S T A T E O F N E W Y O R K

6729

2013-2014 Regular Sessions

I N A S S E M B L Y

April 17, 2013

Introduced by M. of A. TITONE -- read once and referred to the Committee on Judiciary

AN ACT to amend the estates, powers and trusts law, in relation to establishing the "access to digital assets act"

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. This act shall be known and may be cited as the "access to digital assets act".

S 2. Article 10 of the estates, powers and trusts law is amended by adding a new part 11 to read as follows:

PART 11

ACCESS TO DIGITAL ASSETS

SECTION 10-11.1 DEFINITIONS.
10-11.2 CONTROL OF DIGITAL PROPERTY OF DECEDENT BY PERSONAL REPRESENTATIVE.
10-11.3 CONTROL OF DIGITAL PROPERTY OF PROTECTED PERSON BY CONSERVATOR.
10-11.4 CONTROL OF DIGITAL PROPERTY BY AGENT UNDER POWER OF ATTORNEY.
10-11.5 CONTROL OF DIGITAL PROPERTY BY TRUSTEE.
10-11.6 RECOVERY OF DIGITAL PROPERTY FROM CUSTODIAN.
10-11.7 OBJECTION TO RECOVERY OF DIGITAL PROPERTY BY FIDUCIARY.
10-11.8 CUSTODIAN IMMUNITY.

S 10-11.1 DEFINITIONS.

AS USED IN THIS PART, THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

(A) "ACCOUNT HOLDER" MEANS A DECEDENT, PROTECTED PERSON, PRINCIPAL, OR SETTLOR WHO HAS TERMS-OF-SERVICE AGREEMENT WITH A CUSTODIAN.

(B) "AGENT" MEANS AN ATTORNEY-IN-FACT GRANTED AUTHORITY UNDER A DURABLE OR NONDURABLE POWER OF ATTORNEY.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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(C) "CONSERVATOR" MEANS A PERSON THAT IS APPOINTED BY A COURT TO MANAGE THE ESTATE OF AN INDIVIDUAL. THE TERM INCLUDES A LIMITED CONSERVATOR.

(D) "CUSTODIAN" MEANS A PERSON THAT ELECTRONICALLY STORES DIGITAL PROPERTY OF AN ACCOUNT HOLDER OR OTHERWISE HAS CONTROL OVER DIGITAL PROPERTY OF THE ACCOUNT HOLDER.

(E) "DIGITAL ACCOUNT" MEANS AN ELECTRONIC SYSTEM FOR CREATING, GENERATING, SENDING, RECEIVING, STORING, DISPLAYING, OR PROCESSING INFORMATION WHICH PROVIDES ACCESS TO A DIGITAL ASSET OR A DIGITAL SERVICE.

(F) "DIGITAL ASSET" MEANS INFORMATION CREATED, GENERATED, SENT, COMMUNICATED, RECEIVED, OR STORED BY ELECTRONIC MEANS ON A DIGITAL SERVICE OR DIGITAL DEVICE; THE TERM INCLUDES A USERNAME, WORD, CHARACTER, CODE, OR CONTRACT RIGHT UNDER THE TERMS-OF-SERVICE AGREEMENT.

(G) "DIGITAL DEVICE" MEANS AN ELECTRONIC DEVICE THAT CAN RECEIVE, STORE, PROCESS OR SEND DIGITAL INFORMATION.

(H) "DIGITAL PROPERTY" MEANS THE OWNERSHIP AND MANAGEMENT OF AND RIGHTS RELATED TO DIGITAL ACCOUNT AND DIGITAL ASSET.

(I) "DIGITAL SERVICE" MEANS THE DELIVERY OF DIGITAL INFORMATION (SUCH AS DATA OR CONTENT) AND TRANSACTIONAL SERVICES (SUCH AS ONLINE FORMS AND BENEFITS APPLICATIONS) ACROSS A VARIETY OF PLATFORMS, DEVICES AND DELIVERY MECHANISMS (SUCH AS WEBSITES, MOBILE APPLICATIONS, AND SOCIAL MEDIA).

(J) "ELECTRONIC" MEANS RELATING TO TECHNOLOGY HAVING ELECTRICAL, DIGITAL, MAGNETIC, WIRELESS, OPTICAL, ELECTROMAGNETIC, OR SIMILAR CAPABILITIES.

(K) "GOVERNING INSTRUMENT" MEANS A WILL, TRUST, INSTRUMENT CREATING OR EXERCISING POWER OF ATTORNEY, OR OTHER DISPOSITIVE, APPOINTIVE, OR NOMINATIVE INSTRUMENT OF ANY SIMILAR TYPE.

(L) "INFORMATION" MEANS DATA, TEXT, IMAGES, SOUNDS, CODES, COMPUTER PROGRAMS, SOFTWARE, DATABASES, OR THE LIKE.

(M) "INTERESTED PERSON" MEANS HEIRS, DEVISEES, CHILDREN, SPOUSES, CREDITORS, BENEFICIARIES AND ANY OTHERS HAVING A PROPERTY RIGHT IN OR CLAIM AGAINST A TRUST ESTATE OR THE ESTATE OF A DECEDENT, WARD OR PROTECTED PERSON WHICH MAY BE AFFECTED BY THE PROCEEDING. IT ALSO INCLUDES PERSONS HAVING PRIORITY FOR APPOINTMENT AS PERSONAL REPRESENTATIVE, AND OTHER FIDUCIARIES REPRESENTING INTERESTED PERSONS. THE MEANING AS IT RELATES TO PARTICULAR PERSONS MAY VARY FROM TIME TO TIME AND MUST BE DETERMINED ACCORDING TO THE PARTICULAR PURPOSES OF, AND MATTER INVOLVED IN, ANY PROCEEDING. IN A CONSERVATORSHIP PROCEEDING, IT ALSO INCLUDES ANY GOVERNMENTAL AGENCY PAYING OR PLANNING TO PAY BENEFITS TO THE WARD OR PROTECTED PERSON AND ANY PUBLIC OR CHARITABLE AGENCY THAT REGULARLY CONCERNS ITSELF WITH METHODS FOR PREVENTING UNNECESSARY OR OVERLY INTRUSIVE COURT INTERVENTION IN THE AFFAIRS OF PERSONS FOR WHOM PROTECTIVE ORDERS MAY BE SOUGHT AND THAT SEEKS TO PARTICIPATE IN THE PROCEEDINGS.

(N) "PRINCIPAL" MEANS AN INDIVIDUAL WHO GRANTS AUTHORITY TO AN AGENT IN A POWER OF ATTORNEY.

(O) "PROPERTY" MEANS ANYTHING THAT MAY BE THE SUBJECT OF OWNERSHIP, AND IS REAL OR PERSONAL PROPERTY. THE TERM INCLUDES DIGITAL PROPERTY.

(P) "PROTECTED PERSON" MEANS AN INDIVIDUAL FOR WHOM A PROTECTIVE ORDER HAS BEEN MADE.

(Q) "PROTECTIVE ORDER" MEANS AN ORDER APPOINTING A CONSERVATOR OR ANOTHER ORDER RELATED TO MANAGEMENT OF A PROTECTED PERSON'S PROPERTY.

(R) "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.

(S) "TERMS-OF-SERVICE AGREEMENT" MEANS A CONTRACT THAT CONTROLS THE RELATIONSHIP BETWEEN AN ACCOUNT HOLDER AND A CUSTODIAN. THE TERM INCLUDES A TERMS-OF-USE AGREEMENT.

(T) "TRUSTEE" MEANS A FIDUCIARY WITH LEGAL TITLE TO ASSETS PURSUANT TO AN AGREEMENT THAT CREATES A BENEFICIAL INTEREST IN OTHERS.

S 10-11.2 CONTROL OF DIGITAL PROPERTY OF DECEDENT BY PERSONAL REPRESENTATIVE

EXCEPT AS A TESTATOR OTHERWISE PROVIDED BY WILL OR UNTIL A COURT OTHERWISE ORDERS, A PERSONAL REPRESENTATIVE, ACTING REASONABLY FOR THE BENEFIT OF THE INTERESTED PERSONS, MAY EXERCISE CONTROL OVER THE DECEDENT'S DIGITAL PROPERTY TO THE EXTENT PERMITTED UNDER APPLICABLE LAW AND A TERMS-OF-SERVICE AGREEMENT.

S 10-11.3 CONTROL OF DIGITAL PROPERTY OF PROTECTED PERSON BY CONSERVATOR

(A) AT THE INITIAL HEARING ON AN APPLICATION TO APPOINT A CONSERVATOR, OR LATER APPLICATION BY A CONSERVATOR, THE COURT MAY EXPRESSLY AUTHORIZE THE CONSERVATOR TO DO ONE OR MORE OF THE FOLLOWING, SUBJECT TO THE PROVISIONS OF THE APPLICABLE TERMS-OF-SERVICE AGREEMENT:

(1) EXERCISE CONTROL OVER DIGITAL PROPERTY OF THE PROTECTED PERSON;

(2) EXERCISE A RIGHT IN DIGITAL PROPERTY OF THE PROTECTED PERSON; AND

(3) CHANGE A GOVERNING INSTRUMENT AFFECTING THE DIGITAL PROPERTY OF THE PROTECTED PERSON.

(B) IN AUTHORIZING A CONSERVATOR'S POWERS UNDER PARAGRAPH (A) OF THIS SECTION, THE COURT SHALL CONSIDER THE PROTECTED PERSON'S INTENT WITH RESPECT TO THOSE POWERS TO THE EXTENT THAT INTENT CAN BE ASCERTAINED.

S 10-11.4 CONTROL OF DIGITAL PROPERTY BY AGENT UNDER POWER OF ATTORNEY

IF A POWER OF ATTORNEY GRANTS AUTHORITY TO AN AGENT AND EXERCISE OF AUTHORITY IS NOT OTHERWISE PROHIBITED BY A TERMS-OF-SERVICE AGREEMENT OR A GOVERNING INSTRUMENT TO WHICH THE DIGITAL PROPERTY OF THE PRINCIPAL IS SUBJECT, THE AGENT MAY:

(A) EXERCISE CONTROL OVER THE DIGITAL PROPERTY;

(B) EXERCISE ANY RIGHT IN THE DIGITAL PROPERTY; AND

(C) CHANGE A GOVERNING INSTRUMENT AFFECTING THE DIGITAL PROPERTY.

S 10-11.5 CONTROL OF DIGITAL PROPERTY BY TRUSTEE

A TRUSTEE MAY EXERCISE CONTROL OVER AND RIGHTS IN ANY DIGITAL PROPERTY ACCORDING TO THE TERMS OF THE TRUST.

S 10-11.6 RECOVERY OF DIGITAL PROPERTY FROM CUSTODIAN

(A) ON RECEIPT OF A WRITTEN REQUEST BY A FIDUCIARY WITH AUTHORITY OVER THE DIGITAL PROPERTY OF ANOTHER INDIVIDUAL AND AN AUTHORIZED USER UNDER ALL APPLICABLE STATE AND FEDERAL STATUTES, FOR ACCESS TO DIGITAL PROPERTY, OWNERSHIP OF DIGITAL PROPERTY, OR A COPY OF A DIGITAL ASSET, A CUSTODIAN WITH CONTROL OF THE DIGITAL PROPERTY OR ASSET SHALL PROVIDE THE FIDUCIARY THE REQUESTED ACCESS, OWNERSHIP, OR COPY, IF THE FIDUCIARY COMPLIES WITH PARAGRAPH (B) OF THIS SECTION.

(B) A REQUEST MADE PURSUANT TO THIS SECTION SHALL BE IN WRITING AND IF:

(1) BY A PERSONAL REPRESENTATIVE, THE REQUEST MUST BE ACCOMPANIED BY A CERTIFIED COPY OF THE LETTER OF APPOINTMENT OF THE PERSONAL REPRESENTATIVE WHICH GRANTS AUTHORITY OVER THE DIGITAL PROPERTY;

(2) BY A CONSERVATOR, THE REQUEST MUST BE ACCOMPANIED BY A CERTIFIED COPY OF THE COURT ORDER THAT GIVES THE CONSERVATOR AUTHORITY OVER THE DIGITAL PROPERTY;

(3) BY AN AGENT, THE REQUEST MUST BE ACCOMPANIED BY A CERTIFIED COPY OF THE POWER OF ATTORNEY THAT AUTHORIZES THE AGENT TO EXERCISE AUTHORITY OVER THE DIGITAL PROPERTY; OR

(4) BY A TRUSTEE, THE REQUEST MUST BE ACCOMPANIED BY A CERTIFIED COPY OF THE TRUST INSTRUMENT THAT AUTHORIZES THE TRUSTEE TO EXERCISE AUTHORITY OVER THE DIGITAL PROPERTY.

(C) A CUSTODIAN SHALL COMPLY NOT LATER THAN SIXTY DAYS AFTER RECEIPT OF THE REQUEST MADE UNDER THIS SECTION. IF THE CUSTODIAN FAILS TO COMPLY, THE FIDUCIARY MAY APPLY TO THE COURT FOR AN ORDER DIRECTING COMPLIANCE.

(D) A CERTIFIED COPY OF A TRUST OR POWER OF ATTORNEY MEANS A COPY ACCOMPANIED BY AN AFFIDAVIT BY WHICH THE AFFIANT ATTESTS THAT THE COPY IS A TRUE, EXACT, COMPLETE AND UNALTERED PHOTOCOPY OF THE ORIGINAL, AND THAT TO THE BEST OF THE AFFIANT'S KNOWLEDGE, SAID DOCUMENT REMAINS IN FULL FORCE AND EFFECT.

S 10-11.7 OBJECTION TO RECOVERY OF DIGITAL PROPERTY BY FIDUCIARY

(A) AN INTERESTED PARTY MAY FILE WITH THE COURT WITH JURISDICTION OVER THE ACCOUNT HOLDER OR THE FIDUCIARY, A WRITTEN OBJECTION TO THE FIDUCIARY'S REQUEST FOR CONTROL OVER OR THE FIDUCIARY'S EXERCISE OF CONTINUED CONTROL OVER DIGITAL PROPERTY.

(B) ON THE FILING OF AN OBJECTION UNDER PARAGRAPH (A) OF THIS SECTION, THE COURT SHALL ORDER A HEARING ON THE OBJECTION AT LEAST FIFTEEN DAYS AND NOT LATER THAN SIXTY DAYS AFTER THE FILING.

(C) AT A HEARING UNDER PARAGRAPH (B) OF THIS SECTION, THE COURT SHALL CONSIDER THE OBJECTION AND MAY ORDER THE FIDUCIARY NOT TO EXERCISE CONTROL OR ANY OTHER RIGHT OVER THE DIGITAL PROPERTY.

S 10-11.8 CUSTODIAN IMMUNITY

(A) A CUSTODIAN IS IMMUNE FROM LIABILITY FOR ANY ACTION MADE IN COMPLIANCE WITH SECTION 10-11.6 OF THIS PART.

(B) A CUSTODIAN ACTING IN GOOD FAITH IS IMMUNE FROM CIVIL LIABILITY FOR THE CUSTODIAN'S ACCIDENTAL DESTRUCTION OF ANY DIGITAL PROPERTY SUBJECT TO THIS PART.

S 3. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.