

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Fiscal Policy

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BILL: CS/SB 494

INTRODUCER: Judiciary Committee and Senator Hukill

SUBJECT: Digital Assets

DATE: January 13, 2016

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<b>Fav/CS</b>
2.	<u>Jones</u>	<u>Hrdlicka</u>	<u>FP</u>	<b>Favorable</b>
3.	_____	_____	<u>RC</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 494 is a state adaptation of the Revised Uniform Fiduciary Access to Digital Assets Act was approved by the Uniform Law Commission in July 2015. It addresses conflicting interests between fiduciaries, who are trying to access the digital assets of someone who has died or become incapacitated, and custodians, who possess the assets.

Digital assets are electronic records in which someone has a personal interest or right. They include electronic communications and records such as emails, text messages, online photographs, documents stored in the cloud, electronic bank statements, and other electronic communications or records.

The purpose of the revised uniform act codified in the bill is twofold. The bill provides fiduciaries of decedents, incapacitated persons, settlors, principals, and wards the legal authority to manage the digital assets and electronic communications in a similar manner to how they manage tangible assets and accounts. The bill specifies when a fiduciary may access the content of digital assets and electronic communications, and when only a catalog of such property is permitted to be accessed. The bill provides custodians of digital assets and electronic communications the legal authority they need to interact with the fiduciaries of their users while honoring the user's privacy expectations for his or her personal communications.<sup>1</sup> A custodian is

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<sup>1</sup> National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015) Prefatory Note* (on file with the Senate Committee on Judiciary).

granted immunity from liability from state law for acts or omissions done in good faith compliance with the provisions of this bill.

This bill gives Internet users more certainty when planning for the management and disposition of their digital assets if they should die or become unable to manage their assets. This is accomplished by vesting fiduciaries with the authority to access, control, or copy digital assets and accounts.<sup>2</sup>

The fiscal impact on state courts is indeterminate.

## II. Present Situation:

### Background

Digital age technology has dramatically transformed how people acquire and store information, communicate, and transact business. Before the Internet was developed, most information was circulated in tangible forms, often reduced to ink on paper. However, as people have embraced electronic devices, many paper documents have been replaced by digital files, inboxes often substitute for mailboxes, glossy photographs have given way to digital images, and the metal filing cabinet with a key lock has been displaced by a networked file server with user access security.

These new technologies have created challenges to a person who is tasked with corralling the digital assets<sup>3</sup> of someone who has either lost capacity or died. When someone is declared incapacitated or dies in Florida, a fiduciary<sup>4</sup> is required and given legal authority to inventory the person's assets, pay the person's debts, taxes, and expenses, and preserve the person's property during the period of incapacity or transfer the person's property to the correct beneficiaries after death.<sup>5</sup>

Previously, someone's personal information was tangible and could be located by sifting through paper records or waiting for the incoming mail to divulge banking records and bills to be paid. Locating these records and managing property and social media accounts in the digital age is more complicated. Substantial amounts of valuable electronic data and digital assets are stored in cell phones, laptops, personal computers, online accounts, and other devices.

The challenges that the fiduciary must deal with include how to locate the person's digital assets; who has ownership over the assets once located; how to access the account without a password; and whether the original terms-of-service agreement for the digital account controls a successor's

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<sup>2</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper: Proposed Enactment of Chapter 740, Florida Statutes* (2015) (on file with the Senate Committee on Judiciary).

<sup>3</sup> Some examples of digital assets are e-mail, photos, projects, online bank accounts, personal records, digital music, entertainment, presentations, domain names, intellectual property, and client lists. The assets are generally important because of their sentimental or financial value.

<sup>4</sup> A fiduciary is defined as someone who owes to another person a duty to act in good faith and trust. BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>5</sup> Digital Assets and Information Study Committee of the Real Property, Probate and Trust Law Section of The Florida Bar, *White Paper: Digital Assets Questions and Answers* (2015) (on file with the Senate Committee on Judiciary).

ability to access to the account. Generally, a terms-of-service agreement, rather than state property law, controls the access to someone's digital assets, upon death or incapacity.

Efforts to resolve these legal issues have pitted the fiduciary's duty to identify and access the digital assets against the Internet service provider's duty to protect the original account holder's privacy interest. The Internet service provider is also concerned about divulging information that could be a violation of state and federal computer security laws. An additional barrier to the fiduciary's access is the conditions of the terms-of-service agreement that the original account holder agreed to when contracting with the service provider.

## **Privacy Laws for Electronic Communications**

### ***Federal Law***

Both federal and state laws prohibit the unauthorized access of computer systems and certain types of protected data. The most relevant federal laws, passed in 1986, are the Computer Fraud and Abuse Act<sup>6</sup> and the Stored Communications Act.<sup>7</sup>

The Computer Fraud and Abuse Act<sup>8</sup> is a computer security law that imposes penalties for the unauthorized access of stored data, devices, and computer hardware.<sup>9</sup> The law is designed to protect computers in which there is a federal interest and shields them from certain threats and forms of espionage and from being corruptly used as vehicles to commit fraud.<sup>10</sup> In essence, the law makes it a crime to access a computer, online service, or online account without authorization. When this law is read in the context of accessing digital assets, the issue becomes whether a fiduciary has been given authority to access a computer by virtue of a law or whether access must be given explicitly by the owner of the computer, online service, or account.<sup>11</sup>

The Stored Communications Act, which is part of the Electronic Communications Privacy Act,<sup>12</sup> establishes privacy rights and prohibits certain electronic communication services or remote computing services from knowingly divulging the contents of certain electronic communications and files.<sup>13</sup> Under the terms of the act, providers of communications services to the public may not be compelled to disclose data and information stored online. The providers are prohibited from voluntarily divulging the contents of stored communications unless an exception applies

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<sup>6</sup> 18 U.S.C. s. 1030 *et seq.*

<sup>7</sup> 18 U.S.C. s. 2701 *et seq.*

<sup>8</sup> According to the U.S. Department of Justice, the act is broad enough in scope to permit the Federal Government to prosecute someone if the person exceeds his or her authorized access by violating the access terms of a website's terms-of-service agreement or usage policies. James D. Lamm, Digital Passing: *Your Client is Six Feet Under, But His Data is in the Cloud*, Nov. 2014, available at <http://www.digitalpassing.com/wordpress/wp-content/uploads/2013/02/James-Lamm-Digital-Death-1-17-2013.pdf> (last visited Jan. 12, 2016).

<sup>9</sup> William Bissett and David Kauffman, *Surf the Evolving Web of Laws Affecting Digital Assets*, 41 Estate Planning No. 4 (Apr. 2014), available at <http://www.inknowvision.com/newsletters/July2014.pdf> (last visited Jan. 12, 2016).

<sup>10</sup> Charles Doyle, Congressional Research Service, *Cybercrime: A Sketch of 18 U.S.C. 1030 and Related Federal Criminal Laws*, RS20830 (Oct. 15, 2014).

<sup>11</sup> *Supra* note 5 at 3.

<sup>12</sup> 18 U.S.C. s. 2510 *et seq.*

<sup>13</sup> James D. Lamm, Digital Passing: *Your Client is Six Feet Under, But His Data is in the Cloud*, Nov. 2014, available at <http://www.digitalpassing.com/wordpress/wp-content/uploads/2013/02/James-Lamm-Digital-Death-1-17-2013.pdf> (last visited Jan. 12, 2016).

under s. 2702(b) of the Stored Communication Act. Wrongful disclosures result in legal penalties. However, there is a “lawful consent” exception which permits a service provider to voluntarily disclose electronic communications if lawful consent is given.<sup>14</sup>

These privacy protections are viewed by some as being substantial barriers for family members and fiduciaries who seek to access the contents of a deceased or incapacitated user’s online accounts. The service providers see them as restrictions on their ability to disclose electronic communications to anyone, unless certain exceptions are met. The service providers’ reasoning is that, if the Stored Communications Act applies, the online account service provider is prohibited by law from disclosing the contents of the communications and files.

### ***State Law***

Two chapters in the *Florida Statutes* address computer related crimes and the security of communications and are modeled after the Stored Communications Act. Chapter 815, F.S., is the “Florida Computer Crimes Act” and ch. 934, F.S., is entitled “Security of Communications; Surveillance.” Neither chapter addresses the ability of a fiduciary to legally access, duplicate, or control digital assets.<sup>15</sup> Additionally, no other provision of Florida law specifically addresses digital access by fiduciaries.

### **Terms-of-Service Agreements**

Terms-of-service agreements, the conditions controlling the relationship between the account holder and the service provider, are not uniform among Internet service providers. While some Internet service providers publish explicit policies detailing what will occur to digital assets when an individual dies, other providers do not. Some providers’ policies state that upon the death of the account holder, the account will terminate, thereby prohibiting access to the account by anyone. Providers often publish their policies in the terms-of-service agreements, but the terms are frequently ignored as readers quickly move past the language to progress to the end of the document.

### **The Uniform Law Commission**

Mindful that few laws exist to resolve these growing conflicts, the Uniform Law Commission<sup>16</sup> drafted a model law, the Uniform Fiduciary Access to Digital Assets, which it approved in 2014. Versions of the model act were introduced in 27 state legislatures in 2015. Not one bill passed. Internet-based businesses and privacy advocates were vocal opponents. The Uniform Law Commission reconvened in 2015 to address the issue of accessing digital assets. The commission produced a revised version of the earlier act for consideration by state legislatures in 2016,<sup>17</sup> the

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<sup>14</sup> *Supra* note 5.

<sup>15</sup> *Supra* note 2 at 2.

<sup>16</sup> According to its website, the Uniform Law Commission was established in 1892 and is made up of lawyers who are appointed by state governments. Its purpose is to research, draft, and promote the enactment of non-partisan uniform state legislation. See Uniform Law Commission, *About the ULC*, available at [http://www.uniformlawcommission.com/Narrative.aspx?title=About the ULC](http://www.uniformlawcommission.com/Narrative.aspx?title=About%20the%20ULC) (last visited Jan. 12, 2016). The commission began meeting in 2012 to develop the Uniform Fiduciary Access to Digital Assets Act.

<sup>17</sup> Benjamin Orzeske, *Managing a Digital Estate*, ABA Trust Letter, American Bankers Association, October 2015 (on file with the Senate Committee on Judiciary).

Revised Uniform Fiduciary Access to Digital Access Act, often referred to as the Revised UFADAA.

### III. Effect of Proposed Changes:

#### General Overview

The Florida Statutes do not authorize fiduciary access to digital assets. This bill provides fiduciaries with specific authority to access, control, or copy digital assets and accounts. The four types of fiduciaries this bill applies to are personal representatives of decedents' estates, guardians of the property of minors or incapacitated persons, agents who are acting under a power of attorney, and trustees.<sup>18</sup>

According to the Real Property, Probate and Trust Law Section of The Florida Bar, or RPPTL, this bill provides the legal authority that a fiduciary needs to manage digital assets in compliance with a person's estate plan, while also ensuring that a person's private electronic communications remain private unless the person gave consent for disclosure. The bill allows a user to specify whether his or her digital assets will be preserved, distributed to heirs, or destroyed. In keeping with federal privacy laws, the bill prevents companies that store electronic communications from releasing them to fiduciaries unless the user has consented to the disclosure. Fiduciaries are required under the bill to provide proof of their authority under Florida law to the custodians of the digital assets. Custodians that comply with a fiduciary's apparent authorization request are given immunity from liability under the statutes that prohibit unauthorized access.<sup>19</sup>

This bill is a state adaptation of the Revised Uniform Fiduciary Access to Digital Assets Act. The Uniform Law Commission has stated that this revised uniform act, which the bill mirrors, gives Internet users the ability to plan for the management and disposition of their assets in similar ways that they make plans for tangible property. The bill has a three-tiered system of priorities in the event of conflicting instructions. Additionally, the bill is designed as an overlay statute that works in conjunction with the state's existing laws involving probate, guardianship, trusts, and powers of attorney.<sup>20</sup>

#### Limited Application

According to RPPTL, the bill is limited in its scope and applies only to fiduciaries who are already bound to act in compliance with their fiduciary duties and powers. The bill does not extend to family members or other people who seek access to digital assets unless they are also a fiduciary. Moreover, the ability of a fiduciary to access a digital asset does not entitle the fiduciary to own the asset or make transactions with the asset.

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<sup>18</sup> *Supra* note 2 at 1.

<sup>19</sup> *Id.*

<sup>20</sup> Uniform Law Commission, *The Revised Uniform Fiduciary Access to Digital Assets Act – A Summary*, 2015 available at <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Revised%202015/Revised%20UFADAA%20-%20Summary%20-%20September%202015.pdf> (last visited Jan. 12, 2016).

The scope of the bill is further limited by the definition of “digital assets.” The bill’s only application is to an electronic record, which includes electronic communications, and does not apply to the underlying asset or liability unless the asset or liability is itself an electronic record.<sup>21</sup>

### ***Purpose (Sections 1 & 2)***

Section 740.001, F.S., creates the “Florida Fiduciary Access to Digital Assets Act.” According to RPPTL the goal of the revised uniform act, which this bill mirrors, is to:

- Remove barriers to a fiduciary who is seeking access to electronic records;
- Respect the user’s privacy and intentions; and
- Ensure that an Internet service provider’s compliance with the bill’s disclosure requirements do not subject it to liability for violations of federal privacy laws.<sup>22</sup>

### ***Definitions (Section 3)***

Section 740.002, F.S., defines 27 terms used in the bill. The majority of those terms mirror definitions currently in the Florida Probate Code and the Florida Powers of Attorney Act, while others are adapted from federal statutes or the Revised Uniform Fiduciary Access to Digital Assets Act.<sup>23</sup> Some of the most frequently used terms in this bill are listed below.

An “account” means an arrangement under a terms-of-service agreement in which the custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

“Catalog 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. In lay terms, this is considered to be what is on the “outside of an envelope” as opposed to the contents inside the envelope.

“Content of an electronic communication” means information concerning the substance or meaning of the communication which:

- Has been sent or received by a user;
- Is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and
- Is not readily accessible to the public.

In lay terms, this is generally understood to be the “inside of an envelope” or the subject line of an e-mail, the body of an e-mail or attachment, or the body of other types of electronic communications that are protected by the Stored Communications Act.<sup>24</sup>

<sup>21</sup> *Supra* note 2 at 4.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 5. chs. 731-735, F.S. Powers of Attorney Part II, ch. 709, F.S.

<sup>24</sup> According to James Lamm, an expert in this area of law, the Stored Communications Act does not protect the content of all electronic communications, and does not protect all records held in electronic storage by storage providers. The Stored Communications Act protects the content of an electronic communication only if the content is held in electronic storage by a service provider, the service provider holding the content provides an electronic communication service or remote computing

A “custodian” means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

A “designated recipient” means a person chosen by a user through an online tool to administer digital assets of the user.

A “digital asset” means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

“Electronic communication” has the same meaning as provided in 18 U.S.C. s. 2510(12) of the Electronic Communication Privacy Act. It means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce. It does not include any wire or oral communication; any communication made through a tone-only paging device; any communication from a tracking device;<sup>25</sup> or electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

“User” means a person that has an account with a custodian.

#### ***User’s Direction for Disclosure of Digital Assets (Section 4)***

The concept of an “online tool” for directing fiduciary assets is an electronic service provided by a custodian which allows the user, in an agreement separate and distinct from the terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person.

Section 740.003, F.S., establishes the user’s ability to direct disclosure of the digital assets and the order of preference for his or her direction. It is a three-tiered priority system.

The first priority is a user’s online direction for a specific account. If a company provides an online tool for a user to designate a person to receive access to his or her account upon death or incapacity, and the user takes advantage of the online tool, then the user’s designation prevails, even if it is in conflict with a contrary provision in the user’s will or trust. However, for the user’s designation to prevail the online tool must allow the user to modify or delete a direction at all times. The user may direct the custodian to disclose or not disclose some or all of his or her digital assets, even the content of electronic communications.

The second priority is the user’s direction contained in a valid will, trust, power of attorney, or other record, if the user has not used an online tool to give direction or the custodian has not provided an online tool. If the user makes plans for disposing of his or her digital assets, then the

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service to the public, and access to the content is restricted in a manner so that it is not completely public. See Lamm, *supra* note 15.

<sup>25</sup> A tracking device is an electronic or mechanical device that permits the tracking of a person or object. 18 U.S.C. s. 3117(b).

law gives effect to that plan and the custodian of the digital assets is required to comply with the plan.

The third priority is the terms-of-service agreement that governs the account. If the user does not provide for the disposition of his or her digital assets, whether online or in an estate plan, the terms-of-service agreement governing the account controls.

#### ***Terms-of-Service Agreement Preserved (Section 5)***

Section 740.004, F.S., clarifies that a terms-of-service agreement is preserved and the fiduciary has no greater rights than the user, unless there is a conflict with a user's direction. The fiduciary is not given any new or expanded rights. The fiduciary's access to digital assets may be modified or eliminated by a user, federal law, or by a terms-of-service agreement if the user has not provided direction under the previous section.

#### ***Procedure for Disclosing Digital Assets (Section 6)***

Section 740.005, F.S., establishes the custodian's procedure, or three options, for disclosing digital assets. When a custodian discloses a user's digital assets, the custodian has full discretion to:

- Grant the fiduciary or designated recipient full access to the user's account;
- Grant the fiduciary or designated recipient partial access to the account that is sufficient to perform the necessary tasks; or
- Provide the fiduciary or designated recipient a copy in a record of the digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if he or she were alive and had full capacity and access to the account.

A custodian may charge a reasonable administrative fee for the cost of disclosing digital assets and is not required, under this bill, to disclose a digital asset deleted by the user.

If a user directs, or a fiduciary requests, a custodian to disclose some, but not all of the user's digital assets under this act, the custodian is not required to disclose the assets if segregating the assets would be unduly burdensome. If the custodian believes that an undue burden exists, the custodian or the fiduciary may seek a court order to disclose:

- A subset of the user's digital assets, limited by date;
- All of the digital assets to the fiduciary or designated recipient, or to the court for a review in chambers; or
- None of the user's digital assets.

#### ***Sections 7 – 14***

Sections 7 – 14 establish the rights of personal representatives, guardians, agents acting pursuant to a power of attorney, and trustees. Each of the fiduciaries is subject to different rules for the content of communications that are protected by federal privacy laws and for other forms of digital assets. In general, fiduciaries will have access to a catalog of the user's communications (the outside of the envelope) but not the content (the inside of the envelope) unless the user consented to the disclosure of the content of the communication.



***Disclosure of Content of Electronic Communications of Deceased User (Section 7)***

Section 740.006, F.S., establishes the rights of a personal representative of a decedent to the contents of an electronic communication of the user. Section 8, below, addresses disclosure of non-content and other digital assets of a deceased user. A personal representative may not access the contents of a decedent's electronic communications unless the user consented or a court so directs.

In order for a custodian to disclose to the personal representative the content of an electronic communication that the user sent or received, the personal representative must supply to the custodian:

- A written request for disclosure in physical or electronic form;
- A certified copy of the death certificate of the user;
- A certified copy of the letters of administration or similar specified authority; and
- A copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications unless the user provided direction in an online tool.

If the custodian requests, the personal representative must also provide:

- A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
- Evidence linking the account to the user; or
- A finding by a court that:
  - The user had an specific account with the custodian, identifiable by information specified above;
  - Disclosure of the content of electronic communications of the user would not violate the Stored Communication Act at 18 U.S.C. s. 2701 et seq., privacy of customer information at 47 U.S.C. s. 222, or other applicable law;
  - The user consented to disclosure of the content of electronic communications (unless the user provided direction using an online tool); or
  - Disclosure of the content of electronic communications of the user is reasonably necessary for the administration of the estate.

***Disclosure of Other Digital Assets of Deceased User (Section 8)***

Section 740.007, F.S., establishes the rights of a personal representative to the *other* digital assets of a deceased user. This section gives a personal representative default access to the "catalog" (outside of the envelope) of electronic communications and other digital assets that are not protected by federal privacy laws.

A personal representative is permitted to have access to all of a decedent's other digital assets, excluding the contents of electronic communications as discussed above in Section 7, unless the deceased user prohibited disclosure or a court directs differently. The custodian must disclose to the personal representative a catalog of electronic communications sent or received by the user and the digital assets of the user, if the personal representative supplies the custodian with:

- A written request for disclosure in physical or electronic form;
- A certified copy of the death certificate of the user; and

- A certified copy of the letters of administration or similar specified authority.

If the custodian requests, the personal representative must also provide specified information that will identify the user's account; evidence linking the account to the principal; an affidavit stating that disclosure is reasonably necessary for the administration of the decedent's estate; or an order of the court which finds that the user had a specific account with the custodian, as specified earlier, or that disclosure of the user's digital assets is reasonably necessary for the administration of the estate.

#### ***Disclosure of Content of Electronic Communications of Principal (Section 9)***

Section 740.008, F.S., establishes the right of an agent, who acts pursuant to a power of attorney, to the contents of electronic communications of the principal. When acting pursuant to the power of attorney, an agent is permitted access to the contents of a principal's electronic communications if that authority is expressly granted by the principal and is not in some other way restricted by the principal or a court.

The custodian is required to disclose the content if the agent supplies the custodian:

- A written request in physical or electronic form;
- An original or copy of the power of attorney expressly granting the agent authority over the content; and
- A certification by the agent, under penalty of perjury, that the power of attorney is in effect.

If requested by the custodian, the agent must also provide specified information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

#### ***Disclosure of Other Digital Assets of Principal (Section 10)***

Section 740.009, F.S., establishes the right of an agent, who acts pursuant to a power of attorney, access to the other digital assets of the principal. It establishes that the agent has default authority over the principal's digital assets, except for the content of the principal's electronic communications.

Unless otherwise ordered by a court, directed by a principal, or provided by a power of attorney, a custodian must disclose to an agent who has been granted specific authority over the digital assets or general authority to act on behalf of the principal, a catalog of electronic communications that were sent or received by the principal and any other digital assets of the principal, but not the content of electronic communications.

The agent must supply the custodian with:

- A written request in physical or electronic form;
- An original or a copy of the power of attorney which grants the agent specific authority over digital assets or general authority to act on behalf of the principal; and
- A certification by the agent, under penalty of perjury, that the power of attorney is in effect.

If requested by the custodian, an agent must also provide certain enumerated identifying information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

***Disclosure of Digital Assets held in Trust when Trustee is the Original User (Section 11)***

Section 740.01, F.S., establishes that a trustee who is an original account holder can access all digital assets that are held in the trust. A trustee who is an original user may access any digital asset, which includes the catalog and the content of electronic communications, unless it is otherwise ordered by a court or provided in the trust.

***Disclosure of Content of Electronic Communications Held in Trust When Trustee is not the Original User (Section 12)***

Section 740.02, F.S., establishes the rights of a trustee to the contents of electronic communications held in trust when the trustee is *not* the original user. Unless otherwise ordered by a court, directed by the user, or provided in a trust, the custodian must disclose to a trustee who is not an original user the content of an electronic communication that was sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust. The trustee must provide the custodian:

- A written request in physical or electronic form;
- A certified copy of the trust instrument or a certification of trust, which includes consent to disclosure of the content to the trustee; and
- A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust.<sup>26</sup>

If requested by the custodian, the trustee must also provide certain identifying information assigned by the custodian to identify the trust's account or evidence linking the account to the trust.

***Disclosure of Other Digital Assets Held in Trust When Trustee is not the Original User (Section 13)***

Section 740.03, F.S., establishes the rights of a trustee to other digital assets held in trust when the trustee is not the original user. Unless otherwise ordered by a court, the user, or the trust instrument, a trustee who is not the original user may access the catalog of electronic communications and any digital assets, except the content of electronic communication, in an account of the trust. The trustee must supply the custodian:

- A written request for disclosure in physical or electronic form;
- A certified copy of the trust instrument or a certification of trust; and
- A certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee.

If requested by the custodian, the trustee must also provide specified information assigned by the custodian to identify the trust's account or evidence linking the account to the trust.

***Disclosure of Digital Assets to a Guardian of Ward (Section 14)***

Unless a ward grants consent, a guardian is not authorized to access the content of a ward's electronic communications. Section 740.04, F.S., establishes the rights of a guardian to other

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<sup>26</sup> According to RPPTL, sections 12 and 13 of the bill address situations involving either an inter vivos transfer of a digital asset into a trust or the transfer via a pour-over will of a digital asset into a trust. *Supra* note 2 at 11.

digital assets of a ward. Unless otherwise ordered by a court or the user, a guardian can access the catalog of electronic communications and any other digital assets, except the content of electronic communication. The guardian must provide the custodian:

- A written request for disclosure in physical or electronic form; and
- A certified copy of letters of plenary guardianship of the property or the court order giving the guardian authority over the digital assets of the ward.

If requested by the custodian, the guardian must provide specified information assigned by the custodian to identify the ward's account or evidence linking the account to the ward.

A custodian of the ward's digital assets may suspend or terminate an account of the ward for good cause if requested to do so by a guardian with general authority to manage the ward's property. The request to suspend or terminate must be accompanied by a certified copy of the court order giving the guardian the authority over the ward's property.<sup>27</sup>

### ***Fiduciary Duty and Authority (Section 15)***

Section 740.05, F.S., establishes the legal duties of a fiduciary charged with managing digital assets. This includes the duties of care, loyalty, and confidentiality.

Section 740.05(2), F.S., establishes the fiduciary's authority to exercise control over the digital assets in conjunction with other statutes. The fiduciary's authority:

- Is subject to the terms-of-service agreement, except as directed in the online tool;
- Is subject to other laws, including copyright law;
- Is limited by the scope of the fiduciary's duties; and
- May not be used to impersonate the user.

A fiduciary who has authority over the tangible personal property of a decedent, ward, principal, or settlor has the right to access any digital asset in which those persons had or has a right or interest if the digital asset is not held by a custodian or subject to a terms-of-service agreement. For purposes of any applicable computer fraud or unauthorized computer access laws, a fiduciary who acts within the scope of the fiduciary's duties is an authorized user of the property. A fiduciary who has authority over the tangible personal property of a decedent, ward, principal, or settlor has the right to access the property and any digital assets that are stored in it and is an authorized user for the purpose of computer fraud and unauthorized computer access laws.

A custodian is authorized to disclose information in an account to a fiduciary of the user if that information is required to terminate an account used to access digital assets licensed to the user.

A fiduciary who requests a custodian to terminate a user's account must submit the request in writing, either in paper or electronic form, and also supply:

- A certified copy of the death certificate of the user, if the user is deceased; and
- A certified copy of the letters of administration or other specified court orders.

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<sup>27</sup> According to the RPPTL, this section requires that the guardian must be specifically authorized, not implicitly authorized, to access the ward's digital assets and electronic communications *Supra* note 2 at 12.

If requested by the custodian, the fiduciary must also provide specified information assigned by the custodian to identify the user's account or evidence linking the account to the user, or a court finding that the user had a specific account with the custodian, identifiable by certain enumerated information.

#### ***Custodian Compliance and Immunity (Section 16)***

Section 740.06, F.S., provides that a custodian has 60 days to comply with a request from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian does not comply, the fiduciary or designated representative may apply to the court for an order directing compliance. The order directing compliance must contain a finding that compliance would not be in violation of the Stored Communications Act at 18 U.S.C. s. 2702.

A custodian may deny a request for disclosure or terminate an account if the custodian is aware of any lawful access to the account after the custodian receives the fiduciary's request. The bill does not limit a custodian's ability to require a fiduciary or designated recipient to obtain a court order that specifies that an account belongs to the ward or principal, specifies that there is sufficient consent from the ward or principal, and contains a finding required by a law other than one found in this bill.

This section also establishes that a custodian and its officers, employees, and agents are immune from liability for acts or omissions done in good faith and in compliance with this chapter.

#### ***Electronic Signatures in Global and National Commerce Act (Section 17)***

Section 740.07, F.S., establishes the relationship between this act and the Electronic Signatures in Global and National Commerce Act, noting where this act does and does not modify the federal law.<sup>28</sup>

#### ***Applicability (Section 18)***

Section 740.08, F.S., provides that the power granted by the act to fiduciaries, personal representatives, guardians, and trustees, applies to these people regardless of whether their authority arose, before, on, or after July 1, 2016, the effective date of the bill. Additionally, the bill does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

#### ***Severability (Section 19)***

A standard severability provision is supplied which notes that if any provision is held invalid, the other provisions of the chapter will remain in effect.

#### ***Effective Date (Section 20)***

The bill is effective July 1, 2016.

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<sup>28</sup> The bill modifies the Electronic Signatures in Global and National Commerce Act as allowed by 15 U.S.C. s. 7002.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not affect counties and municipalities.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

The federal preemption doctrine is a principle of law which holds that federal laws take precedence over state laws, and as such, states may not enact laws that are inconsistent with the federal law. Under the Electronic Communications Privacy Act, or ECPA, a service provider, with few exceptions, may not divulge the contents of a communication without the “lawful consent” of the originator, addressee, intended recipient, or the subscriber. Under the provisions of this bill, an online tool is created and controlled by the Internet service providers that is separate from the terms of service agreement. This online tool allows the account holder or user to specifically “opt in” and grant permission to the fiduciary to access his or her digital assets. This affirmative act could be deemed to trigger the “lawful consent” exception to ECPA. It could be argued that the online tool, which the account holder or user must affirmatively use to authorize consent, avoids any conflict with the ECPA and violations of the federal law.<sup>29</sup>

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

This bill may help fiduciaries identify assets and bank accounts belonging to those who have died or become incapacitated. The custodians of digital assets, such as email service providers, however, might initially incur costs in reviewing requests for access to digital assets and then making those assets available. Custodians, however, are authorized to assess a reasonable administrative charge for the costs they incur in disclosing digital assets such that this bill should have no impact on them.

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<sup>29</sup> See *supra* note 5 at 3.

**C. Government Sector Impact:**

According to the Office of the State Courts Administrator, it cannot accurately determine the fiscal impact of the bill on the judicial branch. This is due to the unavailability of data needed to establish the increase in judicial time resulting from orders directing compliance, requests for disclosures, and determination requiring an in camera review of documents.

**VI. Technical Deficiencies:**

The term “designated representative” is only used on Lines 493 and 502 of the bill and not defined. However, the bill defines “designated recipient” and uses it in Section 3, 6, 16.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates the following sections of the Florida Statutes: 740.001, 740.002, 740.003, 740.004, 740.005, 740.006, 740.007, 740.008, 740.009, 740.01, 740.02, 740.03, 740.04, 740.05, 740.06, 740.07, 740.08, and 740.09.

**IX. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on November 17, 2015:**

The definition of “ward” is amended and limited to clarify that a ward is someone for whom a guardian has already been appointed. The revised definition excludes a person for whom an application for the appointment of a guardian is pending before a court.

**B. Amendments:**

None.