

CHAPTER 2016-46

Committee Substitute for Committee Substitute for Senate Bill No. 494

An act relating to digital assets; providing a directive to the Division of Law Revision and Information; creating s. 740.001, F.S.; providing a short title; creating s. 740.002, F.S.; defining terms; creating s. 740.003, F.S.; authorizing a user to use an online tool to allow a custodian to disclose to a designated recipient or to prohibit a custodian from disclosing digital assets under certain circumstances; providing that a specified user's direction overrides a contrary provision in a terms-of-service agreement under certain circumstances; creating s. 740.004, F.S.; providing construction; authorizing the modification of a fiduciary's or designated recipient's access to digital assets under certain circumstances; creating s. 740.005, F.S.; providing procedures for the disclosure of digital assets; creating s. 740.006, F.S.; requiring a custodian to disclose the content of electronic communications of a deceased user under certain circumstances; creating s. 740.007, F.S.; requiring a custodian to disclose other digital assets of a deceased user under certain circumstances; creating s. 740.008, F.S.; requiring a custodian to disclose the content of electronic communications of a principal under certain circumstances; creating s. 740.009, F.S.; requiring a custodian to disclose other digital assets of a principal under certain circumstances; creating s. 740.01, F.S.; requiring a custodian to disclose to a trustee who is the original user the digital assets held in trust under certain circumstances; creating s. 740.02, F.S.; requiring a custodian to disclose to a trustee who is not the original user the content of electronic communications held in trust under certain circumstances; creating s. 740.03, F.S.; requiring a custodian to disclose to a trustee who is not the original user other digital assets under certain circumstances; creating s. 740.04, F.S.; authorizing the court to grant a guardian the right to access a ward's digital assets under certain circumstances; requiring a custodian to disclose to a guardian a specified catalog of electronic communications and specified digital assets of a ward under certain circumstances; creating s. 740.05, F.S.; imposing fiduciary duties; providing for the rights and responsibilities of certain fiduciaries; creating s. 740.06, F.S.; requiring compliance of a custodian; providing construction; providing for immunity from liability for a custodian and its officers, employees, and agents acting in good faith in complying with their duties; creating s. 740.07, F.S.; providing construction; creating s. 740.08, F.S.; providing applicability; creating s. 740.09, F.S.; providing severability; providing an effective date.

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

Section 1. The Division of Law Revision and Information is directed to create chapter 740, Florida Statutes, consisting of ss. 740.001-740.09, 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 “Florida Fiduciary Access to Digital Assets Act.”

Section 3. Section 740.002, Florida Statutes, is created to read:

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

(1) “Account” means an arrangement under a terms-of-service agreement in which the custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

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

(3) “Carries” means to engage in the transmission of electronic communications.

(4) “Catalog of electronic communications” means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) “Content of an electronic communication” means information concerning the substance or meaning of the communication which:

(a) Has been sent or received by a user;

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

(c) Is not readily accessible to the public.

(6) “Court” means a circuit court of this state.

(7) “Custodian” means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(8) “Designated recipient” means a person chosen by a user through an online tool to administer digital assets of the user.

(9) “Digital asset” means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(10) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(11) “Electronic communication” has the same meaning as provided in 18 U.S.C. s. 2510(12).

(12) “Electronic communication service” means a custodian that provides to a user the ability to send or receive an electronic communication.

(13) “Fiduciary” means an original, additional, or successor personal representative, guardian, agent, or trustee.

(14) “Guardian” means a person who is appointed by the court as guardian of the property of a minor or an incapacitated individual. The term includes an original guardian, a co-guardian, and a successor guardian, as well as a person appointed by the court as an emergency temporary guardian of the property.

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

(16) “Online tool” means an electronic service provided by a custodian which allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

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

(18) “Personal representative” means the fiduciary appointed by the court to administer the estate of a deceased individual pursuant to letters of administration or an order appointing a curator or administrator ad litem for the estate. The term includes an original personal representative, a copersonal representative, and a successor personal representative, as well as a person who is entitled to receive and collect a deceased individual’s property pursuant to an order of summary administration issued pursuant to chapter 735.

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

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

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

(22) “Remote computing service” means a custodian that provides to a user computer processing services or the storage of digital assets by means of an electronic communications system as defined in 18 U.S.C. s. 2510(14).

(23) “Terms-of-service agreement” means an agreement that controls the relationship between a user and a custodian.

(24) “Trustee” means a fiduciary that holds legal title to property under an agreement, declaration, or trust instrument that creates a beneficial interest in the settlor or other persons. The term includes an original trustee, a cotrustee, and a successor trustee.

(25) “User” means a person that has an account with a custodian.

(26) “Ward” means an individual for whom a guardian has been appointed.

(27) “Will” means an instrument admitted to probate, including a codicil, executed by an individual in the manner prescribed by the Florida Probate Code, which disposes of the individual’s property on or after his or her death. The term includes an instrument that merely appoints a personal representative or revokes or revises another will.

Section 4. Section 740.003, Florida Statutes, is created to read:

740.003 User direction for disclosure of digital assets.—

(1) A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user’s digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(2) If a user has not used an online tool to give direction under subsection (1) or if the custodian has not provided an online tool, the user may allow or prohibit disclosure to a fiduciary of some or all of the user’s digital assets, including the content of electronic communications sent or received by the user, in a will, trust, power of attorney, or other record.

(3) A user’s direction under subsection (1) or subsection (2) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user’s assent to the terms of service.

Section 5. Section 740.004, Florida Statutes, is created to read:

740.004 Terms-of-service agreement preserved.—

(1) This chapter does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use the digital assets of the user.

(2) This chapter does not give a fiduciary or a designated recipient any new or expanded rights other than those held by the user for whom, or for

whose estate or trust, the fiduciary or designated recipient acts or represents.

(3) A fiduciary’s or designated recipient’s access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under s. 740.003.

Section 6. Section 740.005, Florida Statutes, is created to read:

740.005 Procedure for disclosing digital assets.—

(1) When disclosing the digital assets of a user under this chapter, the custodian may, at its sole discretion:

(a) Grant a fiduciary or designated recipient full access to the user’s account;

(b) Grant a fiduciary or designated recipient partial access to the user’s account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or

(c) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(2) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this chapter.

(3) A custodian is not required to disclose under this chapter a digital asset deleted by a user.

(4) If a user directs or a fiduciary requests a custodian to disclose under this chapter some, but not all, of the user’s digital assets to the fiduciary or a designated recipient, the custodian is not required to disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or the fiduciary may seek an order from the court to disclose:

(a) A subset limited by date of the user’s digital assets;

(b) All of the user’s digital assets to the fiduciary or designated recipient, or to the court for review in chambers; or

(c) None of the user’s digital assets.

Section 7. Section 740.006, Florida Statutes, is created to read:

740.006 Disclosure of content of electronic communications of deceased user.—If a deceased user consented to or a court directs the disclosure of the content of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an

electronic communication sent or received by the user if the personal representative gives to the custodian:

(1) A written request for disclosure which is in physical or electronic form;

(2) A certified copy of the death certificate of the user;

(3) A certified copy of the letters of administration, the order authorizing a curator or administrator ad litem, the order of summary administration issued pursuant to chapter 735, or other court order;

(4) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications; and

(5) If requested by the custodian:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(b) Evidence linking the account to the user; or

(c) A finding by the court that:

1. The user had a specific account with the custodian, identifiable by information specified in paragraph (a);

2. Disclosure of the content of electronic communications of the user would not violate 18 U.S.C. s. 2701 et seq., 47 U.S.C. s. 222, or other applicable law;

3. Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

4. Disclosure of the content of electronic communications of the user is reasonably necessary for the administration of the estate.

Section 8. Section 740.007, Florida Statutes, is created to read:

740.007 Disclosure of other digital assets of deceased user.—Unless a user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalog of electronic communications sent or received by the user and digital assets of the user, except the content of electronic communications, if the personal representative gives to the custodian:

(1) A written request for disclosure which is in physical or electronic form;

(2) A certified copy of the death certificate of the user;

(3) A certified copy of the letters of administration, the order authorizing a curator or administrator ad litem, the order of summary administration issued pursuant to chapter 735, or other court order; and

(4) If requested by the custodian:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user’s account;

(b) Evidence linking the account to the user;

(c) An affidavit stating that disclosure of the user’s digital assets is reasonably necessary for the administration of the estate; or

(d) An order of the court finding that:

1. The user had a specific account with the custodian, identifiable by information specified in paragraph (a); or

2. Disclosure of the user’s digital assets is reasonably necessary for the administration of the estate.

Section 9. Section 740.008, Florida Statutes, is created to read:

740.008 Disclosure of content of electronic communications of principal. To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives to the custodian:

(1) A written request for disclosure which is in physical or electronic form;

(2) An original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;

(3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) If requested by the custodian:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal’s account; or

(b) Evidence linking the account to the principal.

Section 10. Section 740.009, Florida Statutes, is created to read:

740.009 Disclosure of other digital assets of principal.—Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over

the digital assets or with general authority to act on behalf of the principal a catalog of electronic communications sent or received by the principal, and digital assets of the principal, except the content of electronic communications, if the agent gives the custodian:

(1) A written request for disclosure which is in physical or electronic form;

(2) An original or a copy of the power of attorney which gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

(3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) If requested by the custodian:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(b) Evidence linking the account to the principal.

Section 11. Section 740.01, Florida Statutes, is created to read:

740.01 Disclosure of digital assets held in trust when trustee is the original user.—Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalog of electronic communications of the trustee and the content of electronic communications.

Section 12. Section 740.02, Florida Statutes, is created to read:

740.02 Disclosure of content of electronic communications held in trust when trustee is not the original user.—Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

(1) A written request for disclosure which is in physical or electronic form;

(2) A certified copy of the trust instrument, or a certification of trust under s. 736.1017, which includes consent to disclosure of the content of electronic communications to the trustee;

(3) A certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust; and

(4) If requested by the custodian:

- (a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or
- (b) Evidence linking the account to the trust.

Section 13. Section 740.03, Florida Statutes, is created to read:

740.03 Disclosure of other digital assets held in trust when trustee is not the original user.—Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account, a catalog of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets in which the trust has a right or interest, other than the content of electronic communications, if the trustee gives the custodian:

- (1) A written request for disclosure which is in physical or electronic form;
- (2) A certified copy of the trust instrument, or a certification of trust under s. 736.1017;
- (3) A certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust; and
- (4) If requested by the custodian:

- (a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or
- (b) Evidence linking the account to the trust.

Section 14. Section 740.04, Florida Statutes, is created to read:

740.04 Disclosure of digital assets to guardian of ward.—

- (1) After an opportunity for a hearing under chapter 744, the court may grant a guardian access to the digital assets of a ward.
- (2) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a guardian the catalog of electronic communications sent or received by the ward and any digital assets in which the ward has a right or interest, other than the content of electronic communications, if the guardian gives the custodian:
- (a) A written request for disclosure which is in physical or electronic form;
- (b) A certified copy of letters of plenary guardianship of the property or the court order that gives the guardian authority over the digital assets of the ward; and

(c) If requested by the custodian:

1. A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the ward's account; or

2. Evidence linking the account to the ward.

(3) A guardian with general authority to manage the property of a ward may request a custodian of the digital assets of the ward to suspend or terminate an account of the ward for good cause. A request made under this section must be accompanied by a certified copy of the court order giving the guardian authority over the ward's property.

Section 15. Section 740.05, Florida Statutes, is created to read:

740.05 Fiduciary duty and authority.—

(1) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

(a) The duty of care;

(b) The duty of loyalty; and

(c) The duty of confidentiality.

(2) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:

(a) Except as otherwise provided in s. 740.003, is subject to the applicable terms-of-service agreement;

(b) Is subject to other applicable law, including copyright law;

(c) In the case of a fiduciary, is limited by the scope of the fiduciary's duties; and

(d) May not be used to impersonate the user.

(3) A fiduciary with authority over the tangible personal property of a decedent, ward, principal, or settlor has the right to access any digital asset in which the decedent, ward, principal, or settlor had or has a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(4) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, ward, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including under chapter 815.

(5) A fiduciary with authority over the tangible personal property of a decedent, ward, principal, or settlor:

(a) Has the right to access the property and any digital asset stored in it; and

(b) Is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including under chapter 815.

(6) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(7) A fiduciary of a user may request a custodian to terminate the user’s account. A request for termination must be in writing, in paper or electronic form, and accompanied by:

(a) If the user is deceased, a certified copy of the death certificate of the user;

(b) A certified copy of the letters of administration; the order authorizing a curator or administrator ad litem; the order of summary administration issued pursuant to chapter 735; or the court order, power of attorney, or trust giving the fiduciary authority over the account; and

(c) If requested by the custodian:

1. A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user’s account;

2. Evidence linking the account to the user; or

3. A finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subparagraph 1.

Section 16. Section 740.06, Florida Statutes, is created to read:

740.06 Custodian compliance and immunity.—

(1) Not later than 60 days after receipt of the information required under ss. 740.006-740.04, a custodian shall comply with a request under this chapter from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(2) An order under subsection (1) directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. s. 2702.

(3) A custodian may notify a user that a request for disclosure or to terminate an account was made under this chapter.

(4) A custodian may deny a request under this chapter from a fiduciary or designated recipient for disclosure of digital assets or to terminate an

account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(5) This chapter does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this chapter to obtain a court order that:

- (a) Specifies that an account belongs to the ward or principal;
- (b) Specifies that there is sufficient consent from the ward or principal to support the requested disclosure; and
- (c) Contains a finding required by a law other than this chapter.

(6) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this chapter.

Section 17. Section 740.07, Florida Statutes, is created to read:

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

Section 18. Section 740.08, Florida Statutes, is created to read:

740.08 Applicability.—

- (1) Subject to subsection (3), this chapter applies to:
 - (a) A fiduciary acting under a will, trust, or power of attorney executed before, on, or after July 1, 2016;
 - (b) A personal representative acting for a decedent who died before, on, or after July 1, 2016;
 - (c) A guardian appointed through a guardianship proceeding, whether pending in a court or commenced before, on, or after July 1, 2016; and
 - (d) A trustee acting under a trust created before, on, or after July 1, 2016.
- (2) This chapter applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.
- (3) This chapter does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

Section 19. Section 740.09, Florida Statutes, is created to read:

740.09 Severability.—If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

Section 20. This act shall take effect July 1, 2016.

Approved by the Governor March 10, 2016.

Filed in Office Secretary of State March 10, 2016.