

Proposed Utah law seeks to clarify digital property rights after death

How many of your pictures are now stored in an online server, as opposed to a physical photo album on the shelf? How many times have you “gone green” and opted for an e-statement in lieu of a paper statement or receipt? How much of your day-to-day business is buried in your email? How much of this digital information do you think is available to your family when you die? In Utah, the answer could be: very little, at least for now.

When someone dies, a representative is typically appointed to settle the deceased individual’s affairs (pay bills, make distributions, etc.). This representative is given authority to act as if he or she were the deceased individual. This authority, however, does not always gain the representative access to a deceased individual’s digital content. Some online vendors are hesitant to give a representative access to digital content for fear of breaking consumer protection and online fraud laws, like the Computer Fraud and Abuse Act. These laws aim to protect an individual during his or her life, but they are also vague as to how digital content can be accessed at death.

For a representative, it can be frustrating to be rejected by an online vendor when the information needed to settle a deceased individual’s affairs is solely in a digital format and in the custody of the online vendor. So, while “going green” with e-statements and emails is great for the environment and is a convenience while an individual is alive, the current laws regarding digital content can be a big stumbling block for a person requiring access to your digital content when you die.

In order to update the law to the reality of the Digital Age, the Uniform Law Commission drafted the Uniform Fiduciary Access to Digital Assets Act (UFADAA) in 2014. This proposed law was revised in 2015 as the Revised Uniform Fiduciary Access to Digital Assets Act, or Revised UFADAA. The Revised UFADAA is an attempt to bridge the legal gap between a representative’s need to access a deceased individual’s digital content and an online vendor’s obligation to protect that individual’s continued right to privacy.

Here in the West, seven states introduced legislation in 2016 based on

the Revised UFADAA: Washington, Oregon, Idaho, Utah, Arizona, Colorado and Wyoming. Six of these states passed its own version of the Revised UFADAA, with Utah being the only holdout. Thirty-two states in total introduced Revised UFADAA legislation in 2016, with 20 of those states enacting the law.



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Based on the widespread acceptance of the Revised UFADAA, it may only be a matter of time before Utah joins the ranks of states enacting the statute. Rep. V. Lowry Snow (R-St.

George) certainly seems to think so. Snow is a co-sponsor of the Utah Revised UFADAA bill, which is currently known as HB383. The other co-sponsor is Sen. Lyle W. Hillyard (R-Logan). When asked why Utah’s

regarding a representative’s rights to access a deceased individual’s digital content, as well as what is reasonable for a digital content provider to require in order to grant access to such digital content. For instance, the Revised UFADAA requires that a representative make a written request for disclosure of a deceased person’s digital content. With the written request, the representative is to prove the legitimacy of his or her appointment by including a copy of the deceased individual’s death certificate, the representative’s letter of appointment and a copy of the user’s will directing digital content be disclosed to the duly appointed representative.

Once a representative has possession of the digital content, the Revised UFADAA imposes on the representative a duty of care, loyalty and confidentiality, which means that

the representative has access to if the deceased individual had agreed to an online service agreement. Some online vendors provide a built-in tool that acts like a contract between the user and the online vendor. For instance, a Facebook user can appoint a “legacy contact.” If a Facebook user opts to appoint a legacy contact then Facebook can bar an otherwise duly appointed representative if the representative is not the legacy contact.

Further, online service agreements, if properly entered into by an individual during his or her life, can limit how much access a representative can have. According to the online service agreement, an online vendor can grant full or partial access to a deceased individual’s digital content. An online vendor can also limit the access by simply providing a copy of whatever digital content

was available to the user at the date of his or her death. It should also be noted that an online vendor has no obligation to provide any digital content where a user had expressly notified the online vendor that the user’s content be erased or destroyed upon his or her death. The Revised UFADAA expressly grants a user and an online vendor to contract how digital content is to be protected after the user’s death.

Access to an individual’s digital content, however, is not limited to a representative appointed to settle an estate, but is also extended to duly appointed trustees, conservators and agents.

If passed, Utah’s Revised UFADAA will give Utah residents a clearer idea as to how their digital content will be handled at their death or incapacity. With this clarity, an estate plan can be formulated to ensure that proper access is granted in regard to specific digital content. The Revised UFADAA will also help clarify how much access an online vendor may allow regarding one of its users without running counter to computer-fraud and unauthorized-computer-access laws, and duly appointed representatives can proceed knowing that there is a way to access vital digital content.

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Revised UFADAA did not pass in the 2016 legislative season, Snow did not recall any objections to the bill. He noted that the Revised UFADAA has been endorsed by the National Association of Elder Law Attorneys, Facebook and Google, among others, which serves to further legitimize the bill. Snow stated that he feels that they simply “ran out of time” in 2016 and intends on having the bill reintroduced during the next legislative session.

If passed, Utah’s Revised UFADAA will offer more clarity

the representative does not have unfettered power over the digital content, but must only use the digital content to complete the tasks required of the representative. In other words, the representative may not act as if they were the deceased individual and repost pictures, use online accounts to make purchases, and so on, but must simply act according to the deceased individual’s wishes in settling the deceased individual’s estate.

On the other hand, an online vendor may limit what a representa-