

The Next Frontier of Guardianship:  
Locating, Collecting, and  
Safeguarding Digital Assets

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**Background**

- More than half of Americans age 65 and older use the Internet or email.
- This is the fastest-growing population on the Internet.
- In the near future, we will have people under our guardianship with substantial digital assets, including digital assets with monetary and sentimental value.



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**Digital Assets with Monetary Value**

- Online bank and investment accounts.
- Collectibles, such as music and books.
- Online credits.
- Intellectual property.
- Important Documents, such as deeds, wills, advanced directives, tax documents, medical records.



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### Digital Assets with Sentimental Value

- ❑ Cherished Photographs.
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- ❑ Diaries.



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### Why is it Important to Quickly Locate and Collect Digital Assets?

- ❑ To fulfill fiduciary and statutory obligations to locate, inventory, collect, and manage assets.
- ❑ To prevent financial exploitation and identity theft.
- ❑ To prevent loss to the estate.



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### Practical Steps

- ❑ As this issue and the law evolve, so will best practices.
- ❑ Add "non-brick and mortar" financial institutions to the distribution list for asset inquiry letters.
- ❑ Asset inquiry letter should request information about online accounts.
- ❑ Freeze orders should include online accounts.
- ❑ Consider closing and deactivating online accounts to prevent hacking and identity theft.
- ❑ Credit reports.
- ❑ If there is a computer in the home, assume that the person has digital assets and/or important information stored digitally.
- ❑ Important legal caveat regarding computer-fraud and unauthorized-computer-access laws.

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### The Law-Background

- In theory, the guardian should be able to step into the shoes of the person under guardianship and do anything that person could do.
- Treating access to digital assets the same as tangible assets is known as “asset neutrality.”



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### Hurdles to Asset Neutrality

- However, the practical extension of fiduciary laws to digital assets is just beginning to be tested.
- Terms of service (TOS) agreements often purport to limit access to accounts.
- Federal laws arguably limit providers. Section 2702 of the Stored Communications Act (SCA) prohibits providers from “knowingly divulge[ing]...the contents of a communication which is carried or maintained on that service.” But the provider *may* (not shall) disclose information with the lawful consent of the subscriber.
- Providers have been reluctant to provide information and risk liability.

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### State Law

- State law has been in flux, and is different in every state.
- “Four generations” of state laws.
- First generation. Covers only email accounts.
- Second generation. Recognizing how rapidly technology is changing, use broad definitions of digital assets. This allows the law to remain relevant, but has created confusion as to what assets are covered.
- Third generation. More specific and contemporary definitions, but are at risk of becoming obsolete.
- The fourth generation is the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA).

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### Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)-Background

- The Uniform Law Commission (ULC) adopted the Uniform Fiduciary Access to Digital Assets Act in 2014.
- Within 1 year the Act was introduced in 23 states. However, it was enacted in only one state, Delaware. The Act was killed in the other 22 states due to lobbying by providers.
- On July 22, 2015, the ULC adopted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA).
- On September 25, 2015, the ULC released RUFADAA with Official Comments.

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### Substance of RUFADAA

- The preface states that RUFADAA is intended to give fiduciaries legal authority to manage digital assets in the same way as tangible assets, to the extent possible, while respecting the user's reasonable expectations of privacy for personal communications.
- The comments explain that RUFADAA is intended to include the types of electronic records currently in existence, and those yet to be invented.
- Applies to all types of fiduciaries, including conservators and estate guardians, administrators, executors, agents under POAs, and trustees. However, there are different requirements depending on the type of fiduciary.
- Allows a user to utilize an online tool to give directions to the custodian regarding disclosure of digital assets.

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### RUFADAA (con't)

- A user may also give such directions in a will, trust, power of attorney, or other document. Such direction will supersede any contrary provision in most TOS agreements.
- When disclosing digital assets, the custodian may, at its sole discretion, grant the fiduciary full access to the user's account; or grant partial access sufficient for the fiduciary to perform her duties. This can be problematic for guardians.
- The custodian need not disclose digital assets deleted by the user, even if recoverable, based on presumed intent of the user. Analogous to throwing a tangible asset in the garbage.
- The custodian may assess a reasonable administrative charge.

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### RUFADAA (con't)

- Disclosure to an estate guardian or conservator is governed by § 14.
- After an opportunity for a hearing under the state's guardianship law, the court may grant a guardian access to the digital assets of the protected person.
- Unless otherwise ordered by a court or directed by the user, a custodian shall disclose to a guardian the catalogue of electronic communications sent or received by the protected person and any digital assets in which the protected person has a right or interest, *other than the contents of electronic communications*.
- Note that administrators, executors, agents under POAs, and trustees can, under certain circumstances, receive the actual contents of electronic communications.
- Not having access to the content can be problematic for guardians, for example, there might be evidence of undue influence or financial exploitation. But the civil discovery tools should still apply.

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### RUFADAA (con't)

- The guardian must provide a written request for disclosure; and a certified copy of the court order allowing access to digital assets.
- If requested by the custodian, the guardian must provide a number, username, or address assigned by the custodian to identify the protected person's account; or evidence linking the account to the person.
- A fiduciary acting within the scope of his duties is an authorized user for purposes of computer-fraud and unauthorized-computer-access laws.
- The guardian may request the custodian to suspend or terminate an account for good cause.
- The fiduciary's authority is subject to the TOS agreement, is limited by the scope of the fiduciary's duties, and may not be used to impersonate the account holder.

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### RUFADAA (con't)

- The Act does not give a fiduciary new or expanded rights beyond those held by the user.
- The fiduciary must act consistent with the duty of care, loyalty, and confidentiality.
- The custodian has 60 days to comply with the fiduciary's request.
- The custodian may notify a user that a request for disclosure of digital assets or account termination was made.
- A custodian may deny a fiduciary's request for disclosure or account termination if the custodian is aware of any lawful access to the account after the request. This is to protect joint account holders, but can be problematic for guardians.

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### The Future . . .



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### Additional Resources

- The ULC's website ([www.uniformlaws.org](http://www.uniformlaws.org)) contains UFADAA, RUFADAA, a chart comparing the two acts, an enactment map, and other resources.
- In 2013, in celebration of the 25<sup>th</sup> anniversary of the specialty of elder law, the Journal of the National Academy of Elder Law Attorneys (NAELA Journal) published a two-part symposium on the future of elder law. The symposium contains an excellent article about digital assets. See G. Beyer and N. Cahn, "Digital Planning: The Future of Elder Law," 9 NAELA J. 1, p. 135 (Spring 2013).
- J. Lamm, C. Kunz, D. Riehl and P. Rademacher, "The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property," 68 U. Miami L.R. 385 (2014).
- The Fall 2016 edition of NAELA Journal will have a comprehensive article about RUFADAA.

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### Questions



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