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THE LAW SOCIETY OF UPPER CANADA

THE SIX-MINUTE ESTATES LAWYER 2013

APRIL 24, 2013

**DIGITAL LIFE AFTER DEATH: THE NEXT LEVEL OF ESTATE
PLANNING AND ESTATE LITIGATION**

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Digital Life After Death: The Next Level of Estate Planning and Estate Litigation¹

There are plenty of things for beneficiaries to fight about in the estate litigation context, and our evolving digital and online presence is simply going to add one more layer to any potentially contentious estate proceeding. If people are willing to go to court over grandmother's tea cups and antique furniture, just imagine the fights that may erupt over the thousands of dollars in the World of Warcraft currency left behind or income from a popular blog written by the deceased.

When drafting wills, most people fret over who will have custody of young children and the allocation of financial and physical assets. Very few are turning their minds to their digital life when contemplating their physical deaths. This paper will examine why we should care about what happens to our digital assets and accounts after we die, what the law says (if anything), and what steps we can take to protect our digital "lives".

Why Should We Care?

Do I want my children to have access to my personal email account after I die? Do I want my Facebook account to be memorialized or shut down? Who should have access to the balance in my online poker account? Do I want my digital "life" to die with me (to the extent it can) or live on? Not enough people are asking themselves these questions or are providing the answers.

¹ Kimberly Whaley, Principal of Whaley Estate Litigation. This paper written with the assisted co-authorship of former associate, Erin C. Cowling, and presented by Benjamin D. Arkin, WEL Associate for the LSUC Six-Minute Estates Lawyer, April 2013

One of the reasons we draft wills and name executors that we trust is to see that our wishes regarding our physical and financial assets are carried out after we die. We should be extending these instructions to our digital assets and accounts as well.

Sentimental Value

Firstly, our digital assets can hold sentimental value. While a physical photo album can be easily found and passed on to our family, it may be difficult for your family members to find your digital photos or videos that are saved and password protected on your home computer or backed-up online. If you want these digital files to be passed on, it is critical to leave instructions on how to find and access them.

Also, couples used to (some still do presumably) write love letters to each other or send written family updates to relatives across the country by Canada Post. Today, these communications are done electronically over email, texting or messenger. Perhaps your children or grandchildren would be interested in reading some of these stories, thoughts and writings. However, will they be able to?

The same thoughts extend to your social media presence on Facebook, Twitter and LinkedIn. Your Facebook page could act as a communal grieving ground for your friends and family. Or it could be a constant reminder of your death every time a friend or family member logs on. Would you want the page maintained or shut down? Families of loved ones who have passed away or committed suicide are often devastated when they realize that they cannot access their loved one's Facebook page without their password to see their last thoughts, words or even to find clues as to why they chose to take their own life.

Monetary Value

Secondly, some digital assets have monetary value as well. Some examples are discussed below:

Blogs and Domain Names: Some blogs can bring in a sizable income especially from sponsored banner ads. If you own a blog with such ads, then you will need to provide instructions. Do you want the blog to be continued by a family member? Would you like the blog to be shutdown? Where will the income generated from the blog go? Do you "own" a domain name that you pay for annually and if not, will it expire?

World of Warcraft, Poker and Other Gaming Accounts: World of Warcraft (or "WoW" as it is referred to) is a massively multiplayer on-line role-playing game or a "MMORPG". WoW requires players to pay for a subscription or to use a prepaid playing card. As with other MMORPGs, players control an avatar (your online alter ego or character) within a game world exploring the landscape, fighting various monsters, completing quests and interacting with non-player characters or "NPCs", or other players over the internet. Playing these games, individuals can accumulate items and "gold" which have a real world value and can be traded and sold for real money over the internet. Currently, WoW has over 9.3 million subscribers.² Just imagine the real world monetary value that these subscribers have accumulated and which in likelihood is not accounted for in their estate planning. The same can be said of other online games including poker or other gambling websites.

Bitcoin: Bitcoin³ is the first decentralized digital currency. This currency can be sent to others via the internet without going through a bank or clearing house and is not associated with any government. Bitcoin's themselves are generated by anyone all over the internet by running a free application on their computer called a Bitcoin miner. Through a process called "mining", the little app that sits on your computer very slowly creates new Bitcoins in exchange for providing computer power to process transactions. When a new batch of Bitcoins is ready, they are distributed in accordance with whomever had the highest computing power in the mining process. The system is set up so that no more than 21 million Bitcoins will ever exist, so the mining process will yield less and less as time goes on and more people sign up. The coins are stored in a

² See <http://wow.joystiq.com/tag/wow-subscriber-numbers>.

digital wallet and can be used to buy real goods such as video games, gifts, books, and can be converted into dollars and euros. As of March 2013 bitcoin's monetary base is valued at over \$400 million USD. Imagine the loss of real value if someone died without taking their Bitcoin into consideration in their estate planning.

Email Accounts: While email accounts will likely have more of a sentimental value to them (emails to friends, spouses and other loved ones documenting your life), if you own a small business and you manage your orders and invoices through your email imagine the devastation to your business if no one knows the password to your account? How will your business fill those orders once you are gone?

Other examples are PayPal or Amazon accounts that may hold a positive balance, reward programs such as Airmiles and Aeroplan etc. Value can also be found in places that people least expect. For example, your significant Twitter followers or the number of "likes" your small company has on Facebook could have business value.

Thought should be given to each of these issues when planning your estate.

Digital Assets vs. Accounts

It is important to distinguish between digital "assets" and "accounts" when planning for a digital afterlife.

In basic terms, digital **assets** have been described as: digital photos, quicken spreadsheets, word and excel documents, tweets, your itunes collection etc.

Digital **accounts** are not the files themselves but the accounts you use to access those files, such as: email accounts, social network accounts, file sharing accounts, software licenses etc. In other words, access to email accounts and copies of the emails themselves are two different things. Accounts can be separated into three categories:

³ For more details, see <http://bitcoin.org/>.

- 1) Actual currency information: This would include any account that contains virtual currency that could translate to real world money that could be transferred to your heirs. Examples are a PayPal account, WoW account, Bitcoin etc.
- 2) Accounts containing virtual property that you "own": Examples would be your Kobo or Kindle account, or your iTunes account. Many people assume that they have the same rights with this digital content as they would with physical books and cds etc. This is incorrect. Customers only own a licence to use the digital files and they do not actually own them.⁴ You cannot leave your iTunes collection or your Kobo books to your children because you do not own them like you used to with their physical counterparts.
- 3) Accounts containing information likely of personal or commercial interest to your heirs and others: Examples would be your personal email accounts, your Facebook page, Twitter, LinkedIn etc.

This distinction between "assets" and "accounts" is important in the estate planning context as it raises the following legal issues: Should an executor have access to an email account and be able to use it to send emails? Or should the executor simply be given copies of all of the emails (if possible)? Or both? Or neither? If executors are provided access to physical mail (snail mail) should they also automatically be granted access to your electronic mail as well? Right now there are no clear answers.

The Law

Unfortunately, the law does not say much... yet! In the United States only five states have created laws governing digital asset management after death. They are

⁴ See Terms of Use from iTunes: <http://images.apple.com/legal/sla/docs/iTunes.pdf> and from Kobo <http://www.kobobooks.com/termsfuse>.

Oklahoma, Idaho, Rhode Island, Indiana and Connecticut.⁵ Nebraska has also proposed a law that is not yet in force.

The Oklahoma, Idaho and proposed Nebraska laws provide that the executor or administrator of an estate shall have the power to access and control or terminate any digital accounts of a deceased person.

The legislation in Indiana, Connecticut and Rhode Island is not as far reaching and does not provide the executor with "control" over the digital accounts of a deceased but just access to, or copies of, the contents of email accounts such as Hotmail or Yahoo. An executor or administrator of an estate must provide the email service providers with: (1) a written request accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor or administrator; or (2) an order of the court of probate that by law has jurisdiction of the estate of such deceased person.

In Oregon, after battling Facebook for access to her deceased son's account, a grieving mother took her cause to the legislature so that loved ones could have easier access to the digital assets of the deceased.⁶ However, pressure from the tech industry has stopped any progress from being made. The tech industry argues that a Federal act enacted in 1986 called the Stored Communications Act, [18 U.S.C. Chapter 121](#) §§ 2701–2712 and the voluntary terms of service agreements prohibit the companies from releasing personal information even if such requests were provided in a last will and testament. The tech industry claims that the Federal law and terms of service trump any state legislation that may be imposed.⁷

⁵ Connecticut Public Act No. 05-136: An Act Concerning Access to Decedents' Electronic Mail Accounts; Rhode Island HB5647: Access to Decedents' Electronic Mail Accounts Act; Indiana Code 29-1-13 (SB 0212, 2007): Electronic Documents As Estates Property; Oklahoma HB2800: Control of certain social networking, microblogging or e-mail accounts of the deceased; Idaho SB1044: Control of certain social networking, microblogging or e-mail accounts of the deceased.

⁶ Lauren Gambino, Katu.com, "Tangle of Laws Leaves Digital Assets of the Deceased Out of Reach", online: <http://www.katu.com/news/local/Tangle-of-laws-leaves-digital-assets-of-the-deceased-out-of-reach-194368741.html>

⁷ *Ibid.*

The Uniform Law Commission has also formed a committee to draft a free-standing act that will vest fiduciaries with at least the authority to manage and distribute digital assets, copy or delete assets and access to digital assets.⁸

So far there is no legislation in Canada that deals with digital assets and accounts after death and there have been no known reported cases dealing with this topic. This means there is little assistance in dealing with what rights executors have to deal with these digital assets and accounts. Without proper legislation we will likely see an increase in grieving families fighting big businesses in court.

Canadian Privacy Law

While there is no specific legislation dealing with digital assets in Canada, Canadian privacy law will play a part. It is often assumed that a person's privacy rights dissipate upon death therefore access to their personal online information would be easy; however, this is not necessarily true. Privacy laws do protect personal and personal health information of an individual after death, however, there are exceptions for the collection, use and disclosure of personal information solely for personal or non-commercial use.⁹ Therefore, it could be argued that no privacy laws would be breached if an executor was seeking information from the deceased's Facebook, email, Twitter account for personal and non-commercial use. However, the big tech companies may not agree with this approach as discussed below.

When you are dealing with online content, jurisdiction and which privacy laws apply is always a question. If the deceased lived in Canada and her computer resided in Canada and she created the content in Canada, do Canadian privacy laws apply? Or

⁸ Uniform Law Commission (ULC), Committees, Fiduciary Access to Digital Assets, online: <http://www.uniformlaws.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets>

⁹ See the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 and The Office of the Privacy Commissioner of Canada, "*PIPEDA and your Practice: A Handbook for Lawyers*", online: http://www.priv.gc.ca/information/pub/gd_phl_201106_e.asp.

would foreign privacy laws apply as the company the deceased used to post her online content (such as Facebook or LinkedIn) is located in a foreign jurisdiction?

Lawson v. Accusearch, [2007] 4 FCR 314 involves a judicial review of the Privacy Commissioner's refusal to investigate the practices of an online foreign company which would conduct "confidential investigations" on Canadian residents and collect, use and sell that information. The complainant complained that this company was in violation of the Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 ("PIPEDA"). However, the Privacy Commissioner refused to investigate the complaint as it was outside the jurisdiction of the office of the Privacy Commissioner as it was a foreign company. The Federal Court however concluded that PIPEDA "gives the Privacy Commissioner jurisdiction to investigate complaints relating to the trans-border flow of personal information".¹⁰ This would mean that the Privacy Commissioner has jurisdiction to investigate privacy complaints regarding Facebook, LinkedIn, Twitter etc.

So what does this mean in the estate's context? Will someone bring a breach of privacy claim against an executor or family member who has accessed a deceased's email or Facebook account with a password that was provided by the deceased? Likely not. However, are online service provider's obligated to protect their client's personal information after death? If an executor does not have user ids and passwords, unless there is new legislation or an executor obtains a court order, digital service providers will likely stand behind their terms of service and privacy laws to limit executors' access to online accounts. These providers have no legal obligation to co-operate with executors.

As usual, the legal commentary in the United States on this topic to date is further advanced than in Canada. Some of the relevant cases include:

Ellsworth v. Yahoo¹¹: In 2005 the family of a deceased American marine named Justin Ellsworth sued Yahoo for copies of his emails and access to his email account. Yahoo

¹⁰ *Lawson v. Accusearch Inc.*, [2007] 4 FCR 314.

¹¹ *In Re Ellsworth*, No. 2005-296, 651-DE, Mich.Prob.Ct.2005).

stood behind its terms of service and the privacy rights of its users and refused to provide access. Yahoo's terms of service provide that its accounts are non-transferrable and terminate upon death. A court eventually ordered Yahoo to turn over a CD of Ellsworth's emails but did not order access to the account itself.¹²

Stassen v. Facebook: This is an unreported decision arising from Wisconsin.¹³ In this case, the Stassen's 21 year old son, Benjamin, committed suicide without leaving a note. Wanting to learn more about why their son may have committed suicide, the Stassens did not have diaries or letters or written journals to search for answers. Instead, they hoped that perhaps Benjamin's online life which could be found on Facebook and in Gmail accounts would hold some answers. Unfortunately, like most parents, they did not have his user-ids and passwords for his accounts and Facebook was standing firm behind privacy laws and its terms of service to deny the Stassens access. However, the Stassens were able to obtain a court order stating that they are "the heirs to their son's estate and are entitled to any of his assets, possessions or records, including the contents of his Facebook account."¹⁴

The Estate of Sahar Daftary v. Facebook¹⁵: In this 2012 case a California judge denied a grieving family access to a deceased daughter's Facebook account. The daughter had died after falling from her boyfriend's balcony in 2008. The boyfriend claimed it was suicide but the family believed he murdered her. The police had arrested the boyfriend on suspicion of murder but he was released due to lack of evidence. Daftary's family hoped access to her Facebook account would show that she did not commit suicide. However, U.S. Magistrate Judge Paul Grewal, relied on the Federal Stored Communications Act to deny the family's request for access. Judge Grewal did note however that "nothing prevents Facebook from concluding on its own that

¹² *In Re Ellsworth*, No. 2005-296, 651-DE, Mich.Prob.Ct.2005).

¹³ NBC News, "*Digital Afterlife: What Happens to your online accounts when you die?*", online: http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite

¹⁴ *Supra* note 9.

¹⁵ Declan McCullagh, C/NET, "*Facebook Fights for Deceased Beauty Queen's Privacy*", online: http://news.cnet.com/8301-13578_3-57518086-38/facebook-fights-for-deceased-beauty-queens-privacy/

applicants have standing to consent on Sahar's behalf and providing the requested materials voluntarily". It is unknown if Facebook ever voluntarily released the information.

Terms of Service

For **Facebook**, the terms of service say it can delete a facebook account with a written request from the deceased next of kin or set the page to a memorial page where friends and family can leave and view messages.¹⁶ However, Facebook is seeing its own problem with lax procedures once a death has been reported. According to the website Buzzfeed,¹⁷ it is quite easy to falsely report that someone has died and have that person locked out of their Facebook account. According to Buzzfeed's online article they were able to pretend to be someone's family member and used an obituary of someone with the same name who died many years earlier and was not the same age as the Facebook user. Another issue is when non-family members contact Facebook first when users have died and lock out the family members who wish to set their own memorialized page for their deceased loved one.

For **Gmail** accounts, Google's terms of service state that they "may be able to provide the Gmail account content to an authorized representative of the deceased user" [emphasis added]. Google requires not only that the "authorized representative" of the deceased send a copy of the death certificate and a copy of an entire email the deceased sent to the representative (among other things) but also requires a court order. And even after receiving the requested documents they do not guarantee access to the account.¹⁸

¹⁶ See http://www.facebook.com/full_data_use_policy#otherthings

¹⁷ Katie Notopoulos, Buzzfeed, "How to Murder Your Friends on Facebook", online: <http://www.buzzfeed.com/katienotopoulos/how-to-murder-your-friends-on-facebook-in-2-easy-s>

¹⁸ See Google Terms of Service, online: <http://support.google.com/mail/bin/answer.py?hl=en&answer=14300>

Hotmail will mail the estate holder a DVD with the decedent's account information after a next of kin provides certain required information, such as a death certificate a proof of next of kinship.¹⁹

LinkedIn will close out a deceased's account once a verification of death form has been completed which requires the deceased's email address.²⁰ LinkedIn will not provide details of the account or transfer the account to an executor.

Twitter used to agree to deactivate an account and digitalize all public tweets of the deceased and provide them to the next of kin or a representative of the estate. However, Twitter will only now just deactivate the account once they have received the following from next of kin or a representative: a Twitter account's @username; death certificate; copy of government issued ID of person deactivating the account and a notarized statement from the same person setting out first and last name, contact information, email address, relationship to the deceased, request being made (deactivation), and a link to online obituary (optional).²¹

Protecting Your Digital Assets

Identify

The main thing you can do to protect your digital assets and accounts is to conduct digital audits and identify your assets before you draft your will and periodically afterwards. Once your digital audit is complete you can leave a detailed list of accounts and passwords and clear instructions of your wishes for your digital life after death.

¹⁹ See Microsoft's Terms of Service, online: <http://answers.microsoft.com/en-us/windowslive/forum/hotmail-profile/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6>

²⁰ See LinkedIn Terms of Service, online: http://help.linkedin.com/app/answers/detail/a_id/2842

²¹ See Twitter Terms of Service, online: <http://support.twitter.com/articles/87894-how-to-contact-twitter-about-a-deceased-user#>

Instruct

Once you have identified all of your digital assets and accounts you need to provide instructions on exactly what you want done with each asset and account. You will also have to identify who you will trust to handle your digital assets instructions. This person should, at a minimum, have some technical knowledge about digital assets and accounts in general so they will be able to fulfill your wishes. Furthermore, you will need to provide some sort of arrangement to ensure this person receives your instructions and digital audit information upon your death.

Access

Once you have figured out what you would like done with each account or asset and who will be following those instructions, you will need to provide a way for that person to access those assets and accounts. Some estate planners in the U.S. have recommended drafting a "Virtual Asset Instruction Letter"(a VAIL)²² for a person to leave in his or her safety deposit box which lists all of digital accounts, passwords and instructions for each.

You could also leave a sealed envelope with your lawyer or executor or keep track of passwords electronically on your computer or blackberry or on an online password manager such as PassPack²³ or LastPass²⁴. Electronically stored lists can be accessed with only one password (which you can provide to your lawyer or executor) and are easier to update than a sealed list in your safety deposit box. There are also many online service providers who will not only store your passwords but your digital assets as well - for a price. See, for example, SecureSafe²⁵ and LegacyLocker²⁶.

²² Samuels, Yoelin, Kantor LLP, Virtual Asset Instruction Letter, online:
<http://images.bimedia.net/documents/Virtual+Asset+Instruction+Letter.pdf>

²³ See <http://www.passpack.com/en/home/>.

²⁴ See <https://lastpass.com/index.php?fromwebsite=1>.

²⁵ See <http://www.securesafe.com/>.

²⁶ See <http://legacylocker.com/>.

It is recommended that your usernames and passwords be kept in separate locations so no one can gain access to your personal information unintentionally.

Other lawyers are opposed to sharing passwords as they believe that this violates terms of service and having someone "pretend" to be you is tantamount to "fraud".²⁷ However, you have to ask how many companies are going to take the time and money to pursue an executor for fraud for accessing someone's Facebook account or online bank account when the deceased left those instructions in his or her will?

Conclusion

The bottom line is we should be putting just as much thought into our digital assets and accounts as we do into our physical and financial assets when planning our estates. Digital audits and recordkeeping should be a part of all estate planners' checklists.

Precedents

To be addressed in a Will:

"My Executor shall have the power to access, handle, distribute, and dispose of my digital assets, and the power to obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my digital devices and digital assets. [ALTERNATIVE: I authorize my Executor to engage to assist in accessing, handling, distributing, and disposing of my digital assets.] If I have prepared a memorandum, which may be altered by me from time to time, with instructions concerning my digital assets and their access, handling, distribution, and disposition, I direct my Executor and beneficiaries to follow my instructions as outlined in that memorandum. "Digital assets" includes the following:

²⁷ Jennifer Deland, MetroWest Daily News, "Digital Estate Planning? No Such Thing" online: <http://www.metrowestdailynews.com/opinion/x719500832/Deland-Digital-estate-planning-No-such-thing>

(1) Files stored on my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops; and

(2) Emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts banking accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items which currently exist or may exist as technology develops, regardless of the ownership of the physical device upon which the digital item is stored.”²⁸

For your Attorney under Power of Attorney:

“Digital Assets. My Agent shall have (i) the power to access, use, and control my digital devices, including but not limited to, desktops, laptops, tablets, peripherals, storage devices, mobile telephones, smartphones, and any similar digital device which currently exists or may exist as technology develops for the purpose of accessing, modifying, deleting, controlling, or transferring my digital assets, and (ii) the power to access, modify, delete, control, and transfer my digital assets, including but not limited to, my emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, banking accounts, domain registrations, DNS service accounts, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items which currently exist or may exist as technology develops, and (iii) the power to obtain, access, modify, delete, and control my passwords

²⁸ Sharon Nelson, Ride the Lightning, "What Your Will Should Say about Your Digital Assets", online: <http://ridethelightning.senseient.com/2012/04/what-your-will-should-say-about-your-digital-assets.html>

and other electronic credentials associated with my digital devices and digital assets described above.”²⁹

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Please visit our new website at <http://www.whaleyestatelitigation.com>

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April 2013

²⁹ *Ibid.*