ATTACHMENT 6
CSP Agenda – Probate and Estate Planning Council

March 15, 2013

8:30 a.m.

1. **Fiduciary Access to Digital Assets Act** -- Meg Lentz/Michael Lichterman
   - Draft legislation (Exhibit A-1)
   - Rep. Cotter’s bills (Exhibit A-2)
   - Senator Bieda’s bills (Exhibit A-3)
   - March draft of the Uniform Law Commission (Exhibit A-4)

2. **Separate Trustee Proposal** – Jim Spica
   - Draft legislation (Exhibit B)

3. **Patient’s Guide to Health Care Decision Making**
   - Final draft (Exhibit C)
EXHIBIT A-1
FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

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

SECTION 2. DEFINITIONS. In this act:

(1) “Account holder” means a person who has entered into a terms-of-service agreement. The term includes a deceased individual who entered into the terms-of-service agreement during the individual’s lifetime.

(2) “Agent” means an attorney-in-fact granted authority under a power of attorney.

(3) “Catalogue of electronic communications” means the record of the name of each person with which an account holder communicated, the time and date of the communication, and the electronic address of each person in an electronic communication that is controlled by an electronic communication service or a remote computing service.

(4) “Conservator” means a person that is appointed by a court to manage all or part of the estate of a protected individual. The term includes a limited conservator.

(5) “Content of electronic communications” means information concerning the substance or meaning of an electronic communication that is controlled by an electronic communication service or a remote computing service that is not readily accessible to the public.

(6) “Court” means the probate court or, when applicable, the circuit court.

(7) “Digital asset” means an electronic record. The term includes the catalogue of electronic communications and the content of electronic communications.

(8) “Digital custodian” means a person that stores, or has control of, a digital asset or electronic communication of an account holder.

(9) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(10) “Electronic communication” means an electronic record while in electronic storage by an electronic communication service and an electronic record which is carried or maintained by a remote computing service.

(11) “Electronic communication service” means any service that provides to the public the ability to send or receive electronic communications.

(12) “Fiduciary” means each person who is an original, additional, or successor personal representative, conservator, agent, or trustee.
(13) “Governing instrument” means a will, a trust, an instrument creating a power of attorney, or other dispositive or nominative instrument.

(14) “Information” means data, text, images, videos, sounds, codes, computer programs, software, databases, or similar intelligence of any nature.

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

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

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

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

(19) “Protected individual” 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 a developmentally disabled person as defined in MCL 330.110a(25).

(20) “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.

(21) “Remote computing service” means any service that provides to the public computer processing services or storage of electronic records by means of an electronic communication system.

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

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

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

SECTION 3. SCOPE. This act applies only to a grant of authority to a fiduciary who is acting lawfully in accordance with fiduciary obligations and duties.

SECTION 4. AUTHORITY OF PERSONAL REPRESENTATIVE OVER DIGITAL ASSETS OF A DECEDENT.

(a) Unless prohibited by the will of a decedent, a court, law of this state other than this act, or federal law, a personal representative of the decedent may access:

(1) any digital asset of the decedent, other than the content of an electronic communication;

(2) the catalogue of electronic communications sent or received by the decedent; and
(3) the content of electronic communications described in subsection (2) if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

(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 5. AUTHORITY OF CONSERVATOR OVER DIGITAL ASSETS OF A PROTECTED INDIVIDUAL.

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

(1) any digital asset of the protected individual, other than the content of electronic communications;

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

(3) the content of electronic communications described in subsection (2) if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

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

(1) the intent of the protected individual with respect to the authority granted to the extent that intent can be ascertained; or

(2) whether granting authority to a conservator is in the protected individual’s best interest.

SECTION 6. CONTROL BY AGENT OF DIGITAL ASSETS.

(a) Unless prohibited by a power of attorney, an agent may access any digital assets of the principal, including the catalogue of electronic communications sent or received by the principal, but not including the content of those electronic communications.

(b) If a power of attorney grants authority to an agent over electronic communications of the principal, the agent may access the content of electronic communications sent or received by the principal, if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

SECTION 7. CONTROL BY TRUSTEE OF DIGITAL ASSETS.
(a) Unless prohibited by the settlor in the terms of a trust, the trustee that is an initial account holder may access each digital asset, including the catalogue of electronic communications sent or received by the account holder and the content of those electronic communications, held in the trust.

(b) Unless prohibited by the settlor in the terms of a trust, when the trustee is a successor account holder, the trustee may access:

(1) the digital assets, including the catalogue of electronic communications sent or received by the account holder (or any account holder who was a prior trustee of the trust), but not including the content of those electronic communications, held in the trust; and

(2) the content of electronic communications described in subsection (b)(1) if the electronic communication service or the remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

SECTION 8. FIDUCIARY ACCESS AND AUTHORITY.

(a) A fiduciary that is an account holder or that has the right to access a digital asset of an account holder:

(1) may take actions concerning the digital asset to the extent of the account holder’s authority and the fiduciary’s powers under law of this state other than this act, subject to copyright and other law and the terms-of-service agreement;

(2) is deemed to have the lawful consent of the account holder for the digital custodian to divulge the content of an electronic communication to the fiduciary pursuant to state and federal electronic privacy law; and

(3) is an authorized user under the federal Computer Fraud and Abuse Act, 18 U.S.C. Section 1030 et seq. and MCL 752.795.

(b) Any provision in a terms-of-service agreement that limits a fiduciary’s access to the digital assets of the account holder under this act is void as against the strong public policy of this state, unless the limitations of that provision are signed by the account holder separately from the other provisions of the terms-of-service agreement.

(c) Subject to Section 9(a), a fiduciary’s access to a digital asset is not a violation of a terms-of-service agreement, notwithstanding a provision in the terms-of-service agreement that bars third party access.
(d) A fiduciary with authority over the equipment of a decedent, protected individual, principal, or settlor that can receive, store, process, or send an electronic record may access that equipment and any electronic record stored on it.

SECTION 9. COMPLIANCE.

(a) If a fiduciary that has a right to access a digital asset of an account holder under this act and 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 unless the digital asset is subject to the copyright of a third party.

(b) If a request under subsection (a) is made by:

(1) a personal representative with the right of access under Section 4, 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 5, 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 under Section 6, the request must be accompanied by a certified copy of a currently-effective power of attorney that authorizes the agent to exercise authority over the digital asset; and

(4) a trustee with the right of access under Section 7, the request must be accompanied by a certified copy of the trust instrument or a certification 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 apply to the court for an order directing compliance.

(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 individual for 2 years after the custodian receives a request or order under subsections (b) 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 certification 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 certification 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 certification.

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

(h) A person that demands the trust instrument in addition to a certification 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 10. DIGITAL CUSTODIAN IMMUNITY. A digital custodian and its officers, employees, and agents are immune from liability for any action done in compliance with this act.

SECTION 11. 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 12. 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 13. 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. 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.

(3) 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.

SECTION 15. EFFECTIVE DATE. This act takes effect immediately.
EXHIBIT A-2
HOUSE BILL No. 5366

February 26, 2014, Introduced by Reps. LaFontaine, Cotter, Geiss, Leonard, Lauwers, Kowall and Jenkins and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled
"Estates and protected individuals code,"
by amending sections 5407 and 5415 (MCL 700.5407 and 700.5415),
section 5407 as amended by 2009 PA 46, and by adding section 5423a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 5407. (1) The court shall exercise the authority
conferred in this part to encourage the development of maximum
self-reliance and independence of a protected individual and shall
make protective orders only to the extent necessitated by the
protected individual's mental and adaptive limitations and other
conditions warranting the procedure. Accordingly, the court may
authorize a protected individual to function without the consent or
supervision of the individual's conservator in handling part of his
or her money or property, including authorizing the individual to
maintain an account with a financial institution. To the extent the
individual is authorized to function autonomously, a person may
deal with the individual as though the individual is mentally
competent.

(2) The court has the following powers that may be exercised
directly or through a conservator in respect to a protected
individual's estate and business affairs:

(a) While a petition for a conservator's appointment or
another protective order is pending and after preliminary hearing
and without notice to others, the court has the power to preserve
and apply property of the individual to be protected as may be
required for the support of the individual or the individual's
dependents.

(b) After hearing and upon determining that a basis for an
appointment or other protective order exists with respect to a
minor without other disability, the court has all those powers over
the minor's estate and business affairs that are or may be
necessary for the best interests of the minor and members of the
minor's immediate family.

(c) After hearing and upon determining that a basis for an
appointment or other protective order exists with respect to an
individual for a reason other than minority, the court, for the
benefit of the individual and members of the individual's immediate
family, has all the powers over the estate and business affairs
that the individual could exercise if present and not under
disability, except the power to make a will. Those powers include,
but are not limited to, all of the following:
(i) To make gifts.

(ii) To convey or release a contingent or expectant interest in property including marital property rights and a right of survivorship incident to joint tenancy or tenancy by the entirety.

(iii) To exercise or release a power held by the protected individual as personal representative, custodian for a minor, conservator, or donee of a power of appointment.

(iv) To enter into a contract.

(v) To create a revocable or irrevocable trust of estate property that may extend beyond the disability or life of the protected individual.

(vi) To exercise an option of the protected individual to purchase securities or other property.

(vii) To exercise a right to elect an option and change a beneficiary under an insurance or annuity policy and to surrender the policy for its cash value.

(viii) To exercise a right to an elective share in the estate of the individual's deceased spouse.

(ix) To renounce or disclaim an interest by testate or intestate succession or by inter vivos transfer.

(x) SUBJECT TO THE APPLICABLE TERMS-OF-SERVICE AGREEMENT:

(A) TO EXERCISE CONTROL OVER DIGITAL PROPERTY OF THE PROTECTED INDIVIDUAL.

(B) TO EXERCISE A RIGHT IN DIGITAL PROPERTY OF THE PROTECTED INDIVIDUAL.

(C) TO CHANGE A GOVERNING INSTRUMENT AFFECTING THE DIGITAL PROPERTY OF THE PROTECTED INDIVIDUAL.
(3) The court may exercise or direct the exercise of the following powers only if satisfied, after the notice and hearing, that it is in the protected individual's best interests and that the individual either is incapable of consenting or has consented to the proposed exercise of the power:

(a) To exercise or release a power of appointment of which the protected individual is donee.

(b) To renounce or disclaim an interest.

(c) To make a gift in trust or otherwise exceeding 20% of a year's income of the estate.

(d) To change a beneficiary under an insurance and annuity policy.

(4) A determination that a basis for a conservator's appointment or another protective order exists has no effect on the protected individual's capacity.

(5) TO THE EXTENT ORDERED BY THE COURT UNDER SUBSECTION (2), AND SUBJECT TO THE APPLICABLE LAW AND TERMS-OF-SERVICE AGREEMENT, WITH RESPECT TO THE PROTECTED INDIVIDUAL'S DIGITAL PROPERTY, A CONSERVATOR HAS THE LAWFUL CONSENT OF THE PROTECTED INDIVIDUAL AND IS AN AUTHORIZED USER UNDER ALL APPLICABLE STATE AND FEDERAL STATUTES.

Sec. 5415. (1) A person interested in the welfare of an individual for whom a conservator is appointed may file a petition in the appointing court for an order to do any of the following:

(a) Require bond or security or additional bond or security, or reduce bond.

(b) Require an accounting for the administration of the trust.
(c) Direct distribution.

(d) Remove the conservator and appoint a temporary or successor conservator.

(E) LIMIT OR ELIMINATE THE CONSERVATOR'S POWER OVER DIGITAL PROPERTY.

(F) (e) Grant other appropriate relief.

(2) ON RECEIPT OF A PETITION UNDER SUBSECTION (1)(E), THE COURT SHALL SET A DATE FOR A HEARING ON THE PETITION. THE HEARING DATE SHALL BE NOT LESS THAN 14 DAYS AND NOT MORE THAN 56 DAYS AFTER THE DATE THE PETITION IS FILED.

(3) (2)—A conservator may petition the appointing court for instructions concerning fiduciary responsibility. Upon notice and hearing, the court may give appropriate instructions or make an appropriate order.

SEC. 5423A. (1) ON RECEIPT OF A CONSERVATOR'S WRITTEN REQUEST UNDER THIS SUBSECTION FOR ACCESS TO DIGITAL PROPERTY, OWNERSHIP OF DIGITAL PROPERTY, OR A COPY OF A DIGITAL ASSET, A DIGITAL CUSTODIAN SHALL PROVIDE THE CONSERVATOR WITH THE REQUESTED ACCESS, OWNERSHIP, OR COPY, AS APPLICABLE. A CONSERVATOR'S WRITTEN REQUEST UNDER THIS SUBSECTION MUST BE ACCOMPANIED BY A CERTIFIED COPY OF THE COURT ORDER THAT GIVES THE CONSERVATOR POWER OVER THE DIGITAL PROPERTY.

(2) A DIGITAL CUSTODIAN SHALL COMPLY NOT LATER THAN 56 DAYS AFTER RECEIPT OF A REQUEST MADE UNDER SUBSECTION (1). IF THE DIGITAL CUSTODIAN FAILS TO COMPLY, THE CONSERVATOR MAY PETITION THE COURT FOR AN ORDER DIRECTING COMPLIANCE. IF, NOT LATER THAN 56 DAYS AFTER RECEIVING A REQUEST MADE UNDER SUBSECTION (1), THE DIGITAL CUSTODIAN FAILS TO COMPLY WITH THE REQUEST OR ORDER, THE
CONSERVATOR MAY PETITION THE COURT FOR AN ORDER DIRECTING

COMPLIANCE.

(3) A DIGITAL CUSTODIAN IS NOT LIABLE FOR AN ACTION DONE IN

COMPLIANCE WITH THIS SECTION.

Enacting section 1. This amendatory act does not take effect
unless all of the following bills of the 97th Legislature are
enacted into law:

(a) Senate Bill No.____ or House Bill No. 5368 (request no.
01198'13).

(b) Senate Bill No.____ or House Bill No. 5367 (request no.
04550'13).

(c) Senate Bill No.____ or House Bill No. 5369 (request no.
04552'13).

(d) Senate Bill No.____ or House Bill No. 5370 (request no.
04553'13).
HOUSE BILL No. 5367

February 26, 2014, Introduced by Reps. Lauwers, Cotter, Geiss, LaFontaine, Leonard, Kowall and Jenkins and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending sections 3709 and 3715 (MCL 700.3709 and 700.3715), section 3715 as amended by 2009 PA 46, and by adding sections 3715a and 3723.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 3709. (1) Except as otherwise provided by a decedent's will or by this section, a personal representative has a right to possession and, if necessary for purposes of administration, shall take possession or control of the decedent's property, OTHER THAN DIGITAL PROPERTY SUBJECT TO SUBSECTION (2), except that real property or tangible personal property may be left with or surrendered to the person presumptively entitled to that property unless or until, in the personal representative's judgment, possession of the property will be necessary for purposes of
administration. A personal representative's request for delivery of
property possessed by an heir or devisee is conclusive evidence, in
an action against the heir or devisee for possession of that
property, that the possession of the property by the personal
representative is necessary for purposes of administration. The
personal representative shall pay taxes on, and take all steps
reasonably necessary for the management, protection, and
preservation of, the estate in the personal representative's
possession. The personal representative may maintain an action to
recover possession of, or to determine the title to, property.

(2) EXCEPT AS OTHERWISE PROVIDED BY A DECEDENT'S WILL, AND
SUBJECT TO APPLICABLE LAW AND A TERMS-OF-SERVICE AGREEMENT, WITH
RESPECT TO A DECEDENT'S DIGITAL PROPERTY, A PERSONAL REPRESENTATIVE
HAS THE LAWFUL CONSENT OF THE DECEDENT AND IS AN AUTHORIZED USER
UNDER ALL APPLICABLE STATE AND FEDERAL STATUTES. A PERSONAL
REPRESENTATIVE HAS THE RIGHT TO, AND IF NECESSARY FOR PURPOSES OF
ADMINISTRATION SHALL, EXERCISE CONTROL OVER THE DECEDENT'S DIGITAL
PROPERTY. A PERSONAL REPRESENTATIVE'S WRITTEN REQUEST FOR ACCESS
TO, OR CONTROL OF, DIGITAL PROPERTY IS CONCLUSIVE EVIDENCE IN ANY
ACTION THAT THE ACCESS TO, EXERCISE OF CONTROL OF, OR BOTH, DIGITAL
PROPERTY BY THE PERSONAL REPRESENTATIVE IS NECESSARY FOR PURPOSES
OF ADMINISTRATION. THE PERSONAL REPRESENTATIVE MAY MAINTAIN AN
ACTION TO GAIN ACCESS TO, EXERCISE CONTROL OF, OR BOTH, DIGITAL
PROPERTY IN ACCORDANCE WITH SECTION 3715A.

Sec. 3715. Except as restricted or otherwise provided by the
will or by an order in a formal proceeding, and subject to the
priorities stated in section 3902, a personal representative,
acting reasonably for the benefit of interested persons, may
properly do any of the following:

(a) Retain property owned by the decedent pending distribution
or liquidation, including property in which the personal
representative is personally interested or that is otherwise
improper for trust investment.

(b) Receive property from a fiduciary or another source.

(c) Perform, compromise, or refuse performance of a contract
of the decedent that continues as an estate obligation, as the
personal representative determines under the circumstances. If the
contract is for a conveyance of land and requires the giving of
warranties, the personal representative shall include in the deed
or other instrument of conveyance the required warranties. The
warranties are binding on the estate as though the decedent made
them but do not bind the personal representative except in a
fiduciary capacity. In performing an enforceable contract by the
decedent to convey or lease land, the personal representative,
among other possible courses of action, may do any of the
following:

   (i) Execute and deliver a deed of conveyance for cash payment
of the amount remaining due or for the purchaser's note for the
amount remaining due secured by a mortgage on the land.

   (ii) Deliver a deed in escrow with directions that the
proceeds, when paid in accordance with the escrow agreement, be
paid to the decedent's successors, as designated in the escrow
agreement.

   (d) If, in the judgment of the personal representative, the
decendent would have wanted the pledge satisfied under the
circumstances, satisfy a written charitable pledge of the decedent
irrespective of whether the pledge constitutes a binding obligation
of the decedent or is properly presented as a claim.

(e) If funds are not needed to meet a debt or
expenses currently payable and are not immediately
distributable, deposit or invest liquid assets of the estate,
including funds received from the sale of other property, in
accordance with the Michigan prudent investor rule.

(f) Acquire or dispose of property, including land in this or
another state, for cash or on credit, at public or private sale;
and manage, develop, improve, exchange, partition, change the
character of, or abandon estate property.

(g) Make an ordinary or extraordinary repair or alteration in
a building or other structure, demolish an improvement, or raze an
existing or erect a new party wall or building.

(h) Subdivide, develop, or dedicate land to public use, make
or obtain the vacation of a plat or adjust a boundary, adjust a
difference in valuation on exchange or partition by giving or
receiving consideration, or dedicate an easement to public use
without consideration.

(i) Enter into a lease as lessor or lessee for any purpose,
with or without an option to purchase or renew, for a term within
or extending beyond the period of administration.

(j) Enter into a lease or arrangement for exploration and
removal of minerals or another natural resource, or enter into a
pooling or unitization agreement.
(k) Abandon property **when-IF**, in the opinion of the personal representative, it is valueless, or is so encumbered or in such a condition as to be of no benefit to the estate.

(l) Vote stocks or another security in person or by general or limited proxy.

(m) Pay a call, assessment, or other amount chargeable or accruing against or on account of a security, unless barred by a provision relating to claims.

(n) Hold a security in the name of a nominee or in other form without disclosure of the estate's interest. However, the personal representative is liable for an act of the nominee in connection with the security so held.

(o) Insure the estate property against damage, loss, and liability and insure the personal representative against liability as to third persons.

(p) Borrow property with or without security to be repaid from the estate property or otherwise, and advance money for the estate's protection.

(q) Effect a fair and reasonable compromise with a debtor or obligor, or extend, renew, or in any manner modify the terms of an obligation owing to the estate. If the personal representative holds a mortgage, pledge, or other lien upon another person's property, the personal representative may, in lieu of foreclosure, accept a conveyance or transfer of encumbered property from the property's owner in satisfaction of the indebtedness secured by lien.

(r) Pay a tax, an assessment, the personal representative's
compensation, or another expense incident to the estate's administration.

(s) Sell or exercise a stock subscription or conversion right.
(t) Consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.
(u) Allocate items of income or expense to either estate income or principal, as permitted or provided by law.
(v) Employ, and pay reasonable compensation for reasonably necessary services performed by, a person, including, but not limited to, an auditor, investment advisor, or agent, even if the person is associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties; act on such a person's recommendations without independent investigation; and, instead of acting personally, employ 1 or more agents to perform an act of administration, whether or not discretionary.
(w) Employ an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties, even if the attorney is associated with the personal representative, and act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.
(x) Prosecute or defend a claim or proceeding in any jurisdiction for the protection of the estate and of the personal representative in the performance of the personal representative's
duties.

(y) Sell, mortgage, or lease estate property or an interest in
estate property for cash, credit, or part cash and part credit, and
with or without security for unpaid balances.

(z) Continue a business or venture in which the decedent was
engaged at the time of death as a sole proprietor or a general
partner, including continuation as a general partner by a personal
representative that is a corporation, in any of the following
manner:

(i) In the same business form for a period of not more than 4
months after the date of appointment of a general personal
representative if continuation is a reasonable means of preserving
the value of the business, including goodwill.

(ii) In the same business form for an additional period of time
if approved by court order in a formal proceeding to which the
persons interested in the estate are parties.

(iii) Throughout the period of administration if the personal
representative incorporates the business or converts the business
to a limited liability company and if none of the probable
distributees of the business who are competent adults object to its
incorporation or conversion and its retention in the estate.

(aa) Change the form of a business or venture in which the
decedent was engaged at the time of death through incorporation or
formation as a limited liability company or other entity offering
protection against or limiting exposure to liabilities.

(bb) Provide for the personal representative's exoneration
from personal liability in a contract entered into on the estate's
behalf.

(cc) Respond to an environmental concern or hazard affecting
estate property as provided in section 3722.

(dd) Satisfy and settle claims and distribute the estate as
provided in this act.

(ee) Make, revise, or revoke an available allocation, consent,
or election in connection with a tax matter as appropriate in order
to carry out the decedent's estate planning objectives and to
reduce the overall burden of taxation, both in the present and in
the future. This authority includes, but is not limited to, all of
the following:

(i) Electing to take expenses as estate tax or income tax
deductions.

(ii) Electing to allocate the exemption from the tax on
generation skipping transfers among transfers subject to estate or
gift tax.

(iii) Electing to have all or a portion of a transfer for a
spouse's benefit qualify for the marital deduction.

(iv) Electing the date of death or an alternate valuation date
for federal estate tax purposes.

(v) Excluding or including property from the gross estate for
federal estate tax purposes.

(vi) Valuing property for federal estate tax purposes.

(vii) Joining with the surviving spouse or the surviving
spouse's personal representative in the execution and filing of a
joint income tax return and consenting to a gift tax return filed
by the surviving spouse or the surviving spouse's personal
representative.

(ff) Divide portions of the estate, including portions to be allocated into trust, into 2 or more separate portions or trusts with substantially identical terms and conditions, and allocate property between them, in order to simplify administration for generation skipping transfer tax purposes, to segregate property for management purposes, or to meet another estate or trust objective.

(GG) SUBJECT TO THE APPLICABLE TERMS-OF-SERVICE AGREEMENT, EXERCISE CONTROL OVER THE DECEDENT'S DIGITAL PROPERTY.

SEC. 3715A. (1) ON RECEIPT OF A PERSONAL REPRESENTATIVE'S WRITTEN REQUEST UNDER THIS SUBSECTION FOR ACCESS TO DIGITAL PROPERTY, OWNERSHIP OF DIGITAL PROPERTY, OR A COPY OF A DIGITAL ASSET, A DIGITAL CUSTODIAN SHALL PROVIDE THE PERSONAL REPRESENTATIVE WITH THE REQUESTED ACCESS, OWNERSHIP, OR COPY, AS APPLICABLE. A PERSONAL REPRESENTATIVE'S WRITTEN REQUEST UNDER THIS SUBSECTION MUST BE ACCOMPANIED BY A CERTIFIED COPY OF LETTERS ISSUED TO THE PERSONAL REPRESENTATIVE.

(2) A DIGITAL CUSTODIAN SHALL COMPLY NOT LATER THAN 56 DAYS AFTER RECEIPT OF A REQUEST MADE UNDER SUBSECTION (1). IF THE DIGITAL CUSTODIAN FAILS TO COMPLY, THE PERSONAL REPRESENTATIVE MAY PETITION THE COURT FOR AN ORDER DIRECTING COMPLIANCE. IF, NOT LATER THAN 56 DAYS AFTER RECEIVING A REQUEST MADE UNDER SUBSECTION (1), THE DIGITAL CUSTODIAN FAILS TO COMPLY WITH THE REQUEST, THE PERSONAL REPRESENTATIVE MAY PETITION THE COURT FOR AN ORDER DIRECTING COMPLIANCE.

(3) A DIGITAL CUSTODIAN IS NOT LIABLE FOR AN ACTION DONE IN
COMPLIANCE WITH THIS SECTION.

SEC. 3723. (1) A PERSON INTERESTED IN THE ESTATE MAY FILE A
PETITION IN THE COURT FOR AN ORDER TO LIMIT OR ELIMINATE A PERSONAL
REPRESENTATIVE'S POWER OVER DIGITAL PROPERTY.

(2) ON RECEIPT OF A PETITION UNDER THIS SECTION, THE COURT
SHALL SET A DATE FOR A HEARING ON THE PETITION. THE HEARING DATE
SHALL BE NOT LESS THAN 14 DAYS AND NOT MORE THAN 56 DAYS AFTER THE
DATE THE PETITION IS FILED.

Enacting section 1. This amendatory act does not take effect
unless all of the following bills of the 97th Legislature are
enacted into law:

(a) Senate Bill No. ____ or House Bill No. 5368 (request no.
01198'13).

(b) Senate Bill No. ____ or House Bill No. 5366 (request no.
04551'13).

(c) Senate Bill No. ____ or House Bill No. 5369 (request no.
04552'13).

(d) Senate Bill No. ____ or House Bill No. 5370 (request no.
04553'13).
February 26, 2014, Introduced by Reps. Cotter, Leonard, LaFontaine, Geiss, Lauwers, Kowall and Jenkins and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending sections 1103, 1104, 1106, and 1107 (MCL 700.1103, 700.1104, 700.1106, and 700.1107), section 1103 as amended by 2013 PA 157 and sections 1104, 1106, and 1107 as amended by 2009 PA 46.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1103. As used in this act:
2   (a) "Agent" includes, but is not limited to, an attorney-in-
3      fact under a durable or nondurable power of attorney and an
4      individual authorized to make decisions as a patient advocate
5      concerning another's health care.
6   (b) "Application" means a written request to the probate
7      register for an order of informal probate or informal appointment
8      under part 3 of article III.
(c) "Attorney" means, if appointed to represent a child under
the provisions referenced in section 5213, an attorney as that term
is defined and serving as the child's legal advocate in the manner
defined and described in section 13a of chapter XIIA of the probate
code of 1939, 1939 PA 288, MCL 712A.13a.

(d) "Beneficiary" includes, but is not limited to, the
following:

(i) In relation to a trust, a person that is a trust
beneficiary as defined in section 7103.

(ii) In relation to a charitable trust, a person that is
entitled to enforce the trust.

(iii) In relation to a beneficiary of a beneficiary designation,
a person that is a beneficiary of an insurance or annuity policy,
of an account with POD designation, of a security registered in
beneficiary form (TOD), of a pension, profit-sharing, retirement,
or similar benefit plan, or of another nonprobate transfer at
death.

(iv) In relation to a beneficiary designated in a governing
instrument, a person that is a grantee of a deed, devisee, trust
beneficiary, beneficiary of a beneficiary designation, donee,
appointee, taker in default of a power of appointment, or person in
whose favor a power of attorney or power held in an individual,
fiduciary, or representative capacity is exercised.

(e) "Beneficiary designation" means the naming in a governing
instrument of a beneficiary of an insurance or annuity policy, of
an account with POD designation, of a security registered in
beneficiary form (TOD), of a pension, profit-sharing, retirement,
or similar benefit plan, or of another nonprobate transfer at
death.

(f) "Child" includes, but is not limited to, an individual
entitled to take as a child under this act by intestate succession
from the parent whose relationship is involved. Child does not
include an individual who is only a stepchild, a foster child, or a
grandchild or more remote descendant.

(g) "Claim" includes, but is not limited to, in respect to a
decedent's or protected individual's estate, a liability of the
decedent or protected individual, whether arising in contract,
tort, or otherwise, and a liability of the estate that arises at or
after the decedent's death or after a conservator's appointment,
including funeral and burial expenses and costs and expenses of
administration. Claim does not include an estate or inheritance
tax, or a demand or dispute regarding a decedent's or protected
individual's title to specific property alleged to be included in
the estate.

(h) "Conservator" means a person appointed by a court to
manage a protected individual's estate.

(i) "Cost-of-living adjustment factor" means a fraction, the
numerator of which is the United States consumer price index for
the prior calendar year and the denominator of which is the United
States consumer price index for 1997. As used in this subdivision,
"United States consumer price index" means the annual average of
the United States consumer price index for all urban consumers as
defined and reported by the United States department of labor,
bureau of labor statistics, or its successor agency, and as
certified by the state treasurer.

(j) "Court" means the probate court or, when applicable, the family division of circuit court.

(k) "Descendant" means, in relation to an individual, all of his or her descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this act.

(l) "Devise" means, when used as a noun, a testamentary disposition of real or personal property and, when used as a verb, to dispose of real or personal property by will.

(m) "Devisee" means a person designated in a will to receive a devise. For the purposes of article II, for a devise to a trustee of an existing trust or to a trustee under a will, the trustee is a devisee and a beneficiary is not.

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

(O) "DIGITAL ACCOUNT HOLDER" MEANS A DECEASED, PROTECTED INDIVIDUAL, PRINCIPAL OF A DURABLE POWER OF ATTORNEY, OR SETTLOR WHO HAS A TERMS-OF-SERVICE AGREEMENT WITH A DIGITAL CUSTODIAN.

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

(Q) "DIGITAL CUSTODIAN" MEANS A PERSON THAT ELECTRONICALLY
STORES DIGITAL PROPERTY OF A DIGITAL ACCOUNT HOLDER OR OTHERWISE
HAS CONTROL OVER DIGITAL PROPERTY OF THE DIGITAL ACCOUNT HOLDER.
(R) "DIGITAL DEVICE" MEANS AN ELECTRONIC DEVICE THAT CAN
RECEIVE, STORE, PROCESS, OR SEND DIGITAL INFORMATION.
(S) "DIGITAL PROPERTY" MEANS THE OWNERSHIP AND MANAGEMENT OF
AND RIGHTS RELATED TO A DIGITAL ACCOUNT AND DIGITAL ASSET.
(T) "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.
(U) (U) "Disability" means cause for a protective order as
described in section 5401.
(V) (V) "Distributee" means a person that receives a
decedent's property from the decedent's personal representative or
trust property from the trustee other than as a creditor or
purchaser. A trustee of a trust created by will is a distributee
only to the extent that distributed property or an increment of the
distributed property remains in the trustee's hands. A beneficiary
of a trust created by will to whom the trustee distributes property
received from a personal representative is a distributee of the
personal representative. For the purposes of this subdivision,
"trustee of a trust created by will" includes a trustee to whom
property is transferred by will to the extent of the devised
property.
(W) (W) "Do-not-resuscitate order" means that term as defined
in section 2 of the Michigan do-not-resuscitate procedure act, 1996
PA 193, MCL 333.1052.

Sec. 1104. As used in this act:

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

(B) "ELECTRONIC INFORMATION" INCLUDES DATA, TEXT, IMAGES, SOUNDS, CODES, COMPUTER PROGRAMS, SOFTWARE, AND DATABASES.

(C) "ELECTRONIC RECORD" MEANS ELECTRONIC INFORMATION THAT IS INSCRIBED ON A TANGIBLE MEDIUM OR THAT IS STORED IN AN ELECTRONIC OR OTHER MEDIUM AND IS RETRIEVABLE IN A PERCEIVABLE FORM.

(D) (a) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance that relates to the protection of the environment or human health.

(E) (b) "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this act as the property is originally constituted and as it exists throughout administration. Estate also includes the rights described in sections 3805, 3922, and 7606 to collect from others amounts necessary to pay claims, allowances, and taxes.

(F) (c) "Exempt property" means property of a decedent's estate that is described in section 2404.

(G) (d) "Family allowance" means the allowance prescribed in section 2403.

(H) (e) "Fiduciary" includes, but is not limited to, a personal representative, guardian, conservator, trustee, plenary guardian, partial guardian, and successor fiduciary.

(I) (f) "Financial institution" means an organization
authorized to do business under state or federal laws relating to a
financial institution and includes, but is not limited to, a bank,
trust company, savings bank, building and loan association, savings
and loan company or association, credit union, insurance company,
and entity that offers mutual fund, securities brokerage, money
market, or retail investment accounts.

(J) -"Foreign personal representative" means a personal
representative appointed by another jurisdiction.

(K) -"Formal proceedings" means proceedings conducted
before a judge with notice to interested persons.

(I) -"Funeral establishment" means that term as defined in
section 1801 of the occupational code, 1980 PA 299, MCL 339.1801,
and the owners, employees, and agents of the funeral establishment.

(M) -"General personal representative" means a personal
representative other than a special personal representative.

(N) -"Governing instrument" means a deed; will; trust;
insurance or annuity policy; account with POD designation; security
registered in beneficiary form (TOD); pension, profit-sharing,
retirement, or similar benefit plan; instrument creating or
exercising a power of appointment or a power of attorney; or
dispositive, appointive, or nominative instrument of any similar
type.

(O) -"Guardian" means a person who has qualified as a
guardian of a minor or a legally incapacitated individual under a
parental or spousal nomination or a court appointment and includes
a limited guardian as described in sections 5205, 5206, and 5306.
Guardian does not include a guardian ad litem.
(P) "Hazardous substance" means a substance defined as hazardous or toxic or otherwise regulated by an environmental law.

(Q) "Heir" means, except as controlled by section 2720, a person, including the surviving spouse or the state, that is entitled under the statutes of intestate succession to a decedent's property.

(R) "Homestead allowance" means the allowance prescribed in section 2402.

Sec. 1106. As used in this act:

(a) "Mental health professional" means an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is 1 of the following:

(i) A physician who is licensed to practice medicine or osteopathic medicine and surgery in this state under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

(ii) A psychologist licensed to practice in this state under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

(iii) A registered professional nurse licensed to practice in this state under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

(iv) A licensed master's social worker licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

(v) A physician's assistant licensed to practice in this state under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.
(w) A licensed professional counselor licensed under part 181 of the public health code, 1978 PA 368, MCL 333.18101 to 333.18117.

(b) "Michigan prudent investor rule" means the fiduciary investment and management rule prescribed by part 5 of this article.

(c) "Minor" means an individual who is less than 18 years of age.

(d) "Minor ward" means a minor for whom a guardian is appointed solely because of minority.

(e) "Money" means legal tender or a note, draft, certificate of deposit, stock, bond, check, or credit card.

(f) "Mortgage" means a conveyance, agreement, or arrangement in which property is encumbered or used as security.

(g) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his or her death.

(h) "Organization" means a corporation, business trust, estate, trust, partnership, limited liability company, association, or joint venture; governmental subdivision, agency, or instrumentality; public corporation; or another legal or commercial entity.

(i) "Parent" includes, but is not limited to, an individual entitled to take, or who would be entitled to take, as a parent under this act by intestate succession from a child who dies without a will and whose relationship is in question. Parent does not include an individual who is only a stepparent, foster parent, or grandparent.

(j) "Partial guardian" means that term as defined in section
600 of the mental health code, 1974 PA 258, MCL 330.1600.

(k) "Patient advocate" means an individual designated to
exercise powers concerning another individual's care, custody, and
medical or mental health treatment or authorized to make an
anatomical gift on behalf of another individual, or both, as
provided in section 5506.

(l) "Patient advocate designation" means the written document
executed and with the effect as described in sections 5506 to 5515.

(m) "Payor" means a trustee, insurer, business entity,
employer, government, governmental subdivision or agency, or other
person authorized or obligated by law or a governing instrument to
make payments.

(n) "Person" means an individual or an organization.

(o) "Personal representative" includes, but is not limited to,
an executor, administrator, successor personal representative, and
special personal representative, and any other person, other than a
trustee of a trust subject to article VII, who performs
substantially the same function under the law governing that
person's status.

(p) "Petition" means a written request to the court for an
order after notice.

(q) "Plenary guardian" means that term as defined in section
600 of the mental health code, 1974 PA 258, MCL 330.1600.

(r) "Proceeding" includes an application and a petition, and
may be an action at law or a suit in equity. A proceeding may be
denominated a civil action under court rules.

(s) "Professional conservator" means a person that provides
conservatorship services for a fee. Professional conservator does not include a person who is an individual who is related to all but 2 of the protected individuals for whom he or she is appointed as conservator.

(t) "Professional guardian" means a person that provides guardianship services for a fee. Professional guardian does not include a person who is an individual who is related to all but 2 of the wards for whom he or she is appointed as guardian.

(u) "Property" means anything that may be the subject of ownership, and includes both real and personal property or an interest in real or personal property. PROPERTY INCLUDES DIGITAL PROPERTY.

(v) "Protected individual" means a minor or other individual for whom a conservator has been appointed or other protective order has been made as provided in part 4 of article V.

(w) "Protective proceeding" means a proceeding under the provisions of part 4 of article V.

Sec. 1107. As used in this act:

(a) "Register" or "probate register" means the official of the court designated to perform the functions of register as provided in section 1304.

(b) "Revised judicature act of 1961" means the revised judicature act of 1961, 1961 PA 236, MCL 600.101 to 600.9947.

(c) "Security" includes, but is not limited to, a note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title
or lease, collateral trust certificate, transferable share, voting
trust certificate, or interest in a regulated investment company or
other entity generally referred to as a mutual fund or, in general,
an interest or instrument commonly known as a security, or a
certificate of interest or participation for, a temporary or
interim certificate, receipt, or certificate of deposit for, or any
warrant or right to subscribe to or purchase any of the items
listed in this subdivision.

(d) "Settlement" means, in reference to a decedent's estate,
the full process of administration, distribution, and closing.

(e) "Special personal representative" means a personal
representative as described by sections 3614 to 3618.

(f) "State" means a state of the United States, the District
of Columbia, the Commonwealth of Puerto Rico, or a territory or
insular possession subject to the jurisdiction of the United
States.

(g) "Successor" means a person, other than a creditor, who is
entitled to property of a decedent under the decedent's will or
this act.

(h) "Successor personal representative" means a personal
representative, other than a special personal representative, who
is appointed to succeed a previously appointed personal
representative.

(i) "Supervised administration" means the proceedings
described in part 5 of article III.

(j) "Survive" means that an individual neither predeceases an
event, including the death of another individual, nor is considered
to predecease an event under section 2104 or 2702.

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

(I) -(k) "Terms of a trust" or "terms of the trust" means the
manifestation of the settlor's intent regarding a trust's
provisions as expressed in the trust instrument or as may be
established by other evidence that would be admissible in a
judicial proceeding.

(M) -(l) "Testacy proceeding" means a proceeding to establish a
will or determine intestacy.

(N) -(m) "Testator" includes an individual of either gender.

(O) -(n) "Trust" includes, but is not limited to, an express
trust, private or charitable, with additions to the trust, wherever
and however created. Trust includes, but is not limited to, a trust
created or determined by judgment or decree under which the trust
is to be administered in the manner of an express trust. Trust does
not include a constructive trust or a resulting trust,
conservatorship, personal representative, custodial arrangement
under the Michigan uniform transfers to minors act, 1998 PA 433,
MCL 554.521 to 554.552, business trust providing for a certificate
to be issued to a beneficiary, common trust fund, voting trust,
security arrangement, liquidation trust, or trust for the primary
purpose of paying debts, dividends, interest, salaries, wages,
profits, pensions, or employee benefits of any kind, or another
arrangement under which a person is a nominee or escrowee for
another.

(P) (e)—"Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by the court.

Enacting section 1. This amendatory act does not take effect unless all of the following bills of the 97th Legislature are enacted into law:

(a) Senate Bill No.__ or House Bill No. 5367 (request no. 04550'13).

(b) Senate Bill No.__ or House Bill No. 5366 (request no. 04551'13).

(c) Senate Bill No.__ or House Bill No. 5369 (request no. 04552'13).

(d) Senate Bill No.__ or House Bill No. 5370 (request no. 04553'13).
HOUSE BILL No. 5369

February 26, 2014, Introduced by Reps. Leonard, LaFontaine, Cotter, Geiss, Lauwers, Kowall and Jenkins and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled "Estate and protected individuals code,"
by amending section 5501 (MCL 700.5501), as amended by 2012 PA 141, and by adding section 5501a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 5501. (1) A durable power of attorney is a power of attorney by which a principal designates another as the principal's attorney-in-fact in a writing that contains the words "This power of attorney is not affected by the principal's subsequent disability or incapacity, or by the lapse of time", or "This power of attorney is effective upon the disability or incapacity of the principal", or similar words showing the principal's intent that the authority conferred is exercisable notwithstanding the principal's subsequent disability or incapacity and, unless the power states a termination time, notwithstanding the lapse of time.
since the execution of the instrument.

(2) A durable power of attorney under this section MUST be dated and signed voluntarily by the principal or signed by a notary public on the principal's behalf pursuant to section 33 of the Michigan notary public act, 2003 PA 238, MCL 55.293. The durable power of attorney MUST be 1 or both of the following:

(a) Signed in the presence of 2 witnesses, neither of whom is the attorney-in-fact, and both of whom also sign the durable power of attorney.

(b) Acknowledged by the principal before a notary public, who endorses on the durable power of attorney a certificate of that acknowledgment and the true date of taking the acknowledgment.

(3) An attorney-in-fact designated and acting under a durable power of attorney has the authority, rights, responsibilities, and limitations as provided by law with respect to a durable power of attorney, including, but not limited to, all of the following:

(a) Except as provided in the durable power of attorney, the attorney-in-fact shall act in accordance with the standards of care applicable to fiduciaries exercising powers under a durable power of attorney.

(b) The attorney-in-fact shall take reasonable steps to follow the instructions of the principal.

(c) Upon request of the principal, the attorney-in-fact shall keep the principal informed of the attorney-in-fact's actions. The attorney-in-fact shall provide an accounting to the principal upon request of the principal, to a conservator or guardian appointed on behalf of the principal upon request of the guardian or
conservator, or pursuant to judicial order.
(d) The attorney-in-fact shall not make a gift of all or any part of the principal's assets, unless provided for in the durable power of attorney or by judicial order.
(e) Unless provided in the durable power of attorney or by judicial order, the attorney-in-fact, while acting as attorney-in-fact, shall not create an account or other asset in joint tenancy between the principal and the attorney-in-fact.
(F) UNLESS PROVIDED IN THE DURABLE POWER OF ATTORNEY OR BY JUDICIAL ORDER AND SUBJECT TO THE APPLICABLE TERMS-OF-SERVICE AGREEMENT, THE ATTORNEY-IN-FACT, WHILE ACTING AS ATTORNEY-IN-FACT, SHALL NOT DO ANY OF THE FOLLOWING:
(i) EXERCISE CONTROL OVER DIGITAL PROPERTY.
(ii) EXERCISE A RIGHT IN DIGITAL PROPERTY.
(iii) CHANGE A GOVERNING INSTRUMENT AFFECTING THE DIGITAL PROPERTY.
(G) (f) The attorney-in-fact shall maintain records of the attorney-in-fact's actions on behalf of the principal, including transactions, receipts, disbursements, and investments.
(H) (g) The attorney-in-fact may be liable for any damage or loss to the principal, and may be subject to any other available remedy, for breach of fiduciary duty owed to the principal. In the durable power of attorney, the principal may exonerate the attorney-in-fact of any liability to the principal for breach of fiduciary duty except for actions committed by the attorney-in-fact in bad faith or with reckless indifference. An exoneration clause is not enforceable if inserted as the result of an abuse by the
attorney-in-fact of a fiduciary or confidential relationship to the principal.

(I) (h) The attorney-in-fact may receive reasonable compensation for the attorney-in-fact's services if provided for in the durable power of attorney.

(4) Before exercising authority under a durable power of attorney, an attorney-in-fact shall execute an acknowledgment of the attorney-in-fact's responsibilities that contains all of the substantive statements in substantially the following form:

I, ____________________, have been appointed as attorney-in-fact for ____________________, the principal, under a durable power of attorney dated _________. By signing this document, I acknowledge that if and when I act as attorney-in-fact, all of the following apply:

(a) Except as provided in the durable power of attorney, I must act in accordance with the standards of care applicable to fiduciaries acting under durable powers of attorney.

(b) I must take reasonable steps to follow the instructions of the principal.

(c) Upon request of the principal, I must keep the principal informed of my actions. I must provide an accounting to the principal upon request of the principal, to a guardian or conservator appointed on behalf of the principal upon the request of that guardian or conservator, or pursuant to judicial order.

(d) I cannot make a gift from the principal's property, unless provided for in the durable power of attorney or by judicial order.

(e) Unless provided in the durable power of attorney or by
judicial order, I, while acting as attorney-in-fact, shall not
CANNOT create an account or other asset in joint tenancy between
the principal and me.

(F) UNLESS PROVIDED IN THE DURABLE POWER OF ATTORNEY OR BY
JUDICIAL ORDER AND SUBJECT TO THE APPLICABLE TERMS-OF-SERVICE
AGREEMENT, I, WHILE ACTING AS ATTORNEY-IN-FACT, CANNOT DO ANY OF
THE FOLLOWING:

(i) EXERCISE CONTROL OVER THE PRINCIPAL'S DIGITAL PROPERTY.
(ii) EXERCISE A RIGHT IN THE PRINCIPAL'S DIGITAL PROPERTY.
(iii) CHANGE A GOVERNING INSTRUMENT AFFECTING THE PRINCIPAL'S
DIGITAL PROPERTY.

(G) (f) I must maintain records of my transactions as
attorney-in-fact, including receipts, disbursements, and
investments.

(H) (g) I may be liable for any damage or loss to the
principal, and may be subject to any other available remedy, for
breach of fiduciary duty owed to the principal. In the durable
power of attorney, the principal may exonerate me of any liability
to the principal for breach of fiduciary duty except for actions
committed by me in bad faith or with reckless indifference. An
exoneration clause is not enforceable if inserted as the result of
my abuse of a fiduciary or confidential relationship to the
principal.

(I) (h) I may be subject to civil or criminal penalties if I
violate my duties to the principal.

Signature: __________________ Date: ________________

(5) A third party is not liable to the principal or any other
person because the third party has complied in good faith with
instructions from an attorney-in-fact named in a durable power of
attorney whether or not the attorney-in-fact has executed an
acknowledgment that complies with subsection (4). A third party is
not liable to the principal or any other person if the third party
requires an attorney-in-fact named in a durable power of attorney
to execute an acknowledgment that complies with subsection (4)
before recognizing the durable power of attorney.

(6) An attorney-in-fact's failure to comply with subsection
(4) does not affect the attorney-in-fact's authority to act for the
principal as provided for in the durable power of attorney and does
not affect the attorney-in-fact's responsibilities or potential
liability to the principal.

(7) Subsections—EXCEPT AS OTHERWISE PROVIDED IN THIS
SUBSECTION, SUBSECTIONS (2) to (6) do not apply to any of the
following:

(a) A durable power of attorney executed before October 1,
2012. SUBSECTIONS (3)(F) AND (4)(F) DO NOT APPLY TO A DURABLE POWER
OF ATTORNEY EXECUTED BEFORE OCTOBER 1, 2014.

(b) A delegation under section 5103 or a similar power of
attorney created by a parent or guardian regarding the care,
custody, or property of a minor child or ward.

(c) A patient advocate designation or a similar power of
attorney relating to the principal's health care.

(d) A durable power of attorney that is coupled with an
interest in the subject matter of the power.

(e) A durable power of attorney that is contained in or is
part of a loan agreement, security agreement, pledge agreement, escrow agreement, or other similar transaction.

(f) A durable power of attorney in connection with a transaction with a joint venture, limited liability company, partnership, limited partnership, limited liability partnership, corporation, condominium, condominium association, condominium trust, or similar entity, including, without limitation, a voting agreement, voting trust, joint venture agreement, royalty agreement, license agreement, proxy, shareholder's agreement, operating agreement, partnership agreement, management agreement, subscription agreement, certification of incorporation, bylaws, or other agreement that primarily relates to such an entity.

(g) A power of attorney given primarily for a business or a commercial purpose.

(h) A power of attorney created on a form prescribed by a government or a governmental subdivision, agency, or instrumentality for a governmental purpose.

SEC. 5501A. (1) ON RECEIPT OF AN ATTORNEY-IN-FACT'S WRITTEN REQUEST UNDER THIS SUBSECTION FOR ACCESS TO DIGITAL PROPERTY, OWNERSHIP OF DIGITAL PROPERTY, OR A COPY OF A DIGITAL ASSET, A DIGITAL CUSTODIAN SHALL PROVIDE THE ATTORNEY-IN-FACT WITH THE REQUESTED ACCESS, OWNERSHIP, OR COPY, AS APPLICABLE. AN ATTORNEY-IN-FACT'S WRITTEN REQUEST UNDER THIS SUBSECTION MUST BE ACCOMPANIED BY A COPY OF THE DURABLE POWER OF ATTORNEY GRANTING THE ATTORNEY-IN-FACT POWER OVER DIGITAL PROPERTY.

(2) A DIGITAL CUSTODIAN SHALL COMPLY NOT LATER THAN 56 DAYS AFTER RECEIPT OF A REQUEST MADE UNDER SUBSECTION (1). IF THE
DIGITAL CUSTODIAN FAILS TO COMPLY, THE ATTORNEY-IN-FACT MAY
PETITION THE COURT FOR AN ORDER DIRECTING COMPLIANCE. IF, NOT LATER
THAN 56 DAYS AFTER RECEIVING A REQUEST MADE UNDER SUBSECTION (1),
THE DIGITAL CUSTODIAN FAILS TO COMPLY WITH THE REQUEST, THE
ATTORNEY-IN-FACT MAY PETITION THE COURT FOR AN ORDER DIRECTING
COMPLIANCE.

(3) A DIGITAL CUSTODIAN IS NOT LIABLE FOR AN ACTION DONE IN
COMPLIANCE WITH THIS SECTION.

Enacting section 1. This amendatory act does not take effect
unless all of the following bills of the 97th Legislature are
enacted into law:

(a) Senate Bill No. ___ or House Bill No. 5368 (request no.
01198'13).

(b) Senate Bill No. ___ or House Bill No. 5367 (request no.
04550'13).

(c) Senate Bill No. ___ or House Bill No. 5366 (request no.
04551'13).

(d) Senate Bill No. ___ or House Bill No. 5370 (request no.
04553'13).


A bill to amend 1998 PA 386, entitled
"Estates and protected individuals code,"
by amending section 7817 (MCL 700.7817), as amended by 2010 PA 325,
and by adding section 7912a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 7817. Without limiting the authority conferred by section
7816, a trustee has all of the following powers:

(a) To take possession, custody, or control of property
transferred to the trust and accept or reject additions to the
trust.

(b) To retain property that the trustee receives, including
property in which the trustee is personally interested, in
accordance with the Michigan prudent investor rule.

(c) To receive property from a fiduciary or another source
that is acceptable to the trustee.

(d) To perform, compromise, or refuse to perform a contract of
the settlor that is an obligation of the trust, as the trustee may
determine under the circumstances. In performing an enforceable
contract by the settlor to convey or lease land, if the contract
for a conveyance requires the giving of a warranty, the deed or
other instrument of conveyance to be given by the trustee shall
contain the warranty required. The warranty is binding on the trust
as though made by the settlor, but does not bind the trustee except
in the trustee's fiduciary capacity. The trustee, among other
possible courses of action, may do either of the following:

(i) Execute and deliver a deed of conveyance for cash payment
of money remaining due or the purchaser's note for the money
remaining due secured by a mortgage on the land.

(ii) Deliver a deed in escrow with directions that the
proceeds, when paid in accordance with the escrow agreement, be
paid to the trustee, as designated in the escrow agreement.

(e) To satisfy a settlor's written charitable pledge
irrespective of whether the pledge constitutes a binding obligation
of the settlor or was properly presented as a claim, if in the
trustee's judgment the settlor would have wanted the pledge
completed under the circumstances.

(f) To deposit trust property in a financial institution,
including a financial institution operated by or affiliated with
the trustee and to invest and reinvest trust property as would a
prudent investor acting in accordance with the Michigan prudent
investor rule and to deposit securities with a depositary or other
financial institution.

(g) To acquire property, including property in this or another
state or country, in any manner for cash or on credit, at public or
private sale; and to manage, develop, improve, exchange, partition,
or change the character of trust property.

(h) To make an ordinary or extraordinary repair or alteration
in a building or another structure, to demolish an improvement, or
to raze an existing or erect a new party wall or building.

(i) To subdivide, develop, or dedicate land to public use; to
make or obtain the vacation of a plat or adjust a boundary; to
adjust a difference in valuation on exchange or partition by giving
or receiving consideration; or to dedicate an easement to public
use without consideration.

(j) To enter for any purpose into a lease as lessor or lessee,
with or without an option to purchase or renew, for a period within
or extending beyond the duration of the trust.

(k) To enter into a lease or arrangement for exploration and
removal of minerals or another natural resource or to enter into a
pooling or unitization agreement for a period within or extending
beyond the duration of the trust.

(l) To abandon or decline to administer property if, in the
trustee's opinion, the property is valueless, or is so encumbered
or in such a condition that it is of no benefit to the trust.

(m) To vote a stock or other security in person, by general or
limited proxy, or in another manner provided by law, or enter into
or continue a voting trust agreement.

(n) To pay a call, assessment, or other amount chargeable or
accruing against or on account of a security, and sell or exercise stock subscription or conversion rights.

(o) To hold property in the name of a nominee or in another form without disclosure of the interest of the trust. However, the trustee is liable for an act of the nominee in connection with the property so held.

(p) To insure the trust property against damage, loss, or liability and to insure the trustee, the trustee's agents, and the trust beneficiaries against liability arising from the administration of the trust.

(q) To borrow property, with or without security, for any purpose from the trustee or others and to mortgage or pledge trust property for a period within or extending beyond the duration of the trust.

(r) To effect a fair and reasonable compromise with a debtor or obligor, or extend, renew, or in any manner modify the terms of an obligation owing to the trust. If the trustee holds a mortgage, pledge, or another lien on property of another person, the trustee may, instead of foreclosure, accept a conveyance or transfer of encumbered property from the property's owner in satisfaction of the indebtedness secured by a lien.

(s) To pay a tax, an assessment, the trustee's compensation, or another expense incident to the administration of the trust.

(t) To sell or exercise a subscription or conversion right or to consent, directly or through a committee or another agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a business enterprise.
(u) To allocate an item of income or expense to either trust income or principal, as permitted or provided by law.

(v) To employ, and pay reasonable compensation for services performed by, a person, including an auditor, investment advisor, accountant, appraiser, broker, custodian, rental agent, realtor, or agent, even if the person is associated with the trustee, for the purpose of advising or assisting the trustee in the performance of an administrative duty; to act without independent investigation upon such a person's recommendation; and, instead of acting personally, to employ 1 or more agents to perform an act of administration, whether or not discretionary.

(w) To employ an attorney to perform necessary legal services or to advise or assist the trustee in the performance of the trustee's administrative duties, even if the attorney is associated with the trustee, and to act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.

(x) To prosecute, defend, arbitrate, settle, release, compromise, or agree to indemnify an action, claim, or proceeding in any jurisdiction or under an alternative dispute resolution procedure. The trustee may act under this subdivision for the trustee's protection in the performance of the trustee's duties.

(y) To sell, exchange, partition, or otherwise dispose of, or grant an option with respect to, trust property for any purpose upon any terms or conditions for a period within or extending beyond the duration of the trust.
(z) To continue or participate in a business or enterprise in any manner, in any form, and for any length of time.

(aa) To change the form, in any manner, of a business or enterprise in which the settlor was engaged at the time of death.

(bb) To provide for exoneration of the trustee from personal liability in a contract entered into on behalf of the trust.

(cc) To respond to environmental concerns and hazards affecting trust property as provided in section 7818.

(dd) To collect, pay, contest, settle, release, agree to indemnify against, compromise, or abandon a claim of or against the trust, including a claim against the trust by the trustee.

(ee) To respond to a tax matter as provided in section 7819.

(ff) To make a payment of money, or other property instead of money, to or for a minor or incapacitated trust beneficiary as provided in section 7820.

(gg) To make a distribution or division of trust property in cash or in kind, or both; to allot a different kind or disproportionate portion of, or an undivided interest in, trust property among beneficiaries and determine the value of allotted trust property; or to distribute an unclaimed share in the same manner as described in section 3916.

(hh) To transfer the property of a trust to another jurisdiction and appoint, compensate, or remove a successor trustee, individual or corporate, for trust property in another jurisdiction, with any trust powers set out in this part that the trustee delegates to the successor trustee.

(ii) To execute and deliver an instrument that accomplishes or
facilitates the exercise of a power vested in the trustee.

(jj) To select a mode of payment under any employee benefit or
retirement plan, annuity, or life insurance payable to the trustee,
exercise rights thereunder, including exercise of the right to
indemnification for expenses and against liabilities, and take
appropriate action to collect the proceeds.

(kk) To make loans out of trust property, including loans to a
trust beneficiary on terms and conditions the trustee considers to
be fair and reasonable under the circumstances. The trustee has a
lien on future distributions for repayment of loans made under this
subdivision.

(ll) To pledge trust property to guarantee loans made by others
to the trust beneficiary.

(mm) To resolve a dispute concerning the interpretation of the
trust or its administration by mediation, arbitration, or other
procedure for alternative dispute resolution.

(nn) On termination of the trust, to exercise the powers
appropriate to wind up the administration of the trust and
distribute the trust property to the persons entitled to it.

(oo) SUBJECT TO THE APPLICABLE TERMS-OF-SERVICE AGREEMENT,
EXERCISE CONTROL OVER AND RIGHTS IN DIGITAL PROPERTY ACCORDING TO
THE TERMS OF THE TRUST.

SEC. 7912A. (1) ON RECEIPT OF A TRUSTEE'S WRITTEN REQUEST
UNDER THIS SUBSECTION FOR ACCESS TO DIGITAL PROPERTY, OWNERSHIP OF
DIGITAL PROPERTY, OR A COPY OF A DIGITAL ASSET, A DIGITAL CUSTODIAN
SHALL PROVIDE THE TRUSTEE WITH THE REQUESTED ACCESS, OWNERSHIP, OR
COPY, AS APPLICABLE. A TRUSTEE'S WRITTEN REQUEST UNDER THIS
SUBSECTION MUST BE ACCOMPANIED BY A CERTIFICATE OF TRUST.

(2) A DIGITAL CUSTODIAN SHALL COMPLY NOT LATER THAN 56 DAYS
AFTER RECEIPT OF A REQUEST MADE UNDER SUBSECTION (1). IF THE
DIGITAL CUSTODIAN FAILS TO COMPLY, THE TRUSTEE MAY PETITION THE
COURT FOR AN ORDER DIRECTING COMPLIANCE. IF, NOT LATER THAN 56 DAYS
AFTER RECEIVING A REQUEST MADE UNDER SUBSECTION (1), THE DIGITAL
CUSTODIAN FAILS TO COMPLY WITH THE REQUEST, THE TRUSTEE MAY
PETITION THE COURT FOR AN ORDER DIRECTING COMPLIANCE.

(3) A DIGITAL CUSTODIAN IS NOT LIABLE FOR AN ACTION DONE IN
COMPLIANCE WITH THIS SECTION.

Enacting section 1. This amendatory act does not take effect
unless all of the following bills of the 97th Legislature are
enacted into law:

(a) Senate Bill No.____ or House Bill No. 5368 (request no.
01198'13).

(b) Senate Bill No.____ or House Bill No. 5367 (request no.
04550'13).

(c) Senate Bill No.____ or House Bill No. 5366 (request no.
04551'13).

(d) Senate Bill No.____ or House Bill No. 5369 (request no.
04552'13).
SENATE BILL No. 293

April 10, 2013, Introduced by Senator BIEDA and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled
"Estates and protected individuals code,"
by amending section 3715 (MCL 700.3715), as amended by 2009 PA 46.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 3715. Except as restricted or otherwise provided by the will or by an order in a formal proceeding, and subject to the priorities stated in section 3902, a personal representative, acting reasonably for the benefit of interested persons, may properly do any of the following:

(a) Retain property owned by the decedent pending distribution or liquidation, including property in which the personal representative is personally interested or that is otherwise improper for trust investment.

(b) Receive property from a fiduciary or another source.
(c) Perform, compromise, or refuse performance of a contract of the decedent that continues as an estate obligation, as the personal representative determines under the circumstances. If the contract is for a conveyance of land and requires the giving of warranties, the personal representative shall include in the deed or other instrument of conveyance the required warranties. The warranties are binding on the estate as though the decedent made them but do not bind the personal representative except in a fiduciary capacity. In performing an enforceable contract by the decedent to convey or lease land, the personal representative, among other possible courses of action, may do any of the following:

(i) Execute and deliver a deed of conveyance for cash payment of the amount remaining due or for the purchaser's note for the amount remaining due secured by a mortgage on the land.

(ii) Deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the decedent's successors, as designated in the escrow agreement.

(d) If, in the judgment of the personal representative, the decedent would have wanted the pledge satisfied under the circumstances, satisfy a written charitable pledge of the decedent irrespective of whether the pledge constitutes a binding obligation of the decedent or is properly presented as a claim.

(e) If funds are not needed to meet a debt or expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including funds received from
the sale of other property, in accordance with the Michigan prudent investor rule.

(f) Acquire or dispose of property, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon estate property.

(g) Make an ordinary or extraordinary repair or alteration in a building or other structure, demolish an improvement, or raze an existing or erect a new party wall or building.

(h) Subdivide, develop, or dedicate land to public use, make or obtain the vacation of a plat or adjust a boundary, adjust a difference in valuation on exchange or partition by giving or receiving consideration, or dedicate an easement to public use without consideration.

(i) Enter into a lease as lessor or lessee for any purpose, with or without an option to purchase or renew, for a term within or extending beyond the period of administration.

(j) Enter into a lease or arrangement for exploration and removal of minerals or another natural resource, or enter into a pooling or unitization agreement.

(k) Abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered or in such a condition as to be of no benefit to the estate.

(l) Vote stocks or another security in person or by general or limited proxy.

(m) Pay a call, assessment, or other amount chargeable or accruing against or on account of a security, unless barred by a
provision relating to claims.

(n) Hold a security in the name of a nominee or in other form without disclosure of the estate's interest. However, the personal representative is liable for an act of the nominee in connection with the security so held.

(o) Insure the estate property against damage, loss, and liability and insure the personal representative against liability as to third persons.

(p) Borrow property with or without security to be repaid from the estate property or otherwise, and advance money for the estate's protection.

(q) Effect a fair and reasonable compromise with a debtor or obligor, or extend, renew, or in any manner modify the terms of an obligation owing to the estate. If the personal representative holds a mortgage, pledge, or other lien upon another person's property, the personal representative may, in lieu of foreclosure, accept a conveyance or transfer of encumbered property from the property's owner in satisfaction of the indebtedness secured by lien.

(r) Pay a tax, an assessment, the personal representative's compensation, or another expense incident to the estate's administration.

(s) Sell or exercise a stock subscription or conversion right.

(t) Consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(u) Allocate items of income or expense to either estate
income or principal, as permitted or provided by law.

(v) Employ, and pay reasonable compensation for reasonably necessary services performed by, a person, including, but not limited to, an auditor, investment advisor, or agent, even if the person is associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties; act on such a person's recommendations without independent investigation; and, instead of acting personally, employ 1 or more agents to perform an act of administration, whether or not discretionary.

(w) Employ an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's administrative duties, even if the attorney is associated with the personal representative, and act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.

(x) Prosecute or defend a claim or proceeding in any jurisdiction for the protection of the estate and of the personal representative in the performance of the personal representative's duties.

(y) Sell, mortgage, or lease estate property or an interest in estate property for cash, credit, or part cash and part credit, and with or without security for unpaid balances.

(z) Continue a business or venture in which the decedent was engaged at the time of death as a sole proprietor or a general partner, including continuation as a general partner by a personal
representative that is a corporation, in any of the following manners:

(i) In the same business form for a period of not more than 4 months after the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business, including goodwill.

(ii) In the same business form for an additional period of time if approved by court order in a formal proceeding to which the persons interested in the estate are parties.

(iii) Throughout the period of administration if the personal representative incorporates the business or converts the business to a limited liability company and if none of the probable distributees of the business who are competent adults object to its incorporation or conversion and its retention in the estate.

(aa) Change the form of a business or venture in which the decedent was engaged at the time of death through incorporation or formation as a limited liability company or other entity offering protection against or limiting exposure to liabilities.

(bb) Provide for the personal representative's exoneration from personal liability in a contract entered into on the estate's behalf.

(cc) Respond to an environmental concern or hazard affecting estate property as provided in section 3722.

(dd) Satisfy and settle claims and distribute the estate as provided in this act.

(ee) Make, revise, or revoke an available allocation, consent, or election in connection with a tax matter as appropriate in order
to carry out the decedent's estate planning objectives and to reduce the overall burden of taxation, both in the present and in the future. This authority includes, but is not limited to, all of the following:

(i) Electing to take expenses as estate tax or income tax deductions.

(ii) Electing to allocate the exemption from the tax on generation skipping transfers among transfers subject to estate or gift tax.

(iii) Electing to have all or a portion of a transfer for a spouse's benefit qualify for the marital deduction.

(iv) Electing the date of death or an alternate valuation date for federal estate tax purposes.

(v) Excluding or including property from the gross estate for federal estate tax purposes.

(vi) Valuing property for federal estate tax purposes.

(vii) Joining with the surviving spouse or the surviving spouse's personal representative in the execution and filing of a joint income tax return and consenting to a gift tax return filed by the surviving spouse or the surviving spouse's personal representative.

(ff) Divide portions of the estate, including portions to be allocated into trust, into 2 or more separate portions or trusts with substantially identical terms and conditions, and allocate property between them, in order to simplify administration for generation skipping transfer tax purposes, to segregate property for management purposes, or to meet another estate or trust
objective.

(GG) TAKE CONTROL OF, CONDUCT, CONTINUE, OR TERMINATE ANY ACCOUNTS OF THE DECEDED ON ANY SOCIAL NETWORKING WEBSITE, ANY MICROBLOGGING OR SHORT MESSAGE SERVICE WEBSITE, OR ANY ELECTRONIC MAIL SERVICE WEBSITE.
EXHIBIT A-4
FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

March 21 – 22, 2014 Drafting Committee Meeting

WITH PREFATORY NOTE AND COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter’s notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

March 3, 2014
DRAFTING COMMITTEE ON FIDUCIARY ACCESS TO DIGITAL ASSETS ACT
The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:
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FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

TABLE OF CONTENTS

Prefatory Note for the Drafting Committee ................................................................. 1
SECTION 1. SHORT TITLE ............................................................................................... 3
SECTION 2. DEFINITIONS ............................................................................................. 3
SECTION 3. SCOPE ......................................................................................................... 6
SECTION 4. AUTHORITY OF PERSONAL REPRESENTATIVE OVER DIGITAL ASSETS
OF A DECEDENT. ....................................................................................................... 6
SECTION 5. AUTHORITY OF [CONSERVATOR] OVER DIGITAL ASSET OF A
PROTECTED PERSON .............................................................................................. 8
SECTION 6. CONTROL BY AGENT OF DIGITAL ASSETS ............................................. 9
SECTION 7. CONTROL BY TRUSTEE OF DIGITAL ASSETS ....................................... 10
SECTION 8. FIDUCIARY ACCESS AND AUTHORITY .................................................. 11
SECTION 9. COMPLIANCE ............................................................................................ 14
SECTION 10. CUSTODIAN IMMUNITY ....................................................................... 17
SECTION 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION ....................... 17
SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND
NATIONAL COMMERCE ACT .................................................................................. 17
[SECTION 13. SEVERABILITY .................................................................................. 17
SECTION 14. APPLICABILITY ..................................................................................... 17
SECTION 15. REPEALS; CONFORMING AMENDMENTS ............................................. 18
FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

Prefatory Note for the Drafting Committee

The purpose of this act is to vest fiduciaries with the authority to access, manage, distribute, copy or delete digital assets and accounts. It addresses four different types of fiduciaries: personal representatives of decedents’ estates, conservators for protected persons, agents acting pursuant to a power of attorney, and trustees.

As the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual’s death or incapacity are becoming more common. Few laws exist on the rights of fiduciaries over digital assets. Few holders of digital assets and accounts consider the fate of their online presences once they are no longer able to manage their assets. And these assets have real value: according to a 2011 survey from McAfee, Intel’s security-technology unit, American consumers valued their digital assets, on average, at almost $55,000.¹ These assets range from online gaming pieces to photos, to digital music, to client lists, to bank accounts, to bill-paying, etc. There are 30 million Facebook accounts that belong to dead people.² The average individual has 25 passwords. Some service providers have explicit policies on what will happen when an individual dies, others do not;³ even where these policies are included in the terms of service, most consumers click-through these agreements.

Only a minority of states has enacted legislation on fiduciary access to digital assets, including Connecticut, Idaho, Indiana, Oklahoma, Rhode Island, Nevada, and Virginia, and the existing statutes grant varying degrees of access to different types of digital assets. In addition, other states, including Massachusetts, Nebraska, New York, and Oregon, have considered, or are considering, legislation.⁴ Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, and whether the principal’s death or incapacity is covered.

This draft is for review by the Drafting Committee at our March meeting. The draft is divided into sixteen sections. Sections 1-3 contain general provisions and definitions, including those relating to the scope of the fiduciary’s authority. Sections 4-7 establish the rights of personal representatives, conservators, agents acting pursuant to a power of attorney, and trustees. Section 8 contains provisions relating to the rights of the fiduciary to recover property. Section 9 addresses compliance, and Section 10 grants immunity to custodians. Sections 11-16 address miscellaneous topics, including the effective date of the Act and similar issues. The act


⁴ A memo summarizing these laws and legislative proposals is available on the shared Google Drive.
addresses only the rights of the four types of fiduciaries, and it is designed solely to provide access without changing the ownership of the underlying asset.

After many of the proposed sections, a Comment to the Committee discusses the drafting of the section and raises issues for Committee consideration. The Comments should be read in conjunction with the proposed statutory text.
FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

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

SECTION 2. DEFINITIONS. In this [act]:

(1) “Account holder” means an individual who has entered into a terms-of-service agreement. The term includes a deceased individual who entered into the agreement during the individual’s lifetime.

(2) “Agent” means an attorney-in-fact granted authority under a durable or nondurable power of attorney.

(3) “Catalogue of electronic communications” means the record of the name of each person with which an account holder communicated, the time and date of the communication, and the electronic address of each person in an electronic communication that is controlled by an electronic communication service or a remote computing service.

(4) “[Conservator] means a person appointed by a court to manage the estate of an individual. The term includes a limited [conservator].

(5) “Content of electronic communications” means information concerning the substance, or meaning of an electronic communication that is controlled by an electronic communication service or a remote computing service that is not readily accessible to the public.

(6) “Court” means the [insert name of court in this state having jurisdiction in matters relating to the content of this [act]].

(7) “Custodian” means a person that stores, or has control of, a digital asset or electronic communication of an account holder.

(8) “Digital asset” means an electronic record. The term includes the catalogue of
electronic communications and the content of electronic communications.

(9) "Electronic" means relating to technology having electrical, digital, magnetic,
wireless, optical, electromagnetic, or similar capabilities.

(10) "Electronic communication" means an electronic record while in electronic storage
by an electronic communication service and an electronic record which is carried or maintained
by a remote computing service.

(11) "Electronic communication service" means any service that provides to the public
the ability to send or receive electronic communications.

(12) "Fiduciary" means each person who is an original, additional, or successor personal
representative, [conservator], agent, or trustee.

(13) "Governing instrument" means a will, a trust, an instrument creating a power of
attorney, or other dispositive or nominative instrument.

(14) "Information" means data, text, images, videos, sounds, codes, computer programs,
software, databases, or similar intelligence of any nature.

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

(16) "Personal representative" means an executor, administrator, special administrator, or
person that performs substantially the same function under law of this state other than this [act].

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

(18) "Principal" means an individual who grants authority to an agent in a power of
attorney.
(19) “Protected person” means an individual for whom a [conservator] has been appointed.

(20) “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.

(21) “Remote computing service” means any service that provides to the public computer processing services or storage of electronic records by means of an electronic communication system.

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

(23) “Trustee” means a fiduciary with legal title to an asset pursuant to an agreement or declaration that creates a beneficial interest in others.

(24) “Will” includes a codicil and a testamentary instrument that only appoints an executor or revokes or revises another testamentary instrument.

Comments for the Committee

The definitions of agent, conservator, court, electronic, fiduciary, governing instrument, information, person, personal representative, power of attorney, principal, property, protected person, protective order, record, and will are based on those in the Uniform Probate Code or the Uniform Power of Appointment Act. The other definitions are new for this act, although the definition of digital service comes from the White House Digital Government Strategy: http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-strategy.pdf. The definition of “contents” is adapted from 18 U.S.C. § 2510(8), the definition of “electronic communication” is adapted from the language of 18 U.S.C. §§ 2510(12) and 2702(a)(1) and (2), the definition of “electronic communication service” is drawn from 18 U.S.C. 2510(15), and the definition of “remote computing service” is adapted from 18 U.S.C. § 2711(2), to help ensure the Act’s compliance with federal law.

An account holder is an individual not acting in a fiduciary capacity.

This newest draft includes a definition for “catalogue of electronic communications.” Past drafts had referred to these as “records,” limited to log-type information about an electronic communication; because “record” has a different definition under the Act, the new term should clarify the distinction between the catalogue and the content of an electronic communication.
A custodian does not include an employer because an employer typically does not have a terms-of-service agreement with an employee. Any digital assets created through employment generally belong to the employer. A custodian includes an electronic service provider as well as any other entity that provides or stores electronic data.

Digital assets include digital currency and similar products currently in existence and yet to be invented. Digital assets do not include any material that the account holder has not obtained legally, such as pirated media.

The definition of “electronic communication” is designed to cover only those records that are subject to the privacy protections of federal law under the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 et seq. Electronic communication is a subcategory of “digital assets.”

A “fiduciary” under this Act occupies a status recognized by state law, and fiduciaries’ powers under the Act are subject to the relevant limits established by other state laws.

The terms-of-service agreement definition relies on the definition found in UCC § 1-201 (3). It refers to any agreement that controls the relationship between an account holder and a custodian, even though it might be called a terms-of-use agreement, a click-through license, or a similar term.

**SECTION 3. SCOPE.** This [act] applies only to a grant of authority to a fiduciary who is acting lawfully in accordance with fiduciary obligations and duties.

**Comment**

Section 3 is critical because it establishes that the act applies only to fiduciaries that act in compliance with their fiduciary obligation. The section distinguishes the authority of fiduciaries, who exercise authority subject to this act only on behalf of the account holder, from any other efforts to access the digital assets and electronic communications. Family members or friends may seek such access, but, unless they are fiduciaries, their efforts are subject to other laws and are not covered by this Act.

**SECTION 4. AUTHORITY OF PERSONAL REPRESENTATIVE OVER DIGITAL ASSETS OF A DECEDENT.** Unless prohibited by the will of a decedent, a court, law of this state other than this [act], or federal law, a personal representative of the decedent may access:

(1) any digital asset of the decedent, other than the content of an electronic communication;
(2) the catalogue of electronic communications sent or received by the decedent; and

(3) the content of electronic communications described in subsection (2) if the electronic
communication service or remote computing service is permitted under 18 U.S.C. Section
2702(b) to disclose the content.

Comments for the Committee

Subsection (1) establishes the default rule that the personal representative is authorized to
administer all of the decedent’s digital assets other than material covered by the Electronic
Communications Privacy Act (ECPA). It is modeled on the formulation of the personal
representative’s default power set out in UPC Sec. 3-715.

The subsection clarifies the difference between fiduciary authority over digital assets
other than electronic communications protected by ECPA, and authority over ECPA-covered
electronic communications. For electronic communications, subsections (a)(2) and (3) establish
procedures that cover: first, the catalogue (logs and records) that providers may release without
consent under ECPA; and second, ECPA-covered communications. Federal law distinguishes
between the permissible disclosure of the “contents” of a communication, covered in 18 U.S.C.
§ 2702(b), and of “a record or other information pertaining to a” subscriber or customer, covered
in 18 U.S.C. § 2702(c); see Matthew J. Tokson, The Content/Envelope Distinction in Internet
Law, 50 Wm. & Mary L. Rev. 2105 (2009).

Content-based material can, in turn, be divided into two types of communications: those
received by the account holder and those sent. Material when the account holder is the
“addressee or intended recipient” can be disclosed either to that individual or to an agent for that
person, 18 U.S.C. § 2702(b)(1), and it can also be disclosed to third parties with the “lawful
consent” of the addressee or intended recipient. 18 U.S.C. § 2702(b)(3). Material for which the
account holder is the “originator” can only be disclosed to third parties with the account holder’s
“lawful consent.” 18 U.S.C. § 2702(b)(3). (Note that, when the account holder is the addressee
or intended recipient, material can be disclosed under either (b)(1) or (b)(3), but that when the
account holder is the originator, lawful consent is required.) By contrast to content-based
material, non-content material can be disclosed not only with the lawful consent of the account
holder but also to any person other than a governmental entity (which would presumably include
fiduciaries). This information includes material about any communication sent, such as the
addressee, sender, date/time, and other subscriber data, what this draft defines as the “catalogue
of electronic communication”. (Further discussion of this issue is set out in the Comments to
Section 8, infra.)

Comment

The phrase, “Unless prohibited by the will,” is intended to indicate that a will controls the
personal representative’s authority. As is true more generally with respect to interpretation of
wills, public policy can override the explicit terms of a will.
SECTION 5. AUTHORITY OF [CONSERVATOR] OVER DIGITAL ASSET OF

A PROTECTED PERSON.

(a) The court, after an opportunity for hearing, may authorize a [conservator] to access:

(1) any digital asset of the individual or protected person, other than the content of
electronic communications;

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

(3) the content of electronic communications described in subsection (2) if the
electronic communication service or remote computing service is permitted under 18 U.S.C.

Section 2702(b) to disclose the content.

(b) In granting authority to a [conservator] under subsection (a), the court shall consider:

(1) the intent of the individual or protected person with respect to the authority
granted to the extent that intent can be ascertained; or

(2) whether granting authority to a [conservator] is in the individual’s or the
protected person’s best interest.

Comments for the Committee

Section 5 establishes that the conservator must be specifically authorized by the court to
access the protected person’s digital assets and electronic communications. Each of the different
levels of access must be specifically granted by court order. The requirement in Section 5 for
express authority over digital assets does not limit the fiduciary’s authority over the underlying
“bricks and mortar” assets, such as a bank account. As a legislative enacting matter, the meaning
of the term “hearing” will vary, depending on a state’s procedures.

Section 5 is comparable to Section 4. It responds to the concerns of internet service
providers who believe that the Act should be structured to clarify the difference between
fiduciary authority over digital assets other than electronic communications protected by federal
law, the Electronic Communications Privacy Act (ECPA), and fiduciary authority over ECPA-
protected electronic communications. Consequently, this draft sets out procedures that cover all
digital assets as well as the catalogue of electronic communications (logs and records) that
providers may release without consent under ECPA, and then addresses ECPA-covered
communications.
This section is designed to clarify that a decision by the court to grant powers to the conservator under this section must be based primarily on the decision that the individual or protected person would have made, if of full capacity. Subsection (b) draws on UPC Section 5-411. The individual’s personal values and expressed desires, past and present, are to be considered when making decisions about the conservator’s authority. Existing state law may also set out the requisite standards for a conservator’s actions, and the bracketed language allows for reference to those laws. Under Section 8, the conservator has the same power over digital assets as the account holder. The conservator must exercise authority in the interests of the protected person.

SECTION 6. CONTROL BY AGENT OF DIGITAL ASSETS.

(a) Unless prohibited by a power of attorney, an agent may access any digital assets of the principal, including the catalogue of electronic communications sent or received by the principal, but not including the content of those electronic communications.

(b) If a power of attorney expressly grants authority to an agent over electronic communications of the principal, the agent may access the content of electronic communications sent or received by the principal, if the electronic communication service or remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

Comments for the Committee

This section establishes that the agent has default authority over the principal’s digital assets and the records, other than the contents, of the principal’s electronic communications. When the principal does not want the agent to exercise this authority, then the power of attorney must explicitly prevent an agent from doing so.

The situation is different with respect to the contents of electronic communications. In that case, the agent must be specifically authorized by the principal to access the contents of the principal’s electronic communications. This provision is modeled on UPC Sec. 5B-201(a). Because a power of attorney contains the consent of the account holder, ECPA should not prevent the agent from exercising authority over the content of electronic communications. There should be no question that an explicit delegation of authority in a power of attorney constitutes authorization from the account holder to access digital assets, and provides “lawful consent” to allow disclosure of electronic communications from an electronic communication service or a remote computing service pursuant to applicable law. Both authorization and lawful consent are important because 18 U.S.C. § 2701 deals with intentional access without authorization and 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

The American College of Trusts and Estates Counsel’s State Laws Committee and others asked the Committee to consider whether the authority over digital assets and electronic
communications should be a default power. The Committee has decided that the power to access the contents of electronic communications must be expressly granted, because when expressed and not default, it satisfies the lawful consent requirement of ECPA. The agent has default authority over other digital assets under (a). States may need to amend their power of attorney forms to include this power.

SECTION 7. CONTROL BY TRUSTEE OF DIGITAL ASSETS.

(a) Unless prohibited by the settlor in the terms of a trust, the trustee that is an initial account holder may access each digital asset, including the catalogue of electronic communications sent or received by the account holder and the content of those electronic communications, held in the trust.

(b) Unless prohibited by the settlor in the terms of a trust, when the trustee is a successor account holder, the trustee may access:

(1) the digital assets, including the catalogue of electronic communications sent or received by the account holder, but not including the content of those electronic communications, held in the trust; and

(2) the content of electronic communications described in subsection (b)(1) if the electronic communication service or the remote computing service is permitted under 18 U.S.C. Section 2702(b) to disclose the content.

Comments for the Committee

Access to digital assets, including the contents of the electronic communications is presumed with respect to assets for which the trustee is the initial account holder. A trustee may have title to digital assets and electronic communications when the trust itself becomes the account holder of a digital asset held by the trust, and when the trustee becomes an account holder for trustee business, situations addressed in subsection (a).

Subsection (b) addresses situations involving either an inter vivos transfer of a digital asset into a trust, or transfer via a pourover will of a digital asset into a trust. There should be no question that holding property in trust form constitutes authorization from the account holder for the trustee to access digital assets, including both the catalogue and contents of the electronic communications, and this provides “lawful consent” to allow disclosure of electronic communications from an electronic communication service or a remote computing service pursuant to applicable law. Nonetheless, subsection (b) distinguishes between the catalogue and
contents of electronic communications in case there are any questions about whether the form in
which property – transferred into a trust - is held constitutes lawful consent. Both authorization
and lawful consent are important because 18 U.S.C. § 2701 deals with intentional access without
authorization, and 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

The underlying trust documents and default trust law will supply the allocation of
responsibilities between and among trustees.

SECTION 8. FIDUCIARY ACCESS AND AUTHORITY.

(a) A fiduciary that is an account holder or that has the right to access a digital asset of
an account holder:

(1) may take actions concerning the asset to the extent of the account holder’s
authority and the fiduciary’s powers under law of this state other than this [act], subject to
copyright and other law and the terms-of-service agreement;

(2) is deemed to have the lawful consent of the account holder for the custodian to
divulge the content of an electronic communication to the fiduciary pursuant to state and federal
electronic privacy law; and

(3) is an authorized user under the federal Computer Fraud and Abuse Act [18
U.S.C. Section 1030 et seq.] [and state computer fraud and abuse acts].

(b) any provision in a terms-of-service agreement that limits a fiduciary’s access to the
digital assets of the account holder under this [act] is void as against the strong public policy of
this state, unless the limitations of that provision are signed by the account holder separately
from the other provisions of the terms-of-service agreement.

(c) subject to Section 9(a), a fiduciary’s access to a digital asset is not a violation of a
terms-of-service agreement, notwithstanding a provision that bars third party access.

(d) A fiduciary with authority over the equipment of a decedent, protected person,
principal, or settlor that can receive, store, process, or send an electronic record may access that
equipment and any electronic record stored on it.
Comment

This section clarifies that the fiduciary has the same authority as the account holder if the account holder were the one exercising the authority (note that, where the account holder has died, this means that the fiduciary has access as of the hour before the account holder’s death). Of course, in exercising its responsibilities, the fiduciary is subject to the duties and obligations established pursuant to state fiduciary law and is liable for breach of those duties.

This issue concerning the parameters of the fiduciary’s authority potentially arises in two situations: 1) the fiduciary obtains access to a password directly from the account holder, as would be true in various circumstances such as for the trustee of an inter vivos trust or someone who has stored passwords with a digital locker and those passwords are then transmitted to the fiduciary; and 2) the fiduciary has obtained access pursuant to this act.

The fiduciary does not, however, obtain power over any digital assets if that property was illegally obtained by the account holder. The section also provides that control by a fiduciary should not be considered a transfer that would violate the anti-transfer terms of a terms-of-service agreement. Finally, the fiduciary has the same responsibilities as the account holder more generally. For example, a fiduciary cannot delete an account if this would be fraudulent. Similarly, if the account holder could challenge provisions in a terms-of-service agreement, then the fiduciary is similarly able to do so. See Ajemian v. Yahoo!, Inc., 987 N.E.2d 604 (Mass. 2013).

Subsection (a) is designed to establish that the fiduciary is authorized to exercise control over digital assets in accordance with other applicable laws. The language mirrors that used in Title II of the Electronic Communications Privacy Act of 1986 (ECPA), known as the Stored Communications Act (SCA), 18 U.S.C. § 2701 et seq. The subsection clarifies that the fiduciary is “authorized” under the two federal statutes that prohibit unauthorized access to computers and computer data, the SCA and the Computer Fraud and Abuse Act, as well as pursuant to any comparable state laws criminalizing unauthorized access.

The Stored Communications Act contains two potentially relevant prohibitions.

1) 18 U.S.C. § 2701(a), which concerns access to the digital assets, makes it a crime for

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anyone to "intentionally access [...] without authorization a facility through which an electronic
communication service is provided" as well as to "intentionally exceed [...] an authorization to
access that facility." Thus, someone who has authorization to access the facility is not engaging
in criminal behavior. Moreover, this section does not apply to "conduct authorized . . . by a user
of that service with respect to a communication of or intended for that user."7

2) 18 U.S.C. § 2702, "Voluntary disclosure of customer communications or records;"
concerns actions by the service provider. It prohibits an electronic communication service or a
remote computing service from knowingly divulging the contents of a communication that is
stored by or carried or maintained on that service unless disclosure is made (among other
exceptions) "to an addressee or intended recipient of such communication or an agent of such
addressee or intended recipient" or "with the lawful consent of the originator or an addressee or
intended recipient of such communication, or the subscriber in the case of remote computing
service." 18 U.S.C. § 2702(b)(1), (3) (emphasis added). The statute permits disclosure of
"customer records" that do not include content, either with lawful consent from the customer or
"to any person other than a governmental entity." 18 U.S.C. § 2702(c)(2) and (6). Thus, unlike
the contents, the provider is permitted to disclose the non-content "records" of the electronic
communications to anyone except the government, and may disclose to the government with the
customer's lawful consent or in certain emergencies.

The Computer Fraud and Abuse Act (CFAA) prohibits unauthorized access to computers.
18 U.S.C. § 1030. Like the SCA, the CFAA similarly protects against anyone who "intentionally
accesses a computer without authorization or exceeds authorized access." 18 U.S.C. § 1030(a).

State laws vary in their coverage, but typically prohibit unauthorized access.

By defining the fiduciary as an authorized user: 1) the fiduciary has authorization to
access the files under the first section of the SCA, 18 U.S.C. § 2701, as well as under the CFAA;
and 2) the fiduciary has "the lawful consent" of the originator/subscriber so that the provider can
voluntarily disclose the files pursuant to the second relevant provision of the SCA, 18 U.S.C.
§ 2702. Moreover, this language should be adequate to avoid liability under the state
unauthorized access laws.

Subsection (b) is new and is based on discussions at the last Drafting Committee meeting.
This subsection is discussed in more detail in Commissioner Walsh's issues memo.

Subsection (c) reinforces the concept that the fiduciary "steps into the shoes" of the
account holder, with no more - and no fewer - rights. For example, the terms-of-service
agreement (TOSA) controls the rights of the account holder (settlor, principal, incapacitated
person, decedent). The Act does not permit the account holder's fiduciary to override the TOSA
in order to make a digital asset or collection of digital assets "descendible," although it does
preserve the rights of the fiduciary to make the same claims as the account holder. See Ajemian

7 18 U.S.C. §§ 2701(a), (c)(2).
The providers have indicated that they would feel more comfortable with language like

the following, suggested by Commissioner Dan Robbins:

The fiduciary's authority to access the digital asset is the same as the account holder
except where (i) the TOS permits an account holder to pre-designate another individual to
have exclusive access to the account upon the incapacitation or death of the account
holder, in which case the fiduciary would have no access; or (ii) the custodian has
conspicuously disclosed within the TOS a default rule for deleting the contents of the
account upon death of the account holder.

Subsection (d) is designed to clarify that the fiduciary is authorized to access digital
assets stored on equipment of the decedent, protected person, principal, or settlor, thereby
superseding state laws on unauthorized access to the equipment.

SECTION 9. COMPLIANCE.

(a) If a fiduciary that has a right to access a digital asset of an account holder under this
[act] has complied 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; or

(3) a copy of the asset unless the asset is subject to the copyright of a third party.

(b) If a request under subsection (a) is made by:

(1) a personal representative with the right of access under Section 4, the request
must be accompanied by a certified copy of [the letter of appointment of the representative or a
small estate affidavit];

(2) a [conservator] with the right of access under Section 5, 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 under Section 6, the request must be
accompanied by a certified copy of a currently-effective power of attorney that authorizes the
agent to exercise authority over the digital asset; and

(4) a trustee with the right of access under Section 7, the request must be

accompanied by a certified copy of the trust instrument [or a certification of the trust under [cite
trust-certification statute, such as Uniform Trust Code Section 1013,] that authorizes the trustee
to exercise authority over the digital asset.

(c) A custodian shall comply with a request not later than [60] days after receipt of the
request. If the custodian fails to comply, the fiduciary may apply to the court for an order
directing compliance.

(d) [Instead of furnishing a copy of a trust instrument under subsection (b)(4), the trustee
may provide a certification of trust. A certification:

(1) must contain the following information:

(A) that the trust exists and the date the trust instrument was executed;

(B) the identity of the settlor;

(C) the identity and address of the currently acting trustee;

(D) the powers of the trustee;

(E) whether the trust is revocable and the identity of any person holding a

power to revoke the trust;

(F) whether the cotrustee has authority to sign or otherwise authenticate,

and whether all or fewer than all cotrustees are required to exercise powers of the trustee;

(G) the trust’s taxpayer identification number; and

(H) the manner of taking title to trust property;

(2) may be signed or otherwise authenticated by any trustee;

(3) must state that the trust has not been revoked, modified, or amended in a
manner that would cause the representations contained in the certification of trust to be incorrect;
and

(4) need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust under subsection (d) 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 custodian that acts in reliance on a certification under subsection (d) 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 facts stated in the certification.

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

(h) A person that demands the trust instrument in addition to a certification of trust under subsection (d) or excerpts under subsection (e) is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(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.

Comment

The bracketed material allows states that have already enacted the UTC to use the shorter version. Those states that have not adopted the UTC may choose to include the bracketed material, which is a slight modification of the language in Uniform Trust Code Section 1013.

The Committee may want to consider the “copyright” language in subsection (a), which has been modified at the suggestion of Commissioner Robbins. He has also suggested, as an alternative, the following language: “(3) a copy of the asset unless the asset is a copyrighted motion picture, sound recording, software or electronic book where the copyright is held by a third party.”

Subsection (c) establishes 60 days as the appropriate time for compliance. The
Committee may want to discuss, at Style's suggestion, whether to include an expedited time period.

SECTION 10. CUSTODIAN IMMUNITY. A custodian and its officers, employees, and agents are immune from liability for any action done in good faith in compliance with this [act].

Comment

This section establishes that custodians are protected from liability when they act in accordance with the procedures of this Act and in good faith. The types of actions covered include disclosure as well as transfer of copies.

SECTION 11. 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 12. 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 13. 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.]

Legislative Note: Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.

SECTION 14. APPLICABILITY. This [act] applies to:

(1) a fiduciary or agent 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]; and

(2) a conservatorship proceeding, whether pending in a court or commenced before, on or

after [the effective date of this [act]], except as otherwise provided in this [Act].

Comment

As the issues memo and the memo from Chris Kunz and John Gregory note, the Committee may want to discuss this provision in more detail.

SECTION 15. REPEALS; CONFORMING AMENDMENTS.

(a) …

(b) …

(c) …

SECTION 16. If the custodian has obligations under other state or federal laws to

preserve records, this act does not override those other obligations.

SECTION 17. EFFECTIVE DATE. This [act] takes effect....
EXHIBIT B
LEGISLATIVE PROPOSAL FOR SEPARATE TRUSTEES

700.7105 Duties and powers of trustee; provisions of law prevailing over terms of trust

Sec. 7105. (1) Except as otherwise provided in the terms of the trust, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a trust beneficiary.

(2) The terms of a trust prevail over any provision of this article except the following:

(a) The requirements under sections 7401 and 7402 for creating a trust.

(b) The duty of a trustee to administer a trust in accordance with section 7801.

(c) The requirement under section 7404 that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

(d) The power of the court to modify or terminate a trust under sections 7410, 7412(1) to (3), 7414(2), 7415, and 7416.

(e) The effect of a spendthrift provision, a support provision, and a discretionary trust provision on the rights of certain creditors and assignees to reach a trust as provided in part 5.

(f) The power of the court under section 7702 to require, dispense with, or modify or terminate a bond.

(g) The requirements under sections 7703a for creating a separate trustee provision.

(h) The power of the court under section 7708(2) to adjust a trustee’s compensation specified in the terms of the trust that is unreasonably low or high.

(hi) Except as permitted under section 7809(2), the obligations imposed on a trust protector in section 7809(1).

(i) The duty under section 7814(2)(a) to (c) to provide beneficiaries with the terms of the trust and information about the trust’s property, and to notify qualified trust beneficiaries of an irrevocable trust of the existence of the trust and the identity of the trustee.

(ik) The power of the court to order the trustee to provide statements of account and other information pursuant to section 7814(4).

(k) The effect of an exculpatory term under section 7809(8) or 7908.

(lm) The rights under sections 7910 to 7913 of a person other than a trustee or beneficiary.

(nn) Periods of limitation under this article for commencing a judicial proceeding.

(no) The power of the court to take action and exercise jurisdiction.

(ep) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in sections 7203 and 7204.
(pq) The requirement under section 7113 that a provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

700.7103 Definitions

Sec. 7103. As used in this article:

(n) "Trust protector" means a person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either any of the following:

(i) A trustee of the trust
(ii) The settlor(s) of the trust.
(iii) The holder of a power of appointment over property of the trust.

700.7703 Cotrustees; powers and duties

Sec. 7703. (1) Cotrustees shall act by majority decision.

(2) If a vacancy occurs in a cotrusteeship, the remaining cotrustee or cotrustees may act for the trust.

(3) A cotrustee shall participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(4) If prompt action is necessary to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust if either of the following applies:

(a) A cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity.

(b) A cotrustee who is available fails or refuses to participate in the administration of the trust following notice from the remaining cotrustee or cotrustees.

(5) By agreement of the trustees, a trustee may delegate to a cotrustee 1 or both of the following:

(a) Any power that is permitted to be delegated pursuant to section 7817(v) to an agent who is not a trustee.

(b) Any power that can only be performed by a trustee, if notice of the delegation is provided to the qualified trust beneficiaries within 28 days.

(6) Unless a delegation under subsection (5) was irrevocable, a trustee may revoke the delegation previously made. A revocation under this subsection shall be in writing and shall be given to all of
the remaining cotrustees. If notice of the delegation was required to be provided to the qualified trust beneficiaries, notice of the revocation shall be given to the qualified trust beneficiaries within 28 days after the revocation.

(7) If 2 or more trustees own securities, their acts with respect to voting have 1 of the following effects:

(a) If only 1 trustee votes, in person or by proxy, that trustee’s act binds all of the trustees.

(b) If more than 1 trustee votes, in person or by proxy, the act of the majority so voting binds all of the trustees.

(c) If more than 1 trustee votes, in person or by proxy, but the vote is evenly split on a particular matter, each faction is entitled to vote the securities proportionately.

(8) A trustee is not liable for the action or omission of a cotrustee if all of the following apply:

(a) The trustee is not unavailable to perform a trustee’s function because of absence, illness, disqualification under other law, or other incapacity or has not properly delegated the performance of the function to a cotrustee.

(b) The trustee is aware of but does not join in the action or omission of the cotrustee.

(c) The trustee dissents in writing to each cotrustee at or before the time of the action or omission.

(9) A trustee who is not aware of an action by a cotrustee is not liable for that action unless the trustee should have known that the action would be taken and, if the trustee had known, would have had an affirmative duty to take action to prevent the action.

(10) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee in writing of the dissent at or before the time of the action is not liable for the action.

700.7703a Separate trustees: powers and duties

Sec. 7703a. (1) As used in this section:

(a) A “separate trustee provision” is a trust provision that complies with all of the requirements of this section, including that it designates, or provides a method of designating, (1) a separate resultant trustee and (2) a separate investment trustee or 1 or more separate distributions trustees.

(b) A “separate resultant trustee” is a separate trustee designated to perform all trustee functions not allocated by the separate trustee provision to a separate investment trustee or to any separate distributions trustee.

(c) A “separate investment trustee” is a separate trustee designated by the separate trustee provision to perform the trustee investment function.

(d) A “separate distributions trustee” is a separate trustee designated by the separate trustee provision to exercise discretion under a discretionary trust provision.
(e) A "separate trustee" is any separate resultant trustee, separate investment trustee or separate distributions trustee. Any separate trustee may be either a trustee that is a person or a cotrusteeship described in section 7703.

(f) A "separate trusteeship" is the office of any separate trustee.

(g) As used in this section, "the trust" refers to the inclusive set of separate relations of trust to be separately accepted by the separate trustees under a given separate trustee provision.

(h) Though a separate trustee provision may define the trustee investment function more narrowly or more broadly, that function generally includes determining for trust investment purposes the retention, purchase, sale, assignment, exchange, tender or encumbrance of trust property and the investment and reinvestment of undistributed income and principal of the trust; management, control and exercise of voting powers related directly or indirectly to any trust asset; and for nonpublicly traded investments or property for which there is no readily available market value, determining the frequency and methodology for valuing such property.

(2) A trust instrument may include 1 or more separate trustee provisions. No more than 1 separate trustee provision shall apply in the administration of any given trust at any given time.

(3) No more than 1 separate investment trustee shall perform the trustee investment function of any given trust at any given time. There may be more than 1 separate distributions trustee acting for any given trust at any given time. The separate investment trustee (if any) may be a separate distributions trustee.

(4) While a separate trustee provision applies, the whole trusteeship of the trust is divided, along the lines created by the designation of separate trustees, into discrete sets of separately accepted fiduciary responsibilities, each set separately allocated to 1 or another of the trust's separate trustees.

(a) Except as provided in paragraph (b) of this subsection, the trust's separate trustees are not cotrustees in their relations to 1 another. Each separate trustee shall act as to [his or her or its] separate trustee function(s) upon [his or her or its] own authority without need of approval from any other separate trustee of the trust. The trust's separate trustees are not cotrustees for purposes of joinder of necessary parties in a proceeding for breach of fiduciary duty or for any other purpose not specifically described in paragraph (b) of this subsection.

(b) The trust's separate trustees are cotrustees only for purposes of:

(i) Taking, holding, transferring and defending title to trust property.

(ii) Determining venue and interested persons in proceedings concerning the trust.

(iii) Trust liability (if any) for income, property or other taxes attributable to trust property.

(iv) The right to have expenses incurred in connection with trusteeship paid from the trust property.

(v) The privileges and immunities of co-trustees to comment, to the trust's beneficiaries or settlor(s) or others, on one another's performance of fiduciary duties, notwithstanding that each separate trustee is expressly relieved, by subsection (10) of this section, of any duty whatsoever to make any such comment. [v Section 5(i) of the qualified dispositions in trust act.]
(c) The trust's separate trustees are not cotrustees for purposes of the requirement in section 7402 that the same person is not the sole trustee and sole beneficiary of the trust: if a trust has only 1 beneficiary, that beneficiary may not be a separate trustee of the trust unless the separate trustee in question comprises a cotrusteeship of which the beneficiary is a cotrustee and the trust instrument prohibits the beneficiary from serving alone.

(d) A separate trustee shall not accept the trust associated with, nor, except as provided elsewhere in this subsection, participate in or provide advice regarding the performance of, the separate trustee function(s) of any other separate trustee of the trust. Ministerial acts on the part of 1 separate trustee (such as confirming that an investment or distribution directive of another separate trustee has been carried out, recording and reporting the actions of another separate trustee or conferring with another separate trustee for purposes of administrative coordination or efficiency) shall not be deemed to constitute an acceptance of the trust associated with the separate trustee function(s) of the other separate trustee. While a separate trustee provision applies, the prohibition of this subsection against the acceptance by one of the trust's separate trustees of the trust associated with the separate trustee function(s) of any other of the trust's separate trustees shall constitute a legal disability.

(e) If a vacancy that is required to be filled under section 7704 occurs in a separate investment trusteeship or a separate distributions trusteeship and prompt action is reasonably thought to be necessary to avoid injury to trust property, the separate resultant trustee may elect, in spite of having no duty to do so, to act for the trust within the function(s) of the vacant separate trusteeship. A separate resultant trustee who acts pursuant to this paragraph shall not be deemed to have accepted the trust associated with the separate trustee function(s) of the vacant separate trusteeship. A separate resultant trustee who acts pursuant to this paragraph on a given occasion shall not thereby be obligated to act pursuant to this paragraph on any other occasion.

(5) The separate trustee provision shall include an express reference, by section number, to this section of the Michigan trust code and shall indicate all of the following.

(a) That the trustee investment function shall be performed by the separate investment trustee (if there is 1) or that 1 or more separate distributions trustees (if any) shall exercise discretion under 1 or more specified discretionary trust provisions.

(b) Which of the trust's separate trustees shall perform the function of allocating between principal and income, for fiduciary accounting purposes, receipts and disbursements or distributions affected by the separate trustees' separate trustee functions.

(c) Which of the trust's separate trustees shall be responsible for preparation and filing of tax and information returns for the trust and for responding on behalf of the trust to inquiries from governmental agencies.

(d) Which of the trust's separate trustees shall be responsible for responding to attacks upon the trust's validity or purpose(s).

(e) Which of the trust's separate trustees shall be responsible for determining whether at any time cash or other property will be loaned by the trust to one or more beneficiaries of the trust; which shall be responsible for determining whether at any time cash or other property will be loaned by the trust to one or more business enterprises in which any beneficiary of the trust has an ownership interest; and which shall be responsible for determining whether at any time cash or other trust property will be loaned by the trust to one or more business enterprises in which the trust itself has an ownership interest.
(f) In the case of a separate investment trustee, whether the separate investment trustee or the separate resultant trustee shall determine the trust's asset allocation for investment purposes.

(6) The separate resultant trustee shall be responsible for possession, custody or control of the of the trust property within the meaning of section 7817(a).

(7) Within [his or her or its] separate trustee function(s):

(a) A separate trustee has all of the rights, privileges, powers, immunities and duties of a trustee under Michigan law, including those described in this Part 7 and in Part 8 of the Michigan trust code.

(b) Is subject to control by the settlor(s) of a revocable trust or by a trust protector (if any) in the same circumstances an ordinary trustee or cotrusteeship would be.

(c) Is bound to seek or consider the advice of a designated trust advisor (if any) in the same circumstances an ordinary trustee or cotrusteeship would be.

(8) If a separate trustee comprises a cotrusteeship, then within that separate trustee’s separate trustee function(s), those cotrustees have all of the rights, privileges, powers, immunities and duties of cotrustees under Michigan law, including those described in this Part 7 of the Michigan trust code.

(9) Each separate trustee has the duty to inform and report on [his or her or its] separate trustee function(s):

(a) To beneficiaries of the trust as described in section 7814, provided, however, that no separate trustee is required to provide any beneficiary any report that [he or she or it] knows will be duplicative of a report provided that beneficiary by another separate trustee of the trust.

(b) To each other separate trustee of the trust as is reasonably necessary for the other separate trustee to perform [his or hers or its] separate trustee function(s).

(10) A separate trustee has no duty whatsoever either to monitor or review the actions of any other separate trustee of the trust or to notify or warn any beneficiary of any possible breach of fiduciary duty on the part of any other separate trustee of the trust. A separate trustee who elects, in spite of having no duty to do so, to notify or warn a beneficiary of a possible breach of fiduciary duty on the part of another separate trustee shall not be deemed to have accepted the trust associated with the separate trustee function(s) of that other separate trustee, and a separate trustee who elects thus to notify or warn a beneficiary on a given occasion shall not thereby be obligated to do so on any other occasion.

(11) Absent clear and convincing evidence of collusion in the breach of a fiduciary duty to a beneficiary of the trust:

(a) A separate trustee is not liable for the act or omission of any other separate trustee of the trust.

(b) A separate trustee in breach of fiduciary duty of [his or her or its] separate trustee function(s) shall be the only separate trustee of the trust obligated to defend any action brought by a beneficiary of the trust regarding that breach.

(c) Except as provided in paragraph (d) of this subsection, a separate trustee shall be liable to trust beneficiaries for breach of a fiduciary duty of [his or her or its] separate trustee function(s) as if the other separate trustee(s) of the trust were not in office.
(d) A separate trustee may be liable concerning a separate trustee function of another separate trustee of the trust only for his or her or its own act(s) or omission(s) in the performance of ministerial offices pursuant to that other separate trustee's instruction(s), and then only to the extent, and on the basis that, an agent of that other separate trustee would be liable for the same act(s) or omission(s).

700.7704 Vacancy in trusteeship; manner of filling; priority; appointment by court of additional trustee or fiduciary

Sec. 7704. (1) A vacancy in a trusteeship occurs if 1 or more of the following occur:

(a) A person designated as trustee rejects the trusteeship.

(b) A person designated as trustee cannot be identified or does not exist.

(c) A trustee resigns.

(d) A trustee is disqualified or removed.

(e) A trustee dies.

(f) A guardian or conservator is appointed for an individual serving as trustee.

(2) If 1 or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship shall be filled if the trust:

(a) a separate trusteeship described in section 7703a has no remaining trustee.

(b) a trust without separate trusteeships (within the meaning of section 7703a) has no remaining trustee.

(3) If a vacancy in a trusteeship of a noncharitable trust is to be filled, the vacancy shall be filled in the following order of priority:

(a) In the manner designated by the terms of the trust.

(b) By a person appointed by the court.

(4) If a vacancy in a trusteeship of a charitable trust is to be filled, the vacancy shall be filled in the following order of priority:

(a) In the manner designated by the terms of the trust.

(b) By a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general concurs in the selection.

(c) By a person appointed by the court.

(5) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary upon the showing of good cause.
EXHIBIT C
The Probate and Estate Planning Section of the State Bar of Michigan has received inquiries from health care providers seeking clarification because of their receipt of lengthy and sometimes confusing or inaccurate information from other sources concerning health care decision making for patients, patient advocates and guardians. The purpose of this document is to provide a user-friendly guide that reflects current Michigan law regarding the following:

1. Who can make health care decisions for a patient?

2. What health care decisions can be made and by whom?

3. Can a patient advocate or guardian request health care information?

This guide has been prepared and published as a public service to provide general information. It is not intended to cover every circumstance or legal question that may occur involving health care decision-making. It does not replace the role of a qualified attorney providing advice with respect to particular legal questions that may arise regarding patient decision-making.
Introduction

Who should read this guide?
This guide is for patients or a patient advocate or guardian acting for a patient receiving medical treatment in Michigan. Because this guide is about health care decision-making, it uses the word "patient" to refer to anyone receiving medical care, including a nursing home resident. This guide does not include the special rules for health care decisions made by legal guardians of persons with developmental disabilities.

Can the patient, patient advocate or guardian ask for more information about the patient's medical condition and proposed treatment?
Yes. Before a healthcare provider begins any non-emergency treatment or procedure, the provider must explain the treatment or procedure and ask whether the patient consents. If a patient advocate or guardian is asked to provide consent for a patient, then that individual exercises the patient's right to the information that is necessary to make an informed decision about the patient's medical treatment.

Adults Who Have the Ability to Make Informed Decisions

Do all adult patients have a right to make their own health care decisions?
Yes. Patients have a right to make their own health care decisions, but a patient may not always have the ability to do so. If that is the case, then the patient advocate or guardian must exercise the patient's rights. The role of a patient advocate or guardian is restricted to exercising the patient's right to make his or her own health care decisions.

What is decision-making capacity for a health care decision?
It has three components and all three must exist in order for a patient to make a decision that meets the criteria of informed consent: (1) the ability to be informed means the ability to comprehend and appreciate the nature and consequences (benefits and risks) of the proposed health care treatment; (2) the ability to make a competent decision which means the patient can apply reasoning and reach an informed decision; and (3) the decision is a voluntary one.

Who decides whether a patient has decision-making capacity?
The patient's attending physician. If the attending physician doubts that a patient has the capacity to provide informed consent, the physician will examine the patient and document in the patient's medical chart that the patient cannot provide informed consent to the proposed treatment because the patient lacks the decision-making capacity to do so. If there is no documentation that this has been done, then it is presumed that the patient has decision-making capacity.

May a family member serve as a patient advocate or guardian?
A family member may serve as a patient advocate or guardian for a patient when designated as the patient advocate or appointed as the guardian. Many patients do not have a guardian and they never executed a patient advocate designation. In these cases, healthcare providers often allow family members to provide consent to ordinary and routine medical procedures to help the patient receive low risk, medically necessary medical treatment. Michigan law is not clear when and the extent to which a family member may consent on behalf of a patient for medical treatment.5

Advance Directives

What is an advance directive?
An advance directive is a written instruction about health care made by an adult patient prior to losing decision-making capacity.6 Michigan refers to its statutory advance directive as a patient advocate designation.7

What decisions can a patient advocate make?
It depends on the instructions in the patient advocate designation. The patient advocate cannot make a decision to withdraw or withhold life-sustaining treatment unless the patient advocate designation clearly gives the patient advocate that decision making authority.8

Does the patient advocate need to ask the patient what he or she wants?
The patient advocate must take reasonable steps to follow the patient’s instructions that were given at a time when the patient had the capacity to make health care decisions.9 Also, the patient advocate must try to learn the patient’s current wishes.10 If it is not in the patient’s best interest to honor the patient’s instructions, Michigan law does not require the patient advocate to do so.11

Can the patient disagree with the patient advocate’s decision?
Yes. The patient can override the patient advocate’s decision as follows: At any time, (1) a patient may override a decision to withdraw or withhold a life-sustaining treatment12 or (2) revoke the patient advocate designation thereby cancelling the patient advocate’s authority.13 A patient may do either of these even when the patient no longer has the capacity to make his or her health care decisions.

What if the patient has a patient advocate and a guardian?
If the patient advocate designation is a legally valid document and it gives the patient advocate authority to make a particular health care decision, then the patient advocate has exclusive legal authority to do so. A guardian may not make a decision if the patient advocate has authority under a patient advocate designation to make that decision.14

What if the patient advocate is not available or is unable or unwilling to make the decision?
If this happens, the successor patient advocate should be contacted to make the decision.15 The patient advocate is not required to agree with healthcare providers; however, he or she is required to be reasonably available for his or her decision-making duties. A healthcare provider may ask a probate court to remove a patient advocate for failure to act in the patient’s best
interest as required by the statute. The quality of the patient's medical care may be seriously affected if crucial treatment decisions are not made in a timely manner.

**May a patient advocate name someone else to make health care decisions if or when the initial patient advocate is absent?**

Yes, if the patient advocate designation expressly authorizes a successor patient advocate to act in that case. 17

**Can a patient, patient advocate or guardian change a decision?**

Yes. Any prior treatment decision may be revoked but the revocation must be documented. The medical facility's staff will need to document in the patient's medical chart the date and time of the revocation as well as the reasons for it.

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**Decisions to Withhold or Withdraw Life-Sustaining Treatment in Nursing Homes**

Life-sustaining treatment means that the attending physician believes the patient will die within a relatively short time if the patient does not get the medical treatment or procedure.

**What is a decision to withhold or withdraw life-sustaining treatment?**

A treatment is withheld when the treatment was refused before it was provided to the patient. A treatment is withdrawn when a decision is made to remove the treatment after it has been started. Every adult patient has the right to refuse a treatment after being fully informed and understanding the probable consequences of such actions.

**What is CPR?**

CPR (cardiopulmonary resuscitation) is a medical procedure that attempts to restart a patient's heart or breathing after either or both have ceased. The simplest CPR is given with mouth-to-mouth breathing and forceful compressions of the patient's chest. In a medical facility it often involves electric shocks (defibrillation); insertion of a tube down the throat into the windpipe (intubation); and placing the patient on a breathing machine (ventilator).

**How does a nursing home carry out a decision to withhold a life-sustaining treatment?**

The attending physician directs staff not to provide certain medicines, treatments or procedures. There are several life-sustaining treatments that may be separately considered: (1) Do Not Intubate (“DNI”). This is an order to not intubate the patient. A DNI will prevent the patient from being connected to a ventilator to provide breathing support. (2) Do Not Resuscitate (“DNR”). A DNR order is a physician order to not attempt CPR and may only be issued by a physician. (3) No artificial nutrition or hydration. This is an order to not provide tube feeding or IV fluids. Tube feeding is provided through a tube inserted in the patient's stomach. IV fluids are provided through a tube inserted into the patient's vein. (4) Other orders may also be written such as an order to not provide dialysis.
If an order is written to not provide life-sustaining treatment will all medical treatment be stopped?
No. The order is limited to the treatments that it specifically addresses. It could be a DNR order only and all other medical treatments must be provided.

When may a patient have a DNR order?
A patient or patient advocate or guardian previously authorized may request a DNR order. However, only the patient’s attending physician may write and place a DNR order in a patient’s medical chart.

What happens to a DNR order if the patient leaves the nursing home?
Whenever the patient’s medical circumstances change, the patient’s DNR order is one of the many physicians’ orders that are reviewed to be renewed, modified or cancelled. If the patient moved to a different physician’s care, the new attending physician must re-authorize the orders, including a DNR order. A patient, patient advocate or guardian previously authorized may request that the DNR order be again authorized.

Is Michigan law different for hospitals and nursing homes when it comes to DNRs?
No. Michigan law is that only a patient, patient advocate or guardian may make health care decisions for an adult who is unable to give informed consent. If a hospital accepts family consent, but a nursing home does not, it is not because Michigan laws for hospitals and nursing homes are different. Many nursing homes do not accept family consent to a DNR order under any circumstances. The State of Michigan inspects nursing homes and issues a citation for each DNR order that does not have the proper consent signatures.

When the patient is discharged home, is a DNR request in a health care power of attorney or similar instrument sufficient?
No. Only a DNR that is in compliance with the Michigan Do Not Resuscitate Procedures Act is sufficient to stop emergency medical services (EMS) from providing CPR if they are called to a residence. Michigan law has established a statutory form of DNR order for use outside of a hospital or nursing home. This statutory form is the standard to be followed in such circumstances.

Decision-Making Standards for Patient Advocates and Guardians

What does it mean for a patient advocate or guardian to honor the patient’s wishes?
The patient has a right to make his or her own health care decisions. A patient advocate or guardian must honor the patient’s right to do so by reasonably following the patient’s wishes.

Do patient advocates and guardians have the same decision-making authority?
No. The patient appoints a patient advocate; the court appoints a guardian. The decision boundaries of a patient advocate or guardian are specified in the document or order that appoints them.
The general rule is that the patient advocate may rely on either oral or written instructions from the patient. However, decisions regarding life sustaining medical treatment are an exception to the general rule. A patient advocate cannot refuse life sustaining medical treatment for a patient unless the patient advocate designation clearly grants this authority. It must give the patient advocate the authority to refuse life sustaining medical treatment and it must acknowledge that the patient advocate’s decision could or would allow the patient to die. Michigan courts have interpreted this part of the statute to also mean that the patient advocate designation must articulate the medical conditions under which the patient advocate’s authority may be exercised. An example might be: "If I am terminally ill, then please do not provide me with CPR or any other life sustaining medical treatment."

A guardian may not refuse a life sustaining medical treatment for the patient unless the guardian has been previously authorized to do so by the court. A court’s authorization may be based on either (1) clear and convincing evidence of the patient’s wishes or (2) an objective standard so long as the decision is consistent with the patient’s values and beliefs.19

**Can the family make this decision on the patient’s behalf?**
Michigan law does not provide clear authority to next of kin to refuse life-sustaining medical treatment.20

**Must an Ethics Review Committee agree with a decision by a patient advocate or guardian.**
An Ethics Review Committee in a health care facility is advisory only. If the Ethics Review Committee does not support the decision of a patient advocate or guardian, the patient may be moved to a different hospital or nursing home. The patient advocate or guardian should ask if the hospital or nursing home has a medical futility policy. Medical care is considered futile if there is no reasonable hope that it will either benefit or cure the patient. Specifically, the patient advocate or guardian may ask if there is an institutional policy that allows a doctor to write an order against providing a medical treatment to the patient, even though the patient advocate or guardian requested treatment because the Ethics Review Committee considers the treatment to be medically futile.
In re Martin, 450 Mich 204, (1995) at 217. The Martin opinion concurs with In re Estate of Rosebush, 195 Mich App 675 (1992) that Michigan recognizes a patient's right to informed consent and that this right arises from an individual's common law right to freedom from unwanted interference with his or her bodily integrity.

2 "...a person's right to refuse life---sustaining medical treatment survives incompetency and may be discharged by a surrogate decision---maker..." Id. at 219. "A third person must implement an incompetent patient's previously expressed decisions."


4 MCL 700.5508. The doctrine of informed consent places a legal obligation on the physician to provide adequate disclosures and to obtain informed consent from the patient.

5 MCL 400.66h is applicable to indigent persons. It requires physicians to obtain consent from a guardian or nearest relative of a patient who is not of sound mind. "Nothing in this act shall be construed as empowering any physician or surgeon, or any officer or representative of the state or county departments of social welfare, in carrying out the provisions of this act, to compel any person, either child or adult, to undergo a surgical operation, or to accept any form of medical treatment contrary to the wishes of said person. If the person for whom surgical or medical treatment is recommended is not of sound mind, or is not in a condition to make decisions for himself, the written consent of such person's nearest relative, or legally appointed guardian, or person standing in loco parentis, shall be secured before such medical or surgical treatment is given. This provision is not intended to prevent temporary first aid from being given in case of an accident or sudden acute illness where the consent of those concerned cannot be immediately obtained." (emphasis added)

6 The Patient Self Determination Act (PSDA) of 1990 defines an advance directive as a written instruction, such as living will or durable power of attorney for healthcare, that is recognized under state law (whether statutory or as recognized by the courts of the State), relating to the provision of health care when the individual is incapacitated. 42 U.S.C. § 1395cc(f)(3).

7 MCL 700.5506

8 Martin at 233 and 234. The word "clearly" in this case is clear and convincing evidence. The Martin opinion provides, "However, where the surrogate decision-maker can establish by clear and convincing evidence that the conscious incapacitated individual, while competent, made a statement of his desire to refuse life-sustaining medical treatment under these circumstances, then the surrogate must be allowed to effectuate the incapacitated individual's expressed preference."

9 MCL 5509(1)

10 MCL 700.5511(1)

11 MCL 5507(4) @ Item 6: (6) A patient advocate shall act in accordance with the standards of care applicable to fiduciaries when acting for the patient and shall act consistent with the patient's best interests. The known desires of the patient expressed or evidenced while the patient is able to participate in medical or mental health treatment decisions are presumed to be in the patient's best interests. (emphasis added) See also, MCL 700.5511(1): (1) Irrespective of a previously expressed or evidenced desire, a current desire by a patient to have provided, and not withheld or withdrawn, a specific life-extending care, custody, or medical treatment is binding on the patient advocate, if known by the patient advocate, regardless of the then ability or inability of the patient to participate in care, custody, or medical...
treatment decisions or the patient's competency. (emphasis added) See also subsection (3) of MCL 700.5511 which directs a healthcare provider to provide medical treatment in accordance with sound medical treatment practice.

12 MCL 700.5511(1) pertains only to a decision in a patient advocate designation to withdraw or withhold a specific life-extending care, custody or medical treatment. At any time a patient may revoke an instruction in a patient advocate designation to refuse a specific life-extending care, custody or medical treatment. The patient’s current decision is binding on the patient advocate so long as he or she has actual knowledge of it. (emphasis added)

13 MCL 700.5510(1)(d)

14 MCL 700.5306(5)

15 MCL 700.5507 (2) A patient may designate in the patient advocate designation a successor individual as a patient advocate who may exercise the powers described in subsection (1) for the patient if the first individual named as patient advocate does not accept, is incapacitated, resigns, or is removed.

16 "Id. However, a medical provider is not obligated to follow the instructions of a patient advocate who is not in compliance with the statute. MCL 700.5511(3). The patient advocate must act in the patient’s best interest. If a patient advocate is not performing his duties, then MCL 700.5511(5) allows a provider to petition the probate court to remove the patient advocate: “If a dispute arises as to whether a patient advocate is acting consistent with the patient's best interests or is not complying with sections 5506 to 5515, a petition may be filed with the court in the county in which the patient resides or is located requesting the court's determination as to the continuation of the designation or the removal of the patient advocate.”

17 MCL 700.5509(1)(g). Neither the Michigan Social Welfare Act nor the Michigan Dignified Death Act specifically addresses surrogate refusal of life sustaining medical treatment. When the legislature creates surrogate authority, it articulates the powers and duties, the priority to serve the and the priority of different surrogates, as it did with the patient advocate and the guardian statutes.


19 The Martin decision did not hold that a guardian may not make a decision for a ward using an objective standard: “Thus, while the facts of the present case do not require that we decide whether the state’s parens patriae authority may be expansive enough to encompass a best interest analysis, we do not that such an analysis cannot be based on the common law right of informed consent.” Martin at 222. The facts presented did not meet the criteria for an objective standard: “Thus, while the clearly expressed wishes of a patient, while competent, should be honored regardless of the patient’s condition, we find nothing that prevents the state from grounding any objective analysis on a threshold requirement of pain, terminal illness, foreseeable death, a persistent vegetative state, or affliction of a similar genre.” Martin at 223.

20 Neither the Michigan Social Welfare Act nor the Michigan Dignified Death Act specifically addresses surrogate refusal of life sustaining medical treatment. When the legislature creates surrogate authority, it articulates the powers and duties, the priority to serve and the priority of different surrogates, as it did with the patient advocate and guardian statutes.