

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.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 102

INTRODUCER: Senator Hukill and others

SUBJECT: Digital Assets

DATE: February 2, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>FP</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 102 is a state adaptation of the Uniform Fiduciary Access to Digital Assets Act developed by the Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws. The bill vests personal representatives of a decedent, agents under a power of attorney, guardians, and trustees with the ability to access the digital assets of an account holder as if these fiduciaries were the account holder. Digital assets include electronic communications and records such as emails, text messages, online photographs, documents stored on the cloud, electronic bank statements, and other electronic communications or records.

The bill expressly states that the fiduciaries are authorized users for purposes of criminal laws prohibiting unauthorized access to electronic accounts. For purposes of privacy laws prohibiting email service providers and similar entities from disclosing an account holder's records without the account holder's consent, the bill provides that the fiduciaries are deemed to have the lawful consent of the account holders.

II. Present Situation:

Technology has dramatically transformed how people communicate, receive and store information, and transact business. Before the Internet was developed, most information and correspondence existed in tangible forms. The news was printed on paper and delivered by the paperboy, correspondence was delivered by the postal carrier to mailboxes, and music was played from vinyl records. To retain items, photographs were glued into photo albums and correspondence was filed in metal filing cabinets.¹ When someone died or became incapacitated, most of his or her personal information could be located by a family member, personal representative, or guardian who sifted through the paper records in the person's home. Incoming

¹ The National Conference of Commissioners on Uniform State Laws, *Legislative Fact Sheet – Fiduciary Access to Digital Assets*, <http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets> (last visited Jan. 23, 2015).

mail would eventually divulge where the person banked and what bills needed to be paid. The quest to identify and access someone's assets, however, is changing with the advent of digital communications.

Many assets that once existed in a tangible form are being replaced by digital assets² that are intangible and not readily discoverable or accessible. Substantial amounts of valuable electronic data and digital assets are acquired and stored in cell phones, laptops, personal computers, online accounts, and other devices.³ Accordingly, a family member or personal representative often faces substantial challenges when trying to identify, locate, or access the online accounts and digital assets of a deceased or incapacitated person. One recent report stated that millions of Internet accounts "belong" to deceased people.⁴

Upon an account holder's death or incapacity, how does someone in a fiduciary⁵ relationship 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 term of service agreement control whether a successor may gain access to an account?

Resolution of these legal issues is pitting 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 and not illegally divulge information that could be a violation of state and federal computer security laws. An additional barrier for guardians exists in the conditions of the terms of service agreement that the original account holder agreed to when initiating a contract with the service provider.

Criminal Laws

Federal Law

Federal and state laws prohibit the unauthorized access of both computer systems and certain types of protected data. The most relevant federal laws, passed in 1986, are the Stored Communications Act⁶ and the Computer Fraud and Abuse Act.⁷ The Stored Communications Act, which was part of the Electronic Communications Privacy Act,⁸ establishes privacy rights and prohibits certain electronic communication services or remote computing services from knowingly divulging the contents of certain electronic communications and files. These privacy protections are viewed by some as being substantial barriers for family members and fiduciaries

² 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.

³ James D. Lamm, Digital Passing: Estate Planning for Passwords and Digital Property, *Video Clip: Family Wants Access to Son's Digital Data After Death* (Sept. 10, 2014), <http://www.digitalpassing.com/2014/09/10/video-clip-family-access-sons-digital-data-death/> (last visited Jan. 23, 2015).

⁴ The National Conference of Commissioners on Uniform State Laws, *Uniform Fiduciary Access to Digital Assets Act* (June 6, 2014) http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014am_ufadaa_draft.pdf.

⁵ 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).

⁶ 18 U.S.C. s. 2701 *et seq.*

⁷ 18 U.S.C. s. 1030 *et seq.*

⁸ 18 U.S.C. s. 2510, *et seq.*

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. Their 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.⁹

The Computer Fraud and Abuse Act is a computer security law that outlaws conduct that victimizes computer systems. 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.¹⁰ The law imposes penalties for the unauthorized access of stored data, devices, and computer hardware.¹¹ The U.S. Department of Justice has stated that the Computer Fraud and Abuse 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 web site's terms of service agreement or usage policies.¹²

State Law

Two chapters in the *Florida Statutes* address computer related crimes and the security of communications and are modeled after the federal Stored Communications Act. Chapter 815 is the "Florida Computer Crimes Act" and Chapter 934 is entitled "Security of Communications; Surveillance." Neither chapter addresses the ability of a fiduciary to legally access, duplicate, or control digital assets.¹³

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 services 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.

⁹ James D. Lamm, *Digital Passing: Your Client is Six Feet Under, But His Data is in the Cloud*, Nov. 2014 (on file with the Senate Committee on Judiciary).

¹⁰ Charles Doyle, Congressional Research Service, *Cybercrime: A Sketch of 18 U.S.C. 1030 and Related Federal Criminal Laws* (Feb. 25, 2008).

¹¹ William Bissett and David Kauffman, *Surf the Evolving Web of Laws Affecting Digital Assets*, 41 *Estate Planning* No. 4 (Apr. 2014).

¹² Lamm, *supra* note 9, at 10.

¹³ The Real Property, Probate, & Trust Law Section of The Florida Bar, *White Paper: Proposed Enactment of Chapter 740, Florida Statutes* (2014) (on file with the Senate Committee on Judiciary).

A Model Uniform Law

Believing that legislation was needed to ensure that account holders or their guardians retain control of digital property, the Uniform Law Commission¹⁴ developed and adopted the Uniform Fiduciary Access to Digital Assets Act in July, 2014, to address these issues. The Real Property, Probate and Trust Law Section of The Florida Bar has modified the uniform law and drafted Senate Bill 102 to enable fiduciaries to access the digital assets of decedents, wards, principals, and settlors of a trust who are or were, prior to death, residents of Florida.

III. Effect of Proposed Changes:

Purpose

This legislation creates the “Florida Fiduciary Access to Digital Assets Act.” According to the Real Property, Probate and Trust Law Section (RPPTL) of The Florida Bar, the goal of the act is two-fold:

- To remove barriers that impede a fiduciary’s ability to access electronic communications and records; and
- Leave unchanged any existing law governing fiduciary, probate, trust, banking, security, and agency law.

Limited Application

According to the RPPTL, the act is limited in its scope and applies only to fiduciaries who are already bound to act in compliance with their fiduciary duties and powers. It does not extend to family members or other people who seek access to the digital assets unless they are also fiduciaries. 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.

The act is further limited by the definition of “digital assets.” The act’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.

Definitions (Section 3)

Section 3 of the bill defines 24 terms used in the act. The majority of those terms are found in the Florida Probate Code and the Florida Powers of Attorney Act, while others are adapted from federal statutes or the Uniform Fiduciary Access to Digital Assets Act. Some of the most frequently used terms in this act are listed below.

An “account holder” is defined as a person who has entered into a terms-of-service agreement with a custodian as well as the fiduciary for that person. It also includes a deceased person who entered into the agreement during the individual’s life time. Under this provision, the fiduciary steps into the shoes of the original account holder.

¹⁴ 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.

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

“Content of an electronic communication” is defined to mean information not readily accessible to the public concerning the substance or meaning of an electronic communication.

A “custodian” is defined as a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

A “digital asset” is defined as an electronic record but does not include the underlying asset or liability unless the asset or liability is an electronic record.

“Electronic communication” is defined as a digital asset stored by an electronic communication service or carried or maintained by a remote computing service and includes the catalogue and content of an electronic communication.

“Electronic communication service” means a custodian that provides to the public the ability to send or receive an electronic communication, an example of which would be Internet service providers.

Four Types of Fiduciaries Covered (Sections 4-7)

Under the bill, a fiduciary who is authorized to access another’s digital assets must be a personal representative of a decedent, a guardian of a ward, an agent for a principal under a power of attorney, or a trustee of a trust. The authority applies whether the fiduciary is the original, additional, or successor fiduciary.

In essence, the bill provides that the fiduciary steps into the shoes of the person he or she is representing through this grant of authority to manage their digital assets.

Each of the four types of fiduciaries are *generally* given the right to access:

- The content of an electronic communication sent or received by the decedent, ward, principal, or held in trust *if* the electronic communication service or remote computing service is authorized to disclose the content under the Electronic Communications Privacy Act. The “content” is defined in the act as being information not readily accessible to the public concerning the substance or meaning of an electronic communication. In lay terms, it is generally understood to be the subject line of an e-mail or the body of an e-mail or the body of other types of electronic communications that are protected by the Stored Communications Act.¹⁵

¹⁵ 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 the Stored Communications Act does not protect all records held in electronic storage by storage providers. The Act only protects the content of an electronic communication 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 service to the public, and access to the content is restricted in a manner so that it is not completely public.

- The “catalogue” of electronic communications sent or received by the decedent. The “catalogue” is understood in lay terms to be the non-content records that a service provider holds such as the sender’s and recipient’s name and address, and the date and time of the e-mail message; and
- Any other digital asset that the decedent had a right or interest in at his or her death. The digital assets include both the content and the catalog of an electronic communication.

The authority of a personal representative or trustee to access a decedent’s or settlor’s digital assets can be restricted by court order, the terms of a trust or will, or by agreement between a service provider and the account holder decedent or trust settlor to restrict a fiduciary’s access to the digital assets.¹⁶ With respect to guardians, a guardian is not authorized to access a ward’s digital assets unless authorized by court order after a hearing.

Section 7 of the bill, regarding the control of digital assets by a trustee, is structured slightly differently than the provisions relating to other types of fiduciaries. The bill makes distinctions between a trustee who is an original account holder and a trustee who is not an original account holder. It states that unless it is otherwise provided by the court or the terms of the trust, a trustee or a successor of a trustee that is the original account holder has the right to access each digital asset held in trust, including the catalogue of electronic communications sent or received and the content of an electronic communication. The language then provides, like the other fiduciaries, that the trustee or successor of a trust that is not an original account holder has the right to access the catalogue of electronic communications. The trustee will have access to the content of the settlor’s communications *if* the electronic communication service or remote computing services is authorized to disclose them under federal law.

A Fiduciary’s Access and Authority Over the Digital Assets (Section 8)

Section 8 of the bill establishes the fiduciary’s access to, and authority over, the digital assets of the account holder. The fiduciary remains subject to the duties and obligations of existing law and is liable if a breach of those duties occurs. If an asset was illegally obtained by the account holder, the fiduciary does not have any power over that asset.

The section provides that a fiduciary that is an account holder or has the right to access a digital asset:

- May take any action regarding the digital asset to the extent the account holder had that authority, subject to terms of a service agreement and copyright laws. However, if the original account holder chose to limit a fiduciary’s authority to access an account in a term of service agreement, that limitation prevails.
- Is deemed to have the consent of the account holder for the custodian to divulge the content of an electronic communication under applicable privacy laws.
- Is an authorized user under applicable computer fraud and unauthorized access laws. By defining the fiduciary as an authorized user, this section clarifies that the fiduciary is legally

Email from James D. Lamm, Attorney, to Judiciary Committee staff (Jan. 30, 2015) (on file with the Senate Committee on Judiciary).

¹⁶ See sections 4 and 7 of the bill.

authorized to access the digital information and is not in violation of the federal or state laws prohibiting unauthorized access.

Provisions in Terms-of-Service Agreements and Access to Tangible Personal Property (Sections 8 & 9)

Section 740.601(2), F.S., which is created by the bill, addresses terms of service agreements. If a terms-of-service agreement limits a fiduciary's access to a digital asset of an account holder, the bill declares the provision as against the public policy of the state unless the account holder agreed to the provision after July 1, 2015, the effective date of this legislation. Additionally, the bill requires that the account holder affirmatively agree to the limits on access in an agreement that is separate from the account holder's agreement to other provisions of the term-of-service agreement. Thus, under the bill, account holders effectively consent to the disclosure of their digital assets to a fiduciary unless they affirmatively act to opt out of disclosing their digital assets.

Section 740.601(3), F.S., addresses choice of law provisions in terms-of-service agreements by declaring that a choice-of-law provision is unenforceable if the provision designates a law that limits a fiduciary's access to a digital asset.

Section 740.601(4), F.S., clarifies that a fiduciary is authorized to access digital assets stored on equipment of the decedent, ward, principal, or settlor. This provision supersedes state criminal laws on unauthorized access to equipment. For criminal law purposes, this language makes clear that a fiduciary has authorization to access the account holder's digital assets that are held locally or remotely.

Section 740.701(5), F.S., which is created by the bill, provides that the fiduciary has the right to access the decedent's, ward's, principal's, or settlor's tangible personal property, such as a computer or cell phone, that receives, stores, processes, or sends digital assets and the digital assets stored on the device and is an authorized user for purposes of applicable computer fraud and unauthorized access laws.

Compliance (Sections 9 & 10)

Section 9 of the bill specifies procedures for a fiduciary to request access to, control of, or a copy of an account holder's digital assets, and requires the custodian's compliance with the fiduciary's request if:

- A personal representative with the right of access submits with the request a certified copy of the letters of administration or other specified document; A guardian having the right of access submits an accompanying certified copy of letters of plenary guardianship or a court order giving the guardian authority over the asset; An agent having the right of access submits with the request an original or copy of the power of attorney and a certification of the agent, under penalty of perjury, that the power of attorney is in effect;
- A trustee having the right of access submits a request accompanied by a certified copy of the trust instrument or a certification of trust authorizing the trustee to exercise authority over the asset; or

- A person entitled to receive and collect specified digital assets submits a request accompanied by a certified copy of an order of summary administration.

The custodian is required to comply with a request within 60 days after receipt of the request.

A custodian who relies on a certification of trust and does not know that certain representations in the trust or amendments are incorrect is not liable for acting in reliance on those documents. However, if the custodian demands additional documentation regarding the trust or amendments, he or she is liable for damages if a court determines that the custodian did not act in good faith when demanding the trust instrument. As provided in s. 740.801, F.S., which is created by the bill, a custodian is immune from liability if it acts in good faith in compliance with the bill.

Electronic Signatures in Global and National Commerce Act (Section 11)

Section 740.901, F.S., which is created by the bill 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.

Application of the Bill (Section 12)

Section 740.011, F.S., created by the bill, provides that the power granted by the act to personal representatives, guardians, trustees, and agents applies to these fiduciaries regardless of whether their authority arose on, before, or after July 1, 2015, the effective date of the bill.¹⁷ Additionally, the bill does not apply to a digital asset of an employer used by an employee in the ordinary course of the employ's business.

Effective Date (Section 13)

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

¹⁷ By allowing the bill to apply retroactively to the digital assets of individuals who died or became incapacitated before the bill takes effect, the bill effectively assumes that given the choice, these individuals would not have acted to restrict access to their digital assets.

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, a service provider, with few exceptions, may not divulge the contents of a communication without the “lawful consent” of the originator or addressee or intended recipient or the subscriber.¹⁸ There is no case law directly on point which explains whether a state statute can deem that a decedent, settler, principal, or ward lawfully consents to the release of his or her communications to a fiduciary. Additionally, committee staff is not aware of any case law indicating whether a state statute can define who is an authorized user of an account for purposes of federal laws that prohibit the unauthorized access to certain electronic data. Thus, arguments exist that federal law preempts the access to digital assets authorized by the bill. However, fiduciaries are generally understood to stand in the shoes of those they represent and this bill seems consistent with the traditional functions of fiduciaries.

Notwithstanding the foregoing, the bill, because of its word choice, arguably might not conflict with federal law at all. Specifically, the bill provides fiduciaries with access to an account holder’s electronic communication *if* authorized by federal law. Thus, the bill could be read to reserve to the courts, the duty of defining what access is authorized under federal law.

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, will incur costs in reviewing requests for access to digital assets and then making those assets available.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

¹⁸ 18 U.S.C. 2702(b)(3).

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 740.001, 740.101, 740.201, 740.301, 740.401, 740.501, 740.601, 740.701, 740.801, 740.901, and 740.911.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
