

By the Committees on Fiscal Policy; and Judiciary; and Senators Hukill, Joyner, and Latvala

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1 A bill to be entitled
2 An act relating to digital assets; providing a
3 directive to the Division of Law Revision and
4 Information; creating s. 740.001, F.S.; providing a
5 short title; creating s. 740.101, F.S.; defining
6 terms; creating s. 740.201, F.S.; authorizing a
7 personal representative to have access to specified
8 digital assets of a decedent under certain
9 circumstances; creating s. 740.301, F.S.; authorizing
10 a guardian to have access to specified digital assets
11 of a ward under certain circumstances; creating s.
12 740.401, F.S.; authorizing an agent to have access to
13 specified digital assets of a principal under certain
14 circumstances; creating s. 740.501, F.S.; authorizing
15 a trustee to have access to specified digital assets
16 held in trust under certain circumstances; creating s.
17 740.601, F.S.; providing the rights of a fiduciary
18 relating to digital assets; providing that specified
19 provisions in a terms of service agreement are
20 unenforceable or void as against the public policy of
21 this state under certain circumstances; creating s.
22 740.701, F.S.; providing requirements for compliance
23 for a custodian, a personal representative, a
24 guardian, an agent, a trustee, or another person that
25 is entitled to receive and collect specified digital
26 assets; providing for damages if a demand for the
27 trust instrument is not made in good faith by a
28 custodian; providing applicability; creating s.
29 740.801, F.S.; providing immunity for a custodian and

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30 its officers, employees, and agents for any action
31 done in good faith and in compliance with ch. 740,
32 F.S.; creating s. 740.901, F.S.; clarifying the
33 relationship of ch. 740, F.S., to the Electronic
34 Signatures in Global and National Commerce Act;
35 creating s. 740.911, F.S.; providing applicability;
36 providing an effective date.

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38 Be It Enacted by the Legislature of the State of Florida:

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40 Section 1. The Division of Law Revision and Information is
41 directed to create chapter 740, Florida Statutes, consisting of
42 ss. 740.001-740.911, Florida Statutes, to be entitled "Fiduciary
43 Access to Digital Assets."

44 Section 2. Section 740.001, Florida Statutes, is created to
45 read:

46 740.001 Short title.—This chapter may be cited as the
47 "Florida Fiduciary Access to Digital Assets Act."

48 Section 3. Section 740.101, Florida Statutes, is created to
49 read:

50 740.101 Definitions.—As used in this chapter, the term:

51 (1) "Account holder" means a person that has entered into a
52 terms-of-service agreement with a custodian or a fiduciary for
53 such person. The term includes a deceased individual who entered
54 into the agreement during the individual's lifetime.

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

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59 agent.

60 (3) "Carry" means to engage in the transmission of
61 electronic communications.

62 (4) "Catalogue of electronic communications" means
63 information that identifies each person with which an account
64 holder has had an electronic communication, the time and date of
65 the communication, and the electronic address of the person.

66 (5) "Content of an electronic communication" means
67 information concerning the substance or meaning of the
68 communication which:

69 (a) Has been sent or received by the account holder;

70 (b) Is in electronic storage by a custodian providing an
71 electronic communication service to the public or is carried or
72 maintained by a custodian providing a remote computing service
73 to the public; and

74 (c) Is not readily accessible to the public.

75 (6) "Court" means a circuit court of this state.

76 (7) "Custodian" means a person that carries, maintains,
77 processes, receives, or stores a digital asset of an account
78 holder.

79 (8) "Digital asset" means an electronic record. The term
80 does not include an underlying asset or liability to which an
81 electronic record refers, unless the asset or liability is
82 itself an electronic record.

83 (9) "Electronic" means technology having electrical,
84 digital, magnetic, wireless, optical, electromagnetic, or
85 similar capabilities.

86 (10) "Electronic communication" has the same meaning as
87 provided in 18 U.S.C. s. 2510(12).

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88 (11) "Electronic communication service" means a custodian
89 that provides to an account holder the ability to send or
90 receive an electronic communication.

91 (12) "Fiduciary" means a person that is an original,
92 additional, or successor personal representative, guardian,
93 agent, or trustee.

94 (13) "Guardian" means a person who is appointed by the
95 court as guardian of the property of a minor or an incapacitated
96 individual. The term includes a person appointed by the court as
97 an emergency temporary guardian of the property.

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

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

105 (16) "Personal representative" means the fiduciary
106 appointed by the court to administer the estate of a deceased
107 individual pursuant to letters of administration or an order
108 appointing a curator or administrator ad litem for the estate.

109 (17) "Power of attorney" means a record that grants an
110 agent authority to act in the place of a principal pursuant to
111 chapter 709.

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

114 (19) "Record" means information that is inscribed on a
115 tangible medium or that is stored in an electronic or other
116 medium and is retrievable in perceivable form.

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117 (20) "Remote computing service" means a custodian that
118 provides to an account holder computer processing services or
119 the storage of digital assets by means of an electronic
120 communications system as defined in 18 U.S.C. s. 2510(14).

121 (21) "Terms-of-service agreement" means an agreement that
122 controls the relationship between an account holder and a
123 custodian.

124 (22) "Trustee" means a fiduciary that holds legal title to
125 a digital asset pursuant to an agreement, declaration, or trust
126 instrument that creates a beneficial interest in the settlor or
127 others.

128 (23) "Ward" means an individual for whom a guardian has
129 been appointed.

130 (24) "Will" means an instrument admitted to probate,
131 including a codicil, executed by an individual in the manner
132 prescribed by the Florida Probate Code, which disposes of the
133 individual's property on or after his or her death. The term
134 includes an instrument that merely appoints a personal
135 representative or revokes or revises another will.

136 Section 4. Section 740.201, Florida Statutes, is created to
137 read:

138 740.201 Authority of personal representative over digital
139 assets of a decedent.—Subject to s. 740.601(2) and unless
140 otherwise provided by the court or the will of a decedent, a
141 personal representative has the right to access:

142 (1) The content of an electronic communication that the
143 custodian is permitted to disclose under the Electronic
144 Communications Privacy Act, 18 U.S.C. s. 2702(b) or 47 U.S.C. s.
145 222;

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146 (2) The catalogue of electronic communications sent or
147 received by the decedent; and

148 (3) Any other digital asset in which the decedent had a
149 right or interest at his or her death.

150 Section 5. Section 740.301, Florida Statutes, is created to
151 read:

152 740.301 Authority of guardian over digital assets of a
153 ward.—The court, after an opportunity for hearing, may grant a
154 guardian the right to access:

155 (1) The content of an electronic communication that the
156 custodian is permitted to disclose under the Electronic
157 Communications Privacy Act, 18 U.S.C. s. 2702(b) or 47 U.S.C. s.
158 222;

159 (2) The catalogue of electronic communications sent or
160 received by the ward; and

161 (3) Any other digital asset in which the ward has a right
162 or interest.

163 Section 6. Section 740.401, Florida Statutes, is created to
164 read:

165 740.401 Control by agent of digital assets.—

166 (1) To the extent that a power of attorney expressly grants
167 an agent authority over the content of an electronic
168 communication of the principal, and subject to s. 740.601(2),
169 the agent has the right to access the content of an electronic
170 communication that the custodian is permitted to disclose under
171 the Electronic Communications Privacy Act, 18 U.S.C. s. 2702(b)
172 or 47 U.S.C. s. 222.

173 (2) Except as provided in subsection (1) and unless
174 otherwise provided by a power of attorney or a court order, an

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175 agent has the right to access:

176 (a) The catalogue of electronic communications sent or
177 received by the principal; and

178 (b) Any other digital asset in which the principal has a
179 right or interest.

180 Section 7. Section 740.501, Florida Statutes, is created to
181 read:

182 740.501 Control by trustee of digital assets.—Subject to s.
183 740.601(2) and unless otherwise provided by the court or the
184 terms of a trust:

185 (1) A trustee or a successor of a trustee who is an
186 original account holder has the right to access each digital
187 asset held in trust, including any catalogue of electronic
188 communications sent or received and the content of an electronic
189 communication; or

190 (2) A trustee or a successor of a trustee who is not an
191 original account holder has the right to access the following
192 digital assets held in trust:

193 (a) The catalogue of electronic communications sent or
194 received by the account holder;

195 (b) The content of an electronic communication that the
196 custodian is permitted to disclose under the Electronic
197 Communications Privacy Act, 18 U.S.C. s. 2702(b) or 47 U.S.C. s.
198 222; and

199 (c) Any other digital asset in which the account holder or
200 any successor account holder has a right or interest.

201 Section 8. Section 740.601, Florida Statutes, is created to
202 read:

203 740.601 Fiduciary access and authority.—

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204 (1) A fiduciary that is an account holder or that has the
205 right under this chapter to access a digital asset of an account
206 holder:

207 (a) May take any action concerning the digital asset to the
208 extent of the account holder's authority and the fiduciary's
209 powers under the laws of this state, subject to the terms-of-
210 service agreement and copyright or other applicable law;

211 (b) Has, for the purpose of applicable electronic privacy
212 laws, the lawful consent of the account holder for the custodian
213 to divulge the content of an electronic communication to the
214 fiduciary; and

215 (c) Is an authorized user under applicable computer fraud
216 and unauthorized access laws.

217 (2) Unless an account holder, after June 30, 2015, agrees,
218 by an affirmative act separate from the account holder's assent
219 to other provisions of the terms of the service agreement, to a
220 provision in the service agreement which limits a fiduciary's
221 access to a digital asset of the account holder:

222 (a) The provision is void as against the public policy of
223 this state; and

224 (b) The fiduciary's access under this chapter to a digital
225 asset does not violate the terms of the service agreement even
226 if the agreement requires notice of a change in the account
227 holder's status.

228 (3) A choice-of-law provision in a terms-of-service
229 agreement is unenforceable against a fiduciary acting under this
230 chapter to the extent the provision designates a law that
231 enforces a limitation on a fiduciary's access to a digital asset
232 which is void under subsection (2).

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233 (4) As to tangible personal property capable of receiving,
234 storing, processing, or sending a digital asset, a fiduciary
235 with authority over the property of a decedent, ward, principal,
236 or settlor has the right to access the property and any digital
237 asset stored in it and is an authorized user for purposes of any
238 applicable computer fraud and unauthorized access laws,
239 including the laws of this state.

240 Section 9. Section 740.701, Florida Statutes, is created to
241 read:

242 740.701 Compliance.—

243 (1) If a fiduciary that has a right under this chapter to
244 access a digital asset of an account holder complies with
245 subsection (2), the custodian shall comply with the fiduciary's
246 request for a record for:

247 (a) Access to the digital asset;

248 (b) Control of the digital asset; and

249 (c) A copy of the digital asset to the extent authorized by
250 copyright law.

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

252 (a) A personal representative who has the right of access
253 under s. 740.201, the request must be accompanied by a certified
254 copy of the letters of administration of the personal
255 representative, an order authorizing a curator or administrator
256 ad litem, or other court order;

257 (b) A guardian that has the right of access under s.
258 740.301, the request must be accompanied by a certified copy of
259 letters of plenary guardianship of the property or a court order
260 that gives the guardian authority over the digital asset;

261 (c) An agent that has the right of access under s. 740.401,

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262 the request must be accompanied by an original or a copy of the
263 power of attorney which authorizes the agent to exercise
264 authority over the digital asset and a certification of the
265 agent, under penalty of perjury, that the power of attorney is
266 in effect;

267 (d) A trustee that has the right of access under s.
268 740.501, the request must be accompanied by a certified copy of
269 the trust instrument, or a certification of trust under s.
270 736.1017, which authorizes the trustee to exercise authority
271 over the digital asset; or

272 (e) A person that is entitled to receive and collect
273 specified digital assets, the request must be accompanied by a
274 certified copy of an order of summary administration issued
275 pursuant to chapter 735.

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

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

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

290 (6) A custodian that enters into a transaction in good

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291 faith and in reliance on a certification of trust may enforce
292 the transaction against the trust property as if the
293 representations contained in the certification were correct.

294 (7) A custodian that demands the trust instrument in
295 addition to a certification of trust or excerpts under
296 subsection (4) is liable for damages if the court determines
297 that the custodian did not act in good faith in demanding the
298 trust instrument.

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

302 Section 10. Section 740.801, Florida Statutes, is created
303 to read:

304 740.801 Immunity.—A custodian and its officers, employees,
305 and agents are immune from liability for any action done in good
306 faith in compliance with this chapter.

307 Section 11. Section 740.901, Florida Statutes, is created
308 to read:

309 740.901 Relation to Electronic Signatures in Global and
310 National Commerce Act.—This chapter modifies, limits, or
311 supersedes the Electronic Signatures in Global and National
312 Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify,
313 limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c),
314 or authorize electronic delivery of the notices described in s.
315 103(b) of that act, 15 U.S.C. s. 7003(b).

316 Section 12. Section 740.911, Florida Statutes, is created
317 to read:

318 740.911 Applicability.—

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

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320 (a) An agent acting under a power of attorney executed
321 before, on, or after July 1, 2015;

322 (b) A personal representative acting for a decedent who
323 died before, on, or after July 1, 2015;

324 (c) A guardian appointed through a guardianship proceeding,
325 whether pending in a court or commenced before, on, or after
326 July 1, 2015; and

327 (d) A trustee acting under a trust created before, on, or
328 after July 1, 2015.

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

332 Section 13. This act shall take effect July 1, 2015.