BEYOND THE GRAVE: A FIDUCIARY'S ACCESS TO A DECEDENT'S DIGITAL ASSETS

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Introduction

Ryan Coleman passed away suddenly and tragically in his sleep at the age of twenty-four on Christmas Day.[1] His initial death certificate stated that the cause of death was "pending further study."[2] The autopsy report ultimately came back inconclusive—Ryan had died of unknown causes.[3] Left with questions unanswered, Ryan's parents, Gregory and Adrienne, reached out to Apple in hopes of retrieving data from Ryan's iPhone.[4] After Apple turned them away, they petitioned the Surrogate's Court of New York, Westchester County, seeking a court order granting them access to Ryan's digital assets as personal representatives of his estate.[5] They set out to identify and collect any unknown assets, determine whether Ryan suffered from any medical conditions that his younger siblings may also have, and decide whether to pursue any legal action on behalf of Ryan's estate.[6] The court denied their request because Ryan died without a will and failed to express his consent to disclose the contents of his digital assets before his death.[7] It is because of Ryan's supposed "choice" to die intestate that Ryan's parents must

[1] *In re* Coleman, 96 N.Y.S.3d 515, 516 (Sur. Ct. 2019).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 518–19.

now grapple with the reality that they may never receive the answers to those unanswered questions.[8]

Technology has drastically altered the ways in which humans interact and connect. The statistics are staggering: 72% of American adults use social media;[9] 93% of American adults use the internet;[10] 85% of Americans own a smartphone;[11] and approximately 15% of Americans are invested in cryptocurrency.[12] Banks and financial institutions have urged their customers to "go paperless," opt for direct deposit, and pay their bills online in an effort to save the environment and reduce clutter.[13] While an estimated 45% to 74% of Americans still prefer a paper trail for billing statements,[14] paperless billing adoption rates are rising.[15] Thus, it is likely that consumer preferences will shift and that the trend in future years will depart from traditional paper. This is especially true as the world navigates the repercussions of the recent COVID-19 pandemic, which has forced many businesses to become more digitally connected and embrace a virtual work

8 *See* discussion *infra* Section I.C.2.

9 *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media [https://perma.cc/69H9-55PV].

10 *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband [https://perma.cc/J7ME-FRP2].

11 *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile [https://perma.cc/KZ6G-88NN].

12 Interestingly, more than half of those individuals invested in cryptocurrency for the first time during the first half of 2020. Ron Shevlin, *The Coronavirus Cryptocurrency Craze: Who's Behind the Bitcoin Buying Binge?*, FORBES (July 27, 2020, 8:00 AM), https://www.forbes.com/sites/ronshevlin/2020/07/27/the-coronavirus-cryptocurrency-craze-whos-behind-the-bitcoin-buying-binge [https://perma.cc/GM3B-9XG7].

13 AT&T, for example, adopted a default system whereby customers were automatically switched to electronic billing unless customers contacted the company to expressly opt out. Ruth Susswein, *Preserving Paper Choice: Not Everyone Is Ready (or Wants) to Transition to Electronic Delivery*, CONSUMER ACTION NEWS (Jan. 15, 2019), https://www.consumer-action.org/news/articles/paper-or-digital-winter-2018-2019 [https://perma.cc/Y9B7-UZ8J]. Other companies have pressured consumers to switch by charging a monthly fee to continue receiving paper statements. Herb Weisbaum, *Switching to Digital Billing Statements? Here's What You Need to Know.*, NBC NEWS (Jan. 23, 2019, 8:30 AM), https://www.nbcnews.com/better/lifestyle/switching-digital-billing-statements-here-s-what-you-need-know-ncna961176 [https://perma.cc/CJ6Y-Q5PD].

14 Susswein, *supra* note 13.

15 Rachel Cooper & Keenan Samuelson, *Trends in Billing and Payment Interactions: Findings from the 2018 E Source Digital Metrics Survey*, E SOURCE, https://www.esource.com/10144-013/trends-billing-and-payment-interactions [https://perma.cc/9VRS-SHUP] (reporting an average paperless billing adoption rate of twenty-five percent for all customer segments in 2018, an increase from nineteen percent in 2016).

environment.[16] Given the increase in mobile access and improvement in computer literacy, consumers inevitably feel it is more convenient to digitize their statements and payment processes.[17]

A reliance on digital assets has created unique challenges in the law. "Digital assets" are defined as "electronic record[s] in which an individual has a right or interest."[18] As technology advances to accommodate changes in consumer choices, trusts and estates law has tried to keep pace with these developments, and estate planning attorneys have modified their practices.[19] The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) is one attempt at addressing the issue of digital assets in estate administration.[20] This Note argues that RUFADAA, while a step in the right direction, falls short of achieving its ultimate goal, especially in the manner in which courts currently construe the statute. Placing an unjustifiably heavy reliance on privacy concerns, the Act overshadows the fiduciary's responsibility to properly and efficiently administer the estate.

This Note proceeds in three Parts. Part I discusses the rationales behind these two competing interests, chronicles the history behind RUFADAA, and outlines its interplay with other relevant laws and policies.[21] It then highlights the ways in which the law obstructs rather than facilitates administration of the estate, including a failure to effectuate the decedent's intent.[22] Part II illustrates why the postmortem right to privacy is misguided and proposes an amendment to RUFADAA that may relieve the burden weighing on fiduciaries.[23] It then examines several scenarios in which courts should be more willing to grant fiduciaries access to the contents of a decedent's communications.[24] Finally, Part III explores the ways in which individuals can escape the confines of the statute through education, creative lawyering, and the execution of various consent documents.[25]

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16 *See* Federica Saliola & Asif M. Islam, *How to Harness the Digital Transformation of the Covid Era*, HARV. BUS. REV. (Sept. 24, 2020), https://hbr.org/2020/09/how-to-harness-the-digital-transformation-of-the-covid-era [https://perma.cc/NNT8-QZC4].

17 Molly Wilkens, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037, 1038–39 (2011).

18 REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 2(10) (UNIF. L. COMM'N 2015).

19 *See generally* Sasha A. Klein & Mark R. Parthemer, *Who Will Delete the Digital You?: Understanding Fiduciary Access to Digital Assets*, PROB. & PROP., July–Aug. 2016, at 32.

20 *Id.* at 34.

21 *See infra* Section I.A.

22 *See infra* Section I.B.

23 *See infra* Sections II.A–II.B.

24 *See infra* Section II.C.

25 *See infra* Part III.

I. BACKGROUND

A. *A Fiduciary's Duty to Act in the Best Interests of the Estate Versus the Decedent's Right to Postmortem Privacy*

A personal representative is an individual appointed to manage the legal affairs and administer the estate of a deceased person.[26] Granted fiduciary authority, personal representatives are tasked with making decisions that will honor the decedent's wishes and benefit her intended beneficiaries.[27] They are confronted with the duty of settling and distributing the decedent's estate in a manner "as expeditiously and efficiently as is consistent with the best interests of the estate."[28] Importantly, to the extent that any causes of action survive the death of the decedent, personal representatives possess the standing to sue on behalf of the estate.[29]

In order to successfully preserve and administer the estate, representatives must first identify all of the decedent's assets[30] and obtain actual possession.[31] In fact, fiduciaries may face liability for negligently losing property, including failing to collect money owed to the decedent in a prompt manner.[32] Personal representatives employ numerous strategies to take inventory of assets, including searching

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26 *Personal Representative*, BLACK'S LAW DICTIONARY (11th ed. 2019). The category of "personal representative" can be distilled into two subcategories—administrators and executors. An "administrator" is appointed by the court to distribute the estate of an intestate decedent, i.e., one who dies without a will, in accordance with a state's statute of descent and laws of intestacy, whereas an "executor" is named by a testator to carry out the will's provisions. *Compare Administrator*, BLACK'S LAW DICTIONARY (11th ed. 2019), *with Executor*, BLACK'S LAW DICTIONARY (11th ed. 2019).

27 UNIF. PROB. CODE § 1-102(b)(2) (UNIF. L. COMM'N 2019) (stating that the purpose of the Probate Code is "to discover and make effective the intent of a decedent in distribution of the decedent's property"). In cases of intestacy, the Code espouses "intent-serving policies" and is "designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law. . . . [by] bringing them into line with developing public policy and family relationships." *Id.* art. II, prefatory note; *Id.* art. II, pt. 1, general cmt.

28 *Id.* § 3-703(a).

29 *Id.* § 3-703(c).

30 *See* Sandi S. Varnado, *Your Digital Footprint Left Behind at Death: An Illustration of Technology Leaving the Law Behind*, 74 LA. L. REV. 719, 734 (2014) ("Gaining awareness of the decedent's digital items is only the first step . . . .").

31 5 LINDA B. HIRSCHSON ET AL., WARREN'S HEATON ON SURROGATE'S COURT PRACTICE § 62.03 (7th ed. 2021) ("The estate fiduciary must proceed with all diligence to obtain actual possession of all personal property of the decedent in order to preserve it from waste and depreciation and to prevent it from falling into the hands of those who might secrete or convert it for their own use.").

32 *Id.*

through filing cabinets and opening mail delivered to the decedent's home address.[33] Fiduciaries are also invited to delve through the contents of a decedent's safe-deposit box in order to find her last will and testament, cash, collectibles, jewelry, and other documentary evidence of assets, such as insurance policies, deeds, contracts, bills of sale, and promissory notes.[34]

Fiduciaries are similarly obligated to "marshal and protect the decedent's digital assets."[35] A difficulty, however, has emerged: where individuals die with password-protected digital accounts, a personal representative might not even know that an asset exists.[36] The average user has approximately ninety digital accounts;[37] thus, the likelihood that a fiduciary overlooks the existence of one is high.[38] Even where an individual dies testate, it is unlikely that any useful "tracking" information will be written in their will; because a traditional will becomes a matter of public record upon the testator's death, specific enumeration of digital assets jeopardizes the entire estate plan by risking the security of assets left to beneficiaries.[39] The ultimate result is that assets remain "unfound," wreaking identity theft issues and causing the estate to suffer economic loss.[40] This concern is exacerbated further if, for example, the deceased "ran an online business and is the only

33 *Finding Assets*, ESTATEEXEC, https://www.estateexec.com/Docs/Finding_Assets (last visited Nov. 7, 2021); *Inventory and Management of Assets*, ALASKA CT. SYS. (July 28, 2014), http://courts.alaska.gov/shc/probate/probate-inventory.htm#find-property [https://perma.cc/689A-Q7FE] (describing helpful steps that administrators can take to find property owned by the decedent, including: (1) looking through the person's home, office, safe, and file cabinets; (2) collecting deeds, life insurance policies, stocks, cash, jewelry, or other valuable property; (3) collecting and reviewing legal, tax, and financial documents; and (4) reviewing the person's mail, including bank and loan statements).

34 *See* THEODORE E. HUGHES & DAVID KLEIN, THE EXECUTOR'S HANDBOOK: A STEP-BY-STEP GUIDE TO SETTLING AN ESTATE FOR PERSONAL REPRESENTATIVES, ADMINISTRATORS, AND BENEFICIARIES 105 (4th ed. 2013).

35 HIRSCHSON ET AL., *supra* note 31, § 62.03.

36 Varnado, *supra* note 30, at 734 ("If the decedent dies intestate or with a will that is silent as to digital items, the succession representative may be unaware of them, which will make these items difficult if not impossible to discover.").

37 Nate Lord, *Uncovering Password Habits: Are Users' Password Security Habits Improving?*, DIGIT. GUARDIAN: DATA INSIDER (Sept. 29, 2020), https://digitalguardian.com/blog/uncovering-password-habits-are-users-password-security-habits-improving-infographic [https://perma.cc/P4NV-BV3Z].

38 *See* Wilkens, *supra* note 17, at 1054 ("If widespread, [a company's refusal to provide account information] could detrimentally delay or impede estate administration. Without access to the email accounts through which a financial institution communicated with the decedent, an executor would likely have no access to e-statements with account numbers or contact information for the financial institution, and thus, no knowledge of an account's existence.").

39 Jamie Patrick Hopkins & Ilya Alexander Lipin, *Viable Solutions to the Digital Estate Planning Dilemma*, 99 IOWA L. REV. BULL. 61, 67 (2014).

40 *See infra* Section I.C.1.

person with access to incoming orders, the servers, corporate bank accounts, and employee payroll accounts."[41]

Estate planning practitioners and scholars argue it is imperative that fiduciaries should be granted access to a decedent's digital accounts.[42] They maintain that, although a catalogue of communications[43] might provide sufficient information for most fiduciaries to perform essential tasks, the process can be significantly prolonged or even impossible for the fiduciary who needs to dig beneath the surface to find certain accounts.[44] Given that many people now opt to receive billing and financial statements via email, a fiduciary might have to open the actual email to obtain the necessary information.[45] Rather than waiting for a representative employed by the service provider to relay information—i.e., engaging the services of an intermediary—fiduciaries should enjoy broad powers to view these communications because they are bound by a duty of confidentiality.[46] Ultimately, a person's digital assets can add significant monetary value to her estate, reveal her otherwise unknown preferences and wishes, and include family photos and videos or contact information that may

41 Gerry W. Beyer & Naomi Cahn, *Digital Planning: The Future of Elder Law*, 9 NAELA J. 135, 139–40 (2013).

42 *See, e.g.*, Klein & Parthemer, *supra* note 19, at 32 (stressing the importance of planning for fiduciary access so that people can "control [their] digital life and afterlife"). Indeed, Florida Senator Dorothy Hukill admitted, "When I can no longer access my assets, I need my fiduciary to be able to, otherwise commerce stops." *Id.* at 35.

43 A "[c]atalogue of electronic communications" is a term of art specifically defined under RUFADAA as a list of communications that includes the electronic addresses of the sender and recipient as well as the time and date of the communication. REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 2(4) (UNIF. L. COMM'N 2015).

44 *See, e.g.*, Gerry W. Beyer, *Web Meets the Will: Estate Planning for Digital Assets*, 42 NAEPC J. EST. & TAX PLAN. 28, 29–30 (2015); Cheryl Winokur Munk, *Make Sure to Include Digital Assets in Your Estate Plans*, WALL ST. J. (Apr. 19, 2020, 10:00 PM), https://www.wsj.com/articles/make-sure-to-include-digital-assets-in-your-estate-plans-11587161327 (last visited Nov. 21, 2021).

45 Harriet Lansing, Sjef van Erp, Radim Polčák, Jos Uitdehaag & Ernst Steigenga, Panel at the European Law Institute Annual Conference and General Assembly: The Revised Uniform Fiduciary Access to Digital Assets Act (Sept. 2, 2015), https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2015/LANSING_UFADAA_-_ELI_Presentation_v5_-_September_2015.pdf [https://perma.cc/XS6L-EF9V]; Lauren G. Barron & Samantha L. Heaton, *Digital Assets in Estate Administration: Concerns and Considerations for Fiduciaries*, INSIGHTS, Autumn 2014, at 13, 14 ("Watching a decedent's mail box (the kind where paper is deposited) will no longer uncover most accounts, investments, or liabilities. Instead, an estate executor now monitors the mail by opening the decedent's laptop and viewing the decedent's 'favorites' or 'bookmarks' in an online browser to find existing accounts.").

46 Elizabeth Sy, *The Revised Uniform Fiduciary Access to Digital Assets Act: Has the Law Caught Up with Technology?*, 32 TOURO L. REV. 647, 671 (2016).

identify her next of kin, an especially important consideration when that person dies intestate.[47]

1. The First Attempt: The Uniform Fiduciary Access to Digital Assets Act

Recognizing that access to a decedent's digital accounts is a priority, the Uniform Law Commission issued the Uniform Fiduciary Access to Digital Assets Act (UFADAA) in 2014.[48] UFADAA is model legislation that only becomes binding law once approved and enacted by each state legislature.[49] UFADAA grants the fiduciary the same rights and powers that the decedent would have enjoyed had she been alive.[50] The personal representative "steps into the shoes" of the decedent and is granted unfettered access to the content of the decedent's electronic communications, except as expressly prohibited by the decedent.[51] UFADAA goes one step further in curbing the power of service providers to deny fiduciary access: any provision in a terms-of-service agreement to that effect would be void as against public policy, unless the decedent agreed to such provision by an "affirmative act" distinct from her assent to the terms-of-service agreement.[52]

Less than one year later, privacy advocacy groups and technology media giants vehemently opposed UFADAA, arguing that digital assets should be treated in a special manner distinct from physical records for the following reasons: (1) online accounts are usually password protected; (2) digital accounts store content by default rather than by active choice; and (3) costs associated with saving and storing digital content are minimal.[53] In differentiating between tangible assets and

[47] Geoffrey S. Kunkler, *Considerations in Planning for and Administering Digital Assets*, 26 OHIO PROB. L.J. 250, 254 (2016).

[48] *See generally* UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT (UNIF. L. COMM'N 2014) (revised 2015).

[49] Klein & Parthemer, *supra* note 19, at 33.

[50] UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 3 (UNIF. L. COMM'N 2014) (revised 2015) ("[A] personal representative of the decedent has the right to access: (1) the content of an electronic communication sent or received by the decedent . . . ; (2) the catalogue of electronic communications sent or received by the decedent; and (3) any other digital asset in which the decedent at death had a right or interest.").

[51] *Id.* (providing that access is granted *unless* specifically provided otherwise by "the will of a decedent").

[52] *Id.* § 7(b).

[53] *See* Letter from the Center for Democracy & Technology, ACLU, Electronic Frontier Foundation, and Consumer Action 1–2 (Jan. 12, 2015), https://cdt.org/wp-content/uploads/2015/01/Joint-Letter-re-ULC-Bill-general-statement-2-FINAL.pdf [https://perma.cc/QMN8-A5V8].

their digital counterparts, civil liberty organizations contended that most people intentionally throw away tangible correspondence and "snail mail"; however, given that digital assets offer unlimited storage, people are not equally as incentivized to discard the clutter that would otherwise be kept on their desks.[54] Critics also claimed that disclosure of digital assets could compromise the privacy interests of third parties who communicated with the decedent, harnessing the philosophy that, unlike physical letters, emails and text messages replaced instantaneous communications that would otherwise be in person or over the phone.[55]

A separate, more personal apprehension is that the private communications stored in a decedent's digital account may contain sensitive information about the *very person*—the executor or administrator of the estate—who will be given access to the account following her death.[56] Offensive remarks may not be informative and may merely incite hostility, doing more harm than good, especially where the decedent never desired the message to leave the sanctity of her communication with the intended recipient.[57]

Unfortunately, little data about actual consumer preferences for postmortem privacy has been collected.[58] NetChoice conducted an online survey of 1,012 adults in 2015, concluding that over seventy percent of Americans believe their private online communications and photos should remain private following their death.[59] However, as one scholar identifies, the results of this survey might be unreliable because the questions asked were phrased in terms of "control" rather than "access."[60]

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54 *Id.* at 2 ("Most people deliberately preserve only a small percentage of real-world correspondence or pictures for any significant period of time.").

55 *Id.* at 3.

56 Alberto B. Lopez, *Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets*, 24 GEO. MASON L. REV. 183, 233 (2016).

57 *Id.*

58 *See id.* at 230, 233 ("[D]ivining a decedent's intent boils down to making a decision between two plausible choices with incomplete information as a guide.").

59 *Id.* at 230.

60 The survey's first question asked: "[A]fter a person dies which of the following describes your view when it comes to keeping the emails and instant messages along with digital photos they have sent private?" *Id.* at 231. There were three possible answer choices. The first choice read, "My online communications and photos should remain private. I wouldn't want anyone accessing them after I die, unless I gave prior consent"—70.5% of participants agreed. *Id.* The second choice stated, "Estate attorneys and executors should control my private communications and photos even if I didn't give prior consent"—15.2% agreed. *Id.* The third answer choice was "[n]ot sure," to which 14.4% agreed. *Id.* The language of "attorneys" wanting "control" presents a negative connotation and the false preconception that lawyers will use digital account information at their sole discretion with no limitation. *Id.* at 232–33. Given that there is already

2. A "Win" for Tech Companies: The Revised Uniform Fiduciary Access to Digital Assets Act

Notwithstanding the high number of bill introductions, UFADAA was only enacted into law in Delaware.[61] Most responsible for the lack of widespread acceptance were the efforts of a coalition composed of internet-based businesses and privacy advocacy organizations that expressed their opposition to the law.[62] These groups offered their own more limited model legislation, prompting the Uniform Law Commission to revise UFADAA so that a fiduciary only has authority over the content of a decedent's electronic communications, including private emails and text messages, if the user explicitly consented to disclosure.[63] A user can direct for or against disclosure in a variety of

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a general public distrust of lawyers, it is possible that the biased phrasing of this question triggered these responses. *Id.* at 233. As Lopez articulates, "The possibility exists that respondents chose their answers based upon fear that an attorney or stranger would control information after death rather than an undiluted general desire to prohibit all access to digital contents after death." *Id.*

61 *Proposed Changes to the Uniform Fiduciary Access to Digital Assets Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6cdd65e9-e4ee-3791-2132-7f4223fb6cef&forceDialog [https://perma.cc/9E3S-SH24].

62 *Id.*

63 Section 7 of RUFADAA provides:

> If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:
>
> (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 letter of appointment of the representative or a small-estate affidavit or court order];
>
> (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; and
>
> (5) if requested by the custodian:
>
> (A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
>
> (B) evidence linking the account to the user; or
>
> (C) a finding by the court . . . .

REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 7 (UNIF. L. COMM'N 2015) (alterations in original). For a complete comparison of UFADAA with RUFADAA, see *Comparison of UFADAA, PEAC Act, and Revised UFADAA*, CTR. FOR DEMOCRACY & TECH., https://cdt.org/wp-content/uploads/2015/10/Comparison-of-UFADAA-PEAC-and-Revised-UFADAA-1.pdf [https://perma.cc/8XLY-HLY7].

permissible ways, including by will, trust, power of attorney, or "other record."[64] Notably, RUFADAA[65] represents a shift in power from personal representatives to service providers, thus explaining the widespread support from technology companies.[66] In the absence of explicit consent, only a court order directing disclosure can provide access to a communication's content;[67] otherwise, the fiduciary is out of luck.[68] Hence, RUFADAA creates a default rule of nondisclosure with regard to the content of e-communications.[69] On the other hand, the Revised Act is prided for providing a default rule of disclosure with respect to a user's catalogue of communications,[70] provided that the fiduciary complies with a custodian's request for information.[71]

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64 REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 4(b) (UNIF. L. COMM'N 2015).

65 As of this writing, RUFADAA has been introduced or enacted in forty-six states, the District of Columbia, and the U.S. Virgin Islands. *Fiduciary Access to Digital Assets Act, Revised*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22 (last visited Nov. 8, 2021). The four states that have declined to adopt RUFADAA are Delaware, California, Oklahoma, and Louisiana. *See id.* Delaware has in place a modified version of UFADAA, while California has implemented a modified form of RUFADAA. PRAC. L. TRS. & ESTS., STATE DIGITAL ASSET LAWS CHART (2021), Westlaw W-006-8402. Under Oklahoma law, a personal representative can "take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites." OKLA. STAT. tit. 58, § 269 (2010). Finally, in Louisiana, a succession representative is granted access to any of the decedent's digital accounts. LA. CODE CIV. PROC. ANN. art. 3191 (2014).

66 *See, e.g.*, Letter from Ron Barnes, Head of State Legis. Affs., Google, to Ben Orzeske, Chief Couns., Unif. L. Comm'n (Oct. 13, 2015), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e894c216-eca3-fdb8-c03b-8ccce5740119&forceDialog [https://perma.cc/JNQ2-ADYD]; Letter from Dan Sachs, Manager, State Pol'y, Facebook, Inc., to Unif. L. Comm'n (Oct. 12, 2015), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=593cf680-87d4-58cd-bd32-19199c4f5bb7&forceDialog [https://perma.cc/Q9TU-EM8G] (supporting adoption of RUFADAA by state legislatures).

67 The "[c]ontent of an electronic communication" includes the subject line and body of messages sent between private parties, which are not available to the general public. *See* REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 2(6) (UNIF. L. COMM'N 2015).

68 *See id.* § 7.

69 *Id.*; Lopez, *supra* note 56, at 214.

70 A "[c]atalogue of communications" is a list of communications that includes the electronic addresses of the sender and recipient as well as the time and date of the communication. REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 2(4) (UNIF. L. COMM'N 2015); *see supra* note 43.

71 REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 8 cmt. (UNIF. L. COMM'N 2015) ("Section 8 was intended to give personal representatives default access to the 'catalogue' of electronic communications and other digital assets not protected by federal privacy law.").

B. *Other Relevant Players*

1. Federal Law

In addition to state privacy legislation, two federal laws—the Stored Communications Act[72] (SCA) and the Computer Fraud and Abuse Act[73] (CFAA)—regulate the administration of digital assets.

The SCA, enacted as Title II of the Electronic Communications Privacy Act of 1986, is a federal criminal law that regulates the disclosure of "stored wire and electronic communications and transactional records" held by third-party internet service providers.[74] In enacting this statute, Congress was responding to the concern that unauthorized third parties could gain access to digital accounts, intentionally desiring to harm the subscriber or expropriate her personal information.[75] Congress had in mind a particular class of people—anonymous hackers and agents of government surveillance—and, therefore, its action was not targeted at fiduciaries who are selected by either the testator or the courts to administer an estate.[76] Given that a fiduciary "is hardly the sort of trespasser envisioned by the SCA," many scholars believe that, under the SCA, a fiduciary can provide lawful consent on behalf of the decedent to gain access to her electronic communications.[77] While there is always the possibility that fiduciaries may abuse their privileges, this risk is also inherent in the administration of intangible assets and, thus, is intrinsic to all instances of estate administration.[78] Unlike anonymous hackers, fiduciaries are also constrained by an additional safeguard—laws that impose duties of loyalty and confidentiality.[79]

This reasoning was embraced in *Ajemian v. Yahoo!, Inc.*, a decision by Massachusetts's court of last resort that expanded the scope of fiduciary powers.[80] In 2006, forty-three-year-old John Ajemian died in

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72 18 U.S.C. §§ 2701–2712.

73 *Id.* § 1030.

74 *Id.* § 2701.

75 Naomi Cahn, *Probate Law Meets the Digital Age*, 67 VAND. L. REV. 1697, 1710 (2014).

76 *Id.* at 1713 ("[I]n enacting the SCA, Congress sought to protect privacy against unwarranted government snooping, rather than against the garden variety marshaling of assets engaged in by executors and other fiduciaries.").

77 *Id.* at 1711, 1716.

78 *Id.* at 1716 ("[T]his risk is present in the administration of tangible assets as well as digital ones, and state fiduciary law is designed to guard against just such misuse.").

79 *Id.*

80 Ajemian v. Yahoo!, Inc., 84 N.E.3d 766 (Mass. 2017), *cert. denied sub nom.* Oath Holdings, Inc. v. Ajemian, 138 S. Ct. 1327 (2018).

a bicycle accident with no will, leaving behind a Yahoo email account with no record of its password and no instructions for its use or deletion.[81] Ajemian's siblings, who were appointed as the personal representatives of his estate, requested access to the account in order to arrange memorial services and identify his assets.[82] When Yahoo declined to turn over the contents of the email communications given the restrictions enumerated in its terms-of-service agreement, Ajemian's siblings commenced an action seeking a declaration that the email account was property of the estate, their case rising all the way to the Massachusetts Supreme Judicial Court (SJC).[83]

The SJC determined that the SCA's lawful consent provision allowed personal representatives to provide consent on a decedent's behalf to release electronic communications, even without the explicit authorization of the decedent herself.[84] Engaging in statutory interpretation, the court noted that Congress elected not to use language of "express consent" and cited legislative history illustrating that Congress intended for the SCA to apply to "unauthorized interception of electronic communications" rather than estate administration.[85] The SJC also relied on the presumption against preemption, finding that Congress did not intend to impinge on state probate law and that restricting the definition of consent to "*express*" consent would preclude fiduciaries from performing their duties in a digitized world.[86]

Notably, the U.S. Supreme Court denied Yahoo's petition for certiorari.[87] Congress has also remained silent on the issue of interpretation and has not amended the Act to explicitly include or exclude personal representatives.[88] Consequently, until the federal government provides clarity on this subject, either through a Supreme Court opinion or statutory amendment, the SJC's ruling carries enormous weight in articulating fiduciaries' powers. In effect, the SCA does not prohibit service providers from releasing stored emails to personal representatives who request them; thus, any potential hurdles

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81 *Id.* at 768.

82 Recent Case, *Estate Planning—Digital Inheritance—Massachusetts Supreme Judicial Court Holds that Personal Representatives May Provide Lawful Consent for Release of a Decedent's Emails*—Ajemian v. Yahoo!, Inc.*, 84 N.E.3d 766 (Mass. 2017),* cert. denied*, No. 17-1005, 2018 WL 489291 (U.S. Mar. 26, 2018)*, 131 HARV. L. REV. 2081, 2082 (2018) [hereinafter Recent Case, *Estate Planning—Digital Inheritance*].

83 *Ajemian*, 84 N.E.3d at 768.

84 *Id.* at 776–77.

85 *Id.* at 775–78.

86 *Id.* at 773–75.

87 Recent Case, *Estate Planning—Digital Inheritance*, *supra* note 82, at 2084.

88 *Id.*

arise under state law or the other relevant federal law at issue—the CFAA.

The CFAA criminalizes the unauthorized access of a computer and the acquisition of any data thereon.[89] A violation can arise in two scenarios: (1) in the context of an outsider who trespasses into a computer with no permission whatsoever; or (2) if an individual exceeds his given authorization.[90] However, given that the fiduciary must obtain the account holder's consent and may also need the internet service provider's authorization in order to obtain the requisite permission and thus avoid violation of the CFAA, a fiduciary feels compelled to comply with the custodian's terms-of-service agreement or else risk criminal prosecution.[91] Since many terms-of-service agreements prohibit the use of another user's login credentials, a fiduciary may violate the CFAA when he logs into an account using the decedent's username and password, even with permission from such user.[92] Consequently, the interplay between the CFAA and state probate law gives rise to a web of mutually conflicting duties and creates a catch twenty-two—on the one hand, the fiduciary is charged with managing an account holder's digital property, which he cannot do without risking criminal liability, thereby inducing a chilling effect; on the other hand, however, the fiduciary has an obligation to uphold the law and refrain from committing criminal misconduct, which he cannot do by fulfilling a decedent's wishes to manually access her digital accounts.[93]

89 Klein & Parthemer, *supra* note 19, at 33.

90 *Id.*; Sy, *supra* note 46, at 661.

91 Notably, the Department of Justice has provided the qualification that "if the defendant exceeded authorized access solely by violating an access restriction contained in a contractual agreement or term of service with an Internet service provider or website, federal prosecution may not be warranted." U.S. DEP'T OF JUST., JUSTICE MANUAL TIT. 9, § 48.000(B)(5), COMPUTER FRAUD AND ABUSE ACT (2020), https://www.justice.gov/jm/jm-9-48000-computer-fraud [https://perma.cc/B282-WYFT]. Nonetheless, in a recent opinion, the U.S. Supreme Court pointed out that "[t]he policy instructs that federal prosecution '*may not* be warranted'—not that it would be prohibited." Van Buren v. United States, 141 S. Ct. 1648, 1661–62 (2021).

92 Barron & Heaton, *supra* note 45, at 15; *see also, e.g.*, *Terms of Service*, FACEBOOK (Oct. 22, 2020), https://www.facebook.com/terms.php [https://perma.cc/8V8S-6EU5] ("[Y]ou must . . . [n]ot share your password, give access to your Facebook account to others, or transfer your account to anyone else (without our permission).").

93 James D. Lamm, Christina L. Kunz, Damien A. Riehl & Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. MIA. L. REV. 385, 402 (2014).

2. Custodians and Terms-of-Service Agreements

Section 4 of RUFADAA establishes a three-tiered procedure by which a decedent may authorize her executor to access her online accounts.[94] In particular, Section 4 serves to offer a solution in the event that the user provides conflicting directions—either purporting to limit or authorize access—in various documents and agreements.[95]

The first tier provides that custodians can create an "online tool," distinct from terms of service, through which users can adjust their account settings and designate recipients whom they trust to obtain access to their communications.[96] Facebook users, for example, may designate a "legacy contact" who has the authority to share a final message, publish the details of a memorial, and view previous posts, all of which may aid a fiduciary in locating the decedent's friends and family.[97] Google's "inactive account manager" feature enables users to set a trusted contact that will be notified of the account's inactivity and can receive access to any data the user chooses to share, including Drive and Mail.[98] These mechanisms remain at the top of the hierarchy—if a user has provided direction through an online tool, such instruction will supersede conflicting directives, including those in a will.[99] At the second tier, the user can authorize access to their assets post-death through a will, trust, power of attorney, or other authorization form.[100] Finally, absent any use of an online tool or execution of a legal document, the third tier provides that the custodian's terms of service apply.[101]

C. *Lingering Challenges Fiduciaries Face: Are We Really Fulfilling the Decedent's Intent?*

An overemphasis on a decedent's intent to preserve the privacy of her digital communications often overshadows the decedent's

94 REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 4 cmt. (UNIF. L. COMM'N 2015).

95 *Id.*

96 *Id.* § 4(a).

97 *What Is a Legacy Contact and What Can They Do with My Facebook Account?*, FACEBOOK, https://www.facebook.com/help/1568013990080948 [https://perma.cc/WHD8-YU2U].

98 *About Inactive Account Manager*, GOOGLE ACCT. HELP, https://support.google.com/accounts/answer/3036546?hl=en [https://perma.cc/4DCW-X55G].

99 REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 4(a) (UNIF. L. COMM'N 2015).

100 *Id.* § 4(b).

101 *Id.* § 4(c).

competing but equally important intent to have her assets identified, preserved, and distributed among her beneficiaries.[102]

1. Predators Who Prey on the Dead's Dormant Accounts

The clash between a decedent's interests in privacy and efficient estate distribution is most apparent with non-mail-generating assets, which are difficult to trace and often remain undiscoverable.[103] If the succession representative cannot access the decedent's digital assets, then "bills may go unpaid, valuable assets may be overlooked, and estate administration may be unavoidably delayed."[104] Where a fiduciary has no inkling of knowledge that an asset exists, he can continue digging, but where assets are hidden, they are in jeopardy of being deemed "unclaimed" or "abandoned" property.[105]

Unclaimed property refers to any property or accounts that have not generated any activity for an extended period of time.[106] Studies estimate that the total value of unclaimed property in the United States is approximately $49.5 billion.[107] As a result, it is entirely likely that beneficiaries who stand to inherit from a decedent's estate never get to see the entire pot of funds. Devisees and distributees can only claim such property once the dormancy period, usually between three to five

102 *See* Lopez, *supra* note 56, at 228 ("Isolating a decedent's independent and surviving interest in privacy does not automatically activate post-mortem protection from disclosure during estate administration. Instead, the privacy setting must be calibrated in accordance with the primary functions that undergird both intestate and testate succession. Whether property is to be distributed by intestate statute or by will, the basic interpretive function of the law of wills is to effectuate a decedent's intent regarding the distribution of her property.").

103 Varnado, *supra* note 30, at 734 ("If the decedent dies intestate or with a will that is silent as to digital items, the succession representative may be unaware of them, which will make these items difficult if not impossible to discover.").

104 *Id.* at 735.

105 *See What Is Unclaimed Property?*, NAT'L ASS'N OF UNCLAIMED PROP. ADM'RS, https://unclaimed.org/what-is-unclaimed-property [https://perma.cc/6Y27-CG4S].

106 *Id.*

107 Nick Wallace, *The Top States for Unclaimed Property*, SMARTASSET (Feb. 14, 2020), https://smartasset.com/personal-finance/the-top-states-for-unclaimed-property [https://perma.cc/5NBH-E4HE]. As of 2021, the current value of all unclaimed funds in New York State is $17 billion, located in a total of forty-four million accounts, including $988 million collected in receipts in the recent fiscal year. OFF. OF THE N.Y. STATE COMPTROLLER, SFY 2020–21: ANNUAL REPORT OF THE OFFICE OF UNCLAIMED FUNDS 1, 3 (2021), https://www.osc.state.ny.us/files/unclaimed-funds/resources/2021/pdf/annual-report-sfy-2020-21.pdf [https://perma.cc/AAA7-FPL5].

years,[108] expires and financial institutions report and escheat the funds to the state.

In the interim, however, identify theft is a real cause for concern,[109] leading to the depletion of assets before discovery and, thus, financial loss to the estate—a result clearly unintended by the decedent.[110] Recent cases in the news highlight the ways in which various bank employees abuse their authority to identify inactive bank accounts and embezzle funds.[111] While many of these criminals are caught and indicted, one is left to wonder how many of these incidents go undetected. In these cases, the potential threat of non-discovery of the assets by the fiduciary is even greater, as the funds could disappear before the dormancy period lapses.

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108 KEANE, BANKING & UNCLAIMED PROPERTY, https://www.aba.com/-/media/documents/industry-insights/keaneunclaimedproperty-banking-and-unclaimed-property.pdf [https://perma.cc/3PLA-Y8SX].

109 A study conducted in 2012 reveals that the identities of approximately 2.5 million deceased Americans are misused in applications for credit products and services each year. *Identities of Nearly 2.5 Million Deceased Americans Misused Each Year*, CISION: PR NEWSWIRE (Apr. 23, 2012, 8:00 AM), https://www.prnewswire.com/news-releases/identities-of-nearly-25-million-deceased-americans-misused-each-year-148491305.html [https://perma.cc/FSB9-UFH5].

110 Dr. Stephen Coggeshall, Chief Technology Officer of ID Analytics, commented:

> This study brings to light a significant problem as we see fraudsters intentionally using identities of the deceased at the rate of more than 2,000 per day. While this is clearly a problem for businesses, surviving family members can also be the victims of this identity fraud as they are left to manage the estates of their deceased loved ones.

Id. The Identity Theft Resource Center reports that it can take up to sixty days for a name to appear on the Social Security Administration's Death Master File, leaving open a window for criminals to "do their dirty work" until reporting agencies and creditors are notified of the decedent's death. *Today's Grave Robbers: ID-Theft Criminals*, IDENTITY THEFT RES. CTR. (July 3, 2015), https://www.idtheftcenter.org/todays-grave-robbers-id-theft-criminals [https://perma.cc/EVZ7-YYBC]; *"Ghosting"—Another Form of Identity Theft*, GUMBINER SAVETT INC. (Jan. 5, 2017), https://gscpa.com/ghosting-exploits-the-stolen-identities-of-the-dead [https://perma.cc/3LB7-G6TP].

111 *See, e.g.*, Joseph N. DiStefano & Erin Arvedlund, *Vanguard Supervisor and Brother-in-Law Stole over $2M from Dead Customers and Dormant Accounts, Feds Say*, PHILA. INQUIRER (Mar. 15, 2019), https://www.inquirer.com/business/vanguard-escheat-scott-capps-lance-tobin-us-attorney-bill-mcswain-stolen-dead-customers-20190315.html [https://perma.cc/RJ7A-MTB6]; *Financial Advisor Guilty of Stealing from Dormant Bank Accounts*, STATE CTR. CONSUMER PROT. REP. (Sept. 7, 2018), https://statecenterinc.org/cpi-newsletter/articles/financial-advisor-guilty-of-stealing-from-dormant-bank-accounts [https://perma.cc/7GXY-KJRJ]; Associated Press, *Bank Teller Admits Embezzling Funds from Dormant Accounts*, WASH. TIMES (Aug. 2, 2016), https://www.washingtontimes.com/news/2016/aug/2/bank-teller-admits-embezzling-funds-from-dormant-a [https://perma.cc/UM3W-LNAM]; Madison Margolin, *Chase Bank Employees Accused of Stealing $400,000 from Elderly, Dead Customers*, VILL. VOICE (Dec. 28, 2015), https://www.villagevoice.com/2015/12/28/chase-bank-employees-accused-of-stealing-400000-from-elderly-dead-customers [https://perma.cc/CTP9-Z7T3].

2. The Failure of Terms-of-Service Agreements to Reveal Intent

Under the current regime, courts are forced to conclude that the absence of any affirmative consent to provide access to digital assets is functionally equivalent to the intent to deny disclosure; accordingly, access to digital assets is forbidden in both scenarios.[112] In *In re Coleman*, a twenty-four-year-old young adult named Ryan died of unknown causes, and his parents petitioned to acquire access to his iCloud account.[113] Ryan's parents, as administrators, sought access to the account for the following reasons:

> (1) to determine if there were any medical issues that Ryan's siblings may also have, (2) to determine if there were any causes of action on behalf of Ryan's estate, (3) to identify and collect digital and non-digital assets, and (4) [to] marshal digital assets as a part of estate administration.[114]

The New York court denied their request, "balancing Ryan's interests in his not having consented to the disclosure of the content of any of these digital assets."[115] Since Ryan left no will granting his fiduciaries access to his digital accounts, Apple's terms-of-service agreement governed.[116]

There is further evidence to suggest that a default rule of nondisclosure does not evince a person's true preferences. In 2017, a survey of two thousand U.S. consumers found that ninety-one percent of people consent to terms of service without reading them.[117] In distinctly looking at people ages eighteen to thirty-four, researchers found that the rate skyrocketed to ninety-seven percent.[118] A year earlier, two professors conducted an experiment among undergraduate students to decipher the extent to which people would blindly surrender their rights.[119] The professors created a fictitious social networking site

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112 *See, e.g.*, *In re* Coleman, 96 N.Y.S.3d 515, 518–19 (Sur. Ct. 2019).

113 *Id.* at 516; *see supra* Introduction.

114 David M. Lenz, *Multiple Bites at the Apple? Interpreting Fiduciaries' Authority to Access Digital Assets Under RUFADAA*, 30 OHIO PROB. L.J. 19, 22 (2019).

115 *Coleman*, 96 N.Y.S.3d at 519.

116 *Id.*

117 Jessica Guynn, *What You Need to Know Before Clicking "I Agree" on That Terms of Service Agreement or Privacy Policy*, USA TODAY (Jan. 29, 2020, 2:21 PM), https://www.usatoday.com/story/tech/2020/01/28/not-reading-the-small-print-is-privacy-policy-fail/4565274002 [https://perma.cc/3JXA-KDSD].

118 *Id.*

119 Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23 INFO., COMMC'N & SOC'Y 128, 132–34 (2020).

called "NameDrop" and drafted an accompanying terms-of-service agreement with two "gotcha clauses": users would agree to give up their firstborn child as payment and have their data shared with the National Security Agency.[120] Ninety-three percent of users "clicked to accept" the agreement.[121] True, many users would not expect an extreme clause like the above to permeate a real terms-of-service agreement. Still, the experiment stands for the proposition that many people are uneager to read the fine print, thereby defeating the notion that most people are *actively* interested in protecting their privacy.[122] Further, this exercise highlights that exaggeration of, and overreliance on, the privacy interest is unsound. It could very well be that the average user, who did not read the privacy terms, "may have preferred to transfer all of the account's contents to her survivors at death so that they could learn about her life."[123] In other words, it is unclear whether we successfully fulfill a decedent's intent with respect to postmortem access of her assets by enforcing the terms-of-service agreement.[124] Hence, in Ryan's case, we lack sufficient information to assume he would have favored a rule of nondisclosure as opposed to disclosure.

II. ARGUMENT

When New York adopted RUFADAA, the legislature articulated its intent by reasoning that

> [a]s a practical matter, there should be no difference between a fiduciary's ability to gain access to information from an online bank or other Internet-based business and the fiduciary's ability to gain access to information from a business with a brick-and-mortar building. This measure would amend the [New York Estates Powers

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120 *Id.*

121 *Id.* at 141.

122 Obar and Oeldorf-Hirsch refer to this phenomenon as the "privacy paradox": "when asked, individuals appear to value privacy, but when behaviors are examined, individual actions suggest that privacy is not a high priority." *Id.* at 142. Furthermore, the concept of user consent has eroded and carries less weight in the context of privacy policies today. *See* David Medine & Gayatri Murthy, *Nobody Reads Privacy Policies: Why We Need to Go Beyond Consent to Ensure Data Privacy*, NEXTBILLION (Dec. 16, 2019), https://nextbillion.net/beyond-consent-for-data-privacy [https://perma.cc/6GD4-K4TP] ("Consent is cumbersome to obtain, and so privacy policies are drafted in the widest possible language to give companies considerable leeway in third-party data transfers—so much so that there is no need for them to ever seek our consent again.").

123 Lopez, *supra* note 56, at 230.

124 *Id.* ("With or without a provision in the terms of service that governs post-mortem consequences following an account holder's death, divining a decedent's intent boils down to making a decision between two plausible choices with incomplete information as a guide.").

> and Trust Law] to restore control of the disposition of digital assets back to the individual and removes such power from the service provider.[125]

Despite this broad acknowledgement, however, RUFADAA falls short of its intended purpose; service providers are left with considerable amounts of power beyond what is necessary to protect the decedent's interest in privacy.

A. *The Right to Postmortem Privacy Is Misplaced*

Analyzing the rights of the dead in other contexts yields the conclusion that the right to privacy after death is misplaced. A dead person, for example, may not be libeled or slandered in the United States.[126] Consequently, an executor may only pursue a defamation claim, alleging damage to reputation, for an incident that arose prior to the decedent's death.[127] The rationale behind this rule is that dead victims do not suffer the harm and humiliation that often accompany defamation, including the "inexplicable cold stares," "job applications refused," and "invitations not received."[128] The law is similarly unconcerned with the perspectives of outsiders who may feel the effects of such harm and encounter ostracism or ridicule, as the law does not recognize a civil right of action by surviving spouses and family members.[129]

The four privacy torts outlined in the Restatement (Second) of Torts—including (1) intrusion upon seclusion; (2) public disclosure of private facts; (3) disclosure of information that places the plaintiff in a false light; and (4) appropriation of name or likeness—are similarly unavailable remedies to dead people.[130] The rationale here is that tort law is designed to compensate victims, and "when a person dies, the law finds no harm that can be compensated."[131] Under common law

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[125] Sponsor Memo, S. S7604A, 201st Sess. (N.Y. 2016). In response to RUFADAA, in 2016 New York enacted Article 13-A of the Estates Powers and Trust Law, which governs the administration of digital assets.

[126] Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 763 (2009).

[127] Mike Hiestand, *Can You Libel a Dead Person?*, STUDENT PRESS L. CTR. (Oct. 17, 2019), https://splc.org/2019/10/can-you-libel-a-dead-person [https://perma.cc/8W8Q-ZCS5].

[128] Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243, 251 (1981).

[129] Annotation, *Civil Liability for Defamation of Dead*, 146 A.L.R. 739 (1943).

[130] *See* Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. REV. 927, 934–35 (2016).

[131] *Id.* at 938.

principles, the right to privacy is deemed a personal right that extinguishes at death, while property rights live on.[132]

Further, decedents also lack privacy protection for their testamentary documents.[133] Once a will is probated, the instrument becomes a public record and its contents can be read by the general population.[134] All of the private financial information found within those documents, including personal property owned by a decedent, the estate's value, and the amount of funds in bank accounts, becomes public knowledge.[135]

Interestingly, the decedent's right to attorney-client privilege also does not completely survive death, as a decedent's personal representative may waive her attorney-client privilege in any proceeding to establish the validity of her will or interpret the will's language.[136] Importantly, the representative's right of waiver is not unfettered, as the waiver must be in the best interest of the estate and must not tarnish the decedent's reputation.[137] Thus, in this setting the fiduciary's right is limited, embracing a more balanced approach, in an effort to protect the value of "full and frank" communication between a client and her attorney.[138] Yet, the law still recognizes that personal representatives might benefit from being privy to certain communications in order to carry out the decedent's intent.[139]

In relation to medical privacy, the result is the same: personal representatives are able to obtain access to a decedent's medical records,

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132 *See id.*

133 *Id.* at 944.

134 *Id.*

135 *See id.*

136 *See, e.g.*, N.Y. C.P.L.R. 4503(b) (McKinney 2019) ("In any action involving the probate, validity or construction of a will or, after the grantor's death, a revocable trust, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will, revocable trust, or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.").

137 *See id.*; Joseph Hage Aaronson, *Posthumous Waiver of Attorney-Client Privilege Must Be in the Interest of the Decedent or the Estate—Reputational Damage to Decedent Benefitting Personal Representative/Executor Precludes Waiver*, JOSEPH HAGE AARONSON LLC (Aug. 15, 2012), https://jhany.com/2012/08/15/posthumous-waiver-of-attorney-client-privilege-must-be-in-the-interest-of-the-decedent-or-the-estate-reputational-damage-to-decedent-benefitting-personal-representative-executor-precludes [https://perma.cc/9RXE-SPLA].

138 Aaronson, *supra* note 137.

139 *Id.*; Mayorga v. Tate, 752 N.Y.S.2d 353, 359 (App. Div. 2002) ("We conclude by returning to the basic thesis that it makes no sense to prohibit an executor from waiving the attorney-client privilege of his or her decedent, where such prohibition operates to the detriment of the decedent's estate, and to the benefit of an alleged tortfeasor against whom the estate possesses a cause of action.").

which often contain confidential information.[140] Postmortem medical examinations or autopsy reports, for instance, reveal sensitive information about whether the cause of death may be attributed to nature, homicide, suicide, or accident.[141]

Finally, a fiduciary may ultimately access a decedent's tangible assets that are hidden under the couch or stuffed under clothes in drawers in the decedent's home—items presumably intended to be concealed.[142] In fact, estate administrators are encouraged to delve through hiding places if they suspect items are secretly stashed somewhere.[143] However, where those same exact communications are stored electronically on a password-protected computer or phone,[144] the law treats them differently and denies access in an inconsistent manner. Indeed, the safe-deposit box can be squarely analogized to the social media account, as the password safeguarding the digital account merely resembles the key that would typically unlock a safe-deposit box, albeit intangibly.[145]

All of this is not to say that users of digital accounts do not and should not have an expectation of privacy post-death; instead, it is to illustrate the illogical discrepancy between posthumous privacy rights in connection with digital assets as compared to other contexts. To the extent the fear is that this information will be disseminated and known beyond the fiduciary, such a fear is unfounded, since fiduciaries are generally bound by duties of care and confidentiality.[146] Fiduciaries are obligated, both legally and ethically, to act in good faith. Additionally, "a fiduciary owes a duty of undivided and undiluted loyalty to those

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140 Smolensky, *supra* note 126, at 763; Chris Dimick, *Accessing Deceased Patient Records—FAQ (2013 Update)*, AM. HEALTH INFO. MGMT. ASS'N, https://library.ahima.org/doc?oid=301010 [https://perma.cc/T6FG-86B8] ("The patient's designated personal representative or the legal executor of his or her estate has a right under law to access the [medical] records.").

141 *What Is an Autopsy?*, YALE SCH. OF MED. (Jan. 21, 2021), https://medicine.yale.edu/pathology/clinical/autopsy/whatisautopsy [https://perma.cc/7KTS-FV9L].

142 MARY RANDOLPH, THE EXECUTOR'S GUIDE: SETTLING A LOVED ONE'S ESTATE OR TRUST 155–56 (9th ed. 2021) ("It's [an executor's] responsibility to do a little digging. . . . [and] check [hiding] places such as mattresses, old shoeboxes, and maybe even the freezer.").

143 *Id.*

144 Klein & Parthemer, *supra* note 19, at 32 ("Today, fiduciaries face a world in which such assets and information, which used to appear in tangible form—letters, tax returns, bank statements, as well as music, art, and literature—now exist only in digital form.").

145 Matthew J. Hodge, *The Fourth Amendment and Privacy Issues on the "New" Internet: Facebook.com and MySpace.com*, 31 S. ILL. U. L.J. 95, 119 (2006) (arguing that courts must consider how a social media profile compares to tangible items to determine whether a privacy expectation exists) ("[U]sers of Facebook are, in a sense, renting out space on a public computer for their personal use . . . . In each case, a person rents a small area in a public facility to store effects or information. The vendors of these areas hold them out to be private, by giving the purchaser a tangible key, or in the case of cyberspace, through a password.").

146 *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 13-A-4.1 (McKinney 2016).

whose interests the fiduciary is to protect."[147] Thus, a fiduciary may be suspended or removed for waste or improper application of an estate's assets, for imprudent management of assets, or for any other form of misconduct, including dishonesty, improvidence, or other behavior demonstrating he is unfit for the position.[148]

The foregoing examples highlighting the scarcity of postmortem privacy rights, coupled with the reality that fiduciaries are constrained by duties of confidentiality and loyalty, lead to the conclusion that the fear of invading a decedent's privacy in the digital assets realm is overstated.

B. *Catalogue of Communications: Why the Default Rule Is No Default at All*

Section 8 of RUFADAA provides that "[u]nless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian *shall disclose* to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets."[149] The provision requires fiduciaries to submit documentation, including a certified copy of the user's death certificate and the letters of appointment verifying their status as the personal representative.[150] The Uniform Law Commission champions this provision as a victory for advocates of default access and disclosure.[151] However, subsection (4) of that same section provides a qualification whereby, if requested by the custodian, a personal representative must also provide:

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147 JOHN A. GEBAUER & CHRISTINA J. HUNG, 27 CARMODY-WAIT 2D N.Y. PRACTICE § 157:8 (2021).

148 *See, e.g.*, N.Y. SURR. CT. PROC. ACT LAW § 711 (McKinney 2014).

149 REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 8 (UNIF. L. COMM'N 2015) (emphasis added). A "custodian" is defined as "a person that carries, maintains, processes, receives, or stores a digital asset of a user." *Id.* § 2(8).

150 *Id.* § 8(1)–(3).

151 *Id.* § 8 cmt. ("Section 8 requires disclosure of all other digital assets, unless prohibited by the decedent or directed by the court, once the personal representative provides a written request, a death certificate and a certified copy of the letter of appointment. In addition, the custodian may request a court order, and such an order must include findings that the decedent had a specific account with the custodian and that disclosure of the decedent's digital assets is reasonably necessary for administration of the estate. Thus, Section 8 was intended to give personal representatives default access to the 'catalogue' of electronic communications and other digital assets not protected by federal privacy law.").

> (A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
>
> (B) evidence linking the account to the user;
>
> (C) an affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or
>
> (D) a finding by the court that:
>
> > (i) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (A); or
> >
> > (ii) disclosure of the user's digital assets is reasonably necessary for administration of the estate.[152]

Indeed, in *all* cases, no matter whether in reference to the catalogue or content of communications, the custodian has the ability to request that the fiduciary obtain a court order finding that disclosure is reasonably necessary.[153] In articulating the rationale behind subsections (4)(A) and (4)(B), the Uniform Law Commission prudently explains that, since some online accounts are created anonymously, additional information might be necessary to link the decedent with the account.[154] Subsections (A) and (B) thus have a legitimate purpose within the statutory scheme. Subsections (C) and (D), however, impose undue burdens on fiduciaries by potentially and unnecessarily requiring them to further justify and defend their request for access.

In practice, the exception swallows the rule, as custodians will err on the side of caution and will frequently opt to use this escape device, especially since there is no cost and only the potential for gain[155]—in other words, subsection (4)(D) effectively serves as a de facto shield against liability.[156] Anecdotal evidence demonstrates that custodian-representatives will almost always exercise their right to request a court order or other identifying information to avoid culpability for improper

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152 *Id.* § 8(4).

153 Patricia Sheridan, *Inheriting Digital Assets: Does the Revised Uniform Fiduciary Access to Digital Assets Act Fall Short?*, 16 OHIO ST. TECH. L.J. 363, 385 (2020) ("The custodian's complete discretion to require a court order, even prior to the disclosure of non-protected digital assets, is particularly troubling since disclosure of these assets is mandatory under RUFADAA.").

154 *Proposed Changes to the Uniform Fiduciary Access to Digital Assets Act*, *supra* note 61.

155 Lopez, *supra* note 56, at 235–36 ("Although court orders are only required if requested under RUFADAA, the fiscally responsible and legally prudent strategy for online service providers fielding requests for either a record or contents under RUFADAA is to require personal representatives to obtain court orders as a matter of course. Demanding a court order from a personal representative is, more or less, a cost-free way to protect against liability.").

156 *Id.* at 236 ("In short, [RUFADAA's] requirement that a court order is only necessary 'if requested' will likely transform into a de facto requirement when applied in the real world.").

disclosure.[157] Thus, even if access to the catalogue of communications is ultimately granted, to the extent that custodians request more information, the entire purpose for a default rule is eroded.[158] Such default access is commensurate with no access at all when fiduciaries must jump through hoops, including bearing the burden of unreasonable delay due to litigation or repeated correspondence with the custodian.[159] Too much authority is left with custodians and, accordingly, this provision of RUFADAA should be amended to repeal subsections (4)(C) and (4)(D).

A clear example of a service provider's abuse of this right can be seen in the case of a seventy-two-year-old widow, Peggy Bush, who was commanded by Apple to obtain a court order to retrieve her dead husband's password so that she could continue to play games on her iPad.[160] Peggy expressed her shock at the system's strict application: "I thought it was ridiculous. I could get the pensions, I could get benefits, I could get all kinds of things from the federal government and the other government. But from Apple, I couldn't even get a silly password."[161] Even though Peggy's daughter provided Apple with the iPad serial number, evidence that her father's will named the widow as his sole beneficiary, and a notarized death certificate, the Apple representative still demanded a court order.[162]

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157 *Id.* at 235–36; Gerry W. Beyer, *Digital Assets: The Basics of Cyberspace Estate Planning*, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=40094 [https://perma.cc/NM4T-299K].

158 Sheridan, *supra* note 153, at 377–78 ("RUFADAA is structured so that custodians have complete discretion to insist that a fiduciary obtain a court order prior to receiving access to the decedent's digital assets, which, in practice, may lead to court orders becoming a *de facto* requirement.").

159 Lopez, *supra* note 56, at 235 ("Given that many state statutes command personal representatives to settle decedents' estates 'expeditiously,' if requested and mandatory court orders are unnecessary roadblocks to honoring a testator's intent regarding disclosure in the absence of a reason to doubt that intent.").

160 Rosa Marchitelli, *Apple Demands Widow Get Court Order to Access Dead Husband's Password*, CBC NEWS (Jan. 18, 2016, 5:00 AM), https://www.cbc.ca/news/business/apple-wants-court-order-to-give-access-to-appleid-1.3405652 [https://perma.cc/56S6-9HAW].

161 *Id.* Her daughter expressed similar astonishment: "I just called Apple thinking it would be a fairly simple thing to take care of, and the person on the phone said, 'Sure, no problem. We just need the will and the death certificate and to talk to Mom.'" *Id.*

162 *Id.*

C. *Claims Pursued or Defended by the Estate: The Need for Disclosure of Content*

Under the current scheme, fiduciaries are expected to garner access to valuable decedent information in an overly complex and roundabout way. Fiduciaries must scavenge through a catalogue of communications in search of any "suspicious" or curious activity that may "tip off" the existence of a potential asset; only then can fiduciaries embark on the process of requesting access to the communication's content by seeking a court order.[163]

Take, for example, the existence of a savings account at Chase Bank. Imagine that the consumer, Mary, has opted for paperless statements and does not receive any mail sent directly to her home address; the account is, thus, non-mail-generating. Let us assume that this customer receives these statements to a Gmail email account. Unless Mary has disclosed the existence of this asset in her will or directly told the executor or administrator of her estate, or an acquaintance thereof, the fiduciary has absolutely no reason to believe that this account exists.[164] Under a policy favoring nondisclosure of the content of the decedent's digital assets, in order to discover that this account even exists, the fiduciary must first contact a Google representative, requesting access to the decedent's catalogue of communications; then, he must review the catalogue for any "suspicious" indicator. Once he has identified the consistent receipt of emails "FROM: Chase" on the fifteenth day of every month, he must then go back to the custodian again to request the content of the communications. It is likely that the custodian-representative will still be unsatisfied and will require that the fiduciary obtain a court order affirming the necessity of the disclosure in order to reasonably administer the estate.[165] This entire process endures for weeks, if not months, if one is lucky.[166] Seeking the catalogue of communications in

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163 E. Edwin Eck, *Revised Uniform Fiduciary Access to Digital Assets Act and Its Impact on Estate Planning*, 43 MONT. LAW. 20, 21 (2017) ("[B]y reviewing the catalogue of a decedent's emails, a personal representative might note monthly communications from a bank. This, *in turn*, would alert the personal representative to the possibility the decedent maintained an account at that bank." (emphasis added)).

164 Indeed, scholars have suggested that "[w]ithout a well-designed digital estate plan, locating and disseminating digital assets is akin to searching for buried treasure with neither a treasure map nor a shovel." Hopkins & Lipin, *supra* note 39, at 63.

165 Sheridan, *supra* note 153, at 385.

166 A custodian has up to sixty days to comply with a fiduciary's request following receipt of all the required information. REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 16(a) (UNIF. L. COMM'N 2015). However, at the end of such sixty-day period, a custodian may well

this manner becomes the equivalent of an unnecessary middleman. If the fiduciary could have avoided contacting the representative twice and pursuing a court order, ample time and court resources could have been spared. Moreover, it is also worth noting that, even if the fiduciary did have a hunch that the account existed from the very beginning, he still may not have succeeded in securing the account's funds if he did not have readily available evidence linking Mary to the account.[167]

Fiduciaries should have access to those communications in order to diligently litigate claims on behalf of the estate, with the goal of either preserving the current assets or increasing the value of the estate. Under current law, the default rule favors nondisclosure, and fiduciaries are tasked with obtaining a court order directing such disclosure.[168] It may be true that in instances where the fiduciary's sole goal is to identify potential distributees, locate all of the assets, and divvy them up accordingly, a mere catalogue of communications suffices. However, where the fiduciary chooses to pursue a viable cause of action on behalf of the estate or is forced to defend the estate, disclosure of the content of communications is more appropriate in certain circumstances and courts should be more willing to grant access. Most importantly, wrongful death actions, cases of undue influence, and situations involving digital business accounts often require intimate knowledge of the facts to prove, which are more likely to be found in the content, and not catalogue, of communications.

Under the current statutory regime, where court intervention is necessary to obtain a court order as requested by a custodian, courts have established heightened pleading standards. Courts often require personal representatives to include the following in their petition: (1) identification of the specific digital asset sought and where it is stored; (2) a statement articulating the basis for the fiduciary's knowledge of the account's association with the decedent; (3) information about whether the decedent consented to disclosure; and (4) an explanation of why disclosure of such assets is reasonably necessary to administer the estate.[169]

Thus, there is a high likelihood that courts will dismiss meritorious petitions merely because they fail on their face to plead sufficient

choose to exercise its discretion to obtain a court order to support the disclosure, which will inevitably prolong the process. *See id.* § 16(e).

167 Indeed, institutions often refuse to surrender assets if fiduciaries are unable to locate "a number, username, address, or other unique subscriber or account identifier assigned by the custodian" or "evidence linking the account to the user," all of which custodians are allowed to request by law. *Id.* § 7(5)(A)–(B).

168 *Id.* § 7.

169 Estate of Gager, No. 18-1186/A, 2019 NYLJ LEXIS 2239, at *1 (Sur. Ct. June 26, 2019).

allegations according to courts' standards. It is true that courts, in practice, dismiss petitions by fiduciaries without prejudice, leaving open the opportunity for them to investigate further and replead their claims.[170] Nonetheless, it is likely that fiduciaries, facing the likely prospect of defeat, will forgo the trouble of trying to secure a court order.[171] This creates the risk that a fiduciary might potentially forfeit a viable cause of action because it requires an inordinate amount of effort or because the fiduciary might not have all the information available prediscovery to meet the heightened pleading standard, especially when the estate is small in size.[172] Indeed, a custodian can refuse to disclose "non-protected assets" alleging blanket protection under the SCA and privacy concerns, playing a game of chicken and waiting to see whether the fiduciary will actually pursue a court order.[173] Even if RUFADAA's language is not amended, it is still within courts' powers to relax pleading standards and be more lenient in finding any of the four factors listed above. A fiduciary's good-faith allegation that access to the content of a decedent's communications is reasonably necessary to (1) prove a wrongful death claim; (2) establish undue influence; or (3) conduct business, if the digital account is a business account, should suffice. Alternatively, where the communications are especially confidential or private in nature, judges could order an in camera review to ascertain what information, if any, is useful.[174]

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170 Lenz, *supra* note 114, at 22–23.

171 *See, e.g.*, Estate of Bass, No. 15-2600, 2019 NYLJ LEXIS 2193, at *1–2 (Sur. Ct. June 20, 2019) (dismissing the petitioner's application for a court order for failing to provide sufficient information after being notified of the deficiencies); Lopez, *supra* note 56, at 236 ("If the online service provider requires a court order prior to disclosure, however, some access seekers are likely to be dissuaded from the pursuit of a court order that details the specific findings required under . . . RUFADAA . . . .").

172 Sheridan, *supra* note 153, at 385 ("In small estate proceedings, this burden may be especially significant and have a chilling effect. When a fiduciary utilizes the summary estate proceedings to settle a small estate, there is little incentive to hire an estate attorney for the sole reason of obtaining a court order to access digital assets . . . .").

173 *Id.*

174 In camera inspection refers to "[a] trial judge's private consideration of evidence." *In camera Inspection*, BLACK'S LAW DICTIONARY (11th ed. 2019). In camera review is already commonly used to address issues of privacy relating to the discovery of social media evidence in civil litigation. *See, e.g.*, Forman v. Henkin, 93 N.E.3d 882, 890 (N.Y. 2018) (holding that "even private materials may be subject to discovery if they are relevant" and explaining that, if the account holder is concerned the account "may contain sensitive or embarrassing materials of marginal relevance, [she] can seek protection from the court"); Israeli v. Rappaport, No. 805309/15, 2019 WL 132527, at *4 (N.Y. Sup. Ct. Jan. 8, 2019) (ordering plaintiffs to produce private Facebook messages and photographs depicting nudity or romantic encounters for in camera inspection to determine "if the usefulness of such information is outweighed by any privacy concerns").

1. Wrongful Death

Where death is due to natural causes, access to content is unnecessary; however, where the cause of death is determined to be suicide or homicide, a potentially meritorious cause of action for wrongful death is likely.[175] In cases of suicide, for example, it could be that the decedent felt compelled to take her own life due to cyberbullying, sexual abuse or rape, or through assisted suicide. In each of these scenarios, the current trend has been to recognize the viability of a claim against the perpetrator.[176] In cases of homicide, it is even more clear that a successful wrongful death claim can be pursued.[177] Social media communications become increasingly important to prove evidence of foul play.[178] In these situations, good-faith allegations declaring the cause of death to be homicide, including intentional killings and failure-to-warn by negligent tortfeasors, should be sufficient to persuade courts to award access to the contents of electronic communications.

Petitioners who sought access on these very grounds in the past have been met with opposition, as seen in *In re Facebook, Inc.*[179] In 2012, the mother of a former British model named Sahar Daftary sought access to her deceased daughter's Facebook account in order to obtain information about her daughter's state of mind leading up to her death—information that was instrumental in proving that she did not commit suicide but rather was murdered by an estranged significant

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175 *Wrongful Death Action*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/wrongful_death_action [https://perma.cc/PJ7Y-AC5F] ("Any tortious injury that caused someone's death may be grounds for a wrongful death action.").

176 *See generally* Alex B. Long, *Abolishing the Suicide Rule*, 113 NW. U. L. REV. 767 (2019) (advocating for the continuation of the trend to assign liability to defendants whose actions result in suicide); Andrea MacIver, *Suicide Causation Experts in Teen Wrongful Death Claims: Will They Assist the Trier of Fact?*, 45 J. MARSHALL L. REV. 51 (2011) (indicating that, over time, plaintiffs will increasingly overcome the suicidal causation barrier in wrongful death lawsuits through use of "suicide causation experts").

177 RANDOLPH, *supra* note 142, at 93 ("If the deceased person was killed intentionally or in an accident, survivors may be able to get sizable compensation to help make up the lost income the deceased person would have provided to the family. . . . Family members may win such a lawsuit if the death was caused by, for example, an incompetent doctor, a careless driver, [or] someone committing a crime . . . . [I]f you think a [wrongful death] lawsuit may be justified, talk to an experienced personal injury lawyer as soon as you feel able.").

178 *See* Christina M. Jordan, *Discovery of Social Media Evidence in Legal Proceedings*, A.B.A. (Jan. 30, 2020), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2020/january-2020/discovery-social-media-evidence-legal-proceedings [https://perma.cc/C8KY-2HSD].

179 *In re* Facebook, Inc., 923 F. Supp. 2d 1204 (N.D. Cal. 2012).

other.[180] Sahar died after falling from the twelfth floor balcony of her husband's apartment.[181] Police initially arrested her husband for murder, but later released him without charges, as the postmortem examination failed to demonstrate any conclusive evidence of assault.[182] Nonetheless, Daftary's mother, Anisa, maintained that her daughter—who had told police she was raped only months before—admitted to her in confidence that she was "treated like a slave" by her husband.[183] Her mother had hoped the Facebook messages would reveal her daughter's emotional state prior to her death, but the court found that the executor lacked lawful consent to access her digital assets under the SCA, thereby granting Facebook's motion to quash the subpoena and effectively forcing her to forfeit any potential wrongful death claim.[184] Had this same fact pattern arisen today, under RUFADAA, a court should find for the petitioner and grant an order requiring service providers to disclose the communications. First, under the reasoning of *Ajemian v. Yahoo!*, the SCA no longer serves as a barrier to access.[185] Second, any evidence that may maximize the size of the estate through a wrongful death claim is "reasonably necessary" to administer the estate.

2. Undue Influence

Undue influence occurs when a favored beneficiary abuses his confidential relationship with the testator by exerting his own dominant influence in procuring execution of the testator's will.[186] Where a will does not reflect the wishes of the testator due to undue influence, the will may be invalidated.[187] The influence must control the deceased's mental state, overcoming her power of resistance and coercing her to adopt the will of the other person and dispose of her property in a manner inconsistent with her true preferences.[188] Access to a decedent's

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180 Declan McCullagh, *Facebook Fights for Deceased Beauty Queen's Privacy*, CNET (Sept. 21, 2012, 1:43 PM), https://www.cnet.com/news/facebook-fights-for-deceased-beauty-queens-privacy [https://perma.cc/BDJ7-SXMU].

181 *Id.*

182 *Sahar Daftary Inquest: Model Told Police She Was Raped*, BBC NEWS (July 23, 2012), https://www.bbc.com/news/uk-england-manchester-18955502 [https://perma.cc/3478-QNED].

183 *Id.* Daftary's mother also claims that her son-in-law "did not allow [her daughter] out alone and locked her in the toilet when he left the house." *Id.*

184 *In re Facebook, Inc.*, 923 F. Supp. 2d at 1206.

185 *See supra* Section I.B.1.

186 MICHAEL J. COTÉ, 36 AM. JUR. 2D *Proof of Facts* § 2 (1983).

187 *Id.* § 1.

188 *Id.*

digital accounts may provide evidence that is useful in proving not only whether the decedent possessed the requisite health and mental capacity to sign a will,[189] but also whether she was unduly influenced or coerced by a favored beneficiary.[190] Fiduciaries should have the authority to obtain access to communications that have been alleged in good faith to reveal any evidence of undue influence. In practice, then, the application of such a rule would mean that the objectant contesting admission of the will to probate on undue influence grounds would attempt to compel the personal representative to produce such evidence during discovery.[191]

3. Business Accounts

Many businesses utilize Facebook, Twitter, and LinkedIn accounts as well as webpages and blogs as mechanisms for advertising and fulfilling customer orders.[192] A lack of fiduciary access to these accounts

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189 Joshua H. Epstein, *Litigation Alert: Recent Cases Highlight "Digital Assets" as a New Frontier in Estate Planning and Litigation*, DAVIS & GILBERT LLP (May 1, 2018), https://www.dglaw.com/press-alert-details.cfm?id=833 [https://perma.cc/C2J6-DHXZ].

190 *Id.*; *The Ultimate Guide to Undue Influence*, RMO LLP, https://rmolawyers.com/undue-influence-guide [https://perma.cc/H6AR-CH6Z] ("Evidence of undue influence often consists of a subtle accumulation of evidence, rather than a single fact. That evidence generally includes statements from the victim, abuser, loved ones, neighbors, care professionals, authorities, etc., but it also often includes digital communications like text messages, emails, social media posts, videos, and other evidence admissible in court."); *see also The Florida Fiduciary Access to Digital Assets Act*, PERSANTEZUROWESTE (Feb. 5, 2017), http://www.persantelaw.com/blog/florida-fiduciary-access-digital-assets-act-2017 [https://perma.cc/Q6M5-HCMS] ("In [probate] litigation, the digital assets may be valuable information to learning about a decedent's . . . susceptibility to undue influence. Photos, emails, purchases, and web browsing history all provide evidence that may be helpful for a trial.").

191 New York courts tend to allow broad latitude in discovery of matters that can provide the basis for objections. N.Y. SURR. CT. PROC. ACT LAW § 1404(4) (McKinney 2011) ("The attesting witnesses, the person who prepared the will, the nominated executors in the will and the proponents may be examined as to all relevant matters which may be the basis of objections to the probate of the propounded instrument."); Anne C. Bederka, *Evidentiary Issues in Will Contests*, *in* CONDUCTING SCPA 1404 DISCOVERY 33, 87 (2017), https://nysba.org/NYSBA/Coursebooks/Fall%202017%20CLE%20Coursebooks/1404%20Proceeding/_REVFALL%202017%20CONDUCTING%20SCPA%201404%20DISCOVERY.pdf [https://perma.cc/VW2N-CFR5] ("An executor may be compelled, however, to authorize disclosure of a decedent's medical records in the course of discovery."); *see also In re* Will of Ettinger, 793 N.Y.S.2d 739 (Sur. Ct. 2005). In *Ettinger*, the court had considered but dismissed the argument that authorization to medical records "could lead to the disclosure of very personal information about the decedent," since the medical records would only be available to the parties. *Id.* at 742. By the same logic, objectants should be entitled to digital communications evidencing undue influence, despite the fact that they can reveal sensitive information, assuming the parties are bound by confidentiality.

192 Jill Choate Beier, *Probate v. Privacy: The Technology Battle After Death*, N.Y. ST. BAR ASS'N J., Mar.–Apr. 2018, at 24, 28.

is especially worrisome where the deceased was the sole individual with control over internet servers, incoming orders, corporate bank accounts, and employee payroll accounts.[193] For example, "[b]ids for items advertised on eBay may go unanswered and lost forever."[194]

In 2017, a man requested authority to access his deceased spouse's Google email account in an effort to "close any unfinished business."[195] The Surrogate's Court, New York County, denied his request without prejudice, advising that disclosure is only warranted if reasonably necessary for the administration of the estate and holding that "unfinished business" is insufficient to meet that standard.[196] In that same year, another fiduciary sought access to a decedent's business email account in order to determine the value of his business.[197] Here, too, a court denied the petitioner access to the content of the communications, expressing a concern that "unfettered access to a decedent's digital assets may result in an unanticipated intrusion into the personal affairs of the decedent or disclosure of sensitive or confidential data" that was unrelated to his business.[198] However, this insistence on privacy in the workplace is inconsistent, given that, in order to protect their business assets, employers are permitted to monitor employees' electronic communications for "legitimate business purpose[s]," which is a "catch-all with potentially broad interpretation."[199] If we place limitations on an employee's expectation of privacy in the workplace while alive, the privacy right afforded to a dead person's business account should not be absolute either. Finally, any concerns about the discovery of sensitive personal messages are mitigated in the context of business accounts, which are usually reserved for matters relating to commercial transactions.

193 Gerry W. Beyer & Kerri G. Nipp, Cyber Estate Planning and Administration 3 (Aug. 31, 2020) (unpublished manuscript), https://ssrn.com/abstract=2166422 [https://perma.cc/4MZA-7WYX].

194 *Id.*

195 *In re* Estate of Serrano, 54 N.Y.S.3d 564, 565 (Sur. Ct. 2017).

196 *Id.* at 566.

197 Estate of White, No. 17/812/A, 2017 NYLJ LEXIS 2780, at *1 (Sur. Ct. Sept. 21, 2017).

198 *Id.* at *2.

199 Under the "business purpose exception" to the Electronic Communications Privacy Act of 1986, an employer is permitted to monitor oral and electronic communications so long as surveillance was undertaken for legitimate business reasons. Brenda R. Sharton & Karen L. Neuman, *The Legal Risks of Monitoring Employees Online*, HARV. BUS. REV. (Dec. 14, 2017), https://hbr.org/2017/12/the-legal-risks-of-monitoring-employees-online [https://perma.cc/4XDD-M8B7].

III. ANALYSIS

A. *Avoiding the Perverse Outcomes of RUFADAA*

Under the current interpretation of RUFADAA, a fiduciary's duty to act in the best interests of the estate is significantly hampered, as the failure to discover monetary assets is counterproductive to fulfillment of the decedent's wishes.[200] Furthermore, if a fiduciary may be held liable for negligently breaching his duty to collect and prevent losses of the assets, it becomes unclear the extent to which fiduciaries must dig for assets until they can give up.[201] Acknowledging that application of RUFADAA can produce contrary results, the following two Sections outline tools that fiduciaries can employ to argue that certain factual situations fall outside the scope of RUFADAA entirely (i.e., navigating *around* the law) or fall within the constructs of the law and its enumerated exceptions (i.e., navigating *within* the law).

1. Navigating *Around* the Law

To evade the application of RUFADAA altogether, practitioners can strategically argue about the proper way in which the statute should be interpreted. In 2004, when a twenty-year-old U.S. marine was killed in Iraq, his father tried to recover his email account in order to create a scrapbook and settle the internal affairs of the estate.[202] Yahoo denied the request because the terms of service only allowed disclosure of login credentials to account holders.[203] The following year, an Oakland County probate judge ordered Yahoo to provide the email account's contents and Yahoo acquiesced, its compliance resulting in a violation

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[200] *See* discussion *supra* Section I.A.

[201] Michael D. Walker, *The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age*, 52 REAL PROP. TR. & EST. L.J. 51, 71 (2017) (suggesting that "what constitutes 'prudent' action by the fiduciary may be difficult to ascertain" and implying that it "may be necessary to hire a forensic expert in information technologies to advise the fiduciary on a prudent process for locating a decedent's digital assets").

[202] Jim Hu, *Yahoo Denies Family Access to Dead Marine's E-mail*, CNET (Dec. 21, 2004, 4:46 PM), https://www.cnet.com/news/yahoo-denies-family-access-to-dead-marines-e-mail [https://perma.cc/E3R2-LWJ5]; Rebecca G. Cummings, *The Case Against Access to Decedents' E-mail: Password Protection as an Exercise of the Right to Destroy*, 15 MINN. J.L. SCI. & TECH. 897, 899 (2014).

[203] Natasha Chu, *Protecting Privacy After Death*, 13 NW. J. TECH. & INTELL. PROP. 255, 264 (2015).

of its privacy practices.[204] Presumably, the court found convincing the father's Petition to Produce Information, which claimed that the email account "may contain information relating to the administration, settlement and internal affairs of the Estate . . . that may be useful in determining the assets and liabilities of the Estate."[205] This case—decided prior to the promulgation of RUFADAA—would surely not come out the same way if the same facts were to arise today.[206] Nonetheless, it does reflect a blurring of the lines and a lack of clarity in distinguishing personal property from other intangible assets like digital property.[207] For instance, a New York court has held that digital photos qualify as personal property and not as electronic communications, thereby falling outside the purview of New York's equivalent of RUFADAA and remaining capable of disclosure despite a lack of consent.[208] In the absence of a will, access to photos is valuable in that it can assist the fiduciary in identifying the decedent's relatives and pointing toward potential heirs of the estate—the people who stand to inherit under the statute of descent.[209]

Similarly, courts have found that entries made while using two applications, Google Calendar and Contacts, do not qualify as electronic communications and are, therefore, beyond the statute's reach, since they do not involve any transfer of information between two or more parties.[210] Calendar information can reveal the occurrence of business meetings while contact lists can provide the fiduciary with a mechanism through which to search for people with the same last name as the decedent.

As new technological innovations emerge, courts will be called upon to determine which digital assets can be classified as electronic

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[204] *Yahoo Gives Dead Marine's Family E-mail Info*, NBC NEWS (Apr. 21, 2005, 5:47 AM), https://www.nbcnews.com/id/wbna7581686 [https://perma.cc/8CHF-9K54].

[205] Petition to Produce Information at 1, *In re* Ellsworth, No. 2005-296, 651-DE (Mich. Prob. Ct. Apr. 20, 2005).

[206] *See, e.g.*, Estate of Paragon, No. 2016-1024/E, 2019 NYLJ LEXIS 4412, at *4 (Sur. Ct. Dec. 5, 2019) (denying fiduciary's request for release of contents of decedent's electronic communications stored in Gmail account); *In re* Estate of White, No. 17/812/A, 2017 NYLJ LEXIS 2780, at *1 (Sur. Ct. Sept. 21, 2017) (refusing to provide a fiduciary with access to decedent's Gmail account).

[207] Chu, *supra* note 203, at 264.

[208] Estate of Swezey, No. 17-2976/A, 2019 NYLJ LEXIS 135, at *3–4 (Sur. Ct. Jan. 17, 2019).

[209] Epstein, *supra* note 189 ("Emails and social media accounts may provide insight into a decedent's relationship with his or her relatives . . . .").

[210] *In re* Serrano, 54 N.Y.S.3d 564, 565–66 (Sur. Ct. 2017).

communications.[211] Lawyers will need to craft creative arguments about statutory meaning and legislative intent in determining which assets can be disclosed.[212] It is not uncommon for a person's photo library to include screenshots of text messages, Facebook posts, and emails. The New York court's opinion does not distinguish between "clean photos" and those that reveal more sensitive information,[213] but presumably that kind of sorting process would be tedious and inadministrable. In the absence of a vetting process, access to photographs can divulge more insightful information than one bargained for.

2. Navigating *Within* the Law

In alignment with the second tier established under Section 4 of RUFADAA, estate planning attorneys should be educated about the ramifications of RUFADAA and should regularly ask their clients about their preferences for inserting language granting consent in their wills.[214] Additionally, to address the "Ryans"[215] of the world, minors, other young people, and those who die intestate, users can sign and notarize a form, often called an "Authorization and Consent for Release of Electronically Stored Information," that has the same effect of providing consent.[216]

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211 *The Path to Disclosure of a Decedent's Digital Assets: Settled or Evolving?*, FARRELL FRITZ (Feb. 26, 2020), https://www.farrellfritz.com/rss-post/the-path-to-disclosure-of-a-decedents-digital-assets-settled-or-evolving [https://perma.cc/C6P8-CABQ] (describing "stones left unturned" and acknowledging that the "interpretation of a fiduciary's access to a decedent's digital assets is truly a work in progress" (capitalization alterations omitted)).

212 *See id.*

213 *See Swezey*, 2019 NYLJ LEXIS 135, at *3–4.

214 Beyer, *supra* note 44, at 32; *see* discussion *supra* Section I.B.2.

215 *See supra* Introduction and notes 112–16 and accompanying text.

216 For a sample document, see Beyer & Nipp, *supra* note 193, at 47. Notably, while minors can grant fiduciaries consent to access their digital assets, they lack the authority to devise and thus do not have the authority to determine the inheritance of their digital assets. *See generally* Natalie M. Banta, *Minors and Digital Asset Succession*, 104 IOWA L. REV. 1699 (2019) (arguing that minors' autonomy and privacy interests would be better served by granting minors the capacity to devise their digital assets). Foreign countries, however, employ different approaches with respect to the digital assets of minors. In 2018, for example, Germany's Federal Court of Justice decided parents can inherit their children's digital accounts in the same manner they could inherit physical property like private diaries or letters, despite resistance from social media platforms. *Facebook Ruling: German Court Grants Parents Right to Dead Daughter's Account*, BBC NEWS (July 12, 2018), https://www.bbc.com/news/world-europe-44804599 [https://perma.cc/R42D-SHGN]. In that case, the parents of a fifteen-year-old girl killed by a train sought to access her Facebook account to determine whether she harbored suicidal thoughts. *Id.*

At the first tier, users can utilize the online tools employed by various technology companies by altering their settings. Surprisingly, other than Google and Facebook, service providers have not developed and marketed the use of an online tool.[217] Perhaps the justification for this lack of development is that technology companies are unincentivized to change their behavior given that RUFADAA operates as a safety net and effectively shields them from liability.[218] Because under the current regime companies can routinely deny fiduciary access at minimal to no cost—other than overhead costs associated with customer service teams who handle fiduciary requests—there is no meaningful inducement to motivate any modification in behavior.[219] Nonetheless, technology companies, like Apple, that do not make available some sort of online tool, should consider doing so in order to restore power to the user and effectuate decedent intent.[220]

A more effective solution, aimed at accurately capturing decedent intent at the third tier, is to require users to enumerate their preferences regarding a fiduciary's ability to access assets upon their death at the time of the account's creation through a clickwrap agreement.[221] Sign-up pages separate from the terms-of-service agreement could inquire about a "legacy contact" or "trusted contact," making it a required field

217 Yahoo's Terms of Service, for example, provide that "all Yahoo accounts are non-transferable, and any rights to them terminate upon the account holder's death." *Yahoo Terms of Service*, YAHOO! (Nov. 2021), https://policies.yahoo.com/sg/en/yahoo/terms/utos/index.htm [https://perma.cc/R726-LVDG].

218 REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 16(f) (UNIF. L. COMM'N 2015) ("A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith, except for willful and wanton misconduct, in compliance with this Act.").

219 Sy, *supra* note 46, at 672–73 ("If the RUFADAA is enacted in more states, there will be an incentive for other ISPs to provide for their own online tools."); Anne W. Coventry, *Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA): Online Tools*, PASTERNAK & FIDIS REP. (Feb. 15, 2016), https://www.pasternakfidis.com/revised-uniform-fiduciary-access-to-digital-assets-act-rufadaa-online-tools [https://perma.cc/F2KM-MYBR] ("However, if RUFADAA is widely enacted in the states, not only will there be more incentive for other internet companies to devise online tools, but there will also be more incentive for internet companies to make their use mandatory. Online tools will be favored by the technology industry, as preferable to users leaving instructions in their estate planning documents, because following instructions via an online tool will be cheaper than staffing in-house compliance departments to read and interpret estate planning documents for every deceased user.").

220 Lenz, *supra* note 114, at 22–23 ("Apple does not, in fact, offer online tools to manage iCloud accounts. It would be wonderful to see Apple develop such a tool to allow users to send iCloud account contents to chosen beneficiaries without requiring Courts, or Apple itself, to go through the process of segregating permissible pieces of data from impermissible ones in estate administration.").

221 Beyer & Nipp, *supra* note 193, at 20 ("To ensure that more people make provisions, providers should offer an easy method at the time a person signs up for a new service so the person can designate the disposition of the account upon the owner's incapacity or death.").

before confirmation.[222] For existing accounts, a pop-up window could appear on the user's screen, preventing the user from continuing to their digital account until they affirmatively click a "nondisclosure" or "disclosure" box.[223] By checking off "disclosure," the user would thereby override the default rule of "nondisclosure" laid out under RUFADAA. A potentially concerning obstacle, though, is that users will disregard the message by not reading it and arbitrarily picking a choice in haste[224] or that they will choose the "nondisclosure" option because they are ignorant as to the importance of such a choice in the estate planning and administration process in the first place. If people quickly glance at or brush over privacy policies and terms-of-service agreements without deliberate thought, there is also no reason to believe they would treat this mandatory sign-up process any differently, thus casting doubt on the credence of "click-on" procedures. It could be argued, then, that in the context of inconsistent choices—for example, where the user utilizes the service provider's tool to opt for nondisclosure but executes a will that opts for disclosure—the judgment of a testator should prevail over the "random" clicking on a website. Perhaps the only effective solution, at least for now, is to educate users about the consequences of assigning a "legacy contact" or the equivalent.

CONCLUSION

The law addressing a fiduciary's access to a decedent's digital assets is still a work in progress. Protection of a decedent's postmortem privacy right must be balanced against the fiduciary's duty to locate and preserve all the assets, prevent waste, and distribute the estate to the decedent's intended beneficiaries. The law, as it currently stands, hinders estate administration by placing an onerous burden on fiduciaries to seek out court orders to obtain access to either the catalogue or content of communications. It is within courts' powers to shift this trajectory by reading the scope of RUFADAA more narrowly and breathing life into the "reasonably necessary for administration of the estate" prong. In the meantime, however, estate planning practitioners should be more proactive in advising their clients to

222 *Id.* ("Although most service providers have a policy on what happens to the accounts of deceased users, these policies are not prominently posted and many consumers may not be aware of them.").

223 *Id.* ("For accounts already in existence, service providers should make the effort to reach out to users about their new online tool, stressing the importance of entering the required data and making it easy for them to do so.").

224 *See supra* notes 121–24 and accompanying text.

express their digital asset wishes explicitly in their estate planning documents.