

DIGITAL ASSETS BILL - WHITE PAPER (Jan. 20, 2016)

NEW CHAPTER 740, FLORIDA STATUTES

I. SUMMARY

The proposed bill, F.S. 740, is called “Florida Fiduciary Access to Digital Assets Act” (herein the “DIGITAL ASSETS ACT”), and is sponsored by Senator Hukill. The purpose of the DIGITAL ASSETS ACT is to vest Fiduciaries, who represent online “Users” (persons who have online accounts with online service providers such as FaceBook, Google, Gmail, Instagram, etc. (“Custodians”)) with the authority to access, control, and/or copy digital assets and account history (a “Catalog”) and User account information. The DIGITAL ASSETS ACT covers four types of Fiduciaries who represent Users: personal representatives of decedents’ estates, guardians of the property of minors or incapacitated persons, agents acting pursuant to a power of attorney, and trustees (“Fiduciaries”, defined at line 0109).

II. BRIEF HISTORY

The DIGITAL ASSETS ACT was originally proposed in 2015 when it died after opposition by Facebook and Google. The DIGITAL ASSETS ACT was revised by Senator Hukill to provide for explicit consent for access and control of digital assets. The Real Estate, Probate and Trust Section of the Florida Bar has promoted the DIGITAL ASSETS ACT and supported Senator Hukill.

III. PROVISIONS

A. Online Tool (740.003)

The Act permits an online service provider (a Custodian) to employ an Online Tool (defined at line 0120) to effectuate a User’s instructions directing disclosure or nondisclosure of Digital Assets (“DA”). The Online Tool, if available at all times to the User, overrides a will, trust or power of attorney or contrary provisions in a Terms-of-Service (TOS) (line 0169-0176) and (line 0183-0186), otherwise the will, trust or power of attorney controls. (line 0177-0182). The Online Tool is meant to override the TOS or Terms of Use (TOU). (line 0183).

B. Terms of Service Preserved (740.004)

A Fiduciary’s access to DA may be modified or eliminated by the User, by federal law, or by a Terms-of-Service agreement or TOU if the User has not provided direction under the Online Tool or a will, trust or power of attorney. 740.003 (line 0196-0199).

C. Procedure for Disclosing DA to the Fiduciary (740.005)

Custodian (a person that carries, maintains, processes, receives, or stores a DA of a User) may: (a) grant Fiduciary full access to User’s account, (b) grant Fiduciary partial access sufficient to perform the delegated tasks, (c) provide Fiduciary a copy in a record of the DA that the User could have accessed if the User were alive. (line 0203-0214). Custodian is not required to disclose an asset deleted by the User.

D. Disclosure of DA Content of Deceased User. (740.006)

The Custodian shall disclose Content (defined line 0083) of deceased User's electronic communications upon receipt of personal representative's: (a) written request, (b) certified copy of death certificate, (c) certified copy of letters of administration, or other court order, (d) copy of user's will, trust, power of attorney evidencing user's consent to disclosure of content of electronic communications, unless an Online Tool is used and directs otherwise.

If requested by Custodian, then the so-called Fiduciary must provide (a) a number, User name, or other User account identifier, (b) evidence linking the account to the User, or (c) a finding by a court that (i) User had a specific account with Custodian "identifiable" (pursuant to (a) or (b) above), (ii) disclosure of Content of the electronic communication would not violate certain laws, (iii) the User consented to disclosure, unless consent was provided by the Online Tool, or (iv) the disclosure of the Content is necessary for administration of estate. (line 0234-0268)

E. Disclosure of Other DA of Deceased User. (740.007)

The Custodian shall disclose to the personal representative (Fiduciary) of the estate, a Catalog of electronic communications (which Catalog does not include the DA Content but lists DA content, such as the subject line of email and the email date, etc.), if the personal representative provides the same items required for disclosure of Content of electronic communications as in 740.006. If requested by the Custodian, there must also be an affidavit saying disclosure is necessary for administration of estate, or an order of court finding that (i) the User had a specific account with Custodian, or (ii) the disclosure is necessary for administration of estate. (line 0271-0298)

F. Disclosure of DA Content of Principal (User). (740.008)

When a power of attorney (defined line 0138) provides authority for the disclosure of Content of the electronic communications, the Agent (see line 0072) must provide items similar to those in 740.006, except the Agent must specifically provide an original or copy of power of attorney expressly granting the Agent authority over content of electronic communications and certification by Agent that power of attorney is in effect. (1.0301-0318)

G. Disclosure of Other DA of Principal. (740.009)

When a power of attorney provides authority for the disclosure of other digital assets, the Agent must provide items identified in 740.008. (line 0321-0341).

H. Disclosure of DA held in trust when Trustee is original User. (740.01)

Unless otherwise ordered by court or provided in a trust, Custodian shall disclose to Trustee (see line 0152), any DA of the account held in trust, including a Catalog of electronic communications and the DA Content. (line 0344-0350)

I. Disclosure of DA Content held in trust when Trustee is not original User. (740.02)

When a trust provides authority for disclosure of DA content of electronic communications, the trustee must provide items similar to 740.008, except trustee is required to provide a certified copy of trust and certification that trustee is currently acting as trustee of trust. (line 0353-0375).

J. Disclosure of other DA held in trust when Trustee is not the original User.  
(740.03)

When a trust provides authority for disclosure of other DA and trustee is not the original User, the trustee must provide items identified in 740.02. (line 0378-0399).

K. Disclosure of DA to Guardian of a Ward (User). (740.04)

A court may grant access to DA of ward (a User) after a guardianship hearing. (line 0403-0405, see “Guardian” defined at line 0111). Unless otherwise ordered by court or directed by User, Custodian shall disclose to Guardian, a Catalog of electronic communications and DA (different than the DA Content) in which ward has a right, if the Agent provides similar items identified in 740.03, and the Guardian is required to provide a certified copy of letters of plenary guardianship of the property over the DA. (line 0406-0421). A Guardian with a general authority to manage property of a ward (User) may request the Custodian to suspend or terminate ward’s account for good cause. (line 0422-0427).

L. Fiduciary Duties and Its Authority to Enforce and Access Physical Devices Carrying DA (740.05)

A Fiduciary has a duty of care, loyalty, and confidentiality. A Fiduciary’s authority is subject to the Terms-of-Service, other applicable laws, including copyright law, and is limited by the scope of Fiduciary’s duties. The Fiduciary may not impersonate the User. Fiduciary is an “authorized user” for purposes of enforcement of computer fraud and unauthorized computer access laws. (line 0451-0455). A Fiduciary with authority over tangible personal property can access DA stored on the User’s physical devices and is considered an authorized user for those purposes. (line 0456-0462). Custodian may disclose information in an account in order for Fiduciary to terminate an account used to access DA licensed to User. (line 0463-0466).

Fiduciary may request Custodian to terminate User’s account in writing.

M. Custodian Compliance and Immunity

Custodian must comply with a request for DA within 60 days of the so-called Fiduciary’s request. (line 0487-0494). If Custodian fails to comply, the Fiduciary may seek an order from the court. Custodian is immune from liability for acts or omissions done in compliance with this chapter. (line 0516-0518).

Nicole Valdivieso, Esq. NValdivieso@ComplexIP.com  
Robert Kain, Esq., Chair Computer and Technology Law Committee  
RKain@ComplexIP.com