CHAPTER 711

DIGITAL PROPERTY

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711.01 Short title. This chapter may be cited as the Wisconsin Digital Property Act.

History: 2015 a. 300.

711.02 Liberal construction. This chapter is remedial in nature and shall be liberally construed, consistent with s. 711.14.

History: 2015 a. 300.

711.03 Definitions. In this chapter:

(1) "Account" means an arrangement under a terms of service agreement in which a custodian carries, maintains, processes, receives, or stores a user's digital property or provides goods or services to the user.

(2) "Agent" means a person granted authority to act under a durable or nondurable power of attorney.

(3) "Carries" means engages in the transmission of an electronic communication.

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

(5) "Conservator" means a person appointed under s. 54.76 to manage the estate of a living individual.

(6) "Content of an electronic communication" means information concerning the substance or meaning of a communication that satisfies all of the following:

(a) The information was sent or received by a user.

(b) The information is electronically stored by a custodian that provides an electronic communication service to the public or is carried or maintained by a custodian that provides a remote computing service to the public.

(c) The information is not readily accessible to the public.

(7) "Court" means the circuit court having jurisdiction over a matter related to this chapter.

(8) "Custodian" means a person that carries, maintains, processes, receives, or stores a user's digital property.

(9) "Designated recipient" means a person chosen by the user using an online tool to administer the user's digital property.

(10) "Digital property" means an electronic record in which a person has a right or interest. "Digital property" does not include underlying property or an underlying liability unless the property or liability is itself an electronic record.

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

(12) "Electronic communication" has the meaning given in 18 USC 2510 (12).

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

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

(15) "Governing instrument" has the meaning given in s. 854.01 (2).

(16) "Guardian" means a person appointed under s. 54.10.

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

(18) "Online tool" means a setting provided by a custodian that allows the user, by an agreement between the custodian and user that is distinct from the user's assent to the terms of service, to provide directions for disclosure or nondisclosure of digital property to a designated recipient.

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

(20) "Personal representative" has the meaning given in s. 851.23, but also includes a special administrator and any person who, under the laws of this state other than this chapter, performs functions substantially similar to a personal representative, as defined in s. 851.23.

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

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

(23) "Protected person" means all of the following:

(a) An individual for whom a guardian is appointed.

(b) An individual for whom a conservator is appointed.

(24) "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.

(25) "Remote computing service" means a custodian that provides to a user computer processing services or the storage of digital property by means of an electronic communications system, as defined in 18 USC 2510 (14).

(26) "Terms of service agreement" means an agreement that controls the relationship between a user and a custodian.

(27) "Trustee" means a person with legal title to an asset under an agreement or declaration that creates a beneficial interest in another. "Trustee" includes an original, additional, and successor trustee, and a cotrustee.

(28) "User" means a person that has an account with a custodian.

(29) "Will" includes a codicil and any document incorporated by reference in a testamentary document under s. 853.32 (1) or (2).

History: 2015 a. 300; 2017 a. 365 s. 110.

711.04 Priorities; user directions for disclosure of digital property. (1) A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital property, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the

user in a will, trust, power of attorney, or any other governing instrument.

(2) If a user has not used an online tool to give direction under sub. (1), or if the custodian has not provided an online tool, the user may allow or prohibit disclosure to a fiduciary of some or all of the user's digital property, including the content of electronic communications sent or received by the user, in a will, trust, power of attorney, or any other governing instrument.

(3) A user's direction under sub. (1) or (2) overrides a contrary provision in a terms of service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

History: 2015 a. 300.

711.05 Disclosure of digital property; personal representative of a deceased user. (1) DIGITAL PROPERTY OTHER THAN CONTENT OF ELECTRONIC COMMUNICATIONS. Unless a user prohibited disclosure of digital property or the court directs otherwise, a custodian shall disclose to the personal representative of the deceased user's estate a catalogue of electronic communications sent or received by the deceased user and digital property, other than the content of electronic communications sent or received by the deceased user, in which the deceased user's estate has a right or interest, if the personal representative gives the custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A certified copy of the death record of the user.

(c) One of the following to establish the personal representative's authority over the deceased user's digital property:

1. A certified copy of the letters of appointment of the personal representative or special administrator.

2. A certified copy of a summary proceeding order under s. 867.01 or 867.02.

3. An original or copy of an affidavit under s. 867.03.

4. An original or copy of an application under s. 867.046.

(d) If requested by the custodian, any of the following:

1. A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account.

2. Evidence linking the account to the user.

3. An affidavit stating that disclosure of the user's digital property is reasonably necessary for administration of the estate.

4. A court order that includes any of the following findings:

a. The user had a specific account with the custodian, identifiable by the information specified in subd. 1.

b. The disclosure of the user's digital property is reasonably necessary for administration of the estate.

(2) DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS; DECEASED USER. If a deceased user consented or a court directs disclosure of the contents of electronic communications of a deceased user, the custodian shall disclose to the personal representative of the deceased user's estate the content of an electronic communication sent or received by the user, in which the deceased user's estate has a right or interest, if the personal representative gives the custodian all of the following:

(a) The items described in sub. (1) (a) to (c).

(b) Unless the user provided direction using an online tool, a copy of the user's will, certification of trust under s. 701.1013, or other governing instrument, evidencing the deceased user's consent to disclosure of the content of electronic communications.

(c) If requested by the custodian, any of the following:

1. A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account.

2. Evidence linking the account to the user.

3. A court order that includes any of the following findings:

a. The user had a specific account with the custodian that is identifiable by the information specified in subd. 1.

b. The disclosure of the content of electronic communications of the user does not violate 18 USC 2701 et seq., 47 USC 222, or other applicable law.

c. Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications.

d. The disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

History: 2015 a. 300; 2017 a. 334.

711.06 Disclosure of digital property; agent under a power of attorney. (1) DISCLOSURE OF DIGITAL PROPERTY OTHER THAN CONTENT OF ELECTRONIC COMMUNICATIONS; PRINCIPAL. Unless otherwise ordered by the court, directed by the principal, or provided in a power of attorney, a custodian shall disclose to an agent with specific authority over the principal's digital property or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital property, other than the content of electronic communications, in which the principal has a right or interest, if the agent gives the custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) An original or a copy of the power of attorney that gives the agent specific authority over digital property or general authority to act on behalf of the principal.

(c) A certification by the agent, under penalty of perjury, that the power of attorney is in effect.

(d) If requested by the custodian, any of the following:

1. A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account.

2. Evidence linking the account to the principal.

(2) DISCLOSURE OF CONTENT OF ELECTRONIC COMMUNICATIONS; PRINCIPAL. To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content of electronic communications if the agent gives the custodian all of the following:

(a) The items described in sub. (1) (a), (c), and (d).

(b) An original or a copy of the power of attorney that expressly grants the agent authority over the content of electronic communications of the principal.

History: 2015 a. 300.

711.07 Disclosure of digital property held in trust. (1) DISCLOSURE OF DIGITAL PROPERTY HELD IN TRUST; TRUSTEE IS ORIGINAL USER. Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee who is an original user of an account any digital property of the account that is held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

(2) DISCLOSURE OF DIGITAL PROPERTY OTHER THAN CONTENT OF ELECTRONIC COMMUNICATIONS; TRUSTEE IS NOT ORIGINAL USER. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital property, other than the content of electronic communications, in which the trust has a right or interest, if the trustee gives the custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A certification of the trust under s. 701.1013.

(c) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust.

(d) If requested by the custodian, any of the following:

1. A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account.

2. Evidence linking the account to the trust.

(3) DISCLOSURE OF CONTENTS OF ELECTRONIC COMMUNICATIONS HELD IN TRUST; TRUSTEE IS NOT ORIGINAL USER. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the trust's account, in which the trust has a right or interest, if the trustee gives the custodian all of the following:

(a) The items described in sub. (2) (a), (c), and (d).

(b) A certification of the trust under s. 701.1013 that includes an original or successor user's consent to disclosure of the content of electronic communications to the trustee.

History: 2015 a. 300.

711.08 Disclosure of digital property; conservator or guardian of protected person. (1) After an opportunity for a hearing under s. 54.10, the court may grant a guardian access to the digital property of a protected person.

(2) After an opportunity for a hearing under s. 54.76, the court may grant a conservator access to the digital property of a protected person.

(3) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a guardian or custodian the catalogue of electronic communications sent or received by a protected person and any digital property, other than the content of electronic communications, in which the protected person has a right or interest if the guardian or conservator gives the custodian all of the following:

(a) A written request for disclosure in physical or electronic form.

(b) A certified copy of the court order that gives the guardian or conservator authority over the protected person's digital property.

(c) If requested by the custodian, any of the following:

1. A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the protected person.

2. Evidence linking the account to the protected person.

(4) A guardian or conservator with general authority to manage a protected person's assets may request a custodian of the protected person's digital property to suspend or terminate an account of the protected person for good cause. A request made under this subsection shall be accompanied by a certified copy of the court order granting the guardian or conservator general authority to manage the protected person's assets.

History: 2015 a. 300.

711.09 Choice of methods for disclosing digital property; custodian. (1) When disclosing digital property of a user under this chapter, the custodian may in its sole discretion provide a fiduciary or designated recipient with any of the following:

(a) Full access to the user's account.

(b) Partial access to the user's account that is sufficient to perform the tasks with which the fiduciary or designated recipient is charged.

(c) A copy in a record of any digital property that the user could have accessed if the user were alive, had full capacity, and had full access to the account on the date on which the custodian received the request for disclosure.

(2) A custodian may assess a reasonable administrative charge to a fiduciary or designated recipient for the cost of disclosing digital property under this chapter.

(3) A custodian is not required to disclose under this chapter digital property deleted by the user.

(4) If a user directs or a fiduciary or designated recipient requests a custodian to disclose under this chapter some, but not all, of the user's digital property, the custodian is not required to disclose the digital property if segregation of the digital property would impose an undue burden on the custodian. If the custodian refuses to disclose digital property because the custodian believes the segregation of the digital property imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose any of the following:

(a) To the fiduciary or designated recipient, a subset of the user's digital property that is limited by date.

(b) To the fiduciary or designated recipient, all of the user's digital property.

(c) None of the user's digital property.

(d) To the court for review in camera, all of the user's digital property.

History: 2015 a. 300.

711.10 Custodian compliance and immunity. (1) Not later than 60 days after receipt of the information required under ss. 711.05 to 711.08 or 711.12 (7) or an online tool, a custodian shall comply with a request under this chapter from a fiduciary or designated recipient to disclose digital property or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing the custodian to comply with the request.

(2) A court shall include in an order directing a custodian to comply with a request made under this chapter a finding that compliance with the request does not violate 18 USC 2702.

(3) A custodian may notify the user that a request for disclosure of digital property or to terminate an account was made under this chapter.

(4) A custodian may deny a request under this chapter from a fiduciary or designated recipient for disclosure of digital property or to terminate an account if the custodian is aware of any lawful access to the account after the receipt of the fiduciary's request.

(5) This chapter does not limit a custodian's ability to obtain or to require a fiduciary or designated recipient requesting disclosure or termination under this chapter to obtain a court order that does all of the following:

(a) Specifies that an account belongs to the protected person or principal.

(b) Specifies that there is sufficient consent from the protected person or principal to support the requested disclosure.

(c) Contains any findings required by law other than this chapter.

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

History: 2015 a. 300.

711.11 Terms of service agreement. (1) This chapter does not change or impair the rights of a custodian or a user under a terms of service agreement to access and use digital property of the user.

(2) This chapter does not give a fiduciary or designated recipient rights other than the rights held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

(3) A fiduciary's or designated recipient's access to digital property may be modified or eliminated by any of the following:

(a) The user.

(b) Federal law.

(c) A terms of service agreement if the user has not provided direction under s. 711.04.

History: 2015 a. 300.

711.12 Fiduciary duty and authority. (1) The legal duties imposed on a fiduciary with the authority to manage tangible property apply to a fiduciary's management of digital property.

(2) (a) A fiduciary's or designated recipient's authority with respect to a user's digital property may not be used to impersonate the user and is subject to all of the following:

1. Except as otherwise provided in s. 711.04, the applicable terms of service.

2. Other applicable law, including copyright law.

(b) A fiduciary's authority is limited by the scope of the fiduciary's duties.

(3) A fiduciary with authority over the property of a decedent, protected person, principal, or settlor has the right to access any digital property in which the decedent, protected person, principal, or settlor had a right or interest and that is not held by a custodian or subject to a terms of service agreement.

(4) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the digital property of the decedent, protected person, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including s. 943.70.

(5) (a) A fiduciary with authority over the tangible personal property of a decedent, protected person, principal, or settlor has the right to access the tangible personal property and any digital property stored in the tangible personal property.

(b) A fiduciary with authority over the tangible personal property of a decedent, protected person, principal, or settlor is an authorized user of digital property stored in the tangible personal property for the purpose of computer fraud and unauthorized computer access laws, including s. 943.70.

(6) A custodian may disclose information in a user's account to a fiduciary of the user when the information is required to terminate an account used to access digital property licensed to the user.

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

(a) If the user is deceased, a certified copy of the death record of the user.

(b) Any of the following that grants the fiduciary authority over the user's account:

1. A certified copy of the letters of appointment of a personal representative.

2. A certified copy of the letters of special administration.

3. A certified copy of a summary proceeding order under s. 867.01 or 867.02.

3m. An original or copy of an affidavit under s. 867.03.

4. An original or copy of an application under s. 867.046.

5. An original or copy of a power of attorney and a certification by the agent that the power of attorney is in effect.

6. A certification of the trust under s. 701.1013.

(c) If requested by the custodian, any of the following:

1. A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account.

2. Evidence linking the account to the user.

3. A finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subd. 1.

(8) (a) A fiduciary has no duty to review any digital property of a decedent, settlor, principal, or protected person or to secure or preserve any digital property that is not in the possession of the fiduciary, unless any of the following applies:

1. The fiduciary has knowledge, or has reason to believe, that the decedent's estate, settlor's trust, principal, or protected person has digital property of economic value.

2. The fiduciary receives a written request from a beneficiary who has an interest in the digital property of the decedent's estate, settlor's trust, principal, or protected person.

(b) A fiduciary's reasonable efforts to review, secure, or preserve digital property satisfy a duty to review, secure, or preserve digital property under par. (a).

(c) If a fiduciary reviews, secures, or preserves a portion of the digital property of a decedent, settlor, principal, or protected person and the fiduciary does not have a duty to do so, the reviewing, securing, or preserving of a portion of digital property does not give rise to a duty to review, secure, or preserve the remaining portion of the digital property of the decedent, settlor, principal, or protected person.

(d) Unless a fiduciary has a duty to review, secure, or preserve digital property under par. (a), a fiduciary is not liable for failing to review, secure, or preserve any digital property of a decedent, settlor, principal, or protected person.

History: 2015 a. 300; 2017 a. 334.

711.13 Marital property classification of digital property. Chapter 766 governs the classification of digital property of a user who is married.

History: 2015 a. 300.

711.14 Uniformity of application and construction. This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

History: 2015 a. 300.

711.15 Relation to Electronic Signatures in Global and National Commerce Act. This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 USC 7001 et seq., but does not modify, limit, or supersede section 101 (c) of that act, 15 USC 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 USC 7003 (b).

History: 2015 a. 300.

711.16 Applicability. (1) This chapter applies to all of the following:

(a) A fiduciary acting under a will or power of attorney executed before, on, or after April 1, 2016.

(b) A personal representative acting for a decedent who died before, on, or after April 1, 2016.

(c) A guardianship or conservatorship proceeding, whether pending in a court or commenced before, on, or after April 1, 2016.

(d) A trustee acting under a trust created before, on, or after April 1, 2016.

(2) This chapter applies to a custodian only if the user resides in this state or resided in this state at the time of the user's death.

(3) This chapter does not apply to digital property of an employer used by an employee in the ordinary course of the employer's business.

History: 2015 a. 300.