointive, or nominative instrument of a similar type.

(16) ‘Incapacity or incapacitated person’ has the meaning specified in Section 62‑5‑101(1).

(17) ‘Information’ means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(18) ‘Person’ means an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality, or other legal entity.

(19) ‘Personal representative’ has the meaning specified in Section 62‑1‑201(33).

(20) ‘Power of attorney’ means a record that grants an agent authority to act in the place of a principal whether or not the term ‘power of attorney’ is used. The term includes a durable and nondurable power of attorney.

(21) ‘Principal’ means an individual who grants authority to an agent in a power of attorney.

(22) ‘Property’ or ‘asset’ means anything that may be the subject of ownership, whether real or personal, tangible or intangible, or legal or equitable, or an interest or right in any property or asset.

(23) ‘Protected person’ has the meaning specified in Section 62‑5‑101(3).

(24) ‘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.

(25) ‘Remote‑computing service’ means a custodian that provides to an account holder computer processing services or the storage of digital assets by means of an electronic communications system, as the term ‘electronic communications system’ is defined in 18 U.S.C. Section 2510(14), as amended.

(26) ‘Settlor’ has the meaning specified in Section 62‑7‑103(14).

(27) ‘Terms‑of‑service agreement’ means an agreement that controls the relationship between an account holder and a custodian.

(28) ‘Terms of a trust’ has the meaning specified in Section 62‑7‑103(17).

(29) ‘Trust instrument’ has the meaning specified in Section 62‑7‑103(18).

(30) ‘Trustee’ has the meaning specified in Section 62‑7‑103(19); and

(31) ‘Will’ has the meaning specified in Section 62‑1‑201(52).

Section 62‑2‑1015. (A) This part applies to a:

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

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

(3) conservatorship proceeding, whether pending in a court or commenced before, on, or after the effective date of this act; and

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

(B) This part does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer’s business.

Section 62‑2‑1020. Subject to Section 62‑2‑1040(B), and unless otherwise ordered by the court or provided in the will of a decedent, the personal representative of the decedent has the right to access:

(1) the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;

(2) any catalogue of electronic communications sent or received by the decedent; and

(3) any other digital asset in which the original or any successor account holder has a right or interest.

Section 62‑2‑1025. Subject to Section 62‑2‑1040(B), the court, after an opportunity for hearing pursuant to the provisions of Part 4, Article 5, Chapter 5, Title 62 of the 1976 Code, may grant a conservator the right to access:

(1) the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;

(2) any catalogue of electronic communications sent or received by the protected person; and

(3) any other digital asset in which the protected person has a right or interest.

Section 62‑2‑1030. (A) To the extent a power of attorney expressly grants an agent authority over the content of an electronic communication of the principal and subject to Section 62‑2‑1040(B), the agent has the right to access the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended.

(B) Subject to Section 62‑2‑1040(B), and unless otherwise ordered by the court or provided by a power of attorney, an agent has the right to access:

(1) a catalogue of electronic communications sent or received by the principal; and

(2) any other digital asset in which the principal has a right or interest.

Section 62‑2‑1035. (A) Subject to Section 62‑2‑1040(B), and unless otherwise ordered by the court or provided in a trust, a trustee that is an original account holder has the right to access any digital asset held in trust, including any catalogue of electronic communications of the trustee and the content of an electronic communication.

(B) Subject to Section 62‑2‑1040(B), and unless otherwise ordered by the court or provided in a trust, a trustee that is not an original account holder has the right to access:

(1) the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;

(2) a catalogue of electronic communications sent or received by the original or any successor account holder; and

(3) any other digital asset in which the original or any successor account holder has a right or interest.

Section 62‑2‑1040. (A) A fiduciary that is an account holder or has the right under this part to access a digital asset of an account holder:

(1) subject to the terms‑of‑service agreement, copyright law, and other applicable law, may take any action concerning the asset to the extent of the account holder’s authority and the fiduciary’s power under the law of this State other than this part;

(2) has, for the purpose of applicable electronic privacy laws, the lawful consent of the account holder for the custodian to divulge the content of an electronic communication to the fiduciary; and

(3) is, for the purpose of applicable computer‑fraud and unauthorized computer‑access laws, including Section 16‑16‑20, an authorized user.

(B) Unless an account holder, after the effective date of this part, agrees to a provision in a terms‑of‑service agreement that limits a fiduciary’s access to a digital asset of the account holder by an affirmative act separate from the account holder’s assent to other provisions of the agreement:

(1) the provision is void as against the strong public policy of this State; and

(2) the fiduciary’s access under this part to a digital asset does not violate the terms‑of‑service agreement even if the agreement requires notice of a change in the account holder’s status.

(C) A choice‑of‑law provision in a terms‑of‑service agreement is unenforceable against a fiduciary acting under this part to the extent the provision designates law that enforces a limitation on a fiduciary’s access to a digital asset, and the limitation is void under subsection (B).

(D) As to tangible personal property capable of receiving, storing, processing, or sending a digital asset, a fiduciary with authority over the property of a decedent, protected person, principal, or settlor:

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

(2) is an authorized user for purposes of any applicable computer‑fraud and unauthorized computer‑access laws, including Section 16‑16‑20.

Section 62‑2‑1045. (A) If a fiduciary with a right under this part to access a digital asset of an account holder complies with subsection (B), the custodian shall comply with the fiduciary’s request in a record for:

(1) access to the asset;

(2) control of the asset; and

(3) a copy of the asset to the extent permitted by copyright law.

(B) If a request under subsection (A) is made by:

(1) a personal representative with the right of access pursuant to Section 62‑2‑1020, the request must be accompanied by a certified copy of the personal representative’s letter of appointment;

(2) a conservator with the right of access pursuant to Section 62‑2‑1025, the request must be accompanied by a certified copy of the court order that gives the conservator authority over the digital asset;

(3) an agent with the right of access pursuant to Section 62‑2‑1030, the request must be accompanied by an original or a copy of the power of attorney that authorizes the agent to exercise authority over the digital asset and a certification of the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) a trustee with the right of access pursuant to Section 62‑2‑1035, the request must be accompanied by a certified copy of the trust instrument, or a certification of the trust pursuant to Section 62‑7‑1013, that authorizes the trustee to exercise authority over the digital asset.

(C) A custodian shall comply with a request made under subsection (A) not later than sixty days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an order directing compliance.

Section 62‑2‑1050. 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 part.

Section 62‑2‑1055. 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 62‑2‑1060. This uniform act modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 2. The provisions of this act are severable. If any section, subsection, paragraph, subparagraph, item, subitem, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of the act, the General Assembly hereby declaring that it would have passed each and every section, subsection, paragraph, subparagraph, item, subitem, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, items, subitems, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 3. This act takes effect upon approval by the Governor.

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