

PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

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HB 5366 – HB 5370, SB 0293

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The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 3,533.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 20. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of Section:

Probate & Estate Planning Section

Contact person:

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Bill Numbers:

[HB 5366](#) (LaFontaine) Probate; guardians and conservators; fiduciary access to digital assets act; enact. Amends secs. 5407 & 5415 of [1998 PA 386](#) (MCL [700.5407](#) & [700.5415](#)) & adds sec. 5423a.

[HB 5367](#) (Lauwers) Probate; wills and estates; powers of personal representatives; enact fiduciary access to digital assets act. Amends secs. 3709 & 3715 of [1998 PA 386](#) (MCL [700.3709](#) & [700.3715](#)) & adds secs. 3715a & 3723.

[HB 5368](#) (Cotter) Probate; other; definitions relating to the fiduciary access to digital assets act; enact. Amends secs. 1103, 1104, 1106 & 1107 of [1998 PA 386](#) (MCL [700.1103](#) et seq.).

[HB 5369](#) (Leonard) Probate; powers of attorney; authority or agent; enact fiduciary access to digital assets act. Amends sec. 5501 of [1998 PA 386](#) (MCL [700.5501](#)) & adds sec. 5501a.

[HB 5370](#) (Jenkins) Probate; trusts; fiduciary access to digital assets act; enact. Amends sec. 7817 of [1998 PA 386](#) (MCL [700.7817](#)) & adds sec. 7912a.

[SB 0293](#) (Bieda) Probate; wills and estates; power of personal representative of a decedent's estate; provide access to certain online accounts. Amends sec. 3715 of [1998 PA 386](#) (MCL [700.3715](#)).

Date position was adopted:

October 25, 2014

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

23

Number who voted in favor and opposed to the position:

20 Voted for position

3 Did not vote (absent)

Position:

Support and Amend

Explanation of the position, including any recommended amendments:

While the Probate and Estate Planning Section supports these bills in concept, we believe that fiduciary access to digital assets is best accomplished in a standalone bill, rather than in various Michigan statutes. We have therefore drafted a proposed "Fiduciary Access to Digital Assets Act" which is based upon the Uniform Law Commission's act of the same name. The Council of the Section has approved the proposed standalone act, having revised the Uniform Act to conform to Michigan law, and has given the Chair of the drafting committee authority to make necessary non-substantive changes. We recommend the attached Fiduciary Access to Digital Assets Act to the Legislature as a substitute for the currently pending bills referenced below. The substitute standalone legislative proposal is attached.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.<http://legislature.mi.gov/doc.aspx?2014-HB-5366><http://legislature.mi.gov/doc.aspx?2014-HB-5367><http://legislature.mi.gov/doc.aspx?2014-HB-5368><http://legislature.mi.gov/doc.aspx?2014-HB-5369><http://legislature.mi.gov/doc.aspx?2014-HB-5370><http://legislature.mi.gov/doc.aspx?2013-SB-0293>

FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

SECTION 1. SHORT TITLE. This act may be cited as the Michigan Fiduciary Access to Digital Assets Act.

SECTION 2. DEFINITIONS. In this act:

- (1) “Account holder” means:
 - (a) a person that has entered into a terms-of-service agreement with a digital custodian;
and
 - (b) a fiduciary for a person described in subsection (1)(a).
- (2) “Agent” means an attorney-in-fact granted authority under a durable or nondurable power of attorney.
- (3) “Carries” means engaging in the transmission of electronic communications.
- (4) “Catalogue 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 that is appointed by a court to manage all or part of the estate of a protected person, including, without limitation, a conservator or limited conservator for a protected individual as defined in MCL 700.1106(v); a plenary guardian or partial guardian for an individual who has a developmental disability as defined in MCL 330.1100a(25); and a guardian for a minor if no conservator has been appointed. “Conservator” also includes a parent for the parent’s minor child if no conservator, plenary guardian, or partial guardian has been appointed for the minor child.
- (6) “Content of an electronic communication” means information not readily accessible to the public concerning the substance or meaning of an electronic communication.
- (7) “Court” means the probate court or, when applicable, the circuit court.
- (8) “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.
- (9) “Digital custodian” means a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.
- (10) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(11) “Electronic communication” means a digital asset stored by an electronic communication service or carried or maintained by a remote-computing service. The term includes the catalogue of electronic communications and the content of an electronic communication.

(12) “Electronic communication service” means a digital custodian that provides to the public the ability to send or receive an electronic communication.

(13) “Fiduciary” means each person who is an original, additional, or successor personal representative, conservator, agent, or trustee. If a court or a governing instrument appoints a “special fiduciary”, for purposes of this act, the special fiduciary shall be treated as a personal representative if such fiduciary controls all or part of a decedent’s estate, as a trustee if such fiduciary controls all or part of a trust, as a conservator if such fiduciary controls all or part of the assets of a protected person, or as an agent if such fiduciary is appointed in a power of attorney.

(14) “Governing instrument” means a will, a trust, an instrument creating a power of attorney, or other dispositive or nominative instrument.

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

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

(17) “Personal representative” has the meaning as stated in MCL 700.1106(o).

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

(19) “Principal” means an individual who grants authority to an agent in a power of attorney.

(20) “Protected person” includes a protected individual as defined in MCL 700.1106(v); a legally incapacitated individual as defined in MCL 700.1105(i); a minor for whom a guardian has been appointed but no conservator has been appointed; and an individual who has a developmental disability as defined in MCL 330.1100a(25).

(21) “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.

(22) “Remote-computing service” means a digital custodian that provides to the public computer processing services or storage of digital assets by means of an electronic communication system, as defined in 18 U.S.C. Section 2510(14).

(23) “Terms-of-service agreement” means an agreement that controls the relationship between an account holder and a digital custodian.

(24) “Trustee” has the meaning stated in MCL 700.1107(o).

(25) “Will” has the meaning stated in MCL 700.1108(b).

SECTION 3. ACCESS BY PERSONAL REPRESENTATIVE TO DIGITAL ASSETS OF A DECEDENT.

(a) Unless otherwise provided by the court or the will of a decedent, a personal representative of the decedent has the right to access:

- (1) the content of an electronic communication sent or received by the decedent if the electronic communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;
- (2) the catalogue of electronic communications sent or received by the decedent; and
- (3) any other digital asset in which the decedent had a right or interest.

(b) A person interested in an estate as defined in MCL 700.1105(c) may file a petition in the court for an order to limit, eliminate, or modify the personal representative’s power over the decedent’s digital assets. On receipt of a petition under this subsection, the court shall set a date for a hearing on the petition. The hearing date shall not be less than 14 days and not more than 56 days after the date the petition is filed.

SECTION 4. ACCESS BY CONSERVATOR TO DIGITAL ASSETS OF A PROTECTED PERSON.

(a) The court, after an opportunity for a hearing, may grant a conservator the right to access:

- (1) the content of an electronic communication sent or received by the protected person if the electronic communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;
- (2) the 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.

(b) In granting to a conservator the right to access under subsection (a), the court shall consider:

- (1) the intent of the protected person with respect to the access granted to the extent that intent can be ascertained; or
- (2) whether granting access to a conservator is in the protected person’s best interest.

SECTION 5. ACCESS BY AGENT TO DIGITAL ASSETS.

- (a) To the extent a power of attorney grants authority to an agent over the content of an electronic communication of the principal, the agent has the right to access the content of an electronic communication sent or received by the principal if the electronic communication service or remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended.
- (b) Except as provided in subsection (a) and unless otherwise provided by a power of attorney or the court, an agent has the right to access:
 - (1) the 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 6. ACCESS BY TRUSTEE TO DIGITAL ASSETS. Unless otherwise provided by the court or the settlor in the terms of a trust, a trustee:

- (a) that is an original account holder has the right to access each digital asset held in trust, including the catalogue of electronic communications sent or received by the trustee and the content of an electronic communication; and
- (b) that is not an original account holder has the right to access:
 - (1) the content of an electronic communication sent or received by the original or any successor account holder if the electronic communication service or the remote-computing service is permitted to disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b), as amended;
 - (2) the 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 7. FIDUCIARY ACCESS AND AUTHORITY.

(a) A fiduciary that is an account holder or has the right under Sections 3, 4, 5, or 6 of this act to access a digital asset of an account holder:

- (1) subject to the terms-of-service agreement and copyright or other applicable law, may take any action concerning the digital asset to the extent of the account holder's authority and the fiduciary's powers under law of this state;

- (2) has, under applicable electronic privacy laws, the lawful consent of the account holder for the digital custodian to divulge the content of an electronic communication to the fiduciary; and
- (3) is, under applicable computer fraud and unauthorized access laws, including MCL 752.795 and MCL 750.540, an authorized user.
- (4) is deemed to have the consent of the device holder under MCL 750.157n to the extent that the digital asset is a financial transaction device within the meaning of MCL 750.157n; and
- (5) is deemed to have the authority to access the digital assets under MCL 752.795 and MCL 750.540 to the extent that the digital asset is subject to MCL 752.795 or MCL 750.540.

(b) If a provision in a terms-of-service agreement limits a fiduciary's access to the digital assets of the account holder, the provision is void as against the strong public policy of this state.

(c) A choice-of-law provision in a terms-of-service agreement is unenforceable against a fiduciary acting under this act to the extent the provision designates law that enforces a limitation on a fiduciary's access to digital assets which limitation is void under subsection (b).

(d) A fiduciary's access under this act to a digital asset does not violate a terms-of-service agreement, notwithstanding a provision of the terms-of-service agreement which limits third-party access or requires notice of change in the account holder's status.

(e) 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 access laws, including MCL 752.795, MCL 750.540, and MCL 750.157n.

SECTION 8. COMPLIANCE.

(a) If a fiduciary with a right under this act to access a digital asset of an account holder complies with subsection (b), the digital custodian shall comply with the fiduciary's request in a record for:

- (1) access to the digital asset;
- (2) control of the digital asset; or
- (3) a copy of the digital 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 under Section 3, the request must be accompanied by a certified copy of the letters of the personal representative as defined in MCL 700.1105(j) or a small estate affidavit pursuant to MCL 700.3983;

(2) a conservator with the right to access under Section 4, the request must be accompanied by a certified copy of the court order that gives the conservator authority over the digital asset or by a certified copy of the letters of the conservator as defined in MCL 700.1105(j) that gives the conservator authority over the digital asset;

(3) an agent with the right of access under Section 5, the request must be accompanied by an original or a copy of a currently-effective power of attorney that authorizes the agent to exercise authority over the digital asset and a sworn statement executed by the agent pursuant to MCL 700.5505; and

(4) a trustee with the right of access under Section 6, the request must be accompanied by a certificate of the trust under MCL 700.7913 that authorizes the trustee to exercise authority over the digital asset.

(c) A digital custodian shall comply with a request made under subsection (a) not later than 56 days after receipt of the request. If the digital custodian fails to comply, the fiduciary may petition the court for an order directing compliance. A digital custodian is liable for damages, costs, expenses, and legal fees if the court determines that the digital custodian was not acting pursuant to a legal requirement in failing to comply with a request made under subsection (a).

(d) So long as any payments under an applicable terms-of-service agreement are kept current or brought current within 56 days of any default, a digital custodian may not destroy, disable or dispose of any digital assets of the protected person for 2 years after the custodian receives a request or order under subsections (a) and (c). If the digital custodian has obligations under other state or federal laws to preserve records, this act does not override those other obligations.

(e) A recipient of a certificate of trust under subsection (b)(4) may require the trustee to provide copies of excerpts from the original trust instrument and later amendments which designate the trustee and confer on the trustee the power to act in the pending transaction.

(f) A digital custodian that acts in reliance on a certificate under subsection (b)(4) without knowledge that the representations contained in it are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certificate.

(g) A person that in good faith enters a transaction in reliance on a certificate of trust under subsection (b)(4) may enforce the transaction against the trust assets as if the representations contained in the certificate were correct.

(h) A person that demands the trust instrument in addition to a certificate of trust under subsection (b)(4) or excerpts under subsection (e) is liable for damages to the same extent the person would be liable under MCL 700.7913(8).

(i) This section does not limit the right of a person to obtain a copy of a trust instrument in a judicial proceeding concerning the trust.

SECTION 9. DIGITAL CUSTODIAN IMMUNITY. A digital custodian and its officers, employees, and agents are immune from liability for any action done in good faith in compliance with this act.

SECTION 10. 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 11. 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 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 12. SEVERABILITY. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 13. APPLICABILITY.

(a) Subject to subsections (b) and (c), this act applies to:

(1) A fiduciary acting under a will, trust, or power of attorney executed before, on, or after the effective date of this act, except as otherwise provided in this act.

(2) Each proceeding pending in court or commenced after the effective date of this act, unless the court determines that it is not feasible to apply the act or, in the interests of justice, the act should not apply.

(b) This act does not impair an accrued right or an action taken in a proceeding before the effective date of this act in a proceeding.

(c) This act does not apply to a digital asset of an employer used by an employee in the ordinary course of business.

SECTION 14. EFFECTIVE DATE. This act takes effect immediately.