

Georgia State University Law Review

Volume 35
Issue 1 Fall 2018

Article 12

12-1-2018

SB 301 - Wills, Trusts, and Administration of Estates

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Recommended Citation

Morgan S. Ownbey & Paul M. Napolitano, *SB 301 - Wills, Trusts, and Administration of Estates*, 35 GA. ST. U. L. REV. (2018).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol35/iss1/12>

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WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES

Trustees: Amend Title 53 of the Official Code of Georgia Annotated, Relating to Wills, Trusts, and Administration of Estates, so as to Enact the “Revised Uniform Fiduciary Access to Digital Assets Act”; To Extend a Fiduciary’s Powers to Include Managing Tangible Property and Digital Assets; To Provide for Exceptions; To Provide For a Short Title; To Provide for Definitions; To Amend Chapter 6B of Title 10, Article 2 of Chapter 9 of Title 15, Title 29, and Code Section 53-12-2 of Article 1 of Chapter 12 of Title 53 of the Official Code of Georgia Annotated, Relating to the “Uniform Power of Attorney Act,” Jurisdiction, Power, and Duties of the Probate Court, Guardian and Ward, and Definitions for Trust, Respectively, so as to Provide Conforming Cross-References for a Conservator; To Provide for Related Matters; To Provide for an Effective Date; To Repeal Conflicting Laws; And for Other Purposes

CODE SECTIONS:	O.C.G.A. §§ 53-13-1, -2, -3, -10, -11, -12, -13, -14, -15, -16, -17, -18, -19, -20, -30, -31, -40 (amended); 10-6B-2, -40 (amended); 15-9-30 (amended); 29-3-22 (amended); 53-12-2 (amended)
BILL NUMBER:	SB 301
ACT NUMBER:	560
GEORGIA LAWS:	2018 Ga. Laws 1089
SUMMARY:	The Act creates the “Revised Uniform Fiduciary Access to Digital Assets Act,” extends fiduciaries’ powers to include managing tangible property and digital assets, and provides conforming cross-references for a conservator.
EFFECTIVE DATE:	July 1, 2018

History

Prior to Senate Bill (SB) 301, Georgia law allowed a fiduciary to have access and authority over physical property and assets but did not provide for the management of digital assets and electronic communications.¹ To that end, “[c]urrent law ha[d] not kept up with the pace of technology,”² and fiduciaries lacked the ability to manage digital assets—a necessary action in performing their required duties.³ SB 301 aims to address the disconnect between the pace of technology and Georgia statutory law by “extending fiduciary powers to include management of digital assets and electronic communications.”⁴ The author of the bill, Senator John F. Kennedy (R-18th), said he supported the bill because the “legislation modernizes [Georgia’s] state code to reflect our ever-changing technological society and the importance that each of us places on non-tangible assets in the [twenty-first] century.”⁵ Senator Kennedy additionally emphasized that the bill “modernizes fiduciary law for the internet age” and “gives internet users the power to plan for the management and disposition of their digital assets.”⁶

With SB 301, Georgia followed thirty-nine other states, including all of Georgia’s neighboring states, in enacting this type of legislation.⁷ This legislative action stems from the Uniform Law Commission’s (ULC) efforts in issuing the Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA or RUFADAA) in 2015.⁸ Issuing the RUFADAA in 2015 marked the culmination of three years of efforts to propose the uniform fiduciary access law.⁹ The ULC has existed for more than 120 years, and it

1. Electronic Mail Interview with Sen. John F. Kennedy (R-18th), Majority Caucus Chairman (May 30, 2018) (on file with Georgia State University Law Review) [hereinafter Sen. Kennedy Interview].

2. *Id.*

3. Victoria Blachly, *Uniform Fiduciary Access to Digital Assets Act: What UFADAA Know*, 29 PROB. & PROP. 8, 11 (2015).

4. Sen. Kennedy Interview, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. See NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, *Fiduciary Access to Digital Assets Act, Revised* (2015), [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)) [<https://perma.cc/C2P8-MQJK>] (last visited Nov. 5, 2018).

9. Blachly, *supra* note 3, at 9.

seeks to “provide[] states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”¹⁰ To become a ULC member, an individual “must be [a] lawyer[], qualified to practice law.”¹¹ ULC members are “practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state [and D.C. and territory] governments . . . to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.”¹² The ULC created a drafting committee in 2012 “to consider a uniform act to vest fiduciaries with the authority to manage and distribute digital assets, copy or delete digital assets, and access digital assets.”¹³ The ULC approved UFADAA on July 16, 2014, and issued the revised uniform law, RUFADAA, in 2015.¹⁴ The reasons for the ULC’s revisions to the uniform law and Georgia’s delay in adopting the uniform law are discussed further in the Analysis section below.

Influential stakeholders responsible for SB 301’s introduction include: South Georgia Alternative Dispute Resolution (ADR) Mediations and Arbitrations; leaders of the Legislative Committee of the State Bar’s Fiduciary Law Section; RUFADAA advocates; prominent companies that store digital assets (including Google and Facebook); Georgia probate judges; other Georgia state judges; members of the Senate Committee on Judiciary; members of the House Judiciary Committee; and Georgia lawyers whose practice involves fiduciary duties.¹⁵ SB 301 allows fiduciaries to gain access to digital assets like they are able to access tangible assets.¹⁶ The ULC defines a fiduciary as “a trusted person with the legal authority to manage another’s property” who also has a “duty to act in that person’s best interest.”¹⁷ For most people, “some of their property

10. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, *supra* note 8.

11. *Id.*

12. *Id.*

13. Blachly, *supra* note 3, at 9.

14. *Id.*

15. Sen. Kennedy Interview, *supra* note 1.

16. *Id.*

17. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, *The Revised Uniform Fiduciary Access to Digital Assets: A Summary*, <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Revised%202015/Revised%20UFADAA%20-%20Summary%20-%20Sep%202017.pdf> [<https://perma.cc/JLL9-ARZG>] (last visited June 17, 2018).

and communications are stored as data on a computer server and accessed via the internet.”¹⁸ The ULC explains that “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.’”¹⁹

Without this legislation, “[a]ccess to digital assets is usually governed by a terms-of-service agreement rather than by property law . . . [which] creates problems when internet users die or otherwise lose the ability to manage their own digital assets.”²⁰ SB 301, which Georgia modeled after the RUFADAA, aims to address that problem by “extending fiduciary powers to include management of digital assets and electronic communications” and “provid[ing] custodians . . . of digital assets and electronic communications legal authority to deal with the fiduciaries of their users.”²¹ Having access to digital accounts enables fiduciaries to fulfill their obligation to act in the decedent’s best interest by taking actions to protect digital assets, including preventing identity theft, marshaling and collecting assets, and consoling grieving loved ones.²² In passing this law, Georgia lawmakers ensured that “[u]sers must give the fiduciary the right to access the content of digital assets,” and the “fiduciary for digital assets is subject to the same fiduciary duties that apply to the management of tangible assets.”²³

Bill Tracking of SB 301

Consideration and Passage by the Senate

Senator John Kennedy (R-18th) sponsored SB 301 in the Senate.²⁴ SB 301 was placed in the Senate Hopper on March 28, 2017.²⁵ The Senate completed a first read of the bill on January 9, 2018, and

18. *Id.*

19. *Id.*

20. *Id.*

21. Sen. Kennedy Interview, *supra* note 1.

22. Blachly, *supra* note 3, at 10–12.

23. Sen. Kennedy Interview, *supra* note 1.

24. Georgia General Assembly, SB 301, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20172018/SB/301> [<https://perma.cc/BSE6-3WBH>] [hereinafter SB 301 Bill Tracking].

25. *Id.*

Lieutenant Governor Casey Cagle (R) committed the bill to the Senate Committee on Judiciary.²⁶ On February 8, 2018, the Committee favorably reported the bill by Committee substitute.²⁷

The Committee substitute included most of the original bill language, merely removing a few statutory cross-references to the federal code and cleaning up language that did not change the bill's substance.²⁸ Because SB 301's "Uniform Power of Attorney Act" from the 2016–2017 legislative session was voted on, passed, and signed into law on May 8, 2017, the Committee ensured that SB 301 was consistent with the last session's bill when it came into effect.²⁹ Additionally, the Committee made the changes to ensure uniform definitions between SB 301 and Titles 10, 29, and 53 of the Georgia Code.³⁰

The Senate read the bill for the second time on February 12, 2018, and for a third time on February 20, 2018.³¹ The Senate did not offer any floor amendments to the bill during the second and third reading.³² After the third reading on February 20, 2018, the Senate voted and passed the Committee substitute of SB 301, by a vote of 54 to 0.³³

Consideration and Passage by the House

Representative Barry Fleming (R-121st) sponsored SB 301 in the House.³⁴ The House read the bill for the first time on February 21, 2018.³⁵ Speaker of the House, Representative David Ralston (R-7th), committed the bill to the House Judiciary Committee.³⁶ After the second reading in the House on February 22, 2018, the Committee

26. State of Georgia Final Composite Status Sheet, SB 301, May 8, 2018.

27. *Id.*

28. *Compare* SB 301, as introduced, 2018 Ga. Gen. Assemb., *with* SB 301 (LC 29 7816ERS), 2018 Ga. Gen. Assemb.

29. *Compare* O.C.G.A. § 10-6B-1 (2017), *with* SB 301, as introduced.

30. *Compare* O.C.G.A. §§ 10-6B-2, 29-1-1 to -2, 53-12-2 (Supp. 2018), *with* SB 301 (LC 29 7816ERS).

31. State of Georgia Final Composite Status Sheet, SB 301, May 8, 2018.

32. *Id.*

33. Georgia General Assembly, SB 301, Senate Vote #476 (Feb. 20, 2018).

34. SB 301 Bill Tracking, *supra* note 24.

35. State of Georgia Final Composite Status Sheet, SB 301, May 8, 2018.

36. *Id.*

reported favorably on the bill.³⁷ The Committee did not offer any amendments during or after the second reading.³⁸ On March 19, 2018, the House read SB 301 for a third time, passed SB 301 by a vote of 162 to 2.³⁹ The bill's sponsor, Representative Fleming, transmitted the bill back to the Senate, and the Senate sent SB 301 to Governor Nathan Deal (R) on April 5, 2018.⁴⁰ Governor Deal signed the bill into law on May 8, 2018, and the bill became effective on July 1, 2018.⁴¹

The Act

The Act amends the following portions of the Official Code of Georgia Annotated: Title 53, relating to wills, trusts, and administration of estates; Chapter 6B of Title 10, relating to Georgia's rules for Power of Attorney; Article 2 of Chapter 9 of Title 15, relating to the duties of state probate courts; and Article 2 of Chapter 12 of Title 53, relating to the "Uniform Power of Attorney Act."⁴² The overall purpose of the Act is to extend fiduciary powers to include digital assets along with tangible assets and to provide custodians authority over fiduciaries' access to digital assets.⁴³

Section 1

Section 1 of the Act, which amends Chapter 13 of Title 53 of the Official Code of Georgia Annotated, is split into four articles.

Article 1 relates to the definitions, incorporating definitions from other Code sections while providing new definitions for Act-specific terms, for example "digital asset."⁴⁴ The definitions section also refers to definition sections throughout the Georgia Code.⁴⁵

37. *Id.*

38. *Id.*

39. Georgia General Assembly, SB 301, House Vote #714 (Mar. 19, 2018).

40. State of Georgia Final Composite Status Sheet, SB 301, May 8, 2018.

41. *Id.*

42. 2018 Ga. Laws 1089

43. *Id.*

44. 2018 Ga. Laws 1089, § 1, at 1090–92.

45. *See id.* ("‘Conservator’ means a person appointed: Pursuant to Code section 7-1-640").

Article 2 relates to a user's right to direct and designate the disclosure of his or her digital assets along with the powers of the custodian regarding the digital assets.⁴⁶ Specifically, Code section 53-13-10 expands the reach of a custodian of a will or trust to the digital assets of the user, whereas a custodian only had purview over the user's tangible assets prior to SB 301's enactment.⁴⁷ In the following Code section, Code section 53-13-11, the Act clarifies that the Chapter does not impact existing terms-of-service agreements and does not extend fiduciaries' rights beyond those provided to the user.⁴⁸ The section also provides that the user, federal law, or a terms-of-service agreement may modify the rights given in the Act.⁴⁹

Article 2 then prescribes when a custodian may use their discretion in disclosing digital assets in Code section 53-13-12.⁵⁰ Subsection (12) gives the custodian discretion regarding the scope of the user's account that may be disclosed to the fiduciary or designated recipient for the fiduciary to adequately perform his or her duties.⁵¹ In addition, the custodian may charge reasonable administrative fees for disclosing digital assets from the user's account.⁵²

The subsequent Code section of Article 2, Code section 53-13-13, provides the procedure that a user's personal representative must complete before the custodian of the digital assets will disclose the assets.⁵³ The required forms ensure that the user's digital assets are properly protected and distributed.⁵⁴ The requirements found in subsection (13) are substantially the same for subsections (14)–(16)

46. 2018 Ga. Laws 1089, § 1, at 1092.

47. *Id.*

48. *Id.* at 1093.

49. *Id.*

50. *Id.* at 1093-94.

51. *Id.*

52. 2018 Ga. Laws 1089, § 1, at 1093.

53. *Id.* at 1094.

54. *Id.* (requiring documents include: "(1) A written request for disclosure in physical or electronic form; (2) A certified copy of the death certificate of the user; (3) A certified copy of the letters testamentary, letters of administration, or other letters of appointment of the personal representative; (4) Unless 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"). Subsection 5 provides for additional information at the discretion of the custodian. *See id.*

and (18)–(20), which relate to the catalogues and the content of electronic communication sent or received by the user.⁵⁵

Article 3 of Section 1 imposes the legal duties on a fiduciary, including the duty of care, loyalty, and confidentiality.⁵⁶ The Article also provides for the fiduciary’s authority over the decedent’s property, including the right to access the digital assets and to request termination of the user’s account by a custodian of the user’s digital assets.⁵⁷ Upon a request to terminate, the Article describes the process that the custodian must follow when terminating the user’s account.⁵⁸

Article 4 of Section 1 modifies, limits, and supersedes the applicability of the Signatures in Global and National Commerce Act.⁵⁹ Article 4 does not, however, modify, limit, or supersede Section 101(c) of the aforementioned Act or the notices described in Section 103(b) of that Act.⁶⁰

Section 2

Section 2 amends paragraph (10) of Code section 10-6B-2, relating to the “Uniform Power of Attorney Act,” to add definitions relating to “Property.”⁶¹ The Act defines “digital assets and electronic communications” as “anything that may be the subject of ownership.”⁶²

Section 3

Section 3 revises paragraph (8) of Code section 10-6B-40(a) to use Code section 53-13-2 of the RUFADAA to define what “exercise authority over content of electronic communication” as means, instead of using 18 U.S.C. § 2510(12) to define the term.⁶³

55. *Id.* at 1094–97.

56. *Id.* at 1097.

57. 2018 Ga. Laws 1089, § 1, at 1098.

58. *Id.*

59. *Id.* at 1099.

60. *Id.*

61. 2018 Ga. Laws 1089, § 2, at 1099.

62. *Id.*

63. 2018 Ga. Laws 1089, § 3, at 1099.

Section 4

Section 4 adds a requirement to Article 2 of Chapter 9 of Title 15 of the Georgia Code relating to the subject matter jurisdiction and powers of the probate courts in Georgia.⁶⁴ The addition requires that “all matters may be conferred on [the probate court] by Chapter 13 of Title 53,” incorporating the Act into the probate subject matter jurisdiction.⁶⁵

Section 5

Section 5 amends paragraph (1) of subsection (b) of Code section 29-3-22 to allow the conservator to request the continuing power to “[a]ccess the digital assets of the minor, pursuant to Code section 53-13-20.”⁶⁶ This is an optional power given to a conservator, and allows the conservator the opportunity to access the digital assets of a protected person after a court hearing.⁶⁷

Section 6

Section 6 amends paragraph (1) of subsection (b) of Code section 29-5-23 to give a conservator the option to request the continuing power to access the digital assets of a ward as part of a petition for appointment.⁶⁸

Section 7

Section 7 amends paragraph (9) of Code section 53-12-2 to include “digital assets” and “electronic communications, as such terms are defined in Code section 53-13-2” in the definition of property.⁶⁹

64. 2018 Ga. Laws 1089, § 4, at 1099.

65. *Id.*

66. 2018 Ga. Laws 1089, § 5, at 1100.

67. *Id.*

68. 2018 Ga. Laws 1089, § 6, at 1100.

69. 2018 Ga. Laws 1089, § 7, at 1100.

Section 8

Section 8 sets the effective date for the Act as July 1, 2018.⁷⁰

Section 9

Section 9 repeals all laws in conflict with the Act.⁷¹

*Analysis**RUFADAA: Reaching a Beneficial Compromise Between Industry and the ULC*

The RUFADAA represents a compromise between the technology industry's online providers and legislation drafters at the ULC.⁷² Since its issuance in 2015, RUFADAA has become one of the more successful uniform acts.⁷³ As of July 2018, forty-two jurisdictions (specifically, forty-one states, including Georgia, and the United States Virgin Islands) have adopted RUFADAA, and four additional states and the District of Columbia introduced it in 2018.⁷⁴ California, notably, did not enact RUFADAA, instead adopting a modified version of the law.⁷⁵ The California law, introduced as AB 691 in 2015, is narrower than RUFADAA.⁷⁶ Specifically, California enacted a "partial version [of RUFADAA] that allows access to assets owned by decedent[s]' estates but omitted the provisions of RUFADAA dealing with trustees, conservators, and agents under powers of attorney."⁷⁷ Because of these differences, "[t]he ULC does

70. 2018 Ga. Laws 1089, § 8, at 1101.

71. 2018 Ga. Laws 1089, § 9, at 1101.

72. Michael D. Walker, *The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age*, 52 REAL PROP, TR. & EST. L.J. 52, 59 (2017).

73. Electronic Mail Interview with Nikola R. Djuric, Chair of the Legislation Committee and the Trust Code Revision Committee of the State Bar of Georgia Fiduciary Law Section (June 30, 2018) (on file with Georgia State University Law Review) [hereinafter Djuric Interview].

74. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *supra* note 8.

75. Djuric Interview, *supra* note 73.

76. See CBA Regulatory Compliance Bulletin, *State Adopts Uniform Fiduciary Access to Digital Assets Act*, CAL. BANKERS ASS'N (Dec. 5, 2016), https://www.calbankers.com/sites/main/files/file-attachments/digital_assets_0.pdf [<https://perma.cc/S8T7-NV3K>].

77. Electronic Mail Interview with Benjamin Orzeske, Chief Counsel, Uniform Law Commission (July 30, 2018) (on file with Georgia State University Law Review) [hereinafter Orzeske Interview].

not count California’s law as uniform.”⁷⁸ “California is of particular importance, because many online service providers’ [terms-of-service] agreements invoke California law for dispute resolution.”⁷⁹

Generally, interest holders, including fiduciaries, online providers, and users, “acknowledge the advantage of a uniform law on this issue.”⁸⁰ Estate law in the United States “is governed at the state level.”⁸¹ There are public policy benefits to adopting a uniform law on this issue to “keep pace with the shift to the digital realm.”⁸² As Mr. T. Kyle King, a practicing trusts and estates lawyer involved in the drafting of SB 301, explains:

The photograph albums, checkbook registers, and safe deposit boxes used by prior generations have been replaced by the social media accounts, online banking portals, and e-commerce websites that now are used in the management and storage of such property interests. Digital assets, whether having monetary worth or strictly sentimental value, are not a new form of property, but they present new challenges for the fiduciaries called upon to manage them.⁸³

Moreover, as the ULC notes, “[d]igital assets travel across state lines nearly instantaneously.”⁸⁴ Additionally, “people relocate more often than ever” in our “modern mobile society.”⁸⁵ The uniformity across states enacting RUFADAA “ensures that fiduciaries in every

78. *Id.*

79. Anne W. Coventry, *Update on Fiduciary Access to Digital Assets*, PASTERNAK & FIDIS (Feb. 12, 2016), <http://www.pasternakfidis.com/update-on-fiduciary-access-to-digital-assets-2/> [https://perma.cc/ER66-53SR].

80. *Id.*

81. Rosalyn Retkwa, *Say You’re Dead—Who Gets Access to Your Online Accounts?*, CBS NEWS (Oct. 21, 2016, 5:30 AM), <https://www.cbsnews.com/news/say-youre-dead-who-gets-access-to-your-online-accounts/> [https://perma.cc/K65L-TBWY].

82. Electronic Mail Interview with T. Kyle King, Fellow of The American College of Trust and Estate Counsel, Partner with Hodges, McEachern & King, Attorneys at Law (July 10, 2018) (on file with Georgia State University Law Review) [hereinafter King Interview].

83. *Id.*

84. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, *Why Your State Should Adopt the Revised Uniform Fiduciary Access to Digital Assets Act (2015)*, <http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/Revised%202015/Revised%20UFADAA%20-%20Why%20Your%20State%20Should%20Adopt%20-%20Sep%202017.pdf> [https://perma.cc/7FXE-XTZK] (last visited July 30, 2018).

85. *Id.*

state will be subject to the same rules for accessing [users'] digital assets, and the custodian firms that store [users'] digital assets will have a single legal standard applicable to their users in every state.”⁸⁶

The ULC issued the original UFADAA in 2014.⁸⁷ Lobbyists for online providers strongly opposed it because of the latitude that it afforded fiduciaries to administer digital assets, including allowing fiduciaries to disclose electronic communications without prior consent.⁸⁸ Online providers raised four arguments against UFADAA: (1) “that the default position of a decedent or incapacitated person was that their digital assets should *not* be disclosed to anyone, even to their fiduciary”; (2) that federal law preempted UFADAA and that “UFADAA could not create a legal presumption of ‘lawful consent’ for purposes of the [Stored Communications Act, or] SCA”; (3) that “UFADAA should not override or supersede their [terms-of-service agreements] in any way”; and (4) “that the [online] providers [had] concern[s] about civil litigation liability exposure and the cost of complying with UFADAA.”⁸⁹

Industry responded to UFADAA with its own attempt at a uniform act as well.⁹⁰ NetChoice, a trade association representing e-commerce and online businesses including Facebook, Google, Yahoo!, eBay, and AOL, created “its own version of an act providing for more limited access to fiduciaries.”⁹¹ That uniform act, the Privacy Expectation Afterlife and Choices Act (PEAC), contrasted with UFADAA by requiring a fiduciary seeking access to an online account to obtain an order from a probate court.⁹² The PEAC did not generally provide a fiduciary much power to gain access from an online provider to a decedent’s or incapacitated person’s digital assets.⁹³ Virginia was the only state to adopt the PEAC.⁹⁴

Due to online providers’ lobbying efforts against it, UFADAA also only passed in one state, Delaware, which adopted a modified version

86. *Id.*

87. Walker, *supra* note 72, at 58.

88. *Id.*

89. *Id.*

90. See Djuric Interview, *supra* note 73.

91. Jeehyeon (Jenny) Lee, Note, *Death and Live Feeds: Privacy Protection in Fiduciary Access to Digital Assets*, 654 COLUM. BUS. L. REV. 654, 673 (2015).

92. *Id.*

93. *Id.* at 673–74.

94. Coventry, *supra* note 79.

of a 2014 draft of UFADAA that went into effect in January 2015.⁹⁵ With such scant adoption and so much opposition from industry, UFADAA became one of the ULC's most unsuccessful uniform acts.⁹⁶ Georgia planned to introduce UFADAA in 2015, but once Georgia saw the issues with UFADAA in other states, Georgia withdrew it from consideration in 2015.⁹⁷

The ULC went “back to the drawing board” after the “universal failure of UFADAA” and produced RUFADAA in 2015.⁹⁸ RUFADAA is “a compromise between the estate lawyers . . . and the service providers, which not only have to abide by . . . federal and state privacy laws but also believed many of their account holders would want to maintain their privacy after death.”⁹⁹ “Unlike . . . UFADAA, which granted fiduciaries *presumptive* authority to access digital assets, RUFADAA places great emphasis upon whether the . . . user *expressly* consented to the disclosure of the content of the digital assets”¹⁰⁰ RUFADAA, therefore, reached a compromise by “respect[ing] the concept of ‘lawful consent’ under the SCA, and, unlike UFADAA, . . . not attempt[ing] to impute such lawful consent to the fiduciary.”¹⁰¹ RUFADAA accomplished such a compromise while allowing fiduciaries to accomplish their duties to effectively manage individuals’ assets by doing the following:

[RUFADAA] carves out an exception for a subset of digital assets called “electronic communications” under the 1986 federal [SCA]. These are communications between private parties, including email messages, text messages, and social media posts viewable by a limited group of contacts (as opposed to posts viewable by the general public). Under RUFADAA, fiduciaries do not have access to the content of electronic communications unless the user granted access in a will, trust, power of attorney, or similar document. However, in order to manage the estate effectively, fiduciaries have default access to the “catalog” of electronic communications—essentially a list of messages received with the address of the sender

95. Walker, *supra* note 72, at 58–59; Lee, *supra* note 91, at 671.

96. Djuric Interview, *supra* note 73.

97. *Id.*

98. King Interview, *supra* note 82.

99. Retkwa, *supra* note 81.

100. Walker, *supra* note 72, at 59.

101. *Id.*

and recipient, date, and time. This allows the fiduciary to identify correspondents of the decedent (e.g., financial institutions, utilities, credit card companies, etc.) and contact those companies to locate assets and liabilities of the estate.¹⁰²

By striking an appropriate balance between the interests and objectives of users, fiduciaries, and the online industry, RUFADAA has provided a uniform law that most states, including Georgia, have enacted to keep pace in the ever-transforming digital age.¹⁰³

Georgia's Enactment of SB 301 and the Act's Challenges

Georgia followed RUFADAA in enacting SB 301.¹⁰⁴ The ULC highlights Georgia as a state that enacted the uniform law.¹⁰⁵ The primary way in which Georgia deviated from RUFADAA was in modifying the definitions section to ensure that the defined terms were not “circular” (i.e., a defined term that refers to other defined terms and then those other defined terms refer back to the first defined term).¹⁰⁶ According to the Chair of the Legislation Committee of the State Bar of Georgia Fiduciary Law Section, Mr. Nick Djuric, an example of “circular” defined terms under RUFADAA are “[a]ccount,” “[u]ser,” and “[c]ustodian.”¹⁰⁷ Georgia addressed these circular definitions before enacting RUFADAA through SB 301.¹⁰⁸ Additionally, Georgia lawmakers ensured that SB

102. Orzeske Interview, *supra* note 77.

103. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *supra* note 8; King Interview, *supra* note 82.

104. Sen. Kennedy Interview, *supra* note 1; Djuric Interview, *supra* note 73; King Interview, *supra* note 82.

105. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *supra* note 8.

106. Djuric Interview, *supra* note 73.

107. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (2015) 3–5 (Mar. 8, 2016) http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf [<https://perma.cc/6MYS-P7XR>] (“(1) ‘Account’ means an arrangement under a terms-of-service agreement in which a *custodian* carries, maintains, processes, receives, or stores a digital asset of the *user* or provides goods or services to the *user* . . . (8) ‘Custodian’ means a person that carries, maintains, processes, receives, or stores a digital asset of a *user* . . . (26) ‘User’ means a person that has an *account* with a *custodian*.”) (emphasis added); see Djuric Interview, *supra* note 73.

108. 2018 Ga. Laws 1089, § 1, at 1090–92.

301 would fit with the Georgia Code, ultimately deciding on Title 53 of the Georgia Code as the most appropriate place for the Act.¹⁰⁹

Unintended consequences resulting from the enactment of SB 301 were limited by a number of factors.¹¹⁰ First, because SB 301 followed thirty-nine other states that already enacted RUFADAA, Georgia “benefit[ed] [by learning] from other states’ experiences.”¹¹¹ Second, as discussed above, Georgia “augmented [RUFADAA] significantly (particularly in the definitions section) to provide clarity and maintain consistency with existing [Georgia] law.”¹¹² Third, “in addition to adding a new chapter to Title 53, SB 301 made accompanying amendments to related provisions to permit the new chapter to mesh effectively with prior statutes.”¹¹³ With sharp definitions and precise “statutory statements of applicability, RUFADAA should avoid any significant unanticipated impact.”¹¹⁴

One challenge for SB 301, and RUFADAA generally, is for individual users, online providers, and fiduciaries to fully understand and consider the law.¹¹⁵ For example, regarding the online tool option outlined under the law, “very few service providers have such tools.”¹¹⁶ Google and Facebook are examples of two service providers “ahead of the curve” with online tools that allow individuals to designate people to access their content, but other companies will need to follow suit for the online tool option to carry weight under the law.¹¹⁷ Regarding individual users, it is important for them to understand and consider the implications of SB 301 because, as Mr. Djuric noted, there will be circumstances when individuals grant fiduciaries access to online communications without fully considering what that means.¹¹⁸ Mr. Djuric, as a

109. Djuric Interview, *supra* note 73.

110. King Interview, *supra* note 82.

111. *Id.*; Sen. Kennedy Interview, *supra* note 1.

112. King Interview, *supra* note 82.

113. *Id.*

114. *Id.*

115. *See* Retkwa, *supra* note 81.

116. *Id.*

117. *Id.* “Under RUFADAA, if the instructions in the online tool and in the estate plan are in conflict, the online tool takes precedence, said Benjamin Orzeske, legislative counsel at the Uniform Law Commission.” *Id.* “But if no online tool exists or the account holder hasn’t used it, RUFADAA is the default, and it allows the user to ‘give legally enforceable directions for the disposition of digital assets in a will, trust, power of attorney, or other written record,’ the ULC states.” *Id.*

118. Djuric Interview, *supra* note 73.

practicing trusts and estates lawyer, noticed that sometimes clients pause and consider whether they really want their spouse or whomever they name as their agent with powers of attorney to have full access to their electronic communications.¹¹⁹ Finally, fiduciaries, as those managing individuals' estates, must understand SB 301 to comply with their "*legal duty* to marshal and protects assets of the decedent or protected person."¹²⁰

Georgia's enactment of SB 301, making minor adjustments to the RUFADAA to comport with the Georgia Code, gives fiduciaries the ability to effectively manage decedents' and protected persons' assets in the digital age. The success of the uniform act in the numerous states that enacted the RUFADAA prior to Georgia's adoption of the Act in 2018 suggests that the challenges of the new law in Georgia should be relatively scarce. Even though fiduciaries have an increased ability to effectively manage individuals' assets by default, they should still discuss the full spectrum of available access options with their clients to the greatest extent possible.

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119. *Id.*; Profile of *Nikola R. Djuric*, BOWDEN SPRATT LAW FIRM, <https://www.bowdenspratt.com/bio/nick-djuric/> [<https://perma.cc/UK5B-JDEG>] (last visited July 30, 2018).

120. Blachly, *supra* note 3, at 9.