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Disposition of Digital Assets in Georgia

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DISPOSITION OF DIGITAL ASSETS IN GEORGIA

*Clint Alain Guillebeau**

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I. INTRODUCTION

Estate planning law tells us that following an individual's death, the disposition of that individual's tangible property, such as a car or a house, whether he died intestate or with a thorough estate plan, will pass on to his or her heirs.¹ Probate and estate issues are governed by state law and Georgia's laws are codified in the Georgia Code in Section 53 where the disposition of tangible property can be found.² What is lacking in Georgia's wills, trust, and estate laws is what happens to other forms of property such as digital assets. With the ever-increasing reliance and usage of the internet this issue needs to be addressed.³

Currently, there is no federal law with regard to the disposition of digital assets, and state law that has thus far been adopted is scarce.⁴ However, in 2015 the Uniform Law Commission (ULC) drafted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) with a twofold purpose expressed in a prefatory note.⁵

First, it gives fiduciaries the legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts, to the extent possible. Second, it gives custodians⁶ of digital assets and electronic communications legal authority to deal with fiduciaries of their users, while respecting the user's reasonable expectation of privacy for personal communications.⁷

This Note will support the position that states, and Georgia in particular, should adopt a version of RUFADAA but should first strongly consider and redraft some of the language. This Note will advocate in part on the potential adoption of federal law requiring users to sign an online tool before gaining access to a website. Further, this Note proposes a reorganization of the three tier distribution system of digital assets found in the Revised Uniform Fiduciary

¹ *Understanding the basics of estate planning*, VANGUARD, <https://personal.vanguard.com/pdf/a129.pdf?2210080142> (last visited Nov. 10, 2017).

² O.C.G.A. § 53 (2010).

³ *Internet Users*, INTERNET LIVE STATS, <https://www.internetlivestats.com/internet-users/> (last visited Nov. 11, 2017).

⁴ Jamie P. Hopkins, *Afterlife in the Cloud: Managing a Digital Estate*, 5 HASTINGS SCI. & TECH. L.J. 209, 240–41 (2013).

⁵ UNIFORM LAW COMMISSION, *Revised Uniform Fiduciary Access to Digital Assets Act*, http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf (last visited Nov. 12, 2017) [hereinafter RUFADAA].

⁶ Custodian—a person that carries, maintains, processes, receives, or stores a digital asset of a user. *Id.* at 4 (footnote added).

⁷ *Id.* at 1.

Access to Digital Assets Act which would allow estate planning documents, if drafted later in time, to trump the online tools articulated designations.

Part II of this Note will provide the background needed for a thorough understanding of the problem. This section will provide the definition and examples of digital assets, provide the history of how digital assets have been handled over the years, as well as provide an understanding of current federal and state law regarding this issue. This section will also analyze how Georgia in particular has dealt with digital assets. Part III will outline important aspects of RUFADAA and analyze the benefits as well as potential consequences of a strict adoption of RUFADAA. Part IV will advocate for Georgia to adopt RUFADAA but with a few changes to better handle possible issues. Part V will be a conclusion summarizing this Note.

II. BACKGROUND

This section will discuss the background of digital assets in estate planning. First, this section will describe the various definitions of digital assets and provide examples. Next, this section will discuss the evolution of how federal law and states have dealt with these assets.

A. DIGITAL ASSETS

With the ever increasing use of electronics and digital media the term digital assets has evolved and will continue to evolve as society progresses.⁸ There are many definitions of digital assets. “A digital asset is any text or media that is formatted into a binary source and includes the right to use it; digital files that do not include this right are not considered digital assets.”⁹ In 2014, Delaware enacted House Bill 345, Fiduciary Access to Digital Assets Act.¹⁰ Delaware, using the Uniform Fiduciary Access to Digital Asset Act as a baseline defined digital assets to mean,

data, text, emails, documents, audio, video, images, sounds, social media content, social networking content, codes, health care records, health insurance records, computer source codes, computer programs, software, software licenses, databases, or the like, including the usernames and passwords, created, generated,

⁸ Techopedia, *Digital Asset*, <https://www.techopedia.com/definition/23367/digital-asset>. (last visited Oct. 3, 2017).

⁹ *Id.*

¹⁰ Fiduciary Access to Digital Assets Act, 12 DEL. CODE ANN. §§ 5001–5007 (2015).

sent, communicated, shared, received, or stored by electronic means on a digital device.¹¹

The RUFADAA, a revised version of UFADAA, which will be discussed in greater detail below, defines digital assets as, “an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.”¹² In more basic terms, digital assets include any information in digital form, either online or on an electronic storage device, including the information necessary to access them.¹³

Although the definition adopted by Delaware provided some examples, any information stored on a computer, including the cloud, information uploaded on websites, a personal right in digital property such as assets one may have obtained through online games such as Second Life or World of Warcraft¹⁴ and both the catalog and content of an electronic communication are all considered digital assets.¹⁵ With these definitions and examples of digital assets in mind, it is easy to see just how important they are in our lives.

With more internet users,¹⁶ the continued growth of social media,¹⁷ and the push for companies and individuals to go paperless,¹⁸ the importance of digital assets is going to continue to grow in the years to come.

While some of these assets may not have a quantifiable value such as the assets obtained in online gaming or even digital currency, the sentimental value of photos and personal videos are still very valuable.¹⁹ Besides sentimental value, these digital assets have real economic value. According to a McAfee survey, the average value of personal digital assets in 2011 is over \$50,000 per

¹¹ See *id.*

¹² See RUFADAA, *supra* note 5.

¹³ Elizabeth Sy, Comment, *The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught Up with Technology?*, 32 TOURO L. REV. 647, 650 (2016).

¹⁴ Nathan Gibson, *10 of the Most Expensive Virtual Items In Video Games*, THE RICHEST (Nov. 15, 2014), <http://www.therichest.com/rich-list/most-popular/10-of-the-most-expensive-virtual-items-in-video-games/>.

¹⁵ Jennifer J. Wioncek & Michael D. Melrose, *Florida Passes Fiduciary Access to Digital Assets Act*, WEALTH MANAGEMENT (June 27, 2016), http://beta.wealthmanagement.com/estate-planning/florida-passes-fiduciary-access-digital-assets-act?utm_test=redirect&utm_referrer=https%3A%2F%2Fwww.google.com%2F.

¹⁶ See *Internet Growth Stats*, INTERNET WORLD STATS, <http://www.internetworldstats.com/emarketing.htm> (last visited Nov. 10, 2017) (finding an increase from 16 million users in 1995 to 3,885 million in June 2017).

¹⁷ Aki Libo-on, *The Growth of Social Media v. 3.0*, SEJ (Feb. 9, 2016), <https://www.searchenginejournal.com/growth-social-media-v-3-0-infographic/155115/>.

¹⁸ Matt Swain, *The Paperless Push: Setting Realistic Expectations*, DOCUMENT MEDIA (Aug. 31, 2015, 12:00 AM), <http://documentmedia.com/article-1671-the-paperless-push-setting-realistic-expectations.html>.

¹⁹ Larry S. Dushkes, *Digital Dispositions: Digital Assets Can No Longer Be Excluded From Estate Planning*, 38 L.A. LAW. 32 (2015).

person.²⁰ An owner of a Twitter account has been offered \$50,000 for his handle,²¹ and the domain name “vacationrentals.com” was sold for \$35 million in 2007.²²

It is interesting to note that digital assets do not include the songs on your iTunes library, e-books, or movies you have on your computer. When an individual purchases these items they buy the licenses and not the particular music, book, or movie.²³ Nonetheless, this does not diminish the importance of digital assets in an increasing digital world.²⁴

The importance and predominant nature of all of these assets in our lives as well as the value, whether sentimental or economical, shows us we need to start paying more attention to the disposition of these assets when an individual passes away. So what happens to these assets?

B. HISTORY OF DISPOSITION OF DIGITAL ASSETS

Imagine if a client of an estate planning lawyer passed away unexpectedly at an early age. The lawyer, as he always does, would compile account statements so he would know what information to gather for the family and the estate. Imagine further this client received all of his financial account statements electronically by e-mail and never printed them out. With the lawyer not allowed access to his clients e-mail and thus the information, including his tax returns, there would be great difficulty in administering the estate.

What happens if there is no estate plan? Who can have access to this information or the digital assets of the deceased? Did the person who passed away want the fiduciaries to have access to this information or these communications that are on e-mails? To understand the answer to these questions it is best to give an overview of the history of disposition of digital assets.

Before 2015 there were only eight states that had laws regarding the disposition of digital assets, but these statutes were largely inefficient.²⁵

²⁰ *Manage Your Digital Assets*, NORTHERN TRUST WEALTH, <https://wealth.northerntrust.com/luxury-living/manage-your-digital-assets> (last visited Nov. 10, 2017).

²¹ Leslie Walker, *Twitter Language: Twitter Slang and Key Terms Explained*, LIFEWIRE, <https://www.lifewire.com/twitter-slang-and-key-terms-explained-2655399> (last visited Oct. 11, 2017).

²² AMERICAN BANKERS ASSOCIATION, *Uniform Fiduciary Access to Digital Assets Act (UFADAA) and Digital Assets*, A.B.A. BRIEFING (Mar. 3, 2016), <http://content.aba.com/briefings/3012911.pdf>.

²³ Hilary Osborne, *Do you own your digital content?*, THE GUARDIAN (Sept. 3, 2012, 11:10 AM), <https://www.theguardian.com/money/2012/sep/03/do-you-own-your-digital-content>.

²⁴ *Id.*

²⁵ Jim Lamm, *Delaware Enacts Fiduciary Access to Digital Assets Act*, DIGITAL PASSING (Aug. 27, 2014), <http://www.digitalpassing.com/2014/08/27/delaware-enacts-fiduciary-access-digital-asset-s-act/>.

Connecticut's and Rhode Island's statutes,²⁶ which give access to the contents of a person's e-mail to a personal representative, are under-inclusive as they do not outline the scope of digital property.²⁷ Idaho, Indiana, Louisiana, Nevada, Oklahoma, and Virginia all have similar problems with narrow scope and under-inclusive coverage pertaining only to personal representatives or an insufficient definition of digital assets.²⁸ For the states that have no law pertaining to the disposition of digital assets the users are left with terms of service (TOS) agreements that often prohibit access to anyone but the original account owner—even after death.²⁹ When an individual agrees to these TOS agreements, often without thinking twice and simply clicking “accept,” they could be signing away much more than they realize.³⁰ Yahoo's TOS provides, “You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.”³¹ Right away, one could see, from the example given above where the lawyer could not access financial information which was critical for the administration of an estate, how Yahoo's terms of service agreement could cause problems.

Besides the TOS agreements, there are also two federal laws that govern digital assets, the Stored Communications Act (SCA)³² and the Computer Fraud and Abuse Act (CFAA).³³ They present a roadblock to estate administration of digital assets because access may be prohibited despite the fiduciary's possession of passwords and other log-in information.³⁴ On one hand the SCA creates privacy protection for e-mail and limits the ability of commercial internet service providers (ISP) to reveal information to nongovernmental entities, such as the estate of a decedent.³⁵ The CFAA provides that, “whoever intentionally accesses a computer without authorization or exceeds authorized access . . .” is in violation of the CFAA.³⁶ Thus, if a family member of a decedent logs on to

²⁶ See CONN. GEN. STAT. § 45a-334b (LexisNexis, Lexis Advance through 2017 Regular Session); see also 33 R.I. GEN. LAWS § 27-3 (current through January 2017 Session).

²⁷ See CONN. GEN. STAT. § 45a-334c (LexisNexis, Lexis Advance Current through 2017 Regular Session); see also Lamm, *supra* note 25.

²⁸ See Lamm, *supra* note 25.

²⁹ Yahoo! Terms of Service, YAHOO!, <https://policies.yahoo.com/sg/en/yahoo/terms/utos/> (last visited Nov. 10, 2017).

³⁰ See generally Ed Bayley, *The Clicks That Bind: Way Users “Agree” to Online Terms of Service*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/wp/clicks-bind-ways-users-agree-online-terms-service> (last visited Oct. 12, 2017).

³¹ See YAHOO!, *supra* note 29.

³² 18 U.S.C. §§ 2701–27012 (2012).

³³ 18 U.S.C. § 1030 (2012).

³⁴ See Sy, *supra* note 13.

³⁵ See *id.*

³⁶ *Computer Fraud and Abuse Act (CFAA)*, INTERNET LAW TREATISE, [https://ilt.eff.org/index.php/Computer_Fraud_and_Abuse_Act_\(CFAA\)](https://ilt.eff.org/index.php/Computer_Fraud_and_Abuse_Act_(CFAA)) (last visited Nov. 10, 2017).

that person's e-mail without permission, that person is violating the CFAA and can be held criminally liable.³⁷

The varying state statutes, as well as the difficulty for fiduciaries to gain access to certain digital assets, led the Uniform Law Commission (ULC) to propose the Uniform Fiduciary Access to Digital Assets Act (UFADAA).³⁸ The UFADAA gave people the ability to plan for the disposition of their digital assets the same way they dealt with tangible property: through estate planning documents.³⁹ If a court has to appoint a fiduciary to manage the decedent's tangible assets, they have the ability to handle digital assets and distribute those to the heirs in the appropriate way.⁴⁰ However, UFADAA was met with great opposition and, although it was introduced in twenty-six states, only one, Delaware, ultimately adopted.⁴¹ Tammy Cota, the executive director of the Internet Coalition, when asked about UFADAA, said that it "raises several complex issues regarding user and third-party privacy rights, would override any express wishes made by the decedent to online services, conflict with federal law which prohibits release of such data, create problems with company authentication processes and could perpetuate fraud."⁴²

The UFADAA was designed to give legally appointed fiduciaries the same broad powers to access of the decedent's digital assets, as they would with other types of assets.⁴³ This fiduciary is "presumed to have access to all of the decedent's digital assets unless that is contrary to the decedent's expressed intent."⁴⁴ One of the major reasons this piece of legislation was vehemently opposed was the privacy issues that were raised.⁴⁵ Imagine this scenario:

Michael and his wife have been married for fifty years; they have four wonderful children and eight beautiful grandchildren. In his forties, Michael was very unhappy with his marriage and, although never having an affair, sent e-mails over a year long period to a female co-worker of his expressing his desire to get divorced and run away together. Eventually, Michael rekindled his love for his wife. One can imagine that in the event of his death he would not

³⁷ See *id.*

³⁸ *Uniform Fiduciary Access to Digital Assets Act: A Summary*, UNIFORM LAW COMMISSION, [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/UFADAA%20-%20Summary%20-\\$20August%202014.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/UFADAA%20-%20Summary%20-$20August%202014.pdf) (last visited Oct. 12, 2017).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *States Struggle to Adopt Uniform Access to Digital Assets Act*, Washington Policy Brief (Apr. 8, 2015), <http://www.arma.org/r1/news/washington-policy-brief/2015/04/08/states-struggle-to-adopt-uniform-access-to-digital-assets-act>.

⁴² Letter from Tammy Cota, Exec. Dir., to Eric Coleman, Co-Chair and William Tong, Co-Chair (Mar. 2, 2015), <https://www.cga.ct.gov/2015/JUDdata/Tmy/2015SB-00979-R000306-Cota,%20Tammy-TMY.PDF>.

⁴³ See UNIFORM LAW COMMISSION, *supra* note 40.

⁴⁴ See *id.*

⁴⁵ See *States Struggle to Adopt Uniform Access to Digital Assets Act*, *supra* note 41.

want his wife and children to have access to these e-mails. But under UFADAA, his wife would have access to all of his e-mail communications.

In addition to some personal invasion of privacy issues, the UFADAA faced strong opposition from technology companies.⁴⁶ Civil liberties organizations, including the ACLU and Center for Democracy & Technology, wrote a letter to the ULC to express their concerns with UFADAA and to urge state legislatures to reject legislation based on its provisions.⁴⁷ Their main quarrel centered around the privacy concerns of both the decedent and third parties from allowing full access to all of the decedents accounts and information.⁴⁸

In response to the privacy concerns presented by UFADAA, Netchoice⁴⁹ drafted the Privacy Expectation Afterlife Choice Act (PEACA). PEACA aims to let fiduciaries have access to digital service providers to view only select contents of accounts, such as the “To” and “From” lines of an e-mail, so they know what organization to contact in the event they need to close an account or access certain information.⁵⁰ The large internet service providers (ISP)’s, including Amazon, Google, and Facebook, all supported PEACA; but it was not without its own problems. Although PEACA seems to protect a user’s privacy, it is not of much benefit with regards to estate planning because of its narrow scope. PEACA only covers executors and administrators who are able to request records spanning no more than one year prior to the decedent’s death.⁵¹

In response to the failure of UFADAA and the implementations and suggestions from other organizations with how to distribute digital assets, the ULC revised UFADAA in July of 2015.⁵² RUFADAA was created to significantly advance digital estate administration by harmonizing both the furtherance of fiduciary access and personal privacy.⁵³ First, RUFADAA gives fiduciaries the legal authority to manage digital assets and electronic communications similarly to the way they manage tangible assets and financial accounts.⁵⁴ Second, it gives custodians of digital assets and electronic

⁴⁶ *Civil Liberty Organizations Respond to the Uniform Fiduciary Access to Digital Assets Act*, Center for Democracy & Technology (Jan. 23, 2015), <http://cdt.org/insight/civil-liberty-organizations-respond-to-the-uniform-fiduciary-access-to-digital-assets-act/>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *About Us*, NETCHOICE, <https://netchoice.org/about/> (last visited Oct. 7, 2017).

⁵⁰ *Privacy Expectation Afterlife and Choices Act (PEAC)*, NETCHOICE, <http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/> (last visited Oct. 7, 2017).

⁵¹ *See Civil Liberty Organizations Respond to the Uniform Fiduciary Access to Digital Assets Act*, *supra* note 46.

⁵² E-mail Newsletter from Steve Leimberg’s Estate Planning Newsletter (Nov. 7, 2016) (on file with author).

⁵³ *See RUFADAA*, *supra* note 5.

⁵⁴ *See id.*

communications legal authority to deal with fiduciaries of their users, all while respecting reasonable privacy expectations.⁵⁵

Georgia's current law does not allow anyone, not even the executor of the estate, to access, manage, or shut down an individual's digital assets or accounts containing digital assets after death.⁵⁶ When an individual passes away in Georgia, subject to TOS agreements, his or her online presence will continue.⁵⁷ There is the option of leaving an individual with the passwords and log-in information, but this could expose these individuals to federal privacy laws.⁵⁸ With this in mind, Georgia considered a law (2015 Georgia House Bill 274) that would give executors broad access to a deceased person's digital assets.⁵⁹ If passed, this law could have allowed an executor to access all of the deceased's digital assets—even those that one would intend to remain private. Passage of this law presumably would have been met with the same opposition as the original UFADAA.

III. PROBLEMS WITH RUFADAA

The current and future problems, as well as the lack of direction surrounding the disposition of digital assets in the state of Georgia, brings light to the need for a law. Other states have recognized the need for a law and have adopted RUFADAA, while some of those states have made subtle changes to the language for their particular jurisdiction.⁶⁰ Although RUFADAA has been adopted in seventeen states and introduced in several more,⁶¹ Georgia should be hesitant to adopt this law per se.

The biggest issues with RUFADAA lies in the three tier hierarchy system for the distribution of digital assets found in Section 4. Section 4(a) states

A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a *direction regarding disclosure using an*

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *What Happens to Digital Assets in Georgia*, NOLO, <http://www.nolo.com/legal-encyclopedia/what-happens-digital-assets-georgia.html> (last visited Jan. 12, 2017).

⁵⁹ GEORGIA GENERAL ASSEMBLY, <http://www.legis.ga.gov/Legislation/en-US/display/20152016/2016/03/fiduciary-access-digital-accounts-act-adopted> (last visited Oct. 10, 2017).

⁶⁰ Walter Impert & Chris Koa, *Revised Uniform Fiduciary Access to Digital Accounts Act Adopted by Four States*, DORSEY (Mar. 15, 2016), <https://www.dorsey.com/newsresources/publications/client-alerts/2016/03/fiduciary-access-digital-accounts-act-adopted>.

⁶¹ Uniform Law Commission, [http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015)) (last visited Oct. 10, 2017).

*online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.*⁶²

It is easy to imagine a scenario where a fifteen year old girl makes a Facebook account or an e-mail account and comes across an online tool and excludes her parents from accessing the information because she does not want her parents to see the date she was on the other night. Fast forward ten or even five years, the true intent of this individual very well could be that she wants all of her digital assets to go to her parents in the event she passes away. Once the disposition in an online tool is expressed, these assets will be prevented from passing to her parents upon her death.

Imagine further that this individual created an estate plan ten years later and clearly expressed that it was her intent her parents have access to all of her digital assets. RUFADAA would not allow her parents to access these particular assets that she designated to go to her best friend ten years prior without the permission of her best friend.

It is not a requirement for ISPs to provide the online tools discussed in section four of RUFADAA,⁶³ and thus these online tools are very scarce. Further, online tools are very hard to locate⁶⁴ and the average American has no idea they actually exist. These issues, coupled with the large percentage of Americans without an estate plan,⁶⁵ leaves the direction of digital assets lying in subsection (c), which states:

A user's direction under subsection (a) or (b) [which allows an estate plan to be the second tier in the distribution system] overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.⁶⁶

Thus, a large portion of Americans and online users, similar to before the potential adoption of RUFADAA, will have their digital assets governed by the TOS agreements, which, as discussed above, presents many problems.

In addition to the three tier system outlined in section four of RUFADAA, the online tools present problems of their own. An "[o]nline tool" means an

⁶² See RUFADAA, *supra* note 5 (emphasis added).

⁶³ See Sy, *supra* note 13, at 672–73 (citation omitted).

⁶⁴ After multiple Google searches, including, "Facebook's online tool," and "disposition of my digital assets on Facebook," I was able to access Facebook's online tool after searching "what happens to my Facebook when I die?" and even then it was the fourth hyperlink, <https://www.facebook.com/help/1070665206293088?helpref=related>.

⁶⁵ Jeff Reeves, *Plan Ahead: 64% of Americans Don't Have Wills*, USA TODAY (July 11, 2015, 1:30 PM), <http://www.usatoday.com/story/money/personalfinance/2015/07/11/estate-plan-will/71270548/>.

⁶⁶ See RUFADAA, *supra* note 5, at 10.

electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.”⁶⁷ First, ISPs are not required to have “online tools”⁶⁸ and thus a large majority of websites where users may acquire digital assets do not even have them. Second, these online tools take affirmative action to designate access to the digital assets, and it is likely that users will simply by-pass these agreements without even paying them mind. Third, each website has their own particular name for their online tool causing confusion for many users. For example, Facebook calls theirs “legacy contact”⁶⁹ while Google calls theirs “Inactive Account Manager.”⁷⁰ Fourth, because each particular website requires affirmative action, users may at different times, similar to the hypothetical above, assign different individuals access to particular assets which could present identity and efficiency problems when the estate is administered.

Fiduciaries in estate planning have a duty of loyalty to the beneficiaries as well as a duty to exercise reasonable care and skill in dealing with the property of the estate.⁷¹ On the other hand, a designated recipient through an online tool may perform many of the same tasks as a fiduciary, but is not held to the same legal standard of conduct. This potentially creates issues, especially in the event the individuals designated in the online tool do not want to partake in the distribution of the estate or have long since fallen out of touch with the decedent.

On the other hand, there is a question of who actually writes the online tools, and whether the writer has had any exposure to the basics of estate planning. Some online tools may be created in a way that encourages users to choose the option that lowers compliance costs for the company.⁷²

IV. CHANGES TO RUFADAA

There are certainly some foreseeable problems with the per se adoption of RUFADAA. Although the Uniform Law Commission believes this is the best possible way to show the user’s intent with regard to the distribution of his

⁶⁷ See *id.* at 4.

⁶⁸ See Sy, *supra* note 13, at 672–73 (citation omitted).

⁶⁹ *What Will Happen to My Facebook if I Pass Away?*, FACEBOOK, <https://www.facebook.com/help/103897939701143?helpref=related> (last visited Oct. 10, 2017).

⁷⁰ *Submit a request regarding a deceased user’s account*, GOOGLE, <https://support.google.com/accounts/troubleshooter/6357590?hl=en> (last visited Oct. 12, 2017).

⁷¹ Glen M. Robertson, *Fiduciary Duties During Administration of Trusts and Estates*, WOLCOTT RIVERS GATES (Sept. 30, 2013), <http://www.wolcottriversgates.com/blog/fiduciary-duties-during-administration-of-trusts-and-estates/>.

⁷² See Sy, *supra* note 13, at 673 (citation omitted).

digital assets, it will be beneficial for Georgia to make a few small changes before blindly adopting RUFADAA.

One potential uniform solution is a federal law that requires users to sign an online tool before gaining access to the website. Requiring ISPs to have uniform online tools that must be filled out before access would decrease the amount of people without estate plans for their digital assets, thus reducing litigation relating to unknown or unassigned beneficiaries of digital assets. However, this does not solve the problem of the decedent's assigning differing beneficiaries on different websites or the problem of when a different beneficiary is assigned in estate planning documents. Additionally, getting a federal law passed presents its own set of difficulties, particularly in an area of law that has traditionally been dealt with on the state level.

A second and possibly an additional solution would be to allow the estate planning documents, if they were drafted later in time, to trump on-line tools. This encourages individuals to obtain estate planning documents, solves the problem of differing designations in online tools, and more directly illustrates the true intent of the users. In the event an ISP does not have an online tool, Georgia should add to RUFADAA a rule that allows direct access to the digital assets regardless of the TOS agreements by designated beneficiaries in an estate plan.

V. CONCLUSION

There have been many potential explanations for disposing of these increasingly important "digital assets," whether it is through the UFADAA, PEACA, TOS agreements, or RUFADAA. Although each explanation presents a particular set of problems, it is undeniable that legislation needs to be passed. Adopting RUFADAA, with its improvements over previous attempts at solving these problems, appears to be the best answer. However, before Georgia is to decide on legislation, they should consider the problems this Note presents with a per se adoption of RUFADAA.