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LEGISLATIVE ACTION

Senate	.	House
Comm: WD	.	
02/05/2015	.	
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The Committee on Judiciary (Simpson) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

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

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

740.001 Short title.—This chapter may be cited as the



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12 "Florida Fiduciary Access to Digital Assets Act."

13 Section 3. Section 740.101, Florida Statutes, is created to
14 read:

15 740.101 Definitions.—As used in this chapter, the term:

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

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

25 (3) "Carry" means to engage in the transmission of
26 electronic communications.

27 (4) "Catalogue of electronic communications" means
28 information that identifies each person with which an account
29 holder has had an electronic communication, the time and date of
30 the communication, and the electronic address of the person.

31 (5) "Content of an electronic communication" means
32 information concerning the substance or meaning of the
33 communication which:

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

35 (b) Is in electronic storage by a custodian providing an
36 electronic communication service to the public or is carried or
37 maintained by a custodian providing a remote computing service
38 to the public; and

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

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



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41 (7) "Custodian" means a person that carries, maintains,
42 processes, receives, or stores a digital asset of an account
43 holder.

44 (8) "Digital asset" means an electronic record. The term
45 does not include an underlying asset or liability to which an
46 electronic record refers, unless the asset or liability is
47 itself an electronic record.

48 (9) "Electronic" means technology having electrical,
49 digital, magnetic, wireless, optical, electromagnetic, or
50 similar capabilities.

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

53 (11) "Electronic communication service" means a custodian
54 that provides to an account holder the ability to send or
55 receive an electronic communication.

56 (12) "Fiduciary" means a person that is an original,
57 additional, or successor personal representative, guardian,
58 agent, or trustee.

59 (13) "Guardian" means a person who is appointed by the
60 court as guardian of the property of a minor or an incapacitated
61 individual. The term includes a person appointed by the court as
62 an emergency temporary guardian of the property.

63 (14) "Information" means data, text, images, videos,
64 sounds, codes, computer programs, software, databases, or the
65 like.

66 (15) "Person" means an individual, estate, trust, business
67 or nonprofit entity, public corporation, government or
68 governmental subdivision, agency, or instrumentality, or other
69 legal entity.



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

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

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

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

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

86 (21) "Terms-of-service agreement" means an agreement that
87 controls the relationship between an account holder and a
88 custodian.

89 (22) "Trustee" means a fiduciary that holds legal title to
90 a digital asset pursuant to an agreement, declaration, or trust
91 instrument that creates a beneficial interest in the settlor or
92 others.

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

95 (24) "Will" means an instrument admitted to probate,
96 including a codicil, executed by an individual in the manner
97 prescribed by the Florida Probate Code, which disposes of the
98 individual's property on or after his or her death. The term



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99 includes an instrument that merely appoints a personal
100 representative or revokes or revises another will.

101 Section 4. Section 740.201, Florida Statutes, is created to
102 read:

103 740.201 Authority of personal representative over digital
104 assets of a decedent.—Subject to s. 740.601(2) and unless
105 otherwise provided by the court or the will of a decedent, a
106 personal representative has the right to access:

107 (1) The content of an electronic communication that the
108 custodian is permitted to disclose under the Electronic
109 Communications Privacy Act, 18 U.S.C. s. 2702(b);

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

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

114 Section 5. Section 740.301, Florida Statutes, is created to
115 read:

116 740.301 Authority of guardian over digital assets of a
117 ward.—The court, after an opportunity for hearing, may grant a
118 guardian the right to access:

119 (1) The content of an electronic communication that the
120 custodian is permitted to disclose under the Electronic
121 Communications Privacy Act, 18 U.S.C. s. 2702(b);

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

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

126 Section 6. Section 740.401, Florida Statutes, is created to
127 read:



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128 740.401 Control by agent of digital assets.-
129 (1) To the extent that a power of attorney expressly grants
130 an agent authority over the content of an electronic
131 communication of the principal, and subject to s. 740.601(2),
132 the agent has the right to access the content of an electronic
133 communication that the custodian is permitted to disclose under
134 the Electronic Communications Privacy Act, 18 U.S.C. s. 2702(b).
135 (2) Except as provided in subsection (1) and unless
136 otherwise provided by a power of attorney or a court order, an
137 agent has the right to access:
138 (a) The catalogue of electronic communications sent or
139 received by the principal; and
140 (b) Any other digital asset in which the principal has a
141 right or interest.
142 Section 7. Section 740.501, Florida Statutes, is created to
143 read:
144 740.501 Control by trustee of digital assets.-Subject to s.
145 740.601(2) and unless otherwise provided by the court or the
146 terms of a trust:
147 (1) A trustee or a successor of a trustee who is an
148 original account holder has the right to access each digital
149 asset held in trust, including any catalogue of electronic
150 communications sent or received and the content of an electronic
151 communication; or
152 (2) A trustee or a successor of a trustee who is not an
153 original account holder has the right to access the following
154 digital assets held in trust:
155 (a) The catalogue of electronic communications sent or
156 received by the account holder;



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

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

162 Section 8. Section 740.601, Florida Statutes, is created to
163 read:

164 740.601 Fiduciary access and authority.—

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

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

172 (b) Has, for the purpose of applicable electronic privacy
173 laws, the lawful consent of the account holder for the custodian
174 to divulge the content of an electronic communication to the
175 fiduciary; and

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

178 (2) Unless an account holder, after June 30, 2015, agrees,
179 by an affirmative act separate from the account holder's assent
180 to other provisions of the terms of the service agreement, to a
181 provision in the service agreement which limits a fiduciary's
182 access to a digital asset of the account holder:

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

185 (b) The fiduciary's access under this chapter to a digital



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186 asset does not violate the terms of the service agreement even
187 if the agreement requires notice of a change in the account
188 holder's status.

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

194 (4) As to tangible personal property capable of receiving,
195 storing, processing, or sending a digital asset, a fiduciary
196 with authority over the property of a decedent, ward, principal,
197 or settlor has the right to access the property and any digital
198 asset stored in it and is an authorized user for purposes of any
199 applicable computer fraud and unauthorized access laws,
200 including the laws of this state.

201 Section 9. Section 740.701, Florida Statutes, is created to
202 read:

203 740.701 Compliance.—

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

208 (a) Access to the digital asset;
209 (b) Control of the digital asset; and
210 (c) A copy of the digital asset to the extent authorized by
211 copyright law.

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

213 (a) A personal representative who has the right of access
214 under s. 740.201, the request must be accompanied by a certified



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215 copy of the letters of administration of the personal
216 representative, an order authorizing a curator or administrator
217 ad litem, or other court order;

218 (b) A guardian that has the right of access under s.
219 740.301, the request must be accompanied by a certified copy of
220 letters of plenary guardianship of the property or a court order
221 that gives the guardian authority over the digital asset;

222 (c) An agent that has the right of access under s. 740.401,
223 the request must be accompanied by an original or a copy of the
224 power of attorney which authorizes the agent to exercise
225 authority over the digital asset and a certification of the
226 agent, under penalty of perjury, that the power of attorney is
227 in effect;

228 (d) A trustee that has the right of access under s.
229 740.501, the request must be accompanied by a certified copy of
230 the trust instrument, or a certification of trust under s.
231 736.1017, which authorizes the trustee to exercise authority
232 over the digital asset; or

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

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

241 (4) A custodian that receives a certification of trust may
242 require the trustee to provide copies of excerpts from the
243 original trust instrument and later amendments which designate



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244 the trustee and confer on the trustee the power to act in the
245 pending transaction.

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

251 (6) A custodian that enters into a transaction in good
252 faith and in reliance on a certification of trust may enforce
253 the transaction against the trust property as if the
254 representations contained in the certification were correct.

255 (7) A custodian that demands the trust instrument in
256 addition to a certification of trust or excerpts under
257 subsection (4) is liable for damages if the court determines
258 that the custodian did not act in good faith in demanding the
259 trust instrument.

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

263 Section 10. Section 740.801, Florida Statutes, is created
264 to read:

265 740.801 Immunity.—A custodian and its officers, employees,
266 and agents are immune from liability for any action done in good
267 faith in compliance with this chapter.

268 Section 11. Section 740.901, Florida Statutes, is created
269 to read:

270 740.901 Relation to Electronic Signatures in Global and
271 National Commerce Act.—This chapter modifies, limits, or
272 supersedes the Electronic Signatures in Global and National



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273 Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify,
274 limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c),
275 or authorize electronic delivery of the notices described in s.
276 103(b) of that act, 15 U.S.C. s. 7003(b).

277 Section 12. Section 740.911, Florida Statutes, is created
278 to read:

279 740.911 Applicability.-

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

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

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

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

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

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

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

294

295 ===== T I T L E A M E N D M E N T =====

296 And the title is amended as follows:

297 Delete everything before the enacting clause
298 and insert:

299 A bill to be entitled

300 An act relating to digital assets; providing a
301 directive to the Division of Law Revision and



302 Information; creating s. 740.001, F.S.; providing a
303 short title; creating s. 740.101, F.S.; defining
304 terms; creating s. 740.201, F.S.; authorizing a
305 personal representative to have access to specified
306 digital assets of a decedent under certain
307 circumstances; creating s. 740.301, F.S.; authorizing
308 a guardian to have access to specified digital assets
309 of a ward under certain circumstances; creating s.
310 740.401, F.S.; authorizing an agent to have access to
311 specified digital assets of a principal under certain
312 circumstances; creating s. 740.501, F.S.; authorizing
313 a trustee to have access to specified digital assets
314 held in trust under certain circumstances; creating s.
315 740.601, F.S.; providing the rights of a fiduciary
316 relating to digital assets; providing that specified
317 provisions in a terms of service agreement are
318 unenforceable or void as against the public policy of
319 this state under certain circumstances; creating s.
320 740.701, F.S.; providing requirements for compliance
321 for a custodian, a personal representative, a
322 guardian, an agent, a trustee, or another person that
323 is entitled to receive and collect specified digital
324 assets; providing for damages if a demand for the
325 trust instrument is not made in good faith by a
326 custodian; providing applicability; creating s.
327 740.801, F.S.; providing immunity for a custodian and
328 its officers, employees, and agents for any action
329 done in good faith and in compliance with ch. 740,
330 F.S.; creating s. 740.901, F.S.; clarifying the



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331 relationship of ch. 740, F.S., to the Electronic
332 Signatures in Global and National Commerce Act;
333 creating s. 740.911, F.S.; providing applicability;
334 providing an effective date.