

The European Law Institute

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Panel on the Revised Uniform Fiduciary Access to Digital Assets Act (2015)

- **Chair: Harriet Lansing**, Immediate Past President of the U.S. Uniform Law Commission
- **Sjef van Erp**, Professor of Civil Law and European Private Law, University of Maastricht
- **Radim Polčák**, Head of the Institute of Law and Technology, Faculty of Law, Masaryk University
- **Jos Uitdehaag**, First Secretary, Union Internationale des Huissiers de Justice
- **Ernst Steigenga**, Senior Advisor, Information Policy at the Ministry of Security and Justice in The Netherlands



The Uniform Law Commission

The Revised Uniform Fiduciary Access to Digital Assets Act (2015)

Transfer of Property and Information at Death or
Incapacity in a Digital Age



The Uniform Law Commission

The ULC is a nonprofit entity, formed in 1892, to create nonpartisan state legislation. Commissioners—who are all lawyers—are appointed for a term of service by the individual state governments, the District of Columbia, Puerto Rico, and the Virgin Islands.

These commissioners—practicing lawyers, judges, law professors, legislators and legislative attorneys—work together without compensation to draft state laws within our constitutional structure of federalism. The ULC has drafted and presented for state enactment more than 250 laws that range from the Uniform Commercial Code and business entity acts to acts on property, trusts and estates, family law, and criminal law.



Uniform Fiduciary Access to Digital Assets Act (UFADAA)

UFADAA was promulgated by the ULC in 2014, following our customary drafting process that includes a drafting committee of commissioners, American Bar Association advisors, a committee chair, and a reporter with expertise in the subject matter.

The drafting committee met formally four times over two years and worked on drafts between meetings. These meetings were open to the public and observers and stakeholders were invited to participate.

After two full readings of the act at ULC annual meetings and a vote of the states, UFADAA was approved at the 2014 annual meeting, and the ULC legislative work began in the individual states.



Why is RUFADAA necessary?

The nature of property in the digital age has changed:

- Financial Accounts on Paper → Online Bank Accounts, Online Stock Accounts, Electronic Bank Statements
- Money in the Bank → Virtual Property (e.g. Bitcoin, Air Miles, Second Life, World Aircraft); Payment Services, (e.g. PayPal, Google Wallet)
- Paper Correspondence → E-mail Accounts, (e.g. Gmail, Yahoo mail, Hotmail, Outlook, proprietary e-mail accounts)
- Paper Records in File Cabinets → Online Storage Accounts, (e.g. iCloud, Drop Box, Google Drive, OneDrive, Mega, Copy, Tresorit)
- And financial or personal social value is captured in digital assets that include Social Networking Sites (Facebook, LinkedIn, Google+, Twitter, My Space, Tumblr, Pinterest) Music Accounts (iTunes, Pandora, Groove Shark, Sound Cloud), Entertainment Accounts (Kindle, Kobo, AppleTV), Auction Sites (Ebay, TradeMe), Photo Storage/Sharing Accounts (Flickr, Instagram, Snapfish), Online Business Accounts, and Personal or Company Websites and Blogs



Why a Uniform State Law?

- 85% of Americans now use the internet for personal and financial interaction.
- Trusts and Estates law and Fiduciary law is state law in the United States.
- The custodians of our increasingly valuable digital assets do business in every state.
- Only nine states currently have a law addressing access to digital assets: CT, DE, ID, IN, LA, NV, OK, RI, VA.



RUFADAA Overview

- Creates a structure to apply effective laws on transfer of property to new types of property (extends workable principles as media-neutral)
- Provides default rules only; the owner controls the disposition of all property, whether tangible or digital.
- Provides access rules for four common types of fiduciaries:
 - Executors of decedents' estates;
 - Guardians/Conservators of protected persons;
 - Agents under a power of attorney; and
 - Trustees.



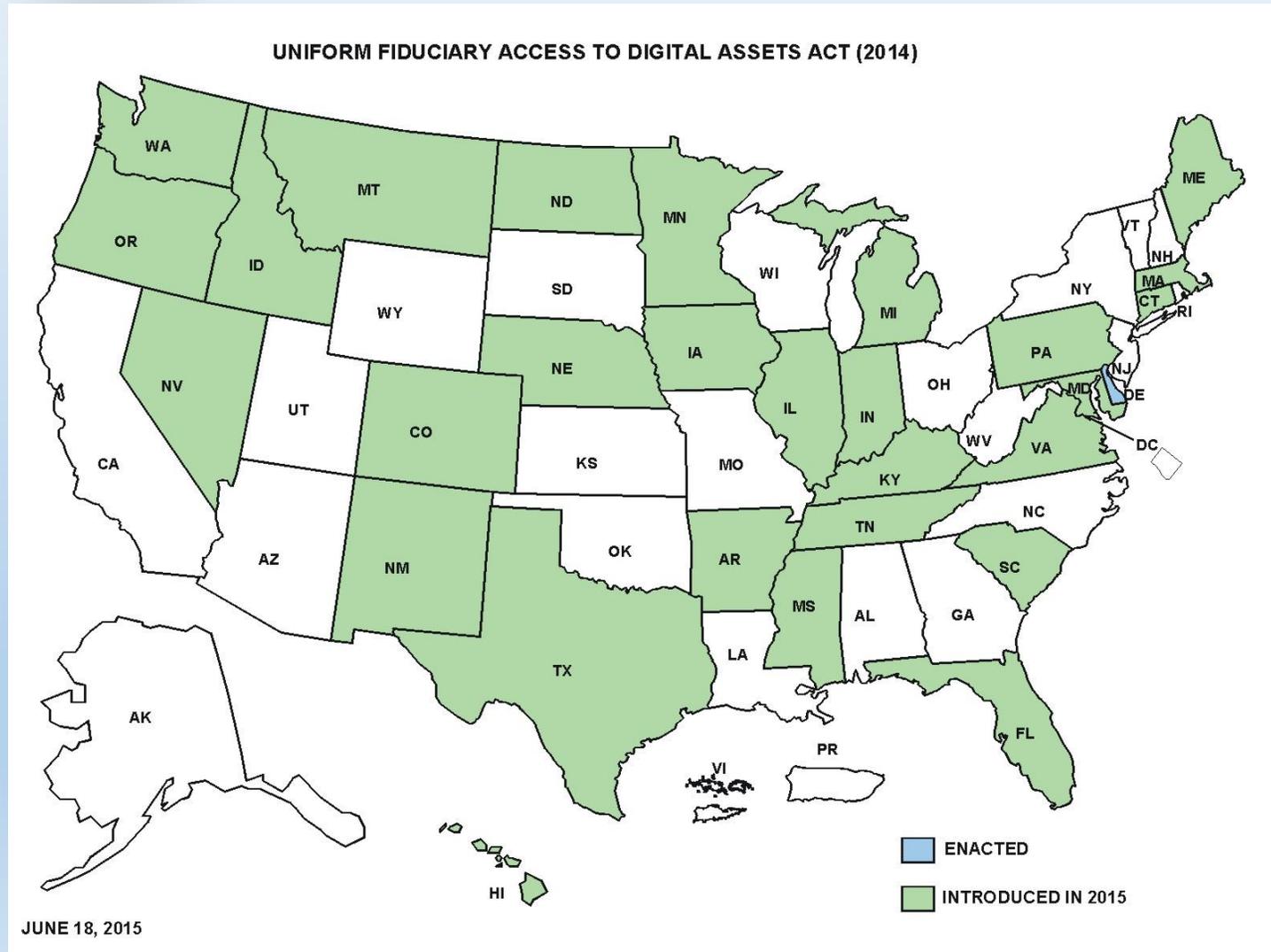
Challenges to Fiduciary Access

- Passwords and Encryption
- Restrictive Terms-of-Service and Privacy Policies
- Federal and State Laws Prohibiting Unauthorized Access
- The Electronic Communications Privacy Act of 1986 (ECPA)





Original UFADAA – Enactment Problems



28 UFADAA Bills
Introduced in 2015.

0 Enactments in 2015.

(Delaware enacted a
substantially similar
law in 2014 based on
a final draft of
UFADAA.)



Privacy Concerns Debated

Issue: Executors traditionally have access to a decedent's paper mail to collect bills and financial statements for estate administration.

Question: Should executors also have access to a decedent's e-mail?

PRO

- Many people now receive bills and financial statements via e-mail.
- Executors are fiduciaries and have a duty to keep private information confidential.
- Access is necessary for estate administration.

CON

- Unlike paper mail, most e-mail programs archive all correspondence automatically.
- Executors would likely have access to many years' worth of the decedent's private correspondence, most of which is irrelevant to estate administration.
- Most people probably do not intend for their e-mail archive to become part of their estate.



Revised UFADAA: Provisions Refined and Limited

RUFADAA Says:

- A fiduciary may not access the content of a decedent's electronic communications unless the decedent consented in a will, trust, or other document.
- A fiduciary may access a catalogue of the decedent's electronic communications for estate administration.
- Unless a decedent opted out, a fiduciary may access a decedent's digital assets that are not the content of a protected electronic communication. These accessible assets include photographs, document files, web pages, contact lists, calendars, etc.



RUFADAA – Online Choices

RUFADAA encourages consumer choice by giving legal effect to a user's online election to name a beneficiary or to prohibit access to online accounts – but only if the choice requires an affirmative act separate from the user's assent to the terms-of-service.



Inactive
Account
Manager



Legacy
Contact



RUFADAA – Widespread Enactment in 2016?

Revised UFADAA resolves the privacy issues that prevented enactment in 2015. The ULC anticipates significant legislative activity in the states beginning in January 2016.

Stay tuned!