Digital Planning: The Future of Elder Law

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INTRODUCTION

More than half of individuals over the age of 65 use the Internet or e-mail — and they are a fast-growing population on the Internet.1 Like most people, however, they have probably not considered how to dispose of their digital life if they become incapacitated or when they die, even though they are in the most likely age group to have drafted a will.2 Indeed, even if they do engage in planning, they cannot be confident that their wishes will be carried out: only a few states have laws covering probate and digital assets, there is no generally accepted method for using wills or trusts to dispose of digital assets, and the policies of Internet providers often preclude the exercise of individual autonomy. As Internet usage becomes even more pervasive and as online assets and accounts have the potential to become even more valuable (emotionally and financially), issues involving control of digital property are rapidly becoming even more important.

This article first explains digital assets as a new species of property and discusses the importance of planning for these assets. The article next analyzes the legal context for digital asset disposition, including the few existing state laws, and then turns its attention to the future, including suggestions for planning and commentary on where the law might be headed. Notwithstanding the legal uncertainties surrounding digital asset disposition, individuals should make plans for the management, ownership, or destruction of these assets based on the foundational principles of deference to the individual’s intent. Ac-

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1 Kathryn Zickuhr & Mary Madden, Older Adults and Internet Use: For the First Time, Half of Adults Ages 65 and Older Are Online 2, http://pewinternet.org/~/media//Files/Reports/2012/PIP_Older_adults_and_internet_use.pdf (Pew Internet & Am. Life Project, June 6, 2012). Moreover, one-third of those users access social media sites, such as Facebook, although only about one-fifth do so each day.

knowing the difficulty of predicting the future, we feel quite confident that, as Elder Law moves forward, planning for a client’s digital assets will assume an increasingly important role.

I. The Digital World: Access, Accounts, and Assets

When individuals enter the digital world, they typically do so in three different ways: 1) using smart phones and personal computers; 2) registering with online services and setting up various types of accounts; and 3) storing files through these accounts, generally somewhere on “the cloud.”

In most cases, each of these is password-protected. Indeed, most Internet users have 25 passwords and some have even more.4 Accesses to different accounts as well as the files stored in these accounts have emotional as well as financial value. While planning for brick-and-mortar assets is a well-established process (even if most people do not have wills or powers of attorney for either financial or health issues), planning for digital assets and accounts is still comparatively novel. People may accumulate different categories of digital assets: personal, social media, financial, or business. Although there is some overlap, of course, individuals probably anticipate different dispositions for each kind of asset, depending on their emotional and financial values. Each asset, or account, can be analogized to existing categories of property.6

A. Types of Digital Assets

Digital assets can be classified in numerous different ways, and the types of property and accounts are constantly changing. (A decade ago, who could have imagined the ubiquity of Facebook? Who can imagine what will replace it in the next few decades?) People may accumulate different categories of digital assets: personal, social media, financial, and business, and an individual may have a license or property ownership interest in the asset.8 While digital assets can overlap specific categories, clients may need to make different plans for each.

4 The “cloud” or “cloud computing” refers to the growing practice of storing data on and running applications housed on a service providers’ computers and servers via the Internet, as opposed to on a hard drive on an individual’s computer or local servers. For a general discussion of the history and practices of cloud computing, see William Jeremy Robison, Free At What Cost? Cloud Computing Privacy under the Stored Communications Act, 98 Geo. L.J. 1195, 1199–1204 (2010).
7 See e.g. Brisk & Alexander, supra n. 3.
1. Personal Assets

In the first category are personal assets stored on a computer or smart phone, or uploaded onto a website, such as Flickr or Shutterfly. These can include treasured photographs or videos, e-mails, or even playlists. Photo albums can be stored on an individual’s hard drive or created through an online system. They also can be created through social media, as discussed below. People can store medical records and tax documents for themselves or family members. The list of what a client’s computers can hold is, almost literally, infinite. Each of these assets requires different means of access. Simply logging onto someone’s computer generally requires a password, perhaps a different password for operating system access, and then each of the different files on the computer may require its own password.

2. Social Media Assets

Social media assets involve interactions with other people, including the websites Facebook, MySpace, LinkedIn, and Twitter, for example, as well as e-mail accounts. Not only are these sites used for messaging and social interaction, but they also can serve as storage for photos, videos, and other electronic files.

3. Financial Accounts

Though some bank and investment accounts have no connection to brick-and-mortar buildings, most retain some connection to physical space. But they are increasingly designed to be accessed via the Internet, with few paper records or monthly statements. For example, an individual can maintain an Amazon.com account, be registered with PayPal or other financial sites, have an e-Bay account, and subscribe to magazines and other media providers. Many people make extensive arrangements to pay bills online such as mortgages, car loans, credit cards, water, gas, telephone, cell phone, cable, and trash disposal.

4. Business Accounts

An individual engaged in any type of commercial practice is highly likely to store some information on computers. Businesses collect data such as customer orders and preferences, home and shipping addresses, credit card data, bank account numbers, and even personal information such as birthdates and the names of family members and friends. Physicians store patient information. eBay sellers have an established presence and reputation. Lawyers might store client files or use a Dropbox.com-type service that allows a legal team spread across the U.S. access to litigation documents through shared folders. A blog or domain name can be valuable, yet access and renewal may only be possible through a password or e-mail.

B. Importance of Planning for Digital Assets

1. To Make Things Easier on Executors and Family Members

When individuals are prudent about their online life, they have many different user-names and passwords for their accounts. This is the only way to secure identities, but this
devotion to protecting sensitive personal information can wreak havoc on families upon incapacity or death.\(^9\) Consider A&E’s *Hoarders*, a reality-based television show that reveals the lives of people who cannot part with their belongings and have houses full of floor-to-ceiling stacks of junk as a result. While most of us find this disgusting, are we not also committing the same offense online when we create multiple e-mail accounts, social networking accounts, websites, Twitter accounts, eBay accounts, online bill-paying arrangements, and more? Sorting through a deceased’s online life for the important things can be just as daunting as cleaning out the house of a hoarder.

To make matters worse, the rights of executors, agents, guardians, and beneficiaries with regard to digital assets are unclear as discussed later in this article. Family members may thus have to go to court for legal authority to gain access to these accounts. Even after gaining legal authority, the company running the online account still may not acquiesce to a family member’s authority without a battle.

This process is complicated further if someone is incapacitated rather than deceased because that person will continue to have expenses that a deceased person would not have. Without passwords, a power of attorney alone may not be enough for the agent to pay these expenses. If no power of attorney is in place, a guardian may have to be appointed to access these accounts, and some companies will still require a specific court order on top of that before they release account information.

2. To Prevent Identity Theft

In addition to needing access to online accounts for personal reasons and closing probate, family members need this information quickly so that a deceased’s identity is not stolen. Until authorities update their databases regarding a new death, criminals can open credit cards, apply for jobs, and get state identification cards under a dead person’s name. There are methods of protecting a deceased’s identity, but they all involve having access to the deceased’s online accounts.\(^10\)

3. To Prevent Losses to the Estate

The value of some digital assets may be lost if they go undiscovered for too long. Consider the case of Leonard Bernstein who died in 1990 leaving the manuscript for his memoir entitled *Blue Ink* on his computer in a password-protected file. To this day, no one has been able to break the password and access what may be a very interesting and valuable document.\(^11\)

Electronic bills for loans, insurance, and website hosting need to be discovered quickly and paid to prevent cancellations. This concern is augmented further if the deceased or incapacitated ran an online business and is the only person with access to in-

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coming orders, the servers, corporate bank accounts, and employee payroll accounts.\(^\text{12}\)

Bids for items advertised on eBay may go unanswered and lost forever.

4. To Avoid Losing the Deceased’s Story

Most digital assets are not inherently valuable, but are valuable to family members who extract meaning from what the deceased leaves behind. Historically, people kept special pictures, letters, and journals in shoeboxes or albums for future heirs. Today, this material is stored on computers or online and is often never printed. Personal blogs and Twitter feeds have replaced physical diaries and e-mails have replaced letters. Without alerting family members that these assets exist, and without telling them how to get access to them, the story of the life of the deceased may be lost forever. This is not only a tragedy for family members, but also possibly for future historians who are losing pieces of history in the digital abyss.\(^\text{13}\)

For more active online lives, this concern may also involve preventing spam from infiltrating a loved one’s website or blog site. Comments from friends and family are normally welcomed, but it is jarring to discover the comment thread gradually infiltrated with links for “cheap Ugg boots.”\(^\text{14}\) “It’s like finding a flier for a dry cleaner stuck among flowers on a grave, except that it is much harder to remove.”\(^\text{15}\) In the alternative, family members may decide to delete the deceased’s website against the deceased’s wishes simply because those wishes were not expressed to the family.\(^\text{16}\)

5. To Prevent Unwanted Secrets from Being Discovered

Sometimes people do not want their loved ones discovering private e-mails or messages. They may contain hurtful secrets, or maybe just inside jokes and personal rantings. Without designating appropriate people to take care of certain accounts, the wrong person may come across this type of information.\(^\text{17}\)

C. Internet Providers’ Approaches to Death of the Account Owner

When an individual signs up for a new online account or service, the process typically requires an agreement to the provider’s terms of service. Service providers may have policies on what will happen on the death of an account holder, but people rarely read the terms of service carefully, if at all. Nonetheless, the user is at least theoretically made aware of these policies before being able to access any service. Anyone who has signed up for an online service has probably clicked on a box next to an “I agree” statement near the bottom of a web page or pop-up window signifying consent to the provider’s terms of use. The courts typically uphold the terms of these “clickwrap” agreements.


\(^\text{14}\) *Id.*

\(^\text{15}\) *Id.*

\(^\text{16}\) *Id.*

For example, Google’s terms of service do not include an explicit discussion of what happens when the account holder dies. The terms state that the individual agrees not to “assign (or grant a sub-license of) your rights to use the Software, grant a security interest in or over your rights to use the Software, or otherwise transfer any part of your rights to use the Software,” although copyright remains in the user.18

Google’s e-mail service, Gmail, on the other hand, does have its own policy, explained in its help section, for “Accessing a Deceased Person’s Mail.” In the first sentence of the policy, Gmail emphasizes that it “may” be able to provide the contents of e-mails after a two-step process. After the second step, which (somewhat incoherently) “will require you to get additional legal process including an order from a U.S. court and/or submitting additional materials,” there is still no guaranteed access.19

At the end of its terms of service, Yahoo explicitly states that an account cannot be transferred: “You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate on your death. On receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.”20

In 2009, Facebook, the world’s most popular online social network, recognized a need to allow a deceased person’s wall to provide a source of comfort.21 It permits someone to “Report a Deceased Person’s Profile.”22 When Facebook receives proof of death through an obituary or a news article, the page can be “memorialized” so that only confirmed friends will continue to have access. Because the “wall” remains, friends can still post on the memorialized page.

19 Google, About Gmail, Accessing a Deceased Person’s Mail, http://support.google.com/mail/bin/answer.py?hl=en&answer=14300 (updated Nov. 8, 2012).
23 Facebook “walls” are an interactive feature of a user’s “profile” page, which reflect the user’s recent Facebook activity. Depending on user privacy settings, walls enable a view of the user’s recent status updates, changes to the user’s profile information, photos posted by or of the user, links and other Internet content shared by the user, and interactive comments regarding content between the user and his or her Facebook “friends.” E.g. John M. Miller, Is MySpace Really My Space? Examining the Discoverability of the Contents of Social Media Accounts, 30 Tr. Advoc. Q. 28, 29 (Spring 2011).
II. LEGAL CONTEXT

The rights of executors, agents, guardians, and beneficiaries with regard to digital assets are muddy. On one hand, their rights in the digital world can be analogized to their rights in the brick-and-mortar world, for which there are well-established probate laws governing access\textsuperscript{24} as well as established procedures designed to safeguard the power of attorney process.\textsuperscript{25} Extension of these laws to digital assets is just beginning to be tested, and the Uniform Law Commission has established a Drafting Committee on Fiduciary Access to Digital Information.\textsuperscript{26} “The Committee will draft a free-standing act and/or amendments to ULC acts, such as the Uniform Probate Code, the Uniform Trust Code, the Uniform Guardianship and Protective Proceedings Act, and the Uniform Power of Attorney Act, that will vest fiduciaries with at least the authority to manage and distribute digital assets, copy or delete digital assets, and access digital assets.”\textsuperscript{27}

In advance of that proposal, states have begun to consider and enact their own laws. Since 2000, a small number of states have passed legislation relating to the power of executors and administrators to have access to and control of the decedent’s digital assets. Other states are considering legislation.\textsuperscript{28} These statutes vary in form and substance, and their power and impact remains unclear due to the limited judicial interpretation that has followed. None of the laws, however, cover the rights of other fiduciaries (e.g., successor trustees or agents acting pursuant to a power of attorney).

A. Existing State Law

Existing legislation takes a variety of forms and can be divided into different “generations.” Each generation is a group of statutes covering similar (or identical) types of digital assets, often under an analogous access structure. The first generation, comprising California, Connecticut, and Rhode Island, only cover e-mail accounts. Perhaps recognizing the shortcomings of such a limited definition, Indiana’s second-generation statute, enacted in 2007, is more open-ended, covering records “stored electronically.” The third generation statutes, enacted since 2010 in Oklahoma and Idaho, explicitly expand the definition of digital assets to include social media and microblogging (e.g., Twitter). These generations are not necessarily distinct in time — legislation of each generational type has recently been proposed in various states.\textsuperscript{29}

\textsuperscript{24} Kutler, supra n. 6.
\textsuperscript{28} See infra § II(B).
\textsuperscript{29} For further discussion of some existing state legislation, see Jason Mazzone, Facebook’s Afterlife, 90 N.C. L. Rev. 1643 (2012).
1. First Generation

The first generation statutes, enacted as early as 2002, only cover e-mail accounts. They do not contain provisions enabling or permitting access to any other type of digital asset.

a. California

The first and most primitive first generation statute was enacted by California in 2002. This statute is not specifically directed to personal representatives and simply provides, “Unless otherwise permitted by law or contract, any provider of electronic mail service shall provide each customer with notice at least 30 days before permanently terminating the customer’s electronic mail address.” Providers are likely to provide this notice via e-mail. Consequently, in the case of a deceased account holder, the notice will be “wholly useless” unless the personal representative has rapid access to the decedent’s e-mail account and monitors it regularly.

b. Connecticut

Connecticut was one of the first states to address executors’ rights to digital assets. In 2005, the legislature passed S.B. 262, requiring “electronic mail providers” to allow executors and administrators “access to or copies of the contents of the electronic mail account” of the deceased upon showing of the death certificate and a certified copy of the certificate of appointment as executor or administrator, or by court order. The bill specifically defined “electronic mail service providers” as “sending or receiving electronic mail” on behalf of end-users.

c. Rhode Island

In 2007, Rhode Island passed the Access to Decedents’ Electronic Mail Accounts Act, requiring “electronic mail service providers” to provide executors and administrators “access to or copies of the contents of the electronic mail account” of the deceased, upon showing of the death certificate and certificate of appointment as executor or administrator, or by court order. Rhode Island uses a definition of “electronic mail service provider” similar to Connecticut’s: “an intermediary in sending or receiving electronic mail” who “provides to end-users the ability to send or receive electronic mail.”

34 Id.
36 Id.
2. Second Generation

Perhaps in acknowledgment of changing technological times, second generation statutes use a broad definition of covered digital assets. While an open-ended definition may allow the law to remain relevant as new technologies are invented and new types of digital assets gain prominence, its generality may also create confusion and uncertainty as to what assets will actually be covered and how best to engage in planning for them.

a. Indiana

In 2007, the Indiana legislature added a provision to its state code requiring custodians of records “stored electronically” regarding or for an Indiana-domiciled decedent, to release such records upon request by the decedent’s personal representative. The personal representative must furnish a copy of the will and death certificate, or a court order. After the custodian is notified of the decedent’s death, it may not dispose of or destroy the electronic records for two years. Custodians need not release records “to which the deceased person would not have been permitted in the ordinary course of business.”

3. Third Generation

Third generation legislation acknowledges the changes to the digital asset landscape, since California enacted its first generation e-mail legislation in 2002. These third generation laws expressly recognize new and popular digital assets — social networking and microblogging. While these laws may better serve the current population than the limited first generation statutes, they share the same risk of becoming obsolete in only a few years.

a. Oklahoma

In 2010, Oklahoma enacted legislation with a fairly broad scope, giving executors and administrators “the power . . . 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.”

b. Idaho

On March 26, 2012, Idaho amended its Uniform Probate Code to enable personal representatives and conservators to “[t]ake control of, conduct, continue or terminate any accounts of the decedent on any social networking website, any microblogging or short message service website or any e-mail service websites.” Sponsors declared that the purpose of the bill was to “make it clear” that personal representatives and conservators can

38 Id.
control the decedent or protected person’s “social media . . . such as e-mail, blogs instant messaging, Facebook types of accounts, and so forth.”

B. Proposed State Legislation

1. Nebraska

Legislative Bill 783, introduced in 2012, “provides the personal representative of a deceased individual the power to take control of or terminate any accounts or message services that are considered digital [sic] assets,” and notes that “[t]he power can be limited by will or court order.” If enacted, the bill would amend Nebraska statute to give personal representatives “the power . . . to take control of, conduct, continue, or terminate any account of a deceased person on any social networking web site, microblogging or short message service web site, or e-mails service website,” in addition to the personal representative’s pre-existing authority to take title to the estate’s real property.

The Nebraska Bar Association, sponsor of the bill, worked with Facebook lobbyists on the precise wording of the proposed bill “so it meshes with Facebook’s service contracts.” Nebraska’s proposed bill was referred to the Judiciary Committee in January 2012, before being indefinitely postponed.

2. Oregon

The Estate Planning and Administration Section of the Oregon State Bar is currently working on drafting proposed digital estate legislation. Proponents are seeking legislation to “give family members and other fiduciaries access to the online worlds of those who have died or become incapacitated.” Though the proposed legislation, itself, has not yet been drafted, the proposal currently calls for expanding the statutory definitions of “property,” “estate,” and “conservatorship” to include “digital assets” and “digital accounts,” and providing a procedure for the personal representative to access digital assets. The proposal

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45 Id.
51 Or. St. B., supra n. 48, at 2–3.
also seeks to make similar changes to the state’s Uniform Trust Code.\textsuperscript{52}

The Oregon State Bar is currently seeking flexible definitions to allow future technology to come under the legislation’s grasp. Under the proposal, “digital accounts” will be defined as including, but not limited to, “e-mail, financial, personal and other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops.”\textsuperscript{53} “Digital assets” are currently defined as: “text, images, multimedia information, or personal property stored in a digital format, whether stored on a server, computer, or other electronic device which currently exists or may exist as technology develops, and regardless of the ownership of the physical device upon which the digital asset is stored.”\textsuperscript{54} Digital assets also include, “without limitation, any words, characters, codes, or contractual rights necessary to access the digital assets.”\textsuperscript{55}

3. Massachusetts

The Massachusetts Senate has approved a bill giving personal representatives and authorized family members “reasonable access” to a decedents “electronic mail account[s].”\textsuperscript{56} The bill specifically demands that access be given even if it conflicts with a provider’s terms of service, unless the decedent expressly declined to have their e-mail account released after death.\textsuperscript{57} It is unclear if and when the Massachusetts House of Representatives will take up this matter.

4. New York

Digital asset legislation was introduced in the New York legislature during its 2012 legislative session, but it stalled in committee by February 2012.\textsuperscript{58} The proposed statute uses nearly identical language to the Nebraska proposal, and would give decedents’ fiduciaries the ability “to take control of, conduct, continue or terminate any account of the decedent on any social networking web site, microblogging or short message service web site or e-mail service web site.”\textsuperscript{59} Such powers can be “expressly prohibited by the will or court order.”\textsuperscript{60}

C. Shortcomings of Existing State Digital Asset Legislation

As evidenced above, many of these statutes are creatures of the precise time period in which they were passed and thus limited in scope by the technology available at the time. Connecticut’s 2005 statute and Rhode Island’s 2007 law cover only “electronic
mail.” Idaho’s 2012 statute, Nebraska’s proposed legislation and Oklahoma’s 2010 statute include social networking, microblogging, e-mail, and “short message service[s].” None were comprehensive even at the time of drafting and will likely become less relevant to contemporary digital asset issues as time goes on and sources of digital assets cycle in and out of popularity.

Of the states that have passed or attempted digital asset legislation, only Indiana’s arguably includes any type of digital assets beyond social networking, e-mail, and other social and communication-type services. Indiana defined records covered under its statute as those electronically stored by the custodian, available to the decedent in the normal course of the custodian’s business. Indiana’s statute potentially covers other types of digital assets, such as financial records, assets related to business conducted over the Internet, online storage and domain hosting, gaming and entertainment accounts, etc. Though judicial interpretations of the relatively recent statute remain limited, the caveat that custodians need only release records that were available to the decedent in the “ordinary course of business” may be a valuable defense angle for reluctant online service providers.

One criticism that has been levied against state digital asset legislation is that these laws may fail to address the contractual relationship between service providers and their end users. Some of the legislation includes caveats that record release or access will only occur where consistent with other state and federal laws, or “where otherwise authorized” (as Oklahoma put it). Through standard terms of service (either expressly consented to by the decedent, or increasingly through passive notification methods like a click-wrap agreement), it is possible that the decedent has already entered into a legally enforceable contract waiving their rights under digital asset laws. This may occur due to simple boilerplate language like “nontransferable,” or under more explicit and detailed provisions. It remains unclear whether digital service providers can use these provisions to avoid release or access.

Even if digital asset legislation covers the particular provider and asset at issue in a particular matter, there is still no guarantee that the type of access sought will be ultimately provided. Much like the existing deceased user policies of digital service providers, themselves, the existing legislation provides varying degrees of access. A fiduciary might be interested only in copying the contents of a file or deleting the account, or might want full management authority, including transferring it to another. The type of access permitted or required by statute may not be of the type sought by an estate.

For example, an executor or administrator who seeks to continue the digital operation of a decedent’s asset (e.g., a blog, message board, or digital store on eBay or Amazon) may be disappointed even in states that have taken the initiative to legislate in this area. Connecticut and Rhode Island grant “access or copies,” but their statutory language does not specify who makes that decision — whether it is the estate’s choice, or the digital service provider gets the final say. Indiana merely requires “release” of digitally stored records; its statute does not even mention full access or transfer as a possibility. By contrast, the Oklahoma and Idaho laws are arguably much broader in granting access to the accounts, themselves.

The Uniform Law Commissioners are in the process of drafting a model state law that recognizes the authority of fiduciaries to access digital accounts. Part of the future of
post-mortem digital asset planning will certainly involve states’ decisions on whether to enact the new proposed law as well as on the authority of principals to set the terms for fiduciary access.\textsuperscript{61}

D. Federal Law

Federal law addresses the privacy of online communication as well as executors’ access to financial information.\textsuperscript{62} Most federal Internet regulation has been focused on “decency” standards, with a particular focus on minors.\textsuperscript{63} In addition, federal laws regulate unauthorized access to digital assets.\textsuperscript{64} While the statutes, themselves, do not directly address issues involving fiduciaries’ access to digital assets and accounts, they can create constraints for fiduciaries. Amendments to the existing federal legislation will probably be required to ensure both uniformity and respect for state laws in this area in order to guarantee fiduciary access. At least one state, California, recognized the possibility of federal law preempting state law when it included the following provision in its statute, “This section shall become inoperable on the date that a federal law or regulation is enacted that regulates notice requirements in the event of termination of electronic mail service.”\textsuperscript{65}

E. Cases

There are few appellate court cases, although numerous media stories recount the difficulties of accessing a deceased’s online accounts. One well-publicized case arose after Lance Cpl. Justin Ellsworth was killed in 2004 while serving with the U.S. Marine Corps in Afghanistan. The late marine’s parents began a legal battle with Yahoo to gain access to messages stored in his e-mail account.\textsuperscript{66} Yahoo initially refused the family’s request, but ultimately did not fight a probate court order to hand over more than 10,000 pages of e-mails.\textsuperscript{67} However, the family remained disappointed when the data CD provided by Yahoo contained only received e-mails but none written or sent by their late son.\textsuperscript{68} Legal cases involving family members’ access to decedents’ accounts are becoming more

\textsuperscript{65} Cal. Bus. & Prof. Code § 17538.35(f) (West 2010).
\textsuperscript{67} Id.
\textsuperscript{68} Id.
commonplace. For example, a Wisconsin couple sought court orders against Google and Facebook to help them understand their 21-year-old son’s suicide. Similar difficulties have prompted state legislators to introduce legislation on the issue, including the Massachusetts proposal discussed above.

III. PLANNING SUGGESTIONS

The legal uncertainty surrounding the disposition of digital assets reinforces the need to plan to ensure that an individual’s wishes are actually carried out. While many attorneys do not yet include such planning as part of their standard set of services, we predict they will begin to do so as part of their standard procedure. Indeed, they are recognizing the need to do so. The assets are valuable, both emotionally and financially, and they are pervasive.

A. Comprehensive Inventory of Digital Estate

An initial elder planning questionnaire can include questions about digital assets and how they are protected. While people may think of bank accounts, stock accounts, real estate, and other brick-and-mortar items as property suitable for estate planning, they may not have considered their digital assets. Accordingly, an Elder Law attorney can help clients account for these assets. Individuals, as an initial matter, need to develop an inventory of these assets including a list of how and where they are held, along with usernames, passwords, and answers to “secret” questions. Lawyers can then provide advice on what happens in the absence of planning, the default system of patchwork laws and patchy Internet service provider policies, as well as the choices for opting out of the default systems.

As individuals plan, they should consider appropriate dispositions for their digital assets — whether to delete, close, or maintain the account — and ensure that their wishes are documented with an appropriate representative appointed to carry them out.

B. Draft Documents

As in any other kind of estate planning, various options are available to ensure the individual’s wishes with respect to an account are carried out — with the caveat that few states have laws explicitly recognizing the binding nature of these documents.

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70 St. H. News Serv., supra n. 56.
73 We want to point out that the enforceability of these stated wishes remains questionable. If these assets are analogized to brick-and-mortar assets (the probate system is quite accustomed to ensuring that the appropriate devisee receives treasured photographs and financial assets), probate orders should be easily enforceable. On the other hand, if Internet content providers require compliance with their terms of service, there is uncertainty with carrying out the testator’s intent in the current legal environment.
Wills

Wills can be an awkward method of planning for the disposition of digital assets. The formalities attendant to the execution of nonholographic wills are antithetical compared to the often rapidly changing nature and ownership of digital assets. Additionally, provisions regarding digital assets may become outdated quickly as the asset disappears or takes a new form. After-created digital assets, which may be numerous, may be omitted. In addition, wills are available on the public records and clients should be cautioned not to place passwords and other confidential information in their wills. Moreover, it is unclear whether service providers will even respect the terms of wills to transfer ownership of digital assets.

Nonetheless, as providers develop improved policies and states enact more specific laws, it will become increasingly common to add language to the will specifically devising digital assets and incorporating by reference a document that sets out a distribution system along with passwords and other access information. Of course, state law will determine how the document incorporated by reference can be updated. Wills are generally unsuitable, however, as repositories for passwords or other information that is critical to accessing online assets. As previously discussed, the information might change before a new will can be executed and wills become public information. A more protective approach might be having the will instead reference a separate document containing detailed account information.

To ensure that the individual responsible for dealing with digital assets is comfortable in the online world, the testator could specify in the will that the estate administrator should work with a knowledgeable individual to whom the testator has provided passwords and other information. Another option is a letter to an executor specifying the decedent’s wishes that might be included with the will but would not, itself, become a public document.74

POAs and Other Advance Directives

The Digital Resource website, which describes itself as “an online repository for estate lawyers who need to learn about how to incorporate digital assets into estate planning,” includes comprehensive language to be included in a power of attorney to ensure coverage of all digital accounts and assets and in a will to ensure adequate disposition of this property.75

While we do not yet know whether a digital “power of attorney” will be effective, it can at least state the principal’s wishes as to who should manage assets during the principal’s incapacity. If digital assets are analogized to brick-and-mortar assets, of course, then state law establishes the parameters of the agent’s access and authority.

Trusts

In the digital field, trusts retain their flexibility. They could serve several purposes. First, the owner could transfer digital property into a trust. Assuming the asset is transferable, trusts can hold digital property,76 so that digital assets could be folded into existing

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76 Trusts hold various kinds of intangible property, including intellectual property rights (e.g., copyrights,
planning tools. Second, an individual could register accounts in the name of the trust so the successor trustee would legally (and, one hopes, seamlessly) succeed to these accounts. And third, an individual could set up a separate trust just to hold digital property or to hold specified digital assets.

C. Online Planning Services

Several online companies market their services to help in planning for digital assets. They provide a useful option for storing passwords. On the other hand, they may promise to carry out your wishes for you when you are unable to do so. One such service advertises:

Our data inheritance feature provides an automatic, secure and confidential way to transfer your files and passwords to your relatives should something happen to you. This is a significant advantage over standard personal data protection. You do not need a lawyer.

In the absence of laws authorizing these actions, and because of uncertainties regarding their potential conflict with Terms of Service or click-wrap agreements, however, other estate planning methods should be used to transfer assets.

D. Obstacles to Planning for Digital Assets

1. Safety Concerns

Clients may be hesitant to place all of their usernames, passwords, and other information in one place. We have all been warned, “Never write down your passwords.” This document could fall into the hands of the wrong person, leaving your client exposed. One option to safeguard against this is to have your clients create two documents — one with usernames and one with passwords. The documents can be stored in different locations or given to different family members. With an online afterlife management company or an online password vault, clients may worry that the security system could be breached, leaving them completely exposed. The same concern is present if your client chooses to place all this information in one document.

2. Hassle

Another obstacle to planning for digital assets is that it is an unwanted burden. Digital asset information is constantly changing and stored on a variety of devices (e.g.,


desktop computers, laptop computers, smart phones, cameras, iPads, CDs, DVDs, and flash drives). A client may open new e-mail accounts, new social networking or gaming accounts, or change passwords routinely. Documents with this information must be revised and accounts at online afterlife management companies must be updated frequently. For the clients who wish to keep this information in a document, tell them to update the document quarterly and save it to a USB flash drive or in the cloud, making sure that a family member knows where to locate it.\footnote{Tamara Schweitzer, \textit{Passing on Your Digital Data}, Inc., \url{http://www.inc.com/magazine/20100301/passing-on-your-digital-data.html} (Mar. 1, 2010).}

3. Uncertain Reliability of Online Afterlife Management Companies

Afterlife management companies come and go; their life is dependent upon the whims and attention spans of their creators and creditors.\footnote{E.g. SecureSafe, \textit{General Questions} (explaining provisions for Entrustet subscribers after Entrustet’s sale to SecureSafe), \url{http://www.securesafe.com/en/partners/entrustet-faq.html} (accessed Dec. 6, 2012).} Lack of sustained existence of all of these companies make it hard, if not impossible, to determine whether this market will remain viable. Clients may not want to spend money to save digital asset information when they are unsure about the reliability of the companies.\footnote{See Walker, \textit{supra} n. 13.}

4. Overstatement of Online Afterlife Management Companies Abilities

Some of these companies purport to distribute digital assets to beneficiaries. Explain to your clients that these companies cannot do this legally, and that they need a will to transfer assets, no matter what kind. Using these companies to store information to make the probate process easier is fine, but they cannot be used to avoid probate altogether. David Shulman, an estate planner in Florida, stated that he “would relish the opportunity to represent the surviving spouse of a decedent whose eBay business was ‘given away’ by Legacy Locker to an online friend in Timbuktu.”\footnote{David Shulman, \textit{Estate Planning for Your Digital Life, or, Why Legacy Locker Is a Big Fat Lawsuit Waiting to Happen}, S. Fla. Est. Plan. L., \url{http://www.sofloridaestateplanning.com/2009/03/articles/digital-assets/estate-planning-for-your-digital-life-or-why-legacy-locker-is-a-big-fat-lawsuit-waiting-to-happen} (Mar. 21, 2009).}

5. Potential Limitations Imposed by Federal Law

Pursuant to laws protecting the privacy of online users, there are two unresolved issues. The first is whether the fiduciary is “authorized” to access the digital property pursuant to the statutes prohibiting unauthorized access to computers and computer data.\footnote{For further discussion, see Jim Lamm, \textit{Facebook Blocks Demands for Contents of Deceased User’s Account}, Digital Passing, \url{http://www.digitalpassing.com} (Oct. 11, 2012); order Granting Facebook, Inc.’s Motion to Quash, No. C 12-80171 LHK (PSG) (N.D. Cal. Sept. 20, 2012), \url{http://www.digitalpassing.com/wordpress/wp-content/uploads/2012/10/Daftary-Facebook-Order-9-20-2012.pdf}.} A second issue is whether the fiduciary can request that the provider disclose records. In that situation, the fiduciary does not go online but rather asks the provider for the records. The critical question here is determining that the fiduciary becomes the subscriber for purposes of permitting access under one of the exceptions to the Stored Communications...
Act. While state law can clarify that the fiduciary is an authorized user, this is an issue of federal law.

IV. THE FUTURE

The increasing use of digital assets, the need for planning, and the existing uncertainty over the application of current laws ensures changes in the legal landscape. Some of the areas for future reform include addressing digital assets from the perspectives of an agent, a decedent’s personal representative, and a guardian.

A. Agent

All states allow powers of attorney, and approximately one quarter have enacted some version of the Uniform Power of Attorney Act. To ensure that agents have the appropriate authority, states could adopt explicit legislation recognizing that digital assets can be controlled through powers of attorney. In the absence of such legislation, businesses may not recognize the authority of the agent over digital account and assets, even though the standard form could easily be construed to cover these situations. For example, Eve Kripke held a power of attorney for her husband, who suffered from Lewy body dementia, a disease affecting cognition, movement, and emotions. She managed his online bank account with Bank of America for several years until she was informed that she had the wrong password. Though she was able to answer a series of questions on the website, including her husband’s Social Security number, she could not answer questions about the numbers on his Bank of America credit card — which she had cut up and disposed of because her husband could no longer use it. Bank of America offered several compromises, including listing Eva as a joint account holder. The power of attorney, however, was insufficient for granting access to online banking. “‘You must be an account holder or user,’ a bank spokesperson explained. ‘The reason we do this is to protect the customer and mitigate risk.’”

To ensure that powers of attorney will be respected, states have two options. They might establish separate, distinct powers of attorney specifically for digital assets, developing a special form tailored to the digital world that could be executed in addition to powers of attorney that cover health care and other financial decision making. In the alternative, they can simply adapt, or amend (if necessary) existing legislation and sample forms. For example, the UPoAA recognizes that some grants of authority to an agent require explicit conferrals of authority. Control over digital assets could simply be added to

85 See e.g. Kerr, supra n. 64 (discussing exceptions).
the list. The principal could be required to list the specific accounts, such as Facebook or Twitter or PayPal, on the form, or could check off a box allowing for access to any and all such accounts.

B. Personal Representative of a Deceased Digital Asset Owner

As discussed earlier, states are beginning to address the power of executors to deal with digital assets. The authors believe, especially with the formation of the Uniform Law Commission’s Drafting Committee on Fiduciary Access to Digital Information, that this trend will continue and at a rapid pace. It is anticipated that such legislation will: 1) enumerate with some precision the exact nature of the executor’s power to manage and distribute digital assets; 2) provide guidance as to whether an executor may access, decrypt, copy, or delete electronically stored data; and 3) recognize the testator’s ability to limit use and access to digital assets in some method either by testamentary provisions or by agreement with the entity storing the data. As discussed later, there will be some difficulty interfacing legislation with the agreements the decedent may have entered into with the storage entity.

C. Guardian of Incapacitated Adult

Since a guardian is appointed by the court and generally has the ability to force third parties to accept the guardian’s authority, a guardian theoretically will have the same access and control over digital assets as the owner. However, a problem may arise because contracts with providers and other entities may attempt to limit the power of a guardian. The authors anticipate that legislation regarding a decedent’s personal representative will cover guardians as well.

D. Clicking Through Terms re Disposition of Internet Accounts and Digital Assets

Though most Internet service providers have some kind of 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. If they are part of the standard terms of service, they may not appear on the initial screens, as Internet users quickly click past them. Internet service providers might instead voluntarily develop new procedures to ensure that anyone who signs up for a new service explicitly designates the disposition of the Internet account upon the owner’s incapacity or death.

Ultimately, to ensure uniformity between states, and to guarantee that Internet service providers will respect each state’s forms, Congress will need to enact national legislation. Such laws could use existing Internet regulation legislation as a model. Federal

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90 Id.; Uniform Power of Attorney Act § 201 (2008). Other examples include the ability to make a gift or amend a trust.
91 See supra § II(A).
92 See id. at § IV(D).
93 See id. at § IV(D).
law could require Internet providers to respect state laws on fiduciary powers, or even to ensure that all Internet users click through an “informed consent” provision when they sign up for new services. This will at least provide default rules.

V. CONCLUSION

Despite the complications surrounding planning for digital assets, all clients need to understand the ramifications of failing to do so. Elder Law attorneys need to understand that this is not a trivial consideration and that it is a developing area of law. Cases will arise regarding terms of service agreements, rights of beneficiaries, and the success of online afterlife management companies. Until the courts and legislatures clarify the law, estate planners need to be especially mindful in planning for these too often overlooked assets.