



Florida Enacts Fiduciary Access to Digital Assets Act

by David A. Shulman

After a few false starts and much wrangling, Florida has enacted the Fiduciary Access to Digital Assets Act (“Act”). The purpose of the law is to allow fiduciaries, such as personal representatives, agents under a power of attorney, guardians, and trustees, to manage the digital assets of a decedent, ward, etc. Instead of integrating the new law into the various provisions of the probate, trust, guardianship, and power of attorney codes, the legislature created a new chapter, Chapter 740, Florida Statutes.

Under Chapter 740, a “digital asset” is an “electronic record in which an individual has a right or interest.” This could be anything online (and some offline storage too), including email and Facebook accounts, domain names, online storage of files in Dropbox, and even access to financial accounts.

The Act introduces the concept of an “online tool” which is “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 prove directions for disclosure or nondisclosure of digital assets to a third person.” Fla. Stat. § 740.002(16).

Examples of this are the Facebook “Legacy Contact” or Google’s “Inactive Account Manager.” The purpose of the online tool is to allow users to choose for themselves whether to allow Google, Facebook, or other internet providers to allow access to digital assets upon their death or incapacity. The user can use the online tool to directly opt-in or opt-out. If the user elects to use the online tool,

then it “overrides a contrary direction in a will, trust, power of attorney, or other record.” In other words, it controls and is more important than your estate planning documents (sort of like a pay on death beneficiary on a bank account). If you told Google through the online tool to not let anyone access your account, then it does not matter what your will says. If a user has not used an online tool, or the provider does not have one, then the user is free to allow or prohibit access to their digital assets through their will, trusts, or other documents.

The key distinction between the new act and past failed attempts is that it gives much more discretion and protection to the internet providers. Under the Act, an internet provider may, in its sole discretion, decide how to grant access to digital assets to fiduciaries. Section 740.005, Florida Statutes, provides that when disclosing the digital assets of a user, a custodian may, at its sole discretion:

1. Grant a fiduciary full access;
2. Grant partial access to the account so that the fiduciary may perform their duties; or
3. Provide the fiduciary with 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 to access the account.

Therefore, the internet provider can, if it so chooses, provide you with a CD of the information, but not actual access to the account.

One important distinction between the

Act and past attempts is that there is a strict separation between the “content of electronic communications” and other digital assets. It was always the content of communications that worried the digital providers the most because they thought providing access to a third party could violate federal privacy laws. Electronic communications are two ways. If you are my friend and send me personal information in an email about your boss, your finances, your health, or your kids, and if I die or become incapacitated, my fiduciary could potentially have access to that information.

The Act also imposes upon fiduciaries duties that they already had under common law. Section 740.05, Florida Statutes, provides that “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. While there is nothing new there, it makes the internet providers feel better.

Hopefully, this Act will resolve a lot of the issues regarding personal representatives, trustees, agents under a power of attorney, and court appointed guardians to access digital assets. ■



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