Oregon State Bar

Testimony before the House Judiciary Committee
In opposition to HB 2647
On behalf of the OSB Estate Planning Section

3/16/2015

Chair Barker, members of the committee

My name is Victoria Blachly and I am a trust and estate litigator with 18-years' experience, licensed in Washington and Oregon. I am here today as part of the enactment team for the Uniform Law Commission, an Executive Member of the Oregon State Bar Elder Law Executive Committee, and as a member of the Governor's Commission on Senior Services.

I'm here today to talk about how we handle digital assets that are left behind when someone dies. While we believe this is an incredibly important issue, and that Oregon should pass legislation, we cannot support the industry proposal embodied in HB 2647 – known as PEAC, and instead urge that Oregon join a growing list of states enacting the Uniform Fiduciary Access to Digital Assets Act or UFADAA.

There are many different kinds of fiduciaries that need access to digital assets through online accounts:

- Personal representatives (PR) – for when someone dies.
- Powers of Attorney – which are sometimes used for members of the military leaving town, or for the elderly or ill who need to assistance managing their affairs.
- Trustees, and Conservators – for when someone has been adjudicated incapacitated because of dementia or other health reasons.

We agree that having a clear process for handling digital assets is important, and that current law could be significantly improved upon. For example, if someone's will says, "I want all of my Snapfish photos to be downloaded and given to the family I leave behind," a personal representative would not be allowed to comply with that request, because even if they had the password, that could be a cybercrime under state and federal law for making a fraudulent representation to the end user. Yet at the same time, the online companies are not required to comply with simple request. There are many similar problems. For example:

- Amazon/Kindle allows books to be willed, yet if you don't have authority to access them, then your hands are tied.
- Digital art exists. When someone dies then that is not to be accessed? I'm certain the artists disagree.
- Bitcoins are trading at $879. Without a fiduciary to have legal access to trade, then who gets that $$?
- How do you access accounts like PayPal? Do you just forfeit those accounts if you die?
- How do you know where the financial assets are held if every single statement goes to a Yahoo account and the current Terms of Service agreements for Yahoo says they can hit the "Delete" button when someone dies?

Unfortunately, HB 2647 does not adequately address these problems, in part because it relies on going through probate – a process many people try to avoid. HB 2647 is expensive, labor intensive, and doesn't address the problems that personal representatives encounter retrieving a decedent's property and returning it to their family.

Perhaps the biggest problem with HB 2647 is that it buys into the idea that large corporate online providers should control all of the information and all of the access. As written the bill provides that if the terms of service say they don't need to turn over digital assets after a user dies, then they do not have to provide anything – regardless of what

someone said in their will. This is premised on the idea that checking a box in a terms of service agreement constituted informed consent that the provider would not provide this property to your heirs – regardless of the fact that nobody reads terms of service agreements and that online providers can unilaterally change the terms of service.

House Bill 2647 is a cumbersome and unnatural extension of the law for many reasons:

- It's limited to personal representatives, and doesn't provide for fiduciaries operating under a power of attorney, or other legal mechanism;
- It codifies an unnecessarily expensive procedure;
- It merely provides that providers "may" give access to digital assets, but does not require it;
- It punishes people who unwittingly access online accounts, because if someone accesses an account after an account holder dies, then the online providers get total control and don't have to provide anything;
- It requires state courts to rule on federal laws when probate is a state issue;
- It requires personal representatives to know, in advance, of the account number and the specific identification of each account, which they likely will not know if someone did not leave that all behind in a readily accessible location;
- It then reverses the normal process, because even if a personal representative could jump through all of the hoops required in HB 2647 to get a court order, the online providers can still go back to court and claim that compliance is too burdensome, and get the order overturned.

SB 369 (UFADAA)

In Oregon and at least 25 other states in the US this year there will be legislation proposed by the Uniform Law Commission (ULC), seeking to confirm that fiduciaries have the same legal right to access online accounts and information as they have for conventional communications and property. In Oregon this is SB 369, which is substantially similar to the bill already adopted in Delaware. It is not controversial – except that the online providers would prefer not to comply with it. Fiduciaries already have a lot of authority – bound and governed by well-established laws in every state. Extending that authority to online information is a natural extension of the law.

It used to be that when someone died, the nominated personal representative ("PR") would bring the will to their attorney and say, "What do I do now?" The attorney would provide advice, including that the PR should have all of the decedent's mail forwarded to the PR, so the PR could begin to marshal the assets, pay the debts, and distribute according to the wishes of the decedent. Indeed, forwarding mail – a federal activity – is not illegal for a fiduciary to do; it is not an invasion of privacy; it is one of the many duties a fiduciary must handle. However, nowadays there are so many financial and other documents online, it is very difficult for a fiduciary to do their job.

This is the problem that the Uniform Law Commission sought to address in UFADAA, and which HB 2647 largely fails to address.

UFADAA updates state fiduciary law for the Internet age. When a person dies or loses the capacity to manage his or her affairs, a fiduciary receives legal authority to manage or distribute the person's property as appropriate. Every single day fiduciaries deal with private information. There is a well-established body of law in every state that confirms that even if a fiduciary gets information, they don't get to broadcast it to the world: they have a duty of confidentiality. UFADAA does not change that. Most people now own a great variety of digital assets, including photographs, documents, social media accounts, web sites, and more. Access to digital assets is often limited by custodians through restrictive terms-of-service agreements (Yahoo's agreement says they can hit the "delete" button when you die and erase EVERYTHING). UFADAA ensures that fiduciaries have the access they need to carry out

their duties in accordance with the account holder's estate plan, if there is one, otherwise in the account holder's best interests.

UFADAA provides a predictable manner where a fiduciary, consistent with well-established fiduciary law, can deal with online accounts and assets. UFADAA does not create new law but rather allows fiduciaries and online providers to comply with the current law without inadvertent exposure to federal laws. Otherwise, fiduciaries are in the impossible position of being ordered to marshal and distribute assets, without the ability to gain access. UFADAA avoids such chaos.

This is a policy decision: It's about CHOICE. Do the citizens of Oregon want large corporations to decide what happens to their online accounts when they die or become incapacitated or do they want the freedom to plan and pick options for what happens to their online accounts? And if your constituents didn't plan for their digital afterlife, perhaps with the assumption that surely someone can put the pieces together when they die, then there needs to be a way to do that: UFADAA is that way.

With UFADAA, you choose what happens to your digital assets. Don't let companies dig your digital grave and bury your digital assets. The choice is clear, and the choice should be yours, or rather the choice of your constituents—UFADAA honors the user's wishes for your online accounts and digital assets. You need UFADAA to protect the privacy of the citizens of Oregon.

- The Uniform Law Commission is a non-partisan, non-profit association that consists of hundreds of practicing lawyers from all 50 states. They spent over two years working on this proposal.
- UFADAA is endorsed by the National Academy of Elder Law Attorneys
- UFADAA is endorsed by the American Bar Association, with over 410,000 members nationwide.
- The Governor's Commission on Senior Services opposes HB 2647 and supports SB 369.

Thank you for your time and your consideration, and I'd be happy to answer any questions that you have.

Uniform Law Commission
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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, both monetary and sentimental. However, Internet service agreements, passwords that can be reset only through the account holder's email, and federal and state privacy laws that do not contemplate the account holder's death or incapacity may prevent fiduciaries from gaining access to these valuable assets. UFADAA solves the problem by ensuring that legally appointed fiduciaries can access, delete, preserve, and distribute digital assets as appropriate.

- ***UFADAA gives account holders control.*** UFADAA allows account holders to specify whether their digital assets should be preserved, distributed to heirs, or destroyed.

- ***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 access to both tangible and digital property.

- ***UFADAA provides 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 provides efficient uniformity for all concerned.*** Digital assets travel across state lines nearly instantaneously. In our modern mobile society, people relocate more often than ever. Because state law governs fiduciaries, a uniform law ensures that, regardless of the state, fiduciaries will have equal access to digital assets and custodians will benefit from uniform regulation.

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

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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 them 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 assets, 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 assets that receive an apparently valid request for access are immune from any liability for good faith compliance.

UFADAA is an overlay statute designed 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.