

# PROPERLY SECURING DIGITAL LEGACIES: A PROPOSAL TO AMEND THE FLORIDA FIDUCIARY ACCESS TO DIGITAL ASSETS ACT TO ENHANCE FIDUCIARY ACCESS AND ADHERE TO TRADITIONAL PRINCIPLES OF THE FLORIDA PROBATE CODE

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## I. INTRODUCTION

Although certain digital assets, such as email accounts, social media accounts, digital files, and electronic communications, have little to no monetary value, they have sentimental value, and if not adequately identified and planned for, run a high risk of being lost forever.<sup>1</sup> Proper planning for those digital assets is essential to ease the burden on family members and fiduciaries, prevent identity theft and losses to the estate, preserve an individual's personal legacy, and protect one's privacy.<sup>2</sup> However, with minimal precedent and case law, personal representatives, lawyers, and judges are left without guidance on digital asset management.<sup>3</sup>

The Society of Trust and Estate Practitioners' ("STEP") 2021 global survey report *Digital Assets: A Call to Action* found that

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1. Betsy Simmons Hannibal, *The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)*, NOLO, <https://www.nolo.com/legal-encyclopedia/ufadaa.html> (last visited Apr. 6, 2024); Durham Law Firm, *Digital Assets Can Tie Your Estate Up in Digital Probate*, HOPLER, WILMS, & HANNA, PLLC, <https://hoplerwilms.com/blog/2017/11/14/digital-assets-can-tie-your-estate-up-in-digital-probate/> (last visited Apr. 6, 2024).

2. Gerry W. Beyer & Kerri G. Nipp, CYBER EST. PLAN. & ADMIN. 3-5 (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2166422](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166422) (discussing the importance of planning for digital assets).

3. Durham Law Firm, *supra* note 1 ("[P]robate law has not caught up to the digital age."); *Technology—Probate: A New Era in Estate Planning for the Digital Age*, 36 PROB. & PROP. 60, 63 (2022) (noting that law regarding digital assets "has not had hundreds of years of legislation and case law to work out the kinks").

“only 6% of estate practitioners agreed that there was a straightforward process for accessing digital assets stored in the cloud” after death or incapacity.<sup>4</sup> Further, nearly a quarter of estate practitioners reported that their clients experienced difficulties accessing or transferring digital assets on death or incapacity.<sup>5</sup> The most-cited obstacles in dealing with digital assets were technical restrictions, lack of clarity around property rights, and lack of estate planning.<sup>6</sup> The STEP global survey report also found that clients seeking information about digital assets most commonly asked about social media accounts and email accounts.<sup>7</sup>

Custodians, companies that store users’ digital assets (e.g., Facebook, Google, Apple), may provide an online tool that allows the user to opt-in and customize how they want their digital assets handled after their death.<sup>8</sup> So far, Facebook, Google, and now Apple provide online tools that allow the user to designate a legacy contact, a person that can access specified portions of the user’s account data once they pass away.<sup>9</sup> Notably, the Florida Fiduciary Access to Digital Assets Act (the “Florida Act”) provides that a designation using an online tool overrides any contrary will, trust, or power of attorney provision.<sup>10</sup> This default rule is inconsistent with the long-standing principles of the Florida Probate Code, creating foreseeable conflicts for personal representatives and probate courts as they attempt to honor the testator’s intent while applying the Florida Act. Given the

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4. Johan David Michels et al., DIGITAL ASSETS: A CALL TO ACTION 15–17 (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3925439](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3925439) (conducted by STEP and the Microsoft-funded Cloud Legal Project at Queen Mary University of London).

5. *Id.* at 13–14 (indicating that many respondents mentioned a lack of cooperation from service providers).

6. *Id.* at 15, 17 (finding that “[t]hird-party service providers can present practical, procedural and legal obstacles to both estate planning and administration”).

7. *Id.* at 12.

8. See FLA. STAT. § 740.003(1) (2023) (allowing a user to use an online tool to provide for disclosure of their digital assets); *id.* § 740.002(16) (defining “online tool”).

9. Henry Sturm, *How to Add Legacy Contacts to Your Accounts*, NOLO, <https://www.nolo.com/legal-encyclopedia/how-to-add-legacy-contacts-to-your-accounts.html> (last visited Apr. 6, 2024); *About Legacy Contacts on Facebook*, FACEBOOK HELP CTR., <https://www.facebook.com/help/1568013990080948> (last visited Apr. 6, 2024); *About Inactive Account Manager*, GOOGLE ACCT. HELP, <https://support.google.com/accounts/answer/3036546?hl=en> (last visited Apr. 6, 2024); *How to Add a Legacy Contact for Your Apple ID*, APPLE SUPPORT (Dec. 15, 2023), <https://support.apple.com/en-us/HT212360>.

10. FLA. STAT. § 740.003(1) (2023) (requiring that, to override any contrary designation in a will, trust, or power of attorney, the online tool must allow the user to modify or delete a direction at all times).

current array of online tools and the anticipated emergence of other companies implementing online tools for their users in the near future, it remains uncertain how the Florida Act will resolve situations where a user designates more than one person access to their digital assets, instances where third parties delete or withhold the digital information, and cases involving conflicting indications of the testator's intent.<sup>11</sup>

In addition, under the Florida Act, custodians have no fiduciary duties and have sole discretion to require fiduciaries to obtain a court order prior to permitting access to the deceased user's digital assets.<sup>12</sup> These powers allow custodians to treat a court order as an additional requirement, regardless of the circumstances, which only further delays probate proceedings, increases probate costs, and inconveniences the courts and the fiduciaries attempting to obtain access to the digital assets.<sup>13</sup> Undoubtedly, the Florida Act was a necessary addition to the Florida Probate Code at the time, however, after over seven years of advancing technology and the increased use of digital assets that replace physical copies,<sup>14</sup> the Florida Act must be revised to address existing and impending conflicts during probate administration as current and future technological developments obscure the testator's intent and unreasonably burden courts, personal representatives, and beneficiaries.<sup>15</sup>

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11. See *Technology—Probate: Digital Planning on IOS*, 35 PROB. & PROP. 58, 58–59 (2021) (noting imperfections in the available online tools and anticipating that more technology companies will create their own online tools); Justin H. Brown, *Online Tools Under RUFADAA: The Next Evolution in Estate Planning or a Flash in the Pan?*, 33 PROB. & PROP. 60, 62–63 (2019) (discussing the shortcomings and lack of uniformity of online tools); Beyer & Nipp, *supra* note 2, at 12 (“More companies will likely soon provide online tool options for users . . .”).

12. FLA. STAT. §§ 740.006–07 (2023) (permitting a custodian to require a personal representative to obtain a court order for disclosure of all digital assets); *id.* § 740.06(5) (“[The Florida Act] does not limit a custodian’s ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under [the Florida Act] to obtain a court order . . .”); see *id.* § 740.05 (imposing the duties of care, loyalty, and confidentiality only on fiduciaries).

13. Beyer & Nipp, *supra* note 2, at 14; Patricia Sheridan, *Inheriting Digital Assets: Does the Revised Uniform Fiduciary Access to Digital Assets Act Fall Short?*, 16 OHIO ST. TECH. L.J. 363, 381–86 (2020).

14. See Beyer & Nipp, *supra* note 2, at 1 (“Digital assets may represent a sizeable portion of a client’s estate.”); FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 2 (2016) (acknowledging that people have transformed the way they acquire and store information, specifically replacing paper documents with digital files).

15. See *Estate of Maria Cecilia Quadri v. Parisi*, Nos. 2018-180-CP-02, 2018-445-CP-02, 2021 WL 3544783, at \*1 (Fla. 11th Cir. Ct. Aug. 9, 2021) (stating that the Florida Act

This Article focuses exclusively on sentimental digital assets—in particular, email accounts and social networking accounts, as well as digital files and electronic communications stored on a cell phone, computer, or the cloud. This Article first looks at the Florida Probate Code, specifically the Florida Act, as it relates to a user’s disposition of their digital assets and a fiduciary’s ability to access those digital assets during probate administration. Part II discusses the online tools that are currently available to users and each of their individual features. Part III identifies and analyzes foreseeable issues that arise under the Florida Act. Part IV proposes that the Florida Act be amended to provide that the disposition of digital assets in a valid will, trust, power of attorney, or other record override any contrary designation in an online tool. Additionally, Part IV proposes that the Florida Act be amended to provide custodians of digital assets with limited discretion to require a court order when disclosing certain digital assets to fiduciaries. Finally, Part V informs estate planning attorneys of how to plan for these fast-approaching legal challenges as technology advances and more custodians offer online tools for their users.

## II. THE CURRENT STATE OF THE LAW AND TECHNOLOGY

Currently, there is no federal legislation regulating a fiduciary’s ability to legally access and manage digital assets.<sup>16</sup> Rather, existing federal laws, specifically the Stored Communications Act (“SCA”)<sup>17</sup> and the Computer Fraud and Abuse Act (“CFAA”),<sup>18</sup> focus on privacy protection and preventing unauthorized access of digital assets.<sup>19</sup> The SCA establishes privacy rights for users and prohibits providers of communications services to the public from voluntarily disclosing

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has not yet been interpreted by Florida courts, but the court anticipates a large amount of litigation regarding the Florida Act over the next few years).

16. Canaan Suitt, *What Digital Assets Should I Include in an Estate Plan?*, SUPER LAWS. (Oct. 7, 2022), <https://www.superlawyers.com/resources/estate-planning-and-probate/what-digital-assets-should-i-include-in-an-estate-plan/>.

17. Stored Communications Act, 18 U.S.C. §§ 2701–13.

18. Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

19. Beyer & Nipp, *supra* note 2, at 6–7 (“Neither the SCA nor the CFAA was intended to address fiduciaries’ access to digital assets . . .”); see FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 3–4 (2016) (discussing privacy laws for electronic communications).

the contents of stored communications.<sup>20</sup> The SCA also imposes criminal penalties on anyone who “intentionally accesses without authorization a facility through which an electronic communication service is provided” or “intentionally exceeds an authorization to access that facility.”<sup>21</sup> The CFAA makes it a crime to “intentionally access[] a computer without authorization or exceed[] authorized access.”<sup>22</sup> The SCA and CFAA are complex statutes that were enacted in 1986 and have not been updated since to adapt to over thirty-seven years of technological advances.<sup>23</sup> The Florida Computer Crimes Act and Florida’s “Security of Communications; Surveillance” statute, both modeled after the SCA, also fail to address a fiduciary’s ability to legally access a deceased user’s digital assets.<sup>24</sup> Thus, confusion emerges when the SCA, CFAA, and state privacy laws are applied to fiduciaries attempting to access a deceased user’s digital assets.<sup>25</sup>

Prior to state legislation addressing fiduciary access to digital assets, state and federal privacy laws imposed substantial obstacles for family members and fiduciaries seeking access to a deceased user’s digital information and often prohibited access altogether.<sup>26</sup> Scenarios frequently arose where family members and fiduciaries, who were seeking to obtain necessary evidence, answers, and closure, were denied access to the deceased user’s online accounts due to the restrictive nature of the privacy laws.

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20. 18 U.S.C. § 2702(a).

21. *Id.* § 2701(a).

22. *Id.* § 1030(a)(2).

23. Beyer & Nipp, *supra* note 2, at 7.

24. FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 4 (2016); *see* FLA. STAT. §§ 815.01–.07 (2023) (Florida Computer Crimes Act); FLA. STAT. §§ 934.01–.50 (2023) (Security of Communications; Surveillance).

25. Beyer & Nipp, *supra* note 2, at 7; *see* FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 3 (2016) (noting that when the CFAA “is read in the context of accessing digital assets, the issue becomes whether a fiduciary has been given authority to access a computer by virtue of a law or whether access must be given explicitly by the owner of the computer, online service, or account”).

26. S. Dresden Brunner, *Access to Digital Assets—Florida’s New Law for Fiduciaries: What Are Digital Assets and Why Are They Relevant?*, 90 FLA. BAR J. 34, 35 (2016) (explaining that if the SCA applied, the custodian was prohibited by law from disclosing the deceased user’s digital assets); FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 4 (2016) (stating that the privacy protections under the SCA and the CFAA were viewed as being a substantial obstacle for family members and fiduciaries and as a restriction on service providers’ ability to disclose electronic communications).

<sup>27</sup> Even when a user consented to disclosure or a personal representative lawfully consented on the user's behalf, courts concluded that under the plain language of the SCA, consent only *permits* production by a provider, it does not *require* such a production.<sup>28</sup> In response to these types of unfortunate situations, the Uniform Law Commission created and adopted the Revised Uniform Fiduciary Access to Digital Assets Act (the "Revised Uniform Act") in July 2015 in an attempt to provide certainty and predictability for courts, users, fiduciaries, and custodians.<sup>29</sup> The Revised Uniform Act purportedly "removes barriers to a fiduciary's access to electronic records and property and leaves unaffected other law, such as fiduciary, probate, trust, banking, investment securities, agency, and privacy law."<sup>30</sup> Since its adoption, nearly every state has either enacted the Revised Uniform Act or has passed a modified version of it.<sup>31</sup>

Notably, digital assets are recognized as a property right.<sup>32</sup> A user can now manage and dispose of their digital assets in the

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27. See, e.g., *In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1205–06 (N.D. Cal. 2012) (denying personal representative, seeking critical evidence to negate the assumption of suicide, access to the deceased user's Facebook account); Fredrick Kunkle, *Virginia Family, Seeking Clues to Son's Suicide, Wants Easier Access to Facebook*, THE WASH. POST (Feb. 17, 2013), [https://www.washingtonpost.com/local/va-politics/virginia-family-seeking-clues-to-sons-suicide-wants-easier-access-to-facebook/2013/02/17/e1fc728a-7935-11e2-82e8-61a46c2cde3d\\_story.html](https://www.washingtonpost.com/local/va-politics/virginia-family-seeking-clues-to-sons-suicide-wants-easier-access-to-facebook/2013/02/17/e1fc728a-7935-11e2-82e8-61a46c2cde3d_story.html) (denying parents, seeking answers to their fifteen-year-old son's death, access to the son's Facebook account).

28. *Ajemian v. Yahoo!, Inc.*, 84 N.E.3d 766, 768 (Mass. 2017) (concluding that the SCA did not prohibit Yahoo! from voluntarily disclosing the contents of the deceased user's email account to the personal representative, but rather permitted Yahoo! to disclose the contents if the personal representative lawfully consented to the disclosure on the deceased user's behalf); *Facebook*, 923 F. Supp. 2d at 1206 (finding that under the SCA, Facebook was permitted, but not required, to disclose the contents of the deceased user's Facebook account to the personal representative).

29. REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT, Prefatory Note (UNIF. L. COMM'N 2015) (stating that the Revised Uniform Act "gives states precise, comprehensive, and easily accessible guidance on questions concerning fiduciaries' ability to access the electronic records of a decedent").

30. *Id.* (providing a summary of the general purposes and goals of the Revised Uniform Act).

31. *Fiduciary Access to Digital Assets Act, Revised*, UNIF. L. COMM'N, <http://my.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22> (Apr. 6, 2024) (click "Bill List") (indicating forty-five states have enacted and three states have introduced the Revised Uniform Act); *State Laws Regarding Fiduciary Access to Digital Assets Chart*, THOMSON REUTERS PRAC. L. TRS. & ESTS., Checklist W-006-8402 (highlighting the key distinctions between each state's digital asset legislation and the Revised Uniform Act).

32. I. Richard Ploss, *Estate Planning for Digital Assets: Understanding the Revised Uniform Fiduciary Access to Digital Assets Act and Its Implications for Planners and Clients*, FIN. PLAN. ASS'N (Apr. 2018), <https://www.financialplanningassociation.org/article/journal/APR18-estate-planning-digital-assets-understanding-revised-uniform->

same way they can for their tangible property.<sup>33</sup> Likewise, the traditional power of a fiduciary to manage, preserve, and access tangible property is extended to include management of digital assets.<sup>34</sup>

#### A. The Florida Fiduciary Access to Digital Assets Act

Florida adopted the Revised Uniform Act in July 2016 by enacting the Florida Fiduciary Access to Digital Assets Act (the “Florida Act”).<sup>35</sup> The stated purposes of the Florida Act are to provide fiduciaries with legal authority to manage a decedent’s digital assets and custodians with legal authority to interact with fiduciaries.<sup>36</sup> The Florida Act attempts to provide a practical solution to fiduciaries who need access to a decedent’s digital assets while also protecting the user’s privacy interests and avoiding violations of federal and state privacy and computer security laws.<sup>37</sup> Crucially, a fiduciary under the Florida Act is deemed an authorized user for the purpose of computer fraud and unauthorized computer access laws.<sup>38</sup>

Under the Florida Act, a “digital asset” is defined as “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.”<sup>39</sup> Digital assets include cryptocurrency and NFTs, as well as online accounts and

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fiduciary-access-digital-0; Sheridan, *supra* note 13, at 373 (citing *Ajemian*, 84 N.E.3d at 780 (Gants, C.J., concurring in part and dissenting in part) (highlighting that Yahoo! did not dispute the lower court’s finding that the contents of the email account were property of the deceased user’s estate)).

33. *Fiduciary Access to Digital Assets Act*, *supra* note 31 (click “Summary”); FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 1–2 (2016).

34. REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT, Prefatory Note (UNIF. L. COMM’N 2015); FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 1–2 (2016).

35. Florida Fiduciary Access to Digital Assets Act, FLA. STAT. §§ 740.001–.11 (2023).

36. FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 1 (2016) (summarizing the purposes of the Florida Act).

37. FLA. S., B. SUMMARY, CS/CS/SB 494, 48th Sess. (2016) (providing a bill summary of the Florida Act); FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 5–6 (2016) (stating the goals and effects of the proposed bill); REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT, Prefatory Note (UNIF. L. COMM’N 2015) (discussing the purposes of the Revised Uniform Act).

38. FLA. STAT. §§ 740.05(4), (5)(b) (2023).

39. *Id.* § 740.002(9); see Betsy Simmons Hannibal, *What Are “Digital Assets”?*, NOLO (Jennie Lin ed.), <https://www.nolo.com/legal-encyclopedia/what-are-digital-assets.html> (last visited Apr. 6, 2024) (providing the example that your online bank account is a digital asset, but not the money in your bank account).

digital files that the decedent owns, such as email accounts; social media accounts; online banking, shopping, and bill-payment accounts; and websites and apps that store or share private communications, pictures, music, videos, and other documents digitally or on a cloud.<sup>40</sup> Digital assets consist of electronic communications (e.g., email, text messages, instant messages) and other digital assets that are not electronic communications (e.g. photos, videos, material stored on the user's computer).<sup>41</sup>

The Florida Act excludes two categories of digital assets from disclosure to a fiduciary or designated recipient. The first provision provides that “[a] custodian is not required to disclose under [the Florida Act] a digital asset deleted by a user.”<sup>42</sup> The second provision states that the Florida Act “does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer’s business.”<sup>43</sup> If a user fails to take proper precautions in managing their digital assets, both of these exclusions may adversely affect the user’s fiduciaries and intended beneficiaries.<sup>44</sup>

For purposes of this Article, the term “digital assets” will focus solely on non-financial, personal digital assets that contain purely informational property and electronic communications stored by a custodian for a user. This Article specifically analyzes the disposition of and fiduciary access to sentimental digital assets, such as email accounts, social networking accounts, and digital information stored on a cell phone, computer, or the cloud.

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40. Kathleen A. Kadyszewski, *Management of Decedent's Property*, in PRACTICE UNDER FLORIDA PROBATE CODE § 9.5 (11th ed. 2023); REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 2 cmt. at 6 (UNIF. L. COMM'N 2015); see Hannibal, *supra* note 39 (providing a non-exhaustive list of digital assets).

41. See FLA. STAT. § 740.006 (2023) (disclosure of content of electronic communications); *id.* § 740.007 (disclosure of other digital assets); REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 2 cmt. at 7 (UNIF. L. COMM'N 2015) (providing examples of electronic communications).

42. FLA. STAT. § 740.005(3) (2023).

43. *Id.* § 740.08(3); see REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 3 cmt. at 9 (UNIF. L. COMM'N 2015) (stating that the Revised Uniform Act does not apply to a fiduciary's access to an employer's internal email system).

44. See REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 6 cmt. at 13 (UNIF. L. COMM'N 2015) (“[A]ny digital asset deleted by the user need not be disclosed, even if recoverable by the custodian. Deletion is assumed to be a good indication that the user did not intend for a fiduciary to have access.”); Ploss, *supra* note 32 (indicating that problems could arise in situations where an employee downloads personal digital assets onto an employer-provided device).



### 1. Online Tools Under the Florida Act

The Florida Act allows an individual to use an online tool, will, power of attorney, or other record to direct a custodian of the individual's digital assets to disclose or not disclose the digital assets to the individual's fiduciaries.<sup>45</sup> A "custodian" carries, maintains, processes, receives, or stores a user's digital assets.<sup>46</sup> Examples of custodians include technology and social media companies such as Google, Facebook, and Apple.<sup>47</sup> A "user" is a person that holds an account with a custodian.<sup>48</sup> Thus, a user holds a property interest in their digital assets, and "the custodian maintains control over the account where the digital property is stored."<sup>49</sup>

An "online tool" is an electronic service provided by a custodian that allows a user to provide directions for the disclosure or nondisclosure of their digital assets to a third person (referred to as a "designated recipient" or "legacy contact") upon their death.<sup>50</sup> An online tool is an agreement between the custodian and the user that is distinct from the terms-of-service agreement ("TOSA").<sup>51</sup> Examples of online tools include Facebook's Legacy Contact, Google's Inactive Account Manager, and Apple's Legacy Contact.<sup>52</sup>

The Florida Act provides a three-tier priority system for determining access to a decedent's digital assets.<sup>53</sup> First priority is given to the user's instructions using an online tool.<sup>54</sup> If the user utilizes an online tool that allows the user to modify or delete a direction at all times, that designation overrides any

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45. FLA. STAT. § 740.003 (2023).

46. *Id.* § 740.002(7).

47. See Ploss, *supra* note 32 (stating that the definition of custodian "is broad enough to include all third-party providers of accounts or services on the internet").

48. FLA. STAT. § 740.002(25) (2023).

49. Sheridan, *supra* note 13, at 375 (discussing property interests in digital assets).

50. FLA. STAT. § 740.002(16) (2023).

51. *Id.*

52. Sturm, *supra* note 9 (discussing how to add legacy contacts to your accounts).

53. FLA. STAT. § 740.003 (2023); see REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 4 cmt. at 11 (UNIF. L. COMM'N 2015).

54. FLA. STAT. § 740.003(1) (2023); see Beyer & Nipp, *supra* note 2, at 13 (listing the priority given to conflicting instructions from a user under the Revised Uniform Act); REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 4 cmt. at 11 (UNIF. L. COMM'N 2015) (concluding that a user's designation using an online tool "provides the clearest possible indication of the user's intent and is specifically limited to those particular digital assets").

contrary direction in the user's will, trust, power of attorney, or other record.<sup>55</sup> Second priority is given to the user's instructions in the user's will, trust, power of attorney, or other record.<sup>56</sup> If the user does not give direction through an online tool or no online tool is provided, the user's authorization to access their digital assets through other instruments, such as a will, trust instrument, or power of attorney, controls.<sup>57</sup> Lastly, if the user has not provided instructions through an online tool or other writing, the custodian's TOSA governs a fiduciary's rights to the decedent's digital assets.<sup>58</sup>

## 2. *Rights of a Personal Representative Under the Florida Act*

A personal representative is a fiduciary under the Florida Act.<sup>59</sup> The Florida Act imposes the same legal duties on fiduciaries managing digital assets as fiduciaries managing tangible property.<sup>60</sup> These duties include the duty of care, the duty of loyalty, and the duty of confidentiality.<sup>61</sup> A personal representative with access to a decedent's digital assets can complete their legal tasks, such as paying bills, notifying beneficiaries, dealing with creditors, and distributing and selling the decedent's property, more efficiently.<sup>62</sup> Fortunately, a personal representative can obtain at least some form of access to

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55. FLA. STAT. § 740.003(1) (2023).

56. *Id.* § 740.003(2); see Beyer & Nipp, *supra* note 2, at 13; FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 8 (2016) (stating that absent a direction using an online tool, the custodian is required to comply with the user's estate planning documents).

57. FLA. STAT. § 740.003(2) (2023).

58. *Id.* § 740.003(3); see Beyer & Nipp, *supra* note 2, at 7, 13 (stating that TOSAs typically prohibit a user from granting third parties access to their account).

59. FLA. STAT. § 740.002(13) (2023) (defining a fiduciary to include an original, additional, or successor personal representative); see *id.* § 740.002(18) (defining a personal representative as the fiduciary appointed by the court to administer the estate of a deceased individual).

60. FLA. STAT. § 740.05(1) (2023); see *id.* §§ 733.601–.620 (specifying the duties and powers of a personal representative); *Management of the Estate*, in BELCHER'S REDFEARN WILLS & ADMIN. IN FLA. § 7:4 (2022) (discussing the duties of personal representatives in managing an estate).

61. FLA. STAT. § 740.05(1) (2023).

62. Betsy Simmons Hannibal, *Why Your Executor Needs Access to Digital Assets*, NOLO (Jennie Lin ed.), <https://www.nolo.com/legal-encyclopedia/why-your-executor-needs-access-to-digital-assets.html> (last visited Apr. 6, 2024) (discussing how access to online accounts makes the personal representative's job easier); FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 2 (2016) (stating that locating necessary records and managing property in the digital age is more complicated because substantial amounts of valuable information are now stored digitally).

the decedent's digital assets under the Florida Act.<sup>63</sup> The personal representative's authority with respect to the digital assets of a user may be subject to the applicable TOSA, is subject to applicable law, is limited by the scope of the fiduciary's duties, and may not be used to impersonate the user.<sup>64</sup>

The Florida Act distinguishes between two types of access: (1) disclosure of the contents of electronic communications; and (2) disclosure of a catalog of electronic communications and digital assets that are not electronic communications (i.e., non-content information).<sup>65</sup> The Florida Act generally grants fiduciaries access to non-content information and a catalog of the user's electronic communications, but not the content unless the user consented to the disclosure of the content of their electronic communications or a court so directs.<sup>66</sup>

If a deceased user consented to using an online tool, a will, or other record, or if a court orders, the custodian *shall* provide the personal representative of the user's estate with the content of the user's electronic communications.<sup>67</sup> The content of an electronic communication includes information concerning the substance or meaning of the communication, which was sent or received by the user, is in electronic storage by a custodian, and is not readily accessible to the public.<sup>68</sup> Basically, the content of electronic communications includes the subject line and body of emails, text messages, private social media posts and instant messages, and other electronic communications between private parties.<sup>69</sup> To obtain access, the personal representative must provide the custodian with certain required information.<sup>70</sup>

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63. See FLA. STAT. §§ 740.006–07 (2023).

64. *Id.* § 740.05(2); see REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 15 cmt. at 26 (UNIF. L. COMM'N 2015) (noting that the fiduciary has the same authority as the user if the user were the one exercising the authority, therefore, the personal representative has the same access as the user had immediately before death).

65. Beyer & Nipp, *supra* note 2, at 54 (providing a primer for probate judges on the Revised Uniform Act); see FLA. STAT. § 740.006 (2023) (disclosure of content of electronic communications); *id.* § 740.007 (disclosure of a catalog of electronic communications and other digital assets).

66. FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 9 (2016).

67. FLA. STAT. § 740.006 (2023).

68. *Id.* § 740.002(5).

69. FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 6–7 (2016) (describing the content of an electronic communication as the “inside of an envelope”); Sheridan, *supra* note 13, at 371.

70. FLA. STAT. § 740.006 (2023) (requiring the personal representative to provide the custodian with a written request; a certified copy of the death certificate; certified copy of

At the very least, as long as a user did not prohibit disclosure of their digital assets using an online tool, a will, or other record, and the court does not direct otherwise, a custodian *shall* provide the personal representative of a deceased user's estate with a catalog of the user's electronic communications and the user's other digital assets (i.e., non-content information).<sup>71</sup> A catalog of electronic communications is essentially a list of "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."<sup>72</sup> A user's digital assets that are not electronic communications include photos, videos, and other documents that are stored digitally.<sup>73</sup> This provision of the Florida Act was intended "to give a personal representative default access to the 'catalog' or outside of the envelope, of electronic communications and other digital assets that are not protected by federal privacy laws."<sup>74</sup> To obtain access, a personal representative is required to provide certain information to the custodian prior to disclosure.<sup>75</sup>

### 3. *Powers of Custodians of Digital Assets Under the Florida Act*

Custodians, companies that store users' digital assets, have sole discretion to grant a fiduciary or designated recipient full or

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the letters of administration; a copy of the user's will, trust, or other record evidencing the user's consent to disclosure; and any other information requested by the custodian).

71. *Id.* § 740.007 (stating that the custodian is not required to disclose the content of the user's electronic communications); see Sheridan, *supra* note 13, at 372 (stating that "digital assets that do not contain the content of electronic communications receive less protection").

72. FLA. STAT. § 740.002(4) (2023); FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 6 (2016) (describing the catalog of electronic communications as the "outside of an envelope").

73. Beyer & Nipp, *supra* note 2, at 54; see Estate of Swezey, 2019 N.Y. L. J. LEXIS 135, at \*3-4 (Sur. Ct. N.Y. Cnty. Jan. 17, 2019) (finding that the decedent's photographs stored in his Apple account were not electronic communications under the New York Administration of Digital Assets Act, therefore, no lawful consent was required for disclosure and Apple was required to provide the personal representative access to the photos).

74. FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 9 (2016); see REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 8 cmt. at 17 (UNIF. L. COMM'N 2015).

75. FLA. STAT. § 740.007 (2023) (requiring the personal representative to provide the custodian with a written request; a certified copy of the death certificate; certified copy of the letters of administration; and any other information requested by the custodian).

partial access to the user's account.<sup>76</sup> Custodians also have the power to require fiduciaries and designated recipients to obtain a court order directing disclosure of the deceased user's digital assets.<sup>77</sup> In addition, custodians have the power to require personal representatives to provide any additional information that the custodian requests prior to allowing access to the deceased user's digital assets.<sup>78</sup> The Florida Act provides that "[a] custodian may assess a reasonable administrative charge for the cost of disclosing digital assets."<sup>79</sup>

Further, a custodian may decline a personal representative's request to disclose the user's digital assets if the custodian believes that isolating certain assets would impose an undue burden on them.<sup>80</sup> While there is no case law analyzing a custodian's exercise of this statutory right, the Uniform Law Commission provides that, for example, a fiduciary's request for disclosure of "any email pertaining to financial matters" is an unduly burdensome request because the custodian would have to sort through the full list of emails and extract any irrelevant messages.<sup>81</sup> In that situation, the custodian or the fiduciary may seek an order from the court to disclose all of the user's digital assets, a subset limited by the date of the user's digital assets, or none of the user's digital assets.<sup>82</sup>

Finally, unlike fiduciaries, custodians do not have any specified fiduciary duties under the Florida Act.<sup>83</sup> Instead, a custodian and its officers, employees, and agents are immune from indirect liability for any "act or omission done in good faith and in compliance with [the Florida Act]."<sup>84</sup> While custodians are

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76. *Id.* § 740.005(1) (discussing the procedure for disclosing digital assets).

77. *Id.* §§ 740.006(5)(c), 740.007(4)(d), 740.06(5).

78. *Id.* §§ 740.006(5), 740.007(4); see *Estate of Maria Cecilia Quadri v. Parisi*, Nos. 2018-180-CP-02, 2018-445-CP-02, 2021 WL 3544783, at \*3 (Fla. 11th Cir. Ct. Aug. 9, 2021) ("'Yahoo!' is entitled to demand the sorts of things it would be expected to demand to insulate itself from future liability in connection with the statutorily-mandated disclosure . . .").

79. FLA. STAT. § 740.005(2) (2023).

80. *Id.* § 740.005(4).

81. REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 6 cmt. at 13 (UNIF. L. COMM'N 2015).

82. FLA. STAT. §§ 740.005(4)(a)–(c) (2023).

83. See *id.* § 740.05 (imposing the duties of care, loyalty, and confidentiality only on fiduciaries).

84. *Id.* § 740.06(6); see REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 16 cmt. at 30 (UNIF. L. COMM'N 2015) (stating that if there is a judicial order directing compliance and finding that compliance is not in violation of the SCA, compliance with the order establishes good faith).

not immune from direct liability, direct liability only arises from noncompliance with a judicial order.<sup>85</sup>

### B. Online Tools Currently Available to Users

Recently, some leading technology and social media companies started providing online tools for their users to designate a third person, often referred to as a legacy contact or designated recipient, to gain access to specific digital assets held by the custodian when the user passes away or becomes incapacitated.<sup>86</sup> Online tools lack uniformity; therefore, a legacy contact's access varies based on the options provided by the custodian and the authorizations selected by the user prior to their death or incapacity.<sup>87</sup>

Facebook was the first company to make legacy contacts an available user feature in 2015 by allowing a designated legacy contact to write a tribute post, update the user's profile photo and cover photo, download a copy of what the user shared on Facebook (if the user turned on this feature), and request removal of the account.<sup>88</sup> The legacy contact may not log into the user's account, read any messages, or change the friends of the user.<sup>89</sup> Alternatively, the user can direct that their account be permanently deleted from Facebook upon their death.<sup>90</sup> The user must be at least eighteen years old to select a legacy contact, and the user may change or remove a legacy contact at any time.<sup>91</sup>

Google's Inactive Account Manager allows users to designate up to ten trusted contacts who will gain access to designated portions of their Google accounts (e.g., Gmail, Google Photos, Calendar, Contacts, Google Drive, YouTube, etc.) after a certain

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85. REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 16 cmt. at 30 (UNIF. L. COMM'N 2015).

86. *Legacy Contact: What is a Legacy Contact?*, TR. & WILL, <https://trustandwill.com/learn/legacy-contact> (last visited Apr. 6, 2024); Sturm, *supra* note 9 (discussing how to add a legacy contact to your accounts).

87. Sturm, *supra* note 9 ("The exact abilities of your legacy contact may vary by company."); Brown, *supra* note 11, at 62–63 (noting that "there is no universal online tool currently available for all of a user's accounts and digital assets" and "every online tool is created differently").

88. *About Legacy Contacts on Facebook*, *supra* note 9 (stating that Facebook "may add more capabilities for legacy contacts in the future").

89. *Id.*

90. *Id.*

91. *Add, Change, or Remove Your Legacy Contact on Facebook*, FACEBOOK HELP CTR., <https://www.facebook.com/help/1070665206293088> (last visited Apr. 6, 2024).

period of inactivity.<sup>92</sup> The user selects a timeframe (e.g., three months or twelve months of inactivity) for when Google should consider their account inactive.<sup>93</sup> The user also chooses what data to share with each designated trusted contact.<sup>94</sup> After the user's account has been inactive for the specified amount of time, the trusted contact receives an email containing a link to download the data the user chose to share with them.<sup>95</sup>

Most recently, Apple incorporated a legacy contact feature for its users in December 2021.<sup>96</sup> While passwords, payment information, licensed media, and in-app purchases cannot be accessed, a legacy contact is provided access to the user's iCloud photos, messages in iCloud, notes, mail, contacts, calendars, reminders, call history, health data, voice memos, files stored in iCloud Drive, Safari bookmarks and reading list, and iCloud Backup.<sup>97</sup> A legacy contact is automatically granted access to all of the above data types, subject to the listed exclusions.<sup>98</sup> The user does not have the ability to pick and choose which data types the legacy contact can access upon their death.<sup>99</sup> The user must be over the age of thirteen to add a legacy contact to their Apple ID, and the user can designate up to five legacy contacts of any

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92. *About Inactive Account Manager*, *supra* note 9; Barbara Krasnoff, *How to Arrange for Your Digital Legacy*, THE VERGE (Dec. 2, 2021), <https://www.theverge.com/22812264/digital-legacy-death-estate-google-apple-how-to>.

93. Sturm, *supra* note 9 (discussing how to set up Google Inactive Account Manager); see *About Inactive Account Manager*, *supra* note 9 (stating that inactivity is detected by a user's last sign-ins, recent activity, usage of Gmail, and Android check-ins).

94. *About Inactive Account Manager*, *supra* note 9; Sturm, *supra* note 9.

95. *About Inactive Account Manager*, *supra* note 9.

96. *About iOS 15 Updates*, APPLE SUPPORT (Mar. 6, 2024), <https://support.apple.com/en-us/HT212788>; *How to Add a Legacy Contact for Your Apple ID*, *supra* note 9; Karen Haslam, *What's in iOS 15.2: iPhone Update Brings Apple Music Voice Plan*, MACWORLD (Dec. 13, 2021), <https://www.macworld.com/article/678011/whats-in-ios-15-2-iphone-update-brings-apple-music-voice-plan.html>.

97. *Data That a Legacy Contact Can Access*, APPLE SUPPORT (Nov. 3, 2023), <https://support.apple.com/en-us/HT212362> (noting that “[t]he data that a Legacy Contact can access depends on what the Apple ID account holder stored in iCloud and their iCloud Backup”).

98. *Id.*

99. *Id.* (providing, for example, the user “can’t grant access to only Messages and Mail and exclude iCloud photos. But if they kept all of their photos on a third-party site, those photos aren’t stored with Apple and won’t be in their Apple ID data”); Mark Vena, *What Happens to Your Digital ‘Legacy’ After You Die? Apple Offers an Answer*, FORBES (Dec. 22, 2021), <https://www.forbes.com/sites/markvena/2021/12/22/what-happens-to-your-digital-legacy-after-you-die-apple-offers-an-answer/?sh=2b033ff3e9b7> (stating that this “all or nothing” type of feature provides legacy contacts with nearly complete access to what is in the user’s iCloud account).

age.<sup>100</sup> A legacy contact, however, must be over the age of thirteen to request access to the deceased user's Apple account.<sup>101</sup> Additionally, to add a legacy contact, the user must have an Apple device with certain software requirements and must have two-factor authentication turned on.<sup>102</sup> When adding a legacy contact, "[the user] might be asked to authenticate with Face ID, Touch ID, or [their] device passcode."<sup>103</sup> The user may remove someone as a legacy contact at any time in their Apple ID settings.<sup>104</sup>

To request access after the user's death, a legacy contact must have the access key provided to them when the user designated them as a legacy contact and the user's death certificate.<sup>105</sup> Apple reviews the legacy contact's request and verifies the information provided before allowing access to the deceased user's Apple ID.<sup>106</sup> Once the legacy contact is approved, the legacy contact receives a special Apple ID that they can use to access the deceased user's account data.<sup>107</sup> Apple warns its users that if more than one legacy contact is designated, "any one of them can individually make decisions about your account data after your death, including permanently deleting it."<sup>108</sup> Lastly,

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100. *How to Add a Legacy Contact for Your Apple ID*, *supra* note 9; Jennifer Pattison Tuohy, *Apple Will Soon Let You Pass on Your iCloud Data When You Die*, THE VERGE (Nov. 10, 2021), <https://www.theverge.com/2021/11/10/22774873/apple-digital-legacy-program-comes-to-ios15-iphones-macs>.

101. *How to Add a Legacy Contact for Your Apple ID*, *supra* note 9 (indicating that the minimum age requirement varies from country and region); see *Create an Apple ID for Your Child*, APPLE SUPPORT (Jan. 12, 2024), <https://support.apple.com/en-us/HT201084#agevaries> (noting that children under thirteen cannot create an Apple ID on their own and providing the minimum age requirements for Apple account creation in different countries and regions).

102. *How to Add a Legacy Contact for Your Apple ID*, *supra* note 9 (requiring an Apple device running iOS 15.2, iPadOS 15.2, or macOS Monterey 12.1).

103. *Id.*

104. *Id.* (stating that the previously designated legacy contact will not receive a notification of the user's decision, but the user's name will no longer appear in their legacy contact list).

105. *Request Access to an Apple Account as a Legacy Contact*, APPLE SUPPORT (Dec. 15, 2023), <https://support.apple.com/en-us/HT212361> ("To protect the privacy and security of the Apple ID account holder, Apple can't access or replace an access key that's been lost or misplaced.").

106. *Id.*

107. *Id.* (stating that after a legacy contact is approved, "[t]he account holder's original Apple ID no longer works, and Activation Lock is removed on any devices that use their Apple ID").

108. *How to Add a Legacy Contact for Your Apple ID*, *supra* note 9.



the user's Apple account is permanently deleted three years after the first legacy contact is granted access to the account.<sup>109</sup>

If a person dies without designating a legacy contact, Apple generally requires a court order finding the disclosure reasonably necessary and other legal documentation before it will disclose any of the deceased user's digital assets.<sup>110</sup> Without a court order or a legacy contact designation, Apple can only remove the passcode lock on the device which erases the device completely and restores the device to factory settings.<sup>111</sup>

### C. Traditional Principles of the Florida Probate Code

In Florida, “[t]he intention of the testator as expressed in the will controls the legal effect of the testator’s dispositions.”<sup>112</sup> Accordingly, ascertaining the testator’s intent is the primary consideration when construing a will.<sup>113</sup> Thus, since probate courts are courts of equity, the testator’s intent is to be effectuated “[i]f possible, and when consistent with law and public policy.”<sup>114</sup> A person must be of sound mind (i.e., have testamentary capacity) and be at least 18 years old to make a will.<sup>115</sup> For a will to be valid, it must be in writing, include the testator’s signature at the end, the testator must sign or acknowledge their signature in the presence of two witnesses, and the two attesting witness must sign the will in the presence of the testator and each other.<sup>116</sup> Strict compliance with the Florida Probate Code’s execution requirements is required to

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109. *Request Access to an Apple Account as a Legacy Contact*, *supra* note 105 (recommending that legacy contacts download any content that they would like to keep).

110. *How to Request Access to a Deceased Family Member’s Apple Account*, APPLE SUPPORT (Jan. 10, 2024), <https://support.apple.com/en-us/HT208510> (listing what the court order must specify and stating that the requirements vary by region, but generally a death certificate and court order are required).

111. *Id.* (stating that Apple cannot remove the passcode lock without erasing the device).

112. FLA. STAT. § 732.6005(1) (2023) (discussing the Florida Probate Code’s rules of construction and intention).

113. *Elliott v. Krause*, 531 So. 2d 74, 75 (Fla. 1987).

114. *Id.* at 75; *see Eyerman v. Mercantile Tr. Co.*, 524 S.W.2d 210, 217 (Mo. Ct. App. 1975) (prohibiting destruction of testator’s house as ordered in her will finding it to be in violation of Missouri’s public policy due to the architectural significance of the house).

115. FLA. STAT. § 732.501 (2023) (stating who may make a will under the Florida Probate Code).

116. *Id.* § 732.502 (providing the execution requirements for wills under the Florida Probate Code).

create a valid will.<sup>117</sup> Nevertheless, a will, or any part of the will, is void if the execution is procured by fraud, duress, mistake, or undue influence.<sup>118</sup>

### III. FORESEEABLE ISSUES SURROUNDING THE FLORIDA ACT

The Florida Probate Code and early Florida common law clearly establish that determining and honoring the decedent's intent is fundamental during probate administration in Florida.<sup>119</sup> Yet, the Florida Act does not take into consideration the timing of testamentary designations nor the user's intent when providing fiduciaries and designated recipients access to the deceased user's digital assets.<sup>120</sup> Rather, the Florida Act simply dictates that designations using online tools trump any contradicting designations in the decedent's valid estate planning documents.<sup>121</sup>

In addition, due to custodians having sole discretion to require a court order prior to disclosing digital assets, the lack of uniformity in online tools, and the anticipation of more custodians providing online tools for their users, the Florida Act fails to provide personal representatives and other fiduciaries with straightforward and swift access to a deceased user's digital assets.<sup>122</sup> Substantial litigation regarding the Florida Act is highly likely over the next few years as there is no precedent and case law analyzing these legal uncertainties and inconsistencies

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117. See *Allen v. Dalk*, 826 So. 2d 245, 247–48 (Fla. 2002) (finding decedent's will invalid because decedent did not strictly comply with the Florida Probate Code's execution requirements by failing to sign or direct someone to sign the will).

118. FLA. STAT. § 732.5165 (2023) (discussing the effect of fraud, duress, mistake, and undue influence).

119. See *id.* § 732.6005; *Elliott*, 531 So. 2d at 75.

120. See Yael Mandel, *Facilitating the Intent of Deceased Social Media Users*, 39 CARDOZO L. REV. 1909, 1936–37 (2018) (analyzing the Revised Uniform Act).

121. FLA. STAT. § 740.003(1) (2023).

122. Brown, *supra* note 11, at 62–63 (discussing the lack of uniformity and shortcomings of online tools which adversely affect users and their attorneys); *Digital Planning on IOS*, *supra* note 11, at 58–59 (stating the imperfections in online tools and indicating that more technology companies will begin to offer their version of an online tool); Beyer & Nipp, *supra* note 2, at 14 (noting the practical problems facing personal representatives and the courts); Beyer & Nipp, *supra* note 2, at 12 (predicting that more companies will soon provide online tool options for users).

that present problems to courts, personal representatives, third parties, and ultimately the user.<sup>123</sup>

A. The Florida Act Departs from Fundamental Principles of the Florida Probate Code Extinguishing Crucial Testamentary Safeguards

Without decisive execution formalities, online tools undermine the protections afforded by the Florida Probate Code, resulting in the testator's intent being obscured and testamentary dispositions no longer being protected against fraud, duress, mistake, or undue influence.<sup>124</sup> Under the Florida Act, a person designated using an online tool without any dependable or consistent execution formalities is given access to the decedent's digital assets over a person who is designated in a decedent's will that was executed with various execution formalities including the testator's signature, two attesting witnesses' signatures, and most likely prepared by an attorney and properly notarized.<sup>125</sup> This result is clearly counter to the goals and protective measures set forth in the Florida Probate Code despite the Uniform Law Commission's assertion that the Revised Uniform Act does not affect other law.<sup>126</sup> Instead of looking at the timeline of designations or attempting to decipher who the decedent actually wanted to have access to their digital assets, the Florida Act imposes a blanket rule that designations using online tools control.<sup>127</sup>

Indeed, the Florida Act and the online tools currently available provide some features that resemble and enforce the

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123. See *Estate of Maria Cecilia Quadri v. Parisi*, Nos. 2018-180-CP-02, 2018-445-CP-02, 2021 WL 3544783, at \*1, \*3 n.6 (Fla. 11th Cir. Ct. Aug. 9, 2021) (stating that the Florida Act is “a relatively new statutory scheme that has yet to be construed by Florida courts, but which is certain to engender a great deal of litigation in the years ahead”); Durham Law Firm, *supra* note 1 (noting the lack of precedent and case law relating to digital assets, and highlighting that digital assets “can get tied up in court for an indeterminate amount of time”).

124. See Mandel, *supra* note 120, at 1937 (stating that online tools superseding a valid will is counter to traditional trusts and estates law); *Digital Planning on IOS*, *supra* note 11, at 58–59 (highlighting how online tools can be disruptive to an estate plan).

125. See FLA. STAT. § 740.003(1) (2023); Mandel, *supra* note 120, at 1936–38 (analyzing the Revised Uniform Act).

126. REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT, Prefatory Note (UNIF. L. COMM'N 2015) (stating that the Revised Uniform Act “leaves unaffected other law, such as fiduciary, probate, trust, banking, investment securities, agency, and privacy law”).

127. FLA. STAT. § 740.003(1) (2023) (providing a three-tier priority system for determining access to a decedent's digital assets).

Florida Probate Code's execution requirements. First, designations using online tools are ambulatory like a will in that the user can remove or change their designation at any time before their death.<sup>128</sup> The Florida Act encourages custodians to incorporate this feature into their online tools by providing that an online tool only overrides a will, trust, or other record if "the online tool allows the user to modify or delete a direction at all times."<sup>129</sup> Additionally, Apple may require the user to authenticate using Face ID, Touch ID, or their device passcode when designating a legacy contact.<sup>130</sup> Apple also provides a disclaimer of what data the legacy contact will have access to prior to the user completing their legacy contact designation.<sup>131</sup> Lastly, Apple requires that a legacy contact provide an access key and the decedent's death certificate prior to disclosure offering security that the person receiving the deceased user's digital assets is the person designated as a legacy contact.<sup>132</sup>

These requirements, however, do not verify that the legacy contact is the person who the decedent truly wanted to receive access to their digital assets as no reliable execution formalities were in place for the online tool designation. Foreseeably, a user could designate an individual as a legacy contact who they trust at the time and then forget to change their online tool designation prior to their death.<sup>133</sup> Despite any circumstances indicating otherwise, the deceased user's online tool designation controls the disposition of those digital assets.<sup>134</sup> There are also justifiable concerns that a family member or someone who has access to the user's account information could simply go into the user's account

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128. See *How to Add a Legacy Contact for Your Apple ID*, *supra* note 9 (stating that the user can remove someone as a legacy contact at any time); *Add, Change, or Remove Your Legacy Contact on Facebook*, *supra* note 91 (providing that a legacy contact can be added, changed, or removed at any time).

129. FLA. STAT. § 740.003(1) (2023).

130. *How to Add a Legacy Contact for Your Apple ID*, *supra* note 9.

131. Tim Brookes, *How to Add a Legacy Contact to Your Apple ID (and Why)*, HOW-TO GEEK (Dec. 15, 2021), <https://www.howtogeek.com/768020/how-to-add-a-legacy-contact-to-your-apple-id-and-why/>.

132. *Request Access to an Apple Account as a Legacy Contact*, *supra* note 105; see *Digital Planning on IOS*, *supra* note 11, at 59 (noting, however, that it is unclear whether a certified copy of the death certificate is required or whether a scan or photograph of the certificate is sufficient).

133. See *Vena*, *supra* note 99 (discussing the realistic possibility where an Apple user designates an individual as a legacy contact, the relationship sours sometime afterward, and the user forgets that they made the designation).

134. See FLA. STAT. § 740.003(1) (2023).

and designate themselves as a legacy contact or remove other legacy contacts previously designated by the user. Thus, Apple's requirements for legacy contact designations and verifications do not protect the user or the intended beneficiaries in these types of unfortunate situations from fraud, duress, mistake, or undue influence.

Since the Florida Act and the available online tools fail to ensure that the deceased user's testamentary wishes are accurately fulfilled with respect to their digital assets, potential beneficiaries will likely challenge the validity of online tools designations when those designations conflict with the testator's will. But, without witnesses, the testator's signature, and in most cases the involvement of an attorney and notary, there is no way to determine whether the user had the testamentary capacity and testamentary intent to make the designation using an online tool or whether fraud, duress, mistake, or undue influence were involved in the online tool designation.

Moreover, online tools can disrupt meticulously constructed estate plans and impose additional burdens on users and their attorneys.<sup>135</sup> Online tools under the Florida Act, like pay-on-death accounts and retirement accounts, are completely separate from a user's estate planning documents and pass outside of probate. Therefore, the user must remember to update all of their online tool designations if they change their estate planning documents.<sup>136</sup> For example, if a user designates a legacy contact using an online tool, years later creates a will disposing of their digital assets to a different individual, and then passes away without changing their online tool designation, the legacy contact, not the beneficiaries under the will, will receive access to those digital assets under the Florida Act. Furthermore, due to the lack of uniformity of online tools, users and attorneys are forced to spend time and money attempting keep up with and understand the technical specifications and legal implications of each online tool.<sup>137</sup>

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135. *Digital Planning on IOS*, *supra* note 11, at 58–59 (listing the planning implications of online tools); Brown, *supra* note 11, at 60, 62–63 (discussing the increased burdens on users and their attorneys resulting from online tools).

136. Mandel, *supra* note 120, at 1938 (stating the issue of online tools being separate from wills and noting that the testator may not assume that their will encompasses everything).

137. See Brown, *supra* note 11, at 62–63.

B. The Florida Act's Unrestricted Discretion Granted to Custodians of Digital Assets Unreasonably Burdens Courts, Personal Representatives, and Designated Recipients

Although the Florida Act and the available online tools are intended to provide a more efficient and streamlined process for fiduciaries to access a decedent's digital assets,<sup>138</sup> personal representatives and designated recipients will likely still encounter issues during the probate process that require the court's intervention. The Florida Act permits custodians to require a fiduciary to obtain a court order before disclosing any information about the deceased user's digital assets.<sup>139</sup> Custodians have frequently utilized their unilateral right to demand a court order, and certain custodians have expressly indicated that they plan on treating a court order as an additional requirement prior to the disclosure of all digital assets.<sup>140</sup> Thus, given the prominent role of the courts under the Florida Act, reasonable concerns surface regarding personal representatives' and the courts' ability to handle countless requests for court orders as custodians continue to require a court order for every disclosure and more custodians start to provide online tools for their users.<sup>141</sup>

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138. FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 2 (2016) (stating one of the goals of the Florida Act is to “[r]emove barriers to a fiduciary who is seeking access to electronic records”); REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT, Prefatory Note (UNIF. L. COMM’N 2015) (providing that the general goal of the Revised Uniform Act “is to facilitate fiduciary access and custodian disclosure while respecting the privacy and intent of the user”); *How to Request Access to a Deceased Family Member’s Apple Account*, *supra* note 110 (stating that Apple’s legacy contact is aimed at “simplify[ing] the process of acquiring a legal order and reduc[ing] delay and frustration for family members during a difficult time”).

139. FLA. STAT. §§ 740.006(5)(c), 740.007(4)(d), 740.06(5) (2023).

140. Beyer & Nipp, *supra* note 2, at 14 (indicating that representatives of Google and Facebook said they will always require a court order); *see* Sheridan, *supra* note 13, at 382–85 (analyzing New York cases that “indicate that custodians will treat the court order as a de facto requirement for disclosure of non-protected digital assets to the fiduciary”); *cf.* Raphael Satter, *Apple Now Requires a Judge’s Consent to Hand Over Push Notification Data*, REUTERS (Dec. 13, 2023), <https://www.reuters.com/technology/apple-now-requires-judges-consent-hand-over-push-notification-data-2023-12-12/> (explaining Apple’s new policy, similar to Google’s, that requires a judge’s order for law enforcement to access a user’s push notification data).

141. *See* Beyer & Nipp, *supra* note 2, at 14 (stating that a custodian’s ability to require a court order under any circumstance burdens personal representatives and the courts); *Digital Planning on IOS*, *supra* note 11, at 58 (predicting that more companies will add an online tool feature into their systems).

1. *Avoidable Challenges Facing Personal Representatives and Designated Recipients Under the Florida Act*

The Florida Act contains provisions that aid the personal representative in carrying out their legal duties of identifying and distributing the decedent's property;<sup>142</sup> however, personal representatives are forced to take excessive and unnecessary steps to retrieve the decedent's digital assets that often hold no monetary value. The main forthcoming problem is that without uniformity in online tools, the personal representative will have to determine which custodians of the decedent's digital assets offer online tools, which online tools the decedent actually used, and then attempt to gain access to the digital assets from each custodian.<sup>143</sup> Ultimately, under the Florida Act, a personal representative will more than likely have to obtain numerous court orders in settling the estate, which increases the workload of the personal representative, extends the length of probate administration, and often requires the personal representative to hire an attorney to prepare the necessary pleadings and motions.<sup>144</sup> This cumbersome, time-consuming, and costly process effectively disincentivizes personal representatives and other fiduciaries from attempting to retrieve the deceased user's digital assets from custodians resulting in those digital assets never being accessed and eventually being deleted.

Custodians have repeatedly used their discretionary powers to require personal representatives to obtain court orders prior to disclosure even when the deceased user consented to the disclosure of the content of their electronic communications in their will and even when disclosure is statutorily mandated

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142. FLA. STAT. § 740.007 (2023) (providing the personal representative access to the catalog of the user's electronic communications and other digital assets); *see id.* § 733.602 (describing the general duties of a personal representative).

143. Brown, *supra* note 11, at 62–63 (noting that online tools may further complicate the planning and administration of estates because a different individual or company may control each digital asset); *id.* at 62 (“As the advent of online tools increases, it will be impossible for users and their attorneys fully to understand the workings of every online tool.”); *Digital Planning on IOS*, *supra* note 11, at 58 (“Online tools are far from perfect. They are not uniform in their application, they have the potential to disrupt complex estate plans, and there is no easy way to search for the existence of online tools after a decedent's passing.”).

144. *See* Christin Mugg & Brody Gustafson, *Access to a Deceased's Digital Assets*, 92 OKLA. BAR J. 7, 10 (2021) (stating that the Revised Uniform Act increases probate fees because lawyers will have to send requests and documentation to each custodian, and then prepare additional pleadings to obtain court orders).

under the Florida Act (i.e., when the information requested is non-content information).<sup>145</sup> This type of behavior by custodians is directly counter to the Florida Act's intention to provide personal representatives with automatic access to a catalog of the deceased user's electronic communications and non-content digital assets.<sup>146</sup> Moreover, custodians that require a court order despite a decedent's express consent to disclosure of the content of their digital assets and absent compelling reasons for demanding the court's intervention, create more work for personal representatives and courts by actively disregarding the Florida Act's explicit procedures for disclosing digital assets and by abusing their discretionary powers.<sup>147</sup>

On the other hand, the Florida Act states that the personal representative must obtain a court order finding the disclosure of the content of the decedent's electronic communications reasonably necessary for the administration of the estate when the deceased user did not consent to the disclosure using an online tool, their will, or other written document.<sup>148</sup> This is a high standard for personal representatives to meet.<sup>149</sup> New York courts have issued a series of decisions interpreting the New York Administration of Digital Assets Act (the "New York Act"), modeled after the Revised Uniform Act, as it relates to the disclosure of the content of electronic communications versus

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145. See FLA. STAT. §§ 740.006(5)(c), 740.007(4)(d) (2023); Sheridan, *supra* note 13, at 382–85 (describing cases where custodians used their discretionary powers to require fiduciaries to obtain court orders for disclosure of non-content information); see, e.g., *In re Serrano*, 54 N.Y.S.3d 564, 566 (Sur. Ct. N.Y. Cnty. 2017) (ordering Google to disclose the calendar and contact information to the personal representative stating that the disclosure of the requested non-content information is permitted, if not mandated, by the New York Administration of Digital Assets Act).

146. See FLA. S., B. ANALYSIS & FISCAL IMPACT STATEMENT, CS/CS/SB 494, 48th Sess., at 9 (2016) ("The purpose of [Section 740.007, Florida Statutes] is to give a personal representative default access to the 'catalog' or outside of the envelope, of electronic communications and other digital assets that are not protected by federal privacy law."); FLA. STAT. § 740.007 (2023) (providing the procedure for disclosure of other digital assets of deceased user).

147. See Sheridan, *supra* note 13, at 382–85 (discussing custodians' abuse of their unfettered discretion to require a court order); FLA. STAT. § 740.006 (2023) (providing the procedure for disclosure of content of electronic communications of deceased user).

148. FLA. STAT. § 740.006 (2023) (disclosing content of electronic communications of deceased user).

149. Mugg & Gustafson, *supra* note 144, at 9 (stating that courts have generally held that disclosure of content of electronic communications is not reasonably necessary to administer the estate).



non-content information to personal representatives.<sup>150</sup> New York courts have held that absent the decedent using an online tool, their will, or other document to grant a fiduciary access to the content of their digital assets, the disclosure of the content of electronic communications to a personal representative is not reasonably necessary for estate administration.<sup>151</sup> Rather, to protect the decedent from unanticipated disclosure of sensitive or confidential information, New York courts have held that the disclosure of a catalog of electronic communications and other non-content digital assets to the personal representative is sufficient.<sup>152</sup>

The Eleventh Circuit, the only Florida court that has analyzed the Florida Act, however, came to a different conclusion.<sup>153</sup> In *Estate of Maria Cecilia Quadri v. Parisi*, the personal representative of the estate obtained access to the decedent's Yahoo! email account, including the emails themselves, by making a demand to Yahoo! for disclosure of the content of the decedent's electronic communications accompanied by a court order.<sup>154</sup> Two interested individuals in the decedent's estate filed a Motion for Sanctions (the "Motion") against the personal representative and her counsel alleging that the personal representative violated the decedent's privacy rights.<sup>155</sup> The court first noted that the movants lacked standing to bring the Motion because neither the common law nor the Florida Act

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150. Yi W. Stewart, *The Path to Disclosure of a Decedent's Digital Assets: Settled or Evolving?*, N.Y. TRS. & ESTS. LITIG. BLOG (Feb. 26, 2020), <https://www.nyestatelitigationblog.com/2020/02/articles/fiduciaries/the-path-to-disclosure-of-a-decedents-digital-assets-settled-or-evolving/>; *Access to Decedent's Digital Assets in New York*, PROB. STARS (Feb. 15, 2022), <https://probatestars.com/access-to-decedents-digital-assets-in-new-york/>.

151. *Estate of Murray*, 2019 N.Y. L. J. LEXIS 3765, at \*7–8 (Sup. Ct. Oct. 21, 2019); *In re Coleman*, 96 N.Y.S.3d 515, 518–19 (Sur. Ct. Westchester Cnty. 2019); *Estate of Roy Langstaf White*, 2017 N.Y. L. J. LEXIS 2780, at \*2–3 (Sur. Ct. Suffolk Cnty. Sept. 21, 2017); *In re Serrano*, 54 N.Y.S.3d 564, 566 (Sur. Ct. N.Y. Cnty. 2017).

152. *Murray*, 2019 N.Y. L. J. LEXIS 3765, at \*6–8; *Coleman*, 96 N.Y.S.3d at 519; *White*, 2017 N.Y. L. J. LEXIS 2780, at \*2–3; *Serrano*, 54 N.Y.S.3d at 566.

153. See *Estate of Maria Cecilia Quadri v. Parisi*, Nos. 2018-180-CP-02, 2018-445-CP-02, 2021 WL 3544783, at \*1, \*3 n.6 (Fla. 11th Cir. Ct. Aug. 9, 2021) (stating that there are no reported opinions under the Florida Act, therefore, the court writes on a blank slate).

154. *Id.* at \*4.

155. *Id.* at \*1; Motion for Sanctions Against Petitioner and HER Counsel at 21–22, *Estate of Maria Cecilia Quadri v. Parisi*, 2021 WL 3544783 (Fla. 11th Cir. Ct. Aug. 9, 2021) (Nos. 2018-000180-CP-02, 2018-000445-CP-02), 2021 WL 11108714 (requesting the court, among other things, to enter an order finding that the personal representative and her counsel used bad faith litigation tactics, awarding movants reasonable fees and costs, and requiring all digital assets received from Yahoo! be deleted).

empower a third party to assert the privacy rights of a decedent.<sup>156</sup> While the court could have denied the Motion solely on that basis, it nevertheless decided to apply the Florida Act.<sup>157</sup>

The court relied on Section 740.006, Florida Statutes which states that “[i]f 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.”<sup>158</sup> Thus, the court held that the personal representative was entitled to the contents of the decedent’s email account because the personal representative obtained a court order directing Yahoo!’s disclosure of the content of the decedent’s electronic communications pursuant to the Florida Act.<sup>159</sup> In its reasoning, the court stated that email correspondences do not raise greater privacy concerns than traditional written correspondences (e.g., diaries and other private papers) which may also become part of an estate.<sup>160</sup> While this perspective differs from that of the New York courts, it stands as the only reported opinion in Florida. Therefore, it is conceivable that a personal representative in Florida could successfully argue that the content of the decedent’s electronic communications is reasonably necessary for the estate administration.<sup>161</sup>

Court challenges are also likely to arise when a designated recipient of an online tool (i.e., a legacy contact) deletes all or portions of the deceased user’s digital assets and the personal representative or another designated recipient requests the digital information from the custodian. The Florida Act only expressly protects digital assets deleted by the user prior to their death from disclosure, not digital assets deleted by a designated

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156. *Parisi*, 2021 WL 3544783, at \*1–2 (“Claims of violation of the right to privacy are personal, to be asserted solely by the person whose privacy was infringed.”).

157. *Id.* at \*1, \*3–4.

158. *Id.* at \*3; FLA. STAT. § 740.006 (2023) (disclosing content of electronic communications of deceased user).

159. *Parisi*, 2021 WL 3544783, at \*4.

160. *Id.* at \*4, \*4 n.8 (stating that prior to the emergence of digital assets, the legal principles that governed a personal representative’s access to, and power to dispose of, estate assets are substantially the same principles that the Florida Act applies to a personal representative’s access to, and power to dispose of, digital assets).

161. *See id.*; Isabelle N. Sehati, *Beyond the Grave: A Fiduciary’s Access to a Decedent’s Digital Assets*, 43 CARDOZO L. REV. 745, 770–72 (2021) (stating that although access to a decedent’s non-content information is usually sufficient, the personal representative often needs evidence that can only be found in the content of a decedent’s electronic communications to pursue an action on behalf of the estate or to defend the estate).

recipient of an online tool.<sup>162</sup> Even though the personal representative has a duty to safeguard the estate's digital assets,<sup>163</sup> a designated recipient of an online tool may delete account data before the personal representative even determines the existence of the digital asset. For example, Apple warns its users that any of the designated legacy contacts “can individually make decisions about [the] account data after [the user’s] death, including permanently deleting it.”<sup>164</sup> Thus, a legacy contact may permanently delete the user’s digital information to the detriment of the other legacy contacts and the personal representative.

## 2. *The Florida Act Increases Probate Fees and Court Orders*

The Florida Act’s procedures for disclosing digital assets substantially increase probate fees and burden courts and personal representatives with redundant work.<sup>165</sup> In administering an estate, the personal representative must send requests for disclosure and supplemental information to each individual custodian that may be storing the decedent’s digital assets.<sup>166</sup> If any of the custodians utilize their unfettered discretionary powers pursuant to the Florida Act to require a court order for disclosure of the deceased user’s digital assets, the personal representative will be forced to spend additional time and money to comply with each of those demands.<sup>167</sup> Most likely,

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162. FLA. STAT. § 740.005(3) (2023) (“A custodian is not required to disclose under [the Florida Act] a digital asset deleted by a user.”).

163. *Id.* § 733.607(1) (“The personal representative shall take all steps reasonably necessary for the management, protection, and preservation of the estate until distribution . . .”).

164. *How to Add a Legacy Contact for Your Apple ID*, *supra* note 9.

165. See Mugg & Gustafson, *supra* note 144, at 10 (noting that the Revised Uniform Act will increase probate fees); Sheridan, *supra* note 13, at 382–86 (discussing the burden on courts and personal representatives); Betsy Simmons Hannibal, *A Plan for Your Digital Assets*, NOLO (Jennie Lin ed.), <https://www.nolo.com/legal-encyclopedia/a-plan-your-digital-legacy.html> (last visited Apr. 6, 2024) (stating that the process to gain access to digital assets in probate court can be lengthy and cost significant time and money); Beyer & Nipp, *supra* note 2, at 14 (discussing the practical problems for personal representatives and courts).

166. FLA. STAT. §§ 740.006–07 (2023); Mugg & Gustafson, *supra* note 144, at 8, 10.

167. See Hannibal, *supra* note 62 (noting that personal representatives will devote significant time and expense if they have to deal with the probate court); Sehati, *supra* note 161, at 770–71 (explaining common situations where a fiduciary must obtain a court order to access a catalog of the decedent’s electronic communications and then go back to get a court order to access the content of the decedent’s electronic communications); Sheridan, *supra* note 13, at 385 (stating that custodians have an incentive to require court

the personal representative will have to hire an attorney, or if an attorney is already involved, pay the attorney more money than anticipated, to prepare the pleadings and motions to obtain court orders and the requests for disclosure to each custodian.<sup>168</sup> The estate will then more than likely have to pay each custodian for their disclosure since the Florida Act permits a custodian to “assess a reasonable administration charge for the cost of disclosing digital assets.”<sup>169</sup>

The Florida Act, by allowing custodians to require a fiduciary to obtain a court order prior to disclosure of any of the deceased user’s digital assets, also places a heavy burden on the courts to decide whether to issue an order, determine the level of access to grant to the fiduciary or designated recipient (e.g., content or non-content information), issue the order, and then deal with enforcement disputes.<sup>170</sup> This process will only be amplified as additional custodians emerge, more users begin storing their digital assets with various custodians, and custodians continue treating court orders as a mandatory requirement for disclosure of all digital assets.<sup>171</sup> Further, custodians that require a court order even when disclosure is mandated under the Florida Act (i.e., when a user consented to disclosure in their will or for disclosure of non-content information) simply waste the courts’ time by initiating unnecessary procedures.<sup>172</sup> The issuance of orders is particularly time consuming when the court has to

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orders since it protects the custodian against liability for improper disclosure and shifts the administrative burden and cost to the deceased user’s estate).

168. Sheridan, *supra* note 13, at 385 (noting that this burden will have a disproportionately negative effect on small estates utilizing the summary estate proceedings that typically do not involve an attorney); Mugg & Gustafson, *supra* note 144, at 10.

169. FLA. STAT. § 740.005(2) (2023); REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 6 cmt. at 13 (UNIF. L. COMM’N 2015) (stating that the reasonable administrative charge is “intended to be analogous to the charge any business may assess for administrative tasks outside the ordinary course of its business to comply with a court order”).

170. See Beyer & Nipp, *supra* note 2, at 53–55 (Appendix D) (providing a primer for probate judges on the Revised Uniform Act).

171. See Beyer & Nipp, *supra* note 2, at 53 (warning judges that an increased number of requests for an order allowing the personal representative to access a decedent’s digital assets will be filed); *Digital Planning on IOS*, *supra* note 11, at 58–59 (stating that Apple’s endorsement of online tools may encourage more custodians to offer their own online tools); Sheridan, *supra* note 13, at 382–86 (discussing custodians treating a court order as an additional requirement).

172. Sheridan, *supra* note 13, at 382–86 (discussing custodians abusing their discretion to require a court order).

engage in fact-specific analysis to determine the appropriate outcome rather than simply looking at whether the decedent granted access to the designated recipient or personal representative.<sup>173</sup>

These delays only provide additional time for legacy contacts designated through an online tool and other third parties to delete or misuse the decedent's digital files and electronic communications before the personal representative can gain access. The Florida probate system will work inefficiently if courts are required to issue orders for each individual custodian to disclose varying amounts of the deceased user's digital assets depending on the decedent's unique estate. While the courts can currently manage the volume of court orders required by the limited number of custodians of digital assets, as the number of custodians and users storing digital assets increases, so will the demand for court orders.

#### IV. PROPOSED SOLUTIONS

To ensure that the goals and purposes of the Florida Probate Code are applied to the disposition of a decedent's digital assets, certain provisions of the Florida Act must be amended to adequately address recent and future technological advancements in digital assets, to provide clarity in digital asset management, and to verify that the testator's intent is effectuated during probate administration. Without change, the Florida Act will continue to overextend personal representatives and the courts, and ultimately lead to unwanted litigation instead of furthering its goal of providing fiduciaries easier access to the decedent's digital assets.

First, the Florida Act's three-tier priority system for determining access to a decedent's digital assets should be modified so that a testator's will, trust, power of attorney, or other record overrides any contrary designation in an online tool regardless of the timing of execution. Online tool designations are contrary to the Florida Probate Code's traditional requirements

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173. See FLA. STAT. § 740.006(5)(c)(4) (2023) (requiring a court to determine whether the content of the user's electronic communications is reasonably necessary for the administration of the estate); FLA. STAT. § 740.005(4) (2023) (requiring a court to determine whether to provide full, limited, or no access to a user's digital assets when the custodian believes limited disclosure is unduly burdensome).

for the execution of testamentary documents because they fail to include essential execution formalities that substantiate the testator's intent and protect against fraud, duress, mistake, and undue influence. Therefore, online tool designations should not trump provisions set forth in a valid will, trust, power of attorney, or other record. This proposed revision will not affect a majority of Americans who do not have any estate planning documents; however, those with carefully crafted and validly executed estate planning documents will have assurance that their will, trust, power of attorney, or other record will dictate the disclosure of their digital assets after their death. Section 740.003, Florida Statutes ("User Direction for Disclosure of Digital Assets") should be revised to read:

- (1) A user may use a will, trust, power of attorney, or other record to direct the custodian to disclose to a beneficiary or not to disclose some or all of the user's digital assets, including the content of electronic communications sent or received by the user. A user may also use a will, trust, power of attorney, or other record to 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. A direction regarding disclosure in a valid will, trust, power of attorney, or other record overrides a contrary direction by the user using an online tool.
- (2) If a user has not provided for the disclosure of some or all of the user's digital assets in a will, trust, power of attorney, or other record under subsection (1), the 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.
- (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.

Second, the power and discretion of custodians of digital assets to require a court order for the disclosure of any of the deceased user's digital assets should be restricted to relieve the courts and personal representatives from unnecessary and excessive responsibilities. Custodians of digital assets continue to abuse their powers to unreasonably prolong and frustrate probate

administration; therefore, the Florida Act must be amended to provide custodians with sole discretion to require a court order only for the disclosure of the content of electronic communications where the deceased user has not consented to the disclosure. To achieve this result, subsection (4)(d) must be omitted from Section 740.007, Florida Statutes—eliminating custodians’ power to require a court order for disclosure of a catalog of electronic communications and non-content digital assets. Accordingly, revised Section 740.007, Florida Statutes (“Disclosure of Other Digital Assets of Deceased User”) would read:

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

Consequently, the proposed amendments to the Florida Act place all digital assets back into the probate system, making court orders inevitable. Custodians will need a court order

declaring whether there is a valid will in order to ascertain the proper individual(s) entitled to disclosure of the deceased user's digital assets. However, the number of court orders required for a decedent's probate estate can be consolidated to a single court order that the personal representative provides to each custodian storing digital assets of the deceased user. The proposed amendments to the Florida Act provide consistent and reliable procedures that will benefit courts, personal representatives, and custodians tasked with managing and disposing of a deceased user's digital assets.

V. *LEGAL CONSIDERATIONS AND STRATEGIES FOR ESTATE PLANNING ATTORNEYS NAVIGATING THE FLORIDA ACT*

In the meantime, estate planning attorneys must be aware of the impending issues surrounding the increased use of online tools to ensure that each estate plan effectively accounts for their clients' digital assets and designates the intended person access to those digital assets following their clients' death or incapacity. In addition, estate planning attorneys must inform their clients about the implications of the Florida Act and provide clear instructions for how to proceed with managing their current digital assets and any digital assets they may acquire in the future.

Most importantly, estate planning attorneys should always include a clause in a client's will for the disposition of their digital assets upon their death and a clause that grants (or withholds from) the personal representative access and authority to manage those digital assets.<sup>174</sup> A clause for the disposition of digital assets should be contained in the testator's will even if the disposition may not be effective due to the presence of an online tool or TOSA prohibiting any postmortem transfer.<sup>175</sup> Additionally, the digital

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174. Beyer & Nipp, *supra* note 2, at 18–19, 47–51 (suggesting that digital assets be addressed in a will and supplying sample document language in Appendix A); see Digit. Prop. Comm. of the Am. Coll. of Tr. & Ests. Council, *Proposed Forms*, MID-ATLANTIC FELLOWS INST., [https://midatlanticfellowsinstitute.org/wp-content/uploads/2020/09/Digital\\_Property\\_Committee\\_-\\_Forms\\_Proposed\\_-\\_As\\_of\\_May\\_2020-01707315x9CCE7.pdf](https://midatlanticfellowsinstitute.org/wp-content/uploads/2020/09/Digital_Property_Committee_-_Forms_Proposed_-_As_of_May_2020-01707315x9CCE7.pdf) (last visited Apr. 6, 2024) (providing sample digital asset provisions for estate planning documents).

175. See Beyer & Nipp, *supra* note 2, at 19 (“[S]ome digital assets may be transferable, so wishes with regard to disposition should be made clear, just in case those wishes can be followed.”).



assets clause should state whether the definition of digital assets includes the content of electronic communications since the content of electronic communications is generally a controversial digital asset, and the default rule under the Florida Act is that fiduciaries do not have access to the content of electronic communications absent an express grant of authority or court order.<sup>176</sup> To ensure that each client's digital assets are accounted for in the estate plan, estate planning attorneys should include a digital asset information form in their intake and estate plan update procedures.<sup>177</sup> If the client wants fiduciaries to have maximum access to their digital assets, the estate planning attorney should also have the client prepare and securely store a comprehensive inventory of their digital assets (i.e., a list of the location of assets, websites, usernames, passwords, and answers to security questions) that is routinely kept up to date.<sup>178</sup>

Furthermore, estate planning attorneys should strategically advise clients on the benefits and consequences of using online tools, most importantly emphasizing that online tools can potentially disrupt their estate plan. Estate planning attorneys should clearly communicate to each of their clients the importance of designating only highly trusted individuals as legacy contacts, the advantages of designating a personal representative as a legacy contact, and being aware as to which digital assets they are providing the legacy contact access to.<sup>179</sup> Nevertheless, to ensure the client's testamentary wishes are fulfilled and to avoid conflicts during probate administration, estate planning attorneys must continually confirm with their clients that all online tool designations are consistent with the client's will, trust, power of attorney, or other record. Further,

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176. Beyer & Nipp, *supra* note 2, at 19; see Digit. Prop. Comm. of the Am. Coll. of Tr. & Ests. Council, *supra* note 174 (recommending will provisions for digital assets); FLA. STAT. § 740.006 (2023) (disclosure of content of electronic communications of deceased user).

177. See Beyer & Nipp, *supra* note 2, at 37–46 (Appendix A) (providing a digital estate information sample form to have clients fill out).

178. *Id.* at 17–18; Hannibal, *supra* note 1; see *How to Add a Legacy Contact for Your Apple ID*, *supra* note 9 (suggesting that the user print and save a copy of the legacy contacts' access key with their estate planning documents).

179. See Vena, *supra* note 99 (emphasizing the importance of being selective and designating only highly trusted individuals as legacy contacts, such as a spouse or personal representative); *id.* (stating that a personal representative as a legacy contact "could be more discrete about accessing the data that [the user] decide[s] to pass on"); Hannibal, *supra* note 62 (explaining how access to digital assets makes the personal representative's job easier); Brown, *supra* note 11, at 62–63 (discussing the drawback of online tools not being uniform).

given that the Florida Act expressly excludes “digital asset[s] of an employer used by an employee in the ordinary course of the employer’s business” and an estimated twenty-two million Americans are working from home,<sup>180</sup> it is important for estate planning attorneys to advise their clients to refrain from comingling their personal and business digital information.<sup>181</sup>

Since custodians will more than likely require a court order before granting access to a deceased user’s digital assets, to save time and hassle, estate planning attorneys should include the required information and “the appropriate language in the earliest possible pleading in the administration of the estate of the deceased user.”<sup>182</sup> Ultimately, estate planning attorneys need to understand the effects of the Florida Act, effectively advise their clients on the appropriate management and disposition of their digital assets, keep up to date with the online tools available to users and other technological advancements in digital assets, and stay flexible and aware as digital asset management is ever-changing.

## VI. CONCLUSION

The Florida Act fails to provide a seamless process for fiduciaries to access a decedent’s digital assets, disregards the Florida Probate Code’s commitment to effectuating the testator’s intent, and burdens courts and personal representatives with additional responsibilities and costs. Therefore, the Florida Act must be amended to provide that a designation in a will, trust, power of attorney, or other record overrides any conflicting designation in an online tool and to limit custodians’ discretion when disclosing certain digital assets of a deceased user. As new online tools surface and technology advances, estate planning attorneys must be prepared to adequately plan for and handle the foreseeable issues discussed in this Article.

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180. FLA. STAT. § 740.08(3) (2023); Kim Parker, *About a Third of U.S. Workers Who Can Work From Home Now Do So All the Time*, PEW RSCH. CTR. (Mar. 30, 2023), <https://www.pewresearch.org/short-reads/2023/03/30/about-a-third-of-us-workers-who-can-work-from-home-do-so-all-the-time/>.

181. See Ploss, *supra* note 32 (recommending that estate planning attorneys “should advise clients not to download ‘personal’ digital assets onto employer-provided devices”).

182. Beyer & Nipp, *supra* note 2, at 14, 47–51 (providing sample language to use in the pleadings in Appendix B); see *id.* at 52 (providing a sample request letter to digital asset custodians in Appendix C).