DAMAGE CONTROL: THE ADOPTION OF THE UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT IN TEXAS

Comment

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I. INTRODUCTION

In estate planning, digital asset management (DAM) is changing.[1] While this technological shift has proven to be very advantageous in many aspects of our day-to-day lives, the current laws have not addressed some of the resulting consequences and legal issues.[2] On a daily basis, we collect an abundance of electronic data in our smartphones, computers, and online accounts.[3] These types of digital properties have personal, emotional, and social value to all who use them.[4] Considering how an online photo album can store years of precious memories, how a Facebook account can record an individual's significant life events and personal thoughts, and how a computer may keep the transcript of a great American novel is important.[5] But what happens to all of these digital assets when we die?

Put yourself in the position of a family member or loved one that has recently experienced death and is now unable to access the digital accounts of the deceased. Take the case of the University of Minnesota freshman Jake Anderson, who tragically died while walking a girl home from a party.[6] While his death was ruled an accident, Jake's family remains unable to gain access to his digital assets in order to carry out a further investigation and maintain his digital assets such as photographs that carry sentimental value.[7] This may be due to the currently enacted privacy laws and terms of service agreements that vary from state to state.[8] In order to prevent situations like this, the Uniform Law Commission has created a universal law, known as the Uniform Fiduciary Access to Digital Assets Act (UFADAA), in an attempt to help estate planners make sure their clients understand their rights when it comes to their digital assets upon their incapacitation or death.[9]

This comment will address some of the positive and negative aspects of adopting the UFADAA as it stands, rejecting it in total, and proposing language that would amend parts of the act in order to make it more favorable to practitioners in Texas.[10] First, this comment will present background

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1. Naomi Cahn & Amy Ziettlow, *Digital Planning*, PROB. & PROP., May/June 2014 Vol. 28 No 3, at 23.

2. *See infra* Part II.B.

3. Jim Lamm, *What Happens to Your Digital Property After You Die*, ST. JOHN'S U. (2013), http://www.csbsju.edu/sjualum/supporting-sju/planned-giving/digital-property [http://perma.cc/9CW3-8USP].

4. Cahn & Ziettlow, *supra* note 1, at 23.

5. *Id.*

6. Tom Hauser, *Family Fights to Access Late Son's Digital Data*, KSTP (Jan. 21, 2015 6:33 AM), http://kstp.com/article/stories/s3682368.shtml [http://perma.cc/77BJ-JHW4].

7. *Id.*

8. *See infra* Part II.B.

9. *Uniform Fiduciary Access to Digital Assets Act*, NAT'L CONF. OF COMM'RS ON UNIF. ST. LS. (July 7–14, 2014), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf [http://perma.cc/ZLT6-KFLR].

10. *See infra* Part VI.B.

information by explaining the definition of a digital asset and discussing what obstacles practitioners are currently facing when planning for these types of assets.[11] Then, this comment will explore the current statutes of the minority states, and discuss the advantages and disadvantages of these statutes.[12] Next, this comment will dissect and compare the actual adoption of the UFADAA, as proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL), with the current state statutes.[13] This discussion will include the subtle differences between the draft as proposed by the NCCUSL and the Delaware statute.[14] Lastly, this comment will address the position Texas should take when it comes to the adoption of the UFADAA.[15] A recommendation will be made as to whether the drafting committee should accept, reject, or amend the act in an attempt to enact a more workable law for practitioners in the state of Texas.[16]

II. DIGITAL ASSETS

According to the UFADAA, "digital assets" are defined as records that are electronic.[17] The act defines "electronic" as relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.[18] There are different categories of digital assets.[19] These include personal, financial, social media, and business digital assets.[20] Since the term digital assets is somewhat fragmented in the UFADAA, and there has not been a well-established definition due to the fast moving pace of technological advances. The definition found in a proposed Oregon statute is useful:

> "Digital assets" includes, but not limited to, text, images, multimedia information, or other property stored in a digital format, whether stored on a server, computer or other physical device or in an electronic medium regardless of the ownership of the physical device or electronic medium which the digital asset is stored. "Digital assets" include, but is not limited to words, characters, codes, or contractual rights necessary to access the digital assets.[21]

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11. *See infra* Part II.
12. *See infra* Part III.
13. *See infra* Part IV.
14. *See infra* Part V.
15. *See infra* Part VI.
16. *See infra* Part VI.B.
17. NAT'L CONF. OF COMM'RS ON UNIF. ST. LS. , *supra* note 9.
18. *Id.*
19. Gerry W. Beyer, *Estate Planning for Digital Assets*, MONTECITO BANK & TRUST, at 1–2 (Jan. 2015).
20. *Id.*
21. S. Res. 54, 2013 Leg., 77th Sess. (Or. 2013).

Digital assets may simply be the means by which one can access other digital items, such as electronic mail, better known as email.[22] They may also be collections of photographs, videos, documents, books, music, or other things such as social media accounts.[23] These digital assets may not be valuable on their face, but from a sentimental standpoint, they can be priceless.[24] From a personal or business perspective, digital assets may also be financial in nature.[25] Because the definition of digital assets can vary substantially, the following section will closely look at how Texas categorizes these types of assets.[26]

A. Digital Assets in Texas

The Texas Legislature recently amended the Texas Property Code's definition of the term property.[27] Effective September 1, 2013, "[p]roperty[] means any type of property, whether real, tangible or intangible, legal, or equitable, including property held in any digital or electronic medium."[28] This amendment to the Property Code was made in order to clarify the definition of the term property in the Texas Trust Code.[29] Through this amendment, the Texas legislature has expanded the meaning of the word property to adjust to a new technological age.[30]

B. Current Obstacles in Federal Law that Affect Planning for Digital Assets

Caught between cyberspace, death, and outdated statutes, there are many issues that current legislation leaves unaddressed in regards to the Internet and social media.[31] Questions that are being posed include: What happens to one's social media, email accounts, and digital assets when they die?[32] Who has the right to access old Facebook accounts, email accounts, and other types of electronic property?[33] These questions are further

22. Sandi S. Varnado, *Your Digital Footprint Left Behind at Death: An Illustration of Technology Leaving the Law Behind*, 74 LA. L. REV. 719, 722 (2014).
23. *Id.* at 719.
24. *Id.* at 722.
25. *Id.*
26. *See infra* Part II.A.
27. TEX. PROP. CODE ANN. § 111.004(12) (West 2013).
28. *Id.*
29. *See* H.B. 2913, 2013 Sess. (Tex. 2013).
30. *Id.*
31. Matt Borden, *Covering Your Digital Assets: Why the Stored Communications Act Stands in the Way of Digital Inheritance*, 75 OHIO ST. L.J. 405, 407–08 (2014).
32. *Id.*
33. *Id.*

complicated by current federal legislation regulating Internet privacy and varying state regulations that govern digital asset management.[34]

In particular, the Stored Communications Act (SCA) has put in place barriers to digital asset management.[35] The SCA makes "intentionally access[ing] without authorization a facility through which an electronic communication service is provided" a federal offense.[36] The SCA is a subsection of the Electronic Communications Privacy Act (ECPA), which originally regulated the interception of electronic communications by federal law enforcement agencies.[37] The ECPA provides that "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service."[38] Specifically, the SCA has encouraged various social media and email providers to adopt strict requirements regarding the accessibility of a deceased user's account.[39] Even though Congress originally drafted the SCA to satisfy its desire to control the federal government's interception of electronic communications for investigations, it now stands as an obstacle to digital asset management.[40]

Another issue that acts as a barrier in terms of digital asset management is interference with user agreements, because they create some resistance to fiduciary access to digital assets.[41] Internet companies, such as Facebook and Google, are concerned with upholding their contracts with their users, which require them to keep requests for privacy in mind.[42] Deceased users most likely do not intend for their loved ones to have access to their digital accounts after their death.[43] Most Internet companies take the position that deceased users want to keep their account private after death and construct terms of service agreements to reflect this way of thinking.[44] However, although most Internet companies have explicit policies in their terms of service agreements concerning what will happen when a user dies, users seldom read all of the terms of the service.[45] Most consumers click through these agreements without knowing the implications of the terms.[46]

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34. *Id.*

35. 18 U.S.C.A. §§ 2701–2712 (2012).

36. *Id.* § 2701(a).

37. Electronic Communications Privacy Act, Pub. L. No. 95-108, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.).

38. 18 U.S.C.A. § 2702(a)(1) (2012).

39. *Id.* § 2702(a)–(b). The SCA also prohibits individuals, entities, and government officials from accessing digital accounts or content. *Id.*

40. Borden, *supra* note 31, at 407–08.

41. Beyer, *supra* note 19, at 7.

42. Jessica Hopper, *Digital Afterlife: What Happens To Your Online Accounts When You Die*?, NBC NEWS (June 1, 2012 7:53 AM), http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite [http://perma.cc/H8AB-CTA5].

43. *Id.*

44. *Id.*

45. Beyer, *supra* note 19, at 7.

46. NAT'L CONF. OF COMM'RS ON UNIF. ST. LS., *supra* note 9.

For example the end of Yahoo!'s terms of service explicitly states that an account cannot be transferred.[47] If users agree to its terms of service, they accept the fact that upon their death all content within their account will permanently disappear.[48] Some user's rights advocacy groups support Yahoo!'s terms of service policies and other similarly phrased terms of service policies.[49] As Rebecca Jeschke of the Electronic Frontier Foundation, a digital civil liberties group, stated, "[I]t's a good idea for sites not to have a blanket policy to hand this stuff over to survivors. This information is private and you assume that it's private, you assume that your Facebook account is private, you assume that your email account is private."[50] But, what if there is something in the files of users' Yahoo! Accounts that their descendants should have access to?[51] For this reason, others disagree.[52]

Opponents of these terms of service agreements argue that allowing access after death is in the best interest of Internet companies, as this will encourage increased use of their services.[53] However, the reality of the situation is that by accepting Yahoo!'s terms of service, users agree that there can be no third party beneficiaries to their accounts in any situation.[54] Ultimately, Internet companies seem to be in a no-win position.[55] The public criticizes them as insensitive if they refuse access to third party beneficiaries, yet the public condemns them as unpredictable if they grant it.[56]

In general, courts typically uphold the terms of service agreements.[57] Therefore, in the current state of the law, there will likely be no relief for fiduciaries of a digital estate.[58] Due to the fact that in this day and age there is a dominant co-dependence on technology, restrictions to access have been a cause for concern.[59] To deal with this situation, a few states have enacted statutes that address beneficiaries' access to their loved one's digital assets.[60] The following section will discuss the minority of states that have enacted statutes in order to attempt to deal with digital asset management.[61]

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47. *Yahoo! Terms of Service*, YAHOO!, https://info.yahoo.com/legal/us/yahoo/utos/en-us/ (last visited Feb. 5, 2015) [http://perma.cc/GT9Z-TKUJ].

48. *Id.*

49. Varnado, *supra* note 22, at 722.

50. Hopper, *supra* note 42.

51. Noam Kutler, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641, 1651 (2011).

52. *Id.*

53. *Id.*

54. YAHOO!, *supra* note 47.

55. Varnado, *supra* note 22, at 742.

56. *Id.*

57. Beyer, *supra* note 19, at 7.

58. *Id.*

59. Varnado, *supra* note 22, at 722.

60. *See infra* Part III.

61. *Id.*

III. STATUTES THAT ADDRESS FIDUCIARY ACCESS TO DIGITAL ASSETS

Since 2000, a minority of states have passed legislation that address the power that executors and administrators may have in regards to access and control over a decedent's digital assets.[62] The majority of other states that have yet to pass similar statutes are still in the process of considering legislation.[63] Out of the eight states that have enacted guidelines for access to digital assets, none of the current statutes cover the rights of other fiduciaries, such as successor trustees or agents acting in accordance with the power of attorney.[64] These statutes substantively vary, and the power that they actually have in giving rights to executors and administrators remains unclear due to limited judicial interpretation.[65] The following sections will explore the existing legislation that a minority of states have passed.[66]

A. California

In 2002, California was the first state to enact a statute that addressed access to digital assets.[67] The California statute is limited because it only covers access to email accounts.[68] The California statute provides that any provider of email service shall provide each customer with notice at least thirty days prior to permanently terminating the customer's email address.[69] This provision is not directed at personal representatives and is essentially useless unless the representative of the decedent's estate has prior access to the existing email account.[70] The California statute falls short in resolving the uncertainty regarding the legal status of email accounts and fails to explain the rights of relatives seeking access to a decedent's email account.[71] The California statute also does not address any of the other types of digital assets such as social media accounts, microblogs, or online bank accounts, which other states have recently defined as property, including Texas.[72]

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62. Gerry W. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 NAELA J. 135, 142 (2013).
63. *Id.*
64. *Id.*
65. *Id.*
66. *See infra* Part III.A–J.
67. Beyer, *supra* note 19, at 7.
68. *Id.*
69. *Id.*
70. *See* CAL. BUS. & PROF. CODE § 17538.35 (West 2015).
71. Tyler G. Tarney, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 CAP. U. L. REV. 773, 788 (2012).
72. *Id.*

B. Connecticut

Although the state legislature passed sections 45a-334a of the Access to Decedent's Electronic Mail Account of the Connecticut General Statutes Annotated in 2005, Connecticut was one of the first states to deal with executors' rights to digital assets.[73] The statute enacted in Connecticut requires email providers to allow executors and administrators access to or copies of the contents of the email account of the deceased.[74] This access is only permitted upon showing "the death certificate and a certified copy of the certificate of appointment as executor or administrator, or [by] an order of the court."[75] However, just as in California, the Connecticut statute is limited.[76] Because it only covers access to electronic mail accounts and does not contain provisions permitting access to any other type of digital assets, its effect and ultimate usefulness is severely limited in a world where digital assets are continuously changing.[77]

C. Rhode Island

Rhode Island passed the Access to Decedents' Electronic Mail Accounts Act in 2007.[78] This statute requires electronic mail service providers to provide executors and administrators access to or copies of the contents of the electronic mail account of the deceased upon showing the death certificate and certificate of appointment as executor or administrator, or by court order.[79] As in California and Connecticut, Rhode Island's Access to Decedents' Electronic Mail Account Act, as indicated by its name, only specifies email accounts.[80] The Rhode Island Statute does not contain language permitting access to any other type of digital asset.[81]

D. Indiana

In 2007, the Indiana legislature revised its state code to require the release of a decedent's electronically stored records and documents upon the request of the decedent's personal representative.[82] Statutes with similar provisions may allow access in a way that is inconsistent with the intent of

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73. Beyer & Cahn, *supra* note 62, at 142.

74. *See* S.B. 262, 2005 Leg., Reg. Sess. (Conn. 2005) (codified at CONN. GEN. STAT. ANN. §§ 45a-334a (West 2012)).

75. *Id*.

76. Beyer, *supra* note 19, at 13.

77. *Id.*

78. *Id.* at 14.

79. *See* R.I. GEN. LAWS § 33-27-3 (2015).

80. Beyer, *supra* note 19, at 13–14.

81. *Id.*

82. *See* IND. CODE ANN. § 29-1-13-1.1 (West 2007).

the user.[83] Specifically, the Indiana statute does not allow the account holder the opportunity to opt-out of providing future access to the digital asset in the event of death.[84] Users often assume that the accounts they create will remain private.[85] By providing heirs access to accounts without first examining the decedent's intent, Indiana's statute may allow for a blatant disregard of the decedent's wishes.[86]

Another argument used to shed a negative light on the Indiana statute is its broad definition for digital assets.[87] Even though an open-ended definition may allow the law to remain uninhibited as new technologies are invented and new types of digital assets gain importance, the statute has generally created confusion as to which assets it will actually cover.[88]

E. Oklahoma

The Oklahoma statute, enacted in 2011, gives executors and administrators the "power . . . to take control of . . . any accounts of a deceased person on any social networking website, any microblogging or short message service website, or any email service website."[89] While this law expressly recognizes new digital assets, such as social networking and microblogging, it runs the risk of becoming obsolete in only a few years due to the ever-changing technological environment.[90]

F. Idaho

In 2012, Idaho revised its version of the Uniform Probate Code to allow "personal representatives and conservators to take control of . . . any accounts of the decedent on any social networking website, any microblogging or short message service website, or any email service website."[91] As expected, "[t]he purpose of the bill was to make it clear that [the] personal representatives and conservators can control the descendant's [digital assets, including emails], blogs, instant messaging," and various other types of accounts such as Facebook.[92] While this statute currently grants executors

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83. Charles Herbst, *Death in Cyberspace*, 53 RES. GEST. 16, 21 (Oct. 2009).

84. *See* IND. CODE ANN. § 29-1-13-1.1(a)–(b).

85. *See generally*, *supra* note 83 (discussing that "[o]ne of the major tensions in accommodating the request of [the decedent's representative] is concern for the user's privacy.").

86. *Id*.

87. Beyer, *supra* note 19, at 14. The Indiana statute does not clearly define which assets are considered digital assets. *Id.*

88. Beyer, *supra* note 19, at 14.

89. *See* OKLA. STAT. ANN. tit. 58, § 269 (2010).

90. *See* Beyer & Cahn, *supra* note 62, at 144.

91. Beyer, *supra* note 19, at 6.

92. Gerry W. Beyer, *Web Meets the Will: Estate Planning for Digital Assets*, ESTATE PLANNING, Mar. 2015, at 40. *See* S.B. 1044, 61st Leg., R.S. (Idaho 2011) (explaining the types of digital assets included).

and administrators the "right to take control of, conduct, continue, or terminate any accounts of a deceased person," it fails to mention other types of fiduciaries that may act on behalf of the decedent.[93]

G. Nevada

Recently taking effect in 2013, the Nevada statute permits "personal representatives to [terminate] email, social networking, and similar accounts."[94] The statute avoided problems with federal law by stating that an act by a personal representative will not invalidate any terms of service or contractual obligations the holder of such digital assets has with the provider.[95] Including language that does not invalidate terms of service agreements ultimately sidesteps the issues with federal law that affect planning for digital assets.[96]

H. Louisiana

In 2014, Louisiana permitted representatives the right to gain "access to or possession of a decedent's digital assets within thirty days" after acceptance of the letters of representation.[97] The statute attempts to trump opposing terms of service agreements by acknowledging that the representative is an authorized user who has the decedent's consent to access the accounts.[98] While this statute currently grants representatives the right to have access to any accounts of a deceased person, it fails to mention other types of fiduciaries such as conservators for a protected person, agents acting pursuant to a power of attorney, or trustees that may be acting on behalf of a decedent.[99]

I. Virginia

In 2013, Virginia enacted a provision that allows "the personal representative of a deceased minor [to have] access to the minor's digital [assets including] those containing email, social networking information and blogs."[100] Unlike other state statutes, this statute only concerns deceased

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93. Greg Lastowka & Trisha Hall, *Living and Dying in a Virtual World*, 284 N.J. LAW. 29, 31 (Oct. 2013). The Idaho statute does not include conservators for protected persons and individuals, agents acting pursuant to a power of attorney, and trustees. *Id.*

94. Beyer, *supra* note 19, at 15.

95. *See* NEV. REV. STAT. ANN. § 143.188 (West 2013).

96. *See supra* Part II.B.

97. Beyer, *supra* note 19, at 6.

98. *Id*.

99. *See* Lastowka & Hall, *supra* note 93, at 31.

100. Beyer, *supra* note 19, at 7.

minors.[101] This limitation on access to digital assets for minor users only solves a small portion of the problems that are presented to executors who are trying to maintain access to these types of assets.[102]

J. Synopsis of Current Statutes

Although well intended public policy considerations encouraged these state statutes, they have been essentially ineffective.[103] Due to the simplistic nature of the statutes in California, Connecticut, and Rhode Island, these laws completely miss the mark by failing to account for digital assets other than email accounts.[104] Not only does California's law fall short in providing access to digital assets other than email, its thirty-day email notice of termination requirement does not resolve the ambiguities surrounding the legal accessibility of a decedent's email account and to whom this right may belong to.[105] The only way to resolve this issue is if a person already has access to the email account prior to the deceased's death.[106] Connecticut, Indiana, and Rhode Island's various statutes are ambiguous and may cause results that are contrary to the user's intent.[107] Specifically, because the statute in Indiana does not allow an account holder to opt-out of providing future access to the account upon death, the statute may provide access to beneficiaries in direct violation of the decedent's wishes for privacy.[108]

The Indiana and Oklahoma statutes create ambiguity regarding which digital assets are actually accounted for under their respective state law.[109] In Indiana, the statute takes an overwhelmingly broad approach, whereas the Oklahoma statute only provides for newly recognized digital assets such as social networks and microblogs.[110] Specifically, Oklahoma's explicit recognition of certain digital assets may cause future conflict because constant technological advances cause other digital technologies to become obsolete.[111]

Although the Idaho statute is progressive in recognizing that executors and administrators may have access to a decedent's digital assets, it neglects to allow other fiduciaries the same privileges.[112] Similarly, the Nevada statute not only fails to recognize other fiduciaries besides personal

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101. *See* VA. CODE ANN. § 64.2-110 (West).
102. *See id.*
103. Herbst, *supra* note 83, at 18.
104. *See supra* Parts III.A–C.
105. *See supra* Part III.A.
106. *See supra* Part III.A.
107. Tarney, *supra* note 71, at 788.
108. *See supra* Part III.D.
109. *See supra* Parts III.D–E.
110. *See supra* Parts III.D–E.
111. *See supra* Part III.E.
112. *See supra* Part III.F.

representatives, but it also does not address or provide remedies for the issues that these representatives face when trying to maintain access to digital assets that have terms of service agreements attached to them.[113] Although the Louisiana statute attempts to trump contrary provisions of service agreements, it makes similar mistakes as Idaho and Nevada because Louisiana also fails to recognize other fiduciaries besides personal representatives.[114]

Not only are these statutes plagued with inherent flaws, but consumers also face other difficulties because they may have dozens of accounts with separate terms of service agreements in different jurisdictions.[115] A court in one state may uphold the terms of service agreement, while another state may legislatively authorize access to the decedent's account through its enacted statute.[116] As previously stated, the provider's terms of service agreements often resolve the conflicts, which typically provide that a particular state's laws govern if a conflict arises.[117] Thus, unless the provider's terms of service include a state that follows a statutory access to digital assets scheme, these state statutes have only had a marginal effect on the issues the legislature intended to resolve.[118] Due to the recognizable flaws in the currently enacted statutes of the states mentioned above, one could assume that the drafters of such laws expected their state statutes would eventually be superseded by federal regulation.[119] The following section will discuss the details of the UFADAA, its intended purpose, and the advantages and disadvantages associated with a uniform law.[120]

IV. THE UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

National legislation could help pick up where the state statutes have fallen short and solve some of the identified issues dealing with fiduciary access to digital assets.[121] In an attempt to bring uniformity and make corrections to errors that the currently enacted statutes have made, the Uniform Law Commission established a drafting committee on the Fiduciary Access to Digital Assets.[122] The drafting committee of the NCCUSL was challenged with the task of

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113. *See supra* Part III.G.
114. *See supra* Part III.H.
115. Tarney, *supra* note 71, at 789.
116. *Id.* at 788-89.
117. Beyer, *supra* note 19, at 7.
118. Tarney, *supra* note 71, at 789.
119. *See generally* CAL. BUS. & PROF. CODE § 17538.35 (West 2003) (explicitly stating that "[t]his section shall become inoperative on the date that a federal law or regulation is enacted that regulates notice requirements in the event of termination of electronic mail service").
120. *See infra* Part IV.
121. Tarney, *supra* note 71, at 797.
122. Cahn & Ziettlow, *supra* note 1, at 23.

> [d]raft[ing] a free-standing act and/or amendments to ULC acts, such as the Uniform Probate Code, the Uniform Trust Code, the Uniform Guardianship and Protective Proceedings Act, and the Uniform Power of Attorney Act, that will vest fiduciaries with at least the authority to manage and distribute digital assets, copy or delete assets, and access digital assets.[123]

The Drafting Committee, which included observers from Internet companies and the Elder Law, Trusts and Estates, and Special Needs bars, released a copy of the final draft of the UFADAA on July 11, 2014.[124]

A. The Purpose

"The purpose of the UFADAA is to vest fiduciaries with the authority to access, control, or copy digital assets and accounts."[125] Essentially, its goal is to remove barriers to a fiduciary's access to digital assets while respecting the privacy and intent of the account holder.[126] Ideally, the enactment of the UFADAA should not affect other laws that govern trusts, probate, banking, investment securities, and agency law.[127] The UFADAA is a blanket statute intended to coincide with a state's existing laws on probate, guardianship, trusts, and powers of attorney.[128] Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, the category of fiduciary included, and whether the principal's death or incapacity is covered.[129] The idea behind a uniform approach amongst the several states is to provide certainty and predictability for courts, account holders, fiduciaries, and Internet companies.[130] States are provided with "precise, comprehensive, and easily accessible guidance on [issues] concerning a fiduciary's ability to access [digital assets] of a decedent, protected person, principal, or a trust."[131] In order to gain access to digital assets, the UFADAA requires a fiduciary to send a request to the custodian of the digital assets, "accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust."[132] Custodians of digital assets are immune from any

123. *Id.*
124. NAT'L CONF. OF COMM'RS ON UNIF. ST. LS., *supra* note 9.
125. *Id.* at 1.
126. *Id.*
127. *Id.*
128. *Id.* at 2.
129. *Id.* at 1.
130. *Id.*
131. *Id.*
132. *Uniform Fiduciary Access to Digital Assets Act - A Summary*, UNIF. L. COMM'N (2014), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/UFADAA%20-%20Summary%20-%20August%202014.pdf [http://perma.cc/G5KF-ZMY9].

liability for good faith compliance if they receive a valid request for access to digital assets.[133]

In general, the uniform act enables fiduciary access while taking into consideration the privacy and intent of the holder of digital assets.[134] The UFADAA generally abides by the traditional approaches used in trusts and estates law, which considers the intent of the digital asset holder and supports the "fiduciary's ability to administer the account holder's property in accord with legally binding fiduciary duties."[135] Ultimately, the UFADAA is a response to the need for guidance in this uncertain area of law, the insufficiency of variable "state legislation, and the [belief] that a uniform law could be the solution."[136]

B. Fiduciaries That Are Addressed in the UFADAA

As previously mentioned, the minority of states that have enacted statutes make a consistent error; that is, the statutes explicitly grant personal representatives or executors rights but neglect to include other types of fiduciaries in their protections.[137] The UFADAA specifically addresses four different types of fiduciaries: (1) personal representatives of decedents' estates; (2) conservators for protected persons and individuals; (3) agents acting pursuant to a power of attorney; and (4) trustees.[138]

Section 4 of the UFADAA grants personal representatives access to digital assets.[139] "'Personal representative' means an executor, administrator, special administrator, or person that performs substantially the same function under [a] law of this state other than this [act]."[140] The ULC adopted the definition for personal representative from the Uniform Probate Code (UPC) in section 1-201(35).[141] In section 4 of the UFADAA, titled "Access By Personal Representative To Digital Asset Of Decedent," the personal representative of the decedent has the right to access:

> (1) the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act, 18 U.S.C. Section 2702(b) [as amended]; (2) any catalogue of electronic communications sent or received by the decedent; and (3) any other digital asset in which at death the decedent had a right or interest.[142]

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133. *Id.*
134. NAT'L CONF. OF COMM'RS ON UNIF. ST. LS., *supra* note 9, at 2.
135. *Id.*
136. Tarney, *supra* note 71, at 798.
137. *See supra* Part III.J.
138. NAT'L CONF. OF COMM'RS ON UNIF. ST. LS., *supra* note 9, at 8.
139. *Id.* at 9–10.
140. *Id.* at 4.
141. UNIF. PROB. CODE § 1-201(35) (2001).
142. NAT'L CONF. OF COMM'RS ON UNIF. ST. LS., *supra* note 9, at 10.

This section of the UFADAA follows the formula of the personal representative's default power set out in UPC § 3-715.[143] Ultimately, UPC § 3-715 and the UFADAA support the assumption that suppling fiduciaries with the ability to practically handle assets laid out in the Uniform Trustee's Powers Act is desirable, and extending that right to personal representatives is beneficial.[144]

UFADAA § 5 grants conservators access to digital assets of protected people.[145] "'Conservator' means a person appointed by a court to manage the estate of a living individual."[146] This description mirrors the definition found in UPC § 5-102(1).[147] UFADAA § 5, entitled "Access By [Conservator] To Digital Assets Of [Protected Person]," gives conservators the same rights to assets that UFADAA § 4 gives personal representatives.[148] However, concerning conservator's rights, the court must specifically authorize access to the protected person's digital assets.[149] In this case, state law will establish the criteria that courts will use to grant power to the conservator.[150] For example, "UPC § 5-411(c) requires the court to consider the [protected person's intent] as well as a list of other factors."[151] However, existing state law may also determine legislative standards for making a determination based on a conservator's actions.[152] If the court grants a conservator access to digital assets, the conservator will have the same power over digital assets as the account holder; however, the law requires conservators to exercise authority in the best interest of the protected person.[153]

UFADAA § 6, entitled "Access by Agent to Digital Assets," establishes that the agent has default rights over all of the principal's digital assets to the extent that a power of attorney expressly grants to the agent.[154] For the purposes of this act, "'[a]gent' means an attorney in fact granted authority under a durable or nondurable power of attorney."[155] "'Power of Attorney' means a record that grants an agent authority to act in the place of a principal."[156] The definition of agent in the UFADAA mirrors the definition in UPC § 1-201(1), whereas the definition used for the power of attorney in

143. *See* UNIF. PROB. CODE § 3-715.
144. *See id.*
145. *See* NAT'L CONF. OF COMM'RS ON UNIF. ST. LS., *supra* note 9, at 11.
146. *Id.* at 3.
147. UNIF. PROB. CODE § 5-102(1).
148. NAT'L CONF. OF COMM'RS ON UNIF. ST. LS., *supra* note 9, at 11.
149. *See id.*
150. *See id.*
151. *Id.* at 12.
152. *Id.*
153. *See id.*
154. *Id.*
155. *Id.* at 3.
156. *Id.* at 4.

the UFADAA reflects the definition in UPC § 5B-102(7).[157] When the principals do not want their agents to exercise such broad authority over all of their digital assets, there must be explicit language in the power of attorney preventing an agent from acting in such a way.[158] However, because a power of attorney typically contains the consent of the principal, the ECPA should not prevent the agent from exercising authority over digital assets.[159]

UFADAA § 7 outlines access by a trustee to digital assets.[160] "'Trustee' means a fiduciary with legal title to an asset pursuant to an agreement or declaration that creates a beneficial interest in another."[161] This section explains that access to digital assets encompasses assets for which the trustee is the initial account holder.[162] Because the law may entitle a trustee to digital assets when the trustee opens the account, the trustee can access each digital asset that is in an account for which the trustee is the original account holder, but not necessarily each digital asset held in the trust.[163] This section also covers situations that call for *inter vivos* transfers of digital assets into a trust, transfers into a testamentary trust, or transfers via a pour-over will or other governing instruments of a digital asset into a trust.[164] In regards to these types of transfers, a trustee acts as a successor account holder when the settlor transfers a digital asset into the trust.[165]

The UFADAA not only distinguishes the four types of fiduciaries that gain access to digital assets, but also the authority of these fiduciaries.[166] While family members or friends may seek such access, unless they fall under one of the categories of fiduciaries that are explicitly mentioned in the UFADAA: "their efforts are subject to other laws [governed by their jurisdiction,] and are not covered by this act."[167] Due to the nature of a uniform law, there are many advantages and disadvantages that one can argue.[168] The following sections will discuss some of the positive and negative aspects of enacting the UFADAA nationwide.[169]

C. Advantages of the UFADAA

Due to the fact that the UFADAA specifically deals with digital asset management, there are many advantages to enacting the UFADAA as federal

157. *See* UNIF. PROB. CODE § 1-201(1), 5B-102(7) (2001).
158. NAT'L CONF. OF COMM'RS ON UNIF. ST. LS., *supra* note 9, at 13.
159. *Id.*
160. *Id.*
161. *Id.* at 5.
162. *Id.* at 14.
163. *Id.* at 16.
164. *Id.*
165. *Id.*
166. *Id.* at 10–16.
167. *Id.* at 1.
168. *See infra* Parts IV.C–D.
169. *See infra* Parts IV.C–D.

law.[170] One highlight of the UFADAA is that it allows the decedents to carry out their intentions effectively.[171] As previously discussed, once an individual is deceased, online accounts become managed by the companies that own the respective accounts, regardless of the decedent's desire to pass them on.[172] Under the current state of the law, terms of service agreements typically dictate the disposition of an account holder's digital assets.[173] The UFADAA solves uncertainty by treating digital assets the same as tangible ones.[174] The UFADAA gives people the power to plan for the management and disposition of their digital assets in the same way that they can make plans for their tangible property.[175] When the original account holder expresses their privacy choices in writing—such as a will, trust, or power of appointment—the UFADAA gives deference to those wishes.[176] Under the UFADAA, account holders can specify through a legal document such as a will or trust whether to preserve their digital assets, distribute them to their heirs, or destroy them.[177] The act ultimately gives digital asset holders more control.[178]

The UFADAA, if adopted, will not only give more power to digital asset holders, but it will allow for more predictability as well.[179] Regarding intestate decedents, fiduciaries would obtain access to a decedent's digital assets by making a request to the state.[180] As previously mentioned, the UFADAA provides default rules for four of the most common types of fiduciaries including executors, agents, conservators, and trustees.[181] These fiduciaries would manage a decedent's digital assets, which will provide closure for families concerned about what will happen to the decedent's accounts and assets, especially if the death is sudden.[182] Without the UFADAA, heirs are unlikely to receive or control the decedent's online accounts and other digital assets, causing the accounts to virtually die with

170. Stephen Doyle, *My Sister's Facebook Keeper: How Delaware Is Changing the Landscape of Online Asset and Account Management*, U. OF CIN. L. REV. (Oct. 23, 2014), http://uclawreview.org/2014/10/23/my-sisters-facebook-keeper-how-delaware-is-changing-the-landscape-of-online-asset-and-account-management/ [http://perma.cc/G4RL-F3F6].

171. *Id*.

172. *Id.*

173. *Why Your State Should Adopt the Uniform Fiduciary Access to Digital Assets Act*, UNIF. L. COMM'N (2014), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/UFADAA%20-%20Why%20Your%20State%20Should%20Adopt%20-%20August%202014.pdf [htpp://perma.cc/B2XE-3VD7].

174. Danielle Feller, *Delaware Becomes First State to Pass Digital Assets Bill*, CAMPBELL L. OBSERVER (Sept. 24, 2014), http://campbelllawobserver.com/delaware-becomes-first-state-to-pass-digital-assets-bill/ [http://perma.cc/4AST-ZDK2].

175. UNIF. L. COMM'N, *supra* note 173.

176. Feller, *supra* note 174.

177. UNIF. L. COMM'N, *supra* note 173.

178. *Id.*

179. Doyle, *supra* note 170.

180. *Id.*

181. UNIF. L. COMM'N, *supra* note 173.

182. Doyle, *supra* note 170.

the original holder.[183] In the current system, a court order is one of the only options that families have to obtain access to a decedent's digital assets.[184] According to Gene Hennig, one of Minnesota's commissioners to the Uniform Law Commission, "You've got to hire lawyers. It's time-consuming. Some people may go to all that trouble and it took forever to get the order and by the time they got it, the stuff had been destroyed. It's just an unworkable and very inefficient way of doing things."[185] If the states adopt the UFADAA, this will no longer be the case.[186] In sum, the fulfillment of a decedent's intentions and the ability of an heir or beneficiary to control the decedent's digital assets significantly outweigh any potential problems of the UFADAA.[187]

Not only will the UFADAA allow for decedents and their fiduciaries to have more control over their digital assets, but the act will also provide more uniformity on the issue if its adoption is widespread.[188] As previously mentioned, a minority of the states have enacted primitive laws that attempt to address the issue of digital asset management.[189] Even though there are issues with the laws these states have enacted, many other states have realized that, with ever-changing technological advances, they need to enact laws to deal with digital assets.[190] States such as Massachusetts, Maryland, Michigan, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, and Virginia have considered jumping on the bandwagon by exploring the idea of passing a bill that deals with the digital assets issues.[191] However, even though these state committees have good intentions, most of these committees have had little to no support from the local legislatures.[192] The enactment of a uniform act might help states come to terms with some of the issues that were unfavorable in their legislatures' initial attempts at introducing bills dealing with digital assets.[193]

Since state law sets policies in place that control fiduciaries, the traveling of digital assets across state lines creates an issue for our courts.[194] Not only will the law achieve uniformity, the digital asset holders, fiduciaries, Internet companies, and courts will have more predictability and certainty when it comes to domestic digital asset issues if legislatures adopt the

183. *Id.*
184. *Id.*
185. Hopper, *supra* note 42.
186. *Id.*
187. UNIF. L. COMM'N, *supra* note 173.
188. *Id.*
189. *See supra* Part III.
190. UNIF. L. COMM'N, *supra* note 173.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

UFADAA.[195] The following section will discuss some of the disadvantages to the UFADAA.[196]

D. Disadvantages of the UFADAA

As there are many advantages to the UFADAA, there are also some uncertainties and potential conflicts surrounding the law, including user and third party privacy concerns, contractual disputes between third parties and provider companies, and conflicts with federal law.[197] As previously mentioned, users may actually want to keep their digital assets private from their family after their death.[198] For that reason, people commonly have a separate account from their loved ones.[199] If the legislature enacts the UFADAA, a user's intent might be overlooked.[200]

Another particularly important problem in relation to privacy concerns is that the law has the potential to intrude onto the confidentiality of still-living third parties who had an interpersonal relationship with the deceased.[201] Opponents of the UFADAA warn "highly confidential communications between the decedent and the third parties that are still alive—patients of deceased doctors, psychiatrists, clergy, etc.— . . . would be very surprised that an executor is reviewing the communication."[202] Even when a doctor or other professional is not involved, some may abuse third party private information.[203] The law is unclear whether the fiduciary would have to uphold a duty to the third party when that duty may actually be only due to the deceased.[204] Because the text of the UFADAA does not explicitly address these and other privacy issues, anyone acting as a fiduciary to the deceased's property will have access to highly personal accounts, documents, photos, videos, etc., and have the ability to misuse and abuse these assets contrary to the deceased's actual intent.[205]

There is also no clear guidance on how to deal with the UFADAA when it conflicts with terms of service agreements that users have to accept when initially using the digital product or account.[206] As previously mentioned,

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195. *Id.*
196. *See infra* Part IV.D.
197. Doyle, *supra* note 170.
198. Hopper, *supra* note 42.
199. *See* Noam Kutler, *Protecting Your Online You: A New Approach to Handling Your Online Persona After Death*, 26 BERKELEY TECH. L.J. 1641, 1651 (2011).
200. *See* Carlo Caraluzzo, *Is Delaware's New Digital Assets Inheritance Law Too Far Reaching?*, COINTELEGRAPH (Aug. 24, 2014, 08:53 AM), http://cointelegraph.com/news/112334/is-delawares-new-digital-assets-inheritance-law-too-far-reaching [http://perma.cc/5326-2HMP].
201. Feller, *supra* note 174.
202. *Id.*
203. *See* Tarney, *supra* note 71, at 799.
204. Feller, *supra* note 174.
205. Caraluzzo, *supra* note 200.
206. Feller, *supra* note 174.

"the default rule is that the [provider] company that issued a decedent's electronic account retains control over the account" after a person dies.[207] A common example of this is when an iTunes user dies.[208] Instead of automatically passing on to a living fiduciary, Apple retains the collection after death.[209] To deal with this situation, the UFADAA will give control of those digital assets to the appointed fiduciary.[210] This in turn, will cause terms of service agreements to become void.[211] Due to these potential contract disputes, "the State Privacy and Security Coalition, which includes lobbying groups for Google and Facebook, has openly" disagreed with the uniform law.[212] Ultimately, this will put pressure on companies to reevaluate their privacy agreements to avoid lawsuits.[213] If nationwide adoption of the UFADAA occurs, there will likely be an influx of opposition from Internet companies and other consumer electronics companies with the invalidation of their terms of service agreements.[214]

In the current state of the law, the UFADAA also creates some confusion as to how it will interact with established federal law.[215] In particular, "one concern is that the statute could conflict with the ECPA."[216] As mentioned above, the ECPA is "a federal law that prohibits consumer electronic communications companies from disclosing content without the owner's consent or [a] government order."[217] However, the federal law is not absolutely exclusive because there are instances where the various states are allowed to legislate.[218] Ultimately the courts will decide how the ECPA and other federal laws will be interpreted with the addition of the UFADAA.[219] The real issue is in the interim period between the date of enactment of the UFADAA and the courts establish a clear precedent.[220] Until the laws are sorted out in relation to one another, digital asset holders and practitioners will be caught in a grey area of the law with an abundance of uncertainties.[221]

Although there are many advantages and disadvantages to the uniform act, one state has made the decision to proceed and enact a statute that mirrors the UFADAA.[222] The following section will discuss Delaware's enactment

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207. Doyle, *supra* note 170.
208. *Id.*
209. *Id.*
210. *Id*.
211. *Id.*
212. *Id*. *See* Jeff Mordock, *Under New Law, Fiduciaries Can Access Deceased's Digital Assets*, DEL. L. WKLY. ONLINE (Aug. 27, 2014), available on LexisNexis.
213. Feller, *supra* note 174.
214. Doyle, *supra* note 170.
215. Feller, *supra* note 174.
216. Mordock, *supra* note 212.
217. *Id.*
218. *Id.*
219. *Id.*
220. Hopper, *supra* note 42.
221. *Id.*
222. Mordock, *supra* note 212.

of the Fiduciary Access to Digital Assets and Digital Accounts Act (FADADAA).[223]

V. DELAWARE'S ENACTMENT OF THE FADADAA

On August 12, 2014, the governor of Delaware signed the FADADAA.[224] The law recently became effective on January 1, 2015.[225] "Delaware is the only state to enact a statute [that is] 'close enough' to UFADAA so that [National Conference of Commissioners on Uniform State Laws] considers the legislation to be a UFADAA [enactment]."[226] "Although Delaware is not the first state to enact legislation that grants beneficiaries or fiduciaries control of a decedent's digital accounts and assets, it is the first to do so with broad language."[227]

The FADADAA provides that "a fiduciary may exercise control over any and all rights in digital assets and digital accounts of an account holder."[228] The definitions of "digital assets" and "digital accounts" are defined by the law and encompass every kind of online account or information.[229] Just as in the UFADAA, the FADADAA also includes provisions that void terms of service agreements if these agreements limit the "fiduciary's access to or control over a digital asset or digital account."[230] The FADADAA only applies to intestate decedents residing in Delaware, and those whose wills are governed by Delaware law.[231]

Delaware's enactment of the FADADAA is the first step in the nationwide adoption of the UFADAA.[232] About twenty-eight other state legislatures are now considering their position in regard to enacting a statute that mirrors the UFADAA.[233] Currently, Texas is one of those states.[234] The

223. *See infra* Part V.
224. Doyle, *supra* note 170.
225. *Id.*
226. Beyer, *supra* note 19, at 7.
227. Doyle, *supra* note 170.
228. *See* DEL. CODE ANN. § tit. 12, 5004(a) (2014).
229. *See id.* § 5002(6)–(7). A digital account includes "electronic system for creating, generating, sending, sharing, communicating, receiving, storing, displaying, or processing information which provides access to a digital asset which currently exist or may exist as technology develops or such comparable items as technology develops." *Id.* A digital asset is defined as "data, text, emails, documents, audio, video, images, sounds, social media content, social networking content, codes, health care records, health insurance records, computer source codes, computer programs, software, software licenses, databases, or the like." *Id.* Including terms such as "may exist as technology develops" and "the like," the definitions of both of these terms broadens their scope to include many forms of online information. *Id.*
230. *Id.* § 5004(b).
231. Doyle, *supra* note 170.
232. Beyer, *supra* note 19, at 1.
233. Telephone Conference with Digital Asset Comm. State Bar of Tex. (Jan. 19, 2015).
234. *See infra* Part VI.

following section will address the Texas committee's progress on the matter of digital asset management and its adoption of the UFADAA.[235]

VI. TEXAS AND THE UFADAA

The adoption of the UFADAA or similarly worded statutes is a topic of concern for many lawmakers nationwide during the 2015 legislative session.[236] Texas should not be excluded.[237] Although as of January 19, 2015, Texas has introduced no fiduciary access to digital asset legislation.[238] However, the state has established a Digital Asset Committee of the Real Estate, Probate, and Trust Law Section of the State Bar of Texas.[239] Headed by the chairman, Gerry W. Beyer, the committee is responsible for making recommendations to representatives in the event they do propose digital asset legislation.[240]

A. The Texas Plan of Action

On January 7, 2015, State Representative Jeff Leach contacted Beyer regarding his interest in digital asset legislation.[241] In his letter, he acknowledged that the congress would not include the digital asset issue among the official legislative priorities during the 84th Legislative Session.[242] However, Representative Leach did mention that he has instructed his staff to begin review of legislative proposals related to fiduciary access to digital assets and requested the assistance of the digital asset committee for recommendations.[243] At this point, the committee plans to follow up with Representative Leach to better understand his position and proceed with a recommendation about digital asset legislation.[244] The following section will discuss a potential recommendation that the committee could present to Representative Leach.[245]

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235. *See infra* Part VI.
236. *See supra* Part V.
237. DIGITAL ASSET COMMITTEE, STATE BAR OF TEXAS (Sept. 17, 2014).
238. Telephone Conference with Digital Asset Comm. State Bar of Tex. (Jan. 19, 2015).
239. DIGITAL ASSET COMMITTEE, STATE BAR OF TEXAS (Sept. 17, 2014).
240. *Id.*
241. Letter from Representative Jeff Leach, House of Representatives, to Gerry W. Beyer, Governor Preston E. Smith Regents Professor of Law, Chairmen of Digital Asset Committee (Jan. 7, 2015) (on file with author).
242. *Id*.
243. *Id.*
244. Telephone Conference with Digital Asset Comm. State Bar of Tex. (Jan. 19, 2015).
245. *See infra* Part VI.B.

B. Dear Legislature

Following in the footsteps of Delaware, Texas should enact digital asset legislation that mirrors the UFADAA.[246] While most of the language should reflect that suggested by the Uniform Law Commission, there should be some variation to meet the state's particular needs.[247] When dealing with the definition of digital assets and digital accounts, the legislation proposed by the Texas legislature should include language that broadens the scope of their meanings.[248] As previously done in Delaware, words and phrases such as "or the like" or "may exist as technology develops" will encompass more technological advances, as they are likely to occur.[249] Language that is analogous to words used in the Delaware statute will likely ensure that the law does not become obsolete as technology changes.[250]

Another issue that Texas should consider in its adoption of the UFADAA, or a statute that mirrors it, is the fact that it is a community property state.[251] The legislation should include a section that deals directly with digital assets as community property. In particular, it should be explicit whether digital assets fall within the meaning of community property or separate property. Further, this section should include language explaining the procedure for which these digital assets are distributed to the surviving spouse. Will the surviving spouse still need to send a formal request to the custodian of the digital asset? Or, will this asset be automatically transferred? A Texas statute that deals with asset management should address all of these questions and more to provide for clarity on an issue that is unique to Texas.

VII. CONCLUSION

Today, most people store at least some of their property and communications as digital assets.[252] The rapid development of technology and the Internet has allowed people to create financial or personal value in the form of digital assets.[253] But what happens to these assets when you die? Remember the case of University of Minnesota freshman Jake Anderson who tragically died while walking a girl home from a party?[254] In the current state of the law, his family may never be able to access a book he may have written

246. *See infra* Part VI.A.
247. *See id.*
248. *See* DEL. CODE ANN. tit. 12, § 5002(6)–(7) (West 2014).
249. *Id.*
250. *Id.*
251. TEX. EST. CODE ANN. § 453.001 (West 2014).
252. *See* Cahn & Ziettlow, *supra* note 1, at 23.
253. *See id*.
254. Hauser, *supra* note 6.

and saved to his Google documents, or pictures that he had in a private folder on Facebook.[255]

These complications are a direct result of the restrictive terms drafted by providers that intend to protect the privacy of users, which often conflict with the intentions of the decedent.[256] Digital asset providers and current state laws have failed to offer an effective solution for the Anderson family and those that are in a similar situation.[257] As the world becomes more dependent on technology, families will call on courts to weigh the interests of users against those of digital asset providers.[258] Because of this potential, judges nationwide should have legislative guidance.[259] Mandating the transferability of digital assets upon a showing of legally recognized authorization reconciles digital asset providers' and users' interests in privacy and certainty.[260]

A uniform law could be an effective method that solves jurisdictional issues.[261] While there are many positive and negative aspects of enacting the UFADAA, the possible negative effects are not enough to outweigh all of the benefits a uniform act could potentially bring to the world of estate planning and digital asset management.[262] In particular, Texas should eventually enact a statute that is born from the intent that the Uniform Law Commission had in its proposition of the UFADAA.[263] However, the Texas Legislature should include amendments to tailor the legislation in order to fit the needs of the state.[264] A statute inspired by the UFADAA will ultimately give people and practitioners the power to better plan for the management and disposition of digital assets in the same way that they can make plans for their tangible property.[265]

VIII. UPDATES

Although UFADAA was the first of its kind to lay the foundation for a uniform law that governed digital asset management, its popularity has not spread amongst the states.[266] In fact, twenty-six states, including Texas, introduced legislation to enact a version of UFADAA during the first half of

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255. *Id.*
256. *See supra* Part II.B.
257. *See supra* Part II.B.
258. *See* Beyer, *supra* note 19, at 7.
259. *See supra* Part IV.C.
260. *See supra* Part IV.B.
261. *See supra* Part IV.C.
262. *See supra* Parts IV.C–D.
263. *See supra* Part IV.A.
264. *See supra* Part VI.B.
265. UNIF. L. COMM'N, *supra* note 132, at 2.
266. Morgan Wiener, *Opposition to the Uniform Fiduciary Access to Digital Assets Act,* FIDUCIARY L. BLOG (Sept. 21, 2015), http://www.fiduciarylawblog.com/2015/07/opposition-to-the-uniform-fiduciary-access-to-digital-assets-act.html [http://perma.cc/QL7Y-4DD6].

2014, but currently none of those measures have passed.[267] According to the Uniform Law Commission, to date, Delaware remains the only state that has passed its version of the UFADAA.[268]

Due to the tremendous industry and state-legislator opposition to the original version of UFADAA, other acts have been proposed.[269] The NCCUSL has recently approved a Revised UFADAA that essentially rewrites the original UFADAA.[270] Also, the Internet Coalition, a group that represents the interests of major e-commerce and social media companies, the State Privacy and Security Coalition, Inc., and NetChoice, have proposed an alternative to UFADAA in the Privacy Expectation Afterlife and Choices Act (PEAC).[271] Various states will likely address these alternatives in the next legislative session.[272]

267. *Id.*

268. *Id.*

269. *Id.*

270. *Revised Uniform Fiduciary Access to Digital Assets Act*, NAT'L CONF. OF COMM'RS ON UNIF. ST. LS. (2015), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015AM_RevFiduciaryAccessDigitalAssets_VBS.pdf [http://perma.cc/L24Z-4NLT].

271. Jeffery R. Gottlieb, *ULC Rewrites 'Uniform Fiduciary Access to Digital Assets Act'*, L. OFF. JEFFREY R. GOTTLIEB, LLC (July 20, 2015), http://www.illinoisestateplan.com/ulc-rewrites-uniform-fiduciary-access-to-digital-assets-act/ [http://perma.cc/PA42-E49N].

272. *See* Wiener, *supra* note 266.