Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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UFADAA and the Federal Stored Communications Act

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

The law states, in relevant part:

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

and

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

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

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

[1] See *Electronic Communications Privacy Act: Hearing on H.R. 3378 Before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 99th Cong. (1985) (statement of Rep. Robert Kastenmeier, Chair) ("When Congress passed the wiretap law in 1968, there was a clear consensus that telephone calls should be private. Earlier Congresses had reached that same consensus regarding mail and telegrams. But in the almost twenty years since Congress last addressed the issue of privacy of communications in a comprehensive fashion, the technologies of communication and interception have changed dramatically. Today we have large-scale electronic mail operations, cellular and cordless telephones, paging devices, miniaturized transmitters for radio surveillance, lightweight compact television cameras for video surveillance, and a dazzling array of digitized information networks which were little more than concepts two decades ago."). Three more decades have passed since the hearing.
[2] 18 U.S.C. § 2702(a).
[3] 18 U.S.C. § 2702(b).

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

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

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

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

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

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

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

[4] See, e.g. *Daniel v. Lipscomb*, 483 S.E.2d 325, 326 (Ct. App. Ga 1997) ("an executor is a fiduciary who owes a duty of confidentiality and the utmost good faith to those to whom he administers…") (internal citations omitted).
[5] 18 U.S.C. § 2702(b)(1).
[6] S. Rep. No. 99-541, at 37 (1986).