“The Uniform Fiduciary Access to Digital Assets Act, originally approved by the Uniform Law Commission (ULC) in July 2014, met fierce opposition from powerful service providers. In response to the opposition, ULC approved a revised UFADAA (RUFADAA) on July 15, 2015. RUFADAA takes a three-tiered approach:

1. Directions given via an online tool that can be modified or deleted at all times prevail over any other direction in a will, trust, power of attorney or other record;

2. If the user has not utilized an online tool, or if the custodian has not provided one, a user’s direction in a will, trust, power of attorney or other record prevails; and

3. In the absence of any direction, the Terms of Service (TOS) Agreement controls.

Accordingly, in order to avoid a provider’s generic TOS Agreement potentially controlling, it is important to use a provider’s online tool, if one is provided, and to address these issues in estate planning documents.

RUFADAA has been introduced or enacted in at least 33 jurisdictions.”

Sharon Klein provides members with a timely update regarding the development of a uniform approach to fiduciary access to digital assets. Sharon’s first newsletter on this topic appeared in LISI on August 12, 2015. This newsletter includes an update on important developments through October 31, 2016.

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Here is Sharon’s commentary:

**EXECUTIVE SUMMARY:**

As digitization in our modern world continues to soar, the issues associated with the transfer and disposition of digital assets become increasingly widespread and complex. Digital assets include social media websites such as Facebook, email accounts such as Yahoo, personal accounts like Shutterfly, financial accounts, blogs and domain names.

Family members can face many challenges in attempting to retrieve a decedent’s digital information. As a practical matter, family members must have the decedent’s confidential user IDs and passwords. Even if they do have that information, they must establish their rights to access a decedent’s accounts.

Terms of Service (TOS) Agreements with individual providers, (which are
typically entered into by clicking “I agree” when opening), usually govern what happens to an account on the death of the owner. They can provide that all rights cease on death, and that all data will be deleted. Heart wrenching headlines have highlighted tragic stories of parents whose children have committed suicide or been killed while in military service, and whose desperate attempts to access the social media sites of their children have been denied. Executors can face additional challenges in marshaling assets - indeed even discovering assets - the information about which is digitally stored.

State and federal privacy laws and laws that criminalize unauthorized access to computers and prohibit the release of electronic account information [1] present further obstacles. Clearly, there is a pressing need to find consistent and workable solutions in response to unprecedented legal challenges.

FACTS:

A Uniform Solution

The Uniform Fiduciary Access to Digital Assets Act (UFADAA) [2] was originally approved by the Uniform Law Commission (ULC) on July 16, 2014. The ULC is comprised of commissioners from each state who are appointed by their states to draft and promote enactment of uniform laws where uniformity is desirable and practical. After receiving the ULC’s approval, a uniform act is officially promulgated for consideration by the states. A uniform law is not effective until a state legislature adopts it, sometimes with some state-level tweaking.

The goal of UFADAA was to remove barriers to a fiduciary’s access to electronic records by reinforcing the concept that the fiduciary “steps into the shoes” of the account holder. The Act approved in July 2014 used the concept of asset neutrality: If a fiduciary would have access to a tangible asset, the fiduciary would also have access to a similar type of digital asset. “Digital asset” was very broadly defined to mean a record that is electronic.

UFADAA:

- **Went beyond the estate situation:** The Act covered four common types of fiduciaries: personal representatives, guardians, agents acting under a power of
attorney and trustees.

- **Maneuvered around federal and state privacy and computer fraud/abuse laws:** The Act codified that, for the purpose of electronic privacy laws, fiduciaries would have the lawful consent of the account holder for the custodian to divulge the content of electronic communications. For purposes of computer fraud and unauthorized computer access laws, fiduciaries were considered authorized users. Accordingly, the provider should have been authorized to disclose or allow access to electronic information without liability.

- **Superseded any contradictory TOS Agreements:** The Act provided that conditions in TOS Agreements broadly barring fiduciary access were void against public policy.

- **Required Custodian Cooperation:** Upon the written request of a fiduciary with authority over digital property, a custodian had to comply with the fiduciary’s request for access, control or a copy of that property within 60 days. Custodians were granted immunity from taking any action in compliance with the statute.

**Default UFADAA Rule for Personal Representatives and Trustees:**

Privacy Off

UFADAA treated the four categories of fiduciaries covered by the Act as follows:

- A personal representative was presumed to have access to all of the decedent’s digital assets unless that was contrary to the decedent’s will, a court order or other applicable law;

- A trustee was presumed to have access to all of the digital assets of a trust, unless prohibited by the court or terms of the trust;

- A conservator was permitted access to a protected person’s digital assets only by court order; and

- An agent acting under a power of attorney was permitted content access to a principal’s digital assets only if authorized by the principal.
COMMENT:

A Flurry of Activity

Many state legislatures were waiting for the final uniform law, so they could introduce state legislation modeled upon it. Following the ULC’s approval, there was a flurry of legislative activity across the country. Delaware enacted a version of the uniform act [3] in 2014 and in 2015 alone at least 26 states introduced legislation modeled on the uniform law.

And then…nothing. Everything appeared to come to screeching halt…

Goliath Stepped In…

Even though they participated in the UFADAA negotiations, powerful service providers such as Facebook and Google did not like UFADAA. At all. The providers, through their spokesperson organization, NetChoice, made intense lobbying efforts against UFADAA, and after Delaware’s enactment in 2014, not a single state enacted a version of the uniform law.

The providers argued that access granted under UFADAA was too broad, raised serious privacy concerns, potentially conflicted with federal and state laws and improperly overrode TOS Agreements. They proposed alternative legislation, the Privacy Expectation Afterlife and Choices Act (PEAC)[4], which was far more restrictive than UFADAA.

Default PEAC Rule for Personal Representatives: Privacy On

PEAC dealt only with executors and administrators. It did not cover trustees, conservators or agents acting under a power of attorney. With respect to executors and administrators, instead of the default access approach taken by UFADAA, PEAC took a default privacy approach. It always required a court order to access a decedent’s accounts, including an order that the estate first indemnify the provider for releasing record contents.

Even if a court order was obtained, a provider could still refuse to disclose or quash the order under certain circumstances, including if the disclosure would
cause an undue burden on the provider or violate other applicable law.

Legislation based on PEAC died after being introduced in California [5] and Oregon [6]. A modified version of PEAC was enacted in Virginia [7].

**Poised for Battle?**

UFADAA and PEAC represented two fundamentally different approaches: UFADAA default privacy off (with the executor stepping into the decedent’s shoes) versus PEAC default privacy on.

And who doesn’t love a good fight? But a fight with the Facebooks and Googles of the world? Maybe not so much…

**New Default UFADAA Rule for Personal Representatives: Privacy On**

With great credit to the ULC that spent years putting together UFADAA, ostensibly with the concurrence of the providers who participated in the process, it tried to bridge the gap. In response to the opposition, the ULC approved a revised UFADAA [9] (RUFADAA) on July 15, 2015. Among the more significant changes and notable provisions are the following:

- RUFADAA further distinguishes between access to the *content* of an electronic communication and access to a *catalogue* of electronic communications (like the “to” and “from” lines of an email, without content, so accounts could be identified, for example);

- With respect to the content of electronic communications, the default rule for personal representatives has flipped; privacy is on, and access is not permitted unless the decedent consented to disclosure;

- RUFADAA specifically provides that users can utilize an online tool provided by a custodian to allow or prohibit custodians from disclosing information, including content. The online tool must be distinct from the TOS Agreement between the user and custodian;

- Instead of providing that conditions in TOS Agreements broadly barring fiduciary access are void, RUFADAA takes a three-tiered approach:
1. Directions given via an online tool that can be modified or deleted at all times prevail over any other direction in a will, trust, power of attorney or other record;

2. If the user has not utilized an online tool, or if the custodian has not provided one, a user’s direction in a will, trust, power of attorney or other record prevails; and

3. In the absence of any direction, the TOS Agreement controls.

Accordingly, in order to avoid a provider’s generic TOS Agreement potentially controlling, it is important to use a provider’s online tool, if one is provided, and to address these issues in estate planning documents.

• With regard to the procedure for disclosing digital assets, the custodian may, at its sole discretion:
  
  a. Grant the fiduciary full access;
  
  b. Grant the fiduciary partial access sufficient to perform the fiduciary’s tasks; or
  
  c. Provide the fiduciary with a copy of a digital asset.

Custodians may assess a reasonable administrative charge for the cost of disclosing digital assets.

• It appears that custodians would always be entitled to seek a court order before providing access.

  o As noted, access by a personal representative to the content of a decedent’s accounts would not be permitted unless the decedent consented to disclosure, which can be via an online tool provided by the custodian. Additionally, the custodian can request a court order:
    
    ▪ Identifying the account;
    
    ▪ Finding that disclosure would not violate federal privacy laws, laws regarding unlawful access to electronic
communications or other applicable laws; and

- Finding that the user consented to disclosure, or that disclosure is reasonably necessary for estate administration.

(Unlike PEAC, RUFADAA does not require that providers be indemnified).

o Default access by a personal representative to a catalogue of electronic information (without content) would be allowed, unless the decedent prohibited disclosure. Additionally, even if catalogue only access is sought, the custodian can request a court order:

- Identifying the account; or

- Finding that disclosure is reasonably necessary for estate administration.

- With respect to trusts, the RUFADAA default rule continues to allow trustee content access when the trustee is the original user, or if access is permitted by the trust agreement. The default rule continues to allow trustees access to catalogues of electronic information, unless prohibited by the user, trust or court.

- RUFADAA specifically incorporates fiduciary duties with respect to the management of digital assets, including duties of care, loyalty and confidentiality.

- “Digital asset” continues to be very broadly defined to mean a record that is electronic.

- RUFADAA extends to the four types of fiduciaries covered in the original UFADAA: personal representatives, guardians, agents acting under a power of attorney and trustees.

RUFADAA has been introduced or enacted in at least 33 jurisdictions. Most recently, Governor Cuomo signed digital asset legislation into law in New York on September 29, 2016. California enacted a modified version of RUFADAA on September 24, 2016. Ohio introduced legislation on October 5, 2016.
New York [10] and California [11] now join the following states in which some version of RUFADAA has been enacted: Arizona [12], Colorado [13], Connecticut [14], Florida [15], Hawaii [16], Idaho [17], Illinois [18], Indiana [19], Maryland [20], Michigan [21], Minnesota [22], Nebraska [23], North Carolina [24], Oregon [25], South Carolina [26], Tennessee [27], Washington [28], Wisconsin [29] and Wyoming [30]. States in which RUFADAA has been introduced include: Alabama [31], Iowa [32], Louisiana [33], Massachusetts [34], Mississippi (died) [35], New Jersey [36], Ohio [37], Oklahoma [38], Pennsylvania [39], Rhode Island [40], Utah [41] and West Virginia [42].

California’s modified version of RUFADAA has a more limited scope and applies only where a person has died, and electronic information is being requested from the custodian by a decedent's personal representative, administrator, executor, or trustee for the purpose of ascertaining the decedent's assets and liabilities. The legislation does not cover powers of attorney, trusts, and conservatorships where the principal, trustor, or conservatee, is still alive.

**The Bottom Line?**

Be proactive! RUFADAA emphasizes respecting a user’s intent reflected in online account options and dispositive documents. They are the first two priorities in the three-tier approach. Accordingly, advisors should consider speaking with clients about taking advantage of those options, in particular:

1. Creating inventories of electronic data, with log-in IDs and passwords.

2. Ensuring the inventories are stored in a secure and private location and are kept up-to-date.

3. Using providers’ online tools regarding disclosure of digital information. Although this requires individuals to give separate directions at each custodian, RUFADAA defers to the choice given via a custodian’s own online option as the direction that prevails above anything else.

For example, Google’s “Inactive Account Manager,” which it launched in April 2013, allows the account owner to decide what happens to data after the account has been inactive for a period of time specified by the
owner. The owner can determine whether to delete the account data or share some or all of it with one or more trusted contacts. Google also recently updated its Accounts Help to provide:

“We recognize that many people pass away without leaving clear instructions about how to manage their online accounts. We can work with immediate family members and representatives to close the account of a deceased person where appropriate. In certain circumstances we may provide content from a deceased user's account. In all of these cases, our primary responsibility is to keep people's information secure, safe, and private. We cannot provide passwords or other login details. Any decision to satisfy a request about a deceased user will be made only after a careful review.”

New options available on Google include submitting a request to: close the account of a deceased user, seek funds from a deceased user’s account and obtain data from a deceased user’s account. If the last option is chosen, the person submitting the request must check the following box:

“I understand that, if my request to get information from a deceased person's account is approved, I will need to get a court order issued in the United States. I also understand that Google will provide me with the necessary language for the court order.”

Facebook allows users to decide whether to memorialize or delete an account after death. Users can also add “legacy contacts” to posthumously manage parts of their Facebook accounts. A legacy contact can download a copy of what the user has posted on Facebook, share a final message on the user’s behalf, respond to new friend requests and update the user’s profile picture and cover photo. A legacy contact cannot read messages the user sent to other friends, but Facebook’s website provides that “Facebook may provide access to this type of information in response to a valid will or other legal consent document expressing clear consent.”

4. As the second tier direction that will be respected if an online tool is not available or used, consider:

(a) Including provisions in wills and trust agreements that expressly deal with disposition of and access to digital assets.
(b) Including provisions in powers of attorney regarding access to digital assets, including content, if that is desired.

And There’s Always the Business Potential…

In July 2014, Yahoo in Japan rolled out their “Yahoo Ending” service. The service includes sending an email the user has prepared regarding the death “in their own words” to designated individuals, can cancel subscription services linked to Yahoo Wallet and, in connection with funeral service providers, for a fee, can help find a grave site, plan a funeral and feed the guests!

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Sharon Klein

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CITES:


CITATIONS:

Available at this link: Uniform Fiduciary Access to Digital Assets Act.

A version of the uniform act was signed into law in Delaware (the first state to introduce legislation based on the model law) on August 12, 2014. 12 Del.C. §§ 5001-5007.

Available at this link: http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/.

California AB 691 (2015).


Available at this link: Revised UFADAA.


California AB 691 (2015).

Arizona SB 1413/HB 2467 (2016).

Colorado SB 88 (2016).

Connecticut HB 5606 (2016).

Florida SB 494/HB 747 (2016).

Hawaii SB 2298/HB 2115 (2016).

Idaho SB 1303 (2016).

Illinois HB 4648 (2016).
[33] Louisiana HB 1118 (2016).
[34] Massachusetts HB 4365 (2016).
[38] Oklahoma SB 1107 (2016).
[40] Rhode Island HB 8125 (2016).

