

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 2306

BY DELEGATE STORCH

[Introduced January 11, 2019; Referred
to the Committee on the Judiciary.]

1 A BILL to amend and reenact §39B-2-101 and §39B-3-101 of the Code of West Virginia, 1931,
2 as amended; and to further amend said code by adding thereto a new article, designated
3 §44E-1-1, §44E-1-2, §44E-1-3, §44E-1-4, §44E-1-5, §44E-1-6, §44E-1-7, §44E-1-8,
4 §44E-1-9, §44E-1-10, §44E-1-11, §44E-1-12, §44E-1-13, §44E-1-14, §44E-1-15, §44E-
5 1-16, §44E-1-17, and §44E-1-18, all relating to the Uniform Power of Attorney Act,
6 exercising authority over the content of electronic communications and accessing the
7 content of electronic communications; creating the West Virginia Uniform Fiduciary
8 Access to Digital Assets Act; providing a short title; defining certain terms; setting forth to
9 whom the article applies; providing for user direction for disclosure of assets; addressing
10 terms of service agreements; setting forth procedure for disclosing digital assets; providing
11 for disclosure of content of electronic communications and other digital assets of deceased
12 users; providing for disclosure of content of electronic communications of a principal;
13 addressing disclosure of digital assets of a principal; addressing disclosure of digital
14 assets held in trust when the trustee is an original owner or user; addressing disclosure
15 of digital assets held in trust when trustee is not an original owner or user; addressing
16 disclosure of digital assets to conservator of a protected person; setting forth fiduciary's
17 duties and authority; providing for custodian's compliance and immunity; providing for
18 uniformity of application and construction of article; and addressing relation of article to
19 Electronic Signatures in Global and National Commerce Act.

Be it enacted by the Legislature of West Virginia:

CHAPTER 39B. UNIFORM POWER OF ATTORNEY ACT.

ARTICLE 2. AUTHORITY.

§39B-2-101. Authority that requires specific grant; grant of general authority.

1 (a) An agent under a power of attorney may do the following on behalf of the principal or
2 with the principal's property only if the power of attorney expressly grants the agent the authority

3 and exercise of the authority is not otherwise prohibited by another agreement or instrument to
4 which the authority or property is subject to:

5 (1) Create, amend, revoke or terminate an inter vivos trust;

6 (2) Make a gift;

7 (3) Create or change rights of survivorship;

8 (4) Create or change a beneficiary designation;

9 (5) Delegate authority granted under the power of attorney;

10 (6) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including
11 a survivor benefit under a retirement plan;

12 (7) Exercise fiduciary powers that the principal has authority to delegate; or

13 (8) Disclaim property, including a power of appointment; or

14 (9) Exercise authority over the content of electronic communications, as defined in 18
15 U.S.C. Section 2510(12) sent or received by the principal.

16 (b) Notwithstanding a grant of authority to do an act described in this section, an agent
17 may not exercise authority under a power of attorney to create in the agent, or in an individual to
18 whom the agent owes a legal obligation of support, an interest in the principal's property, whether
19 by gift, right of survivorship, beneficiary designation, disclaimer or otherwise, unless the power of
20 attorney expresses in the grant of authority the specific act and identifies the existing property
21 interest with particularity, rather than in general terms.

22 (c) Subject to §39B-2-101(a), §39B-2-101(b), §39B-2-101(d) and §39B-2-101(e) of this
23 code, if a power of attorney grants to an agent authority to do all acts that a principal could do,
24 the agent has the general authority described in §39B-2-104 through §39B-2-116 of this code.

25 (d) Unless the power of attorney otherwise provides, a grant of authority to make a gift is
26 subject to the provisions of §39B-2-117 of this code.

27 (e) Subject to §39B-2-101(a), §39B-2-101(b) and §39B-2-101(d) of this code, if the
28 subjects over which authority is granted in a power of attorney are similar or overlap, the broadest
29 authority controls.

30 (f) Authority granted in a power of attorney is exercisable with respect to property that the
 31 principal has when the power of attorney is executed or acquires later, whether or not the property
 32 is located in this state and whether or not the authority is exercised or the power of attorney is
 33 executed in this state.

34 (g) An act performed by an agent pursuant to a power of attorney has the same effect and
 35 inures to the benefit of and binds the principal and the principal's successors in interest as if the
 36 principal had performed the act.

ARTICLE 3. STATUTORY FORMS.

§39B-3-101. Statutory form power of attorney.

1 A document substantially in the following form may be used to create a statutory form
 2 power of attorney that has the meaning and effect prescribed by this act.

3 STATE OF WEST VIRGINIA

4 STATUTORY FORM POWER OF ATTORNEY

5 IMPORTANT INFORMATION

6 This power of attorney authorizes another person (your agent) to make decisions
 7 concerning your property for you (the principal). Your agent will be able to make decisions and
 8 act with respect to your property (including your money) whether or not you are able to act for
 9 yourself. The meaning of authority over subjects listed on this form is explained in the Uniform
 10 Power of Attorney Act [insert citation].

11 This power of attorney does not authorize the agent to make health-care decisions for you.

12 You should select someone you trust to serve as your agent. Unless you specify
 13 otherwise, generally the agent's authority will continue until you die or revoke the power of
 14 attorney or the agent resigns or is unable to act for you.

15 Your agent is entitled to reasonable compensation unless you state otherwise in the
 16 special instructions. This form provides for designation of one agent. If you wish to name more
 17 than one agent you may name a coagent in the Special Instructions. Coagents are not required

18 to act together unless you include that requirement in the Special Instructions. If your agent is
19 unable or unwilling to act for you, your power of attorney will end unless you have named a
20 successor agent. You may also name a second successor agent.

21 This power of attorney becomes effective immediately unless you state otherwise in the
22 Special Instructions.

23 If you have questions about the power of attorney or the authority you are granting to your
24 agent, you should seek legal advice before signing this form.

25 DESIGNATION OF AGENT

26 I _____ name the following person as my agent:

27 (Name of Principal)

28 Name of Agent:_____

29 Agent's Address:_____

30 Agent's Telephone Number:_____

31 If my agent is unable or unwilling to act for me, I name as my successor agent:

32 Name of Successor Agent:_____

33 Successor Agent's Address:_____

34 Successor Agent's Telephone Number:_____

35 If my successor agent is unable or unwilling to act for me, I name as my second successor
36 agent:

37 Name of Second Successor Agent:_____

38 Second Successor Agent's Address:_____

39 Second Successor Agent's Telephone Number:_____

40 GRANT OF GENERAL AUTHORITY

41 I grant my agent and any successor agent general authority to act for me with respect to
42 the following subjects as defined in the Uniform Power of Attorney Act [insert citation]:

43 (INITIAL each subject you want to include in the agent's general authority. If you wish to
44 grant general authority over all of the subjects you may initial "All Preceding Subjects" instead of
45 initialing each subject.)

46 Real Property

47 Tangible Personal Property

48 Stocks and Bonds

49 Commodities and Options

50 Banks and Other Financial Institutions

51 Operation of Entity or Business

52 Insurance and Annuities

53 Estates, Trusts, and Other Beneficial Interests

54 Claims and Litigation

55 Personal and Family Maintenance

56 Benefits from Governmental Programs or Civil or Military Service

57 Retirement Plans

58 Taxes

59 All Preceding Subjects

60 GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

61 My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED
62 the specific authority listed below:

63 (CAUTION: Granting any of the following will give your agent the authority to take actions
64 that could significantly reduce your property or change how your property is distributed at your
65 death. INITIAL ONLY the specific authority you WANT to give your agent.)

66 Create, amend, revoke, or terminate an inter vivos trust

67 Make a gift, subject to the limitations of the West Virginia Uniform Power of Attorney

68 Act and any special instructions in this power of attorney

- 69 Create or change rights of survivorship
- 70 Create or change a beneficiary designation
- 71 Authorize another person to exercise the authority granted under this power of
- 72 attorney
- 73 Waive the principal's right to be a beneficiary of a joint and survivor annuity, including
- 74 a survivor benefit under a retirement plan
- 75 Exercise fiduciary powers that the principal has authority to delegate
- 76 [Disclaim or refuse an interest in property, including a power of appointment]
- 77 Access the content of electronic communications

78 **LIMITATION ON AGENT'S AUTHORITY**

79 An agent that is not my ancestor, spouse or descendant MAY NOT use my property to
80 benefit the agent or a person to whom the agent owes an obligation of support unless I have
81 included that authority in the Special Instructions.

82 **SPECIAL INSTRUCTIONS (OPTIONAL)**

83 You may give special instructions on the following lines:

84 _____

85 _____

86 _____

87 _____

88 _____

89 _____

90 _____

91 **EFFECTIVE DATE**

92 This power of attorney is effective immediately unless I have stated otherwise in the
93 special instructions.

94 NOMINATION OF [CONSERVATOR OR GUARDIAN] (OPTIONAL)

95 If it becomes necessary for a court to appoint a [conservator or guardian] of my estate or
96 [guardian] of my person, I nominate the following person(s) for appointment:

97 Name of Nominee for [conservator or guardian] of my estate:

98 _____

99 Nominee's Address: _____

100 Nominee's Telephone Number: _____

101 Name of Nominee for [guardian] of my person: _____

102 Nominee's Address: _____

103 Nominee's Telephone Number: _____

104 RELIANCE ON THIS POWER OF ATTORNEY

105 Any person, including my agent, may rely upon the validity of this power of attorney or a
106 copy of it unless that person knows it has terminated or is invalid.

107 SIGNATURE AND ACKNOWLEDGMENT

108 _____

109 Your Signature _____ Date _____

110 Your Name Printed _____

111 Your Address _____

112 Your Telephone Number _____

113 State of _____

114 [County] of _____

115 This document was acknowledged before me on _____,

116 (Date)

117 by _____.

118 (Name of Principal)

119 _____ (Seal, if any)

120 Signature of Notary

121 My commission expires: _____

122 [This document prepared by:_____]

123 IMPORTANT INFORMATION FOR AGENT

124 **Agent's Duties**

125 When you accept the authority granted under this power of attorney, a special legal
126 relationship is created between you and the principal. This relationship imposes upon you legal
127 duties that continue until you resign or the power of attorney is terminated or revoked. You must:

128 (1) Do what you know the principal reasonably expects you to do with the principal's
129 property or, if you do not know the principal's expectations, act in the principal's best interest; act
130 in good faith;

131 (2) Do nothing beyond the authority granted in this power of attorney; and

132 (3) Disclose your identity as an agent whenever you act for the principal by writing or
133 printing the name of the principal and signing your own name as "agent" in the following manner:

134 _____ by _____

135 (Principal's Name)

(Your Signature) as Agent

136 Unless the special instructions in this power of attorney state otherwise, you must also:

137 (1) Act loyally for the principal's benefit;

138 (2) Avoid conflicts that would impair your ability to act in the principal's best interest;

139 (3) Act with care, competence and diligence;

140 (4) Keep a record of all receipts, disbursements and transactions made on behalf of the
141 principal;

142 (5) Cooperate with any person that has authority to make health-care decisions for the
143 principal to do what you know the principal reasonably expects or, if you do not know the
144 principal's expectations, to act in the principal's best interest; and attempt to preserve the
145 principal's estate plan if you know the plan and preserving the plan is consistent with the principal's

146 best interest.

147 **TERMINATION OF AGENT'S AUTHORITY**

148 You must stop acting on behalf of the principal if you learn of any event that terminates
149 this power of attorney or your authority under this power of attorney. Events that terminate a power
150 of attorney or your authority to act under a power of attorney include:

- 151 (1) Death of the principal;
- 152 (2) The principal's revocation of the power of attorney or your authority;
- 153 (3) The occurrence of a termination event stated in the power of attorney;
- 154 (4) The purpose of the power of attorney is fully accomplished; or
- 155 (5) If you are married to the principal, a legal action is filed with a court to end your marriage
156 or for your legal separation, unless the Special Instructions in this power of attorney state that
157 such an action will not terminate your authority.

158 **LIABILITY OF AGENT**

159 The meaning of the authority granted to you is defined in the Uniform Power of Attorney
160 Act [insert citation]. If you violate the Uniform Power of Attorney Act [insert citation] or act outside
161 the authority granted, you may be liable for any damages caused by your violation.

162 If there is anything about this document or your duties that you do not understand, you
163 should seek legal advice.

CHAPTER 44E. WEST VIRGINIA REVISED UNIFORM FIDUCIARY

ACCESS TO DIGITAL ASSETS ACT.

ARTICLE 1. REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT.

§44E-1-1. Short title.

1 This article may be cited as the Revised Uniform Fiduciary Access to Digital Assets Act.

§44E-1-2. Definitions.

1 In this article:

2 (1) “Account” means an arrangement under a terms-of-service agreement in which a
3 custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides
4 goods or services to the user.

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

7 (3) “Carries” means engages in the transmission of an electronic communication.

8 (4) “Catalogue of electronic communications” means information that identifies each
9 person with which a user has had an electronic communication, the time and date of the
10 communication, and the electronic address of the person.

11 (5) “Conservator” means a person appointed by a court to manage the estate and financial
12 affairs of a protected person. The term includes a limited conservator and temporary conservator.

13 (6) “Content of an electronic communication” means information concerning the substance
14 or meaning of the communication which:

15 (A) Has been sent or received by a user;

16 (B) Is in electronic storage by a custodian providing an electronic-communication service
17 to the public or is carried or maintained by a custodian providing a remote-computing service to
18 the public; and

19 (C) Is not readily accessible to the public.

20 (7) “Court” means the circuit court of the county having jurisdiction over the fiduciary or
21 designated recipient.

22 (8) “Custodian” means a person that carries, maintains, processes, receives, or stores a
23 digital asset of a user.

24 (9) “Designated recipient” means a person chosen by a user using an online tool to
25 administer digital assets of the user.

26 (10) “Digital asset” means an electronic record in which an individual has a right or interest.
27 The term does not include an underlying asset or liability unless the asset or liability is itself an

28 electronic record.

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

31 (12) "Electronic communication" has the meaning set forth in 18 U.S.C. Section 2510(12).

32 (13) "Electronic-communication service" means a custodian that provides to a user the
33 ability to send or receive an electronic communication.

34 (14) "Fiduciary" means an original, additional, or successor personal representative,
35 conservator, agent, or trustee.

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

38 (16) "Online tool" means an electronic service provided by a custodian that allows the
39 user, in an agreement distinct from the terms-of-service agreement between the custodian and
40 user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

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

43 (18) "Personal representative" means an executor, administrator, special administrator, or
44 person that performs substantially the same function under law of this state other than this article.

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

47 (20) "Principal" means an individual who grants authority to an agent in a power of
48 attorney.

49 (21) "Protected person" means an individual for whom a conservator has been appointed.
50 The term includes an individual for whom an application for the appointment of a conservator is
51 pending.

52 (22) "Record" means information that is inscribed on a tangible medium or that is stored
53 in an electronic or other medium and is retrievable in perceivable form.

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

57 (24) “Terms-of-service agreement” means an agreement that controls the relationship
58 between a user and a custodian.

59 (25) “Trustee” means a fiduciary with legal title to property under an agreement or
60 declaration that creates a beneficial interest in another. The term includes a successor trustee.

61 (26) “User” means a person that has an account with a custodian.

62 (27) “Will” includes a codicil, testamentary instrument that only appoints an executor, and
63 instrument that revokes or revises a testamentary instrument.

§44E-1-3. Applicability.

1 (a) This article applies to:

2 (1) A fiduciary acting under a will or power of attorney executed before, on, or after the
3 effective date of this article;

4 (2) A personal representative acting for a decedent who died before, on, or after the
5 effective date of this article;

6 (3) A conservatorship proceeding commenced before, on, or after the effective date of this
7 article; and

8 (4) A trustee acting under a trust created before, on, or after the effective date of this
9 article.

10 (b) This article applies to a custodian if the user resides in this state or resided in this state
11 at the time of the user’s death.

12 (c) This article does not apply to a digital asset of an employer used by an employee in
13 the ordinary course of the employer’s business.

§44E-1-4. User direction for disclosure of digital assets.

1 (a) A user may use an online tool to direct the custodian to disclose or not to disclose to a

2 designated recipient some or all of the user's digital assets, including the content of electronic
3 communications. If the online tool allows the user to modify or delete a direction at all times, a
4 direction regarding disclosure using an online tool overrides a contrary direction by the user in a
5 will, trust, power of attorney, or other record.

6 (b) If a user has not used an online tool to give direction under subsection (a) of this section
7 or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust,
8 power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital
9 assets, including the content of electronic communications sent or received by the user.

10 (c) A user's direction under §44E-1-4(a) or §44E-1-4(b) of this code overrides a contrary
11 provision in a terms-of-service agreement that does not require the user to act affirmatively and
12 distinctly from the user's assent to the terms of service.

§44E-1-5. TERMS-OF-SERVICE AGREEMENT.

1 (a) This article does not change or impair a right of a custodian or a user under a terms-
2 of-service agreement to access and use digital assets of the user.

3 (b) This article does not give a fiduciary or a designated recipient any new or expanded
4 rights other than those held by the user for whom, or for whose estate, the fiduciary or designated
5 recipient acts or represents.

6 (c) A fiduciary's or a designated recipient's access to digital assets may be modified or
7 eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not
8 provided direction under §44E-1-4 of this code.

§44E-1-6. Procedure for disclosing digital assets.

1 (a) When disclosing digital assets of a user under this article, the custodian may at its sole
2 discretion:

3 (1) Grant a fiduciary or designated recipient full access to the user's account;

4 (2) Grant a fiduciary or designated recipient partial access to the user's account sufficient
5 to perform the tasks with which the fiduciary or designated recipient is charged; or

6 (3) Provide a fiduciary or designated recipient a copy in a record of any digital asset that,
7 on the date the custodian received the request for disclosure, the user could have accessed if the
8 user were alive and had full capacity and access to the account.

9 (b) A custodian may assess a reasonable administrative charge for the cost of disclosing
10 digital assets under this article.

11 (c) A custodian need not disclose under this article a digital asset deleted by a user.

12 (d) If a user directs or a fiduciary requests a custodian to disclose under this article some,
13 but not all, of the user's digital assets, the custodian need not disclose the assets if segregation
14 of the assets would impose an undue burden on the custodian. If the custodian believes the
15 direction or request imposes an undue burden, the custodian or fiduciary may seek an order from
16 the court to disclose:

17 (1) A subset limited by date of the user's digital assets;

18 (2) All of the user's digital assets to the fiduciary or designated recipient;

19 (3) None of the user's digital assets; or

20 (4) All of the user's digital assets to the court for review in camera.

§44E-1-7. Disclosure of content of electronic communications of deceased user.

1 If a deceased user consented or a court directs disclosure of the contents of electronic
2 communications of the user, the custodian shall disclose to the personal representative of the
3 estate of the user the content of an electronic communication sent or received by the user if the
4 representative gives the custodian:

5 (1) A written request for disclosure in physical or electronic form;

6 (2) A certified copy of the death certificate of the user;

7 (3) A certified copy of the letter of appointment of the representative;

8 (4) Unless the user provided direction using an online tool, a copy of the user's will, trust,
9 power of attorney, or other record evidencing the user's consent to disclosure of the content of
10 electronic communications; and

- 11 (5) If requested by the custodian:
- 12 (A) A number, username, address, or other unique subscriber or account identifier
- 13 assigned by the custodian to identify the user's account;
- 14 (B) Evidence linking the account to the user; or
- 15 (C) A finding by the court that:
- 16 (i) The user had a specific account with the custodian, identifiable by the information
- 17 specified in subparagraph (A) of this section;
- 18 (ii) Disclosure of the content of electronic communications of the user would not violate 18
- 19 U.S.C. Section 2701 et seq., 47 U.S.C. Section 222, or other applicable law;
- 20 (iii) Unless the user provided direction using an online tool, the user consented to
- 21 disclosure of the content of electronic communications; or
- 22 (iv) Disclosure of the content of electronic communications of the user is reasonably
- 23 necessary for administration of the estate.

§44E-1-8. Disclosure of other digital assets of deceased user.

- 1 Unless the user prohibited disclosure of digital assets or the court directs otherwise, a
- 2 custodian shall disclose to the personal representative of the estate of a deceased user a
- 3 catalogue of electronic communications sent or received by the user and digital assets, other than
- 4 the content of electronic communications, of the user, if the representative gives the custodian:
- 5 (1) A written request for disclosure in physical or electronic form;
- 6 (2) A certified copy of the death certificate of the user;
- 7 (3) A certified copy of the letter of appointment of the representative; and
- 8 (4) If requested by the custodian:
- 9 (A) A number, username, address, or other unique subscriber or account identifier
- 10 assigned by the custodian to identify the user's account;
- 11 (B) Evidence linking the account to the user;
- 12 (C) An affidavit stating that disclosure of the user's digital assets is reasonably necessary

13 for administration of the estate; or

14 (D) A finding by the court that:

15 (i) The user had a specific account with the custodian, identifiable by the information
16 specified in §44-1-8(3)(A) of this code; or

17 (ii) Disclosure of the user's digital assets is reasonably necessary for administration of the
18 estate.

§44E-1-9. Disclosure of content of electronic communications of principal.

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

5 (1) A written request for disclosure in physical or electronic form;

6 (2) An original or copy of the power of attorney expressly granting the agent authority over
7 the content of electronic communications of the principal;

8 (3) A certification by the agent, under penalty of perjury, that the power of attorney is in
9 effect; and

10 (4) If requested by the custodian:

11 (A) A number, username, address, or other unique subscriber or account identifier
12 assigned by the custodian to identify the principal's account; or

13 (B) Evidence linking the account to the principal.

§44E-1-10. Disclosure of other digital assets of principal

1 Unless otherwise ordered by the court, directed by the principal, or provided by a power
2 of attorney, a custodian shall disclose to an agent with specific authority over digital assets or
3 general authority to act on behalf of a principal a catalogue of electronic communications sent or
4 received by the principal and digital assets, other than the content of electronic communications,
5 of the principal if the agent gives the custodian:

- 6 (1) A written request for disclosure in physical or electronic form;
- 7 (2) An original or a copy of the power of attorney that gives the agent specific authority
- 8 over digital assets or general authority to act on behalf of the principal;
- 9 (3) A certification by the agent, under penalty of perjury, that the power of attorney is in
- 10 effect; and
- 11 (4) If requested by the custodian:
 - 12 (A) A number, username, address, or other unique subscriber or account identifier
 - 13 assigned by the custodian to identify the principal's account; or
 - 14 (B) Evidence linking the account to the principal.

§44E-1-11. Disclosure of digital assets held in trust when trustee is original user.

1 Unless otherwise ordered by the court or provided in a trust instrument, a custodian shall
2 disclose to a trustee that is an original user of an account any digital asset of the account held in
3 trust, including a catalogue of electronic communications of the trustee and the content of
4 electronic communications.

§44E-1-12. Disclosure of contents of electronic communications held in trust when trustee
not original user.

1 Unless otherwise ordered by the court, directed by the user, or provided in a trust
2 instrument, a custodian shall disclose to a trustee that is not an original user of an account the
3 content of an electronic communication sent or received by an original or successor user and
4 carried, maintained, processed, received, or stored by the custodian in the account of the trust if
5 the trustee gives the custodian:

- 6 (1) A written request for disclosure in physical or electronic form;
- 7 (2) A certified copy of the trust instrument or a certification of the trust under §44D-10-
- 8 1013 of this code that includes consent to disclosure of the content of electronic communications
- 9 to the trustee;
- 10 (3) A certification by the trustee, under penalty of perjury, that the trust exists and the

11 trustee is a currently acting trustee of the trust; and

12 (4) If requested by the custodian:

13 (A) A number, username, address, or other unique subscriber or account identifier
14 assigned by the custodian to identify the trust's account; or

15 (B) Evidence linking the account to the trust.

§44E-1-13. Disclosure of other digital assets held in trust when trustee not original user.

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

7 (1) A written request for disclosure in physical or electronic form;

8 (2) A certified copy of the trust instrument or a certification of the trust under §44D-10-
9 1013 of this code;

10 (3) A certification by the trustee, under penalty of perjury, that the trust exists and the
11 trustee is a currently acting trustee of the trust; and

12 (4) If requested by the custodian:

13 (A) A number, username, address, or other unique subscriber or account identifier
14 assigned by the custodian to identify the trust's account; or

15 (B) Evidence linking the account to the trust.

§44E-1-14. Disclosure of digital assets to conservator of protected person.

1 (a) After an opportunity for a hearing under §44A-1-1 et seq. of this code, the court may
2 grant a conservator access to the digital assets of a protected person.

3 (b) Unless otherwise ordered by the court or directed by the user, a custodian shall
4 disclose to a conservator the catalogue of electronic communications sent or received by a

5 protected person and any digital assets, other than the content of electronic communications, in
6 which the protected person has a right or interest if the conservator gives the custodian:

7 (1) A written request for disclosure in physical or electronic form;

8 (2) A certified copy of the court order that gives the conservator authority over the digital
9 assets of the protected person; and

10 (3) If requested by the custodian:

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

13 (B) Evidence linking the account to the protected person.

14 (c) A conservator with general authority to manage the assets of a protected person may
15 request a custodian of the digital assets of the protected person to suspend or terminate an
16 account of the protected person for good cause. A request made under this section must be
17 accompanied by a certified copy of the court order giving the conservator authority over the
18 protected person's property.

§44E-1-15. Fiduciary duty and authority.

1 (a) The legal duties imposed on a fiduciary charged with managing tangible property apply
2 to the management of digital assets, including:

3 (1) The duty of care;

4 (2) The duty of loyalty; and

5 (3) The duty of confidentiality.

6 (b) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:

7 (1) Except as otherwise provided in §44E-1-4 of this code, is subject to the applicable
8 terms of service;

9 (2) Is subject to other applicable law, including copyright law;

10 (3) In the case of a fiduciary, is limited by the scope of the fiduciary's duties; and

11 (4) May not be used to impersonate the user.

12 (c) A fiduciary with authority over the property of a decedent, protected person, principal,
13 or settlor may access any digital asset in which the decedent, protected person, principal, or
14 settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service
15 agreement.

16 (d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the
17 property of the decedent, protected person, principal, or settlor for the purpose of applicable
18 computer-fraud and unauthorized-computer-access laws, including §61-3C-1 et seq. of this code.

19 (e) A fiduciary with authority over the tangible, personal property of a decedent, protected
20 person, principal, or settlor:

21 (1) May access the property and any digital asset stored in it; and

22 (2) Is an authorized user for the purpose of computer-fraud and unauthorized computer
23 access laws, including §61-3C-1 et seq. of this code.

24 (f) A custodian may disclose information in an account to a fiduciary of the user when the
25 information is required to terminate an account used to access digital assets licensed to the user.

26 (g) A fiduciary of a user may request a custodian to terminate the user's account. A request
27 for termination must be in writing, in either physical or electronic form, and accompanied by:

28 (1) If the user is deceased, a certified copy of the death certificate of the user;

29 (2) A certified copy of the letter of appointment of the representative, court order, power
30 of attorney, or trust giving the fiduciary authority over the account; and

31 (3) If requested by the custodian:

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

34 (B) Evidence linking the account to the user; or

35 (C) A finding by the court that the user had a specific account with the custodian,
36 identifiable by the information specified in paragraph (A) of this section.

§44E-1-16. Custodian compliance and immunity.

1 (a) Not later than 60 days after receipt of the information required under §44E-1-7 through
2 §44E-1-15 of this code, a custodian shall comply with a request under this article from a fiduciary
3 or designated recipient to disclose digital assets or terminate an account. If the custodian fails to
4 comply, the fiduciary or designated recipient may apply to the court for an order directing
5 compliance.

6 (b) An order under §44E-1-16(a) of this code directing compliance must contain a finding
7 that compliance is not in violation of 18 U.S.C. Section 2702.

8 (c) A custodian may notify the user that a request for disclosure or to terminate an account
9 was made under this article.

10 (d) A custodian may deny a request under this article from a fiduciary or designated
11 recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any
12 lawful access to the account following the receipt of the fiduciary's request.

13 (e) This article does not limit a custodian's ability to obtain or require a fiduciary or
14 designated recipient requesting disclosure or termination under this article to obtain a court order
15 which:

16 (1) Specifies that an account belongs to the protected person or principal;

17 (2) Specifies that there is sufficient consent from the protected person or principal to
18 support the requested disclosure; and

19 (3) Contains a finding required by law other than this article.

20 (f) A custodian and its officers, employees, and agents are immune from liability for an act
21 or omission done in good faith in compliance with this article.

§44E-1-17. Uniformity of application and construction.

1 In applying and construing this uniform act, consideration shall be given to the need to
2 promote uniformity of the law with respect to its subject matter among states that enact it.

§44E-1-18. Relation to electronic signatures in global and national commerce act.

1 This article modifies, limits, or supersedes the Electronic Signatures in Global and National
2 Commerce Act, 15 U.S.C. Section 7001 *et seq.*, but does not modify, limit, or supersede Section
3 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
4 described in Section 103(b) of that act, 15 U.S.C.

NOTE: The purpose of this bill is to amend the Uniform Power of Attorney Act by authorizing the exercising of authority over the content of electronic communications and accessing the content of electronic communications. The bill also creates the West Virginia Uniform Fiduciary Access to Digital Assets Act. It provides a short title and defines certain terms. The bill sets forth to whom the article applies; provides for user direction for disclosure of assets; and addresses terms of service agreements. The bill sets forth a procedure for disclosing digital assets; for disclosure of the content of electronic communications of deceased users; and for disclosure of content of electronic communications of a principal. The bill addresses disclosure of digital assets of a principal and disclosure of digital assets held in trust when the trustee is not the original owner or user. The bill addresses disclosure of digital assets to a conservator of a protected person. The bill sets forth a fiduciary's duties and authority and provides for a custodian's compliance and immunity. The bill provides for the uniformity of the application and construction of the article; and addresses the relation of the article to electronic signatures in global and national commerce act.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.