The Digital Asset Dilemma

By Jill Choate Beier and Susan Porter

It is the worst nightmare for a parent. Seemingly out of nowhere, your 15-year-old son commits suicide. You search for answers, finding none. Like all teenagers his age, your son spent a lot of time on his computer and, in particular, on the Facebook website. So, you hope to find some answers by accessing his account. The problem is that Facebook refuses your request stating that you have no rights to access or obtain a copy of the content within your own son's account.[1] Or, imagine that your son is fighting for our country in Iraq and is killed by a bomb near Fallujah. Your son frequently communicated by email with family and friends while serving in the military. After his death, you request the contents of your son's email account from Yahoo! as a sort of modern-day collection of his letters home. The company, however, denies the request for privacy reasons, noting that the Terms of Service for its free email accounts state that a person's rights to the accounts and its contents terminate at death.[2]

Welcome to the age of digital assets. These scenarios raise questions concerning not only ownership of an individual's web assets, but also the right of the deceased individual's survivors to access his or her web assets after death. As just one example of the enormity of this issue, it is estimated that there are 30 million Facebook accounts that belong to deceased persons.[3] Few people consider the fate of their online accounts or web-based assets upon death or incapacity. Before addressing what happens to such accounts and/or assets upon one's death, we first need to define what these assets are.

What Are Digital Assets?

A general definition of a digital asset is "any file on your computer in a storage drive or website and any online account or membership."[4] Digital assets, therefore, can be found in many different forms. For example, some digital assets may be stored on a computer or smartphone or uploaded to a website. These assets would include items such as music, videos, medical records, tax documents, financial records, photographs stored on websites such as Shutterfly or Flickr, or generic file storage sites in the Cloud such as Dropbox. Most, if not all, of these types of digital assets require a login ID and password to gain access to the stored materials.

Other assets involve social media websites, such as Facebook, Twitter, LinkedIn, Pinterest, or Google Plus,[5] which promote social interaction, messaging and connection to other individuals.[6] Again, these types of digital accounts typically require a login ID and password to gain access. In addition, there are many other types of accounts that we use in our daily lives that have secured access. These accounts include email accounts such as Yahoo!, Gmail or Hotmail,[7] on-line banking accounts, Paypal accounts, eBay accounts and Amazon accounts, just to name a few. Certain digital assets have their own pecuniary value such as ownership of a domain name or a blog.

It is no wonder that with all of these digital assets, estate planners and administrators are wondering how to deal with them after the death or incapacitation of the "owner."

What Is the Law Regarding Digital Assets?

Terms of Service of the Service Provider

As discussed below, very few states have enacted statutes to deal with electronic content and digital assets. That means for most people in most states, if the service provider has a policy regarding the transfer or disposal of account access and content under the provider's Terms of Service ("TOS"), then the TOS will control the fate of the deceased person's account and content for that service provider.[8] Most people agree to the TOS of the service provider by clicking on the "I agree" button when establishing an account.[9] Some service providers have a policy that indicates what will happen upon the death of an account holder. Others have no detailed policy.

For example, Shutterfly's TOS does not include an explicit discussion of what happens when the account holder dies. Shutterfly's TOS states that the individual agrees not to disclose his or her username or password to any third party and acknowledges that the individual's access to the account is non-transferable.[10] The TOS for LinkedIn, Google and Twitter each contain similar language regarding disclosure of the secured access information and transferability.[11]

Conversely, Gmail has a policy for potentially releasing emails to the personal representative of a deceased account holder.[12] The policy makes it clear, however, that there is no guarantee the email content will be released and a court order will be required.[13] Yahoo! explicitly states in its TOS that the account cannot be transferred and any rights to content within the user's email account terminate upon death and all content may be permanently deleted.[14] Facebook allows someone to report a user as deceased and the deceased user's Facebook page may then be converted into a

memorial to the deceased user. Only confirmed friends will continue to have access to the deceased user's profile and may continue to post messages in memoriam on the deceased user's wall.[15]

A more complex issue surrounds the choice of law clause that is generally included in a service provider's TOS. A choice of law clause dictates which state's law will govern the TOS itself and any transaction that is related to the TOS.[16] The result may be that even where the deceased resides in a state with a statute governing the disposition of and access to the deceased's digital assets, if the state law governing the TOS does not have a similar statute, the TOS may override the state law where the deceased resides.

Current Law Regarding Fiduciary Access to Digital Assets

At the time of this writing, only six states, Connecticut, Rhode Island, Indiana, Oklahoma, Idaho, and Virginia, have enacted statutes to deal with electronic content and digital assets. Connecticut enacted the first statute in this country in 2005[17] to respond to situations similar to that of the Yahoo! case described in the opening paragraph of this article. The Connecticut statute specifically addresses fiduciary access to email accounts and requires an email service provider to provide the executor or administrator of the deceased person's estate "access to or copies of the contents of the electronic mail account of such deceased person…."[18] The executor or administrator must submit a written request for the email account access along with a certified copy of the death certificate and his or her certificate of appointment as executor or administrator of the deceased person's estate, or submit an order of the court of probate that has jurisdiction over the deceased person's estate.[19] The legislation, however, does not address the other types of digital assets previously discussed.

Rhode Island enacted a statute in 2007 that is very similar to the Connecticut statute and only deals with fiduciary access to a deceased person's email account.[20] Indiana, by contrast, enacted a statute in 2007 that attempts to deal with additional types of digital assets.[21] The Indiana statute provides that a custodian[22] "shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of any documents or information of the deceased person stored electronically by the custodian…."[23] Similar to the Connecticut and Rhode Island statutes, the personal representative must submit a written request for access along with the death certificate and the official documents appointing the personal representative, or provide a court order issued by the probate court that has jurisdiction over the deceased person's estate.[24] The statute further prohibits the custodian from destroying or disposing of any electronically stored documents or information of the deceased person for two years after the request from the personal representative was received by the custodian.[25]

Oklahoma enacted a digital asset statute in 2010[26] and Idaho enacted a similar statute in 2011.[27] These statutes are, arguably, the most comprehensive regarding digital assets enacted to date. Oklahoma's statute provides:

> The executor or administrator of an estate shall have the power, where otherwise authorized, to 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.[28]

Idaho's statute uses virtually identical language.[29] These statutes make good progress toward resolving the digital asset dilemma. However, the Oklahoma and Idaho statutes do not authorize full-blown access to all of the decedent's digital property. In addition, the Oklahoma statute expressly grants the executor power only "where otherwise authorized."[30] This language can give the service provider the ability to claim control over the transfer of the deceased's account through the TOS. As discussed above, most service providers utilize a TOS that does not allow for transfer or assignment, much less access to the deceased's accounts by a fiduciary.

Finally, Virginia's statute was very recently passed in March 2013, and was crafted to specifically address the inability of the parents of the 15-year old who committed suicide to gain access to their son's Facebook account.[31] The statute, however, appears to only address the access of digital accounts that were controlled by a minor.[32]

Proposed Law Regarding Fiduciary Access to Digital Assets

Several states have recently introduced legislation regarding fiduciary access to digital assets. New York, Nebraska, Maryland, North Dakota and Nevada have each introduced bills with proposed language similar or identical to the language used in the Oklahoma and Idaho statutes described above.[33] Other states such as North Carolina and Oregon are proposing broader legislation to include laws that would provide an agent or a conservator, in addition to a decedent's personal representative, access to the digital accounts and digital assets of the individual whom the agent or conservator represents.[34] Many more states are also studying possible legislation.

The digital asset dilemma has become such a prominent topic for discussion among estate planners and administrators around the country that the Uniform Law Commission ("ULC") has formed a drafting committee to create a uniform law relating to fiduciary access to digital assets entitled the "Fiduciary Access To Digital Assets Act."[35] The ULC proposal includes thorough definitions of a custodian, digital account, digital asset, digital device and digital service, just to name a few.[36] It also adds the term "digital property," which consists of the "ownership and management of and rights related to a digital account and digital asset."[37] The proposal authorizes a fiduciary, such as a personal representative, conservator, trustee or an agent, to exercise control over the deceased person's digital property so long as it is permitted under the provisions of the terms of service agreement.[38] Finally, the proposed law provides that the personal representative is an "authorized user" under all applicable state and federal statutes.[39] This last provision ensures that the fiduciary is considered an authorized user under two federal statutes that prohibit unauthorized access to computers and computer data,[40] as well as pursuant to any comparable state laws prohibiting unauthorized access.[41]

Although the ULC's proposal is comprehensive, it is arguable that some of the proposed language will simply allow the service provider to refuse to cooperate with the executor or comply with the law because the TOS prohibits a third party from accessing the deceased's account. In the absence of clear statutory language, therefore, the practitioner should contemplate the disposition of digital assets in crafting a client's estate plan.

Planning for Digital Assets

The first step in planning for digital assets is simply to identify your client's digital assets, which, sometimes, can be the most difficult aspect of planning for them. It is important to create an inventory of all digital accounts with password protection, including the login ID and password for each site. Some websites require a user to periodically change the password for the account, so this list will need to be updated for new passwords and for any new accounts that your client may create. A sample digital inventory form can be found at http://www.digitalpassing.com/digitalaudit.pdf.[42] After the inventory has been created, the next step is to ensure the inventory is stored in a secure and private location. If the inventory is in hard copy format, it may be stored in a safe deposit box or with an attorney. If the inventory is stored in an electronic file or multiple electronic files, the client should consider creating a master password for the storage device such as a CD or USB flash drive.[43] The main purpose is to save the information in a secure and private location so that upon the user's death or incapacitation, the information is easily accessible to the appropriate parties. An alternative option is to entrust the information to a digital estate planning service. These services are discussed in more detail below.

The Will

Disposing of digital assets concerns the disposition of both tangible (*e.g.*, computers, tablets and smartphones) and intangible (*e.g.*, email, social accounts and business and financial accounts) property. Current documents may—or may not—anticipate the proper disposition of these assets. For example, what does a bequest of "all my tangible personal property" include? Who inherits the books downloaded on a Kindle or music downloaded on an iPod? The Kindle plan provides a one-time payment to buy the hardware and it is accompanied by a "forever" service of holding the books purchased by the account holder (presumably, in the event the Kindle is lost, stolen or destroyed and needs to be replaced).[44] So, in general, your clients own the hardware, but probably do not own the content. Content is not "purchased" in the traditional sense, because it is leased or, sometimes, the term "licensed" is used. Under the iTunes TOS, clients only "borrow" music tracks rather than owning them outright.[45]

In light of this, the decedent may wish that one beneficiary receive the tangible digital asset, such as the computer, and another beneficiary receive the content. Consequently, it is crucial to read and understand the end-user agreement for the hardware as well as the TOS in place for the content. The practitioner must also ensure that the language in the will properly specifies the distribution of tangible and intangible digital assets in accordance with the client's wishes.

In addition, the will should grant the deceased's executor with the authority to access, control and/or delete the deceased's digital accounts. This is preferable even in a jurisdiction that has a statute governing the disposal of digital assets. The estate planner should advise the client to carefully consider the choice of executor if the client has significant digital assets. Care should be taken to ensure that the chosen executor possesses the necessary skills and/or knowledge to administer the client's digital assets. Nevertheless, if the executor lacks the necessary skill, the will should authorize the executor to engage the services of a technology specialist. Indeed, some jurisdictions may recognize the appointment of a "digital executor" to deal with administering digital assets.[46]

Power of Attorney

Although the law is unclear on the issue, an individual could execute a power of attorney that authorizes another person to access, control and/or delete

the individual's digital assets and accounts in the event the individual becomes incapacitated. However, as previously discussed, most TOS agreements prohibit providing a person other than the account holder with the login and password information. Doing so may violate the TOS and cause the service provider to terminate the account and delete all the content contained therein.[47]

Trust

A third planning option is to consider advising clients to transfer ownership of digital assets to a revocable trust. As discussed above, some digital assets are in the form of licenses which may be transferred to a trust, thus enabling a trustee to manage and administer all online accounts without violating the TOS agreements.[48]

Third Party Service Providers for Administering Digital Assets

There are a number of third party services ("TPP") that will provide planning assistance for digital assets. For example, Deathswitch is a company which utilizes an automated system to prompt the subscriber for a password on a regular schedule to ensure the subscriber is still alive. If the subscriber does not enter the password for some period of time and after additional prompts, the computer deduces that the subscriber is either dead or incapacitated and the subscriber's "prescripted messages are automatically emailed" to those individuals named by the subscriber.[49] AssetLock provides an "electronic safe deposit box" that holds estate information and messages and will release information upon the user's death or incapacity.[50] Legacy Locker is another provider that lets the user grant access to online assets in the event of "loss, death or disability."[51]

One advantage of using a TPP is the likelihood that survivors will receive the information maintained by the TPP in a timely manner and without difficulty. In addition, updating the information in a TPP account is easier than updating a physical document and storing the hard copy securely. Despite the advantages, using a TPP may create some difficulties as well. As discussed above, providing the TPP with the subscriber's login and password may be a violation of the service provider's TOS. In addition, the TPP is not a legally recognized representative of the subscriber's estate in the way of an executor or administrator appointed by the court.[52] Finally, because TPPs typically store a subscriber's account login credentials and other private information, they are sure to become prime targets for hackers and identity thieves.[53]

Conclusion

As evidenced by the discussion in this article, digital assets and planning for them can create many legal issues. Those issues are increasing day-by-day as new technologies emerge. In addition, there is no doubt that the number of clients with digital assets will only continue to rise. Amidst the uncertainty in the law, a practitioner must navigate the landscape to help clients accomplish their testamentary objectives for digital assets. The emotional hurt suffered by the family of the 15-year-old who committed suicide or the family of the soldier killed in Fallujah will ameliorate over time. However, a well-prepared practitioner who understands how to properly handle digital assets can make the distribution of such digital assets easier for the executor and, perhaps, less painful for those families who have suffered so much.

Endnotes

1. Tracy Sears, *Family, lawmakers push for Facebook changes following son's suicide*, available at http://wtvr.com, January 8, 2013.
2. Evan E. Carroll, John W. Romano and Jean Gordon Carter, *Helping Clients Reach Their Great Digital Beyond,* Trusts & Estates, September 2011, 66 at p. 67. *See also In re Ellsworth*, No. 2005-296. 651-DE (Mich. Prob. Ct. 2005). The Michigan probate court appointed the father as personal representative of the estate and obtained a court order directing Yahoo! to turn over the emails. (*N.B.* Yahoo! was made a party to the proceeding.) Yahoo! ultimately provided a CD with photographs and emails—but only the emails the deceased received because he set up the account not to save sent messages.
3. Craig Blaha, *Over 30 Million Accounts on Facebook Belong to Dead People*, Technorati (March 7, 2012), http://technorati.com.
4. John Conner, *Digital Life After Death: The Issue of Planning For a Person's Digital Assets After Death,* Estate Planning & Community Prop. L.J., Vol. 3:301 at p. 303. Nathan Dosch, an estate planning and tax attorney with Nieder & Boucher, pieced together this definition.
5. Sample websites taken from "Top 15 Most Popular Social Networking Sites," updated March 2013, available at http://www.ebizmba.com.
6. Many of these sites also offer storage for photographs and videos.
7. It should be noted that these email account providers are free services. Many people pay a fee for their email service to companies such as Time Warner Cable, Optimum Online and AT&T. For these types of services, the email accounts will remain active as long as the fee is paid.
8. Service providers routinely amend the TOS agreements with no notice to the account holder, so it is wise to periodically check the service provider's website for any changes to the TOS.
9. Naomi Cahn, *Postmortem Life On-line*, Probate & Property, July/August 2011 (also stating that the courts have routinely upheld and enforced these TOS agreements).
10. *See* http://www.shutterfly.com/help/terms.jsp.
11. *See* http://www.linkedin.com/static?key=user_agreement&trk=hb_ft_userag; http://www.google.com/intl/en/policies/terms/; https://twitter.com/tos.
12. http://support.google.com/mail/answer/14300?hl=en&ref_topic=1669055.
13. *Id*.
14. http://help.yahoo.com/kb/index?page=product&y=PROD_ACCT&locale=en_US.

15. http://www.facebook.com/help/?ref=pf#!/help/103897939701143/?q=death&sid=0G0Ow9oru3HcT7v4v.
16. The TOS for Shutterfly, Twitter, LinkedIn, Yahoo!, Facebook and Google are each governed by the laws of the State of California.
17. *See* CONN. GEN. STAT. § 45a-334a (2013).
18. CONN. GEN. STAT. § 45a-344a(b) (2013).
19. *Id.*
20. *See* R.I. GEN. LAWS § 33-27-1 (2012).
21. *See* BURNS IND. CODE ANN. § 29-1-13-1.1 (2012).
22. BURNS IND. CODE ANN. § 29-1-13-1.1(a) (2012) defines custodian as "any person who electronically stores the documents or information of another person."
23. BURNS IND. CODE ANN. § 29-1-13-1.1(b) (2012).
24. *Id*.
25. BURNS IND. CODE ANN. § 29-1-13-1.1(c) (2012).
26. *See* 58 OKL. ST. § 269 (2012).
27. *See* IDAHO CODE § 15-5-424 (2012).
28. 58 OKL. ST.. § 269 (2012).
29. IDAHO CODE § 15-5-424(z) (2012).
30. 58 OKL. ST. § 269 (2012).
31. *See* note 1 *supra.*
32. *See* VA. CODE ANN. §§ 64.2-109 and 110 (2013) which will become effective July 1, 2013.
33. *See, e.g.*, New York Assembly Bill 823 introduced Jan. 9, 2013; Nebraska Bill LB37 introduced Jan. 25, 2013; Maryland Senate Bill 29 introduced Jan. 9, 2013; North Dakota House Bill 1455 introduced Jan. 21, 2013; Nevada Senate Bill No. 131 introduced February 18, 2013.
34. See North Carolina Senate Bill 279 introduced March 13, 2013; Oregon Senate Bill 54 introduced March 2013.
35. The full report of the drafting committee may be found at www.uniformlaws.org/committees.
36. *See id.*, Section 2 Definitions.
37. *Id.*
38. *Id.* Sections 4, 5, 6 and 7.
39. *Id.* Section 8.
40. *See* Stored Comm. Act, 18 U.S.C. §§ 2701 *et. seq.* (2006); Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030 *et seq*. (2006).
41. *See, e.g.*, N.Y. CLS PENAL § 156.05 (2012).
42. James D. Lamm, Editor of Digital Passing blog, available at http://www.digitalpassing.com.
43. *See* Cahn, *supra* at Note 9.
44. *See* https://kindle.amazon.com/.
45. *See* http://www.apple.com/legal/terms/site.html.
46. *See* Cahn, *supra* at note 9.
47. *See* discussion notes 10 through 15 *supra.*
48. Joseph M. Mentreck, *Estate Planning in a Digital World*, 19 OHIO PROB. L.J. 195 (2009).
49. *See* http://www.deathswitch.com.
50. *See* http://www.assetlock.net.
51. *See* http://www.legacylocker.com.
52. *See* Cahn, *supra* note 9.
53. Michael D. Roy, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning*?, 24 QUINNIPIAC PROB. L.J. 376 2010-2011.

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