

A bill to be entitled

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

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

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

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

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

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

(1) "Account holder" means:

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

and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56 (15) “Information” means data, text, images, videos, sounds, codes, computer programs,
57 software, databases, or the like.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

103 740.501. Control By Agent of Digital Assets—

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

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

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

113 and

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

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

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

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

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

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

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

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

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

132 740.701. Fiduciary Access and Authority--

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

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

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

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

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

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

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

155 (5) As to tangible personal property capable of receiving, storing, processing, or sending
156 a digital asset, a fiduciary with authority over the property of a decedent, ward, principal, or
157 settlor has the right to access the property and any digital asset stored in it and is an authorized
158 user for purposes of any applicable computer fraud and unauthorized access laws, including the
159 laws of this State.

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

161 740.801. Compliance--

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

165 (a) access to the asset;

166 (b) control of the asset; and

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

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

169 (a) a personal representative with the right of access under s. 740.301, the request
170 must be accompanied by a certified copy of the letters of administration of the personal
171 representative, an order authorizing a curator or administrator ad litem, , or other court order;

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

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

179 (d) a trustee with the right of access under s. 740.601, the request must be
180 accompanied by a certified copy of the trust instrument, or a certification of the trust under s.
181 736.1017, that authorizes the trustee to exercise authority over the digital asset.

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

185 (3) A custodian shall comply with a request made under subsection (1) not later than
186 60 days after receipt. If the custodian fails to comply, the fiduciary may apply to the court for an
187 order directing compliance.

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

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

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

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

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

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

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

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

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

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

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

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

215 (a) an agent acting under a power of attorney executed before, on, or after the
216 effective date of this chapter;

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

219 (c) a guardian appointed through a guardianship proceeding, whether pending in a
220 court or commenced before, on or after the effective date of this chapter; and

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

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

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