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No. 846

H.P. 595

House of Representatives, March 7, 2017

**An Act To Enact the Revised Uniform Fiduciary Access to Digital
Assets Act**

Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "R B. Hunt".

ROBERT B. HUNT
Clerk

Presented by Representative CARDONE of Bangor.
Cosponsored by Senator HILL of York.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **PART A**

3 **Sec. A-1. 18-A MRSA Art. 10** is enacted to read:

4 **ARTICLE 10**

5 **MAINE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL**
6 **ASSETS ACT**

7 **§10-101. Short title**

8 This Article may be known and cited as "the Maine Revised Uniform Fiduciary
9 Access to Digital Assets Act."

10 **§10-102. Definitions**

11 As used in this Act, unless the context otherwise indicates, the following terms have
12 the following meanings.

13 **1. Account.** "Account" means an arrangement under a terms of service agreement in
14 which a custodian carries, maintains, processes, receives or stores a digital asset of a user
15 or provides goods or services to a user.

16 **2. Agent.** "Agent" means an attorney in fact granted authority under a durable or
17 nondurable power of attorney.

18 **3. Carries.** "Carries" means engages in the transmission of an electronic
19 communication.

20 **4. Catalog of electronic communications.** "Catalog of electronic communications"
21 means information that identifies each person with which a user has had an electronic
22 communication, the time and date of the communication and the electronic address of the
23 person.

24 **5. Conservator.** "Conservator" means a person appointed by a court to manage the
25 estate of a living individual. "Conservator" includes a limited conservator.

26 **6. Content of an electronic communication.** "Content of an electronic
27 communication" means information concerning the substance or meaning of an electronic
28 communication that:

29 A. Has been sent or received by a user;

30 B. Is in electronic storage by a custodian providing an electronic communication
31 service to the public or is carried or maintained by a custodian providing a remote
32 computing service to the public; and

33 C. Is not readily accessible to the public.

1 **7. Custodian.** "Custodian" means a person that carries, maintains, processes,
2 receives or stores a digital asset of a user.

3 **8. Designated recipient.** "Designated recipient" means a person chosen by a user
4 using an online tool to administer digital assets of the user.

5 **9. Digital asset.** "Digital asset" means an electronic record in which an individual
6 has a right or interest. "Digital asset" does not include an underlying asset or liability
7 unless the asset or liability is itself an electronic record.

8 **10. Electronic.** "Electronic" means relating to technology having electrical, digital,
9 magnetic, wireless, optical, electromagnetic or similar capabilities.

10 **11. Electronic communication.** "Electronic communication" has the same meaning
11 as in 18 United States Code, Section 2510(12).

12 **12. Electronic communication service.** "Electronic communication service" means
13 a service that provides to a user the ability to send or receive an electronic
14 communication.

15 **13. Fiduciary.** "Fiduciary" means an original, additional or successor personal
16 representative, conservator, agent or trustee.

17 **14. Information.** "Information" means data, text, images, videos, sounds, codes,
18 computer programs, software and databases or the like.

19 **15. Online tool.** "Online tool" means an electronic service provided by a custodian
20 that allows a user, in an agreement distinct from the terms of service agreement between
21 the custodian and user, to provide directions for disclosure or nondisclosure of digital
22 assets to a 3rd person.

23 **16. Person.** "Person" means an individual, estate, business or nonprofit entity,
24 public corporation, government or governmental subdivision, agency or instrumentality
25 or other legal entity.

26 **17. Personal representative.** "Personal representative" means an executor,
27 administrator, special administrator or person that performs substantially the same
28 function under the laws of this State other than this Act.

29 **18. Power of attorney.** "Power of attorney" means a record that grants an agent
30 authority to act in the place of a principal.

31 **19. Principal.** "Principal" means an individual who grants authority to an agent in a
32 power of attorney.

33 **20. Protected person.** "Protected person" means an individual for whom a
34 conservator has been appointed. "Protected person" includes an individual for whom an
35 application for the appointment of a conservator is pending.

36 **21. Record.** "Record" means information that is inscribed on a tangible medium or
37 that is stored in an electronic or other medium and is retrievable in perceivable form.

1 **22. Remote computing service.** "Remote computing service" means a service that
2 provides to a user computer processing services or the storage of digital assets by means
3 of an electronic communications system as defined in 18 United States Code, Section
4 2510(14).

5 **23. Terms of service agreement.** "Terms of service agreement" means an
6 agreement, as defined in Title 11, section 1-1201, subsection (3), that controls the
7 relationship between a user and a custodian.

8 **24. Trustee.** "Trustee" means a fiduciary with legal title to property pursuant to an
9 agreement or declaration that creates a beneficial interest in another person. "Trustee"
10 includes a successor trustee.

11 **25. User.** "User" means a person that has an account with a custodian.

12 **26. Will.** "Will" includes a codicil, a testamentary instrument that only appoints an
13 executor and an instrument that revokes or revises a testamentary instrument.

14 **§10-103. Applicability**

15 **1. Applicable date.** This Act applies to:

16 A. A fiduciary or agent acting under a will or power of attorney executed before, on
17 or after January 1, 2018;

18 B. A personal representative acting for a decedent who died before, on or after
19 January 1, 2018;

20 C. A conservatorship proceeding commenced before, on or after January 1, 2018;
21 and

22 D. A trustee acting under a trust created before, on or after January 1, 2018.

23 **2. User resident of this State.** This Act applies to a custodian if the user resides in
24 this State or resided in this State at the time of the user's death.

25 **3. Digital asset of employer.** This Act does not apply to a digital asset of an
26 employer used by an employee in the ordinary course of the employer's business.

27 **§10-104. User direction for disclosure of digital assets**

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

34 **2. No online tool used.** If a user has not used an online tool to give direction under
35 subsection 1 or if the custodian has not provided an online tool, the user may allow or
36 prohibit in a will, trust, power of attorney or other record disclosure to a fiduciary of

1 some or all of the user's digital assets, including the content of electronic
2 communications.

3 **3. User direction overrides.** A user's direction under subsection 1 or 2 overrides a
4 contrary provision in a terms of service agreement that does not require the user to act
5 affirmatively and distinctly from the user's assent to the terms of service.

6 **§10-105. Terms of service agreement**

7 **1. Rights of custodian or user not changed or impaired.** This Act does not
8 change or impair a right of a custodian or a user under a terms of service agreement to
9 access and use digital assets of the user.

10 **2. No new or expanded rights to fiduciary or designated recipient.** This Act does
11 not give a fiduciary or designated recipient any new or expanded rights other than those
12 held by the user for whom, or for whose estate, the fiduciary or designated recipient acts
13 or represents.

14 **3. Fiduciary's or designated recipient's access may be modified or eliminated.** A
15 fiduciary's or designated recipient's access to digital assets may be modified or eliminated
16 by a user, by federal law or by a terms of service agreement if the user has not provided
17 direction under section 10-104.

18 **§10-106. Procedure for disclosing digital assets**

19 **1. Disclosure at discretion of custodian.** When disclosing digital assets of a user
20 under this Act, the custodian may at its sole discretion:

21 A. Grant a fiduciary or designated recipient full access to the user's account;

22 B. Grant a fiduciary or designated recipient partial access to the user's account
23 sufficient to perform the tasks with which the fiduciary or designated recipient is
24 charged; or

25 C. Provide a fiduciary or designated recipient a copy in a record of any digital asset
26 that, on the date the custodian received the request for disclosure, the user could have
27 accessed if the user were alive and had full capacity and access to the account.

28 **2. Administrative charge.** A custodian may assess a reasonable administrative
29 charge for the cost of disclosing digital assets under this Act.

30 **3. Deleted digital assets.** A custodian need not disclose under this Act a digital
31 asset deleted by a user.

32 **4. Undue burden on custodian; court order to disclose.** If a user directs or a
33 fiduciary requests a custodian to disclose under this Act some, but not all, of the user's
34 digital assets, the custodian need not disclose the assets if segregation of the assets would
35 impose an undue burden on the custodian. If the custodian believes the direction or
36 request imposes an undue burden, the custodian or fiduciary may seek an order from the
37 court to disclose:

38 A. A subset limited by date of the user's digital assets;

- 1 B. All of the user's digital assets to the fiduciary or designated recipient;
- 2 C. None of the user's digital assets; or
- 3 D. All of the user's digital assets to the court for review in camera.

4 **§10-107. Disclosure of content of electronic communications of deceased user**

5 If a deceased user consented to or a court directs disclosure of the content of
6 electronic communications of the user, the custodian shall disclose to the personal
7 representative of the estate of the user the content of an electronic communication if the
8 representative gives the custodian:

- 9 1. **Written request.** A written request for disclosure in physical or electronic form;
- 10 2. **Death certificate.** A copy of the death certificate of the user;
- 11 3. **Letters of appointment or court order.** A copy of the letters of appointment of
12 the personal representative or court order;
- 13 4. **Record of consent to disclosure.** Unless the user provided direction using an
14 online tool, a copy of the user's will, trust, power of attorney or other record evidencing
15 the user's consent to disclosure of the content of electronic communications; and
- 16 5. **Information requested by custodian.** If requested by the custodian:
 - 17 A. A number, username, address or other unique subscriber or account identifier
18 assigned by the custodian to identify the user's account;
 - 19 B. Evidence linking the account to the user; or
 - 20 C. A finding by the court that:
 - 21 (1) The user had a specific account with the custodian, identifiable by the
22 information specified in paragraph A;
 - 23 (2) Disclosure of the content of electronic communications of the user would not
24 violate 18 United States Code, Section 2701 et seq., 47 United States Code,
25 Section 222 or other applicable law;
 - 26 (3) Unless the user provided direction using an online tool, the user consented to
27 disclosure of the content of electronic communications; or
 - 28 (4) Disclosure of the content of electronic communications of the user is
29 reasonably necessary for administration of the estate.

30 **§10-108. Disclosure of other digital assets of deceased user**

31 Unless the user prohibited disclosure of digital assets or the court directs otherwise, a
32 custodian shall disclose to the personal representative of the estate of a deceased user a
33 catalog of electronic communications sent or received by the user and digital assets, other
34 than the content of electronic communications, of the user if the representative gives the
35 custodian:

- 36 1. **Written request.** A written request for disclosure in physical or electronic form;

1 **2. Death certificate.** A copy of the death certificate of the user;

2 **3. Letters of appointment or court order.** A copy of the letters of appointment of
3 the personal representative or court order; and

4 **4. Information requested by custodian.** If requested by the custodian:

5 A. A number, username, address or other unique subscriber or account identifier
6 assigned by the custodian to identify the user's account;

7 B. Evidence linking the account to the user;

8 C. An affidavit stating that disclosure of the user's digital assets is reasonably
9 necessary for administration of the estate; or

10 D. A finding by the court that:

11 (1) The user had a specific account with the custodian, identifiable by the
12 information specified in paragraph A; or

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

15 **§10-109. Disclosure of content of electronic communications of principal**

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

20 **1. Written request.** A written request for disclosure in physical or electronic form;

21 **2. Power of attorney.** An original or copy of the power of attorney expressly
22 granting the agent authority over the content of electronic communications of the
23 principal;

24 **3. Agent's certificate.** A certification by the agent, under penalty of perjury, that the
25 power of attorney is in effect; and

26 **4. Information requested by custodian.** If requested by the custodian:

27 A. A number, username, address or other unique subscriber or account identifier
28 assigned by the custodian to identify the principal's account; or

29 B. Evidence linking the account to the principal.

30 **§10-110. Disclosure of other digital assets of principal**

31 Unless otherwise ordered by the court, directed by the principal or provided by a
32 power of attorney, a custodian shall disclose to an agent with specific authority over
33 digital assets or general authority to act on behalf of a principal a catalog of electronic
34 communications sent or received by the principal and digital assets, other than the content
35 of electronic communications, of the principal if the agent gives the custodian:

1 **1. Written request.** A written request for disclosure in physical or electronic form;

2 **2. Power of attorney.** An original or a copy of the power of attorney that gives the
3 agent specific authority over digital assets or general authority to act on behalf of the
4 principal;

5 **3. Agent's certificate.** A certification by the agent, under penalty of perjury, that the
6 power of attorney is in effect; and

7 **4. Information requested by custodian.** If requested by the custodian:

8 **A.** A number, username, address or other unique subscriber or account identifier
9 assigned by the custodian to identify the principal's account; or

10 **B.** Evidence linking the account to the principal.

11 **§10-111. Disclosure of digital assets held in trust when trustee is original user**

12 Unless otherwise ordered by the court or provided in a trust, a custodian shall
13 disclose to a trustee that is an original user of an account any digital asset of the account
14 held in trust, including a catalog of electronic communications of the trustee and the
15 content of those electronic communications.

16 **§10-112. Disclosure of content of electronic communications held in trust when**
17 **trustee is not original user**

18 Unless otherwise ordered by the court, directed by the user or provided in a trust, a
19 custodian shall disclose to a trustee that is not an original user of an account the content
20 of an electronic communication sent or received by an original or successor user and
21 carried, maintained, processed, received or stored by the custodian in the account of the
22 trust if the trustee gives the custodian:

23 **1. Written request.** A written request for disclosure in physical or electronic form;

24 **2. Trust instrument or certification of trust.** A certified copy of the trust
25 instrument or a certification of the trust under Title 18-B, section 1013 that includes
26 consent to disclosure of the content of electronic communications to the trustee;

27 **3. Trustee's certification.** A certification by the trustee, under penalty of perjury,
28 that the trust exists and the trustee is a currently acting trustee of the trust; and

29 **4. Information requested by custodian.** If requested by the custodian:

30 **A.** A number, username, address or other unique subscriber or account identifier
31 assigned by the custodian to identify the trust's account; or

32 **B.** Evidence linking the account to the trust.

1 **§10-113. Disclosure of other digital assets held in trust when trustee is not original**
2 **user**

3 Unless otherwise ordered by the court, directed by the user or provided in a trust, a
4 custodian shall disclose to a trustee that is not an original user of an account a catalog of
5 electronic communications sent or received by an original or successor user and stored,
6 carried or maintained by the custodian in an account of the trust and any digital assets,
7 other than the content of electronic communications, in which the trust has a right or
8 interest if the trustee gives the custodian:

9 **1. Written request.** A written request for disclosure in physical or electronic form;

10 **2. Trust instrument or certification of trust.** A certified copy of the trust
11 instrument or a certification of the trust under Title 18-B, section 1013;

12 **3. Trustee's certification.** A certification by the trustee, under penalty of perjury,
13 that the trust exists and the trustee is a currently acting trustee of the trust; and

14 **4. Information requested by custodian.** If requested by the custodian:

15 A. A number, username, address or other unique subscriber or account identifier
16 assigned by the custodian to identify the trust's account; or

17 B. Evidence linking the account to the trust.

18 **§10-114. Disclosure of digital assets to conservator of protected person**

19 **1. Court order granting access.** After an opportunity for a hearing under Article 5,
20 Part 4, the court may grant a conservator access to the digital assets of a protected person.

21 **2. Disclosure by custodian.** Unless otherwise ordered by the court or directed by
22 the user, a custodian shall disclose to a conservator the catalog of electronic
23 communications sent or received by a protected person and any digital assets, other than
24 the content of electronic communications, in which the protected person has a right or
25 interest if the conservator gives the custodian:

26 A. A written request for disclosure in physical or electronic form;

27 B. A certified copy of the court order that gives the conservator authority over the
28 digital assets of the protected person; and

29 C. If requested by the custodian:

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

32 (2) Evidence linking the account to the protected person.

33 **3. Request to suspend or terminate account.** A conservator with general authority
34 to manage the assets of a protected person may request a custodian of the digital assets of
35 the protected person to suspend or terminate an account of the protected person for good
36 cause. A request made under this subsection must be accompanied by a copy of the court
37 order giving the conservator authority over the protected person's property.

1 **§10-115. Fiduciary duty and authority**

2 **1. Fiduciary's legal duties.** The legal duties imposed on a fiduciary charged with
3 managing tangible property apply to the management of digital assets, including:

- 4 A. The duty of care;
5 B. The duty of loyalty; and
6 C. The duty of confidentiality.

7 **2. Limitations on fiduciary's or designated recipient's authority.** A fiduciary's or
8 designated recipient's authority with respect to a digital asset of a user:

- 9 A. Except as otherwise provided in section 10-104, is subject to the applicable terms
10 of service agreement;
11 B. Is subject to other applicable law, including copyright law;
12 C. In the case of a fiduciary, is limited by the scope of the fiduciary's duties; and
13 D. May not be used to impersonate the user.

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

18 **4. Authorized user.** A fiduciary acting within the scope of the fiduciary's duties is
19 an authorized user of the property of the decedent, protected person, principal or settlor
20 for the purpose of applicable computer fraud and unauthorized computer access laws,
21 including Title 17-A, chapter 18.

22 **5. Fiduciary's authority to access; authorized user.** A fiduciary with authority
23 over the tangible, personal property of a decedent, protected person, principal or settlor:

- 24 A. Has the right to access the property and any digital asset stored in it; and
25 B. Is an authorized user for the purpose of computer fraud and unauthorized
26 computer access laws, including Title 17-A, chapter 18.

27 **6. Disclosure of information to terminate account.** A custodian may disclose
28 information in an account to a fiduciary of a user when the information is required to
29 terminate an account used to access digital assets licensed to the user.

30 **7. Request for termination.** A fiduciary of a user may request a custodian to
31 terminate the user's account. A request for termination must be in writing, in either
32 physical or electronic form, and accompanied by:

- 33 A. If the user is deceased, a copy of the death certificate of the user;
34 B. A copy of the letters of appointment of the personal representative or court order,
35 power of attorney or trust giving the fiduciary authority over the account; and
36 C. If requested by the custodian:

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

3 (2) Evidence linking the account to the user; or

4 (3) A finding by the court that the user had a specific account with the custodian,
5 identifiable by the information specified in subparagraph (1).

6 **§10-116. Custodian compliance and immunity**

7 **1. Disclose or terminate upon request; court order.** Not later than 60 days after
8 receipt of the information required under sections 10-107 to 10-115, a custodian shall
9 comply with a request under this Act from a fiduciary or designated recipient to disclose
10 digital assets or terminate an account. If the custodian fails to comply, the fiduciary or
11 designated recipient may apply to the court for an order directing compliance.

12 **2. Finding that compliance not in violation.** An order under subsection 1 directing
13 compliance must contain a finding that compliance is not in violation of 18 United States
14 Code, Section 2702.

15 **3. Notification to user.** A custodian may notify the user that a request for disclosure
16 or to terminate an account was made under this Act.

17 **4. Denial of request if subsequent lawful access.** A custodian may deny a request
18 under this Act from a fiduciary or designated recipient for disclosure of digital assets or
19 to terminate an account if the custodian is aware of any lawful access to the account
20 following the receipt of the fiduciary's request.

21 **5. Court order.** This Act does not limit a custodian's ability to obtain or require a
22 fiduciary or designated recipient requesting disclosure or termination under this Act to
23 obtain a court order that:

24 A. Specifies that an account belongs to the protected person or principal;

25 B. Specifies that there is sufficient consent from the protected person or principal to
26 support the requested disclosure; and

27 C. Contains a finding required by law other than this Act.

28 **6. Immunity.** A custodian and its officers, employees and agents are immune from
29 liability for an act or omission done in good faith in compliance with this Act.

30 **§10-117. Uniformity of application and construction**

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

33 **§10-118. Relation to Electronic Signatures in Global and National Commerce Act**

34 This Act modifies, limits or supersedes the federal Electronic Signatures in Global
35 and National Commerce Act, 15 United States Code, Section 7001 et seq., but does not
36 modify, limit or supersede Section 101(c) of that Act, 15 United States Code, Section

1 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b)
2 of that Act, 15 United States Code, Section 7003(b).

3 **PART B**

4 **Sec. B-1. 18-A MRSA §5-931, sub-§(a), ¶¶(7) and (8),** as enacted by PL
5 2009, c. 292, §2 and affected by §6, are amended to read:

6 (7). Exercise fiduciary powers that the principal has authority to delegate; ~~or~~

7 (8). Disclaim property, including a power of appointment; ~~or~~

8 **Sec. B-2. 18-A MRSA §5-931, sub-§(a), ¶(9)** is enacted to read:

9 (9). Exercise authority over the content of an electronic communication of the
10 principal in accordance with the Maine Revised Uniform Fiduciary Access to Digital
11 Assets Act.

12 **PART C**

13 **Sec. C-1. Effective date.** This Act takes effect January 1, 2018.

14 **SUMMARY**

15 This bill enacts the Revised Uniform Fiduciary Access to Digital Assets Act as the
16 Maine Revised Uniform Fiduciary Access to Digital Assets Act, Article 10 in the Maine
17 Revised Statutes, Title 18-A.

18 The National Conference of Commissioners on Uniform State Laws approved the
19 Revised Uniform Fiduciary Access to Digital Assets Act in July 2015.

20 The Prefatory Note and accompanying comments to the Maine Revised Uniform
21 Fiduciary Access to Digital Assets Act provide a summary and explanation of the
22 Revised Uniform Fiduciary Access to Digital Assets Act. The Revised Uniform
23 Fiduciary Access to Digital Assets Act provides an important update for the Internet age.
24 A generation ago, files were stored in cabinets, photos were stored in albums and mail
25 was delivered by a human being. Today, people are more likely to use the Internet to
26 communicate and store information. The Revised Uniform Fiduciary Access to Digital
27 Assets Act ensures users retain control of their digital property and can plan for its
28 ultimate disposition after their death but also takes into account the digital privacy that
29 users and those with whom they communicate have a right to expect under federal law
30 and the unique authentication issues inherent in a paperless record-keeping system.
31 Unless the user instructs otherwise, legally appointed fiduciaries will have the same
32 access to digital assets as they have always had to tangible assets and the same duty to
33 comply with the user's instructions.

34 This bill modifies the Revised Uniform Fiduciary Access to Digital Assets Act to be
35 consistent with existing Maine law with regard to conservators.

1 Part B amends the Maine Uniform Power of Attorney Act to specifically allow a
2 power of attorney to grant authority to enable the agent to access the content of an
3 electronic communication to be consistent with the grant of express authority required by
4 Section 9 of the Revised Uniform Fiduciary Access to Digital Assets Act, included in this
5 bill as the Maine Revised Statutes, Title 18-A, section 10-109.

6 Part C provides that the provisions of this bill take effect January 1, 2018.