

## Technological Requiems: The Uniform Fiduciary Access to Digital Assets Act

Family caregivers may manage their loved one's money by way of a legal power of attorney or guardianship or by less formal ways like organizing monthly bills. Sometimes, they continue to serve in this capacity after the death of their loved one in settling an estate. With so much of the 21<sup>st</sup> century American lifestyle being lived out on and surrounded by online technologies, confusion exists in state laws about who ultimately controls these digital assets when loved ones pass away. Some fear that without updates which allow for the deactivation of online accounts, a deceased's social media, bank and other online accounts could remain active and become vulnerable to security issues such as e-vandalism, identity theft, and exploitation.

Probate laws, which govern the transfer of property at death, vary significantly from state to state. And with the rapid increase of an individual's online presence, state laws vary on whether or not the caregiver can access or deactivate their loved one's online accounts, including social media. States are now grappling with who owns online accounts of a deceased loved one and many are looking at a new uniform law for guidance.

### What is UFADAA?

In 2014 the Uniform Law Commission (ULC) approved the Uniform Fiduciary Access to Digital Assets Act (UFADAA), which seeks to minimize the variation of state probate laws and extend them to cover online accounts. The UFADAA also seeks to protect the digital assets of an individual who passed away by giving their designated fiduciaries control of those assets much the same as the fiduciary would already have access to their tangible assets.

The UFADAA applies to the four most common types of fiduciaries

- Executors or administrators of deceased persons' estates
- Court-appointed guardians or conservators of protected persons' estates
- Agents appointed under powers of attorney
- Trustees

Under the UFADAA, individuals have the opportunity to plan for what happens to their digital estate in the same way that they now plan for their tangible estate. For example, an executor of an estate, under the UFADAA, may access a descendant's email account in order to make inventory of essential information, like bank accounts, as well as close the account in a timely manner.

The UFADAA is designed to supplement current state statute on probate, guardianship, trusts and powers of attorney. Essentially in order to be allowed access to accounts under UFADAA, a fiduciary is required to send a request to the custodian, accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust.

## Current Status of UFADAA

Since it was approved in 2014, a modified UFADAA was enacted in Delaware, and the full version of the act was introduced in 27 states during the 2015 legislative session. Thus far, there are no further enactments, partly due to opposition from technology companies and privacy advocates.

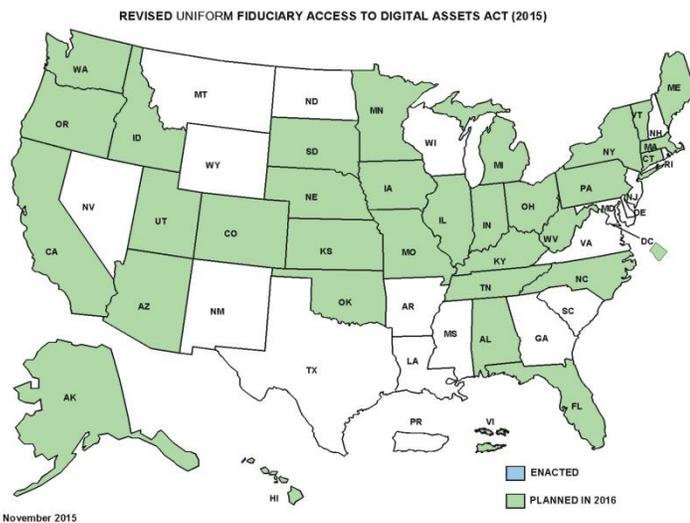
Privacy advocates, like the ACLU, expressed concerns about the possibility of oversight concerning an individual's wishes to not disclose certain instances of electronic communications but withdrew opposition in most instances upon learning the UFADAA includes language to honor those wishes.

In a [letter](#) to members of the Connecticut state legislature, Tammy Cota, the executive director of the Internet Coalition, a trade association whose members include (1-800-Flowers, Amazon.com, Expedia, Experian, eBay, Facebook, FTD, Google, Match.com, and Yahoo!), urged members not to advance UFADAA, because they assert it would allow the fiduciary unlimited access to all electronic communications on an individual's online account, not just those related to the estate.

To counter UFADAA, a coalition of internet companies drafted the Privacy Expectation Afterlife and Choices Act (PEAC). This act would, among other things, allow an executor to access to digital assets only with a court order, regardless of previous fiduciary roles, legal or otherwise. A modified version of this act was enacted in Virginia in 2015. There is a [comparison chart](#) in the SASI library of the two acts.

Throughout the ULC drafting process, which began in 2012, technology companies, lawyers, advocates and any other interested parties were invited to participate. However, most of the concerns were not raised until bills were introduced in state legislatures. Nonetheless, throughout 2015 both sides met to compare components of the PEAC act and the UFADAA to discuss privacy and liability concerns.

These conversations lead to revisions of the UFADAA to clarify what types of access a fiduciary will have to an individual's account. Highlights include language that would further protect an individual's privacy, allows the named beneficiary of current user agreements to continue to



serve in that capacity, and revisions that also incorporate data catalogs as an alternative when no written will exists. These data catalogs would only include a list of the sent and received messages and not the messages themselves. This allows for the fiduciary to contact those in communication with their loved one and carry out the wishes of the deceased without being given the entirety of electronic messages.

Since the revision, Facebook and Google have endorsed the UFADAA and the ACLU agreed they would not oppose. In a [letter](#) to the ULC, Google was “pleased to have found common accord with the Uniform Law Commission in both of our efforts to address access issues to digital information of decedents and others.” Facebook also sent a [letter](#) to the ULC saying that the revised UFADAA, “creates a reasonable compromise regarding disposition of digital accounts upon death or incapacitation.” Going forward, both letters also mention the need for review as states consider the revised UFADAA.

### **AARP State Advocacy**

During the 2015 state legislative session, several state offices were approached by state uniform law commissioners, legislators or other stakeholders requesting support or opposition to the UFADAA, and all remained neutral. The primary reason was the lack of policy on the issue. However, the 2015 AARP policy book modified language on estate planning. Specifically, AARP policy supports state efforts to simplify, modify, and clarify estate planning, and support of state efforts to enact laws like the Uniform Fiduciary Access to Digital Assets Act that would allow fiduciaries to treat digital assets in the same manner as tangible assets.

Similar to 2015, the Uniform Law Commission is anticipating a large number of introductions during the 2016 legislative session (see map). AARP state offices may be contacted by interested parties regarding the legislation.

### **For More Information**

For more information on the [UFADAA, guardianship, power of attorney or other probate issues](#), please visit the SASI library or contact Diana Noel, Senior Legislative Representative.