

1 A bill to be entitled

2 An act relating to a fiduciary's access to digital assets; creating a new Chapter  
3 740, entitled "Florida Fiduciary Access to Digital Assets Act"; defining terms  
4 used in the act; providing for the authority of the personal representative over  
5 digital assets of a decedent; providing for the authority of a guardian over the  
6 digital assets of a ward; providing for authority of an agent over digital assets of a  
7 principal pursuant to a power of attorney; providing for authority of a trustee over  
8 digital assets of a trust; providing for fiduciary's rights of access to digital assets;  
9 providing for custodian's duties as it relates to access; providing for immunity of  
10 the custodian for complying with this act; providing for applicability to existing  
11 relationships; and providing an effective date.

12  
13 Be it Enacted by the Legislature of the State of Florida:

14  
15 Section 1. Section 740.101, Florida Statutes, is created to read:

16 740.101. Short Title-- This chapter may be cited as the "Florida Fiduciary Access to  
17 Digital Assets Act."

18 Section 2. Section 740.201, Florida Statutes, is created to read:

19 740.201. Definitions-- As used in this chapter, the term:

20 (1) "Account holder" means:

21 (a) a person that has entered into a terms-of-service agreement with a custodian;

22 and

23 (b) a fiduciary for a person described in subparagraph 1(a).

24 The term includes a deceased individual who entered into the agreement during the individual's  
25 lifetime.

26 (2) "Agent" means a person granted authority to act for a principal under a durable or  
27 nondurable power of attorney, whether denominated an agent, attorney in fact, or otherwise. The  
28 term includes an original agent, co-agent, and successor agent.

29 (3) "Carries" means engaging in the transmission of electronic communications.

30 (34) “Catalogue of electronic communications” means information that identifies each  
 31 person with which an account holder has had an electronic communication, the time and date of  
 32 the communication, and the electronic address of the person.

33 (45) “Content of an electronic communication” means information not readily accessible  
 34 to the public concerning the substance or meaning of an electronic communication.

35 (56) “Court” means the circuit court.

36 (67) “Custodian” means a person that carries, maintains, processes, receives, or stores a  
 37 digital asset of an account holder.

38 (78) “Digital asset” means an ~~electronic~~ record that is electronic. The term does not  
 39 include an underlying asset or liability to which an electronic record refers, unless the asset or  
 40 liability is itself an ~~electronic~~ record that is electronic.

41 (89) “Electronic” means technology having electrical, digital, magnetic, wireless,  
 42 optical, electromagnetic, or similar capabilities.

43 (910) “Electronic communication” means a digital asset stored by an  
 44 electronic-communication service or carried or maintained by a remote-computing service. The  
 45 term includes the catalogue of electronic communications and the content of an electronic  
 46 communication.

47 (1011) “Electronic-communication service” means a custodian that provides to the  
 48 public the ability to send or receive an electronic communication.

49 (1112) “Fiduciary” means each person who is an original, additional, or successor  
 50 personal representative, guardian, agent, or trustee.

51 (1213) “Governing instrument” means a will, trust, instrument creating a power of  
 52 attorney, or other dispositive, appointive, or nominative instrument.

53 (1314) “Guardian” means a person who has been appointed by the court as guardian of  
 54 the property of a minor or incapacitated person. The term includes a person who has been  
 55 appointed by the court as an emergency temporary guardian of the property.

56 (1415) “Information” means data, text, images, videos, sounds, codes, computer  
 57 programs, software, databases, or ~~similar intelligence of any nature~~ the like.

58 (1516) “Person” means an individual, estate, trust, business or nonprofit entity, public  
59 corporation, government or governmental subdivision, agency, or instrumentality, or other legal  
60 entity.

61 (1617) ~~—~~“Personal representative” means the fiduciary appointed by the court to  
62 administer the estate of a deceased individual pursuant to letters of administration or an order  
63 appointing a curator or administrator ad litem for the estate.

64 (1718) “Power of attorney” means a record that grants an agent authority to act in the  
65 place of a principal pursuant to Chapter 709.

66 (1819) “Principal” means an individual who grants authority to an agent in a power of  
67 attorney.

68 (1920) “Record” means information that is inscribed on a tangible medium or that is  
69 stored in an electronic or other medium and is retrievable in perceivable form.

70 (2021) “Remote-computing service” means a custodian that provides to the public  
71 computer processing services or the storage of digital assets by means of an electronic  
72 communication system, as defined 18 U.S.C. 2510(14).

73 (2122) “Terms-of-service agreement” means an agreement that controls the relationship  
74 between an account holder and a custodian.

75 (2223) “Trustee” means a fiduciary that holds legal title to an asset pursuant to an  
76 agreement, declaration, or ~~trust~~ instrument that creates a beneficial interest in the settlor or  
77 others.

78 (2324) “Ward” means a person for whom a guardian has been appointed.

79 (2425) “Will” means an instrument admitted to probate, including a codicil, executed by  
80 a person in the manner prescribed by the Florida Probate Code, which disposes of the person’s  
81 property on or after his or her death and includes an instrument which merely appoints a personal  
82 representative or revokes or revises another will.

83 Section 3. Section 740.301, Florida Statutes, is created to read:

84 740.301. Authority of Personal Representative over Digital Assets of a Decedent--

85 ~~Unless~~ Subject to Section 740.701(2) and unless otherwise provided by the court or the will of a  
86 decedent, a personal representative of the decedent ~~may~~ has the right to access:

87 (1) the content of an electronic communication sent or received by the decedent ~~only~~ if  
88 the electronic-communication service or remote computing service is permitted to disclose the  
89 content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as  
90 amended];

91 (2) the catalogue of electronic communications sent or received by the decedent; and

92 (3) any other digital asset in which the decedent at death had a right or interest.

93 Section 4. Section 740.401, Florida Statutes, is created to read:

94 740.401. Authority of Guardian over Digital Assets of a Ward--The court, after an  
95 opportunity for hearing, ~~may authorize~~ grant a guardian the right to access:

96 (1) the content of an electronic communication sent or received by the ward ~~only~~ if the  
97 electronic-communication service or remote computing service is permitted to disclose the  
98 content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as  
99 amended];

100 (2) the catalogue of electronic communications sent or received by the ward; and

101 (3) any other digital asset in which the ward has a right or interest.

102 Section 5. Section 740.501, Florida Statutes, is created to read:

103 740.501. Control By Agent of Digital Assets—

104 (1) To the extent a power of attorney expressly grants authority to an agent over the  
105 content of an electronic communication of the principal, the agent ~~may~~ has the right to access the  
106 content of an electronic communication sent or received by the principal if the  
107 electronic-communication service or remote computing service is permitted to disclose the  
108 content under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as  
109 amended], and

110 (2) ~~Unless~~ Except as provided in subsection (1) and unless otherwise provided by a  
111 power of attorney or a court, an agent ~~may~~ has the right to access:

112 (a) the catalogue of electronic communications sent or received by the principal;

113 and

114 (b) any other digital asset in which the principal has a right or interest.

115 Section 6. Section 740.601, Florida Statutes, is created to read:

116 740.601. Control By Trustee of Digital Assets-- Subject to Section 740.701(2) and  
117 unless~~Unless~~ otherwise provided by the court or the terms of a trust, a trustee or a successor of  
118 the trustee:

119 (1) that is an original account holder ~~may~~ has the right to access each digital asset held in  
120 trust, including the catalogue of electronic communications sent or received and the content of an  
121 electronic communication; and

122 (2) that is not an original account holder ~~may~~ has the right to access each digital asset  
123 held in trust as follows:

124 (a) the catalogue of electronic communications sent or received by the account  
125 holder; and

126 (b) the content of an electronic communication sent or received by the account  
127 holder ~~only~~ if the electronic-communication service or remote computing service is permitted to  
128 disclose the content under the Electronic Communications Privacy Act, 18 U.S.C. Section  
129 2702(b) [as amended];

130 (c) any other digital asset ~~of~~ in which the account holder or any successor account  
131 holder has a right or interest.

132 Section 7. Section 740.701, Florida Statutes, is created to read:

133 740.701. Fiduciary Access and Authority--

134 (1) A fiduciary that is an account holder or has the right under this chapter ~~(??)~~ to access  
135 a digital asset of an account holder:

136 (a) subject to the terms-of-service agreement and copyright or other applicable  
137 law, may take any action concerning the asset to the extent of the account holder's authority and  
138 the fiduciary's powers under the laws of this state;

139 (b) has, under applicable electronic privacy laws, the lawful consent of the  
140 account holder for the custodian to divulge the content of an electronic communication to the  
141 fiduciary; and

142 (c) is, under applicable computer fraud and unauthorized access laws, an  
143 authorized user.

144 (2) If a provision in a terms-of-service agreement limits a fiduciary's access to the digital  
 145 assets of the account holder, the provision is void as against the strong public policy of this state,  
 146 unless the account holder, after the effective date of this chapter, agreed to the provision by an  
 147 affirmative act separate from the account holder's assent to other provisions of the terms-of-  
 148 service agreement.

149 (3) A choice-of-law provision in a terms-of-service agreement is unenforceable against a  
 150 fiduciary acting under this chapter to the extent the provision designates law that enforces a  
 151 limitation on a fiduciary's access to digital assets which is void under subsection (2).

152 (4) Except as provided in subsection (2), ~~A~~ a fiduciary's access under this chapter to a  
 153 digital asset does not violate a terms-of-service agreement, notwithstanding a provision of the  
 154 agreement, which limits third-party access or requires notice of change in the account holder's  
 155 status.

156 (5) ~~If~~ As to tangible personal property ~~of a decedent, ward, principal, or settlor~~  
 157 ~~can~~ capable of ~~receive, store, process, or send~~ receiving, storing, processing, or sending a digital  
 158 asset, a fiduciary with authority over the property of a decedent, ward, principal, or settlor ~~may~~  
 159 has the right to access the property and any digital asset stored in it. ~~The fiduciary~~ and is an  
 160 authorized user for purposes of any applicable computer fraud and unauthorized access laws,  
 161 including ~~sections 815.01-815.07, Florida Statutes~~ the laws of this State.

162 Section 8. Section 740.801, Florida Statutes, is created to read:

163 740.801. Compliance--

164 (1) If a fiduciary with a right under this chapter to access a digital asset of an account  
 165 holder complies with subsection (2), the custodian shall comply with the fiduciary's request in a  
 166 record for:

167 (a) access to the asset;

168 (b) control of the asset; and

169 (c) a copy of the asset to the extent permitted by copyright law.

170 (2) If a request under subsection (1) is made by:

171 (a) a personal representative with the right of access under s. 740.301, the request  
 172 must be accompanied by a certified copy of the letters of administration of the personal

173 representative, an order authorizing a curator or administrator ad litem, ~~an order of summary~~  
174 ~~administration~~, or other court order;

175 (b) a guardian with the right of access under s. 740.401, the request must be  
176 accompanied by a certified copy of letters of plenary guardianship of the property or a court  
177 order that gives the guardian authority over the digital asset;

178 (c) an agent with the right of access under s. 740.501, the request must be  
179 accompanied by a an original or a copy of the power of attorney that authorizes the agent to  
180 exercise authority over the digital asset and a certification of the agent, under penalty of perjury,  
181 that the power of attorney is in effect; and

182 (d) a trustee with the right of access under s. 740.601, the request must be  
183 accompanied by a certified copy of the trust instrument, or a certification of the trust under s.  
184 736.1017, that authorizes the trustee to exercise authority over the digital asset.

185 (e) a person who is entitled to receive and collect specified digital assets pursuant  
186 to a certified copy of an order of summary administration issued pursuant to chapter 735, Florida  
187 Statutes.

188 (3) A custodian shall comply with a request made under subsection (1) not later than  
189 60 days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an  
190 order directing compliance.

191 (4) A custodian that receives a certification of trust may require the trustee to provide  
192 copies of excerpts from the original trust instrument and later amendments which designate the  
193 trustee and confer on the trustee the power to act in the pending transaction.

194 (5) A custodian that acts in reliance on a certification of trust without knowledge that the  
195 representations contained in it are incorrect is not liable to any person for so acting and may  
196 assume without inquiry the existence of facts stated in the certification.

197 (6) A person that in good faith enters into a transaction in reliance on a certification of  
198 trust may enforce the transaction against the trust property as if the representations contained in  
199 the certification were correct.

200 (7) A person that demands the trust instrument in addition to a certification of trust or  
201 excerpts under subsection (4) is liable for damages if the court determines that the person did not  
202 act in good faith in demanding the trust instrument.

203 (8) This section does not limit the right of a person to obtain a copy of a trust instrument  
204 in a judicial proceeding concerning the trust.

205 Section 9. Section 740.901, Florida Statutes, is created to read:

206 Section 740.901. Custodian Immunity--A custodian and its officers, employees, and  
207 agents are immune from liability for any action done in good faith in compliance with this  
208 chapter.

209 Section 10. Section 740.1001, Florida Statutes, is created to read:

210 Section 740.1001. Relation to Electronic Signatures in Global and National Commerce  
211 Act--This chapter modifies, limits, or supersedes the Electronic Signatures in Global and  
212 National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede  
213 Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of  
214 the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

215 Section 11. Section 740.1101, Florida Statutes, is created to read:

216 Section 740.1101. Applicability-- This chapter applies to:

217 (1) Subject to subsection (2), this chapter applies to:

218 (a) an ~~fiduciary or agent~~ agent acting under a ~~will, intestate appointment, trust or~~  
219 power of attorney executed before, on, or after the effective date of this chapter, ~~except as~~  
220 ~~otherwise provided in this chapter; and~~

221 (b) a personal representative acting for a decedent who died before, on, or after  
222 the effective date of this chapter;

223 ~~(c) a guardian appointed through a guardianship proceeding, whether pending in~~  
224 a court or commenced before, on or after the effective date of this chapter, ~~except as otherwise~~  
225 ~~provided in this chapter; and~~

226 (d) a trustee acting under a trust created before, on, or after the effective date of  
227 this chapter.

228 (2) This chapter does not apply to a digital asset of an employer used by an employee in  
229 the ordinary course of the employer's business.-

230 Section 12. This act shall take effect July 1, 2015.

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