

**2016 LEGISLATION OF INTEREST FOR TRUST AND ESTATES PRACTITIONERS
ENACTED INTO LAW¹**

Presented by Michael A. Dribin, Esq.

Harper Meyer Perez Hagen O'Connor Albert & Dribin, LLP

Estate Planning Council of Greater Miami

May 19, 2016

1. **Digital assets (“Florida Fiduciary Access to Digital Assets Act”)**—CS for CS for SB 494, approved by Governor on March 10, 2016, Chapter 2016-46 of Florida Laws; effective July 1, 2016
 - Creates new Chapter 740, to create rules and authority for fiduciaries (agent under durable power of attorney, personal representative, guardian or trustee) to have access to a user’s digital assets, including the content of electronic communications.
 - If the service provider provides an online tool for a user to direct the degree of access to digital assets and if that tool allows the user to modify or delete a direction at all times, a direction through the use of that tool overrides a contrary direction by the user in a will, trust, power of attorney or other record.
 - If a user has not used an online tool, or no such online tool is provided or if the tool doesn’t permit a modification of the directions by the user, then a designation in a will, trust, power of attorney or other record governs the disposition.
 - As to access by a guardian, in the absence of authority granted by user in power of attorney, guardian may access with court order.
 - As to decedent’s estate, in the absence of authority granted by user in will, court may enter order authorizing access.
 - Designation either by an online tool or in one of these estate planning documents overrides a contrary provision in a terms-of-service agreement as to accessibility.

¹ These materials are only brief summaries of legislation and are intended to only describe the general subject matter and highlights of the legislation. No reader should rely on these summaries as authoritative in their practice. The full text of the legislation is readily available at the legislative websites (www.myfloridahouse.gov or www.flsenate.gov). In addition, the reader is invited to attend programs such as the annual *Legislative and Case Update*, sponsored by the Real Property, Probate and Trust Law Section of The Florida Bar.

- Authority granted may include content of electronic communications or a catalog of electronic communications, exclusive of content. A catalog means information that identifies each person with which a user has had an electronic communication, the time and date of the communication and the electronic address of the person.
- Fiduciary duties of care, loyalty and confidentiality specifically apply.
- Custodian and its officers, employees and agents are immune from liability for an act or omission done in good faith in compliance with statutes.
- Applies to:
 - Fiduciary acting under a will, trust, or power of attorney executed before, on, or after July 1, 2016
 - Personal representative acting for a decedent who died before, on, or after July 1, 2016
 - Guardian appointed through proceeding whether pending in a court or commenced before, on, or after July 1, 2016
 - Trustee acting under a trust created before, on or after July 1, 2016.

2. **Family Trust Companies**—SB 80, approved by Governor on March 10, 2016, Chapter 2016-35 of Florida Laws, effective upon becoming law, but application by existing company needed by December 30, 2016.

- 2014 legislation created Chapter 662, Family Trust Companies, but without provisions dealing with Office of Financial Regulation (“OFR”) involvement and oversight.
- 2016 legislation provides those substantive provisions.
- Family trust company which elects to be a licensed family trust company is subject to the regulatory oversight of OFR. As to a licensed company, OFR is responsible for regulating, supervising and examining the family trust company.
- As to an “unlicensed” family trust company or a foreign licensed family trust company, OFR role limited to ensuring that fiduciary services provide are restricted to family members and authorized related interests and not to the general public. OFR specifically is not responsible for examining such a company regarding the safety or soundness of its operations.
- If family trust company (licensed, unlicensed or foreign) limits its activities to those authorized under Chapter 662, provisions of other chapters of financial institutions codes do not apply to family trust company.
- Family trust company in operation as of October 1, 2016 must either apply for license (as to a licensed family trust company) or register (as to an “unlicensed” family trust company or foreign trust company) by December 31, 2016 or cease doing business.

3. **Guardianship legislation**—CS for CS for CS for SB 232, approved by Governor on March 10, 2016, Chapter 2016-40, Florida Laws, effective upon becoming law.
- Modified statement of legislative intent that it is desirable to make available least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs and that alternatives to guardianship and less restricted means of assistance, including, but not limited to, guardian advocates, be explored before appointing a plenary guardian.
 - Part II of Chapter 744 (Venue) is deleted and replaced with new “Public and Professional Guardians” chapter. Office of Public and Professional Guardians” created. Part IX of Chapter 744 (“Public Guardianship”) is deleted.
 - Extensive oversight regulations placed on executive director of Office of Public and Professional Guardians (to be appointed by Department of Elderly Affairs) to establish standards of practice for public and professional guardians by rule, in consultation with other stakeholders by October 1, 2016.
 - Monitoring tool to ensure compliance by public guardians;
 - Developing procedures for review of an allegation that a professional guardian has violated standards of practice; and,
 - Establishing disciplinary proceedings. Penalties may include, but are not limited to, requiring a professional guardian to participate in additional education courses, imposing additional monitoring and suspension or revocation of registration.
 - Extensive statement of grounds (19 in number) for discipline.
 - Extensive list of potential penalties (6 in number) ranging from refusal to register professional guardian to paying restitution.
 - Legislature establishes the Joining Forces for Public Guardianship matching grant program for the purpose of assisting counties to establish and fund community-supported public guardianship programs.
 - For 2016-2017 fiscal year, six full-time equivalent positions and \$821,670 appropriated to Department of Elder Affairs for purpose of implementing requirements of the acts.
4. **Miscellaneous probate and trust legislation**—CS for CS for CS for SB 540, approved by the Governor on April 6, 2016, Chapter 2016-189 Florida Laws, effective July 1, 2016.
- Validity and effect of a disposition, whether intestate or testate, of real property in this state shall be determined by Florida law.
 - Elective share: election does not reduce what the spouse receives if the election were not made and the spouse is not treated as having predeceased the decedent. Statement of intent that this amendment is to clarify existing law.
 - Section 736.0802(10), dealing with circumstances when a trustee who is accused of breach of fiduciary duty may pay its legal fees from trust assets. Substantial reworking

and clarification of this statute. If the trustee pays attorney fees before giving required notice of intent to do so to qualified beneficiaries, a beneficiary whose interest in trust is affected by payment is entitled, upon filing of a motion, to an order compelling return of such payment to the trust, with interest at statutory rate in addition to possible award of attorney fees and costs. Notice must be served in a manner that requires a signed receipt or that is in compliance with Rules of Civil Procedure pertaining to service of process; or, as to any party over whom the court has already acquired jurisdiction in that proceeding, in manner provided for service of pleadings.

- Process associated with the “mini-trial” to determine if attorney fees may be paid from the trust is clarified and made more specific as to procedure, rules of evidence.

110777.2