

## Estate Planning & Elder Law

### Death in the Digital Age

An exploration of the issues that arise when disposing of a decedent's online materials

By Andrew Bolson

**D**eath is an inevitable part of life. However, through proper estate planning, individuals are able to plan for their ultimate fate by self-determining how they want their estate handled upon their death. The advent of the Internet and the rise in the ubiquitous nature of email, social media and digitally stored assets has created new considerations for persons planning their estate. For example, would a decedent want his emails read by a next-of-kin after his death? Would a person want her online identity deleted or memorialized in perpetuity? These are just a couple of the questions that estate planners and/or attorneys will need to be asking in the coming years.

#### Email

There are circumstances where an executor, family member or possibly a friend may want access to a decedent's email account. To address this poten-

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tial issue, email providers have devised policies to determine who gets access and what information is needed prior to obtaining any of the emails' contents. Google's policy errs on the side of refusing access to a decedent's email account and releases the requested information only upon the completion of a two-step process. First, an individual seeking access to a decedent's account must send Google information, including his name, email address, a copy of a government-issued ID and the death certificate of the decedent, among other items. After reviewing the submitted material, Google determines whether it is willing to move forward with the request. If so, Google may require a court order authorizing the request or additional unspecified documentation. Google's burdensome and restrictive death policy is clearly designed to protect the privacy of its users.

Yahoo!'s policy is also written with privacy in mind. The applicable provision reads "[y]ou 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." Based upon this policy, Yahoo! has been extremely reluctant to release a decedent's email account to anyone, let alone a family member. Its restrictive policy received attention in 2004 when the father of a slain American soldier sought his son's final emails and Yahoo! refused. Only after a court compelled Yahoo! to release the emails, did the company acquiesce. Molly Wilkens, "Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?," 62 *HASTINGS L.J.* 1037, 1053-1054 (2011).

On the less restrictive side of the privacy spectrum is Microsoft and its range of email accounts (@hotmail.com, @live.com, @windowslive.com and @msn.com). Unlike Google and Yahoo!, Microsoft will permit next-of-kin unqualified access to a decedent's account after an authentication process. Microsoft requires an official death certificate, proof to establish that the person requesting the account is a decedent's next-of-kin or executor, and answers about the decedent. Whether it is Google, Yahoo! or Microsoft, obtaining the contents of a decedent's account will not be a speedy process and could take weeks, if not months. If there are time-sensitive materials within the email account, this can prove problematic.

#### Social Media

Nowadays when people die, they live on in perpetuity in the online world.

Whether it is on Facebook, Twitter or the like, a person's online profile could conceivably remain forever. Facebook, for example, allows profiles to become memorialized for eternity. Essentially, Facebook will retain the individual's profile but will eliminate certain functionality from the account. Their policy states that "only confirmed friends can see the [decedent's] profile (timeline) or locate it in Search." Additionally, "[t]he profile (timeline) will also no longer appear in the Suggestions section of the Home page." If an immediate family member or executor wishes to remove a loved one's profile, Facebook would honor the request. It should be noted however, that at least on Facebook's website, there is no mechanism to determine disputes between family members on whether the account should remain active or be deleted.

Many other social media sites, including Twitter and LinkedIn, have developed their own deceased user policies. Twitter will delete a user's account upon a requesting individual's providing a copy of the user's death certificate, a copy of the requesting individual's ID, contact information for the requestor and a description of the relationship between the requestor and the decedent. LinkedIn's policy nearly mirrors Twitter's and requires someone requesting deletion of an account to complete a simple form and attach the user's death certificate.

#### **Digitally Stored Assets**

In addition to revolutionizing how we socialize and communicate, the Internet is changing how we store our music, movies and books. Internet storage is quickly becoming the 21<sup>st</sup> century basement. But, unlike old records, digital assets cannot be so easily distributed upon one's death. Products purchased online are not considered "owned" but rather "licensed." In the case of Kindle, Amazon.com's License Agreement and Terms of Use prevents an account holder from passing on digital books upon her death. The policy states:

Unless specifically indicated otherwise, you may not sell, rent, lease, distribute, broadcast, sublicense, or otherwise assign any rights to the Digital Content or any portion of it to any

third party, and you may not remove or modify any proprietary notices or labels on the Digital Content. In addition, you may not bypass, modify, defeat, or circumvent security features that protect the Digital Content.

Apple's policy, which controls iTunes, is similarly restrictive. It states, "You agree that your Account is non-transferable and that any rights to your Apple ID or Content within your Account terminate upon your death. Upon receipt of a copy of a death certificate your Account may be terminated and all Content within your Account deleted." While individuals are currently prevented from bequeathing digitally stored assets, it is likely that in the not-too-distant future, a court will ultimately decide whether individuals have a right to leave their "licensed" purchased products to their beneficiaries.

#### **Considerations for Estate Planning**

As the Internet matures, so do the generations that have come to rely upon email, social media and digitally stored content. Individuals now possess a second persona on the Internet that will not die when the individual himself or herself passes away. Increasingly, people are going to want to control their post-mortem Internet life just like an individual chooses whether to be cremated or buried, and estate planners should be prepared.

First, attorneys should be asking clients whether they want family members to have access to their email. Although courts have appeared willing to allow next-of-kin access to a decedent's email, a provision in a will granting such access could make it easier and quicker for a family to obtain the desired contents. Since the issue has never been examined in New Jersey, a future court may limit or even prevent the release of a decedent's email based upon privacy concerns. A provision in a will stating that the decedent authorized the release of email would likely circumvent the prohibition on any release. Moreover, an email in a decedent's inbox may contain materials that are time sensitive.

While having a provision in a will regarding email may not gain the requestor instantaneous access, it may be able to

speed up the process of obtaining the account's contents. To avoid this hassle in the first place, estate planners should advise clients to provide passwords to key accounts, including email, to a trusted friend and/or family member. This may be especially critical for small business owners who control their company's billing, payroll, purchasing, etc. On the other hand, since most email and social media providers ultimately release a user's account contents to a family member, if a user does not want such information released, it is imperative that they have a clause in their will stating that intention.

Further, to some extent, email and social media providers, i.e. Facebook, permit family members to make decisions regarding a decedent's online accounts. As already mentioned, family members may differ on how to control the decedent's online content. While some may want to delete a decedent's Facebook account, others may want to preserve it. Similarly, some family members may want to obtain a decedent's email account and others may see the release as an improper invasion of privacy. By specifying in a will how online material should be treated, people can dictate their preferences regarding online content and specify who should be authorized to make decisions regarding online material upon their death.

As for digital content, planners should be asking to whom a person may want to leave their digital music, movies, books, etc. Although digital providers have thus far refused to allow such materials to be passed on, the law may one day change. In the event that the law does change, it would be beneficial to have such information available.

An estate is no longer bounded by a person's physical possessions. Rather, in the Internet age, when a person dies, an online life remains. While the concept of post-mortem Internet planning may be in its infancy, as our world moves increasingly online, these issues are likely to become more prevalent. To ensure that the decedent's online life is managed, preserved and treated in conformance to the decedent's desires, estate planners should at least be discussing Internet issues with their clients and drafting applicable provisions when appropriate. ■