

1 A bill to be entitled

2 An act relating to digital assets; providing a  
3 directive to the Division of Law Revision and  
4 Information; creating s. 740.001, F.S.; providing a  
5 short title; creating s. 740.101, F.S.; defining  
6 terms; creating s. 740.201, F.S.; authorizing a  
7 personal representative to have access to specified  
8 digital assets of a decedent under certain  
9 circumstances; creating s. 740.301, F.S.; authorizing  
10 a guardian to have access to specified digital assets  
11 of a ward under certain circumstances; creating s.  
12 740.401, F.S.; authorizing an agent to have access to  
13 specified digital assets of a principal under certain  
14 circumstances; creating s. 740.501, F.S.; authorizing  
15 a trustee to have access to specified digital assets  
16 held in trust under certain circumstances; creating s.  
17 740.601, F.S.; providing the rights of a fiduciary  
18 relating to digital assets; providing that specified  
19 provisions in a terms-of-service agreement are  
20 unenforceable or void as against the strong public  
21 policy of this state under certain circumstances;  
22 creating s. 740.701, F.S.; providing requirements for  
23 compliance for a custodian, a personal representative,  
24 a guardian, an agent, a trustee, or another person  
25 that is entitled to receive and collect specified  
26 digital assets; providing for damages if a demand for

27 the trust instrument is not made in good faith by a  
 28 custodian; providing applicability; creating s.  
 29 740.801, F.S.; providing immunity for a custodian and  
 30 its officers, employees, and agents for any action  
 31 done in good faith and in compliance with ch. 740,  
 32 F.S.; creating s. 740.901, F.S.; clarifying the  
 33 relationship of ch. 740, F.S., to the Electronic  
 34 Signatures in Global and National Commerce Act;  
 35 creating s. 740.911, F.S.; providing applicability;  
 36 providing an effective date.

37

38 Be It Enacted by the Legislature of the State of Florida:

39

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

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

46 740.001 Short title.—This chapter may be cited as the  
 47 "Florida Fiduciary Access to Digital Assets Act."

48 Section 3. Section 740.101, Florida Statutes, is created  
 49 to read:

50 740.101 Definitions.—As used in this chapter, the term:

51 (1) "Account holder" means a person that has entered into  
 52 a terms-of-service agreement with a custodian and also includes

53 a fiduciary for such person. The term includes a deceased  
54 individual who entered into the agreement during the  
55 individual's lifetime.

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

61 (3) "Carry" means to engage in the transmission of  
62 electronic communications.

63 (4) "Catalogue of electronic communications" means  
64 information that identifies each person with which an account  
65 holder has had an electronic communication, the time and date of  
66 the communication, and the electronic address of the person.

67 (5) "Content of an electronic communication" means  
68 information not readily accessible to the public concerning the  
69 substance or meaning of an electronic communication.

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

71 (7) "Custodian" means a person that carries, maintains,  
72 processes, receives, or stores a digital asset of an account  
73 holder.

74 (8) "Digital asset" means an electronic record. The term  
75 does not include an underlying asset or liability to which an  
76 electronic record refers, unless the asset or liability is  
77 itself an electronic record.

78 (9) "Electronic" means technology having electrical,

79 digital, magnetic, wireless, optical, electromagnetic, or  
 80 similar capabilities.

81 (10) "Electronic communication" means a digital asset  
 82 stored by an electronic communication service or carried or  
 83 maintained by a remote computing service. The term includes the  
 84 catalogue of electronic communications and the content of an  
 85 electronic communication.

86 (11) "Electronic communication service" means a custodian  
 87 that provides to the public the ability to send or receive an  
 88 electronic communication.

89 (12) "Fiduciary" means a person that is an original,  
 90 additional, or successor personal representative, guardian,  
 91 agent, or trustee.

92 (13) "Guardian" means a person that has been appointed by  
 93 the court as guardian of the property of a minor or  
 94 incapacitated individual. The term includes a person that has  
 95 been appointed by the court as an emergency temporary guardian  
 96 of the property.

97 (14) "Information" means data, text, images, videos,  
 98 sounds, codes, computer programs, software, databases, or the  
 99 like.

100 (15) "Person" means an individual, estate, trust, business  
 101 or nonprofit entity, public corporation, government or  
 102 governmental subdivision, agency, or instrumentality, or other  
 103 legal entity.

104 (16) "Personal representative" means the fiduciary

105 appointed by the court to administer the estate of a deceased  
 106 individual pursuant to letters of administration or an order  
 107 appointing a curator or administrator ad litem for the estate.

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

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

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

116 (20) "Remote computing service" means a custodian that  
 117 provides to the public computer processing services or the  
 118 storage of digital assets by means of an electronic  
 119 communications system as defined in 18 U.S.C. s. 2510(14).

120 (21) "Terms-of-service agreement" means an agreement that  
 121 controls the relationship between an account holder and a  
 122 custodian.

123 (22) "Trustee" means a fiduciary that holds legal title to  
 124 a digital asset pursuant to an agreement, declaration, or trust  
 125 instrument that creates a beneficial interest in the settlor or  
 126 others.

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

129 (24) "Will" means an instrument admitted to probate,  
 130 including a codicil, executed by an individual in the manner

131 prescribed by the Florida Probate Code, which disposes of the  
 132 individual's property on or after his or her death. The term  
 133 includes an instrument that merely appoints a personal  
 134 representative or revokes or revises another will.

135 Section 4. Section 740.201, Florida Statutes, is created  
 136 to read:

137 740.201 Authority of personal representative over digital  
 138 assets of a decedent.—Subject to s. 740.601(2) and unless  
 139 otherwise provided by the court or the will of a decedent, a  
 140 personal representative has the right to access:

141 (1) The content of an electronic communication sent or  
 142 received by the decedent if the electronic communication service  
 143 or remote computing service is authorized to disclose the  
 144 content under the Electronic Communications Privacy Act, 18  
 145 U.S.C. s. 2702(b);

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

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

150 Section 5. Section 740.301, Florida Statutes, is created  
 151 to read:

152 740.301 Authority of guardian over digital assets of a  
 153 ward.—The court, after an opportunity for hearing, may grant a  
 154 guardian the right to access:

155 (1) The content of an electronic communication sent or  
 156 received by the ward if the electronic communication service or

157 remote computing service is authorized to disclose the content  
 158 under the Electronic Communications Privacy Act, 18 U.S.C. s.  
 159 2702(b);

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

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

164 Section 6. Section 740.401, Florida Statutes, is created  
 165 to read:

166 740.401 Control by agent of digital assets.—

167 (1) To the extent a power of attorney expressly grants  
 168 authority to an agent over the content of an electronic  
 169 communication of the principal, the agent has the right to  
 170 access the content of an electronic communication sent or  
 171 received by the principal if the electronic communication  
 172 service or remote computing service is authorized to disclose  
 173 the content under the Electronic Communications Privacy Act, 18  
 174 U.S.C. s. 2702(b).

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

178 (a) The catalogue of electronic communications sent or  
 179 received by the principal; and

180 (b) Any other digital asset in which the principal has a  
 181 right or interest.

182 Section 7. Section 740.501, Florida Statutes, is created

183 to read:

184 740.501 Control by trustee of digital assets.—Subject to  
 185 s. 740.601(2) and unless otherwise provided by the court or the  
 186 terms of a trust, a trustee or a successor of a trustee that is:

187 (1) An original account holder has the right to access  
 188 each digital asset held in trust, including the catalogue of  
 189 electronic communications sent or received and the content of an  
 190 electronic communication; or

191 (2) Not an original account holder has the right to access  
 192 the following digital assets held in trust:

193 (a) The catalogue of electronic communications sent or  
 194 received by the account holder;

195 (b) The content of an electronic communication sent or  
 196 received by the account holder if the electronic communication  
 197 service or remote computing service is authorized to disclose  
 198 the content under the Electronic Communications Privacy Act, 18  
 199 U.S.C. s. 2702(b); and

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

202 Section 8. Section 740.601, Florida Statutes, is created  
 203 to read:

204 740.601 Fiduciary access and authority.—

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

208 (a) May take any action concerning the digital asset to

209 the extent of the account holder's authority and the fiduciary's  
210 powers under the laws of this state, subject to the terms-of-  
211 service agreement and copyright or other applicable law;

212 (b) Is deemed to have the lawful consent of the account  
213 holder for the custodian to divulge the content of an electronic  
214 communication to the fiduciary under applicable electronic  
215 privacy laws; and

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

218 (2) If a provision in a terms-of-service agreement limits  
219 a fiduciary's access to a digital asset of the account holder,  
220 the provision is void as against the strong public policy of  
221 this state unless the account holder agreed to the provision  
222 after July 1, 2015, by an affirmative act separate from the  
223 account holder's assent to other provisions of the terms-of-  
224 service agreement.

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

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

235 (5) As to tangible personal property capable of receiving,  
236 storing, processing, or sending a digital asset, a fiduciary  
237 with authority over the property of a decedent, ward, principal,  
238 or settlor has the right to access the property and any digital  
239 asset stored in it and is an authorized user for purposes of any  
240 applicable computer fraud and unauthorized access laws,  
241 including the laws of this state.

242 Section 9. Section 740.701, Florida Statutes, is created  
243 to read:

244 740.701 Compliance.—

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

249 (a) Access to the digital asset;

250 (b) Control of the digital asset; and

251 (c) A copy of the digital asset to the extent authorized  
252 by copyright law.

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

254 (a) A personal representative who has the right of access  
255 under s. 740.201, the request must be accompanied by a certified  
256 copy of the letters of administration of the personal  
257 representative, an order authorizing a curator or administrator  
258 ad litem, or other court order;

259 (b) A guardian that has the right of access under s.  
260 740.301, the request must be accompanied by a certified copy of

261 letters of plenary guardianship of the property or a court order  
262 that gives the guardian authority over the digital asset;

263 (c) An agent that has the right of access under s.  
264 740.401, the request must be accompanied by an original or a  
265 copy of the power of attorney which authorizes the agent to  
266 exercise authority over the digital asset and a certification of  
267 the agent, under penalty of perjury, that the power of attorney  
268 is in effect;

269 (d) A trustee that has the right of access under s.  
270 740.501, the request must be accompanied by a certified copy of  
271 the trust instrument, or a certification of trust under s.  
272 736.1017, which authorizes the trustee to exercise authority  
273 over the digital asset; or

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

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

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

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

292 (6) A custodian that enters into a transaction in good  
293 faith and in reliance on a certification of trust may enforce  
294 the transaction against the trust property as if the  
295 representations contained in the certification were correct.

296 (7) A custodian that demands the trust instrument in  
297 addition to a certification of trust or excerpts under  
298 subsection (4) is liable for damages if the court determines  
299 that the custodian did not act in good faith in demanding the  
300 trust instrument.

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

304 Section 10. Section 740.801, Florida Statutes, is created  
305 to read:

306 740.801 Immunity.—A custodian and its officers, employees,  
307 and agents are immune from liability for any action done in good  
308 faith in compliance with this chapter.

309 Section 11. Section 740.901, Florida Statutes, is created  
310 to read:

311 740.901 Relation to Electronic Signatures in Global and  
312 National Commerce Act.—This chapter modifies, limits, or

313 supersedes the Electronic Signatures in Global and National  
314 Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify,  
315 limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c),  
316 or authorize electronic delivery of the notices described in s.  
317 103(b) of that act, 15 U.S.C. s. 7003(b).

318 Section 12. Section 740.911, Florida Statutes, is created  
319 to read:

320 740.911 Applicability.—

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

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

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

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

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

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

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