

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 313 Digital Assets
SPONSOR(S): Civil Justice Subcommittee; Fant
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 102

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Malcolm	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The bill creates the Florida Fiduciary Access to Digital Assets Act (Act) to provide fiduciaries such as the personal representative of a decedent, an agent under a power of attorney, a guardian, or a trustee with the ability to access the digital assets of the deceased, principal, or ward, as if the fiduciary were the computer 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 provides that a fiduciary is an authorized user 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 a fiduciary is deemed to have the lawful consent of the account holder.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED 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 assets¹ 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.² 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.

This switch to electronic records and digital assets raise 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 term of service agreement control whether a successor 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 and not divulge information that could be a violation of state or 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 service provider.

Criminal Laws

Federal Law

Federal laws prohibit the unauthorized access of both computer systems and certain types of protected data. The Stored Communications Act³ 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 who seek to access the contents of a deceased or incapacitated user's online accounts.⁴ 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.⁵

The Computer Fraud and Abuse Act⁶ 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.⁷ The law imposes penalties for the unauthorized access of stored data, devices, and computer hardware.⁸ The

¹ 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.

² See 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 March 11, 2015).

³ 18 U.S.C. s. 2701 *et seq.*

⁴ 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).

⁵ *Id.*

⁶ 18 U.S.C. s. 2510, *et seq.*

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

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

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 violates the access terms of a web site's terms-of-service agreement or usage policies.⁹

State Law

Chapter 815, F.S., the "Florida Computer Crimes Act," and Ch. 934, F.S., "Security of Communications; Surveillance," address computer related crimes and the security of communications and are modeled after the federal Stored Communications Act. Neither provision addresses the ability of a fiduciary to legally access, duplicate, or control digital assets.¹⁰

The Model Uniform Law

Believing that legislation was needed to ensure that account holders or their guardians retain control of digital property, the Uniform Law Commission developed and adopted the Uniform Fiduciary Access to Digital Assets Act in July, 2014.

Effect of the Bill

The bill creates ch. 740, F.S., consisting of ss. 740.001-740.911, 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 different 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 assets." The act only applies 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

The bill creates s. 740.101, F.S., to define terms used in the Act. The majority of the 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 act. Below are some of the most frequently used new terms in the bill:

- An "account holder" is defined as a person who has entered into a terms-of-service agreement with a custodian as well as a fiduciary for that person. It also includes a deceased person who entered into the agreement during the individual's lifetime. Under this definition, the fiduciary steps into the shoes of the original account holder;
- "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 concerning the substance of an electronic communication which has been sent or received by an account holder; is in electronic storage, or carried or maintained by a custodian; and, is not readily accessible to the public;
- A "custodian" is defined as a person that carries, maintains, processes, receives, or stores a digital asset of an account holder, such as an ISP;
- 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;

⁹ Lamm, *supra* note 4, at 10.

¹⁰ The Real Property, Probate, & Trust Law Section of The Florida Bar, *White Paper: Proposed Enactment of Chapter 740, Florida Statutes* (2014).

- “Electronic communication” has the same meaning as provided in federal law¹¹; and
- “Electronic communication service” means a custodian that provides to an account holder the ability to send or receive an electronic communication, such as a web-based email provider;

Four Types of Fiduciaries Covered (Sections 4-7)

The bill creates ss. 740.201-740.501, F.S., which provide that only a fiduciary who is a personal representative of a decedent, a guardian of a ward, an agent for a principal under a power of attorney, or a trustee may be authorized to access another’s digital assets. 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 that the custodian is authorized to disclose under federal law. The “content” is generally 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 federal law;
- The “catalogue” of electronic communications sent or received by the decedent. The “catalogue” is 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 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 settlor to restrict a fiduciary’s access to the digital assets. With respect to guardians, a guardian is not authorized to access a ward’s digital assets unless authorized by court order.

Section 750.501, F.S., regarding the control of digital assets by a trustee, is structured slightly different than the provisions relating to other types of fiduciaries. The bill distinguishes a trustee who is an original account holder from a trustee who is not an original account holder. Unless otherwise provided by the court or the terms of the trust, 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 and the content of an electronic communication. Similar to provisions in the bill for the other fiduciaries, a 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 740.601, F.S., created in 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 any terms-of-service agreement and is liable for any breach that occurs.

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 of the account holder, subject to any limitations in a terms of a service agreement and copyright laws;
- 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; and
- Is an authorized user under applicable computer fraud and unauthorized access laws. By defining the fiduciary as an authorized user, this section provides that the fiduciary is legally

¹¹ 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.”)

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 (Section 8)

Section 740.601(2), F.S., which is created in the bill, addresses terms-of-service agreements. A provision in a terms-of-service agreement that limits a fiduciary's access to a digital asset of an account holder is declared to be against the public policy of the state unless the account holder agreed to the provision in a separate, affirmative act. Such separate and affirmative consent supersedes any contrary direction in the account holder's will, trust, or power of attorney. The bill effectively provides that account holders consent to the disclosure of their digital assets to a fiduciary unless they affirmatively opt out of disclosing their digital assets. The bill also declares that a choice-of-law provision in a terms-of-service agreement is unenforceable if the provision designates a law that limits a fiduciary's access to a digital asset.

Section 740.601(5), F.S., provides that a fiduciary is authorized to access digital assets stored on equipment that is the tangible property of the decedent, ward, principal, or settlor, such as a computer or cell phone. This provision shields a fiduciary from criminal and civil liability for unauthorized access of such equipment.

Compliance and Immunity (Sections 9 & 10)

Section 740.701, F.S., created in the bill provides the 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 within 60 days, if:

- A personal representative submits a certified copy of the letters of administration or other specified document;
- A guardian submits a certified copy of letters of plenary guardianship or a court order giving the guardian authority over the asset;
- An agent submits 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 submits 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.

A custodian who relies on a certification of trust is not liable if he or she acts in reliance on those documents. However, if the custodian demands the trust instrument, 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. The bill also provides that 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 the Act and the Electronic Signatures in Global and National Commerce Act, which regulates the recognition of electronic signatures for interstate and foreign commerce, noting where this act does and does not modify the federal law.

Exception for Anonymous Accounts (Section 12)

Section 740.921, F.S., created by the bill, provides that nothing in the bill prevents any person from opening an anonymous account. The custodian of an anonymous account is not required to provide a fiduciary with access to the anonymous account unless the fiduciary establishes by clear and convincing evidence that the owner of the account is deceased; that the account belonged to the

decedent; and, that the fiduciary has legal authority over the estate of the decedent who owned the account.

Applicability of the Act (Section 13)

Section 740.921, F.S., created by the bill, provides that the powers granted by the Act to personal representatives, guardians, trustees, and agents applies regardless of whether the fiduciary's authority arose on, before, or after July 1, 2015 (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.

Effective Date (Section 14)

The bill provides an effective date of July 1, 2015.

B. SECTION DIRECTORY:

Section 1 creates ch. 740, F.S., consisting of ss. 740.001-740.911, F.S., to be entitled "Fiduciary Access to Digital Assets."

Section 2 creates s. 740.001, F.S., relating to the short title.

Section 3 creates s. 740.101, F.S., relating to definitions.

Section 4 creates s. 740.201, F.S., relating to the authority of a personal representative over the digital assets of a decedent.

Section 5 creates s. 740.301, F.S., relating to the authority of a guardian over the digital assets of a ward.

Section 6 creates s. 740.401, F.S., relating to the control by an agent over digital assets.

Section 7 creates s. 740.501, F.S., relating to the control by a trustee over digital assets.

Section 8 creates s. 740.601, F.S., relating to fiduciary access and authority.

Section 9 creates s. 740.701, F.S., relating to compliance.

Section 10 creates s. 740.801, F.S., relating to immunity.

Section 11 creates s. 740.901, F.S., relating to the relation to the Electronic Signatures in Global and National Commerce Act.

Section 12 creates s. 740.911, F.S., relating to exceptions for anonymous accounts.

Section 13 creates s. 740.921, F.S., relating to applicability.

Section 14 provides an effective date of July 1, 2015.

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:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The doctrine of preemption 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.¹² There is no case law directly on point that addresses 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, there does not appear to be 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. Therefore, it is unclear whether 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, might not conflict with federal law because it 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.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 12 of the bill provides a limited exemption from the Act for "anonymous account." However, the term "anonymous account" is not defined in the bill.

¹² 18 U.S.C. 2702(b)(3).
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Section 13 of the bill provides that the Act applies retroactively to the digital assets of individuals who died or became incapacitated before the bill takes effect. Consequently, the bill assumes that given the choice, these individuals would not have acted to restrict access to their digital assets.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 17, 2015, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Updates definitions for "content of an electronic communication," "digital asset," "electronic communication," "electronic communication service," "remote computing service," "trustee," and "ward";
- Provides that a custodian may disclose to a personal representative, guardian, agent, or trustee only the content of an electronic communication that it is permitted to disclose pursuant to federal law;
- Provides that an account holder may consent to a provision in a terms-of-service agreement that limits a fiduciary's access and that such consent supersedes any contrary direction in the account holder's will, trust, or power of attorney; and
- Creates an exception for anonymous accounts.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.