



THE UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

- A Summary -

In the Internet age, the nature of property and our methods of communication have changed dramatically. A generation ago, a human being delivered our mail, photos were kept in albums, documents in file cabinets, and money on deposit at the corner bank. For most people today, at least some of their property and communications are stored as data on a computer server and accessed via the Internet.

Collectively, a person's digital property and electronic communications are referred to as "digital assets" and the companies that store those assets on their servers are called "custodians." Access to digital assets is usually governed by a restrictive terms-of-service agreement provided by the custodian. This creates problems when account holders die or otherwise lose the ability to manage their own digital assets.

A fiduciary is a trusted person with the legal authority to manage another's property, and the duty to act in that person's best interest. The Uniform Fiduciary Access to Digital Assets Act (UFADAA) concerns four common types of fiduciaries:

1. Executors or administrators of deceased persons' estates;
2. Court-appointed guardians or conservators of protected persons' estates;
3. Agents appointed under powers of attorney; and
4. Trustees.

UFADAA gives people the power to plan for the management and disposition of their digital assets in the same way they can make plans for their tangible property: by providing instructions in a will, trust, or power of attorney. If a person fails to plan, the same court-appointed fiduciary that manages the person's tangible assets can manage the person's digital assets, distributing those assets to heirs or disposing of it as appropriate.

Some custodians of digital assets provide an online planning option by which account holders can choose to delete or preserve their digital assets after some period of inactivity. UFADAA defers to the account holder's choice in such circumstances, but overrides any provision in a click-through terms-of-service agreement that conflicts with the account holder's express instructions.

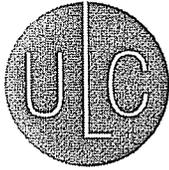
Under UFADAA, fiduciaries that manage an account holder's digital assets have the same right to access those assets as the account holder, but only for the limited purpose of carrying out their fiduciary duties. Thus, for example, an executor may access a decedent's email account in order to make an inventory of estate assets and ultimately to close the account in an orderly manner,

but may not publish the decedent's confidential communications or impersonate the decedent by sending email from the account. Moreover, a fiduciary's management of digital assets may be limited by other law. For example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not access the contents of communications protected by federal privacy laws.

In order to gain access to digital property, UFADAA requires a fiduciary 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. Custodians of digital property that receive an apparently valid request for access are immune from any liability for good faith compliance.

UFADAA is an overlay statute drafted to work in conjunction with a state's existing laws on probate, guardianship, trusts, and powers of attorney. Enacting UFADAA will simply extend a fiduciary's existing authority over a person's tangible assets to include the person's digital assets, with the same fiduciary duties to act for the benefit of the represented person or estate. It is a vital statute for the digital age, and should be enacted by every state legislature as soon as possible.

For further information about UFADAA, please contact ULC Legislative Counsel Benjamin Orzeske at 312-450-6621 or borzeske@uniformlaws.org.



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WHY YOUR STATE SHOULD ADOPT THE UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

The Uniform Fiduciary Access to Digital Assets Act (UFADAA) modernizes fiduciary law for the Internet age. Nearly everyone today has digital assets, such as documents, photographs, email, and social media accounts. Digital assets may have real value, either monetary or sentimental. However, fiduciary access to digital assets is often barred by restrictions in terms of service agreements, passwords that can only be reset through the account holder's email, and federal and state privacy laws that do not contemplate the account holder's death or incapacity. UFADAA solves the problem by ensuring legally appointed fiduciaries can access all of the digital assets necessary for carrying out their duties.

- ***UFADAA gives account holders control.*** UFADAA allows account holders to specify whether their digital assets should be preserved, distributed to heirs, or destroyed. Under the current law, click-through terms-of-service agreements often dictate the disposition of an account holder's digital assets.
- ***UFADAA treats digital assets like all other assets.*** If a fiduciary has the legal authority to inventory and dispose of all of a person's documents, it should not matter whether those documents are printed on paper, stored on a personal computer, or stored in the cloud. UFADAA provides a fiduciary with equal access to both tangible and digital property.
- ***UFADAA provides different rules for four common types of fiduciaries.*** The executor of a decedent's estate may have responsibilities altogether different from those of an agent under a living person's power of attorney. UFADAA provides appropriate default rules governing access for executors, agents, conservators, and trustees.
- ***UFADAA protects custodians and copyright holders.*** Under UFADAA, fiduciaries must provide proof of their authority in the form of a certified document. Custodians of digital assets that comply with a fiduciary's apparently authorized request for access are immune from any liability. A fiduciary's authority over digital assets is limited by federal law, including the Copyright Act and the Electronic Communications Privacy Act.
- ***UFADAA addresses an ideal topic for a uniform law.*** While fiduciaries are regulated by state law, digital assets travel across state lines nearly instantaneously. In our mobile society, people move more often than ever. A uniform law ensures that fiduciaries will have equal access and custodians will be subject to uniform regulation in every state.

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