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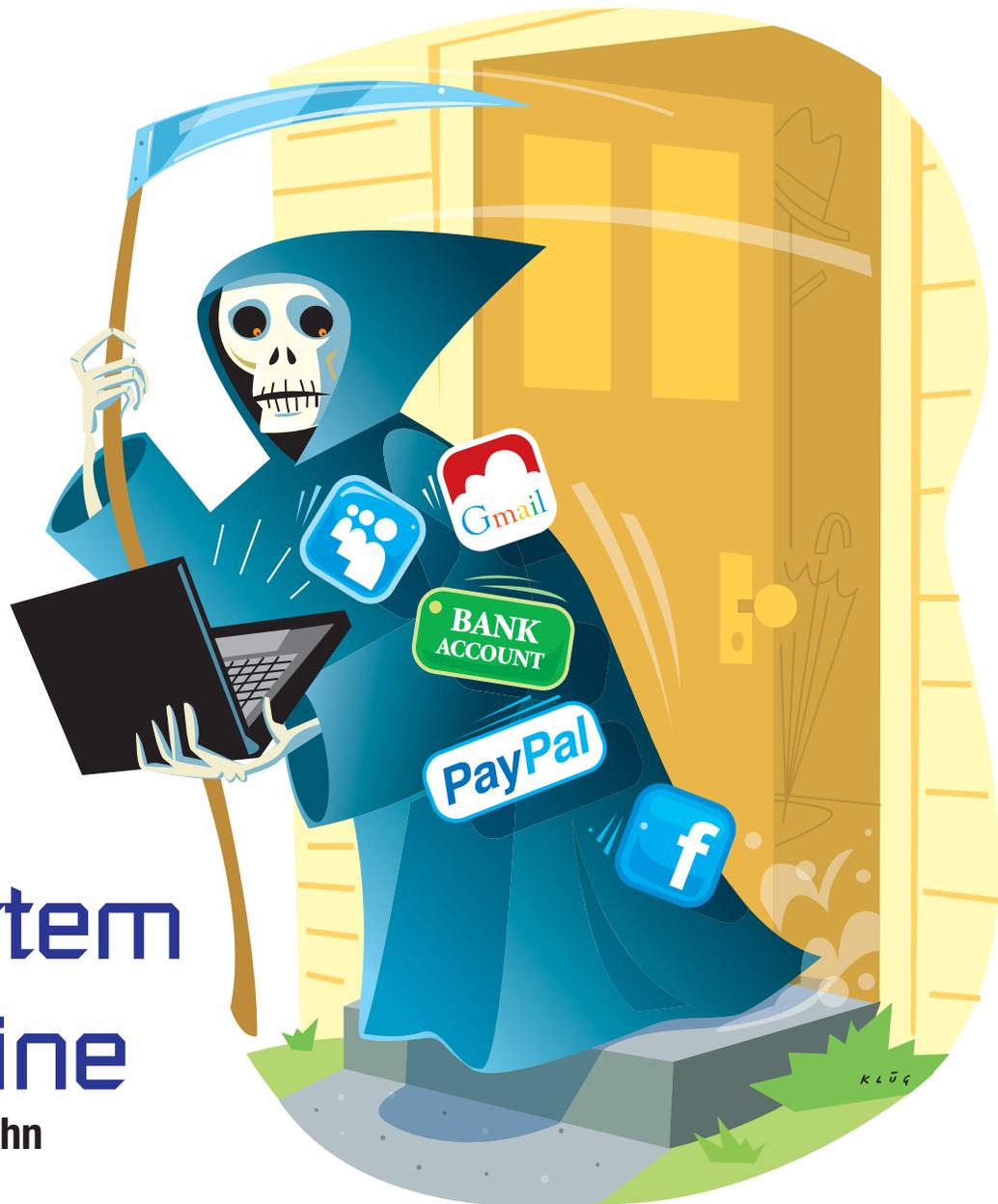
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# Postmortem Life On-line

By Naomi Cahn

What happens to a client's on-line life when the client can no longer manage it? According to Entrustet, a digital estate planning site, an estimated 408,000 U.S. Facebook users will die in 2011; thousands of others will undoubtedly be disabled. Estate planning attorneys are beginning to request, as part of their estate planning questionnaire, information about a client's on-line presence. This means asking not just about the types of assets but also how they are protected. This can be an extensive list with numerous different passwords on various sites. This first step, of asking a client simply to inventory the range of assets, can be useful in itself, and it provides the basis for counseling and planning. As this article discusses, relatively little law specifically addresses the inheritance of digital

assets. Although there are strong and persuasive arguments that on-line assets should be treated in the same way as brick-and-mortar assets, able to be marshaled by executors and personal representatives, these arguments are just beginning to be developed.

## Types of Digital Assets

As part of an asset inventory, it is helpful to think of different categories of digital assets: personal, social media, financial, and business. Although there is some overlap, of course, clients may need to make different plans for each.

- *Personal Assets:* In the first category are personal assets typically stored on a computer or smartphone or uploaded onto a web site, such as Flickr or Shutterfly. These can include treasured photographs or videos and e-mails or even playlists. Photo albums can be stored on an individual's hard drive or created through an

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on-line system. (They also can be created through social media, as discussed in the next paragraph.) 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 requires different means of access; in fact, simply logging onto someone's computer generally requires a password, and then each of the different files on the computer can require separate passwords.

- **Social Media Assets:** These assets involve interactions with other people and include the web sites Facebook and Twitter, for example, as well as e-mail accounts. Not only are these sites used for messaging, but they also can serve as storage for photos, videos, and other assets.
- **Financial Assets:** Although some bank accounts have no connection to brick-and-mortar buildings, most bank accounts and investments retain some connection to physical space. But increasingly they are set up to be accessed via a computer. An individual also can have an Amazon account, be registered with Paypal or on other shopping sites, have magazine subscriptions, and so on. An on-line bill payment system also may have been established.
- **Business Accounts:** An individual engaging in any type of commercial practice probably stores some information on a computer. Businesses collect customer orders and preferences, even customer addresses, and 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 access to litigation documents through shared folders to a team that is spread across the United States. A blog or domain name can be valuable, yet may only be capable of access and renewal through a password or e-mail.

An inventory of each of these assets should include the domain name, user name, and password, and, when known, the date the account was created.

### The Default Rules of Web Sites

Some sites have explicit policies in their user agreements on what will happen on the death of an account holder. Each site has its own policies, and the user is made aware of these policies, at least theoretically, before being able to access any service. Anyone who has signed up for an on-line service has



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probably clicked on a box next to an "I agree" statement near the bottom of a web page signifying consent to the provider's terms of use, even though few people actually read all terms of these agreements. These "clickwrap" agreements are typically upheld by the courts. Here are a few examples.

Google's terms of service do not include an explicit discussion of what happens when the account holder dies. Google's terms of service 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. Google Terms of Service ¶ 11, available at [www.google.com/accounts/TOS](http://www.google.com/accounts/TOS).

Gmail, on the other hand, has a policy, explained in its help section, for potentially releasing e-mails to the personal representative of an individual over the age of 18, or to the parents of

anyone younger. Accessing a Deceased Person's Mail, Gmail.com, <http://mail.google.com/support/bin/answer.py?hl=en&answer=14300>.

Yahoo explicitly states, in its terms of service, that the 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." Yahoo Terms of Service, <http://info.yahoo.com/legal/us/yahoo/utos/utos-173.html>.

Facebook, the world's most popular online social network, allows someone to "Report a Deceased Person's Profile." See [www.facebook.com/help/contact.php?show\\_form=deceased](http://www.facebook.com/help/contact.php?show_form=deceased). On 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 to the profile. Because the "wall" remains, friends can continue to post, and memorialized pages can serve to bring comfort to those in the decedent's Facebook community.

### The Law

Digital assets are not the first intangible assets that estate planning attorneys have faced. Copyrights, for example, are capable of probate and nonprobate transfer. But copyrights clearly belong to the holder rather than being subject to terms of service with another party. If the analogy is instead to tangible assets, such as bank accounts, then few problems should arise when the executor or personal representative seeks to collect estate assets.

Nonetheless, few states have laws directly on point, and few court cases address these issues. One of the only such cases involved Justin Ellsworth, a soldier killed in Iraq, whose father wanted access to his son's Yahoo! e-mail account. When Yahoo refused to provide access, the father went to court, and a probate judge ordered Yahoo to turn over the e-mails. Jennifer Chambers, *Family Gets GI's E-Mail*, Detroit News, Apr. 21, 2005, at 1, available at [www.justinellsworth.net/email/](http://www.justinellsworth.net/email/)

detnewsapr.htm (last modified Apr. 28, 2005). Even in this situation, Yahoo was not required to provide access to the actual account.

Connecticut has enacted legislation that responds to situations like that involving Cpl. Ellsworth and requires e-mail providers to turn over copies of all e-mails (sent and received) to the executor or administrator of a decedent's estate. Conn. Gen. Stat. § 45a-334a. The legislation does not cover other on-line accounts, however, and it is unclear whether a testator could prevent this result or require the provider to transmit the e-mails to another individual.

Indiana explicitly requires "any person who electronically stores the documents or information of another person" to "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." Ind. Code § 29-1-13-1.1.

Oklahoma has enacted an even more comprehensive statute. The law, which became effective on November 1, 2010, states:

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.

58 Okla. Stat. Ann. § 269. This statute is a start but, by its own terms, does not authorize full-blown access to all of the decedent's digital property. First, it is limited to the sites that are covered. Second, it explicitly grants the executor power only "where otherwise authorized." A general problem is that on-line sites can claim the ability to control the transfer of accounts through their user agreements, and these service agreements can contain terms that, arguably, would not permit the accounts to survive the decedent or allow anyone else, even an executor, to access

the accounts. Consequently, service providers might challenge any effort to apply the law when it allegedly violates a service agreement. They might also claim not to be controlled by Oklahoma law. On the other hand, analogizing on-line content to laws applicable to bailment, safe deposit boxes, and more traditional types of probate assets might be productive in recognizing the rights of an executor to the on-line property of the deceased. Jonathan J. Darrow & Gerald R. Ferrera, *Email Is Forever . . . Or Is It?*, 11 J. Internet L. No. 10, 1, 18 (2008).

### Planning

This is when planning comes in. Digital asset planning should be part of both incapacity and postmortem planning. Deirdre Wheatley-Liss, a shareholder at Fein, Such, Kahn & Shepard, P.C., explained on the New Jersey Estate Planning and Elder Law blog:

As part of every Estate Planning consultation these days, I ask not only "Where do you keep your assets" (ie: what institutions do you use for banks, brokerage accounts) but "How do you access your assets?" The point of the second question is to find out if the client takes advantage of electronic account access, and if so, who else shares access to those accounts.

Deirdre Wheatley-Liss, *You Die—Your Passwords and User Names Die with You*, N.J. Est. Plan. & Elder Law blog, [www.njelderlawestateplanning.com/2007/01/articles/estate-planning/you-die-your-passwords-and-user-names-die-with-you](http://www.njelderlawestateplanning.com/2007/01/articles/estate-planning/you-die-your-passwords-and-user-names-die-with-you).

If the client has any digital assets, then different levels of planning (not all of which require a lawyer) may be appropriate. The most basic is ensuring password protection and transmission. There are various ways of doing so, including through some of the new digital asset web sites (discussed below). Once an individual has inventoried all of her assets, she should also, as discussed earlier, list the appropriate login and password information for each site. The list needs to be updated whenever

she adds or deletes a new account, or whenever she changes her password.

Difficult as that may be, the next steps to ensuring safety and privacy during life, but disclosure on incapacity or death, can be more complex. A first question is how to save this information. It can be saved, and password protected, on a CD, DVD-R, or USB flash drive or even in hard copy. A second question is where to store the information and who should have access to it. It could be stored in a safe deposit box or with an attorney, although either option makes changing the information difficult. Presumably, wherever it is stored, someone else should know about its existence. This might be a spouse, an adult child, the agent authorized to act under a power of attorney, and so on. Of course, if the document is itself password protected, then the designated individual also must be given information about the password. An alternative option is through one of the new companies that offers to protect this information, such as Entrusted or Digital Locker.

But allowing another person to access an on-line account can be a violation of the service provider agreement. Although no cases are directly on point, an individual could execute a power of attorney that authorizes someone else to access the accounts in case of incapacity and could transfer all digital assets into a trust so that the trustee would have access. As Joseph M. Mentrek, vice-president of Cleveland's Meaden & Moore, Ltd., explained about Digital Asset Revocable Trusts: "Many digital assets take the form of licenses, which can be transferred to a trust. In the event of the client's death or disability, the trustee has the authority to manage the assets and transfer them to the beneficiaries according to the client's instructions." Joseph M. Mentrek, *Estate Planning in a Digital World*, 19 Ohio Prob. L.J. 195 (2009).

An individual could also attempt to include appropriate authorizations in a will. Although not yet legally recognized as an independent characterization, individuals could designate a "digital executor" in a will, someone who would have explicit authority over digital assets.

Finally, an important part of the planning process is helping a client decide what to do with the accounts. If, for example, they contain information about mortgage

payments on a marital home, then the other spouse will need access to this information. But, if they contain a secret stash of pornography or love letters or a personal diary, then the individual will probably want the accounts destroyed rather than accessed and preserved. As with all other aspects of estate planning, the lawyer must determine how to respect and effectuate the testator's intent. An individual might want to make any of the following choices: notify others of his or her death, such as through a Facebook message; continue or shut down web sites, such as blogs or eBay businesses; delete accounts, such as those with secret love letters or shopping accounts; ensure that items of sentimental value are preserved; or distribute information to those who need it. See Dennis Kennedy, *Estate Planning for Your Digital Assets*, Law Practice Today, March 2010, <http://apps.americanbar.org/lpm/lpt/articles/fttr03103.shtml>. These last two goals, of preserving sentimentally significant data or distributing important information, benefit the account owners as well as all survivors. As the father of Cpl. Ellsworth learned, accessing his deceased son's e-mails was worth fighting for.

### Resources?

It is not just lawyers who are thinking about digital asset planning. Numerous web sites provide various kinds of "help" in deciding how your on-line life should be handled once you are unable to do so yourself. A few books have even been published, including the recent *Your Digital Afterlife: When Facebook, Flickr and Twitter Are Your Estate, What's Your Legacy?*, by John Romano and Evan Carroll. And there are blogs on this issue, such as The Digital Beyond, which describes itself as providing insights into how to take care of your digital assets postmortem. The Digital Beyond, [www.thedigitalbeyond.com](http://www.thedigitalbeyond.com).

These web sites offer different types of services. Entrustet explains that its "mission is to allow people to quickly, easily and securely prepare last wishes for their digital assets." Entrustet, [www.entrustet.com/about-us](http://www.entrustet.com/about-us). It offers a free "Account Guardian," through which individuals can create a list of their digital assets and indicate what should happen, postmortem, to these assets. It also offers an "Account Incinerator," which will delete

accounts. And not only does the web site provide various tools for lawyers, but it also includes a list of attorneys who are "Entrustet Certified." Legacy Locker describes itself as "a safe, secure repository for your vital digital property that lets you grant access to online assets for friends and loved ones in the event of loss, death, or disability." Legacy Locker, <http://legacylocker.com>. Through the site, an individual can store passwords as well as designate "beneficiaries" that will receive the various digital assets registered with Legacy Locker. It allows the transmission of "Legacy Letters," farewell letters that will be sent once Legacy Locker learns of the individual's death (there is an elaborate verification process). The site offers various levels of service, including a free account that includes limited numbers of assets. DataInherit, which is owned by a Swiss company, does not allow for the transmission of letters, but it does offer "DataInherit on-line safes from Switzerland" that provide "highly secure online storage for passwords and digital documents." When it receives notification of an account owner's death, DataInherit provides access codes to the designated beneficiaries.

Notwithstanding their potential, these legacy services may not provide the promised solutions inherent in the concept of a digital executor. Unless the legacy service is working with the on-line asset providers, it may be a violation of the user's agreement to allow a third party to access an individual's account. Unlike an executor or personal representative recognized by a court or state statute, legacy services do not have legally recognized powers to control an individual's assets. Indeed, even their products are not legally binding because they do not satisfy the requisite will formalities. Nonetheless, they are useful as repositories of information during the client's life, as well as on the client's death or incapacity; they are also useful as reminders of the need for planning.

### Conclusion

Planning for digital assets requires contemplating mortality—just like drafting a trust, writing a will, or executing an advance directive. Although clients can develop actual plans without their lawyer's involvement, lawyers can help remind them of their responsibilities to do so. ■