

**HOUSE OF REPRESENTATIVES  
FINAL BILL ANALYSIS**

<b>BILL #:</b>	CS/HB 747	<b>FINAL HOUSE FLOOR ACTION:</b>	
<b>SPONSOR(S):</b>	Judiciary Committee; Fant and others	116 Y's	0 N's
<b>COMPANION BILLS:</b>	CS/CS/SB 494	<b>GOVERNOR'S ACTION:</b>	Approved

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**SUMMARY ANALYSIS**

CS/HB 747 passed the House on February 24, 2016 as CS/CS/SB 494.

The bill creates the Florida Fiduciary Access to Digital Assets Act to provide designated recipients and specified fiduciaries, specifically the personal representative of a decedent, an agent under a power of attorney, a guardian, or a trustee, with a limited ability to access the digital assets of the decedent, principal, or ward. Digital assets include electronic communications and records such as emails, text messages, online photographs, documents stored on the cloud, and electronic bank statements.

In general, the bill provides that a fiduciary or designated recipient will have access to a catalogue 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.

The bill may have an indeterminate negative fiscal impact on state expenditures. The bill does not appear to have a fiscal impact on local governments.

The bill was approved by the Governor on March 10, 2016, ch. 2016-46, L.O.F., and will become effective on July 1, 2016.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **Current Situation**

Many documents and records that once existed in tangible form, such as letters, contracts, and financial and bank statements, are being replaced by intangible digital assets<sup>1</sup> that are not readily discoverable or accessible. Substantial amounts of valuable electronic data and digital assets are acquired and stored in cell phones, computers, online accounts, and other devices. Consequently, a family member or personal representative often faces substantial challenges when trying to identify, locate, or access the digital assets of a deceased or incapacitated person.

This switch to digital assets raises a number of issues: Upon an account holder's death or incapacity, how does a fiduciary identify and locate that person's digital assets? Who then has control or ownership? How is an account accessed when no one has the decedent's password? Does the original terms-of-service agreement control whether a fiduciary may gain access to an account?

Resolution of these issues require balancing the fiduciary's duty to identify and access the digital assets with the Internet Service Provider's (ISP) duty to protect the original account holder's privacy in accordance with state and federal computer security laws. An additional barrier may exist in the terms-of-service agreement that the original account holder agreed to when initiating a contract with the ISP.

#### **Electronic Communication Laws**

##### ***Federal Law***

Federal laws prohibit the unauthorized access of both computer systems and certain types of protected data. The Stored Communications Act<sup>2</sup> (SCA) establishes privacy rights and prohibits certain electronic communication services or remote computing services from knowingly divulging the contents of certain electronic communications and files. An ISP is prohibited from voluntarily divulging the contents of stored communications unless an exception applies under the SCA. However, a "lawful consent" exception allows an ISP to voluntarily disclose electronic communications if lawful consent is given.<sup>3</sup>

The privacy protections in the SCA 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.<sup>4</sup> The ISPs see them as restrictions on their ability to disclose electronic communications to anyone, unless certain exceptions are met. Their reasoning is that if the SCA applies, the ISP is prohibited from disclosing the contents of the communications and files.<sup>5</sup>

The Computer Fraud and Abuse Act<sup>6</sup> (CFAA) is designed to protect computers in which there is a federal interest from certain threats and forms of espionage and from being used to commit fraud.<sup>7</sup> The

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<sup>1</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>2</sup> 18 U.S.C. s. 2701 *et seq.*

<sup>3</sup> 18 U.S.C. s. 2702(b)(c).

<sup>4</sup> James D. Lamm, Digital Passing: *Your Client is Six Feet Under, But His Data is in the Cloud*, Nov. 2014, 12 (on file with the Civil Justice Subcommittee).

<sup>5</sup> *Id.*

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

<sup>7</sup> Charles Doyle, Congressional Research Service, *Cybercrime: A Sketch of 18 U.S.C. 1030 and Related Federal Criminal Laws*, 1 (Oct. 15, 2014).

law imposes penalties for the unauthorized access of stored data, devices, and computer hardware.<sup>8</sup> The Department of Justice has stated that the CFAA is broad enough in scope to permit the federal government to prosecute a person who violates the access provisions of a web site's terms-of-service agreement or usage policies.<sup>9</sup>

### **State Law**

Chapter 815, F.S., the "Florida Computer Crimes Act," and ch. 934, F.S., related to security of communications surveillance, address computer related crimes and the security of communications. These provisions are modeled after the federal SCA. Like the SCA, neither Florida provision addresses the ability of a fiduciary to legally access, duplicate, or control digital assets.<sup>10</sup>

### **The Model Uniform Law**

Believing that legislation was needed to ensure that account holders and their fiduciaries retain control of digital property, the Uniform Law Commission developed and adopted the Uniform Fiduciary Access to Digital Assets Act in July 2014. Versions of the model act were introduced in numerous state legislatures in 2015. The Uniform Law Commission reconvened in 2015 to readdress the issue and produced a revised version of the model act for 2016. The bill is a state adaptation of the Revised Uniform Fiduciary Access to Digital Access Act, referred to as the Revised UFADAA.

### **Effect of the Bill**

The bill creates ch. 740, F.S., consisting of ss. 740.001-740.09, F.S., the "Florida Fiduciary Access to Digital Assets Act," (Act) to provide fiduciaries with the authority to access, control, or copy digital assets and accounts. The Act only applies to four types of fiduciaries: personal representatives, guardians, agents acting pursuant to a power of attorney, and trustees. These fiduciaries are already bound to comply with existing fiduciary duties. The provisions of the Act do not extend to family members or others who seek access to the digital assets unless they are a fiduciary.

The bill is also limited by the definition of "digital asset." The Act only applies to an electronic record in which an individual has a right or interest, and does not apply to the underlying asset or liability unless the asset or liability is itself an electronic record.<sup>11</sup>

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

The bill creates s. 740.002, F.S., to define terms used in the Act. The majority of the terms are found in the Florida Probate Code and the Florida Power of Attorney Act, while others are adapted from federal statutes or the Revised UFADAA. Below are some of the most frequently used new terms in the bill:

- An "account" is as 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
- "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

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<sup>8</sup> William Bissett and David Kauffman, *Surf the Evolving Web of Laws Affecting Digital Assets*, 41 Estate Planning No. 4 (Apr. 2014).

<sup>9</sup> Lamm, *supra* note 4, at 10.

<sup>10</sup> The Real Property, Probate, & Trust Law Section of The Florida Bar, *White Paper: Proposed Enactment of Chapter 740, Florida Statutes*, 2, (2015) (on file with the Civil Justice Subcommittee).

<sup>11</sup> "Digital assets include electronically-stored information, such as: 1) any information stored on a computer and other digital devices; 2) content uploaded onto websites, ranging from photos to documents; and 3) rights in digital property, such as domain names or digital entitlements associated with online games. Both the catalogue and content of an electronic communication are covered by the term 'digital assets.'" *Id.* at 7.

- “Content of an electronic communication” is defined to mean information concerning the substance of an electronic communication which has been sent or received by a user; is in electronic storage, or carried or maintained by a custodian; and, is not readily accessible to the public<sup>12</sup>
- A “custodian” is defined as a person that carries, maintains, processes, receives, or stores a digital asset of a user, such as an ISP
- A “designated recipient” is defined as a person chosen by a user through an online tool to administer digital assets of the user
- A “digital asset” is defined as a record that is electronic but does not include the underlying asset or liability unless the asset or liability is a record that is electronic<sup>13</sup>
- “Electronic communication” has the same meaning as provided in federal law<sup>14</sup>
- “Online tool” means an electronic service provided by a custodian that 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

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

The bill creates s. 740.003, F.S., to establish a user’s ability to direct disclosure of the user’s 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 have 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 over a contrary provision in the user’s will or trust provided that the online tool allows the user to modify or delete a direction at any time. 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 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 via an online tool or in an estate plan, the terms-of-service governing the account control.

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

The bill creates s. 740.004, F.S., to provide that a terms-of-service agreement<sup>15</sup> is preserved and the fiduciary or designated recipient has no greater rights than the user has under the terms-of-service agreement. However, a fiduciary or designated recipient’s access to digital assets may be modified or

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<sup>12</sup> 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.

<sup>13</sup> Based on this definition, a fiduciary’s access to a digital asset does not mean that the fiduciary is entitled to “own” or otherwise engage in transactions with the asset; rather, the fiduciary has access to the electronically-stored information that constitutes the “digital asset.” *White Paper, supra* note 10, at 7.

<sup>14</sup> See 18 U.S.C. § 2510(12) (“Electronic communication” 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, but does not include: any wire or oral communication; any communication made through a tone-only paging device; any communication from a tracking device; electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.”).

<sup>15</sup> A “terms-of-service agreement” is defined in the bill as “an agreement that controls the relationship between a user and a custodian.”

eliminated by a user, federal law, or by a terms-of-service agreement if the user has not provided direction under newly-created s. 740.003, F.S.

### **Procedure for Custodians When Disclosing Assets (Section 6)**

Section 740.005, F.S., is created to provide three options to a custodian for disclosing digital assets. When a custodian discloses a user's digital assets, the custodian may:

- allow the fiduciary or designated recipient full access to the user's account;
- allow the fiduciary or designated recipient partial access to the account that is sufficient to perform necessary tasks; or
- provide the fiduciary or designated recipient with a copy in a record of the digital asset that the user could have accessed if he or she were alive.

If a user directs or a fiduciary requests a custodian to disclose some, but not all of the user's digital assets, 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;
- 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.

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

### **Four Types of Fiduciaries Covered (Sections 7 - 14)**

The bill creates ss. 740.006-740.04, F.S., to establish the rights of a personal representative, guardian, agent acting pursuant to a power of attorney, or trustee to access a user's digital assets. In general, fiduciaries will have access to a catalogue 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. Because the fiduciary has the same authority as the deceased user (no more and no less), the fiduciary is "authorized" by the deceased user as required under the two federal statutes (the SCA and CFAA) that prohibit unauthorized access.<sup>16</sup>

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

The bill creates s. 740.006, F.S., to establish the rights of a personal representative of a decedent to access the contents of an electronic communication of the user (the "inside of the envelope").<sup>17</sup> A personal representative may not access the contents of a decedent's electronic communications unless the user consented to or a court directs such access.

A custodian must disclose the content of an electronic communication if the personal representative provides:

- a written request for disclosure;
- a certified copy of the user's death certificate;
- a certified copy of the letters of administration or similar specified authority;
- 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; and
- if the custodian requests, the personal representative must provide specified information that will identify the user's account, evidence linking the account to the user; or a finding by the court

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<sup>16</sup> *White Paper*, *supra* note 10, at 3.

<sup>17</sup> Newly-created s. 740.007, F.S., addresses disclosure of non-content and other digital assets of a deceased user.

that the user had a specific account with the custodian; that disclosure of the contents would not violate the SCA or other federal law relating to privacy of telecommunication carriers' customer information; that the user consented to disclosure of the content; or disclosure of the content is reasonably necessary for the administration of the estate.

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

Section 740.007, F.S., is created to provide a personal representative default access to the catalogue, or "outside of the envelope," of electronic communications and other digital assets that are not protected by federal privacy laws.<sup>18</sup> A personal representative is permitted to access all of a decedent's other digital assets, excluding the contents of electronic communications, unless the deceased user prohibited disclosure or a court orders otherwise. The custodian must disclose a catalog of the user's electronic communications and the user's digital assets of the user if the personal representative provides:

- a written request for disclosure;
- a certified copy of the user's death certificate;
- a certified copy of the letters of administration or similar specified authority; and
- if the custodian requests, the personal representative must provide information that will identify the user's account; evidence linking the account to the user; an affidavit stating that disclosure is reasonably necessary for the administration of the estate; or a court order finding that the user had an account with the custodian or that disclosure of the digital assets is reasonably necessary for the administration of the estate.

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

The bill creates s. 740.008, F.S., to provide that an agent acting pursuant to a power of attorney may access the contents of a principal's electronic communications if the authority is expressly granted by the principal and is not otherwise restricted by the principal or a court. The custodian is required to disclose the contents if the agent provides:

- a written request for disclosure;
- an original or copy of the power of attorney in which the authority over the content is expressly granted to the agent;
- a certification by the agent that the power of attorney is in effect; and
- if requested by the custodian, 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 a Principal (Section 10)***

Section 740.009, F.S., is created to provide that an agent acting pursuant to a power of attorney granting specific authority over the digital assets or granting general authority to act on behalf of the principal may access a catalog of the principal's electronic communications and the principal's digital assets, but not the content of electronic communications, unless otherwise ordered by a court, directed by the principal, or provided by a power of attorney. The custodian is required to disclose the digital assets if the agent provides:

- a written request for disclosure;
- 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;
- a certification by the agent that the power of attorney is in effect; and
- if requested by the custodian, identifying information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

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<sup>18</sup> See "Electronic Communication Laws" section above.

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

The bill creates s. 740.01, F.S., to provide that a trustee who is an original user may access any digital assets that are held in the trust, including the catalogue 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 a Trustee is not the Original User (Section 12)***

The bill creates s. 740.02, F.S., to provide that a trustee, who is not an original user, may access 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 if the trust instrument consents to the disclosure of the content to the trustee. A trustee's access may be limited by court order, at the direction of the user, or by the trust instrument. The custodian is required to disclose the contents if the agent provides:

- a written request for disclosure;
- a certified copy of the trust instrument or a certification of trust which includes consent to disclosure of the content to the trustee;
- a certification by the trustee that the trust exists and the trustee is a currently acting trustee; and
- if requested by the custodian, 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 the Trustee is not the Original User (Section 13)***

The bill creates s. 740.03, F.S., to provide that unless prohibited 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 communications, in an account of the trust. The trustee must supply the custodian with:

- a written request for disclosure;
- a certified copy of the trust instrument or a certification of trust;
- a certification by the trustee that the trust exists and that the trustee is a currently acting trustee; and
- if requested by the custodian, specified information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

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

Section 740.04, F.S., is created to provide that a guardian is not authorized to access the contents of a ward's electronic communications unless the ward expressly grants consent to do so. A guardian is permitted, however, to access the ward's other digital assets pursuant to letters of guardianship or a court order, unless directed otherwise by a court or the user. The guardian must provide the custodian with:

- a written request for disclosure;
- 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; and
- if requested by the custodian, 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 the ward's account 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.

## **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 or designated recipient's authority is:

- subject to the terms-of-service agreement, except as directed in the online tool;
- subject to other laws, including copyright law;
- 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 user's fiduciary if the information is required to terminate an account used to access digital assets licensed to the user.

A fiduciary who requests that a custodian terminate a user's account must submit the request in writing, along with:

- a certified copy of the death certificate of the user, if the user is deceased;
- a certified copy of the letters of administration or other specified court orders; and
- if requested by the custodian, specified information assigned by the custodian to identify the ward's account or evidence linking the account to the ward, 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)**

The bill creates s. 740.06, F.S., to provide that a custodian has 60 days to comply with a request from a fiduciary or designated recipient to disclose digital assets or to terminate an account. If the custodian does not comply, the fiduciary or designated recipient may seek a court order directing compliance. An order directing compliance must contain a finding that compliance would not be in violation of 18 U.S.C. s. 2702, related to the disclosure of electronic communications or records.

A custodian may deny a request for disclosure or termination 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 from obtaining 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 any findings required by law other than those required in the Act.

A custodian and its officers, employees, and agents are immune from liability for acts or omissions done in good faith in compliance with the Act.

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

Section 740.07, F.S., is created to establish the relationship between the Act and the federal Electronic Signatures in Global and National Commerce Act,<sup>19</sup> noting where this Act does and does not modify, limit, or supersede federal law.

### **Applicability of the Act (Section 18)**

Section 740.08, F.S., created by the bill, provides that the powers granted by the Act to a fiduciary, personal representative, guardian, trustee, or agent applies regardless of whether such person's authority arose on, before, or after July 1, 2016 (the effective date of the bill). The bill also provides that the Act applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

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)**

Section 740.09, F.S., is created to provide a severability provision that provides that if any provision is held invalid, the other provisions of the Act will remain in effect.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

#### **2. Expenditures:**

Provisions in the bill allowing application to the circuit courts for orders directing compliance, requests for disclosures segregating assets, assertions by custodians claiming selective disclosures impose an undue burden, and determinations requiring in camera review may increase the expenditure of judicial time and resources. However, these matters will be case-specific and any corresponding increase in judicial time or court workload is indeterminate.<sup>20</sup>

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

#### **2. Expenditures:**

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<sup>19</sup> The Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. ss. 7001 et seq., is designed "to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically." Bureau of Consumer Protection, Federal Trade Commission and National Telecommunications and Information Administration, Department of Commerce, *Report to Congress: Electronic Signatures in Global and National Commerce Act, The Consumer Consent Provision in Section 101(c)(1)(C)(ii)*, i (June 2001) [www.ntia.doc.gov/files/ntia/publications/esign7.pdf](http://www.ntia.doc.gov/files/ntia/publications/esign7.pdf) (last visited Dec. 14, 2015).

<sup>20</sup> Office of the State Courts Administrator, 2016 Judicial Impact Statement, SB 494, p. 2 (Nov. 12, 2015) (on file with the Civil Justice Subcommittee).

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.