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PROTECTING THE DIGITAL AFTERLIFE: VIRGINIA'S  
PRIVACY EXPECTATION AFTERLIFE AND CHOICES ACT

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## INTRODUCTION

With the use of online services becoming ubiquitous and with more personal and family information being stored and maintained online, it has become important for us to consider our “digital afterlife.” Digital information at stake includes domain names, webpages, online purchasing/sales accounts and electronic communications such as email and social media messages.<sup>1</sup> What is going to happen to this digital information after we die? Should our family have access to these accounts? Should the executor of our estates have access? If so, how far should that access extend – to Facebook, to family photos posted on Flickr or Gmail accounts? How about privacy protected correspondence in an alternate Gmail account using a pseudonym or Tinder and Ashley Madison accounts?

What might at first blush appear to be an issue susceptible to a simple solution has become the focus of considerable debate over how to balance competing interests including the needs of fiduciaries, the privacy rights of the deceased account holder and correspondents and the compliance with federal law by online service providers. The Virginia General Assembly wrestled with this issue and crafted a legislative solution that attempts to balance those interests and the result is the first of its kind—the Privacy Expectation Afterlife and Choices Act (PEAC).<sup>2</sup>

This article examines Virginia’s Privacy Expectation Afterlife and Choices Act. Part I surveys federal legislation and proposed uniform legislation that attempts to protect digital assets and records. Part II examines opposition to proposed legislation and another proposed law: the Privacy Expectation Afterlife and Choices Act. Part III details Virginia’s final version of the Privacy Expectation Afterlife and Choices Act. Part V concludes the Article.

## I. FEDERAL LEGISLATION AND PROPOSED UNIFORM LEGISLATION

As with many public policy issues the debate in Virginia over these issues had very human and personal origins. In January of 2011, in rural Nottoway County Virginia a dairy farmer found the body of his 15-year-old son.<sup>3</sup> He had committed suicide.<sup>4</sup> From that moment forward, Ricky and Di-

<sup>1</sup> Greg Lastowka & Trisha Hall, *Living and Dying in a Virtual World: Estate Planning for Digital Assets*, N.J. LAWYER (October 2013), <http://lastowka.rutgers.edu/files/2013/10/Lastowka.pdf>.

<sup>2</sup> VA. CODE ANN. § 64.2-109 (2015); S.B. 1450, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

<sup>3</sup> Victoria Ross, *Life and Death Online*, THE CONNECTION NEWSPAPER, Nov. 8, 2015, <http://www.connectionnewspapers.com/news/2013/feb/22/life-and-death-online>.

<sup>4</sup> Tracey Sears, *Family, Lawmakers Push for Facebook Changes Following Son’s Suicide*, WTRV.COM

ane Rash went looking for answers as to why their son would have taken his life.<sup>5</sup> That search ran into a brick wall when they sought access to their son's Facebook and Twitter accounts.<sup>6</sup> The social media behemoths of the technology sector cited federal privacy laws in denying the grieving parents the access they sought.<sup>7</sup>

The culprit was the Federal Electronic Communications Privacy Act (ECPA), adopted in 1986.<sup>8</sup> Sections 2510 through 2522 address wire and electronic communication interception and interception of oral communications,<sup>9</sup> and §§ 2701 through 2712 address stored wire and electronic communications and access to transactional records.<sup>10</sup> In rejecting the Rash's request for electronic records, the technology sector voiced concerns that the provisions of Chapter 121, in particular §2702, prohibit the release of stored wire and electronic communications and impose civil penalties, including the award of actual damages and attorney fees and, if the release is willful or intentional, punitive damages.<sup>11</sup>

Although parents normally have control over and access to matters involving their children, federal law allows children as young as 13 to enter service agreements with online service providers and preempts what most believe to be the rules governing contracts with minors.<sup>12</sup> As noted, ECPA establishes restrictions for access to private information transmitted and stored on the Internet, such as emails, photos or direct messages; shields the privacy of everyone entering service agreements; and, in a consequence almost certainly unintended, that protection extends to the privacy of children from their parents after the child's death.<sup>13</sup> Citing ECPA, in 2013, the Vir-

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(Jan. 9, 2013, 6:52 AM), <http://wtvr.com/2013/01/08/legislation-introduced-for-access-to-deceased-persons-digital-property>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Frederick Kunkle, *Virginia Family, Seeking Clues to Son's Suicide, Wants Easier Access to Facebook*, WASH. POST, February 17, 2013, [https://www.washingtonpost.com/local/va-politics/virginia-family-seeing-clues-to-sons-suicide-wants-easier-access-to-facebook/2013/02/17/e1fc728a-7935-11e2-82e8-61a46e2cde3d\\_story.html](https://www.washingtonpost.com/local/va-politics/virginia-family-seeing-clues-to-sons-suicide-wants-easier-access-to-facebook/2013/02/17/e1fc728a-7935-11e2-82e8-61a46e2cde3d_story.html).

<sup>8</sup> Electronic Communications Privacy Act (ECPA) of 1986, 18 U.S.C. §§ 2510–2522 (2012).

<sup>9</sup> *Id.*

<sup>10</sup> 18 U.S.C. §§ 2701–2712 (2012) (discussing damages).

<sup>11</sup> See also *Freedman v. Am. Online, Inc.*, 325 F. Supp. 2d 638, 640, 643–45 (E.D. Va. 2004) (finding AOL was in violation of the ECPA because the conduct resulting in the violation was "engaged in with a knowing or intentional state of mind."). See generally *Negro v. Superior Court*, 179 Cal. Rptr. 3d 215 (Cal. Ct. App. 2014) (discussing the "Stored Communications Act" and finding defendant's Gmail messages were "covered by the Act's prohibitions.").

<sup>12</sup> 15 U.S.C. §§ 6501-02 (1998).

<sup>13</sup> 18 U.S.C. § 2510(12) (1986) (defining electronic communications as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by wire..."); 18 U.S.C. § 2510(15) (defining "electronic communications service" as "any service which provides to users thereof the ability to send or receive wire or electronic communications."); 18 U.S.C. § 2511 (pro-

ginia General Assembly passed legislation that addressed the problem, but only for minors.<sup>14</sup>

The 2013 legislation tackled the issue by addressing online contracts with minors, providing that in most circumstances a deceased minor's service contracts for digital accounts may be assumed by his or her personal representative.<sup>15</sup> This narrow statutory solution addressing online content for deceased minors actually sidestepped the question of whether such disclosures are permissible under ECPA in that it contained an express exclusion stating that "[n]othing in this section shall be construed to require a provider to disclose any information in violation of any applicable state or federal law."<sup>16</sup>

#### A. Uniform Fiduciary Access to Digital Assets Act

For the past several years there has been an effort to craft a solution to the dilemma. In the summer of 2014 the Uniform Law Commission (ULC) approved the Uniform Fiduciary Access to Digital Assets Act (UFADAA): model uniform legislation it hoped would become the national standard for addressing the right of fiduciaries to access social media and other digital accounts of the deceased.<sup>17</sup> The most controversial provision to UFADAA is that it created a presumption of access to "digital assets" by a fiduciary.<sup>18</sup> "Digital asset" was defined by UFADAA as an electronic record but did not include the underlying asset or liability unless such asset or liability was itself an electronic record.<sup>19</sup>

Without UFADAA, executors and administrators viewed the ability to access digital assets as overly burdensome if not completely futile.<sup>20</sup> Although internet service providers and the larger internet community did not interpret ECPA to be as restrictive in providing "records" and "content" to trustees, conservators/guardians and agents acting under a power of attorney, UFADAA provided clear rules and guidelines to an area of the law that

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hibiting the disclosure of wire, oral, or electronic communications).

<sup>14</sup> VA. CODE ANN. § 64.2-110 (2013).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT §§ 1-15 (UNIF. LAW COMM'N 2014) available at [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014\\_UFADAA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf).

<sup>18</sup> The provisions of the Uniform Fiduciary Access to Digital Assets Act, addressed all types of fiduciaries including: executors, administrators, conservators, guardians, powers of attorney and trustees. *Id.* at §§ 4-7.

<sup>19</sup> *Id.* at § 2(9).

<sup>20</sup> Thomas Henske, *Protect Online Assets with a Digital Estate Plan*, CNBC (May 19, 2014), <http://www.cnbc.com/2014/05/18/protect-your-digital-assets-after-your-death.html>.

was, by most accounts, uncertain and ambiguous.<sup>21</sup>

## II. CHALLENGES TO UFADAA AND OTHER PROPOSED LEGISLATION

With rising awareness of the difficulties experienced by family members and fiduciaries, UFADAA was introduced in the 2015 General Assembly Session as House Bill 1477.<sup>22</sup> Opposition to HB1477 and the provisions of UFADAA from large technology companies and the American Civil Liberties Union (ACLU) was immediate and strong.<sup>23</sup>

Opponents argued compliance with HB 1477 and UFADAA's grant of broad fiduciary powers and presumption of access to digital assets violated the provisions of ECPA and federally protected privacy rights of a user or account holder.<sup>24</sup> Opponents further argued that the unlimited access HB 1477 and UFADAA provided to fiduciaries disregarded the privacy interests of third parties by failing to protect the communications of people who corresponded with the deceased.<sup>25</sup> These communications can include highly confidential communications where the deceased may be a doctor, psychologist, an addiction counselor or a member of the clergy.<sup>26</sup> These privacy concerns are buttressed by public opinion. According to a February 2014 poll conducted by Zogby Analytics for NetChoice (a coalition of on-line technology businesses), more than 70 percent of Americans think that their private online communications should remain private after they die – unless they gave prior consent for others to access.<sup>27</sup> In addition, 70 percent also felt that the law should err on the side of privacy when someone dies without documenting their preference about how to handle their private communications.<sup>28</sup>

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<sup>21</sup> See UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, 1 (2014) [hereinafter UFADAA] available at [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014\\_UFADAA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf); see, e.g., U.S. Internet Serv. Provider Ass'n, *Electronic Evidence Compliance - A Guide for Internet Service Providers*, 18 BERKELEY TECH. L.J. 945, 951 (2003).

<sup>22</sup> H.R. 1477, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

<sup>23</sup> Letter from Carl Szabo, Policy Counsel, NetChoice, to Greg D. Habeeb, Va. Del. (Jan. 19, 2015) available at <https://netchoice.org/wp-content/uploads/NetChoice-Opposition-to-VA-HB-1477.pdf>.

<sup>24</sup> *Joint Letter: Civil Liberty Organizations Respond to the Uniform Fiduciary Access to Digital Assets Act*, AMERICAN CIVIL LIBERTIES UNION (Jan. 15, 2015), available at <https://www.aclu.org/joint-letter-civil-liberty-organizations-respond-uniform-fiduciary-access-digital-assets-act>.

<sup>25</sup> *Id.*

<sup>26</sup> Letter from Carl Szabo, *supra* note 25.

<sup>27</sup> *Privacy Afterlife: Empowering Users to Control Who can See Their Online Accounts*, NETCHOICE, <http://netchoice.org/library/decendent-information> (last visited Nov. 8, 2015).

<sup>28</sup> *Id.*

### A. Privacy Expectation Afterlife and Choices Act

As a consequence of the concerns expressed to UFADAA, an alternative approach was developed and drafted by the technology sector, the Privacy Expectation Afterlife and Choices Act (PEAC), with the stated purpose of balancing fiduciary needs with privacy rights while also complying with federal law.<sup>29</sup> PEAC was introduced in the 2015 General Assembly Session as Senate Bill 1450.<sup>30</sup> Proponents highlighted that PEAC provides incentive to online service providers to develop and provide tools to their users that allows them to elect what happens to their digital information and their continued right to privacy after death.<sup>31</sup> At the same time, it provided executors and administrators with the basic digital information necessary to administer an estate.<sup>32</sup>

Another critical distinction between PEAC and UFADAA is that the latter created a definition of digital assets whereas PEAC did not treat stored communications as an asset of the user or account holder, primarily because many terms of service agreements establish that much of the content stored online is not owned by the user or account holder.<sup>33</sup> For example and in general, emails sent and received by and through Internet service providers are not actually owned by the user or account holder.<sup>34</sup> Another enlightening example is an iTunes account. Although many iTunes account holders may believe they own a “downloaded” song, they actually have only a license to the song, which cannot be left or devised to a third party upon death, thus, access by a fiduciary would potentially provide continued use of a song that was not contemplated by the original license agreement.<sup>35</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> S.B. 1450, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

<sup>31</sup> See *Advocacy: 2015 Legislative Session in Richmond Reaches Halfway Mark*, NVTC: NORTHERN VIRGINIA TECHNOLOGY COUNCIL, <http://www.nvtc.org/advocacy/2015SessionCrossoverRpt.php> (last visited Nov. 8, 2015).

<sup>32</sup> See VA. CODE ANN. §§ 64.2-110 – 64.2-111(A); S.B. 1450, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

<sup>33</sup> See Kristina Sherry, Comment, *What Happens to Our Facebook Account When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185, 189 (2012) (excluding content stored on a private server or “drop box”). Compare VA. CODE ANN. §§ 64.2-111 (A) with UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT §2 (amended 2015), [http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014\\_UFADAA\\_Final.pdf](http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf).

<sup>34</sup> See Natalie M. Banta, *Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death*, 83 FORDHAM L. REV. 799, 817–20, 825 (2014) (“It is the corporation that decides what ownership interest we have in our digital assets.”); Jonathan J. Darrow & Gerald R. Ferrara, *Who Owns a Decedent’s E-mails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. LEGIS & PUB. POL’Y 281, 291–92 (2007); Claudine Wong, *Can Bruce Willis Leave His iTunes Collection to his Children?: Inheritability of Digital Media in the Face of EULAs*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 703, 706–07 (2012-2013).

<sup>35</sup> APPLE, iTUNES STORE – OERMS AND CONDITIONS (2015), available at <http://www.apple.com/legal>

While UFADAA and HB 1477 presumed access of digital information by fiduciaries, PEAC as introduced, was viewed by UFADAA proponents as creating an expensive, cumbersome, and prohibitive process for executors and administrators to obtain information necessary to administer a decedent's estate.<sup>36</sup> To receive "records" or "content" PEAC seemingly required service of process on entities holding desired "records" and or "content." In its original form, PEAC would have also required the introduction of evidence to prove a litany of facts and, in some instances, the proof of a "negative."<sup>37</sup> For example, an executor or administrator would have been required to prove there are no other authorized users or owners of a deceased user's account.<sup>38</sup>

Other significant objections by UFADAA proponents to the initial language of PEAC included (1) the requirement that to receive "records" and or "content" an executor or administrator would be required to affirmatively prove disclosure was "not in violation of 18 U.S.C § 2701 et seq., 47 U.S.C. § 222, or other applicable law" and (2) that the order requiring the disclosure of "content" include a provision "that the estate shall first indemnify the provider from all liability in complying with the order."<sup>39</sup>

### III. VIRGINIA'S ULTIMATE RESPONSE TO PROTECT DIGITAL AFTERLIFE

To achieve balance between legitimate competing interests, access and

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/internet-services/itunes/us/terms.html (last visited Nov. 5, 2015).

<sup>36</sup> See, e.g., Karin Prangle, *War and PEAC in Digital Assets: The Providers' PEAC Act Wages War with UFADAA*, 29 PROB. AND PROP. MAGAZINE, no. 4, July/Aug. 2015, at 43–44.

<sup>37</sup> To disclose a "record" it was necessary for a Court to find that (a) the user is deceased; (b) the deceased user was the subscriber to or customer of the provider; (c) the account(s) belonging to the deceased user have been identified with specificity, including a unique identifier assigned by the provider; (d) there are no other authorized users or owners of the deceased user's account(s); (e) disclosure is not in violation of 18 U.S.C. § 2701 et seq., 47 U.S.C. § 222, or other applicable law; (f) the request for disclosure is narrowly tailored to effect the purpose of the administration of the estate, (g) the executor or administrator demonstrates a good faith belief that account records are relevant to resolve fiscal assets of the estate; (h) the request seeks information spanning no more than a year prior to the date of death; and (i) the request is not in conflict with the deceased user's will or testament. To disclose "content" it was necessary for a Court to find (i) that the will of the decedent or setting within the product or service regarding how the user's contents can be treated after a set period of inactivity or other event expressly consented to the disclosure of the contents of the deceased user's account by the executor or administrator of the estate of the deceased user, (ii) ordering that the estate shall first indemnify the provider from all liability in complying with the order; (iii) finding that the user is deceased; (iv) finding that the deceased user was the subscriber to or customer of the provider; (v) finding that the account(s) belonging to the deceased user have been identified with specificity, including a unique identifier assigned by the provider; (vi) finding that there are no other authorized users or owners of the deceased user's account(s) and (vii) finding that disclosure of the contents is not in violation of §2701 et seq., 47 U.S.C. § 222, or other applicable law. S.B. 1450 § 64.2-110 (E)-(F), 2015 Gen. Assemb., Reg. Sess. (Va. 2015) (as introduced Jan. 23, 2015).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

privacy, proponents of both HB 1477 and SB 1450 established and agreed upon definitions of separate categories of electronic communications.<sup>40</sup> These include “records of electronic communications” and “contents of electronic communications.”<sup>41</sup> The final draft of PEAC, did not include a definition of “digital assets” primarily because of concern that assigning a definition to the term may create a new class of property rights and inadvertently cause conflict with existing personal property law, both common and statutory.<sup>42</sup>

As noted, Federal law prohibits technology service providers from disclosing the “content” of electronic communications of a user or subscriber.<sup>43</sup> It is less protective of the “records” of a user or subscriber, which include certain basic information like the recipient, sender and date information, thus, the necessity to assign specific definitions to and different requirements for the disclosure of each.<sup>44</sup>

To protect privacy rights, comport with federal law, but facilitate the legitimate need for “records” or “content” by an executor or administrator, PEAC was modified to eliminate both the need for a hearing and the formal introduction of evidence, unless there is a true controversy over disclosure.<sup>45</sup> In its final form, Virginia’s version of PEAC also set forth a more structured procedure to obtain “content” and “records” and moderated the threshold of obtaining an order requiring disclosure.<sup>46</sup>

As adopted by the General Assembly, a personal representative can obtain a court order directing a service provider to provide a decedent’s “records” or “content” by filing an affidavit with the Clerk of Court attesting to the requirements of disclosure as set forth in § 64.2-111 of the Act.<sup>47</sup>

A personal representative can obtain records (i.e. recipient, sender and date information) for the last 18 months of a decedent’s life provided he/she attests to a series of facts including, but not limited to:

- That the decedent is deceased
- The decedent’s user name/account information
- The request for disclosure is tailored to effectuate the purpose of the administration of the estate

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<sup>40</sup> S.B. 1450, 2015 Gen. Assemb., Reg. Sess. (Va. 2015) (enacted).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 47 U.S.C. § 222 (2015); 18 U.S.C. § 2702 (2009).

<sup>44</sup> 18 U.S.C §§ 2702–2703 (2006).

<sup>45</sup> S.B. 1450, 2015 Gen. Assemb., Reg. Sess. (Va. 2015).

<sup>46</sup> VA. CODE ANN. § 64.2-109–64.2-115 (2015).

<sup>47</sup> VA. CODE ANN. § 64.2-111(A) (2015).

- The decedent did not object to the disclosure of records in their will<sup>48</sup>

A personal representative may ask a court for records extending beyond the last 18 months of a decedent's life if a court concludes that such records are necessary to administer the user's estate.<sup>49</sup>

A personal representative can obtain content (i.e. the body of electronic communications, subject lines, etc.) provided he/she attests to a series of facts including, but not limited to:

- That the decedent is deceased
- The decedent's user name/account information
- The request for disclosure is tailored to effectuate the purpose of the administration of the estate
- The decedent expressly consented to the disclosure of records in their will or through an election with their service provider<sup>50</sup>

To reach a more obtainable threshold of disclosure, in recognition that a personal representative may be a layperson, and to minimize potential costs to an estate, the requirement to "prove" or "attest" that disclosure would not violate federal law (18 U.S.C § 2701 et seq., 47 U.S.C. § 222, or other applicable law) was struck.<sup>51</sup> The requirement that an estate indemnify a "provider" prior to releasing "content" was also eliminated.<sup>52</sup> Added to PEAC was a provision clarifying that an order to obtain "records" and or "content," may be an *ex parte* proceeding and a personal representative is not required to provide notice to heirs, beneficiaries of the estate, or the provider.<sup>53</sup>

A more subtle change to PEAC appears in §64.2-111(A)(3) and (B)(5).<sup>54</sup> As originally drafted, PEAC would have required a personal representative to identify an account with specificity, including a unique identifier assigned by the provider; however, the term "unique identifier" was not defined.<sup>55</sup> Proponents of UFADAA held concerns that in a vast majority of situations only the decedent would know a password, screen name, username or other "unique identifier."<sup>56</sup> In the final draft of PEAC, unique identifier is defined and subsections (A)(3) and (B)(5) of § 64.2-111 include

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<sup>48</sup> *Id.*

<sup>49</sup> VA. CODE ANN. § 64.2-111 (C) (2015).

<sup>50</sup> VA. CODE ANN. § 64.2-111(B) (2015).

<sup>51</sup> Compare S.B. 1450, 2015 Gen. Assemb., Reg. Sess. (Va. 2015) with VA. CODE ANN. § 64.2-111 (2015) (showing that the information cited in the bill is not in the current statute).

<sup>52</sup> *Id.*

<sup>53</sup> VA. CODE ANN. § 64.2-111 (D) (2015).

<sup>54</sup> VA. CODE ANN. § 64.2-111 (A)(3), (B)(5) (2015).

<sup>55</sup> VA. CODE ANN. § 64.2-111 (A)(3) (2015).

<sup>56</sup> Victoria Blachly, *Uniform Fiduciary Access to Digital Assets Act: What UFADAA Know*, 29 PROB. & PROP. MAGAZINE, no. 4, July/August 2015, at 2-3 (2015).

language allowing for the *reasonable* identification of an account and providing that ownership of an account may be established by “other identifying information sufficient to enable the service provider to definitively identify the user.”<sup>57</sup>

In a vast majority of cases, those settling estates should be able to locate the financial information needed by receiving 18 months worth of records (to, from, date information). They can then determine whom a decedent had been transacting businesses with and send letters of administration directly to those financial institutions. Personal representatives can obtain records of the decedent provided they include in their attestation that there was no expression in the will to keep the records private.<sup>58</sup>

However, should a personal representative need to obtain content, they can only do so if the decedent expressly consented in their will or through an affirmative election with the Internet service provider.<sup>59</sup> This is consistent with federal law, which prohibits Internet service providers from disclosing content unless there is a warrant or consent.<sup>60</sup> It is also consistent with the privacy expectations users have under the terms of service agreements and privacy policies of many Internet businesses.<sup>61</sup> To further ensure the protection of privacy rights and as a counterbalance to the disclosure of “records” and “content” by affidavit, a provision was added to PEAC, which sets forth a clear procedure for an order requiring disclosure to be re-evaluated if an objection to disclosure is made.<sup>62</sup>

Recognizing that it is difficult to solve for everything in one General Assembly session, PEAC also provides for a JCOTS study of the implementation of this Act and also asks JCOTS for recommendations to deal with other fiduciary situations like conservators, guardians, guardians ad litem,

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<sup>57</sup> VA. CODE ANN. § 64.2-109 (2015)(defining “unique identifier” as an email address, unique screen name or user name, user identification, or other identifier assigned by a service provider of such service to engage in such use); VA. CODE ANN. § 64.2-111(A)(3) (2015)(stating that the affidavit must assert that the decedent’s account has been reasonably identified, including through a unique identifier assigned by the provider or other identifying information sufficient to enable the service provider to definitively identify the user); VA. CODE ANN. § 64.2-111(B)(3) (2015)(stating that the affidavit must assert that the decedent user can be reasonably identified through a unique identifier assigned by the service provider or other identifying information sufficient to enable the service provider to definitively identifying the user).

<sup>58</sup> VA. CODE ANN. § 64.2-111(B)(5) (2015)(stating that affidavit must assert the decedent user consented, through a will provision or by affirmative consent in account settings, to the disclosure of the user’s account - not including terms of service agreements).

<sup>59</sup> VA. CODE ANN. § 64.2-111 (B)(5) (2015).

<sup>60</sup> 18 U.S.C § 2703 (2009).

<sup>61</sup> See generally *Privacy Afterlife: Empowering users to control who can see their online accounts*, NETCHOICE, <http://netchoice.org/library/decedent-information/#poll> (last visited Nov. 8, 2015) (discussing expectations users have regarding online information).

<sup>62</sup> See VA. CODE ANN. §§ 64.2-112, 64.2-113 (2015).

trustees and powers of attorney.<sup>63</sup>

## V. CONCLUSION

In the digital age, our presence lives on through social media and electronic communications long after our death. Grappling with privacy concerns, effective estate administration, compliance with federal law, and personal wishes of the deceased, lawmakers and industry leaders have struggled to determine the best course of action for access to these accounts and communications. Virginia's Privacy Expectation Afterlife and Choices Act provides access in a way that hopes to preserve our privacy rights while allowing fiduciaries to carry out estate administration duties. More concerns in this area of the law are sure to arise, but Virginia's adoption of PEAC gives citizens of the Commonwealth better clarity regarding their digital afterlife.

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<sup>63</sup> VA. DIV. OF LEGISLATIVE SERVS., VA. GEN. ASSEMB. 2015 SESSION SUMMARY (2015).

