

BILL ANALYSIS

H.B. 2158
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Judiciary & Civil Jurisprudence
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Interested parties contend that in addition to the legal duties imposed on a fiduciary charged with managing tangible property, such fiduciaries need clarity regarding their duties in managing digital assets. H.B. 2158 seeks to address this issue by adopting the Texas Revised Uniform Fiduciary Access to Digital Assets Act.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

H.B. 2158 amends the Estates Code to set out provisions relating to fiduciary access to digital assets, applicable to a custodian if the user resides in Texas or resided in Texas at the time of the user's death, but not to a digital asset of an employer used by an employee in the ordinary course of the employer's business. The bill defines "digital asset" as an electronic record in which an individual has a right or interest but not an underlying asset or liability unless the asset or liability is itself an electronic record. The bill defines "user" as a person who has an account with a custodian, which the bill defines as a person that carries, maintains, processes, receives, or stores a digital asset of a user.

H.B. 2158 authorizes a user to use an online tool to direct a custodian to disclose or not to disclose to a designated recipient some or all of the user's digital assets, including the content of an electronic communication. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool expressly overrides a contrary direction by the user in a will, trust, power of attorney, or other record. The bill authorizes a user, if the user has not used an online tool to give such direction or if the custodian has not provided an online tool, to allow or prohibit disclosure to a fiduciary of some or all of the user's digital assets, including the content of an electronic communication sent or received by the user, in a will, trust, power of attorney, or other record. A user's direction expressly 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. The bill's provisions relating to fiduciary access to digital assets expressly do 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, nor do they give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate or trust, the fiduciary or designated recipient acts or represents. The bill authorizes a fiduciary's or designated recipient's access to digital assets to be modified or

eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction for the disclosure of digital assets under the bill's provisions.

H.B. 2158 sets out provisions relating to the following: procedures for the disclosure of digital assets of a deceased user; procedures for the disclosure of digital assets of a principal; the disclosure of digital assets held in trust; and the disclosure of digital assets of a ward to the ward's guardian. The bill defines "principal" as an individual who grants authority to an agent in a power of attorney and "agent" as an attorney in fact granted authority to act for a principal under a durable or other power of attorney, though not under a medical power of attorney.

H.B. 2158 provides for the duty and authority of a fiduciary or designated recipient regarding digital assets, the authority to terminate an account at the request of a fiduciary, and a custodian's compliance and immunity regarding digital assets.

H.B. 2158 requires consideration to be given in applying and construing the bill's provisions relating to fiduciary access to digital assets to the need to promote uniformity of the law, with respect to the subject matter of the bill's provisions, among states that enact a law based on the uniform act on which the bill is based. These bill provisions expressly modify, limit, and supersede the federal Electronic Signatures in Global and National Commerce Act but not certain provisions of that law, nor do they authorize electronic delivery of certain notices described in that law.

H.B. 2158 includes digital assets and the content of an electronic communication among the powers of attorney that may be granted on a statutory durable power of attorney form. The bill establishes that the language conferring authority with respect to digital assets in a statutory durable power of attorney empowers the attorney in fact or agent, without further reference to a specific digital asset, to access digital assets as provided by the bill's provisions relating to fiduciary access to digital assets. The bill entitles the guardian of the estate of a ward to access the ward's digital assets as provided by those bill provisions.

H.B. 2158 amends the Property Code to authorize a trustee to access digital assets as provided by the bill's provisions relating to fiduciary access to digital assets.

H.B. 2158 applies to a fiduciary acting under a will or power of attorney executed before, on, or after bill's effective date, a personal representative acting for a decedent who died before, on, or after the bill's effective date, a guardian appointed to act for a ward in a guardianship proceeding commenced before, on, or after the bill's effective date, and a trustee acting under a trust created before, on, or after the bill's effective date.

EFFECTIVE DATE

September 1, 2017.