

2019

Towards a New California Revised Uniform Fiduciary Access to Digital Assets Act

Michael T. Yu
California Western School of Law, mty@cwsl.edu

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/fs>



Part of the [Privacy Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Michael T. Yu, *Towards a New California Revised Uniform Fiduciary Access to Digital Assets Act*, 39 *Loy. L.A. Ent. L. Rev.* 115 (2019).

Available at: <https://scholarlycommons.law.cwsl.edu/fs/321>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

TOWARDS A NEW CALIFORNIA REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

*Michael T. Yu**

California enacted the Revised Uniform Fiduciary Access to Digital Assets Act (the California RUFADAA) to govern the disclosure (or non-disclosure) of digital assets when a California resident dies. Digital assets include not just emails and social media accounts but may also include online files and assets, digital currencies, domain names, and blogs. The California RUFADAA ostensibly governs the disclosure of digital assets only when a California resident dies, and it, therefore, does not govern the scenario when a California resident becomes incapacitated and can no longer handle his or her digital assets. This scenario is likely to become more common because Californians (like most Americans) increasingly are living longer, owning more digital assets, and holding their assets (non-digital and digital) in revocable living trusts. Forty-five other states have enacted laws governing the digital assets of both deceased individuals and individuals who are alive but incapacitated. Currently, California ostensibly has no guidance for a fiduciary currently administering the digital assets of a Californian who is incapacitated. The California RUFADAA, therefore, should be amended to apply to individuals who are still living but who become incapacitated. If the California RUFADAA is not so amended, this article proposes (1) the California RUFADAA be amended to clarify whether it applies to California users who have successfully used an online tool to authorize a “designated recipient” to administer the user’s digital asset upon the user’s incapacity and whose “designated recipient” is currently acting and administering the user’s digital asset, and (2) the California RUFADAA be amended to delete apparently superfluous references to an individual who has, under a power of attorney, authorized an agent to handle digital assets when the individual becomes incapacitated.

*Associate Professor of Law, California Western School of Law. The author would like to thank the editors and staffers of the Entertainment Law Review of Loyola Law School, Los Angeles for their assistance in publishing this article.

I. INTRODUCTION

The California Revised Uniform Fiduciary Access to Digital Assets Act (California RUFADAA)¹ provides, through new California Probate Code sections 870-884,² rules addressing the treatment, at the death of a “user”³ who resided in California at the time of the user’s death,⁴ of any “digital asset”⁵ of the user. The California legislature modeled the California

1. 2016 Cal. Stat. Ch. 551, § 1 (AB 691) (effective Jan. 1, 2017).

2. CAL. PROB. CODE §§ 870–884 (2017) [hereinafter “California RUFADAA”].

3. A “user” means “a person that has an account with a custodian.” California RUFADAA, *supra* note 2, at § 871(v). This article uses the term “user” to refer to an individual who has a right or interest in a digital asset. Additionally, this article uses the term “California RUFADAA” to refer to the California Revised Uniform Fiduciary Access to Digital Assets (California Probate Code sections 870–884) and uses the term “RUFADAA” to refer to the Uniform Law Commission’s model law entitled, “Revised Uniform Fiduciary Access to Digital Assets Act.”

4. The California RUFADAA applies to a “custodian of digital assets for a user if the user resides in this state or resided in this state at the time of the user’s death.” California RUFADAA, *supra* note 2, at § 872(a)(4). A “custodian” means “a person that carries, maintains, processes, receives, or stores a digital asset of a user.” California RUFADAA, *supra* note 2, at § 871(f). As will be discussed in section III of this article, the California RUFADAA—despite the reference to a user who “resides in this state” and, therefore, must be living—ostensibly addresses only deceased users, not living ones.

5. A “digital asset” means “an electronic record in which an individual has a right or interest. The term ‘digital asset’ does not include an underlying asset or liability, unless the asset or liability is itself an electronic record.” California RUFADAA, *supra* note 2, at § 871(h). Digital assets can be divided into four broad categories: (1) “electronic access to financial information,” such as online information regarding bank and brokerage accounts, credit cards and other online payment accounts, insurance, and tax and financial software; (2) “purely digital assets with monetary value,” such as web addresses, online accounts holding cash value, online game personalities, and digital currencies; (3) “electronic files and resources,” such as personal photos and videos, medical information, organizational information, websites, blogs, and planned electronic afterlife items; and (4) “electronic communications,” such as email and social networking accounts and photos and other items stored in those accounts. David M. Lenz, *Is the Cloud Finally Lifting? Planning for Digital Assets*, 23 ALI CLE EST. PLAN. COURSE MATERIALS J. 35, 36–39 (2017).

RUFADAA after the Uniform Law Commission's⁶ Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)⁷ retaining (and slightly revising) the provisions addressing digital assets at the user's death, but deleting the provisions addressing digital assets while the user is alive.⁸

This Article argues that California should enact the RUFADAA provisions addressing digital assets while the user is alive. Americans are living longer than ever before, and, increasingly, they are holding their assets under revocable living trusts as conservatorship trusts.⁹ Accordingly, Californians need the RUFADAA provisions addressing the treatment of digital assets while users are alive. Should the California legislature decide not to enact such provisions, then this Article argues that the California legislature should amend the California RUFADAA to delete superfluous, potentially confusing references to powers of attorney and principals, which the California RUFADAA does not recognize.

Part II of this Article provides a brief history leading to the enactment of the California RUFADAA, including a brief summary of relevant federal and California laws addressing digital assets. Part III discusses the reasons why the California RUFADAA should apply to users who are living. Finally, Part IV suggests certain deletions from the current California RUFADAA to prevent confusion about its applicability to living users.

6. *About the ULC*, UNIFORM LAW COMMISSION (Oct. 12, 2018, 5:25 PM), <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> [<https://perma.cc/EZZ8-6VSR>] (The Uniform Law Commission (ULC), "also known as the National Conference of Commissioners on Uniform State Laws, established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.").

7. *See generally Revised Uniform Fiduciary Access to Digital Assets Act (2015)*, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS (Mar. 8, 2016), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf [<https://perma.cc/7EFY-Y5WR>] [hereinafter RUFADAA] (generally, bracketed language in RUFADAA provisions is suggested language that can be changed by the state legislature to reflect state-specific terms).

8. Cal. Leg., Assemb. Floor, Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) Aug. 24, 2016, p. 4.

9. *See* David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*, 24 ELDER L.J. 1, 26-27 (2016) (discussing "the common use of a funded revocable trust not only as a will substitute but also as a conservatorship substitute" in planning for incapacity (citation omitted)).

II. BRIEF HISTORY LEADING TO THE CALIFORNIA RUFADAA

The California RUFADAA arose amid a web of federal, state, industry-proposed, and model laws. Several commentators have discussed the federal, state, industry-proposed, and model laws leading to the drafting of the RUFADAA.¹⁰ The following is an extremely brief discussion of the relevant federal, state, industry-proposed, and model laws that led to the enactment of the California RUFADAA and that relate to the focus of this article, namely, a proposal for the California RUFADAA to apply to living users.

A. *Relevant Federal Law*

There are two federal laws governing digital assets: (1) the Stored Communications Act (SCA) (which is a part of the Electronic Communications Privacy Act of 1986 (ECPA)),¹¹ and (2) the Computer Fraud and Abuse Act (CFAA).¹² The SCA does not address what happens to a user's electronic communications after the user dies or when the user becomes incapacitated, but the SCA does criminalize unauthorized access to electronic communications (regardless of whether the user is dead or alive), unless the user authorizes such conduct.¹³ Additionally, a person or entity providing "an electronic communication service" or "remote computing service" shall not "knowingly divulge to any person or entity the contents of any communication" while it is "in electronic storage by" or "carried or maintained on" that

10. See e.g., Gerry W. Beyer, *Web Meets the Will: Estate Planning for Digital Assets*, 42 NAEPJ. OF EST. & TAX PLAN. 28, 39–42 (2015) (addressing the histories of several states' laws and UFADAA); Alberto B. Lopez, *Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets*, 24 GEO. MASON L. REV. 183, 193–215 (2016) (addressing the histories of several states' laws, UFADAA, PEAC, and RUFADAA); Suzanne Brown Walsh & Catherine Anne Seal, *The Revised Uniform Fiduciary Access to Digital Assets Act: Striking a Balance Between Privacy Expectations and the Need for Fiduciary Access to Digital Assets*, 12 NAELA J. 101, 107–113, 115–117 (Fall 2016) (addressing the history of federal laws, UFADAA, and RUFADAA); Elizabeth Sy, Comment, *The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught up with Technology?*, 32 TOURO L. REV. 647, 657–670 (2016) (addressing the history of federal laws, UFADAA, and RUFADAA).

11. 18 U.S.C. §§ 2701–12 (2012).

12. 18 U.S.C. § 1030 (2012).

13. 18 U.S.C. § 2701 (with certain other allowed exceptions that are beyond the scope of this article).

service.¹⁴ The service providers, however, “may divulge the contents of a communication” with “the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.”¹⁵

The CFAA, also, does not address what happens after a user dies or becomes incapacitated, but it does criminalize certain actions as to digital assets that are relevant to this article. The CFAA punishes, among other actions, whoever “intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer”.¹⁶ Additionally, the CFAA punishes whoever “knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value,” unless what is “obtained” is only the use of the computer and the value of such use is “not more than \$5,000 in any 1-year period.”¹⁷

B. Relevant State Law

In 2002, California enacted the “first and most primitive”¹⁸ statute,¹⁹ which addressed only email accounts. The statute does not address what would happen to the email account when the email account user dies or becomes incapacitated, but it does provide, “[u]nless otherwise permitted by law or contract, any provider of electronic mail service shall provide each customer with notice at least 30 days before permanently terminating the customer’s electronic mail address.”²⁰

14. 18 U.S.C. § 2702(b)(3).

15. *Id.*

16. 18 U.S.C. § 1030(a)(2)(C).

17. 18 U.S.C. § 1030(a)(4).

18. Beyer, *supra* note 10, at 39.

19. CAL. BUS. & PROF. CODE § 17538.35 (West 2010).

20. BUS. & PROF. CODE § 17538.35(a).

Every state has a statute analogous to the federal CFAA. The California Comprehensive Computer Data Access and Fraud Act (CCCDFAFA), similar to the federal CFAA, does not address what happens to digital assets after a user dies or becomes incapacitated, but it does criminalize certain actions as to digital assets that are relevant to this article.²¹ The CCCDAFA provides that any person who commits the following (excluding those actions beyond the scope of this article) is “guilty of a public offense”:

(1) Knowingly accesses and without permission, alters, damages, deletes, destroys, or otherwise uses any data, computer, computer system, or computer network in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data.

(2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.

(3) Knowingly and without permission uses or causes to be used computer services. . . .

(7) Knowingly and without permission accesses or causes to be accessed any computer, computer system, or computer network.²²

C. Relevant Industry-Proposed and Model Laws Leading to the California RUFADAA

The California RUFADAA started as Assembly Bill 691 (AB 691), which California Assembly Member Ian Calderon introduced on February 25, 2015.²³ In the first version of AB 691, the Legislative Counsel’s Digest stated, “[t]his bill would establish the Privacy Expectation Afterlife and Choices Act (PEAC), which would require a probate court to order an electronic communication service or remote computing service provider, as defined, to disclose to the executor or administrator of the estate a record or

21. CAL. PEN. CODE § 502 (West 2016).

22. *Id.* at § 502(c).

23. A complete history of the enactment of the California RUFADAA is beyond the scope of this article. This brief history focuses on the differing treatment under the California RUFADAA between deceased and living users.

other information pertaining to the deceased user, but not the contents of communications or stored contents.”²⁴ The Legislative Counsel’s Digest referred to “the deceased user” with no reference to a user who is alive.²⁵ Indeed, the title of AB 691 was, “[a]n act to add Part 20 (commencing with Section 870) to Division 2 of the Probate Code, relating to estates.”²⁶ In sum, the first version of AB 691 focused on deceased users and their digital assets and excluded living users.

The first version of AB 691 focused on deceased users, in part, because AB 691 was based on the Privacy Expectation Afterlife and Choices Act (PEAC),²⁷ which was proposed legislation drafted by NetChoice.²⁸ The subtitle of PEAC indicates that it is “An Act relative to protecting a decedent’s private communications and stored contents while facilitating administration of a decedent’s estate.”²⁹

PEAC arose because the parties comprising NetChoice were not pleased with the Uniform Fiduciary Access to Digital Assets Act (the precursor to the RUFADAA), which the ULC approved on July 16, 2014. In its Bill Analysis of AB 691, the California Senate Judiciary Committee noted that the UFADAA “was recommended for enactment in all states ‘to vest fiduciaries with the authority to access, control, or copy digital assets and accounts[,] . . . remove barriers to a fiduciary’s access to electronic records[,] and to leave unaffected other law, such as fiduciary, probate, trust, banking, investment, securities, and agency law.’”³⁰ The Senate Judiciary Committee concluded, however, “[t]his bill [based on PEAC] would not enact the

24. Cal. Leg., Assemb. B. No. 691 (2015-2016 Reg. Sess.) as introduced Feb. 25, 2015.

25. *Id.*

26. *Id.*

27. *Privacy Expectation Afterlife and Choices Act (PEAC)*, NETCHOICE, <http://NetChoice.org/library/privacy-expectation-afterlife-choices-act-peac/> [<https://perma.cc/C9KV-XS89>] [hereinafter PEAC].

28. NETCHOICE, <https://netchoice.org> [<https://perma.cc/2D7J-UKAU>] (NetChoice is “a trade association of eCommerce businesses and online consumers all of whom share the goal of promoting convenience, choice, and commerce on the net.”).

29. PEAC, *supra* note 27.

30. Cal. Leg., S. Judiciary, Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) July 14, 2015, p. 3.

UFADAA, but, instead, provide for the issuance of probate court orders, authorizing the disclosure of electronic communications, as specified, to fiduciaries for the purpose of resolving issues regarding assets or liabilities of a decedent's estate."³¹ Additionally, the Senate Judiciary Committee stated in the "Comment" section, "the scope of this bill is limited and only applies to electronic information being requested from providers by a decedent's administrator, executor, or trustee in order to marshal the decedent's assets and ascertain the liabilities."³² From its beginning, AB 691 focused on the administration of a decedent's estate and how the disclosure of electronic communications of a deceased user could help in that administration.

It should be noted that the Assembly Committee on Privacy and Consumer Protection previously stated that because UFADAA "establishes an 'opt-out' rule for access to digital assets after death" (which would lead to "full post-mortem access to digital assets" if a person "fails to make a conscious choice during their life") and because AB 691 (based on PEAC) "provides an opt-in rule," then AB 691 "could be viewed as significantly more protective of personal privacy rights" than UFADAA.³³ Thus, for the reasons stated above, the California legislature preferred PEAC over UFADAA and never proposed legislation based on UFADAA.³⁴

On September 10, 2015, less than seven months after AB 691 was introduced, the Senate Judiciary Committee addressed AB 691 but noted, in the "Comment" section, "[a]ccording to NCCUSL, the RUFADAA was recently approved and represents a consensus reached among stakeholders, including technology firms, privacy advocates, bankers, and the trust and estate bar. . . . NCCUSL recommended that this Committee 'take no action on

31. *Id.*

32. *Id.* at 15.

33. Cal. Leg., Assemb. Comm. on Privacy and Consumer Protection, Analysis of Assemb. B. 691 (2015-2016 Reg. Sess.) May 5, 2015, p. 5.

34. As this article soon discusses, California enacted the California Revised Uniform Fiduciary Access to Digital Assets Act (California RUFADAA) based on the ULC's RUFADAA, but California never introduced legislation based on ULC's UFADAA. In this brief history leading to the enactment of the California RUFADAA, this article notes that there was a California Senate Bill 849 (Anderson, 2014), which would have authorized, under certain conditions, "the decedent's personal representative to request access to the electronic mail account of the decedent," but "SB 849 failed passage in Committee because it only addressed access to the decedent's electronic mail account," among other reasons. Cal. Leg., S. Judiciary, Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) July 14, 2015, p. 20-21.

digital assets legislation until the [RUFADAA] is available for its consideration.”³⁵ The Senate Floor Analyses, in the Background section, stated, “UFADAA was recently revised this past July, and is now supported by technology stakeholders.”³⁶ The “Arguments in Opposition” provided:

The opposition notes that the alternative approach to this bill, the revised UFADAA, at a minimum, includes important definitions that ought to be adopted in statute, and, if there is a disagreement over some of the basic elements, or distinctions in terms between the states, the ability to comply with this bill will be frustrated to the detriment of beneficiaries. Opponents recommend withholding passage of this bill this year with a commitment to working through the interim because the underlying public policy is too important to rush since the result impacts privacy rights and the rights of beneficiaries.³⁷

The “opposition” appeared to win the day, and the California legislature took no action for about seven months. Then, on April 11, 2016, AB 691 was amended in the Senate, and the Legislative Counsel’s Digest stated, “[t]his bill would enact the Revised Uniform Fiduciary Access to Digital Assets Act, which would authorize a decedent’s personal representative or trustee to access and manage digital assets and electronic communications, as specified.”³⁸ AB 691 was no longer based on PEAC, but it retained a focus on only deceased users and excluded living ones.

On May 3, 2016, the Senate Judiciary Committee, in the “Comment” section of its Bill Analysis, stated,

With no statute currently in place in California protecting the online information of the newly deceased, families are left responsible for accessing their loved ones [sic] information, often

35. Cal. Leg., S. Judiciary Comm., Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) Sept. 10, 2015, p. 7-8.

36. Cal. Leg., S. Floor, Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) Sept. 10, 2015, p. 5.

37. *Id.* at 7.

38. Cal. Leg., Assemb. B. No. 691 (2015-2016 Reg. Sess.) as amended Apr. 11, 2016.

times causing unnecessary financial and emotional burdens' [sic] during a time that is already painfully difficult.

AB 691 addresses this issue by striking a balance between providing a clear path for fiduciaries to access relevant information to handle the deceased person's estate, while respecting the privacy choices of not just the deceased person but those with whom the deceased was communicating.³⁹

The Senate Judiciary Committee also stated, "the scope of this bill is limited and only applies to electronic information being requested from the custodians of the digital assets by a decedent's personal representative, administrator, executor, or trustee (fiduciary) for the purpose of ascertaining the decedent's assets and liabilities" and that this bill "would enact the RUFADAA and provide procedures through which a decedent's fiduciary could obtain access to, or a catalogue or content of, the decedent's digital assets from the custodian of those digital assets."⁴⁰ Although AB 691 was now based on RUFADAA and not on PEAC, the California legislature nevertheless maintained AB 691's focus on a deceased user (and on the administration of the deceased user's estate).

The Senate Judiciary Committee expressly noted AB 691's emphasis on deceased users. In its Bill Analysis, the Senate Judiciary Committee stated,

[a]lthough the RUFADAA, approved for use in all 50 states, would apply to personal representatives of decedents' estates, conservators for protected persons and individuals, agents acting pursuant to a power of attorney, and trustees, this bill would adopt a modified version of RUFADAA and would not provide for conservator access to a conservatee's digital assets.⁴¹

The Senate Judiciary Committee did not indicate that AB 691's adoption of a modified RUFADAA also would not provide for "agents acting

39. Cal. Leg., S. Judiciary, Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) May 3, 2016, p. 12.

40. *Id.* at 14.

41. *Id.*

pursuant to a power of attorney.” Nevertheless, in noting that AB 691 excludes conservators for users who are alive, the Senate Judiciary Committee remained consistent to AB 691’s historical focus on deceased users, not living ones.

The Senate Judiciary Committee, in discussing the fiduciary’s duty of confidentiality, again focused only on deceased users. In its Bill Analysis, the Committee stated,

Arguably, the duty of confidentiality provision goes to the heart of the privacy concerns this bill [AB 691] seeks to address. Since the fiduciary would only be able to receive the content of or access to the electronic communications pursuant to the decedent’s online designation, authorization in a testamentary document, or by court order for the purpose of administering the decedent’s trust or estate, this provision effectively resolves much of the concern regarding disclosure of the decedent’s confidential electronic communications.⁴²

As to a “decedent,” the foregoing language refers to only the decedent’s online designation, the decedent’s authorization in a testamentary document, or a court order relating to the decedent’s trust or estate—there is no reference to a living user.⁴³

On June 15, 2016, the Senate Rules Committee provided the last Senate Bill Analysis before AB 691 was enacted on September 24, 2016. The Senate Rules Committee, in the Analysis section, stated that this AB 691 “[e]stablishes the RUFADAA and authorizes a decedent’s personal representative or trustee (fiduciary) to access and manage digital assets and electronic communications, as specified.”⁴⁴ In the Background section of its Bill Analysis, the Senate Rules Committee stated, “[t]his bill adopts a modified version of RUFADAA and establish [sic] procedures for a decedent’s per-

42. *Id.* at 16.

43. *Id.* A “living” user’s online designation is not addressed. The next section of this article discusses a living user’s “designated recipient.”

44. Cal. Leg., S. Floor, Analyses of Assemb. B. No. 691 (2015-2016 Reg. Sess.) June 15, 2016, p. 3.

sonal representative or trustee to obtain digital assets and electronic information from the custodian of those assets and information.”⁴⁵ Indeed, both of the foregoing statements are each a general overview of the purpose of AB 691. It is interesting to note, however, that both statements refer to a “decedent” and the “personal representative or trustee” as to that decedent and both statements exclude any reference to a living user or to a fiduciary acting for that living user.⁴⁶

Before AB 691 was enacted on September 24, 2016, both the Assembly Committee on Judiciary Analysis and the Assembly Floor Analysis included the same paragraph entitled “Scope of the bill,” which stated,

Unlike the broader approach of the RUFADAA model act adopted by the NCCUSL, the scope of this bill does not include powers of attorney, trusts, and conservatorships where the principal, trustor, and conservatee, respectively, are alive. Instead, this bill has a more limited scope that applies only to situations where a person has died, and electronic information is being requested from the custodian by a decedent’s personal representative, administrator, executor, or trustee for the purpose of ascertaining the decedent’s assets and liabilities.⁴⁷

These two Assembly Bill Analyses were more explicit than the last Senate Bill Analysis. As seen above, the two Assembly Bill Analyses stated that the scope of AB 691 excludes “powers of attorney, trusts, and conservatorships” where the user is living; there is no explicit exclusion, however, to a “designated recipient” of a living user.⁴⁸ Further, the two Assembly Bill Analyses stated that AB 691 “applies only to situations where a person has died” and electronic information is requested “for the purpose of ascertaining the decedent’s assets and liabilities.”⁴⁹ While this paragraph provides the

45. *Id.* at 6.

46. *Id.*

47. Cal. Leg., Assemb. Judiciary Comm., Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) Aug. 23, 2016, p. 7; Cal. Leg., Assemb. Floor, Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) Aug. 24, 2016, p. 4.

48. *Id.*

49. *Id.*

general “scope” of AB 691, it is interesting to note that the two Assembly Bill Analyses both exclude any reference to a “designated recipient.”

This brief history leading to the enactment of the California RUFADAA shows how, from AB 691’s initial version based on PEAC, the California RUFADAA focused on the treatment of the digital assets of a deceased user. The California RUFADAA excludes the RUFADAA sections dealing with assets of users who have authorized (or have had authorized for them) someone to handle their digital assets. In the next section, this article proposes that the California RUFADAA be amended to include provisions for the treatment of digital assets when the user is alive.

III. AMENDING THE CALIFORNIA RUFADAA TO ADDRESS LIVING USERS

Although the previous section of this article shows that the California RUFADAA focuses on deceased users rather than living ones, it appears that the California RUFADAA might nevertheless govern a specific group of living users. Before Section III.B. of this article addresses the reasons for amending the California RUFADAA to include provisions addressing living users, Section III.A. addresses this specific group of living users who appear to be currently governed by the California RUFADAA. This specific group of living users may or may not have been intended by the California legislature to be governed by the California RUFADAA. If this group of living users is, indeed, governed by the California RUFADAA, and if the California legislature did not intend for that group to be so governed, then the California legislature might consider amending the California RUFADAA to clarify that it does not govern that group of living users.

A. California RUFADAA Appears to Apply to Certain Living Users

The California RUFADAA, though drafted to address only deceased users, as discussed in Section II.C. of this article, appears to apply to certain living users, namely, those who have used an “online tool”⁵⁰ to authorize a “designated recipient” to act (as to the digital asset relating to that online

50. An “online tool” means “an 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.” CAL. PROB. CODE § 871(n) (2017) [hereinafter “California RUFADAA”].

tool) upon the user's incapacity.⁵¹ This group of living users may or may not have a power of attorney authorizing an agent to administer some or all of the user's digital assets upon the user's incapacity (including any digital asset relating to any online tool).⁵² Whether or not the California RUFADAA applies to agents acting under a power of attorney, because a user's use of an online tool "overrides a contrary direction by the user in a will, trust, power of attorney, or other record," a user's successful use of an online tool to name a designated recipient (as to the digital asset relating to the online tool) overrides any named agent (if one exists).⁵³ Accordingly, this section of this article addresses only the group of users who have successfully used an online tool to authorize a "designated recipient" to administer the user's digital asset (relating to that online tool) upon the user's incapacity and whose "designated recipients" are currently acting and administering those users' digital assets (relating to that online tool).

Although the California RUFADAA defines a "designated recipient," the statute does not include designated recipients among those parties to which the California RUFADAA applies. California RUFADAA section 872 (the "applicability section") provides in full:

872. (a) This part shall apply to any of the following:
- (1) A fiduciary acting under a will executed before, on, or after January 1, 2017.
 - (2) A personal representative acting for a decedent who died before, on, or after January 1, 2017.
 - (3) A trustee acting under a trust created before, on, or after January 1, 2017.
 - (4) A custodian of digital assets for a user if the user resides in this state or resided in this state at the time of the user's death.

51. A "designated recipient" means "a person chosen by a user using an online tool to administer digital assets of the user." California RUFADAA, *supra* note 50, at § 871(g).

52. As discussed in section II.C. of this article, the California RUFADAA excluded the RUFADAA provisions addressing an agent who, under a power of attorney, administers the digital assets of a principal. California RUFADAA, nonetheless, retains the RUFADAA definition of a "power of attorney" to mean "a record that grants an agent authority to act in the place of the principal." California RUFADAA, *supra* note 50, at § 871(q).

53. California RUFADAA, *supra* note 50, at § 873(a).

(b) This part shall not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.⁵⁴

It should be noted that California RUFADAA section 872 models RUFADAA section 3 (entitled "Applicability"), which also omits any reference to a "designated recipient." None of the California RUFADAA definitions of these parties—fiduciary,⁵⁵ personal representative,⁵⁶ trustee,⁵⁷ or custodian⁵⁸—encompasses a "designated recipient." California RUFADAA section 872 does not provide that it applies "only" to the named parties—rather, that it "shall apply to any of the following" named parties.⁵⁹ Accordingly, it appears, arguably, that California RUFADAA could apply to a designated recipient who is acting and administering the digital assets of a user.

The California RUFADAA applicability section provides that a "custodian" includes a custodian of "digital assets for a user if the user resides in this state."⁶⁰ Even though the California legislature sought to focus California RUFADAA's applicability only to deceased users, the California RUFADAA's definition of a "custodian" retains the RUFADAA reference to living users who "reside[] in this state."⁶¹ Accordingly, the test for

54. California RUFADAA, *supra* note 50, at § 872.

55. A "fiduciary" means "an original, additional, or successor personal representative or trustee." California RUFADAA, *supra* note 50, at § 871(l).

56. A "personal representative" means "an executor, administrator, special administrator, or person that performs substantially the same function under any other law." California RUFADAA, *supra* note 50, at § 871(p).

57. A "trustee" means "a fiduciary with legal title to property under an agreement or declaration that creates a beneficial interest in another. The term includes a successor trustee." California RUFADAA, *supra* note 50, at § 871(u).

58. A "custodian" means "a person that carries, maintains, processes, receives, or stores a digital asset of a user." California RUFADAA, *supra* note 50, at § 871(f).

59. California RUFADAA, *supra* note 50, at § 872(a).

60. California RUFADAA, *supra* note 50, at § 872(a)(4).

61. *Revised Uniform Fiduciary Access to Digital Assets Act (2015)*, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS at § 3(b) (Mar. 8, 2016), <http://www.uniform->

RUFADAA applicability does not refer to the residence of a designated recipient. Consequently, as to any designated recipient administering the digital assets of a user, the California RUFADAA applies to (1) custodians of digital assets of (2) users who reside in California.⁶²

The term “designated recipient” appears in California RUFADAA sections 871, 872, 873, 874, 875, 880, and 881. Although, as discussed above, the California RUFADAA applicability section omits any reference to the term, “designated recipient,” the appearance of that term in so many California RUFADAA sections seems to indicate that the California RUFADAA does, indeed, apply to “designated recipients.” If the foregoing arguments and conclusions are accepted, then the California RUFADAA applies to “designated recipients” of living users who reside in California and who have a right or interest in a digital asset carried, maintained, processed, received, or stored by a custodian.

The California legislature’s Senate Judiciary Committee appears to have assumed that “designated recipients” act, under the California RUFADAA, only for deceased users. In its Bill Analysis, the Senate Judiciary Committee addressed how AB 691 protected a deceased user’s privacy, stating, “Since the fiduciary would only be able to receive the content of or access to the electronic communications pursuant to the decedent’s online designation, authorization in a testamentary document, or by court order for the purpose of administering the decedent’s trust or estate, this provision effectively resolves much of the concern regarding disclosure of the decedent’s confidential electronic communications.”⁶³ The Senate Judiciary Committee reference to a “decedent’s online designation” presumes that the user is now dead. Additionally, the Senate Judiciary Committee states that the fiduciary would “only” be able to receive anything “for the purpose of administering the decedent’s trust or estate,” again presuming that the user is now dead.

The Assembly Committee on Judiciary also appears to assume that, under the California RUFADAA, designated recipients act only for deceased

laws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf [https://perma.cc/7EFY-Y5WR] [hereinafter “RUFADAA”].

62. California RUFADAA also applies to a custodian for a user who “resided in this state at the time of the user’s death,” California RUFADAA, *supra* note 50, at § 872(a)(4). However, III.A. of this article addresses only the possible California RUFADAA applicability to living users.

63. Cal. Leg., S. Judiciary, Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) May 3, 2016, p. 16.

users. In its Bill Analysis, the Assembly Committee on Judiciary addressed the privacy of a deceased user, stating in the Comments section,

[T]his bill would also establish that fiduciaries owe a duty of confidentiality in addition to the duties of care and loyalty. To the extent the decedent limits access to his or her electronic information so that the information is only disclosable to or accessible by the fiduciary, either through the online tool or pursuant to testamentary documents, this bill inherently incorporates the expectation that the fiduciary will maintain the decedent's confidentiality upon receiving the electronic information.⁶⁴

The Assembly Committee on Judiciary focuses only on the “decedent's” confidentiality and, therefore, like the Senate Judiciary Committee, appears to assume that “designated recipients” act, under the California RUFADAA, only for deceased users.

The language of both of the foregoing committees about “designated recipients” acting only for deceased users is consistent with the apparent understanding of both California houses that the California RUFADAA applies only to deceased users, as discussed above. The RUFADAA (upon which the California RUFADAA is based), however, acknowledges that “designated recipients” can act for living users. In the Comment following section 4 of the RUFADAA, regarding the user's use (or non-use) of an online tool, the Uniform Law Commission stated, “[i]f a custodian of digital assets allows the user to provide directions for handling those digital assets in case of the user's death or incapacity, and the user does so, that provides the clearest possible indication of the user's intent and is specifically limited to those particular digital assets.”⁶⁵ The RUFADAA, then, allows for the possibility that a “designated recipient” can act for a user while the user is living but incapacitated.

Although both California houses appear to have believed that the California RUFADAA applies only to deceased users, there are several California RUFADAA sections that apparently apply to living users, specifically, those living users who used an online tool to authorize a “designated recipient” to administer the digital assets of the user (upon the user's incapacity).

64. Cal. Leg., Assemb. Judiciary Comm., Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) Aug. 23, 2016, p. 9.

65. Comment to RUFADAA, *supra* note 61, at § 4.

California RUFADAA section 874 provides, “[t]his part does not give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate or trust, the fiduciary or designated recipient acts or represents.”⁶⁶ The reference to “the user” is distinguished from the reference to the user’s “estate or trust”; accordingly, the reference to “the user” appears to indicate that California RUFADAA section 874 addresses a living user. The definition of a “fiduciary” includes a “personal representative”⁶⁷ or “trustee”⁶⁸ but excludes a “designated recipient.”⁶⁹ Accordingly, because a “fiduciary” only acts when the user is deceased, a living user can have only have a “designated recipient” acting for the user, and not a “fiduciary.”

The provisions regarding a user’s use of an online tool appear in California RUFADAA section 873(a). A user

may use an online tool to direct the custodian to disclose to a designated recipient or not 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 online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.⁷⁰

Depending on the digital asset, the online tool may allow for the designated recipient to act upon the user’s incapacity. Consequently, it appears that, at least theoretically, a designated recipient can act under the California

66. California RUFADAA, *supra* note 50, at § 874(b).

67. A “personal representative” is defined to be “an executor, administrator, special administrator, or person that performs substantially the same function under any other law.” California RUFADAA, *supra* note 50, at § 871(p). An executor, administrator, or special administrator acts only upon an individual’s death. Accordingly, a “personal representative” acts only for a deceased user, not a living one.

68. A custodian “shall disclose” to a “trustee that is not an original user of an account” certain electronic information if the trustee gives to the custodian, among other things, a “certified copy of the death certificate of the settlor.” California RUFADAA, *supra* note 50, at §§ 878(b), 879(b). Accordingly, it appears that a trustee acting under California RUFADAA acts only for a deceased user, not a living one.

69. California RUFADAA, *supra* note 50, at § 871(l).

70. *Id.* at § 873(a).

RUFADAA to administer the digital assets of a living user (while the user is incapacitated).

If the California RUFADAA, indeed, currently allows designated recipients to act, pursuant to a user's use of an online tool to authorize a designated recipient to act for the user upon the user's incapacity, and if the California legislature intended to include designated recipients in the California RUFADAA, then the California RUFADAA perhaps should be amended to provide more explicitly for those designated recipients. For example, the California RUFADAA, which provides a general procedure by which a custodian can disclose the digital assets of a user, currently includes references to a "designated recipient."⁷¹ The general procedure is:

When disclosing the digital assets of a user under this part, the custodian may, in its sole discretion, do any of the following:

- (1) Grant the fiduciary or designated recipient full access to the user's account.
- (2) Grant the fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged.
- (3) Provide the fiduciary or designated recipient with a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.⁷²

Although designated recipients are included in the foregoing California RUFADAA's general procedures by which a custodian can disclose a user's digital assets, the California RUFADAA procedures when a custodian "shall disclose" certain electronic information do not apply to "designated recipients." Those procedures when a custodian "shall disclose" certain electronic information currently apply to "the "personal representative of the estate of a deceased user"⁷³ or to a "trustee that is not an original user of an account"⁷⁴

71. *Id.* at § 875(a).

72. *Id.*

73. *Id.* at §§ 876, 877.

74. *Id.* at §§ 878, 879.

and not to a “designated recipient.” If the custodian chooses not to disclose anything to a designated recipient, the designated recipient cannot argue that because the designated recipient has met all statutory requirements, the custodian, therefore, “shall disclose” certain electronic information to that designated recipient.

Based upon the legislative history discussed in Section II.B. of this article, it appears that the California RUFADAA was drafted to apply only to deceased users. If designated recipients acting for living users are, indeed, governed by the California RUFADAA, and if the California legislature did not intend for those designated recipients to be so governed, then the California legislature should consider amending the California RUFADAA to clarify that it does not govern those designated recipients.

B. California RUFADAA Should be Amended to Apply to All Living Users

Whether or not the California RUFADAA applies to living users who have used an online tool to authorize a designated recipient to act upon the user’s incapacity, the California RUFADAA should apply to all living users (except those who can act for themselves), including (in addition to those living users having designated recipients acting for them, which users are, as argued above, already covered by the California RUFADAA): (1) living users who already transferred their assets to a revocable trust and those assets are held by the original trustee or a successor trustee of the revocable living trust, (2) living users who are subject to a conservatorship, and (3) living users who have an agent authorized under a power of attorney to act for the user. When the California legislature introduced the amended version of AB 691 based on the RUFADAA, the legislature’s focus on deceased users and the administration of their estates meant that AB 691 deleted RUFADAA references to a living user (except, perhaps, as noted in Section III.A. of this article above). Specifically, AB 691 deleted the RUFADAA sections by which a custodian “shall disclose” certain electronic information to a “conservator,”⁷⁵ an “agent”⁷⁶ acting under a power of attorney, or a “trustee that is an original user of an account.”⁷⁷ Additionally, AB 691 amended the

75. RUFADAA, *supra* note 61, at § 14.

76. *Id.* at §§ 9, 10.

77. *Id.* at § 11.

RUFADAA section by which a custodian “shall disclose” certain electronic information to a “trustee that is not an original user of an account” so that the California RUFADAA, when enacted, does not apply to a successor trustee who is acting as trustee because the original trustee (i.e., the trustee that is an original user of an account) is living but incapacitated.⁷⁸ While California, indeed, needed laws addressing the treatment of digital assets upon a user’s death, the California legislature’s focus on only deceased users might have been too narrow. The California legislature should amend the California RUFADAA to apply to all living users (except those who can act for themselves) for the following reasons.

First, Americans are living longer than ever before and, therefore, are susceptible to being exposed to more physical and mental problems because of their longevity. A recent analysis of United States “life expectancy trends and disability rates over a 40-year span from 1970 to 2010 . . . found that the average total life span increased for men and women in those 40 years, but so did the proportion of time spent living with a disability.”⁷⁹ More recent data indicates that, as to Americans of all races and both sexes, an apparent plateau of a life expectancy (calculated to be “at birth”⁸⁰) for individuals in years 2012-2015 to be 78.8 to 78.9 years.⁸¹ Consequently, with the greater number of digital assets in existence and with Americans’ longevity, individuals with digital assets (and the custodians of those digital assets) increasingly need laws governing the treatment of digital assets while the user is living (but incapacitated).

A second reason why California RUFADAA should apply to all living users overlaps with the first reason—Americans use a funded revocable trust

78. The California legislature achieved this change by adding (to the RUFADAA §§ 11, 12) the requirement that, before the custodian “shall disclose” certain electronic information to a “trustee that is not an original user of an account”, the trustee must give to the custodian, among other things, a “certified copy of the death certificate of the settlor.” California RUFADAA, *supra* note 50, at §§ 878(b), 879(b).

79. Emily Gersema and Beth Newcomb, *Americans Living Longer with Disability or Health Issues, Study Shows*, USC NEWS (Apr. 15, 2016), <https://news.usc.edu/98750/americans-living-longer-with-disability-or-health-issues-study-shows/> [<https://perma.cc/5URF-4RTL>].

80. A thorough discussion of calculations of life expectancy, which can be at birth or at some age, such as 65 or 75, and can be narrowed to a certain race, sex, or geographic area, is beyond the scope of this article.

81. NATIONAL CENTER FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2016: WITH CHARTBOOK ON LONG-TERM TRENDS IN HEALTH, 1, 116 (2017), <https://www.cdc.gov/nchs/data/hus/16.pdf#015> [<https://perma.cc/2FZA-PZV5>].

as a “common planning alternative to a court-appointed conservator or a durable power of attorney in the event of incapacity.”⁸² If a trust settlor who is the initial trustee of certain trust property becomes incapacitated, then the named successor trustee “can take over without court involvement and act expeditiously to protect the trust property.”⁸³ In this way, the revocable trust “provides for quick, cheap, and private transfer of responsibility for managing the settlor’s property to the settlor’s chosen successor fiduciary.”⁸⁴ Consequently, with the increasing number of digital assets in existence, with Americans’ longevity, and with Americans’ common use of revocable trusts as conservatorship substitutes, individuals with digital assets (and the custodians of those digital assets) increasingly need laws governing the treatment of digital assets while the user is living and the trustee of the revocable trust is either: (1) the user or (2) the user’s successor trustee, who is acting because of the user’s incapacity.

The third reason why the California RUFADAA should be amended to address living users is that forty-six other states found the RUFADAA provisions addressing living users to be worthy of being enacted. As of this writing, forty-one states have enacted the RUFADAA (in full), and five states have introduced RUFADAA to be enacted.⁸⁵ Of the four remaining states, California alone enacted only the RUFADAA provisions applying to deceased users. For the reasons discussed above, the California legislature’s focus on only deceased users (thereby excluding living users who become incapacitated) seems unsupported. Apparently, at least forty-six other states recognize that the arguments often cited for fast and efficient transfer to fiduciaries of authority to administer digital assets upon the user’s death also apply when the user becomes incapacitated.

There appear to be at least four commonly-cited arguments supporting efficient fiduciary access to digital assets. The first is to prevent identity

82. David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*, 24 ELDER L.J. 1, 27 (2016).

83. *Id.* at 31.

84. *Id.*

85. *State Digital Asset Laws Chart*, PRACTICAL LAW TRUSTS & ESTATES W-006-8402, Westlaw (database updated Feb. 2019).

theft, which is more likely to occur when the user is unable to maintain digital assets because of the user's death or incapacity.⁸⁶ The second is to marshal the user's assets⁸⁷ in order to prevent financial losses to the estate.⁸⁸ Identifying and collecting traditional assets can be difficult, but doing so for a disorganized user (whether deceased or living but incapacitated) who failed to plan or kept poor records "can completely prevent, or at least delay, access to critical information and assets."⁸⁹ Preventing financial losses to the estate includes not only traditional assets but also, in today's digital world, online bill payments and online business, domain names, encrypted files, and other virtual property.⁹⁰ The third argument is to console the living⁹¹ and to avoid losing the deceased's personal story⁹² by ensuring that digital assets such as "social media accounts, voicemails, and other digital assets" are accessible to people as the user determines.⁹³ Finally, the fourth argument for efficient fiduciary access, building on the third argument, is to prevent unwanted secrets from being discovered by allowing the user to control the disclosure and non-disclosure of digital assets to not only digital fiduciaries but also to people beyond those digital fiduciaries.⁹⁴

The foregoing four arguments for efficient fiduciary access to a user's digital assets are often premised upon the user being deceased. All four arguments—preventing identity theft, marshalling assets, preserving the user's story, and preserving the user's privacy—however, apply equally to a user

86. Gerry W. Beyer & Kerri G. Nipp, *Cyber Estate Planning and Administration*, SOCIAL SCIENCE RESEARCH NETWORK 1, 3 (May 22, 2018), <https://ssrn.com/abstract=2166422> [<https://perma.cc/RB4C-6T5F>]; Suzanne Brown Walsh & Catherine Anne Seal, *The Revised Uniform Fiduciary Access to Digital Assets Act: Striking a Balance Between Privacy Expectations and the Need for Fiduciary Access to Digital Assets*, 12 NAELA J. 101, 104 (Fall 2016).

87. Walsh & Seal, *supra* note 86, at 105.

88. Beyer & Nipp, *supra* note 86, at 3.

89. Walsh & Seal, *supra* note 86, at 105.

90. Beyer & Nipp, *supra* note 86, at 3–4.

91. Walsh & Seal, *supra* note 86, at 104.

92. Beyer & Nipp, *supra* note 86, at 4.

93. Walsh & Seal, *supra* note 86, at 104–05.

94. Beyer & Nipp, *supra* note 86, at 5.

who is living but who is also incapacitated and, therefore, unable to administer the user's digital assets. The California legislature's apparent singular focus on the California RUFADAA being needed to assist fiduciaries in the administration of a user's estate, accordingly, seems to be too narrow. Consequently, for all of the foregoing reasons—Americans' longevity, the common usage of revocable trusts as conservatorship substitutes, and forty-five states' apparent recognition of the need for efficient fiduciary access for both deceased and incapacitated users—the California RUFADAA should be amended to apply to living users who are incapacitated.

IV. PROPOSED CHANGES TO THE CALIFORNIA RUFADAA

If the California legislature intends for the California RUFADAA to continue to address only deceased users and their digital assets, then the California RUFADAA should omit apparently superfluous references to powers of attorney and principals.⁹⁵ The continued existence of these references may cause confusion because powers of attorney and principals are not recognized under the California RUFADAA.⁹⁶ I have grouped my suggested deletions into the following three proposals.

Proposal #1: Delete California RUFADAA section 871(q), which defines "Power of attorney" to mean "a record that grants an agent authority to act in the place of the principal."⁹⁷ In drafting the California RUFADAA from the RUFADAA, the California legislature omitted from the

95. The California RUFADAA arguably applies to living users who have used an online tool to authorize designated recipients to act for the users when they become incapacitated, as discussed in section II.C. of this article.

96. Cal. Leg., Assemb. Judiciary Comm., Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) Aug. 23, 2016, p. 7; Cal. Leg., Assemb. Floor, Analysis of Assemb. B. No. 691 (2015-2016 Reg. Sess.) Aug. 24, 2016, p. 4.

97. CAL. PROB. CODE § 871(q) (2017) [hereinafter "California RUFADAA"].

RUFADAA the definitions of “agent”⁹⁸ and “principal”⁹⁹ and omitted the term “agent” from the definition of a “fiduciary.”¹⁰⁰

This proposed deletion is consistent with other instances when California RUFADAA deleted from RUFADAA a reference to a “power of attorney.” For example, RUFADAA section 15(g) provides that a “fiduciary of a user may request a custodian to terminate the user’s account” if the fiduciary submits a request in writing and includes, among other things, “a [certified] copy of the [letter of appointment of the representative or a small-estate affidavit or court order,] court order, power of attorney, or trust giving the fiduciary authority over the account.”¹⁰¹ California RUFADAA section 880(g)(2) provides that, in the foregoing situation, a fiduciary must submit, among other things, “[a] certified copy of the letter of appointment of the representative, a small-estate affidavit under Section 13101, a court order, a certified copy of the trust instrument, or a certification of the trust under Section 18100.5 giving the fiduciary authority over the account.”¹⁰² The California legislature’s decision to delete from the RUFADAA the reference to a “power of attorney” is consistent with the California RUFADAA’s focus on the treatment of digital assets only for deceased users.

Proposal #2: Delete from each of California RUFADAA sections 873(a), 873(b), and 876(d) the reference to a “power of attorney.” California RUFADAA section 873(a) provides that, if an online tool allows at all times the user to modify or to delete a direction under the online tool, then “a di-

98. An “agent” means “an attorney-in-fact granted authority under a durable or nondurable power of attorney.” *Revised Uniform Fiduciary Access to Digital Assets Act (2015)*, NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS at § 2(2) (Mar. 8, 2016), http://www.uniform-laws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf [<https://perma.cc/7EFY-Y5WR>] [hereinafter “RUFADAA”].

99. A “principal” means “an individual who grants authority to an agent in a power of attorney.” *Id.* at § 2(20).

100. A “fiduciary” means “an original, additional, or successor personal representative, [conservator], agent, or trustee.” *Id.* at § 2(14).

101. *Id.* at § 15(g)(2).

102. California RUFADAA, *supra* note 97, at § 880(g)(2).

rection regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.”¹⁰³ California RUFADAA section 873(b) provides that, if a user has not used an online tool or if no online tool is available, then “a user may allow or prohibit in a will, trust, power of attorney, or other record the disclosure to a fiduciary of some or all of the user’s digital assets, including the contents of electronic communications sent or received by the user.”¹⁰⁴ Finally, California RUFADAA section 876(d) provides that the custodian “shall disclose” the content of electronic communications of a user if the “personal representative of the estate of the user” gives to the custodian, among other things, “[u]nless the user provided direction using an online tool, a copy of the user’s will, trust, power of attorney, or other record evidencing the user’s consent to disclosure of the content of electronic communications.”¹⁰⁵

The foregoing references to a “power of attorney” appear to be superfluous because the California RUFADAA ostensibly addresses only the treatment of digital assets after the user has died, not while the user is alive. Specifically, RUFADAA section 7, upon which California RUFADAA section 876 is based, is entitled, “Disclosure of Content of Electronic Communications of Deceased User.”¹⁰⁶ Additionally, RUFADAA has two sections addressing a principal using a power of attorney to grant certain authority to an agent: RUFADAA section 9 (“Disclosure of Content of Electronic Communications of Principal”)¹⁰⁷ and RUFADAA section 10 (“Disclosure of Other Digital Assets of Principal”).¹⁰⁸ The California legislature, however, omitted those two RUFADAA sections and omitted the RUFADAA’s reference to a “power of attorney” in the provision stating that RUFADAA applied to a “fiduciary acting under a will or power of attorney executed before, on, or after [the effective date of this [act]].”¹⁰⁹ The California RUFADAA

103. *Id.* at § 873(a).

104. *Id.* at § 873(b).

105. *Id.* at § 876(d).

106. RUFADAA, *supra* note 98, at § 7.

107. *Id.* at § 9.

108. *Id.* at § 10.

109. *Id.* at § 3(a)(1).

section 872 provides that California RUFADAA applies to a “fiduciary acting under a will executed before, on, or after January 1, 2017.”¹¹⁰

Also, per California RUFADAA section 876(b), in order for the custodian to disclose the contents of electronic communications, a personal representative must give to the custodian, among other things, a “certified copy of the death certificate of the user.”¹¹¹ The personal representative would not be acting under a “power of attorney,” which generally terminates upon the principal’s death. Additionally, California RUFADAA section 876 provides, “[i]f a deceased user consented to or a court directs disclosure of the content of electronic communications of the user, the custodian shall disclose” that content if the personal representative gives to the custodian all of the following stated things.¹¹² The condition of “[i]f a deceased user consented” to the disclosure appears to limit the application of California RUFADAA section 876 to a user who is deceased. Finally, the custodian can request (before disclosing the content of electronic communications) an order of the court finding that “disclosure of the content of electronic communications of a user is reasonably necessary for estate administration.”¹¹³

Proposal #3: Delete from California RUFADAA section 881 the references to a “principal.” California RUFADAA section 881(e) provides,

This part does not limit a custodian’s ability to obtain or to require a fiduciary or designated recipient requesting disclosure or account termination under this part to obtain a court order that makes all of the following findings:

- (1) The account belongs to the decedent, principal, or trustee.
- (2) There is sufficient consent from the decedent, principal, or settlor to support the requested disclosure.¹¹⁴

The foregoing California RUFADAA section erroneously retains from RUFADAA the references to a “principal.” As noted above, the California RUFADAA deleted from RUFADAA the definition of “principal” and the

110. California RUFADAA, *supra* note 97, at § 872(a)(1).

111. *Id.* at § 876(b).

112. *Id.* at § 876.

113. *Id.* at § 876(e)(3)(D).

114. *Id.* at § 881(e).

two RUFADAA sections governing the disclosure of digital assets of a principal using a power of attorney to authorize an agent to act for the principal.

This proposed deletion is consistent with other instances when California RUFADAA deleted from RUFADAA a reference to a “principal.” For example, RUFADAA section 15(c) provides, “[a] fiduciary with authority over the property of a decedent, [protected person], principal, or settlor has the right to access any digital asset in which the decedent, [protected person], principal, or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.”¹¹⁵ California RUFADAA section 880(c), however, provides, “[a] fiduciary with authority over the property of a decedent or settlor has the right of access to any digital asset in which the decedent or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.”¹¹⁶ Similar references to a “principal” in RUFADAA section 15(d)¹¹⁷ and (e)¹¹⁸ do not appear in the corresponding California RUFADAA section 880(d)¹¹⁹ and (e).¹²⁰

V. CONCLUSION

Californians now benefit from the California RUFADAA, which provides procedures for the treatment of digital assets of a user after a user’s death. While forty-six states have either enacted the ULC’s RUFADAA in

115. *RUFADAA*, *supra* note 98, at § 15(c).

116. California RUFADAA, *supra* note 97, at § 880(c).

117. “A fiduciary acting within the scope of the fiduciary’s duties is an authorized user of the property of the decedent, [protected person], principal, or settlor for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including [this state’s law on unauthorized computer access].” *RUFADAA*, *supra* note 98, at § 15(d).

118. “A fiduciary with authority over the tangible, personal property of a decedent, [protected person], principal, or settlor: (1) has the right to access the property and any digital asset stored in it; and (2) is an authorized user for the purpose of computer-fraud and unauthorized-computer-access laws, including [this state’s law on unauthorized computer access.” *Id.* at § 15(e).

119. “A fiduciary acting within the scope of the fiduciary’s duties is an authorized user of the property of the decedent or settlor for the purpose of applicable computer-fraud and unauthorized-computer-access laws.”). California RUFADAA, *supra* note 97, at § 880(d).

120. “The following shall apply to a fiduciary with authority over the tangible, personal property of a decedent or settlor: (1) The fiduciary has the right to access the property and any digital asset stored in it. . . . (2) The fiduciary is an authorized user for purposes of any computer-fraud and unauthorized-computer-access laws.” *Id.* at § 880(e).

full or introduced it to be enacted, California is the only state to enact RUFADAA in part, including the provisions dealing with a deceased user and excluding the provisions dealing with a living user (whether incapacitated or not). The California RUFADAA should be amended to address living users. If the California RUFADAA is not so amended, then it should be amended (1) to clarify the treatment of designated recipients acting for living users and (2) to delete apparently superfluous references to powers of attorney and principals, which the California RUFADAA does not recognize.

