# Client Alert

Business Information for Clients and Friends of Shumaker, Loop & Kendrick, LLP

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Florida Passes the Florida Fiduciary Access to Digital Assets Act

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The Florida Fiduciary Access to Digital Assets Act (the "Act") took effect as of July 1, 2016. The digital world is growing at an exponential rate. The Act provides much needed guidance for digital asset owners of how they can plan for the management and disposition of their digital assets if they should die or become incapacitated.

# What is a "digital asset"?

The Act defines "digital assets" as electronic records that are transmitted or stored on digital devices or the internet.¹ Commonly used digital assets include documents (Adobe PDF, MS Word, spreadsheets, etc.), domain names or blogs, email accounts, social media accounts (Facebook, Instagram, Snapchat, LinkedIn, etc.), online user accounts (banks, PayPal, Venmo, etc.), and digital currency (for example, credits with online vendors such as iTunes).

# Disclosure or Nondisclosure of Digital Assets

The Act provides fiduciaries the legal authority to manage digital assets and accounts in the same manner that they manage tangible assets and accounts. Simultaneously, the Act provides custodians of digital assets and accounts the legal authority they need to interact with the fiduciaries of their users while honoring the user's privacy expectations. A "custodian" is the person or entity that carries, maintains, processes, receives, or stores a digital asset of a user. <sup>2</sup> For example, Facebook and Google are custodians of the user's Facebook account and Gmail account. The "user" is the digital asset owner.

The Act instructs the user how to allow a certain level of disclosure or nondisclosure of his or her digital assets. The Act establishes a three-tiered priority system for users to specify the level of disclosure or nondisclosure of their digital assts. The three-tiered priority system is as follows:

#### 1. Online Tool

A direction regarding disclosure using an "online tool" supersedes a contrary direction in a will, trust, power of attorney, or terms-of-service agreement. An "online tool" is defined as "an electronic service provided by a custodian which allows the user, in an agreement distinct from the terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person."<sup>3</sup> Examples of online tools are Facebook's Legacy Contact tool or Google's Inactive Account Manager tool.

### 2. Will, Trust, or Power of Attorney

A direction regarding disclosure in a will, trust, or power of attorney supersedes a contrary direction in the terms-of-service agreement with the custodian.<sup>4</sup>

#### 3. Terms of Service Agreement

In the absence of an online tool directive or other written direction in a will, trust, power of attorney, or other record, the terms-of-service agreement will control.<sup>5</sup> Not surprisingly, the percentage of users who actually read the terms-of-service agreement is very low. Most users have no knowledge of the terms they are agreeing to. Thus, relying on the terms-of-service agreement to dictate how their digital assets are to be disclosed should the user die or become incapacitated could lead to undesirable results.

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Furthermore, the Act differentiates between four types of fiduciaries and the manner in which each may access the content of the electronic communications without additional direction from the user either through an online tool, will, trust, power of attorney, or terms-of-service agreement.<sup>6</sup>

Fiduciary Type	Access to Content of Electronic Communications	Access to Other Digital Assets or Noncontent Communications
Personal Representative	Allowed only if decedent consented to disclosure online or in will, trust, power of attorney or other record, or a court directs disclosure	Allowed unless decedent opted out or prohibited (or court directs otherwise)
Guardian	Allowed only if ward consented prior to incapacity	Allowed if authorized by letters of guardianship or court order
Attorney-in-Fact/Agent	Allowed only if principal expressly authorized online or in power of attorney	Allowed under a grant of general or specific authority in power of attorney unless prohibited by principal or court
Trustee	Allowed when trustee is original user unless trust prohibits or, if trustee not original user, when authorized by trust or user	Allowed unless prohibited by user, trust, or court

Note: An example of Noncontent Communications is the Sender, Receiver, and Subject Line of an Email (but not the content of the email)<sup>7</sup>

As of July 1, 2016, the Act applies to all fiduciaries regardless of when the will, trust or power of attorney was executed, or when the user died or became incapacitated.<sup>8</sup> Failing to plan for the transfer of digital assets can create both financial losses to an individual's estate and emotional losses to an individual's loved ones. It is important for all users to take note of the implications of the Act and take action as needed.



<sup>&</sup>lt;sup>1</sup> Fla. Stat. §740.002(9)

<sup>&</sup>lt;sup>2</sup> Fla. Stat. §740.002(7)

<sup>&</sup>lt;sup>3</sup> Fla. Stat. §740.003(1)

<sup>&</sup>lt;sup>4</sup> Fla. Stat. §740.003(2)

<sup>&</sup>lt;sup>5</sup> Fla. Stat. §740.003(3)

<sup>&</sup>lt;sup>6</sup> Fla. Stat. §§740.008, 740.009, 740.01, 740.02, 740.03, 740.04; Chart from S. Dresden Brunner, <u>Access to Digital Assets-Florida's New Law for Fiduciaries: What Are Digital Assets and Why Are They Relevant?</u>, Fla. B.J., November 2016, at 34

<sup>&</sup>lt;sup>7</sup> S. Dresden Brunner, <u>Access to Digital Assets-Florida's New Law for Fiduciaries: What Are Digital Assets and Why Are They Relevant?</u>, Fla. B.J., November 2016, at 34

<sup>8</sup> Fla. Stat. §740.08