DIGITAL LEGACIES: ELECTRONIC AND OTHER INTANGIBLE ESTATE ASSETS IN THE 21ST CENTURY

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INTRODUCTION

People spend an increasing part of their lives using Facebook and other online social networking sites. However, virtually no law regulates what happens to a person's online existence after his or her death. This is true even though individuals have privacy interests in materials they post to social networking sites; such sites are repositories of intellectual property, as well as materials important to family members and friends; and historians of the future will depend upon digital archives to reconstruct the past. In the absence of legal regulation, social networking sites determine on their own what, if anything, to do with a deceased user's account and the materials the user posted to the site. Yet allowing social networking sites to set their own policies with respect to decedents' accounts does not adequately protect the individual and collective interests at stake. The law, particularly federal law, can and should play a stronger role in regulating social networking sites and in determining the contours of our digital afterlives.

Prof. Jason Mazzone, *Facebook's Afterlife*[1]

I. THE DIGITAL AFTERLIFE

A recent report by the BMO Retirement Institute noted that, based on an online survey it had conducted, 99% of North Americans reported using at least one personal online tool, and 85 percent at least one financial online tool.[2]

When people first read this statistic they are not usually surprised and yet despite this recognition of the extent of digital integration we experience in our lives, very few of us have thought to set out our digital succession plans and wishes. Why do our clients ignore this important and often significant portion of their lives?

II. THE DIGITAL EXECUTOR

Much as we now select a personal representative from amongst our family and close group of peers to administer our estates, or in some cases a professional trustee, testators and donees[3] should now be advised to consider appointing digital executors and digital attorneys to be the personal representative of their digital estates, if the general executor or attorney lacks the knowledge to do the work.

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[1] Illinois Public Law and Legal Theory Research Papers Series No. 13-05, available for download through the Social Science Research Network Electronic Paper Collection: http://papers.ssrn.com/abstract=2142594 (last accessed November 26, 2012)

[2] BMO Retirement Institute, "Estate Planning in the 21st century: New considerations in a changing society". April 2012: www.bmo.com/retirementinstitute (last accessed November 26, 2012)

[3] Throughout this paper we will generally refer to testators, but our comments will generally be equally applicable for digital attorneys in the event of incapacity

While it is possible that the same individual (or corporation, in the case of professional trustees) may act as both the traditional and digital executor, we anticipate that many people will select individuals or professionals who are tech savvy to be their digital executors, or to act as an "agent" or delegate of the personal representative, due to the increasing complexity and extent of our digital footprint.

The notion of a digital executor is similar to the "literary executor" concept included in authors' wills, and we anticipate the concept will become prevalent.

A. Sample Digital Executor Clause and Definitions

The following clauses are examples of definitions and a digital execution clause which may be included as standard clauses in Wills:

> "Digital Estate" means all intangible and/or digital assets of my personal estate stored electronically, excepting bank accounts and other financial or insurance products, which I intend to be administered by my Digital Executor according to such wishes as I have made known to my Digital Executor in a memorandum of digital instructions which I have prepared and provided to my Digital Executor;
>
> "Digital Trustee" or "Digital Trustees" means both the digital executors of my Will and the digital trustees of my digital estate and any reference to my Digital Trustee or my Digital Trustees includes all genders and the singular or the plural as the context requires; if at any time there is more than one Digital Trustee of my estate, then my Digital Trustees shall act unanimously;
>
> I appoint X to be my Digital Executor and Digital Trustee of this my Will. If X is unwilling or unable to act or to continue to act as my Digital Executor and Digital Trustee, THEN I APPOINT Y, to be my Digital Executor and Digital Trustee of this my Will. I intend that my Executor and Trustee of this my Will provides all necessary and reasonable cooperation to my Digital Executor and Digital Trustee so that my Digital Executor and Digital Trustee is able to effectively administer my Digital Estate according to my wishes.

There are many ways to create a digital execution clause, the above is offered merely for discussion purposes and should not be necessarily relied upon for drafting. Such clauses have not yet been given proper judicial consideration in B.C. or Canada at the time of this writing. There are number of complicating factors which might interfere with a digital executor's abilities to executor the digital estate of a given testator, such as service provider account policies.

DIGITAL PLANNING

One explanation as to why most of us fail to provide for our digital succession is that our digital existences are quite complicated. The volume of usernames and changing passwords which we accumulate over the course of our lives can be daunting to try and inventory, and yet without this

process of inventorying our digital estate, it is not possible to preserve the commercial and sentimental value of our digital existence after we pass.

One way of making our clients' online existence easier to manage, involves the use of applications to keep track of their various user names and passwords. While it may seem counterintuitive to keep all of a person's usernames and passwords in a single location, many of the services that offer assistance in this regard use encryption in order to keep such information secure. Popular services include, LastPass, 1Password, KeePass, RoboForm, and Keeper.

To further simplify the process, services like LastPass integrate with the user's web browser in order to allow user names and passwords to be securely filled in automatically, thus removing the need to constantly keep track of all passwords. These services also provide assistance in ensuring that the passwords are robust and not easily discoverable. Clients should ensure that if their passwords are encrypted, that their digital executor has the means of accessing them in the event of the user's death or incapacity.

I. INVENTORYING DIGITAL ASSETS

A recent STEP article on digital assets by Julia Aubrey called "I'm Shutting Down"[4] suggests that the digital lives of our clients fall into three broad categories:

(i) Personal and Sentimental Items;

(ii) Financial Information; and

(iii) Items that already have a value or may acquire value in the future.

The first two categories of items/information do not have an immediate value and may be resistant to traditional valuation models. Many people, when asked, tend to attribute the greatest value to their personal and sentimental items, and therefore are generally most concerned as to the treatment of these items upon death.

While we note that this valuation behaviour is somewhat ironic, when one considers that the traditional family heirlooms of the past are largely now stored electronically, it makes sense that individuals would value their Facebook timelines and walls chronicling, for instance, their courtship with their husband or wife, much in the same way that previous generations would scrap-book the cherished love letters sent back and forth between sweethearts during the war. The apparent popularity of websites such as Ancestry.com suggests this digital history will grow in volume and importance.

The reality of the 21st century is that we have rapidly converted many of our analog experiences and existential placeholders into digital equivalencies, e.g. digital picture frames, without necessarily creating the associated mechanisms and cultural traditions for their preservation and inter-generational dissemination. This creates difficulties for those individuals, most notably baby boomers, who straddle the analog and digital divide and who do not yet have the benefit of

[4] STEP Journal, November 2012, Volume 20/Issue 9

the various digital conventions and traditions which will surely develop in subsequent generations.

A. Memorandum of Digital Assets

The first step in at least attempting to preserve a client's digital legacy is to complete an inventory. The three categories listed above are a helpful way of conceptualizing the nature and extent of a digital legacy.

Nicole Garton-Jones of Heritage Law recommends to all of her estate planning clients that they prepare a "hit by a bus memo" which would provide instructions to a personal representative with respect to bank account information, insurance, and other critical information in one location.

Creating a "hit by a bus" memo for an individual's digital assets is generally not a simple process; consider for instance how many online accounts and passwords individuals use on a daily basis. As mentioned previously, the scope of the inventory may explain why so few have undertaken such an inventory, however the upside to going through it, is that individuals often discover significant value in their digital assets that otherwise would have neglected in their testamentary wishes.

Therefore, it is recommended that estate planning clients prepare a memorandum outlining their various digital assets and turn their mind as to how they would like those assets distributed or dealt with upon their death or incapacity. Once this memorandum is complete, it is then possible to value, or at least attempt to value, these assets and legally document the testator's wishes as to their treatment and/or distribution.

II. VALUING AND PRESERVING DIGITAL ASSETS

A 2011 survey conducted by McAfee, the internet security provider, in the U.S. revealed that the average online user has more than $37,000.00 in under-protected digital assets. Interestingly, the report also noted that the average U.S. consumer valued their digital assets at $55,000.00.[5]

It should be noted however, that the values reported above were self-reported by the survey participants and therefore values for personal files such as photographs, e-mails, letters, poems and digital art were valued by the user arbitrarily. This is relevant because it points to one of the problems with digital assets: they are often difficult to value.

A. Digital Media and Other Items with Determinable Value

Take for instance an iTunes library which, depending on the user, may be worth hundreds or thousands of dollars. This value is somewhat misleading, insofar as the individual songs and albums in a library cannot be transferred from the device(s) on which they have been stored due to licensing restrictions, i.e. the songs are not songs, rather they are perpetual licenses to play those songs and are therefore cannot be sold or distributed to other individuals. Therefore while

[5] http://www.mcafee.com/ca/about/news/2011/q3/20110927-01.aspx (last accessed November 26, 2012)

it is possible to value an individual's entertainment media files, it is often impossible to distribute such value, effectively creating something of a paradox for estate planning.[6]

While new provisions of the *Copyright Act*, RSC 1985, c. 42, are moving in the direction of permitting the copying of digital media files between different users for private use, the user agreements for many digital media content providers, such as Apple, do not permit such copying. As such, it is always recommended that a client review the terms of use for a particular content provider before taking steps to affect the transfer of their media files where such transfer would result in breach of contract.[7]

Additionally, as Apple, Amazon, Google and others enter the film and television distribution market, similar issues relating to digital licences and the films or television episodes in a deceased's library will likely persist, i.e. a person's film collection will be trapped on the device where it was located when the deceased passed.

Therefore, we recommend that individuals review the end-user license agreements (EULA) for the various digital media services they subscribe to in order to determine the nature of their digital assets. Where such assets are non-transferable, careful consideration should be given to the distribution of the devices on which such assets are physically stored.

Note that domain names, while not digital media per se, have the potential to significantly increase in value over time, especially where the domains are clearly linked to commercial or entertainment related activities, e.g. ford.com or paris.hilton.com. Such value would also likely accrue to twitter handles, e-mail addresses and Facebook account names, due to the limited nature of the "first come, first served" registration policies of these services.

However, in light of the new domain name suffixes scheduled to be released by the Internet Corporation for Assigned Names and Numbers (ICANN) in 2013[8], it is uncertain whether strategic domain name registration, also referred to as "domain squatting" will continue to hold value where corporations and other entities will be able to register www.ford.cars instead of holding out for www.ford.com. This may make it difficult for digital executors to value the digital assets of an estate where such assets include domain names not directly linked to the deceased.

B. Personal and Financial Information

While an individual's personal and financial information does of course have value, it is not generally the sort of thing that would be typically bequeathed expressly to a beneficiary. That being said, many North Americans have private lives which may be significantly different from their public personas and therefore those individuals may want to keep certain information about their digital existence private.

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[6] Note: you can always bequeath your computer or media device to another individual and therefore effectively transfer the media without violating the licensing requirements, although allowing an individual to access your account with a media provider, such as Apple, may violate the EULA for a particular service.

[7] It is unclear at this juncture how Canadian courts will interpret these new provisions of the *Copyright Act* and whether they will have the effect of overriding service providers' terms of use.

[8] http://digitaljournal.com/article/327259 (last accessed November 26, 2012).

In addition to distributing and protecting digital assets, a digital executor may also destroy other digital information about the testator at their behest. This is a potentially important benefit in naming a separate digital executor from the executor of a person's real and personal property assets, especially where an individual is concerned with maintaining their privacy upon their death or incapacity.

The commercial sector has realized the potential market for posthumous information recovery and destruction and a number of service providers now exist, e.g. Legacy Locker, AssetLock, Deathswitch, Entrustet, ifidie.org and SecureSafe. Services range from data destruction if the testator does not respond to a confirmation e-mail within a certain time-frame (see Entrustet's Account Incinerator service), to password release and dissemination to pre-authorized individuals, i.e. the digital executor.

These service providers provide a valuable service to those individuals who do not have a close friend or family member that they can trust with their digital persona, and who wish to maintain the sanctity of their privacy upon their death or incapacity.

C. Personal, Sentimental and Other Items with Indeterminate Value

Personal photos of friends and families and other private moments do not have an easily determined value, and yet according to the McAfee survey participants, they hold the largest value of the three classes of digital assets.

Despite the value placed on this class of assets, it is this class of digital asset that individuals frequently ignore in their estate planning, largely perhaps because such items do not hold readily ascertainable financial value. However, as mentioned above, because these items are generally valued by individuals the most, and because such items may or may not be stored on social media accounts, it is worthwhile for individuals to decide which items hold value and therefore should be passed along, and those that do not and can be deleted or dealt with at the personal representative's discretion.

Much as above for media libraries and related licensing issues, personal or sentimental items which are stored on social media accounts may not be transferable upon the death of the individual and therefore care should be given to either: a.) backing-up these items in a location which will be easy to access and distribute upon the death of the individual; and/or b.) ensuring that the personal representative is provided the necessary user names and passwords to retrieve the items and close the relevant accounts.[9]

Unfortunately, some social media providers have policies that can have the effect of neatly undoing digital estate planning.

[9] Please note that it remains undecided law as to whether or not a personal representative accessing the accounts of a deceased, on the deceased's instructions, constitutes a breach of the terms of service or account fraud.

COMPLICATIONS TO DIGITAL PLANNING

There is a vast assortment of options for social networking today. From Facebook to Twitter, or Instagram to LinkedIn, there are a number of different ways to be socially integrated in the digital realm. However, for each social media host, there are a number of different and often divergent policies for continued use and access to the service.

In light of the above, the best rule of thumb for digital estate planning is to ensure that the testator has backed up their valuable digital assets offline, such that a digital executor may have unfettered access to the assets for distribution without being subject to the arbitrary and often divergent policies of the major social networking and media content providers.

I. SOCIAL NETWORKING AND POLICY ISSUES[10]

The difficulty with these networking mediums, and we include public e-mail providers such as Google, Microsoft and Yahoo! in this category, is that by and large, all public social networking providers retain the ownership rights to the various accounts that users create.

This creates something of a dilemma for intellectual property rights, insofar as while a beneficiary of a digital estate might have been bequeathed the copyright to a particular poem of the deceased, if that poem was not stored outside of, for example, the deceased's Facebook account, then the beneficiary would have no means of compelling Facebook to turn over the digital asset, since Facebook retains the right to the account and its contents, but not necessarily the intellectual property rights of the contents themselves.

A. Facebook

Perhaps the most frustrating Facebook policy which may impact/undo digital estate planning, with respect to a testator's account, is that Facebook has a policy of "memorializing" the accounts of people who have been reported as deceased by other users.

Facebook currently allows anybody to submit a form reporting a Facebook user's death. Submission of the form results in the deceased user's Facebook page automatically being "memorialized." Nobody can then log into or edit the page. The page is also made "private" so that only previously confirmed Facebook friends of the deceased user can see it or locate it through Facebook's search mechanism. Confirmed Facebook friends may continue, without limitation, to post messages to the deceased user's Facebook wall, with the idea that the wall becomes a memorial to the decedent. In order to "protect the deceased's privacy," Facebook removes "sensitive information such as contact information" and, notably, status updates from a memorialized page.[11]

[10] This section has been largely quoted verbatim from Professor Jason Mazzone's paper "Facebook's Afterlife". For accurate citations please see the paper as hyperlinked in Note 1.

[11] *Supra* Note 1

Another potential policy issue arises from Facebook's terms of service which do not permit anyone other than the original user from logging in and accessing that user's account. While it is unclear in Canada what the exact legal consequences of breaching the terms of service might be, in the United States their position is quite strict.

For example, the U.S. Department of Justice asserts that § 1030(a)(2) of the Computer Fraud and Abuse Act is broad enough to permit the government to charge a person with a crime for violating the CFAA when that person "exceeds authorized access" by violating the access rules of a Web site's Terms of Service contract or use policies. This position was stated by Richard Downing, Deputy Chief of the DOJ's Computer Crime and Intellectual Property Section, Criminal Division, in testimony presented on November 15, 2011, before the U.S. House Committee on Judiciary, Subcommittee on Crime, Terrorism, and National Security.[12]

B. Yahoo! And Flickr

According to the terms of service governing Yahoo!, "You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.

Yahoo! owns Flickr, a site that hosts more than five billion photographs submitted by users. Yahoo!'s terms of service also apply to Flickr accounts. In a rare case testing the enforceability of Yahoo!'s terms of service, in 2005, a probate judge in Michigan ordered Yahoo! to turn e-mails over to the family of a U.S. Marine killed in Iraq.

After Justin Ellsworth was killed in Fallujah by a roadside bomb, his father, John, asked Yahoo! to permit him to access his deceased son's e-mail. John Ellsworth wanted to use the e-mails to create a memorial for his son. Until the court order, Yahoo! refused the request on the ground that disclosing a subscriber's e-mails would violate its own privacy policy.[13]

C. Google and Hotmail

Gmail and Hotmail, by contrast, do have mechanisms in place that provide for account access, under certain circumstances, by a representative of a deceased user's estate. (Hotmail also provides similar access to an individual with a power of attorney for an incapacitated user.)

Gmail, owned by Google, has a policy that appears strict. "[I]n rare cases we may be able to provide the Gmail account content to an authorized representative of the deceased user," Google says. This limitation exists, the company explains, because At Google, we're keenly aware of the trust users place in us, and we take our responsibility to protect the privacy of people who use Google services very seriously. Any decision to provide the contents of a deceased user's email will be made only after a careful review, and the application to obtain email content is a lengthy process.

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[12] http://www.digitalpassing.com/2012/02/09/planning-ahead-access-contents-decedent-online-accounts/ (last accessed November 26, 2012)

[13] *Supra* note 1

The process for obtaining a decedent's e-mails requires the estate's representative to submit identifying information and a death certificate. Google conducts an initial review of those materials and according to its policy, "[i]f we are able to move forward based on our preliminary review, we will send further instructions outlining Part 2. Part 2 will require you to get additional legal process including an order from a U.S. court and/or submitting additional materials."

Hotmail, owned by Microsoft, appears to have a more lenient approach. It preserves e-mails for one year after notification of a user's death and allows individuals who can show they are "the users next of kin and/or executor or benefactor of their estate, or that you have power of attorney" and who submit either "[a]n official death certificate for the user, if the user is deceased" or "[a] certified document signed by a medical professional . . . if the user is incapacitated" to obtain "the release of Hotmail content, including all emails and their attachments, address book, and Messenger contact list."[14]

D. Twitter

Twitter, with 200 million accounts and 230 million tweets per day, promises to close the account of a deceased user and provide family members with an archive of the user's public Tweets. To trigger these steps, individuals must supply Twitter with information about, among other things, their relationship to the deceased user and a public obituary.[15]

POSSIBLE SOLUTIONS

In light of the size and scope of the majority of social networking companies and the massive revenues generated from user content, it is unlikely that digital estate policies in favour of estate beneficiaries will be willingly adopted. We anticipate that legislation, specifically federal legislation, will be required in order to address a number of issues which have not yet been properly considered before our Canadian courts.

However, in the meantime, while we wait for legislation to address the issues discussed herein, the general workaround to preserving the digital assets of an individual seems to be simply requesting electronic copies of the deceased's account contents.

I. THE ACCOUNT VERSUS THE CONTENTS

While much of the U.S. case law relating to disputes over the digital assets of a deceased seems to focus around ownership of and access to the actual accounts, there are a number of service providers who will release the contents of an account to a personal representative who can provide acceptable documentation of the account holder's death and the personal representative's authority.

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[14] *Ibid*

[15] *Ibid*

Since the vast majority of social networking and other media sharing accounts hold no value in and of themselves, most family members will primarily be concerned with the contents of an account and not the account itself. Notable exceptions to this rule would be Twitter, eBay, YouTube, PokerStars and other types of accounts that hold real market value regardless of the account contents, e.g. certain gaming accounts where the games have real-world economies (see Second Life).[16]

The value of an account vs. its contents is of particular relevance for blogs and other accounts which may generate revenue through the use of advertisement banners. Unfortunately, if the terms of service for a particular content provider do not allow the transfer of accounts, the value of these accounts should be expected to cease upon the death of the original account holder.

II. LEGISLATION

In Canada, unlike the U.S.[17] we do not currently have federal or provincial legislation specifically governing the digital assets of a deceased and the rights of the estate beneficiaries to such assets. Until such legislation is passed, it is expected that providers will continue to maintain their rights to user accounts and their contents. Isn't this reminiscent of telephony providers claiming ownership in people's business and personal telephone numbers?

While provincial legislation would be helpful in certain instances, e.g. WESA sections dealing with digital assets, given the national and international scope of operations for many social networking companies such as Facebook and Google, it would seem a foregone conclusion that federal legislation would be required to adequately compel these companies to assist digital executors in administering the digital assets of a deceased account holder.

Despite many of these corporations' apparently flexible policies for releasing account contents to personal representatives of a deceased account holder, these policies are ultimately subject to the corporations' best interests and are changeable at their option.

We suggest that in order to provide for the orderly administration of the digital assets of a deceased, federal legislation, likely along the lines of PIPEDA,[18] is required which will provide clear instructions and procedures for compelling these corporations to return the digital assets of a deceased to its personal representative(s).

III. RECAP

The following is meant to serve as a quick reference flow chart/guide for the issues and potential solutions relating digital estate planning for estate planners discussed.

(i) Has client prepared "hit by a bus" memo of digital assets?

[16] http://secondlife.com/

[17] Digital estate legislation, to some extent, currently exists in over 30 states.

[18] *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5

(ii) If so, have assets been divided into three categories of value/importance/risk?

(iii) If no, have client categorize. If yes, determine whether digital assets can be valued and if so whether they are transferable?

(iv) If transferable, include digital executor clauses in Will or Power of Attorney and have client name digital executor or digital attorney. If not transferable, ensure client has backed up copies offline.

(v) If client cannot think of appropriate digital executor/attorney, consider suggesting third party digital legacy service provider, e.g. Legacy Locker, AssetLock, Deathswitch, Entrustet, ifidie.org and SecureSafe.

(vi) If client decides to use third party digital legacy service provider, warn client of potential risks associated with this service, e.g. insolvency of service provider, security risks, etc.

(vii) Upon death of client, if retained by digital executor, submit requests for account contents of deceased and request that accounts be closed/deleted if not transferable.

(viii) Add to list of personal representative's duties the duty to review the digital assets of the deceased in order to preserve or delete such assets in accordance with the actual or implied wishes of the deceased.