Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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Senator Stewart J. Greenleaf, Chairman
PA Senate Judiciary Committee
Main Capitol, 19 EW
Harrisburg, PA 17120

Re: SB 518 to enact the Uniform Fiduciary Access to Digital Assets Act

Dear Senator Greenleaf,

Tomorrow the Judiciary Committee will consider SB 518 based on the Uniform Fiduciary Access to Digital Assets Act (UFADAA). This legislation is needed because the nature of our property has changed. A generation ago, most of us kept files in file cabinets, photos in photo albums, and had our financial statements delivered via U.S. Mail. Today, many of us use the Internet for those same functions. When an Internet user dies, the executor of the estate needs access to the person's digital assets in order to administer the estate properly and distribute assets to the decedent's heirs.

Ray Pepe sent me the testimony submitted in opposition to SB 518, and asked me to address the opponents' arguments. I will do so in this letter, and I will also send you written rebuttals to the opponents' two main objections: privacy concerns, and conflict with federal law.

With respect to the testimony submitted, the opponents state:

> **Similar bills, such as this, have failed to pass in any of the 30 states where it was introduced this year.**

Technically, this is true. UFADAA bills have been introduced in 27 states in 2015 and have yet to be enacted anywhere except Delaware (which enacted UFADAA last year before the opposition was organized). A few other states have introduced non-uniform bills on the same topic. The bills have not passed because of an extensive lobbying effort paid for by the same firms whose representatives are opposing SB 518.

On the other hand, the opponents' alternative legislation (the "PEAC" Act) has been introduced in only three states: California, Oregon, and Virginia. The California act is opposed by the state bar's trust and estate law committee but is still in committee. The Oregon bill died in favor of a bill based on UFADAA, and the Virginia bill passed in a watered-down form.

The opponents state:

> **While well intentioned, SB 518 could cause more harm than good by seeking to make a decedent's private communications public, *by default.***

The above statement is false, and intentionally misleading. The argument has been used by same the

UFADAA opponents and refuted in the other 26 states that introduced UFADAA bills this year. A decedent's communications are always available to the executor of the decedent's estate, but the executor is subject to strict fiduciary duties, including the duty to keep confidential information private. UFADAA does nothing more than extend the existing law so that it applies to electronic communications as well as paper communications, but both types are revealed only to the court-appointed executor, which is a far cry from making communications "public."

The opponents list as one concern, that the act:

- Creates acute privacy concerns for decedents and for third parties with whom the decedent communicated.

Again, this statement is misleading at best. The opponents often use the example of a doctor or drug counselor who communicates with patients via email. When the doctor or drug counselor dies, their patients' sensitive communications could be revealed to the executor of the doctor's estate.

Except, doctors and drug counselors died long before email was invented, and the law long ago developed procedures to deal with those types of private communications. The same doctor or drug counselor who communicates by email most likely has much more extensive private information about patients in paper files stored in file cabinets. When the doctor dies, those paper files are routinely handled by the executor of the doctor's estate, under the supervision of the probate court. There is no reason to believe we should entrust sensitive information to an email provider as opposed to the court-appointed executor that administers the rest of the estate.

Another concern states that SB 518:

- Seeks to fundamentally reshape relationships between businesses and consumers by striking terms of service and choice of law provisions that govern those relationships.

In reality, SB 518 defers to nearly all aspects of the terms-of-service provision. (See § 3906(a)(1).) Only if the terms-of-service include a blanket prohibition on fiduciary access will the law overrule the terms on public policy grounds (§ 3906(b)). This is necessary because without such a provision, a custodian of digital assets could defeat the purpose of the law by inserting a term permitting the deletion of digital assets upon the account holder's death on the last page of a lengthy, click-through terms-of-service agreement. Indeed, most Yahoo users would be surprised to discover that the company has such a provision in its current terms-of-service.

Similarly, the choice of law override is necessary to give effect to the law. Otherwise, the terms-of-service could mandate the law of a jurisdiction that does not require custodian firms to provide access to the assets of deceased Pennsylvanians to their fiduciaries legally appointed under Pennsylvania law.

Still another concern states that SB 518:

- Increases the risks of cyber security malfeasance by forcing exposure of more information than necessary.

On the contrary, the risk of identity theft increases significantly when a decedent's online assets are

abandoned. The executor who is charged with closing the decedent's bank accounts and utility accounts should also have the ability to close a decedent's email and social media accounts, removing the decedent's digital assets from the Internet and thereby reducing the risk of identity theft.

Finally, the opposition states that SB 518:

- **Disregards user choices about treatment of their accounts when they die.**

The statement is 100% False. UFADAA continues the basic premise of all probate law: that the decedent can control the disposition of his or her property in an estate plan. (See § 3902: "Unless otherwise provided by the court or in the will of a decedent....") UFADAA also allows a decedent to direct the disposition of digital assets using an online form, as long as the form requires an affirmative act by the account holder separate and distinct from the assent to the online provider's boilerplate terms of service. ("Subject to Section 3906(b)....")

In summary, the submitted testimony is from Internet firms that oppose UFADAA for self-serving reasons and is misleading at best. That said, the Uniform Law Commission has learned from the difficulties of enacting UFADAA that certain provisions of the uniform law could be improved. It is likely that a set of amendments to UFADAA will be considered by the ULC membership at its 2015 annual meeting next month. Therefore, the Judiciary Committee may wish to consider deferring action on SB 518 until the act review is complete later this summer.

Thank you for your consideration of SB 518. I welcome any questions from members of the committee.

Best regards,

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UFADAA and the Federal Stored Communications Act

Federal Privacy Law. Congress enacted the Stored Communications Act (SCA) in 1986. Its intent was to extend the protections of the federal wiretap law, which prohibited the unauthorized interception of telephone calls and telegrams, to the emerging technologies of electronic mail and cellular telephony.[1] Although the statute primarily sets the rules for surveillance by law enforcement and government entities, it also prohibits the companies that handle our electronic communications from releasing the content of those communications to other persons unless one of several exceptions applies.

The law states, in relevant part:

> (a) **Prohibitions.**— Except as provided in subsection (b) or (c)—
> (1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service....[2]

and

> (b) **Exceptions for disclosure of communications.**— A provider described in subsection (a) may divulge the contents of a communication—
> (1) to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient;
> ...
> (3) with the lawful consent of the originator or an addressee or intended recipient of such communication....[3]

The Stored Communications Act does not address access to the contents of a *decedent's* electronic communications – which is unsurprising. Congress has always allowed state law to govern the probate and administration of a decedent's estate. When federal law is silent on a subject, we look to state law to fill the gap.

State Fiduciary Law. Although the details of estate administration vary from state to state, some general principals are universal. Once appointed by a probate court, the personal representative of an estate (PR) "steps into the shoes" of the decedent and assumes all of the decedent's rights with respect to the decedent's

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[1] See *Electronic Communications Privacy Act: Hearing on H.R. 3378 Before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 99th Cong. (1985) (statement of Rep. Robert Kastenmeier, Chair) ("When Congress passed the wiretap law in 1968, there was a clear consensus that telephone calls should be private. Earlier Congresses had reached that same consensus regarding mail and telegrams. But in the almost twenty years since Congress last addressed the issue of privacy of communications in a comprehensive fashion, the technologies of communication and interception have changed dramatically. Today we have large-scale electronic mail operations, cellular and cordless telephones, paging devices, miniaturized transmitters for radio surveillance, lightweight compact television cameras for video surveillance, and a dazzling array of digitized information networks which were little more than concepts two decades ago."). Three more decades have passed since the hearing.

[2] 18 U.S.C. § 2702(a).

[3] 18 U.S.C. § 2702(b).

property, subject to a series of strict fiduciary duties and state laws that require the PR to act in the best interest of the estate.[4] These include the duty of care, the duty of loyalty, and the duty of confidentiality.

For example, in the process of administering the estate the PR may open the decedent's mail, review the decedent's financial and tax records, close the decedent's bank account, empty the decedent's safe deposit box, and take possession of all of the decedent's property –real, personal, and intangible. If the decedent were still alive and legally capable of managing his own property, these same actions would be crimes. But state law and the probate court's order authorize the PR to collect, review, and manage all of the decedent's property, and the PR assumes all of the deceased owner's rights only for the purpose of estate administration, subject to court oversight and state law.

The Uniform Fiduciary Access to Digital Assets Act (UFADAA) does not make new law. Rather it clarifies how the existing state fiduciary laws apply to new types of digital assets. Under UFADAA, the same PR appointed by the state probate court to manage a decedent's real property, tangible personal property, and intangible personal property can also manage the decedent's digital property, subject to state fiduciary laws and duties, federal and state privacy laws, federal copyright law, other applicable laws, and the governing terms-of-service agreement. If the provider may, under subsection (b) of the federal law, release the contents of a decedent's electronic communications, UFADAA requires the provider to do so when requested by a legally appointed fiduciary.

Traditionally, the PR would review the decedent's paper financial and tax records and review the U.S. mail sent to the decedent for financial account statements and bills. UFADAA clarifies that the PR may review the electronic financial and tax records stored in the decedent's computer and review the financial account statements and bills sent via email to the decedent. As always, the PR is required to follow the decedent's estate plan, if there was one, and the decedent can limit or deny access to certain property by planning ahead.

No Conflict with Federal Law. There is no conflict between the federal Stored Communications Act and UFADAA.

First, sections 4, 5, 6, and 7 of UFADAA expressly cite the federal Stored Communications Act and state that the fiduciary has access to the content of an electronic communication only if the federal law permits the custodian to release it. Second, service providers may divulge the contents of an electronic communication protected by the federal Stored Communications Act to a recipient of the communication or an "agent" of the recipient because of an express exception under the federal privacy law.[5] UFADAA deals with four types of agents who act on behalf of a person: a court-appointed personal representative of a decedent's estate, an agent acting under a living person's power of attorney, a court-appointed conservator of a living person, and a trustee of a trust. Third, although the Stored Communications Act does not expressly provide an exception for a person's agents with respect to the content of an electronic communication that was sent by the person, the legislative history of § 2702 of the Stored Communications Act clarifies that Congress intended that "Either the sender or the receiver can directly or through authorized agents authorize further disclosures of the contents of their electronic communication."[6]

Just as banks are not liable for misdirection of funds when they release the contents of a decedent's account to a validly appointed PR, email providers are not liable under the SCA for releasing the contents of electronic communications. It is not a violation of federal law to recognize the authority of a fiduciary appointed under state law to act as an agent on behalf of a deceased account holder.

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[4] See, e.g. *Daniel v. Lipscomb*, 483 S.E.2d 325, 326 (Ct. App. Ga 1997) ("an executor is a fiduciary who owes a duty of confidentiality and the utmost good faith to those to whom he administers…") (internal citations omitted).

[5] 18 U.S.C. § 2702(b)(1).

[6] S. Rep. No. 99-541, at 37 (1986).

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UFADAA and Privacy

Background. 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 were filed in file cabinets, and money was deposited 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 password-protected and governed by a restrictive terms-of-service agreement provided by the custodian. This can create 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, subject to a set of strict fiduciary duties. 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.

The private nature of property. What exactly do we mean when we say property is *private*? The Mirriam-Webster dictionary says "private" means "intended for or restricted to the use of a particular person, group, or class." In other words, the issue boils down to control: private property is controlled by its owner(s), who may or may not choose to share it with others.

Controlling access to tangible private property such as a house, car, or book is relatively simple. But what about intangible assets, like ideas and information? In this context, does "private" mean not for publication? Limited to a group of insiders? Only known to close family and friends? For your personal knowledge only? Obviously there are different kinds of private information and the appropriate level of privacy depends on the circumstances. For example, information from the financial records of a privately held business can be appropriately shared with all qualifying shareholders, but not with competitors or the public. Information contained in a patient's medical records can be appropriately shared with all of the professionals who provide treatment, but not with a treating physician's spouse or friends. The contents of a love letter might be inappropriate to share with anyone except the sender and the recipient.

As with tangible private property, the real issue with private information boils down to control. The person who has private information decides whether to share it, and with whom, subject to any applicable contract rights or relevant laws (such as copyright law).

The digital revolution. When our property was mostly in tangible form there was little question of ownership and control. It is obvious that you control the files in your file cabinet, the photos in your albums, and the mail the post office delivers to your door. With digital assets, the issues of ownership and control are more complex. If you upload files to an Internet-based storage provider, the custodian that provides the digital storage might also have some rights in those files. Your rights are usually spelled out in a terms-of-service agreement that you click on to indicate that you agree to its terms.

Usually, your digital assets are password protected. Only you, or someone to whom you give your password, may access your account. However, the custodian of your digital assets may be able to override or reset your password under certain conditions.

Fiduciary law. For as long as the law has recognized private property, the law has also recognized that property owners can die or otherwise become unable to manage their property, requiring a court to appoint a trusted fiduciary. Property owners might also appoint a fiduciary voluntarily by setting up a trust or signing a power of attorney. In any case, a fiduciary appointed to manage property for the benefit of the owner or the owner's estate is subject to a set of strict fiduciary duties. Fiduciaries have a duty of care, which means they must take care of the owner's property as least as well as a prudent person would care for their own property. They have a duty of loyalty, which means fiduciaries must always act for the benefit of the owner rather than for themselves. Finally, fiduciaries have a duty of confidentiality, meaning they must keep private information private, or face liability under our privacy laws. This system has worked very well for hundreds of years.

In our society, businesses and other organizations simply must deal with fiduciaries. When someone dies, becomes incapacitated, or appoints an agent or trustee, that fiduciary may have to close bank accounts, cancel subscriptions, forward mail, pay bills, sell property, and start or stop benefit payments from the Social Security Administration. Banks, hospitals, magazine publishers, insurance companies, investment firms, credit card issuers, the post office, the IRS, the Social Security office, and millions of other entities deal with fiduciaries every day. There is no good reason why Internet-based entities should not be subject to the same rules of law.

UFADAA restores your control. Your private assets are yours alone, whether digital or tangible. Only you can determine who else (if anyone) should have access. It would be absurd to allow your bank to decide who gets your money when you die. Yet under today's law, some custodians want the right to keep or delete your digital assets, which may have real monetary or sentimental value. UFADAA allows you to decide who may access your digital assets.

Of course, you should also be able to keep your digital assets private if you wish. UFADAA allows anonymous accounts and permits you to direct a custodian to destroy your assets if you die. Your directions are legally enforceable, just like any other provision in a will, trust, or power of attorney. The key issue is control: *you* decide, not the custodian of your assets.

A simple solution. When you sign up for a retirement account, you are asked to name a beneficiary to receive funds in the event of your death. It would be just as simple to name a person to receive access to your email account, your cloud-based document storage service, or your social media account. Why don't the internet-based companies that provide those accounts offer you the same option?

One major firm has recently taken a step in that direction. Google's "Inactive Account Manager" feature allows you to tell Google how to handle your digital assets in the event your account is inactive for a period of time (you choose how long). You can direct Google to delete your assets, or to grant access to a trusted person for whom you provide a phone number and email address. You can provide different instructions for different assets. For example, you might allow your sister to download all of your photos and YouTube videos, allow your business partner to access document files stored in the cloud, and order Google to delete all of your gmail messages. And you can change your mind and provide new instructions at any time.

UFADAA does not require custodians to provide a service like Google's Inactive Account Manager, but it provides an incentive. UFADAA requires the custodian to follow the account holder's directions for granting access to fiduciaries, whether those directions are made in a will, trust, power of attorney, or using an online service similar to Google's. Companies with millions of account holders will find it much simpler and less costly to ask their customers to provide instructions for fiduciary access online, like Google is already doing, rather than reviewing millions of estate planning documents. If UFADAA is widely enacted, other companies are likely to follow Google's lead and provide a similar option.

Conclusion. UFADAA does not break new legal ground; it simply applies the tried and true laws governing fiduciaries to the digital assets that are widely used today. Account holders will have control of their digital assets just as they have always had control over their tangible property – they are free to pass on their assets to loved ones, or to permanently delete them as they see fit.

Under current laws, consumers have very little control. Instead, custodian companies control access to digital assets using click-through terms-of-service agreements that studies confirm most account holders do not read. The terms vary widely and are often changed unilaterally by the companies that provide internet-based services.

UFADAA restores control to account holders and the fiduciaries who carry out the account holders' plans when they cannot do so for themselves. It is an essential update for the digital age and should be enacted in every state as soon as possible.