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AFTERMATH OF THE FIGHT OVER FIDUCIARY ACCESS TO DIGITAL ASSETS: THE REVISED UFADAA AND ITS IMPLICATIONS FOR LEGISLATORS AND PROFESSIONAL ADVISORS

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What happens to your emails, social media accounts, domain names, online stores, blogs, and Bitcoins if you are not able to manage them? Digital accounts and digital assets, some of which have substantial financial value, are becoming more and more popular with each passing day. Unfortunately, legislators in many states have not addressed fiduciary access to digital assets should the account holder or owner become incapacitated or pass away. Even the few states that adopted such legislation prior to 2015 were years behind digital advancements, which limited the statutes' effect on fiduciaries and estate administration. Recognizing this need, as well as the discrepancies in current legislation, the Uniform Law Commission drafted the original Uniform Fiduciary Access to Digital Assets Act (UFADAA) to grant fiduciaries access to digital assets. Major e-commerce companies, social media companies, email providers, and civil liberties groups (collectively referred to as the "Providers"), and their trade organization, NetChoice, opposed the original UFADAA by sending letters of opposition to state legislators that had introduced a bill on the topic. After drafting their own limited

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provision on fiduciary access to email communications, NetChoice entered into negotiations with the Uniform Law Commission.

The result of these negotiations is the Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA), released late in the 2015 legislative session. The Revised UFADAA maintains its applicability to a broad range of digital assets and fiduciaries, while at the same time addressing NetChoice concerns over potential violations of federal law and leeway for service providers. Some states adopted the Revised UFADAA in the 2016 legislative session; however, there are a number of states that are still ignoring fiduciary access to digital assets altogether. Even states that have adopted limited provisions have to consider the clarification and protections that the Revised UFADAA brings to both fiduciaries and Providers. If adopted, estate planners and tax advisors have to identify digital assets owned by clients and incorporate provisions of the statute into their clients' planning. State adoption of the Revised UFADAA, along with incorporation of digital assets into traditional estate and tax planning, will prevent identity theft of clients, preserve estate assets, and ease estate administration. More importantly, this combination of legislator and professional advisor action will ensure that the digital asset owner's intent is effectuated upon his or her incapacity or death.

INTRODUCTION

A 2013 McAfee global survey estimated that individuals have more than \$35,000 in assets stored on digital devices, 55 percent of which would be “impossible to recreate, re-download, or re-purchase.”¹ While some of these assets are family photos with purely subjective value, others have substantial objective economic value.² Virtual property in the Entropia Universe sold for \$635,000 in 2010, thought to be the largest grossing virtual transaction at that time.³ That may seem far-fetched, but sales of a wide range of digital assets occur on a regular basis. For example, in 2012, Nations Luxury Transportation, LLC, acquired the domain name “privatejet.com” for over \$30 million.⁴ Digital assets are often overlooked in traditional estate planning. Estate planners often do not ask about digital assets, and their clients fail to document them. However, as the world becomes more and more technologically advanced,

¹ Robert Siciliano, *How Do Your Digital Assets Compare?* MCAFEE CONSUMER BLOG (May 14, 2013), <https://blogs.mcafee.com/consumer/digital-assets/>.

² Sasha A. Klein & Mark R. Parthemer, *Plan Ahead: Protect Your #DigitalFootprint*, 89 FLA. B.J. 51, 51 (2015).

³ *Id.*; Oliver Chiang, *Meet The Man Who Just Made A Half Million From The Sale of Virtual Property*, FORBES (Nov. 13, 2010), <http://www.forbes.com/sites/oliverchiang/-2010/11/13/meet-the-man-who-just-made-a-cool-half-million-from-the-sale-of-virtual-property/>.

⁴ Kenneth Starnes, *Nations Luxury Transportation, LLC Acquires* <http://www.privatejet.com>, PRWEB (Feb. 21, 2012), <http://www.prweb.com/releases/-2012/2/prweb9204576.htm>.

both estate planning and probate laws need to address digital assets in order to preserve wealth and ease estate administration. State and federal laws on digital assets generally have been underdeveloped⁵ and have lagged behind current digital advancements and challenges.

Section I explains the different categories of digital assets and why they are important to manage as part of every estate plan. Section II reviews the relatively small number of states that had legislation related to digital assets of a decedent prior to the 2016 legislative session. Section III introduces the Uniform Fiduciary Access to Digital Assets Act (UFADAA) proposed in July 2014 by the National Conference of Commissioners on Uniform State Laws and the Privacy Expectation Afterlife and Choices Act (PEAC) proposed by NetChoice as a response. Section IV details the Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) proposed in July 2015 as a result of negotiations with NetChoice and analyzes the compromises made by both parties. Section V discusses whether the Revised UFADAA should be adopted by a state and reviews the practical implications for professional advisors if adopted.

I. DIGITAL ASSETS

The meaning of the words “digital” and “asset” seems intuitive, yet there are many types of digital assets with a range of complexity. Each of these types has different implications for estate planning. Additionally, it is not necessarily obvious why digital assets matter to an estate plan. This Section explores both of these topics in order to provide context for the legislative discussion to follow.

A. *Categories of Digital Assets*

Digital assets can be separated into three main categories: (1) digital items with sentimental value, (2) digitally managed assets, and (3) digital assets that exist solely in the digital world. Digital items with sentimental value are not technically assets; they are “owned” by the individual but their value is purely subjective.⁶ These sentimental digital items include social media accounts with personal photos and videos,⁷ uploads to cloud-based photo storage systems,⁸ and personal files including anything from family recipes to personal notes.⁹ This category

⁵ Sasha A. Klein & Mark R. Prathemer, *#Where Are Our Family Photos?!? Planning for a Digital Legacy*, 29 PROB. & PROP. 45, 45 (2015).

⁶ *See Asset*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁷ Joseph R. Pozzuolo & Kelly A. Barse, *Digital Assets: Estate Planning for the Twenty-First Century*, 94 PRAC. TAX STRATEGIES 4, 4 (2015), Westlaw 1522411.

⁸ David M. Lenz, *Afterlife On The Cloud: Creating A Heavenly Plan For Digital Assets*, Address at the A.L.I. Continuing Legal Education Course at the U. of Wis. L. Sch. (June 23, 2015) (transcript available in Westlaw SW037 ALI-CLE 511).

⁹ *Id.*

also includes portions of personal email accounts, including correspondence with friends and family, receipts from purchases, and other personal information. These items will certainly be a concern to estate planning clients and should be combed through and saved by a family member after death. They do not, however, have any economic value that needs to be preserved or monitored after death.

Digitally managed assets are those assets that exist in a tangible form but are managed by the owner through digital means.¹⁰ For example, a personal bank account is comprised of cash (a tangible asset); however, the vast majority of people manages their bank accounts through an online portal and receives their bank statements via email. Other examples include digital access to brokerage accounts, retirement accounts, and life insurance policies.¹¹ The digital access to these accounts does not have any economic value, but swift access to a decedent's email for statements or direct access to the custodian's portal can prevent unnecessary fees on the decedent's account.¹² The discord between the UFADAA and the PEAC, discussed in detail in Section III, was a result of this segment of digital assets.¹³

Intangible digital assets that exist solely in the digital world generally have the highest monetary impact on estate planning. As previously mentioned, Internet domain names can be purchased and sold later for a windfall.¹⁴ Digital intellectual property such as blogs and online storefronts through websites such as eBay or Etsy¹⁵ can either be used by family members to generate income or sold upon death. Gaming assets and gaming currency, including World of Warcraft and Second Life, may also be sold for significant sums.¹⁶ The main challenge of digital assets in estate planning is identifying these assets prior to the owner's death so that they can be administered as part of the estate. Some intangible digital assets, however, pose additional challenges in planning for estate administration based on their complexity. For example, Bitcoins are an

¹⁰ See *id.* (referring to electronic access to both tangible and intangible assets).

¹¹ *Id.*

¹² See Jennifer A. Davis, *Counseling Clients for #DigitalDeath*, 71 J. OF THE MO. B. 134, 135–36 (2015).

¹³ See *supra* Section III.

¹⁴ Davis, *supra* note 12, at 135; Starnes, *supra* note 4.

¹⁵ Pozzuolo & Barse, *supra* note 7, at 4.

¹⁶ World of Warcraft prohibits the sale of game contents; however, a player spent \$10,000 to purchase a level 70 character. Charles Phelps, *More Inheritable Rights for Digital Assets*, 41 RUTGERS L. REC. 131, 137 (2013–14). Second Life has its own exchange, LindeX, where a million transactions occur daily and some players supplement their incomes through working in the virtual world; however, the license agreement makes electronic belongings indescendible. David Horton, *Contractual Indescendibility*, 66 HASTINGS L.J. 1047, 1056–57 (2015). An issue may arise even if the property is sold; Second Life recognizes intellectual rights in the creator or author of an item in the virtual world, but the copyright and ownership of that virtual world object are separate. Juliet M. Moringiello, *What Virtual Worlds Can Do For Property Law*, 62 FLA. L. REV. 159, 176 (2010).

encrypted code that acts as a substitute for real cash.¹⁷ An investor can share his wallet with a designated person during life, but the designated person would have full access to all Bitcoins in the wallet.¹⁸ To avoid misappropriation, investors have created alternatives that require multiple signatories or a specific key to complete the transaction.¹⁹ The type and complexity of digital assets existing exclusively in the digital world will only expand and become more complex in the future.

B. *Why Are Digital Assets Important?*

Planning for digital assets in an estate plan serves two main purposes: preventing identity theft and preventing direct financial loss to the estate. The Internal Revenue Service has estimated that the identities of nearly 2.5 million deceased Americans are stolen every year.²⁰ While the majority of these thefts occur by chance, 800,000 of the thefts are the result of deliberate targeting – nearly 2,200 every day.²¹ In 2011 alone, refunds of \$5.2 billion of federal income tax were obtained by criminals filing tax returns under social security numbers of deceased persons.²² This form of identity theft is called “ghosting.”²³ Ghosting is made possible by a lag between the decedent’s death and the date that financial institutions, agencies (such as the Internal Revenue Service and the Social

¹⁷ Sasha A. Klein & Andrew R. Comiter, *Are You Ready for This Change for a Dollar?* 29 PROB. & PROP. 10, 10 (2015).

¹⁸ Aubrey K. Noonan, *Bitcoin or Bust: Can One Really “Trust” One’s Digital Assets?* 7 EST. PLAN. & COMTY. PROP. L.J. 583, 612 (2015).

¹⁹ *Id.* (explaining both the “M-of-N Transaction,” which uses multiple signatories to allow access to a particular transaction instead of the whole wallet, and “Dead Man’s Switch,” which allows a server to sign off on a transaction after the owner’s death with a specified key).

²⁰ Internal Revenue Serv., <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Deceased-Taxpayers-Protecting-the-Deceaseds-Identity-from-ID-Theft> (updated as of June 29, 2015).

²¹ Sid Kirchheimer, *Protecting the Dead from Identity Theft*, AARP (Mar. 6, 2013), <http://www.aarp.org/money/scams-fraud/info-03-2013/protecting-the-dead-from-identity-theft.html>.

²² *Id.*

²³ “Ghosting,” or stealing the identity of a deceased person, can occur in a variety of ways. By way of example, the following are three popular fictional characters that used a false identity obtained from ghosting. Seymour Skinner, the principal on the Simpsons, is actually Armin Tamzarian who stole the identity of a prisoner of war. Timothy M. Dale, *Aristotle’s Politics and the Virtues of Springfield*, in HOMER SIMPSON PONDERES POLITICS: POPULAR CULTURE AS POLITICAL THEORY 33 (U. Press of Ky. 2013). Don Draper, partner at Sterling Cooper Draper Pryce on Mad Men, stole a fellow soldier’s identity during the Korean War and lived under the identity for decades. *Jon Hamm: Mad Men’s Don Draper Redefines Himself*, NPR (Apr. 1, 2011), <http://www.npr.org/2011/04/01/135011626/jon-hamm-mad-mens-don-draper-redefines-himself>. Creed Bratton, quality assurance director on the Office, strongly implies in the episode titled “Crime Aid” that he stole the identity of the real Creed Bratton after he “disappeared.” TVFANATIC, *The Office Season 5 Episode 5: “Crime Aid” Quotes*, <http://www.tvfanatic.com/quotes/shows/theoffice/episodes/crime-aid/>.

Security Administration), and credit-reporting bureaus update their databases.²⁴ Incapacitated and deceased individuals are particularly vulnerable to identity theft due to their inability to monitor online presence under their names and report any misuse.²⁵ By planning for a family member or representative to review, delete, or otherwise take over digital accounts, ghosting can be prevented.

Inventorying and planning for the transfer of digital assets also prevents direct financial loss to the estate. As described above, swift access to digital account statements and portals of custodians prevents unnecessary fees for inactivity or late payment.²⁶ Additionally, having access to online accounts allows an administrator to prevent automatic payments that overdraw the account²⁷ and to stop automatic payments for services the decedent no longer uses. A real challenge presents itself when the administrator is unaware that digital assets even exist.²⁸ The administrator might not know, or ever find out that the decedent owned domain names, Bitcoins, or other digital assets with economic value. Other digital assets, such as a decedent's blog, may fall victim to content theft if not monitored.²⁹ Without knowledge of and swift access to digital assets, the estate is at risk of financial loss from fees, theft, or lost opportunity costs on a digital asset's potential sales price.

An "easy" solution to the abovementioned problems can be to provide an inventory of usernames, passwords, and security questions and answers to a trusted person prior to death.³⁰ If an administrator uses the provided username and password, however, it may constitute a violation of the Computer Fraud and Abuse Act,³¹ the Stored Wire and Electronic Communications Act (part of the Electronic Communications Privacy

²⁴ Kirchheimer, *supra* note 21.

²⁵ Davis, *supra* note 12, at 135.

²⁶ *See id.* at 135–36; Pozzuolo & Barse, *supra* note 7, at 5.

²⁷ Pozzuolo & Barse, *supra* note 7, at 5. For example, a Michigan woman died over five years prior to being found and her automatic bill payments continued until her bank account reached zero. Jethro Mullen and Kevin Conlon, *Michigan Woman's Auto-payments Hid Her Death for over Five Years*, CNN (Mar. 8, 2014), <http://www.cnn.com/2014/03/07/us/-michigan-mummified-body-found/>.

²⁸ *See generally* Frank S. Baldino, *Estate Planning and Administration for Digital Assets*, 45 MD. B.J. 28, 30 (2012).

²⁹ John Conner, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 3 EST. PLAN. & COMTY. PROP. L.J. 301, 321 (2011); Davis, *supra* note 12, at 136.

³⁰ Baldino, *supra* note 28, at 30.

³¹ 18 U.S.C. § 1030 (2012). The Computer Fraud and Abuse Act "criminalizes the intentional access of a protected computer without authorization, or exceeding the granted authorization, and thereby obtaining financial data or information from that computer." Pozzuolo & Barse, *supra* note 7, at 5. Almost every device qualifies as a protected computer, one used in or affecting interstate commerce, due to the widespread purchase of goods and services online. *Id.* The Act does not, however, apply to access that was approved by the decedent. Gerry W. Beyer, *Web Meets the Will: Estate Planning for Digital Assets*, 42 NAEPC J. OF EST. & TAX PLAN. 28, 32 (Mar. 2015), available at <http://www.naepc.org/journal/issue20.html>.

Act),³² or the service provider’s Terms of Service Agreement.³³ While a decedent may have given his consent to access the account, the Terms of Service Agreement often prohibits a user from allowing another to access the user’s account.³⁴ For example, in *Ajemian v. Yahoo!, Inc.*, co-administrators and siblings of the decedent were found to have no rights under the Yahoo! Terms of Service Agreement, and they were not entitled to use Yahoo!’s email service or the email account opened for the decedent.³⁵ Federal law and Terms of Service Agreements pose uncertainties for accessing accounts after the death of a decedent, yet only a handful of states had legislation aimed at clearing up these uncertainties prior to the release of the Revised UFADAA.

II. STATUS OF LEGISLATION PRIOR TO THE RELEASE OF THE REVISED UFADAA

State law regarding access to digital assets prior to the release of the Revised UFADAA can be categorized as statutes: (1) covering only email accounts; (2) applying to a slightly broader “records stored electronically”; (3) including an expanded definition of digital assets; (4) applying only to a restricted scenario for deceased minor’s digital accounts, or (5) adopting either the UFADAA or PEAC.³⁶ The following table lists the states that fall into each of these categories and provides a summary of the statute.

Extent of Coverage	State Statutes
(1) Email accounts only	<u>California</u> - The statute does not directly address access to a decedent’s account; however, the required notice of termination of email services would be useless unless a personal representative

³² 18 U.S.C. §§ 2701-2712 (2012). The Stored Communications Act prohibits electronic service providers from sharing the content of any communications stored by that service with any person. Pozzuolo & Barse, *supra* note 7, at 5. There is an exception for those who have the lawful consent of the customer. *Id.* The Act only allows the service provider to provide a catalogue of communications (date and time of communication, subject line, sender, and recipient) without consent. *Id.* One challenge is that the executor of an estate cannot compel access even with a court order. *Id.* For example, in *In re Facebook, Inc.*, a U.S. District Court quashed a subpoena for records from a decedent’s account to be used to help determine if she committed suicide. 923 F. Supp. 2d 1204, 1205–06 (N.D. Cal. 2012).

³³ Terms of Service Agreements are the documents customers acknowledge (but seldom read) when creating accounts.

³⁴ Klein & Prathemer, *supra* note 5, at 45. For example, Facebook and Microsoft’s Hotmail both have a provision prohibiting anyone other than the customer from accessing the account. *Id.*

³⁵ 987 N.E.2d 604, 607 (Mass. App. Ct. 2013).

³⁶ Beyer, *supra* note 31, at 39–40. The UFADAA and PEAC are discussed in depth in the next Section. *See infra* Section III.

	<p>had access to a decedent's email account.³⁷</p> <p><u>Connecticut</u> - Requires an electronic service provider to provide copies of contents of a decedent's email account to the executor or administrator of the estate upon either written request (accompanied by death certificate and certified copy of certificate of appointment of executor or guardian) or an order from probate court.³⁸</p> <p><u>Rhode Island</u> - Same requirements as Connecticut listed above.³⁹</p>
(2) Electronically stored records	<p><u>Indiana</u> - Requires a custodian⁴⁰ to provide the personal representative of the estate copies of stored information upon either written request (accompanied by death certificate and certified copy of the personal representative's letters testamentary) or an order from probate court.⁴¹</p>
(3) Expanded definition of digital assets	<p><u>Oklahoma</u> - Grants the executor or administrator the power, where authorized, to manage decedent's social networking sites, microblogging or short message service websites, or email accounts.⁴²</p> <p><u>Idaho</u> - Grants a conservator the same powers as Oklahoma listed above.⁴³</p> <p><u>Nevada</u> - A personal representative, unless otherwise prescribed in the will of decedent or court order, has the</p>

³⁷ *Id.* at 39; *See* CAL. BUS. & PROF. CODE § 17538.35(a) (West 2015).

³⁸ CONN. GEN. STAT. § 45a-334a (2015). This section has since been repealed and replaced with the Revised UFADAA. *Infra* note 159.

³⁹ 33 R.I. GEN. LAWS § 33-27-3 (West 2015).

⁴⁰ "Custodian" is defined more broadly than simply an email provider: "any person who electronically stores the documents or information of another person." *See* IND. CODE § 29-1-13-1.1 (2015). Indiana has since enacted the Revised UFADAA. *Infra* note 159.

⁴¹ *Id.*

⁴² OKLA. STAT. tit. 58, § 269 (2015).

⁴³ Idaho Code §15-5-424(z) (2015). Idaho has since enacted the Revised UFADAA. *Infra* note 159.

	<p>power to terminate the following accounts: social net-working, web log, microblog, short message service, email, or other similar electronic or digital asset.⁴⁴</p> <p><u>Louisiana</u> – A valid testament of the decedent or order from a court allow a representative to control, handle, conduct, continue, distribute, or terminate any digital account⁴⁵ of the decedent.⁴⁶ Any person who electronically stores, maintains, manages, controls, operates, or administers a digital account of a decedent shall provide access or possession of the account to a representative within 30 days or receipt of a letter evidencing their status as a representative for the decedent.⁴⁷</p>
(4) Restricted for access to deceased minor’s digital accounts only	<p><u>Virginia</u> - A personal representative of a deceased minor is entitled to the deceased’s electronic communications and records within 60 days of a written request and death certificate of the minor.⁴⁸</p>

⁴⁴ NEV. REV. STAT. § 143.188 (2015). The statute specifically excludes the ability of a personal representative to terminate any financial account (i.e., bank account or investment account). *Id.*

⁴⁵ Louisiana defined “digital account” as accounts on social networking sites, web logs, microblog services, short service sites, email services, financial account websites, or any similar electronic service or record. LA. CODE CIV. PROC. ANN. art. 3191 (2015). The statute also specifically includes “any words, characters, codes, or contractual rights necessary to access such digital assets and any text, images, multimedia information, or other personal property stored by or through such digital account.” *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ VA. CODE ANN. § 64.2-110 (West 2015). The provider is not required to comply with the written request unless a nonappealable court judgment has been rendered. *Id.* The statute attempts to address any possible issues with a Terms of Service Agreement by allowing the personal representative to contractually step into the shoes of the deceased minor. *See id.* The statute is limited to personal representatives of deceased minors as a main proponent of the statute was searching for answers into his 15-year-old son’s suicide. Frederick Kunkle, *Virginia family, seeking clues to son’s suicide, wants easier access to Facebook*, THE WASHINGTON 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. Virginia has introduced the Revised UFADAA in the 2017 legislative session. *Infra* note 159.

(5) Based on the original UFADAA or PEAC ⁴⁹	<p><u>Delaware</u> – Adopted a modified version of the UFADAA effective January 1, 2015.⁵⁰</p> <p><u>Virginia</u> – Modified §64.2-109 (definitions) and §64.2110 (Personal Representative Access to Digital Accounts mentioned above in the table), as well as added a modified version of the PEAC.⁵¹</p>
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As this table illustrates, the few states that enacted legislation related to digital assets prior to the Revised UFADAA differed on a number of key aspects, including the types of digital assets covered, the individuals who can access digital assets, and the depth of powers the fiduciary has over the digital asset.⁵² Those states that cover only a limited scope of digital assets provide little practical value for fiduciaries managing the assets of an incapacitated individual or decedent. For example, California and Rhode Island do not address incapacity or any intangible digital assets.⁵³ Incapacitated individuals are equally susceptible to identity theft, and intangible digital assets arguably would have the highest monetary impact on the estate.⁵⁴ Additionally, the lack of any legislation on the topic in a large majority of states likely prevented estate planners from considering digital assets in a meaningful way with their clients.⁵⁵

III. UFADAA vs. PEAC

To alleviate the confusion surrounding digital assets and the wide variety of legislation that was adopted by states,⁵⁶ the Uniform Law Commission (also known as the National Conference of Commissioners

⁴⁹ The UFADAA and PEAC are discussed in depth in the Section III.

⁵⁰ See DEL. CODE ANN. tit. 12, §§ 5001–5007 (West 2015); *infra* Section III.

⁵¹ See VIRGINIA’S LEGISLATIVE INFORMATION SYSTEM, <https://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+SB1450ER> (last visited Jan. 15, 2017); *Infra* Section III. Virginia has introduced the Revised UFADAA in the 2017 legislative session. *Infra* note 159.

⁵² See Nat’l Conference of Comm’rs on Uniform State Laws, *Uniform Fiduciary Access to Digital Assets Act*, 5 (2014), http://www.uniformlaws.org/shared/docs/Fiduciary-%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf.

⁵³ These states only allow access to a decedent’s email account. *Supra* notes 37, 39 and accompanying text. There is no provision for other digitally managed assets such as online banking or for actual intangible digital assets. *Id.*

⁵⁴ Access to an email account or online banking may prevent inactivity fees, automatic withdrawals, or other recurring fees. Actual intangible assets, however, can potentially be sold or used by the estate to produce income. *Supra* notes 14–19 and accompanying text.

⁵⁵ See *infra* Sections IV and V.

⁵⁶ See *supra* Section II.

on Uniform State Laws) drafted the UFADAA.⁵⁷ The Uniform Law Commission publishes proposed legislation on certain topics in order to provide states with sample language that can be introduced into legislation in each state. These uniform laws must be enacted by an individual state to be binding on that state. Uniformity among the states on handling digital assets would provide certainty and predictability to courts, account holders, fiduciaries, and service providers.⁵⁸ Both the original UFADAA and the Revised UFADAA were drafted to achieve that certainty and predictability.

A. *Uniform Fiduciary Access to Digital Assets Act*

The original UFADAA was drafted to facilitate fiduciary access to digital assets while also protecting the privacy and intent of the decedent.⁵⁹ The UFADAA applied to a fiduciary or agent under a will or power of attorney, a personal representative, a conservatorship, or a trustee.⁶⁰ It allowed those individuals, unless otherwise ordered by the court or by the decedent in his or her will, to access the content of electronic communications,⁶¹ any catalogue of electronic communications⁶² sent or received by the decedent, and any other digital asset in which the decedent had a right or interest.⁶³ The UFADAA allowed the fiduciary to access, control, and copy the asset.⁶⁴ A request to a service provider to access an account had to be accompanied by a court order, letter of appointment, copy of the power of attorney, or copy of the trust depending on the fiduciary's status as a personal representative, custodian, agent, or trustee.⁶⁵

The original UFADAA was specifically drafted so as not to be in conflict with federal law and thus able to withstand constitutional challenge.⁶⁶ This goal was accomplished by defining fiduciaries as authorized users⁶⁷ and providing that the fiduciary had the lawful consent of the account holder for the custodian to divulge content.⁶⁸ An agent had to have express authority in a power of attorney over the content of an

⁵⁷ See Nat'l Conference of Comm'rs on Uniform State Laws, *supra* note 52, at 2.

⁵⁸ *Id.*

⁵⁹ *Id.* at 6.

⁶⁰ *Id.* at 12.

⁶¹ The UFADAA specifically states that access to electronic communications is permitted only if it is allowed under the Electronic Communications Privacy Act, of which the Stored Wire and Electronic Communications Act is a part. *Id.* at 14

⁶² "Catalogue of electronic communications" is defined as information that identifies each person with which the decedent has an electronic communication, the email address of the sender and recipient, and the time and date of that communication. *Id.* at 7.

⁶³ *Id.* at 13–18.

⁶⁴ *Id.* at 25.

⁶⁵ *Id.* at 25–26.

⁶⁶ Klein & Prathemer, *supra* note 5, at 47.

⁶⁷ *Id.*

⁶⁸ Nat'l Conference of Comm'rs on Uniform State Laws, *supra* note 52, at 19.

electronic communication of the principal in order to access the content of electronic communications governed by the Electronic Communications Privacy Act.⁶⁹ Also, the UFADAA gave the fiduciary the same authority and limitations that the account holder had, except where the account owner had explicitly opted out of fiduciary access to the account, thus avoiding a violation of the custodian's Terms of Service Agreement.⁷⁰

As a protection for the service provider, it provided immunity for a custodian and its officers, employees, or agents if they acted in good faith in compliance with the UFADAA in complying with or denying a request for access.⁷¹ Even with this provision, the expansive rights provided to fiduciaries under the UFADAA was met with strong opposition from groups of major e-commerce companies, social media companies, email providers, and civil liberties groups (collectively referred to as the "Providers").⁷² For example, social media and email providers theoretically could override fiduciary access to accounts by requiring users to forfeit any fiduciary right to access or control at the time the accounts are created.⁷³ The Providers sent letters of opposition to state legislatures, collectively adopting three main arguments against adoption of the UFADAA.⁷⁴ First, the Providers asserted that disclosing information to a fiduciary under the UFADAA would place them in violation of the Electronic Communications Privacy Act.⁷⁵ Secondly, the Providers believed that most users would *not* want their fiduciaries to have access to their electronic communications.⁷⁶ Some Providers went further and argued that the privacy of the people who communicated with the decedent would be violated when electronic communications were released to the fiduciary.⁷⁷ Finally, the Providers believed that the UFADAA would void millions of contracts by invalidating Terms of Service Agreements that restrict fiduciary access.⁷⁸

These opponents caused delays in state legislatures that introduced the UFADAA, while other states killed the bills altogether. Delaware was the only state to adopt any version of the UFADAA as of January 1, 2015.⁷⁹ Delaware consolidated the UFADAA's separate sections addressing fiduciaries, personal representatives, guardians, agents,

⁶⁹ 18 U.S.C. §§ 2701-2712 (2012). *Id.* at 16.

⁷⁰ *Id.* at 19–20.

⁷¹ *Id.* at 28.

⁷² Holland & Hart LLP, *Opposition to the Uniform Fiduciary Access to Digital Assets Act*, THE NAT'L L. REV. (July 21, 2015), <http://www.natlawreview.com/article/-opposition-to-uniform-fiduciary-access-to-digital-assets-act>.

⁷³ Alexandra Elliott, *Death and Social Media Implications for the Young and Will-Less*, 55 JURIMETRICS J. 381, 398–99 (2015).

⁷⁴ Karin Prangle, *War and PEAC in Digital Assets: The Providers' PEAC Act Wages War with UFADAA*, 29 PROB. & PROP. 40, 41 (2015).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Holland & Hart LLP, *supra* note 72.

⁷⁸ Prangle, *supra* note 74, at 41.

⁷⁹ See DEL. CODE ANN. tit. 12, §§ 5001–5007 (West 2015).

trustees, and advisors, into one section.⁸⁰ The Delaware statute gives a fiduciary control over and all rights in digital assets⁸¹ and digital accounts,⁸² which overrides any provision in the Terms of Service Agreement.⁸³ The definitions for both digital assets and digital accounts provide more guidance to users than those provided in the UFADAA.⁸⁴ Delaware also included a clearer explanation of the custodian's duties when presented with a request for access to the digital asset.⁸⁵ Rather than the general immunity provision for custodians acting in good faith,⁸⁶ the Delaware statute delineates situations in which a custodian is liable or immune.⁸⁷ More specifically, the statute details in which cases a custodian is allowed to refuse a valid written request for access to digital assets⁸⁸ and provides the custodian immunity from civil or criminal liability if acting in good faith in denying the request.⁸⁹ The statute also states that a custodian who refuses a valid written request for access to digital assets may be subject to liability for damages to the fiduciary.⁹⁰

Thirty states proposed the UFADAA during the 2015 legislative session; however, none was passed into law.⁹¹ Bills in eight of these states

⁸⁰ If a particular fiduciary requires a special or specific disclosure or modification to the general rule, it is listed under the same subset of the statute as opposed to a separate statute for each fiduciary. *See* DEL. CODE ANN. tit. 12, §§ 5002(11), 5004, 5005 (West 2015); Nat'l Conference of Comm'rs on Uniform State Laws, *supra* note 52, at 9–14.

⁸¹ Delaware provides a list of digital assets, including data, texts, emails, videos, images, social media content, computer programs, software, licenses, databases, and health care records. DEL. CODE ANN. tit. 12, § 5002(7) (West 2015).

⁸² Delaware provided an expanded definition of digital accounts as email accounts, social networking accounts, file sharing accounts, domain name service accounts, web hosting accounts, health insurance and health care accounts, tax preparation service accounts, online store accounts and other such accounts as technology develops. *See* DEL. CODE ANN. tit. 12, § 5002(6) (West 2015).

⁸³ DEL. CODE ANN. tit. 12, § 5004 (West 2015).

⁸⁴ *See* DEL. CODE ANN. tit. 12, § 5002(6)-(7) (West 2015); Nat'l Conference of Comm'rs on Uniform State Laws, *supra* note 52, at 4.

⁸⁵ *See* DEL. CODE ANN. tit. 12, § 5002(6)-(7) (West 2015).

⁸⁶ Nat'l Conference of Comm'rs on Uniform State Laws, *supra* note 52, at 28.

⁸⁷ *See* DEL. CODE ANN. tit. 12, § 5006 (West 2015).

⁸⁸ The custodian can refuse a written request if he or she would not be required to assist the actual account holder with the same request, disclosure would violate state or federal law, or the custodian has actual knowledge that the fiduciary does not have the authority to disclose the information. DEL. CODE ANN. tit. 12, § 5006(b) (West 2015).

⁸⁹ DEL. CODE ANN. tit. 12, § 5006(f)-(g) (West 2015).

⁹⁰ DEL. CODE ANN. tit. 12, § 5006(e) (West 2015).

⁹¹ The following states proposed the UFADAA during the 2015 legislative session: Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and Washington. UNIFORM LAW COMMISSION, [http://www.uniformlaws.org/Legislation.aspx?title=Fiduciary+Access+to+Digital+Assets+Act+\(2014\)](http://www.uniformlaws.org/Legislation.aspx?title=Fiduciary+Access+to+Digital+Assets+Act+(2014)) (last visited Oct. 17, 2015); Samantha Moodie, *Access to Digital Assets of Decedents*, NAT'L CONF. OF ST. LEGISLATURES (May 19, 2015), <http://www.ncsl.org/research/telecommunications-and-information-technology/access-to-digital-assets-of-decedents.aspx>.

died in subcommittee meetings or on the legislative floor.⁹² Many others were referred to a committee and remained there for most of the 2015

⁹² The UFADAA proposals in Arkansas, Colorado, Florida, Mississippi, Montana, New Mexico, North Dakota, and Virginia are discussed in turn. Arkansas H.B. 1362 died in the Senate on April 22, 2015. H.R. 1362, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); ARK. ST. LEG., <http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/Bill-Information.aspx?measureno=hb1362> (last visited Jan. 15, 2017). Colorado H.B. 15-1189 was suspended indefinitely by the House committee on March 12, 2015. H.R. 15-1189, 70th Gen. Assemb., Reg. Sess. (Colo. 2015); COLO. GEN. ASSEMB., http://www.leg.state.co.us/clics/clics2015a/csl.nsf/fsbillcont3/40E22B5B0A915CA387257DBD005D9FEF?open&file=1189_01.pdf (last visited Jan. 15, 2017). Florida H.B. 313 died in the Insurance and Banking Subcommittee. H.B. 313, Gen. Assemb., Reg. Sess. (Fla. 2015); THE FLA. S., <http://www.flsenate.gov/Session/Bill/2015/313> (last visited Jan. 15, 2017). Florida S.B. 102 also proposing the UFADAA died on the calendar on May 1, 2015. S.B. 102, Gen. Assemb., Reg. Sess. (Fla. 2015); THE FLA. S., <http://www.flsenate.gov/Session/-Bill/2015/0102> (last visited Jan. 15, 2017). Mississippi H.B. 1217 died in the Judiciary Committee. H.B. 1217, Gen. Assemb., Reg. Sess. (Miss. 2015); MISS. LEG., <http://billstatus.ls.state.ms.us/2015/pdf/history/HB/HB1217.xml> (last visited Jan. 15, 2017). Montana S.B. 266 died in the Judiciary Committee. S.B. 266, 64th Gen. Assemb., Reg. Sess. (Mont. 2015); MONT. LEG., [http://laws.leg.mt.gov/legprd/-LAW0203W\\$BSRV.ActionQuery?P_SESS=20151&P_BLTP_BILL_TYP_CD=SB&P_BILL_NO=266&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=](http://laws.leg.mt.gov/legprd/-LAW0203W$BSRV.ActionQuery?P_SESS=20151&P_BLTP_BILL_TYP_CD=SB&P_BILL_NO=266&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=) (last visited Jan. 15, 2017). New Mexico S.B. 59 was postponed indefinitely. S.B. 59, 52nd Gen. Assemb., Reg. Sess. (N.M. 2015); N.M. LEG., <http://www.nmlegis.gov/lcs/legislation.aspx?chamber=S&legtype=B&legno=59&year=15> (last visited Jan. 15, 2017). North Dakota S.B. 2106 failed to pass on its second reading in the Senate. S.B. 2106, 64th Gen. Assemb., Reg. Sess. (N.D. 2015); N.D. LEG. BRANCH, <http://www.legis.nd.gov/assembly/64-2015/bill-actions/ba2106.html> (last visited Jan. 15, 2017). Virginia H.B. 1477 was defeated in the Committee for the Courts of Justice. H.B. 1477, Gen. Assemb., Reg. Sess. (Va. 2015); VA. LEG. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=151&typ=bil&val=hb1477> (last visited Jan. 15, 2017). Virginia S.B. 1452 also introducing the UFADAA was also defeated in the Committee for the Courts of Justice. S.B. 1452, Gen. Assemb., Reg. Sess. (Va. 2015); VA. LEG. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=151&typ=bil&val=sb1452> (last visited Jan. 15, 2017).

legislative session.⁹³ Some of these 30 states carried their bills into the 2016 legislative session.⁹⁴

B. *Privacy Expectation Afterlife and Choices Act*

Despite their opposition to the UFADAA, the Providers and their trade association, NetChoice, believe that some legislation is needed to allow and clarify fiduciary access to digital assets.⁹⁵ Recognizing the need, NetChoice drafted and published the PEAC for introduction by state legislatures as an alternative to the UFADAA.⁹⁶

The PEAC required the executor or administrator of the estate to obtain a court order from a probate court with proper jurisdiction over the deceased's estate requesting information from a service provider spanning no more than a year prior to death.⁹⁷ The executor or administrator had to then submit a written request to the service provider, a copy of the death certificate, and the order of the court.⁹⁸ After receipt, the service provider could deny the request if the deceased indicated a different intent through account settings, there had been lawful access to the account after the date of death, or the disclosure would violate applicable laws.⁹⁹ If the service provider had no reason to deny the request, it was required to disclose only a "record or other information pertaining to the deceased user,"¹⁰⁰ which

⁹³ Idaho, Indiana, Kentucky, and Michigan are just a few examples. Idaho S.B. 1055 was referred to the Judiciary and Rules Committee on February 10, 2015, and remained there indefinitely. S.B. 1055, 63rd Gen. Assem., Reg. Sess. (Idaho 2015); IDAHO LEG., <http://legislature.idaho.gov/legislation/2015/S1055.htm> (last visited Jan. 15, 2017). Idaho has since adopted the Revised UFADAA. *Infra* note 159. Indiana S.B. 368 was referred to the Committee on Judiciary on March 3, 2015, and remained there indefinitely. S.B. 368, 119th Gen. Assem., Reg. Sess. (Ind. 2015); IND. GEN. ASSEMB., <https://iga.in.gov/legislative/2015/bills/senate/368#> (last visited Jan. 15, 2017). Indiana has since adopted the Revised UFADAA. *Infra* note 159. Kentucky S.B. 53 was referred to the Senate Standing Committee on Judiciary on February 3, 2015, and remained there indefinitely. S.B. 53, Gen. Assem., Reg. Sess. (Ky. 2015); KY. LEG., <http://www.lrc.ky.gov/record/15RS/SB53.htm> (last visited Jan. 15, 2017). Michigan H.B. 4072 was referred to the Committee on Judiciary on January 27, 2015, and remained there indefinitely. H.B. 4072, 98th Gen. Assem., Reg. Sess. (Mich. 2015); MICH. LEG., [http://www.legislature.mi.gov/\(S\(abh3m4qjmdzfxk2i0e1s4hy\)\)/mileg.aspx?page=GetObject&objectname=2015-hb-4072](http://www.legislature.mi.gov/(S(abh3m4qjmdzfxk2i0e1s4hy))/mileg.aspx?page=GetObject&objectname=2015-hb-4072) (last visited Jan. 15, 2017). Michigan has since adopted the Revised UFADAA. *Infra* note 159.

⁹⁴ For example, Tennessee and Washington carried the original UFADAA bill into the 2016 legislative session, updated the language to reflect the Revised UFADAA, and have since passed the bill into law. See *infra* note 159.

⁹⁵ See Prangley, *supra* note 74, at 41.

⁹⁶ NetChoice, *Privacy Expectation Afterlife and Choices Act (PEAC)*, <http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/> (last visited Jan. 15, 2017).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ "Record or other information pertaining to a user" refers to the language used in the Stored Wire and Electronic Communications Act. 18 U.S.C. § 2702 (2012).

did not include the “contents” of the communication.¹⁰¹ The contents, which would *not* be disclosed, included information concerning the substance, purpose, or meaning of that communication and the subject line of the communication.¹⁰² In no circumstance was the executor or administrator allowed to use or control the account.¹⁰³

While the PEAC was noted as containing provisions that protected the holders of digital assets,¹⁰⁴ a number of criticisms surfaced. The PEAC addressed only a small portion of the UFADAA, as it applies solely to email communications.¹⁰⁵ The PEAC provided the executor or administrator with a “record” of communications, while the fiduciary had access to and control of the asset under the UFADAA.¹⁰⁶ That record would assist a fiduciary in discovering an institution in which the decedent had a bank account or service,¹⁰⁷ but would not allow a fiduciary any control over a digital asset in order to manage or sell it to benefit the estate. This focus on the second category of digital assets, digitally managed tangible assets, as opposed to the third category, true digital assets, failed to address the highest monetary impact that digital assets could have on an estate.¹⁰⁸ Also, the PEAC only addressed a deceased person’s representative and did not include any provisions for accessing the account of someone that is incapacitated, which is addressed in the UFADAA.¹⁰⁹ This would leave incapacitated individuals with the same financial risks as the deceased,¹¹⁰ but without similar protection under the statute.

The biggest criticism of the PEAC, however, was that the record could only be requested if accompanied by a court order. This would cause a delay in obtaining access to email communications, whereas the UFADAA proposed automatic access for the fiduciary.¹¹¹ Requiring a court order could force an estate to open a probate proceeding where it otherwise would not have been needed.¹¹² For example, if the decedent’s

¹⁰¹ NetChoice, *supra* note 96.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Morgan M. Wiener, *Opposition to the Uniform Fiduciary Access to Digital Assets Act*, THE NAT’L L. REV. (July 21, 2015), <http://www.natlawreview.com/article/opposition-to-uniform-fiduciary-access-to-digital-assets-act>.

¹⁰⁵ Prangle, *supra* note 74, at 42.

¹⁰⁶ Nat’l Conference of Comm’rs on Uniform State Laws, *supra* note 59 and accompanying text.

¹⁰⁷ For example, if the fiduciary saw in the subject line of an email communication the name of a bank, the fiduciary would know that the decedent likely had an account at that bank. Similarly, if a cable company sent the decedent an email communication with a subject line that included his or her name, the fiduciary would know to look for a bill or automatic payment draw from that company.

¹⁰⁸ *See supra* notes 14–16.

¹⁰⁹ Prangle, *supra* note 74, at 42.

¹¹⁰ *See supra* notes 20–29.

¹¹¹ Wiener, *supra* note 104.

¹¹² Prangle, *supra* note 74, at 43.

assets were all funded into a revocable living trust¹¹³ or the estate had minimal assets,¹¹⁴ a probate proceeding would typically not be required. Aside from increasing the number of estates opening probate, the statute would also increase research and analysis by the probate court and time spent in hearings.¹¹⁵ More specifically, the PEAC required the court to make a number of findings of fact, including whether the request is narrowly tailored to effect the purpose of the administration, the executor or administrator demonstrated a good faith belief that the records are needed to resolve the fiscal assets of the estate, and the disclosure would not violate applicable law.¹¹⁶ This not only increases the workload of the probate court but also increases the expenses of estate administration.¹¹⁷

Virginia, which enacted a limited statute pertaining to a deceased minor's digital assets only,¹¹⁸ debated both the UFADAA and PEAC in the 2015 legislative session.¹¹⁹ Virginia ultimately enacted a modified version of the PEAC, effective in June of 2015.¹²⁰ The legislature maintained its original provision for deceased minors and added this modified version of the PEAC.¹²¹ Virginia limited the burden on the probate court by requiring the personal representative to submit an affidavit attesting to the required findings of fact in the PEAC.¹²² Virginia also expanded the timeframe for communications that can be requested to include an 18-month period prior to death and more time if needed for estate administration.¹²³ The modified version of the PEAC also allowed for the fiduciary to request access to a joint user account if consent is given from the joint users.¹²⁴ No other states adopted the PEAC during the 2015 legislative session.

¹¹³ As long as the revocable living trust is funded by the decedent before death, the assets are not subject to probate. 12 Fla. Prac., Estate Planning § 7:10 (2015–16 ed.), Westlaw (database updated Dec. 2016).

¹¹⁴ For example, in Florida no administration is required if the decedent leaves only personal property under §732.402, personal property exempt from creditors under the Florida Constitution, or non-exempt personal property that does not exceed the cost of funeral expenses and medical expenses incurred during the last 60 days of the decedent's last illness. FLA. STAT. § 735.301 (2017). Exempt property under § 732.402 includes most commonly household furnishings and appliances up to \$20,000 and two personal vehicles. FLA. STAT. § 732.402 (2017).

¹¹⁵ Prangley, *supra* note 74, at 43.

¹¹⁶ NetChoice, *supra* note 96.

¹¹⁷ Prangley, *supra* note 74, at 44.

¹¹⁸ VA. CODE ANN. § 64.2-110 (West 2017).

¹¹⁹ Lenz, *supra* note 8.

¹²⁰ See VIRGINIA'S LEGISLATIVE INFORMATION SYSTEM, <https://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+SB1450> (last visited Jan. 15, 2017). Virginia has most recently introduced the Revised UFADAA in the 2017 legislative session. *Infra* note 159.

¹²¹ See VIRGINIA'S LEGISLATIVE INFORMATION SYSTEM, <https://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+SB1450> (last visited Jan. 15, 2017).

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *Id.*

IV. REVISED UFADAA

With a choice between the UFADAA and PEAC, many states remained at a standstill with their proposed legislation on fiduciary access to digital assets during the 2015 legislative session. The Section of Real Property, Trust and Estate Law of the American Bar Association created a new committee, the Digital Property Committee, to promote and educate state legislatures and the public on the need for the UFADAA.¹²⁵ The Uniform Law Commission also met with representatives from several Providers in May 2015 and negotiated a statute halfway between the UFADAA and PEAC.¹²⁶ The Revised UFADAA was approved by the Uniform Law Commission in July 2015¹²⁷ and was published shortly thereafter.

A. *Main Provisions of the Revised UFADAA*

The Revised UFADAA addresses the same set of fiduciaries as the UFADAA: a fiduciary acting under a will or power of attorney, a personal representative acting for a decedent, a conservator acting for a protected person, and a trustee.¹²⁸ The Revised UFADAA distinguishes between a request for content of electronic communications of a deceased user and disclosure of other digital assets of a deceased user in line with the PEAC.¹²⁹ For disclosure of the *content*¹³⁰ of electronic communications, the deceased user must have consented to the disclosure or a court order is needed to direct the disclosure.¹³¹ For disclosure of a *catalogue*¹³² of electronic communications and other digital assets, however, the personal representative has default access as long as the user or a court has not prohibited such disclosure.¹³³

The Revised UFADAA builds in more leeway for service providers. Even if the fiduciary is requesting only a *catalogue* of digital

¹²⁵ Anne W. Coventry & Karin Prangle, *Status of the Uniform Fiduciary Access to Digital Assets Act. Not exacted anywhere... yet*, A.B.A. (May 3, 2015), http://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2015/3/May/practice_alert.authcheckdam.pdf.

¹²⁶ *Id.*

¹²⁷ Nat'l Conference of Comm'rs on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act* (2015), http://www.uniformlaws.org/shared/docs/-Fiduciary%20Access%20to%20Digital%20Assets/revised%202015/2015_RUFADAA_Final%20Act_2015dec11.pdf.

¹²⁸ *Id.* at 8–9.

¹²⁹ *Id.* at 13–15.

¹³⁰ Content of electronic communications includes the substance or meaning of the communication sent or received by the user, stored by the Provider, and not readily accessible to the public. *Id.* at 13.

¹³¹ *Id.* at 14.

¹³² Catalogue of electronic communications includes the identity of the person in which the user had electronic communications (including their electronic address) and the time and date of communication. *Id.* at 3.

¹³³ *Id.* at 15–16.

assets, the service provider can request a court order finding that disclosure of the digital assets is reasonably necessary for administration of the estate.¹³⁴ When digital information is requested, the service provider is also afforded discretion to grant full access to the user's account, grant partial access to the user's account that would allow a fiduciary to carry out his duty, or provide the fiduciary with a record of any digital asset the user would have been able to access on the date of the request.¹³⁵

Additional provisions establish procedures for agents, trustees, and conservators to obtain access to digital assets. For agents, the power of attorney must expressly grant the agent authority over the *content* of electronic communications in order for the agent to obtain access.¹³⁶ If the agent has general authority or specific authority over digital assets, he can still obtain a *catalogue* of electronic communication and other digital assets from the Provider.¹³⁷ For digital assets and accounts that are transferred into trust, a trustee has access to the *content* of electronic communication if the trust instrument includes consent to the disclosure.¹³⁸ Thus, a settlor may include provisions in the trust limiting this access, which would be binding on the trustee.¹³⁹ Without specific authorization by the settlor to access *content* of electronic communications, the trustee can still access a *catalogue* of electronic communication and other digital assets placed in the trust.¹⁴⁰ Finally, a conservator of a protected person can obtain a *catalogue* of electronic communication and any digital assets with a court order only.¹⁴¹ While a conservator cannot obtain the *content* of electronic communications, general authority to manage the assets of a protected person would allow the conservator to suspend or terminate the account of the protected person for good cause.¹⁴²

The Revised UFADAA also clarifies the treatment of digital assets that are not within an account or stored on a personal computer or device. A fiduciary has the right to obtain a digital asset of the decedent that is not held by a custodian or within an account subject to a Terms of Service Agreement.¹⁴³ Also, if the fiduciary has the authority over a tangible object, such as a personal computer, he has the right to access that property and any digital assets stored on it.¹⁴⁴ This subset was not specifically addressed by the original UFADAA.

¹³⁴ *Id.* at 16.

¹³⁵ *Id.* at 8–9.

¹³⁶ *Id.* at 17.

¹³⁷ *Id.* at 18.

¹³⁸ *Id.* at 19–20.

¹³⁹ *Id.* at 19.

¹⁴⁰ *Id.* at 21.

¹⁴¹ *Id.* at 22.

¹⁴² *Id.*

¹⁴³ *Id.* at 24.

¹⁴⁴ *Id.*

B. *Compromises in the Revised UFADAA*

The Revised UFADAA contains a number of provisions that specifically address criticisms raised in response to the PEAC. Like the UFADAA, the Revised UFADAA applies to both email communications and other digital assets, while the PEAC only applies to email communications.¹⁴⁵ Addressing digital assets beyond email communications is important for the current wide range of digital assets.¹⁴⁶ Not restricting the language to only email communications also allows the Revised UFADAA to grow and adapt to new types of digital assets in the future. The Revised UFADAA, like the UFADAA, applies to personal representatives of the deceased as well as trustees, agents, and conservators of protected persons.¹⁴⁷ The PEAC failed to include any provision for accessing email communications of incapacitated persons,¹⁴⁸ which would have left an incapacitated person vulnerable to identity theft and possible financial loss.¹⁴⁹ The Revised UFADAA allows a conservator to suspend or terminate an account with a showing of good cause, even if he only has the general power to manage the incapacitated person's assets.¹⁵⁰ Finally, to avoid adding a significant volume of hearings to the probate courts,¹⁵¹ the Revised UFADAA requires a court order only for a personal representative requesting access to the *content* of email communications when consent of the deceased user cannot otherwise be shown or for a conservator requesting access to a *catalogue* of email communications.¹⁵² While the Revised UFADAA still gives a service provider discretion to request a court order in certain situations,¹⁵³ it cannot be predicted how often a service provider will exercise that discretion.

Other revisions in the Revised UFADAA respond to concerns Providers had with the UFADAA. Providers were concerned that the UFADAA would cause them to be in violation of federal law.¹⁵⁴ The Revised UFADAA maintains separate provisions for accessing the *content*

¹⁴⁵ *Supra* notes 105, 132–34 and accompanying text.

¹⁴⁶ *Supra* notes 6–19 and accompanying text explaining the various types of digital assets.

¹⁴⁷ *Supra* notes 60, 129 and accompanying text.

¹⁴⁸ *Supra* note 109 and accompanying text.

¹⁴⁹ *Supra* notes 20–29 and accompanying text explaining the harm in not monitoring digital assets.

¹⁵⁰ *Supra* note 142 and accompanying text.

¹⁵¹ *Supra* notes 111–17 and accompanying text detailing the potential effect of the PEAC on the workload of the probate court system.

¹⁵² *Supra* notes 131, 142 and accompanying text.

¹⁵³ *Supra* note 134 and accompanying text.

¹⁵⁴ *Supra* note 75 and accompanying text.

of email communications and a *catalogue* of email communications.¹⁵⁵ This delineation is necessary to ensure “lawful consent” is obtained prior to divulging the *content* of email communications as required by the Stored Communications Act.¹⁵⁶ The Providers were also concerned with the intent of the user,¹⁵⁷ which was given priority when drafting the Revised UFADAA.¹⁵⁸

V. IMPLICATIONS OF THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT ON LEGISLATORS AND TAX PROFESSIONALS

The Revised UFADAA has been enacted in 21 states and introduced during the 2017 legislative term in six others.¹⁵⁹ Having already gotten the input and blessing of NetChoice on the Revised UFADAA, the legislative process for these states should run more smoothly than the process for states enacting the original UFADAA.¹⁶⁰ There are still a number of states, however, that should consider introducing the Revised UFADAA during the 2017 legislative session.

A. State Adoption

While the Revised UFADAA does not give fiduciaries as much power in accessing digital assets as was contained in the original UFADAA, it is a vast improvement over having no state statute addressing the topic. Currently, 22 states have not passed any legislation clarifying fiduciary access to digital assets.¹⁶¹ Without a statute that provides

¹⁵⁵ *Supra* notes 129–42 and accompanying text, explaining the requirements to access content or a catalogue of email communications for a personal representative, agent, trustee, or conservator.

¹⁵⁶ 18 U.S.C. §§ 2701–2712 (2012); Nat’l Conference of Comm’rs on Uniform State Laws, *supra* note 127, at 15.

¹⁵⁷ *Supra* note 76 and accompanying text.

¹⁵⁸ Section 4 gives priority first to the user’s direction in an online tool or through a will, trust, power of attorney or other record; even if the Provider’s Terms of Service Agreement provides otherwise. Nat’l Conference of Comm’rs on Uniform State Laws, *supra* note 127, at 10.

¹⁵⁹ As of January 15, 2017, the complete list of states to adopt the Revised UFADAA is: Arizona, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Maryland, Michigan, Minnesota, Nebraska, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Washington, Wisconsin, and Wyoming. UNIFORM LAW COMMISSION, [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited Jan. 15, 2017). The full list of states that have introduced but not enacted the Revised UFADAA, as of January 15, 2017, are Mississippi, Missouri, New Jersey, New Mexico, Utah, and Virginia. *Id.*

¹⁶⁰ *See supra* notes 91–94.

¹⁶¹ Twenty-one states have adopted the revised UFADAA. *Supra* note 159 and accompanying text. In addition, seven states have older legislation addressing fiduciary access to digital assets (California, Rhode Island, Oklahoma, Nevada, Louisiana, Virginia, and Delaware). *Supra* notes 37–51 and accompanying text. This leaves 22 states without legislation addressing the topic.

fiduciary access to digital assets, incapacitated persons and estates will continue to be an easy target for identity theft and their assets subject to financial loss.¹⁶² Fiduciaries in these states have no statute authorizing access or control of digital assets. Thus, ad hoc methods are likely employed to limited success. For example, fiduciaries may be attempting to take over digital assets by using or guessing at the account holder's password, which is likely in violation of federal law.¹⁶³ Similarly, fiduciaries may be contacting service providers either posing as the deceased or incapacitated account holder or honestly explaining the situation and hoping to gain access to the digital account or digital asset. Assuming that most service providers would deny such access, it is easy to see that this method would not often provide the fiduciary with the information or access needed to properly administer the estate. Additionally, fiduciaries will not be able to employ these ad hoc methods if they are not aware of the digital account or asset in the first place.¹⁶⁴ Without any knowledge of a digitally managed asset or intangible digital asset, the fiduciary has no chance of properly administering it as part of the estate. To protect the identities and assets of the deceased and incapacitated, while at the same time providing clarity for fiduciaries, these legislatures should consider introducing the Revised UFADAA. To date, only six of the 22 states with no legislation related to fiduciary access to digital assets have introduced the Revised UFADAA in the 2017 legislative session.¹⁶⁵

Even among the six states that had enacted legislation on fiduciary access to digital assets prior to the UFADAA, their statutes remain restrictive or outdated as to the type of assets for which they grant access.¹⁶⁶ For example, California and Rhode Island passed their statutes covering only email communications in 2002¹⁶⁷ and 2007,¹⁶⁸ respectively. Not only has the type and complexity of digital assets increased over the past ten plus years, the likelihood of individuals creating wills and trusts actually owning digital assets has also increased. As the years pass without modification to outdated legislation, fiduciaries will be more likely to encounter issues with digital accounts and assets. If adopted by a state legislature, the Revised UFADAA would cover a much broader range of digital assets, would apply to a broader class of fiduciaries, and would

¹⁶² *Supra* notes 20–29 and accompanying text.

¹⁶³ *Supra* notes 31–33.

¹⁶⁴ The implications of the Revised UFADAA on estate planners' practices, such as their standard wills, trusts, and powers of appointment, are discussed in detail in Subsection B.

¹⁶⁵ *See supra* note 159. Seven states have introduced (but not enacted) legislation during the 2017 legislative session; however, Virginia, included in that list, already has legislation addressing the topic. *See infra* note 172 and accompanying text.

¹⁶⁶ Of the nine states that had legislation on the topic prior to the UFADAA (excluding Delaware which is discussed separately below), only Connecticut, Indiana, and Idaho have enacted the Revised UFADAA. *See supra* notes 37–61, 159 and accompanying text.

¹⁶⁷ CAL. BUS. & PROF. CODE § 17538.35(a) (West 2015).

¹⁶⁸ 33 R.I. GEN. LAWS § 33-27-3 (West 2015).

provide fiduciaries with a set rule for gaining access to digital accounts and assets.¹⁶⁹ Even Virginia, which adopted a modified version of the PEAC, currently has a statute that is narrower in content than the Revised UFADAA. The PEAC addresses only access to email communications (a small portion of the Revised UFADAA) and applies only to fiduciaries of decedents (ignoring the incapacitated).¹⁷⁰ The six states that have already adopted legislation on fiduciary access to digital assets should consider enacting the Revised UFADAA to remain in sync with the states currently discussing similar legislation.¹⁷¹ Only one of those six states has introduced the Revised UFADAA in the 2017 legislative session.¹⁷²

Delaware faces a unique situation in that it is the only state that adopted a modified version of the original UFADAA.¹⁷³ The original UFADAA provided fiduciaries with broader access to the content of electronic communications, which was opposed by NetChoice and modified in the Revised UFADAA.¹⁷⁴ The original UFADAA had less leeway and protections for service providers. However, Delaware, in enacting its own legislation, modified the original UFADAA to include more detailed provisions on service provider immunity and liability.¹⁷⁵ While Delaware's current statute builds in greater clarity on service provider immunity and liability, it still does not rise to the level of the service provider protections in the Revised UFADAA.¹⁷⁶ Even though Delaware's statute is similar to the Revised UFADAA,¹⁷⁷ the Delaware legislature should consider modifying its statute to match the recent revisions contained in the Revised UFADAA. These small revisions could limit pushback from service providers and result in greater uniformity among the states.

B. *Practical Implications*

Adopting the Revised UFADAA would not only provide protection and clarity on the management of digital assets in an individual state but would also benefit service providers and individuals currently planning their estates. First, if each state adopts the Revised UFADAA,

¹⁶⁹ See *supra* Section IV.

¹⁷⁰ See *supra* notes 105, 109, 145, 147 and accompanying text.

¹⁷¹ The benefits of a uniform set of statutes among the states are discussed in detail in the Section IV.

¹⁷² Virginia has a current statute that addresses fiduciary access to digital assets, but also introduced the modified UFADAA in 2017. See *supra* notes 48, 51, 159 and accompanying text. Connecticut, Indiana, and Idaho have already enacted the Revised UFADAA. *Supra* note 159. Delaware is discussed separately in the next paragraph.

¹⁷³ See *supra* notes 50, 79–90 and accompanying text.

¹⁷⁴ See *supra* notes 61–63, 130–31 and accompanying text.

¹⁷⁵ See *supra* notes 86–89, 134–35 and accompanying text.

¹⁷⁶ See *supra* note 135 and accompanying text.

¹⁷⁷ See *supra* Section II.

which NetChoice has officially endorsed,¹⁷⁸ service providers will only have one set of standards to learn and apply when requests for access to digital assets are received. This will not only decrease the time and effort service providers will have to expend in fulfilling a fiduciary's request for access, but could also decrease the number of challenges by service providers and court orders requested in response to a fiduciary's request for a catalogue of electronic communications.¹⁷⁹ This reduction in time, effort, and required court orders would reduce the expenses of both service providers and fiduciaries while at the same time alleviating the caseload of probate courts.

Secondly, if a state adopts the Revised UFADAA, estate planners and tax professionals in that state will be more likely to discuss with their clients access to digital assets after death and during incapacity as well as the impact of the digital assets on the value of their estates. Asking clients for a listing of digitally managed assets and digital assets is the first practical step towards effective management of digital assets. Without any knowledge of digitally managed assets or intangible digital assets, a fiduciary has no chance of administering the asset as part of the estate or monitoring it during a period of incapacity. A tax professional would also have no way to preserve the asset's value or include it in the client's estate.

The Revised UFADAA also suggests a number of revisions that estate planners can make to their standard will, trust, and power of attorney documents.

Wills: The Revised UFADAA requires a court order to disclose the content of electronic communications, unless the deceased consented to the disclosure.¹⁸⁰ If desired by the client, consent to the disclosure of this content can be added to traditional will language. Adding the language directly to the will would avoid any disputes over the client's intent after death or if he or she were to become incapacitated. Additionally, adding the language to a traditional will would prevent reliance on the availability of specific settings within the service provider's application or the Terms of Service Agreement where the account holder could specify this preference. Using account settings or Terms of Service Agreements to show intent opens the door for disputes as to the true intent of the deceased or incapacitated person, especially if the account settings are automatic or the agreement was never read by the user. While the estate could still obtain a court order for access to the content of electronic communications, this would require additional time and expense of the personal representative. As discussed previously, obtaining a court order

¹⁷⁸ See NETCHOICE, *Privacy Afterlife*, <http://netchoice.org/library/decedent-information/#peac> (last visited Jan. 15, 2017).

¹⁷⁹ The Revised UFADAA allows a Provider to request a court order if it does not believe a catalogue of electronic communication is reasonably necessary for the administration of the estate. See *supra* note 134 and accompanying text.

¹⁸⁰ *Supra* note 131 and accompanying text.

might also require an estate to open probate when it otherwise would not have been necessary.¹⁸¹ Opening probate, when otherwise not necessary, would add significant unnecessary expenses to the estate, which could have been prevented with a simple will provision documenting the intent of the client.

Trusts: Under the Revised UFADAA, a trustee can access the content of electronic communications for digital assets transferred to the trust only if the trust instrument contains a consent to the disclosure.¹⁸² If the settlor desires such language, it should be included in the trust instrument. The settlor also has the flexibility to limit a service provider's disclosure of such content through the trust instrument, which would be binding on the trustee.¹⁸³ Adding language to the trust instrument gives the settlor the power to qualify access to digital communications or digital assets for certain estate administration purposes, detail specific digital assets for which the settlor consents to access or disclosure, or even put a time limit on the ability to access or control the asset. Additionally, if the trust instrument is silent, a trustee has default access to a catalogue of electronic communication and other digital assets transferred to trust.¹⁸⁴ For settlors that do not want the trustee to access a catalogue of electronic communications or certain digital assets, the restriction must be explicitly stated in the trust to bind the trustee. An estate planner would likely have to discuss these provisions with each client on a case-by-case basis. Such custom drafting may be the only way to capture the intent of the settlor by tailoring the language to the settlor's specific digital assets.

Durable Powers of Attorney: In a state that adopts the Revised UFADAA, a power of attorney must expressly grant the agent authority over the content of electronic communications in order for the agent to obtain access.¹⁸⁵ If desired by the principal, a durable power of attorney¹⁸⁶ must explicitly give the agent authority to access the content of electronic communications. Similar to the situation with trusts, an agent with general authority or specific authority over digital assets has default access to a catalogue of electronic communication and other digital assets.¹⁸⁷ For principals that do not want the agent to access a catalogue of electronic communications or certain digital assets, the restriction must be explicitly stated in the power of attorney to bind the agent. Again, depending on the type and complexity of digital assets owned by the principal, these provisions would likely require custom drafting on a case-by-case basis.

¹⁸¹ *Supra* notes 112–14 and accompanying text.

¹⁸² *Supra* note 138 and accompanying text.

¹⁸³ *Supra* note 139 and accompanying text.

¹⁸⁴ *Supra* note 140 and accompanying text.

¹⁸⁵ *Supra* note 136 and accompanying text.

¹⁸⁶ A durable power of attorney would be necessary in order to survive the incapacity of the principal. Principals can manage digital assets themselves at full capacity; thus, a durable power of attorney makes the most sense in this context.

¹⁸⁷ *Supra* note 137 and accompanying text.

In discussing provisions such as these with clients, clients have the opportunity to consider whether they want anyone to have access to their digital assets after death and to what extent they want such access. Sparking this discussion between an estate planner and a client increases the likelihood that a client's wishes will be carried out at his death or during his incapacity. Tax professionals should also breach this topic with their clients, so that their clients fully understand the tax implications regarding digital assets. Upholding the intent of the digital account holder or digital asset owner was a driving force in drafting the Revised UFADAA,¹⁸⁸ and it falls on estate planners and tax professionals to capture that intent through focused conversations with their clients.

CONCLUSION

While the path to the Revised UFADAA was not without conflict, state legislatures should have less difficulty discussing and adopting the provisions in their states. With the endorsement of NetChoice, the main opponent to legislation on a fiduciary's access to digital assets has turned into an advocate. Many states, however, have still not introduced the Revised UFADAA for debate in their states. These states face the prospect of lagging further behind advancements in digital assets, while fiduciaries in these states are left with little power to obtain information on digitally managed assets or digital assets themselves. The time has arrived for legislators of each state to consider addressing access to digital assets as part of their probate statutes, thus detailing rules and protections for both fiduciaries and service providers. Once legislation is adopted, it then falls on estate planners and tax professionals to carry out the spirit of these statutes. Estate planners will be charged with documenting the existence of digital assets and the intent of their clients with regard to these digital assets after death or during incapacity. Tax professionals will need to recognize the impact digital assets can have on their client's estates. As digital savvy generations increase in age, these discussions will occur more and more frequently between professional advisors and their clients. The sooner estate planners and tax professionals incorporate digital assets into their planning, the more likely they will be to effectuate the intent of their clients during incapacity or death, preserve wealth of the estate, and ease estate administration.

¹⁸⁸ *Supra* notes 157–58 and accompanying text.